IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

ALDEN J. EVANS, SR.,	:	
Plaintiff	:	**NO. CV-20-0879**
	:	
vs.	:	
	:	
NATHALIE LAVALLEE, M.D.;	:	
TIMOTHY PASTORE, M.D.;	:	
KRISTIN ADKINS, CRNA; THE	:	
WILLIAMSPORT HOSPITAL; THE	:	**CIVIL ACTION – LAW**
WILLIAMSPORT HOSPITAL d/b/a,	:	
WILLIAMSPORT REGIONAL MEDICAL	:	
CENTER; UPMC SUSQUEHANNA f/k/a	:	
SUSQUEHANNA HEALTH SYSTEM;	:	
and ANESTHESIA ASSOCIATES OF	:	
WILLIAMSPORT, INC.	:	**Preliminary Objections**
Defendants	:	

OPINION

I. Factual and Procedural History

This medical malpractice action arises out of an incident that occurred on October 30, 2019. All of the following facts are taken from Plaintiff's Complaint:

On October 30, 2019, Plaintiff underwent a surgical procedure to remove basal cell carcinomas from his face and chest. Defendant, Dr. Lavallee, performed the surgery. Defendants, Dr. Pastore and CRNA Adkins, were administering oxygen during the procedure. At the start of the surgery, the oxygen level was at 94%. Prior to using the Bovie cautery, Dr. Lavallee failed to announce that she was about to begin its use. She also failed to turn off the oxygen for at least sixty second prior to its use. When Dr. Lavallee began using the Bovie cautery, a fire ignited, resulting in severe burns and several other injuries to the Plaintiff. At the time of the explosion, the oxygen level was read to be 97%. The oxygen level during an electrosurgery and in preparation for the use

of a Bovie should be at 30% or less. The oxygen used during the procedure was ignited by Dr. Lavallee's use of the Bovie cautery.

Plaintiff filed his Complaint on September 4, 2020, which contained seven counts, including negligence claims against all Defendants, punitive damages claims against all Defendants, and fraud/misrepresentation. All of the above captioned Defendants have filed preliminary objections to Plaintiff's Complaint in the nature of a demurrer and/or motion to strike. The preliminary objections relate to Plaintiff's claim for punitive damages and fraudulent misrepresentation. Argument was held on November 13, 2020 at which time the parties stipulated that Plaintiff's claims for fraud and/or misrepresentation shall be stricken from the Complaint[1] and Plaintiff conceded that he had not pled a basis for punitive damages claims against the corporate Defendants. Therefore, the only issue left to be decided by the Court is whether Plaintiff has sufficiently pled a claim for punitive damages against Defendants Nathalie Lavallee, MD, Timothy Pastore, MD, and Kristin Adkins, CRNA.

II. Legal Principles

a. Standard of Review

Preliminary objections may be filed by any party to any pleading and are limited to the following grounds:

> (3) insufficient specificity in a pleading;
>
> (4) legal insufficiency of a pleading (demurrer) . . . .

Pa.R.C.P. 1028(a)(3) and (4).

[1] See separate Order issued November 13, 2020.

Because Pennsylvania is a fact-pleading state, a complaint must "formulate the issues by summarizing those facts essential to support the Plaintiff's claim as well as give the defendant notice of what the plaintiff's claim is and the grounds upon which it rests." *Lerner v. Lerner,* 954 A.2d 1229, 1235 (Pa. Super. 2008). "When considering preliminary objections, all material facts set forth in the challenged pleadings are admitted as true, as well as all inferences reasonably deducible therefrom. Preliminary objections which seek the dismissal of a cause of action should be sustained only in cases in which it is clear and free from doubt that the pleader will be unable to prove facts legally sufficient to establish the right to relief. If any doubt exists as to whether a demurrer should be sustained, it should be resolved in favor of overruling the preliminary objections." *Richmond v. McHale*, 35 A.3d 779, 783 (Pa. Super. 2012). Pursuant to the rules of civil procedure, the Court has the authority to allow the Plaintiff to file an amended complaint if the preliminary objections are sustained. Pa.R.C.P. 1028(e).

b. Punitive Damages Generally

In medical malpractice cases, "[p]unitive damages may be awarded for conduct that is the result of the health care provider's willful or wanton conduct or reckless indifference to the rights of others. In assessing punitive damages, the trier of fact can properly consider the character of the health care provider's act, the nature and extent of the harm to the patient that the health care provider caused or intended to cause and the wealth of the health care provider. A showing of gross negligence is insufficient to support an award of punitive damages." 40 P.S. § 1303.505(a) and (b).

"[P]unitive 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. Additionally, this Court has stressed that, when assessing the propriety of the imposition of punitive damages, the state of mind of the actor is vital. The act, or the failure to act, must be intentional, reckless or malicious." *Hutchison v. Luddy,* 870 A.2d 766, 770–771 (Pa. 2005).

The Court in *Stroud v. Abington Memorial Hospital*, applying Pennsylvania law, held that pleading a conscious disregard for a known risk of harm is sufficient for the purpose of establishing a request for punitive damages. *Stroud v. Abington Mem'l Hosp.*, 546 F. Supp. 2d 238, 257 (E.D. Pa. 2008). "[I]n Pennsylvania, 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 of that risk. *Id.*, *citing Hutchison*, 870 A.2d at 771-72. Therefore, when a plaintiff demonstrates that the defendant acted with at least a mental state of recklessness, punitive damages may be recovered. *Stroud*, 546 F. Supp. 2d at 257.

The Supreme Court has also defined reckless indifference as when "the actor has intentionally done an act of an unreasonable character, in disregard to a risk known to him or so obvious that he must be taken to have been aware of it, and so great as to make it highly probable that harm would follow." *Evans v. Philadelphia Transportation Company,* 212 A.2d 440, 443 (Pa. 1965).

Additionally, reckless conduct *"must involve an easily perceptible danger of death or substantial physical harm, and the probability that it will so result must be substantially greater than is required for ordinary negligence*" and the actor must "recognize that his conduct involves a risk substantially greater in amount than that which is necessary to make his conduct negligent." *Hall v. Jackson,* 2001 WL 1506037, *8, ¶31 (Pa. Super. November 28, 2001) (emphasis in original). Courts must determine whether allegations in a Complaint establish that the tort-feasor actually knew or had reason to know of facts which created a high risk of physical harm to the plaintiff and that the defendant proceeded to act in conscious disregard of or indifference to that risk. *Field v. Philadelphia Elec. Co.*, 565 A.2d 1170, 1182 (Pa. Super. 1989). "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.*

> Section 500 of the Restatement defines "reckless disregard" as follows:
>
> > 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. Restatement (Second) of Torts § 500.[2]

[2] Conduct cannot be in reckless disregard of the safety of others **unless the act or omission is itself intended**, notwithstanding that the actor knows of facts which would lead any reasonable man to realize the extreme risk to which it subjects the safety of others. It is reckless for a driver of an automobile intentionally to cross a through highway in defiance of a stop sign if a stream of vehicles is seen to be closely approaching in both directions, but if his failure to stop is due to the fact that he has permitted his attention to be diverted so that he does not know that he is approaching the crossing, he may be merely negligent and not reckless.

Thomas v. Am. Cystoscope Makers, Inc., 414 F. Supp. 255, 266 (E.D. Pa. 1976), *citing to* Section 500, Restatement of Torts, Comment (b).

III. Analysis

In his Complaint, Plaintiff includes a demand for punitive damages against Dr. Lavallee, Dr. Pastore, and CRNA Adkins and includes words such as "deliberately indifferent," "knowing disregard," "reckless indifference," and "recklessly indifferent" to describe each Defendant's conduct. Plaintiff pleads that the reckless indifference displayed by these Defendants resulted in a "never event," which is an error that was clearly identifiable, preventable, and in violation of the standard of care. Plaintiff also states that the conduct of the Defendants' were "so extreme that they reflect a knowing disregard for the high probability of an explosion . . . ."

Defendants' argument, essentially, is that Plaintiff's Complaint is devoid of any facts or averments that describe the required state of mind necessary to assert a claim for punitive damages in a medical malpractice action; namely, that Defendants had an evil motive or were recklessly indifferent to the rights of the Plaintiff. Plaintiff's response is that punitive damages are proper when there is **either** intent **or** reckless indifference and that malice or intent to harm is not a prerequisite. "The requisite mental state of the Defendants may be inferred since their acts were of such an unreasonable character and in disregard of a known risk . . . ." *See Plaintiff's Response at Page 16*.

The facts and allegations pled in this case are at least comparable to those in the *Stroud v. Abington* case, *supra*, and at best reflect even more recklessly indifferent behavior that those facts in *Stroud*. In *Stroud*, Plaintiff was admitted to the hospital for a total right knee replacement. *Stroud*, 546 F.Supp.2d

at 240. Following the surgery, Plaintiff complained of nausea and failed to have a bowel movement but the Defendants failed to property diagnose and treat his medical condition, which was later found to be a bowel obstruction. *Id.* at 242. Defendants failed to diagnose and treat this condition even after an abnormal pelvic CT scan as well as continued nausea, vomiting, and abdominal complaints by the Plaintiff. *Id.* Due to these failures, Plaintiff passed away. *Id.*

In the Complaint in *Stroud*, Plaintiff specifically pled that "'Defendants were aware that Decedent was suffering from an emergent and life threatening condition' and that they nonetheless failed to take any action to remedy the condition or avert the demise of [the Decedent]" and that "'the conduct of Defendants i[n] failing to take any action on critical test results . . . showing an emergent and life threatening condition was outrageous and shocking to the conscience.'" *Id.* at 257. The Court held that the Complaint was sufficiently pled to overcome a motion to dismiss punitive damages because they allege that "while [Defendants] knew of the risk of harm to James Stroud, they nonetheless failed to act, and this failure to act, in conscious disregard of the known risk, caused decedent's demise." *Id.*

Here, Plaintiff avers that "the conduct and omissions by Defendant[s] were so extreme that they reflect a knowing disregard for the high probability of an explosion, fire and disfigurement, which in fact did occur, said conduct and omissions thereby constitution reckless indifference." *Plaintiff's Complaint at Paragraphs 36.12 and 42.10.* The conduct and omissions cited by the Plaintiff include, but are not limited to, Dr. Lavallee failing to announce to the room that she was going to begin using the cautery, failing to turn off the oxygen for at least

sixty seconds prior to its use, failing to ensure the oxygen level was thirty percent or less, draping Plaintiff in a way to cause a funneling effect, and failing to follow fire prevention protocol.

As it relates to Defendants Dr. Pastore and CRNA Adkins, in Paragraph 14 of his Complaint, Plaintiff pleads that the Anesthesia Report includes a note on Fire Prevention that the FiO2 during electrosurgery is to be "[l]ess than or equal to 30% -- Titrating O2 to be less than 30% in preparation for bovie." This allegation establishes that Defendants Dr. Pastore and CRNA Adkins knew of the severe risk that if the FiO2 during electrosurgery is greater than 30%, a fire could ignite. Further, Plaintiff pleads that the Anesthesia Report reflects that Defendants Dr. Pastore and CRNA Adkins continued to provide FiO2 in excess of the Fire Prevention Level after the procedure began. *See Plaintiff's Complaint at Paragraph 13*.

The allegations in this case against Dr. Pastore and CRNA Adkins are more than a mere failure to diagnose a serious condition. The allegations in this case represent a serious disregard for not only one but several protocols and procedures. The Court, in reading the Complaint in the light most favorable to the Plaintiff, can reasonably infer from the averments and allegations that Defendants Dr. Pastore and CRNA Adkins were subjectively aware, or should have been subjectively aware, of the risk of harm to the Plaintiff – that is, that when the oxygen level is over three times higher than it was supposed to be, the likelihood of a fire starting is significantly increased. Additionally, it can be reasonably inferred that despite this appreciation, Dr. Pastore and CRNA Adkins continually failed to decrease the oxygen level in conscious disregard of the risk,

which caused or contributed to the cause of the Plaintiff's injuries. Plaintiff's Complaint is sufficiently pled regarding Defendants, Dr. Pastore and CRNA Adkins.

Regarding Plaintiff's punitive damages claim against Dr. Lavallee, the Court agrees that Plaintiff's Complaint lacks allegations sufficient to sustain preliminary objections. The complaint in *Stroud* specifically pled that the Defendants were *aware* that Decedent was suffering from an emergent and life threatening condition and that they nonetheless failed to act. The *Stroud* Court found it important that, in the Complaint, Plaintiff showed that "while [Defendants] knew of the risk of harm, they nonetheless failed to act, and this failure to act, in conscious disregard of the known risk, caused decedent's demise." *Stroud*, 546 F.Supp.2d at 257. Unlike the averments cited above regarding Dr. Pastore and CRNA Adkins, Plaintiff simply just lists the things that Dr. Lavallee did or failed to do and calls it reckless. Plaintiff fails to plead that Dr. Lavallee had a subjective appreciation of a risk and there are no allegations included that the Court could reasonably infer the same. For these reasons, Plaintiff's Complaint lack sufficient allegations regarding his punitive damages claim against Dr. Lavallee.

IV. Conclusion

For the foregoing reasons, Plaintiff has sufficiently pled claims for punitive damages against Defendants, Dr. Pastore, and CRNA Adkins but not against Dr. Lavallee. At this stage of the pleadings, the Court must read the Complaint in the light most favorable to the Plaintiff and give the Plaintiff the benefit of any doubt that may exist. The Court is satisfied that the Plaintiff has pled with sufficient detail that Dr. Pastore and CRNA Adkins were aware or should have been aware

of the rising oxygen level and nevertheless failed to act. However, the Court could find no allegations to support a punitive damages claim against Dr. Lavallee. The Court grants the Plaintiff leave to file an Amended Complaint within twenty (20) days of the date of this Order.

The Court acknowledges Defendants' well-reasoned positions and arguments and notes that the burden still rests on the Plaintiff to prove that he is entitled to punitive damages. Therefore, while Defendants' preliminary objections regarding punitive damages are overruled as to Dr. Pastore and CRNA Adkins, this ruling is without prejudice to the Defendants' ability to file for summary judgment at the close of discovery or other appropriate stage of the case.

ORDER

AND NOW, this **1st** day of **December**, **2020**, upon consideration of Defendants' Preliminary Objections to Plaintiff's Complaint and Plaintiff's responses thereto, Defendants, Timothy Pastore, MD and Kristin Adkins, CRNA, Preliminary Objections are **OVERRULED** and Defendant, Nathalie Lavallee, MD's Preliminary Objections are **SUSTAINED**. Plaintiff shall have twenty (20) days from the date of this Order to file an Amended Complaint.

Pursuant to Plaintiff's concession, Defendants' Preliminary Objections relating to punitive damages against Defendants, The Williamsport Hospital, The Williamsport Hospital d/b/a Williamsport Regional Medical Center, UPMC Susquehanna f/k/a Susquehanna Health System, and Anesthesia Associates of Williamsport, Inc. are **SUSTAINED**.

BY THE COURT,

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Ryan M. Tira, Judge

CC: Clifford Rieders, Esquire
Mark Perry, Esquire – 305 Linden Street, Scranton, PA 18503
Brian Bluth, Esquire
Gary Weber, Esquire