STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

KENT, SC. **SUPERIOR COURT**

(Filed: October 26, 2012)

CAROL A. LESSARD	:	
	:	
VS.	:	**C.A. No. KC 10-0369**
	:	
KENT COUNTY MEMORIAL HOSPITAL	:	
AND RAYMOND J. MIS, D.O.,	:	
JOHN DOE #1,	:	
JOHN DOE #2,	:	
JOHN DOE CORP.	:	

DECISION

RUBINE, J. This matter is before the Court following a pre-trial hearing on punitive damages, as required by the holding in Palmisano v. Toth, 624 A.2d 314 (R.I. 1983). Plaintiff has filed a negligence claim against Dr. Raymond Mis ("Dr. Mis") and Kent County Memorial Hospital (KCMH) arising from injuries she sustained on March 7, 2007 during an endoscopic procedure performed by Dr. Mis at KCMH, at a time when he had privileges to perform such service at KCMH.

Plaintiff has also asserted a claim for punitive damages against KCMH, alleging that the hospital acted with such willfulness, recklessness and malice in allowing Dr. Mis to be on staff and credentialed to practice at KCMH as to justify the award of punitive damages against the hospital. Plaintiff has served discovery requests on KCMH relating to the claim of punitive damages (requesting for example, information concerning the hospital's financial resources), and KCMH has moved for a protective order as to such discovery. Additionally, KCMH has moved to strike Plaintiff's claim for punitive damages. Because the motion to strike is accompanied by a discovery motion, the holding of Palmisano requires "a plaintiff to make a prima facie showing

that a viable issue exists for awarding punitive damages" at a pre-trial evidentiary hearing in which the Court hears the plaintiff's evidence as it relates to the punitive damage claim, and determines if the plaintiff is able to establish a prima facie claim for punitive damages. Palmisano v. Toth, 624 A.2d 314, 320 (R.I. 1993). In the absence of such a showing, the plaintiff will not be permitted to pursue its claim for punitive damage or discovery related thereto.

STANDARD

Corporate negligence has been applied to hospitals. See Rodriguez v. Miriam Hospital, 623 A.2d 456, 464 (R.I. 1993). In Rhode Island, before punitive damages may be awarded, there must be a showing that the defendant acted willfully and with malice or in bad faith. Izep v. Winoker, 589 A.2d 824 (R.I. 1991); Morin v. Aetna Casualty and Surety Co., 478 A.2d 964, 967 (R.I. 1984). To establish a claim for punitive damages, the plaintiff must allege and prove that the defendant acted with the intent to cause harm. Wilson Auto Enterprises, Inc. v. Mobil Oil Corp., 778 F. Supp. 101, 107 (D.R.I. 1991). The courts have characterized punitive damages as an extraordinary sanction which should be awarded with great caution and within narrow limits. D'Amato v. Rhode Island Hospital Trust National Bank, 772 F. Supp. 1322, 1324 (D.R.I. 1991).

At the hearing required by Palmisano, the Court must determine if adequate facts exist to support an award of punitive damages. If the court determines that the prima facie threshold has been met, the question of whether and to what extent the party is entitled to punitive damages is left to the discretion of the trier of fact at trial. Borden v. Paul Revere Life Insurance Co., 935 F.2d 370, 382 (1st Cir. 1991); Sarkisian v. The NewPaper, Inc., 512 A.2d 831, 836 (R.I. 1986). The court does not make findings of fact at a Palmisano hearing.

Through many days of hearings, and after reviewing exhibits and deposition testimony, the Court can state the background facts put forward by the Plaintiff. On March 7, 2007, Carol Lessard underwent a scheduled endoscopy. The procedure was performed on an outpatient basis by Dr. Mis at KCMH. Dr. Mis, in accordance with the by-law provisions of KCMH, was appointed to the medical staff of the hospital. Under the by-laws, a physician wishing to acquire privileges at KCMH must submit an application to request privileges. Upon receipt of the completed application, the Vice President/Medical Director must verify the contents. The application then goes to the Credentials Committee. It is the responsibility of the Credentials Committee to review the applicant's file and conduct an interview of the applicant. The Credentials Committee must make a recommendation to approve, disapprove, or defer, which decision must be forwarded to the Executive Committee. The recommendation of the Executive Committee is in turn transmitted to the Medical Staff Application and Quality Improvement Committee of the Board. All appointments are for a period of two years. Three months prior to the expiration of the initial period, the physician must apply for reappointment. This process is repeated every two years.

Dr. Mis was first appointed to the staff of KCMH in September 1994. Thereafter, Dr. Mis applied for recertification every two years. He testified that beginning in June 2001, he suffered bilateral vision loss, a condition for which he was receiving care from a neuro-ophthalmologist in Boston, Dr. Rizzo. As of April 16, 2002, Dr. Audett informed Dr. Mis that there were to be certain conditions placed on Dr. Mis' practice at KCMH. Due to his visual deficits, the conditions included requiring Dr. Mis to have a proctor during his procedures, a sighted physician was required to co-manage his patients, and he was not allowed to admit patients. Dr. Mis, in 2001, voluntarily discontinued performing endoscopic procedures due to

his vision loss. Dr. Mis also revealed in his application for reappointment in 2002 that he was suffering from a substance abuse problem, for which he voluntarily sought assistance from the Rhode Island Medical Society Physician Health Committee beginning in October 2001.

Beginning with the 2002 Reappointment Activity Summary prepared by the Quality Improvement Department (Q. I.), the Credentials Committee considered the vision loss Dr. Mis reported, in connection with his reappointment as a staff physician at KCMH in 2003. The Credentials Committee also was made aware of the conditions which Dr. Audett, as Medical Director, earlier placed on Dr. Mis' practice. Periodically, Dr. Audett reviewed reports from Dr. Rizzo (Mis' treating ophthalmologist). Although these reports were to be sent annually, there were several years wherein the Rizzo updates were not timely received. However, in his report dated October 31, 2001, Dr. Rizzo opined that notwithstanding Dr. Mis' visual problems, he believed his condition did not disqualify him from performing his duties at KCMH. Specifically, Dr. Rizzo believed "it was reasonable for Dr. Mis to continue to participate in the clinical evaluations of patients who have disorders within his specialty of practice." Dr. Rizzo, however, added a caveat to his assessment of Dr. Mis, that "there is no doubt that there would be impairment in his ability to recognize some clinical signs that would be relevant for the diagnosis and management of patients with gastrointestinal disease." Dr. Rizzo further stated that he was not a gastroenterologist and as such could not comment as to the degree to which Dr. Mis' visual impairment would impact his capability as a gastroenterologist.

Thereafter, on April 1, 2001, Dr. Padula, Dr. Mis' treating optometrist,[1] sent Dr. Audett a letter stating that in his opinion Dr. Mis' visual acuity can be corrected to 20/25 with the

[1] The Court understands, and takes judicial notice, that an optometrist focuses on correction of visual impairments, as opposed to an ophthalmologist, who is a medical doctor who focuses on the clinical etiology of the defect and clinical treatment for such impairment. The Court believes an optometrist's opinion is a compliment to that of an

appropriate optical technological devices and "utilizing these devices in conjunction with special procedures should make him [Dr. Mis] visually functional for his daily activities." Dr. Audett followed up on the Rizzo and Padula reports by seeking input from the Rhode Island Gastrointestinal Society. The Society's conclusion, based upon the consideration by three gastroenterologists, was that additional information was needed as to Dr. Mis' corrected vision, which information was obtained from Dr. Padula, Dr. Mis' optometrist. See fn. 1.

In addition to his vision loss, Dr. Mis revealed to KCMH, in connection with his 2003 reappointment application, that he had a substance abuse problem involving prescription painkillers. Dr. Mis indicated that as a result, he voluntarily entered a recovery program in October 2001, which was administered by the Physician Health Committee (affiliated with the R.I. Medical Society) which monitored his compliance with his treatment program. Notwithstanding this information, which the Credentialing Committee knew, Dr. Mis was reappointed as a KCMH staff physician in 2005, two years prior to Plaintiff's injury. During the course of his continued practice, the Medical Director monitored Dr. Mis' status and compliance with his treatment program periodically. Ms. Rosemary Maher, the Executive Director of the Rhode Island Medical Society Physician Health Committee, assured Dr. Audett that Dr. Mis was in continuing compliance with his treatment program, and that in the opinion of the Physician Health Committee, Dr. Mis' continued practice at KCMH was not inappropriate.

There was no evidence presented by the Plaintiff to indicate that the injury to Mrs. Lessard in 2007 was causally related to Dr. Mis' vision or substance abuse problems.[2] There is also no evidence with respect to proctoring during Mrs. Lessard's procedure or whether Dr. Mis

---

ophthalmologist, whereas Plaintiff's counsel suggests that the hospital should consider an optometrist's opinion as less reliable than that of an ophthalmologist.

[2] Dr. David Shulkin was offered by the Plaintiff as a "causation" expert; he was examined at deposition, and opined with respect to perceived deficiencies in the KCMH credentialing process. He did not offer any opinion with respect to any causal relationship between Mrs. Lessard's injuries and the vision/substance abuse issues of Dr. Mis.

used adaptive equipment to assist him in visualizing the progress of the procedure. In the absence of evidence showing that the alleged harm to Mrs. Lessard would not have occurred "but for" the alleged intentional conduct of the hospital a punitive damage claim will fail. If Plaintiff fails to present evidence of proximate cause at the Palmisano hearing, the Court must conclude that Plaintiff has failed to show a prima facie claim for punitive damages. Schenck v. Roger Williams General Hospital, 119 R.I. 510, 514-15; 382 A.2d 514, 516 (R.I. 1977).

It appears to the Court from the evidence presented by the Plaintiff that KCMH, through its Medical director and Credentialing Committee, was attempting to work with Dr. Mis by setting certain restrictions on his practice to enable him to continue his professional practice and livelihood, rather than discontinue performing such procedures. This Court, however, does not view the evidence as establishing that KCMH was intentionally favoring Dr. Mis' continued practice over its responsibility for patient safety and welfare. KCMH did not ignore the information provided by Dr. Mis relative to his vision impairment and his admitted substance abuse. Rather, the evidence supports that KCMH had in place a variety of safeguards designed to protect patient safety while remaining sensitive to a physician's health related impairments. As to vision, KCMH stayed in frequent contact with Dr. Rizzo, Dr. Mis' treating ophthalmologist, and even attempted independently to verify Dr. Rizzo's statement concerning Dr. Mis' ability to continue his G.I. practice. Although there was some evidence that several written annual reports from Dr. Rizzo were missing, Dr. Audett was in frequent contact with Dr. Rizzo to receive updated information concerning Dr. Mis' conditions. Notwithstanding the evidence of several missing annual reports between 2001—2007, and in light of the totality of the evidence, this Court does not believe the missing reports would have evidenced a

deterioration of Dr. Mis' condition or a showing of the Hospital's reckless disregard for patient safety to a level of criminality necessary to substantiate a claim for punitive damages.

This Court reaches no conclusion as to whether the totality of the Plaintiff's evidence demonstrates negligence on the part of KCMH. Corporate negligence alone, while actionable, is insufficient without more egregious conduct to satisfy a prima facie showing of Plaintiff's entitlement to punitive damages. KCMH had a competent program for quality improvement and oversight, which investigated every incident of physician error to ensure the competency of its staff. In certain reappointment years, the credentialing summary for Dr. Mis prepared by the Q.I. Department did not reflect completion of the investigation by the Q.I. Department to reach a conclusion as to certain reported incidents of alleged physician error. The fact that the investigation was incomplete at the time set for renewal of staff privileges was explained as a result of the timing of a complaint when compared to the time of the preparation of the summary for the Credentialing Committee. The fact that every investigation was not accompanied by a conclusion of innocence or culpability does not suggest that the Q. I. investigative process was so inadequate as to amount to wanton disregard for patient safety. Such incomplete investigations might be suggestive of the need for more investigative staff to complete such investigations on a timelier basis. However, I believe it falls far short of evidence of willful, wanton and reckless disregard for patient safety.

Much of the post-hearing memoranda of Plaintiff's counsel attempts to point to an alleged conspiracy between Dr. Audett and Dr. Mis to give greater consideration to Dr. Mis' continued professional practice over reasonable efforts to ensure patient safety through the credentialing and Q.I. departments. Dr. Audett's testimony and demeanor in his videotaped deposition did not suggest to this Court a hospital official callously unconcerned about patient

safety, but perhaps a hospital administrator frustrated by certain errors and oversights made by staff. It is not for this Court at this time to conclude whether such errors or oversights amounted to a level of proof sufficient to support a claim of negligence.

The Plaintiff's post-hearing brief spells out various theories of reckless conduct. However, the Court must consider whether sufficient facts were introduced at the hearing to substantiate such theories. One of the theories put forward by Plaintiff's counsel is that Dr. Audett was overly concerned about protecting the career of a practicing physician, and in the process failed to consider the overriding importance of patient safety. The Court believes that the testimony evidences a fair balance of treating Dr. Mis fairly in light of his disability,[3] while taking reasonable steps believed necessary to protect patient safety. I conclude, therefore, that Plaintiff's evidence falls short of the evidence necessary to establish a prima facie case for punitive damages.

In addition to the specific conditions and restrictions placed upon Dr Mis, Dr. Mis and his optometrist also reported that he was able to use adaptive equipment to maximize the use of his available vision. Also, Dr. Mis was to be "proctored" during his procedures, to ensure that a sighted physician assisted with the procedure. The record is incomplete with respect to whether Dr. Mis used adaptive equipment or was monitored by a sighted physician during the endoscopy performed upon Mrs. Lessard. Without evidence of whether Dr. Mis was proctored when he treated Mrs. Lessard or whether he used adaptive equipment when he treated Mrs. Lessard, the Court is unable to conclude that the available evidence rises to the level necessary to establish a prima facie case for punitive damages. In other words, the record fails to establish that Dr. Mis

[3] The Court notes that the Americans with Disabilities Act, (ADA 42 U.S.C.A. §12112) requires an employer to provide reasonable accommodations to those employees experiencing a disability rather than terminating the impaired employee's employment. 42 U.S.C.A. §12112(5)(A). The Hospital should not be punished for attempting to find reasonable accommodations for Dr. Mis.

was non-compliant with the conditions placed on his practice at the time he treated Mrs. Lessard, or that such non-compliance caused or contributed to Mrs. Lessard's injury.

As to Dr. Mis' reporting a pattern of substance abuse, the evidence shows that Dr. Mis voluntarily self-reported this issue to the Physician Health Committee of the Rhode Island Medical Society, and that KCMH, through its Medical Director, Dr. Audett, closely monitored Dr. Mis' performance in the treatment program prescribed by that Committee. The record reflects several communications between Dr. Audett and Rosemary Maher, the Director of the program. Ms. Maher reported that Dr. Mis was compliant with his treatment program and that she so reported to KCMH. KCMH did not ignore this problem, but in fact monitored the situation closely. There is no evidence that had the Credentialing Committee been more vigilant concerning this issue, that patient safety would have been enhanced at KCMH. There is absolutely no evidence that Dr. Mis' performance as a physician was in any way hampered by his vision impairments or his history of prior substance abuse, and more specifically, there is no evidence that his admitted substance abuse caused or contributed to the injuries suffered by Mrs. Lessard in 2007.

CONCLUSION

For the foregoing reasons, KCMH's motion for protective order and motion to strike are granted. Counsel shall prepare and submit a form of Order reflecting this Decision.