**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE**

**IN AND FOR NEW CASTLE COUNTY**

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| ROBERTA TAYLOR, individually and as Personal Representative of the Estate of DORIS BOWERS, Decedent, JEANNA BOWERS, and GAIL BOWERS,<br>Plaintiffs,<br><br>v.<br><br>CHRISTIANA CARE HEALTH SERVICES, INC., a/k/a CHRISTIANA CARE HEALTH SYSTEM, INC., KENNETH NUKUNA, M.D., QING LIU, M.D., and CHRISTIANA MEDICAL GROUP, P.A.,<br>Defendants. | ) | C.A. No.: 10C-02-068 FSS<br>**(E-FILED)** |

Submitted: November 7, 2011
Decided: February 27, 2012

**ORDER**

**Upon Plaintiffs' Motion to Amend Complaint to Add Punitive Damages Against Christiana Care Health Services - *DENIED.***

This is a medical negligence case stemming from a hospital's alleged patient neglect. Almost two years into the litigation, Plaintiffs have moved to amend their complaint to seek punitive damages. They want to allege that when the hospital's physicians-in-training, its medical residents, neglected the patient, the doctors acted "recklessly and/or intentionally." Plaintiffs do not, however, seek to prove that the medical residents' supervision was recklessly or intentionally derelict. Thus, Plaintiffs want the hospital to be punished vicariously for its employees' misconduct

While Plaintiffs' allegations are serious and they have some evidence supporting their new claim, it is unlikely Plaintiffs can show that the residents acted in a "managerial capacity." Where, as here, Plaintiffs are asking to hold the hospital vicariously liable not only for all injury its employees caused, but also demand that the hospital be punished, Plaintiffs must prove the wrongdoers acted in a managerial capacity.

As discussed below, it is likely the hospital's medical residents, including its "chief" resident, are merely temporary employees, in-training. They are not part of the hospital's management. And so, it would be neither efficient nor productive to allow the amendment now. Allowing the amendment will drastically refocus, expand and delay the litigation. Denying the motion, on the other hand, will

have no impact on Plaintiffs' opportunity to receive full compensation.

## I.

On January 20, 2011, Plaintiffs filed their motion to amend to allege punitive damages against Defendant Christiana Care Health Services. On February 11, 2011, the court denied Plaintiffs' motion without prejudice, but allowed additional discovery to determine whether the chief resident acted in a "managerial capacity."[1] On October 7, 2011, after additional discovery concluded, Plaintiffs again moved to add punitive damages against Christiana Care. On October 13, 2011, Christiana Care responded. On October 28, 2011, the court heard oral argument and allowed the parties to submit "managerial capacity" cases. On November 7, 2011, they complied. Trial is April 2, 2012, little more than a month from now.

## II.

### A. Amendment When Justice Requires

Under Superior Court Civil Rule 15(a), a party may amend its pleading when "justice so requires."[2] Plaintiffs move to add punitive damages against Christiana Care "based upon the reckless and/or intentional behavior of the

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[1] *See* Restatement (Second) of Torts § 909(c) (1977) ("Punitive damages can properly be awarded against a master or other principal because of an act by an agent if, but only if the agent was employed in a managerial capacity and was acting in the scope of employment.").

[2] Super. Ct. Civ. R. 15(a).

employees and residents of [Christiana Care], which was unknown to [Plaintiffs] until after recent fact discovery was taken." The court assumes without deciding that Plaintiffs' "reckless and/or intentional behavior" is tantamount to the wilful or wanton conduct mentioned in 18 *Del. C.* § 6855.[3] Plaintiffs would allege Dr. Ray Green, chief surgical resident at the time Doris Bowers died, acted in a "managerial capacity" when he allegedly refused to treat her, and his refusal should be imputed to Christiana Care so that the hospital is punished for the resident's decision.

Ordinarily, amendment is permitted because the court prefers to give parties the opportunity to be heard. That preference, however, is tempered somewhat if there is delay in presentation or the amendment: is broad, adds to the trial's complexity, substantially changes a cause of action or defense, or is legally insufficient.[4] The idea behind punitive damages is to punish the wrongdoer as a deterrent, not just to make the injured party whole again. Moreover:

> [A] claim of . . . punitive damages can indeed add to the evidentiary burden both on discovery and at trial. There can be added evidence designed to paint the defendant as a large, bad corporate person. Even on liability, the degree of inquiry, and particularly the

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[3] 18 *Del. C.* § 6855.

[4] *See Timblin v. Kent Gen. Hosp.,* 1995 WL 44250, at *1 (Del. Super. Feb. 1, 1995) (Quillen, J.) (citing *Itek Corp. v. Chicago Aerial Industries, Inc.,* 257 A.2d 232 (Del. Super. 1969), *aff'd,* 274 A.2d 141 (Del. 1971)).

> degree of defense, are seldom the same as in simple negligence claims. Allowing amendments to the complaint which add a . . . claim for punitive damages would inject new issues requiring additional discovery.[5]

The proposed amendment broadens the case considerably, adds to its complexity, changes the action and defenses, and, as discussed at length below, is legally insufficient.

### B. Punitive Damages

In a medical negligence case, punitive damages may be imposed if "the injury complained of . . . was the result of wilful or wanton misconduct by the health care provider."[6] Dr. Green is a "health care provider," as is Christiana Care.[7] Under Restatement (Second) of Torts, however, a hospital may only be subject to punitive damages if its negligent employees "act in a managerial capacity and within the scope of employment."[8]

Thus, assuming Dr. Green made a bad decision that was wilful or wanton, Plaintiffs must also prove he acted in a managerial capacity. For present

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[5] *Id.* at *4.

[6] 18 *Del. C.* § 6855.

[7] 18 *Del. C.* § 6801(5) ("'Health care provider' means a person, corporation, facility, or institution licensed by this State pursuant to Title 24, . . . or any employees or agents thereof acting within the scope of their employment.").

[8] Restatement (Second) of Torts § 909(c) (1977).

purposes only, it is conceded that Dr. Green acted wilfully or wantonly.[9] Nevertheless, Christiana Care challenges punitive damages on the ground that Dr. Green did not act in a managerial capacity.

Plaintiffs cited four "managerial capacity" cases: two linking managerial capacity to Title VII discrimination,[10] and two linking managerial capacity to employees' intentional and gross negligence torts.[11] Title VII does not apply here and Plaintiffs do not cite a case linking managerial capacity to a health care provider's wilful or wanton misconduct in a medical negligence case.

Christiana Care provided four cases holding "managerial capacity" was not present: three Title VII cases[12] and one maritime case.[13] As stated above, Title VII does not apply. Maritime law also does not apply. Christiana Care fails to cite

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[9] *But see, e.g., Ciarlo v. St. Francis Hosp., Inc.,* 1994 WL 713894 (Del. Super. Sept. 9, 1994) (Gebelein, J.). (Granting defendant's motion for summary judgment on punitive damages claim because nurse's administering wrong medicine could not establish reckless indifference to hold defendant vicariously liable).

[10] *Sackett v. ITC Deltacom, Inc.,* 374 F.Supp. 2d 602 (E.D. Tenn. 2005); *Deffenbaugh-Williams v. Wal-Mart Stores, Inc.,* 188 F.3d 278 (5th Cir. 1999).

[11] *Chavarria v. Fleetwood Retail Corp.,* 143 P.3d 717 (N.M. 2006) (Employer liable for employees' fraud and conversion); *Mathias v. Accor Econ. Lodging,* 347 F.3d 672 (7th Cir. 2003) (Employer vicariously liable for an employee's gross negligence).

[12] *Steinhoff v. Upper River Restaurant Joint Venture,* 117 F. Supp. 2d 598 (E.D. Ken. 2000); *Kolstad v. American Dental Association,* 527 U.S. 526 (1999); *Sackett v. ITC Deltacom, Inc.,* 374 F.Supp. 2d 602 (E.D. Tenn. 2005).

[13] *In the Matter of P&E Boat Rentals, Inc.,* 872 F.2d 642 (5th Cir. 1989).

a medical negligence case holding a health care provider did not have managerial capacity. Thus, the parties have little precedent on which to rely.[14]

*Kolstad v. American Dental Association*,[15] however, helps define "managerial capacity." "Managerial capacity" depends on the "type of authority that the employer has given to the employee, [and] the amount of discretion that the employee has in what is done and how it is accomplished."[16] As discussed below, it may be that Dr. Green, as chief resident, had some temporary authority over other residents, but he was still subordinate to the hospital's full-time, attending physicians.

**III.**

Plaintiffs allege three newly discovered pieces of evidence show chief resident Dr. Green acted in a managerial capacity, which justify allowing amendment. First, Plaintiffs cite Christiana Care's Surgical Resident Policy and Procedure Manual. The manual requires "senior" residents "[p]rovide[] direct and indirect supervision of "junior" residents' activities." The manual also states, "[I]f any

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[14] *But see Treib v. Glatt,* 2010 WL 5068075 (D.S.D. Dec. 7, 2010) (Denying surgical center defendant's summary judgment motion on plaintiff's punitive damages claim because plaintiff pled sufficient facts under Restatement (Second) of Torts § 909(c) to allege attending surgeon committed a tort by performing surgery without anesthesia despite the patient's and nurses' strenuous objections).

[15] 527 U.S. 526 (1999).

[16] *Id.* at 543 (quoting 1 L. Schlueter & K. Redden, Punitive Damages, § 4.4(B)(2)(a), p. 181 (3d ed.1995)).

question should arise about the management of a patient, residents should call the senior resident or the attending surgeon." The snippets from the manual provided by Plaintiffs do not speak to the chief resident's authority, so the court sees the chief resident as the most senior of all residents. The chief, however, is neither a permanent employee nor an attending.

Plaintiffs misconstrue"management" by equating it with "managerial capacity." Christiana Care's manual discusses management in a patient-care context. Simply put, the fact that a chief resident is responsible for managing a patient's care does not make him or her part of the hospital's management. Similarly, the fact that he was the most senior resident does not, by that alone, make him a hospital manager. A chief resident, like a junior resident, is still a physician-in-training and, as to the hospital, just passing through. All residents, including the "chief," answer to the hospital's permanent, attending physicians.[17] Dr. Green's chief residency meant he was further along in his studies and superior to the hospital's other physicians-in-training.[18] It did not make him a hospital administrator or manager.[19]

Second, Plaintiffs cite Dr. James Larson's deposition. Dr. Larson was

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[17] *Id.* at 26:3-7.

[18] Green Dep. 26:11-23, Apr. 21, 2011.

[19] *Id.* at 26:24-27:6.

a junior resident at Christiana Care when Ms. Bowers died. Dr. Larson testified, "Chain of command as a first year resident in general is once you've seen [a patient], speak either [to] the chief resident on call and/or the attending. If you're missing something as a junior resident, they may be able to help you with it."[20] As discussed above, the fact that the chief resident helps supervise junior residents on the front-line does not make the chief part of the hospital's management. Dr. Green testified a chief resident's job was to "educate and assist patient management for the younger residents."[21] He also testified he did not have authority to set hospital policy.[22] Even after discovery, that is undisputed.

Last, Christiana Care's attorney invoked attorney-client privilege during Dr. Green's deposition. Plaintiffs allege invoking the privilege "concede[s] that Dr. Green was employed in a managerial capacity" because attorney-client privilege applies only to employees "having a managerial responsibility on behalf of the organization."[23] It does not.

Plaintiffs' reliance on *Showell v. Mountaire Farms* for that proposition

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[20] Larson Dep. 40:1-6, May 25, 2011.

[21] Green Dep. 5:12-14, Apr. 21, 2011.

[22] *Id.* at 32:14-17 ("Q: As chief resident, did you have any authority to set any type of policy for the hospital? A: God, no.").

[23] *Showell v. Mountaire Farms,* 2002 WL 31818512, at *1 (Del. Super. Ct. Nov. 15, 2002) (Stokes, J.).

is misguided. *Showell* does not address attorney-client privilege.[24] *Showell* only discusses Delaware Rule of Professional Conduct 4.2 and its application to employees acting in a "managerial capacity."[25]

Dr. Green was a hospital employee. Christiana Care's attorney was present at the deposition to defend his client. Thus, Christiana Care's attorney could attempt to invoke attorney-client privilege regarding statements between Dr. Green and Christiana Care.[26] Plaintiffs have not shown how invoking the privilege concedes managerial capacity, and they have presented no case-authority to that effect.

In context, Plaintiffs only show that a chief resident is not the lowest doctor in the hospital's chain of command. Plaintiffs show that as to a patient's care, the chief resident outranks and, to a limited extent, supervises a junior resident. While that is consistent with the chief resident's being a managerial agent, by itself that does not establish that he has managerial capacity. Thus, while the chief resident may be the leader of a given treatment team, he or she is only barely more responsible for hospital policy implementation than a junior resident. At best, the chief resident

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[24] *See id.*

[25] *See id. See also* Del. Lawyers' Rules of Prof'l Conduct R. 4.2.

[26] D.R.E. 502(b)(3) ("A client has a privilege . . . to prevent any other person from disclosing confidential communications . . . to a lawyer or a representative of a lawyer representing another in a matter of common interest.") ; *See also* D.R.E. 502(c) ("A person who was the lawyer . . . at the time of the communication is presumed to have authority to claim the privilege but only on behalf of the client.").

has more experience and knows the hospital's policies a little better than a junior resident. For this case's purpose, Dr. Green's decision not to treat Ms. Bowers, if he decided that, was little different than if he were any other resident.

In summary, there is no more reason to punish the hospital for a serious mistake, if that is what it is proved to be, by a chief resident than for the same mistake by another of its residents. They are all temporary physicians in-training, even if among them the chief resident has the final say. And so, although the court gave Plaintiffs leeway to firm-up their case for punitive damages before deciding this motion, the court declines to allow Plaintiffs to greatly broaden the litigation's scope and delay its disposition by seeking to punish the hospital for a resident's alleged mistake. Plaintiffs, of course, are still entitled to the full measure of actual damages they establish were caused by the hospital's employees.

**IV.**

For the foregoing reasons, Plaintiffs' motion to amend the complaint to add punitive damages against Christiana Care is **DENIED.**

**IT IS SO ORDERED.**

/s/ Fred S. Silverman
Judge

cc: Prothonotary (Civil)
pc: Timothy E. Lengkeek, Esquire
Dennis D. Ferri, Esquire
Joshua H. Meyeroff, Esquire