

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

UMESH C. PATTANAYAK, in his :  
own right and next of kin of : C.A. No. 03C-09-005 WLW  
SAVITRI PATTANAYAK, deceased, :  
: :  
Plaintiff, :  
: :  
v. :  
: :  
NASREEN M. KHAN, D.O. and :  
CHARLES W. WHITNEY, M.D., :  
: :  
Defendants. :

Submitted: June 3, 2005  
Decided: September 12, 2005

**ORDER**

Upon Defendant Dr. Charles W. Whitney's Motion  
for Partial Summary Judgment. Granted.

Elizabeth Ainslie, Esquire and Stephen A. Fogdall, Esquire of Schnader Harrison Segal & Lewis, LLP, Philadelphia, Pennsylvania, *pro hac vice* and Nicholas H. Rodriguez, Esquire of Schmittinger & Rodriguez, P.A., Dover, Delaware, *of counsel*; attorneys for the Plaintiff.

John D. Balaguer, Esquire and William L. Doerler, Esquire of White and Williams, LLP, Wilmington, Delaware; attorneys for Defendant Charles W. Whitney, M.D.

Gilbert F. Shelsby, Jr., Esquire of Morgan Shelsby & Leoni, P.C., Newark, Delaware and Michael C. Rosendorf, Esquire, Hunt Valley, Maryland; attorneys for Defendant Nasreen M. Khan, D.O.

Witham, R.J.

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Upon consideration of Defendant Dr. Charles W. Whitney's motion for partial summary judgment and the record before this Court, it appears to the Court:

On September 5, 2003, Umesh C. Pattanayak ("Plaintiff") filed a complaint against Nasreen M. Khan, D.O. and Charles W. Whitney, M.D. ("Defendants") asserting a wrongful death claim. Specifically, Plaintiff alleged that Defendants improperly performed surgery on his wife to remove a cancerous fibroid which ultimately caused the cancer to recur and resulted in her death. On December 2, 2004, Plaintiff was granted leave to amend. In addition to the wrongful death claim, Plaintiff's amended complaint asserts a survival action on behalf of his wife's estate which includes a claim for punitive damages. Plaintiff contends the claim for punitive damages is warranted because Dr. Whitney exhibited willful and wanton indifference to Mrs. Pattanayak's rights by either (a) failing to attend the surgery as planned, or (b) if he did attend, failing to perform necessary procedures as promised, or (c) if he did perform them, performing them in a manner recklessly indifferent to the patient's medical needs.

Defendant has filed a motion for partial summary judgment contending that the claim for punitive damages is procedurally defective and substantively deficient. Defendant argues that the amended complaint containing the claim for punitive damages is procedurally defective because it was never filed. Even if the amended complaint is valid, Defendant contends insufficient evidence exists to support an award for punitive damages.

Superior Court Civil Rule 56(c) provides that judgment "shall be rendered

forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.”<sup>1</sup> On a motion for summary judgment the Court examines the record to determine whether any material issues of fact exist. Summary judgment will only be granted when, after viewing the record in a light most favorable to the non-moving party, no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law.<sup>2</sup> Summary judgment will not be granted when a more thorough inquiry into the facts is desirable to clarify the application of the law to the circumstances.<sup>3</sup>

Punitive damages in medical negligence claims are governed by 10 *Del. C.* § 6855 which provides:

In any action for medical negligence, punitive damages may be awarded only if it is found that the injury complained of was maliciously intended or was the result of wilful or wanton misconduct by the health care provider, and may be awarded only if separately awarded by the trier of fact in a separate finding from any finding of compensatory damages which separate finding shall also state the amounts being awarded for each category of damages. Injuries shall not be considered maliciously intended in instances in which unforeseen damage or injury results from intended medication, manipulation,

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<sup>1</sup> Super. Ct. Civ. R. 56.

<sup>2</sup> *Oliver B. Cannon & Sons, Inc. v. Dorr-Oliver, Inc.*, 312 A.2d 322, 325 (Del. Super. Ct. 1973); *see also McCall v. Villa Pizza, Inc.*, 636 A.2d 912 (Del. 1994).

<sup>3</sup> *Ebersole v. Lowengrub*, 180 A.2d 467, 470 (Del. 1962).

surgery, treatment or the intended omission thereof, administered or admitted without actual malice or if the intended treatment is applied or omitted by mistake to or for the wrong patient or wrong organ.<sup>4</sup>

Punitive damages should only be awarded if the injury is inflicted with malicious intent or the product of wilful or wanton misconduct.<sup>5</sup> In the case *sub judice*, Plaintiff does not allege malicious intent but avers that punitive damages are warranted based upon the wilful and wanton misconduct of Dr. Whitney. Wilful and wanton misconduct is analogous to the conscious indifference or disregard for the rights of others and has commonly been referred to as the “I don’t care” attitude.<sup>6</sup>

Plaintiff alleges that Dr. Khan recited two different versions of events and punitive damages against Dr. Whitney could be sustained under either version. Plaintiff contends sufficient evidence exists to support a finding that Dr. Whitney abandoned his patient by not attending the surgery. In the alternative, if Dr. Whitney did attend the surgery, Plaintiff contends sufficient evidence exists to support the conclusion that Dr. Whitney performed the surgery with an “I don’t care” attitude by deliberately removing the malignant fibroid from Mrs. Pattanayak’s uterus while the uterus was still attached inside her abdomen.

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<sup>4</sup> 10 *Del. C.* § 6855.

<sup>5</sup> *Ford v. Laggner*, 1985 Del. Super. LEXIS 1010, at \*7.

<sup>6</sup> *Id.*

*Abandonment Theory*

Plaintiff contends sufficient evidence exists suggesting that Dr. Whitney was not present in the operating room during the surgery and therefore abandoned Mrs. Pattanayak. Although never addressed in this jurisdiction, abandonment has been a legally cognizable claim in other jurisdictions. While this Court will not foreclose on the possibility that abandonment is a legally cognizable claim in Delaware to which punitive damages may attach, jurisdictions that have awarded punitive damages based upon abandonment have still required the conduct supporting an award for punitive damages to appear affirmatively in the evidence.<sup>7</sup> Punitive damages will not be presumed.<sup>8</sup> In the case *sub judice*, there is no affirmative evidence supporting a claim for punitive damages based upon the theory of abandonment. The theory of abandonment rests exclusively on the testimony of Plaintiff who contends that Dr. Khan made statements indicating Dr. Whitney did not attend the surgery. Specifically, Plaintiff stated in his deposition:

A: ....At that point, I asked her how Dr. Whitney performed the cancer surgery. Then Dr. Khan said, “ I don’ t know where Dr. Whitney went.” She continued to say that she saw Dr. Whitney in the operating room talking to staff members, and Dr. Whitney apparently left the operating room without informing Dr. Khan.<sup>9</sup>

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<sup>7</sup> *Medvecz v. Choi*, 529 F.2d 1221, 1228 n22 (3d Cir.1977) (quoting *Thompson v. Swank*, 176 A.2d 211 (1934)).

<sup>8</sup> *Id.*

<sup>9</sup> Pl. Dep. at 25-26.

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- A. That she (Dr. Khan) saw Dr. Whitney in the operating room talking to the staff members. And she said, “ I don’ t know where Dr. Whitney went.”
- Q. When she told you that, did you ask Dr. Khan, well, what about the part of the surgery that Dr. Whitney was supposed to do, what happened with that?
- A. I asked her?
- Q. What did she say?
- A. No. No. Before she said, “ I don’ t know where Dr. Whitney was”--
- Q. Right?
- A. I’ d asked the question.
- Q. Okay
- A. So, when she said she removed the part that seemed to contain cancer, just by looking at it, as she said, at that point I asked her how Dr. Whitney performed the surgery. Then she answered, “ I don’ t know where Dr. Whitney went.” That was the first sentence. And then she said that Dr. Khan saw Dr. Whitney talking to the staff member in the operating room.<sup>10</sup>

This is the only evidence supporting a claim of punitive damages based upon the theory of abandonment.

Contrary to Plaintiff’ s contention, this evidence, even if uncontested, is insufficient to support an award for punitive damages based upon a claim of abandonment. Moreover, the theory that Dr. Whitney was not present during the surgery is highly contested and refuted by the rest of the evidence. Dr. Khan stated in his deposition that Dr. Whitney was present throughout the entire surgery. Dr.

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<sup>10</sup> *Id.* at 30-31.

Whitney stated in his deposition that he was in the operating room throughout the surgery. Plaintiff's own expert even withdrew his opinion with respect to abandonment.

Q. Okay. To the extent that your report discussed this issue of whether Dr. Whitney was present at the surgery, or whether he abandoned Mrs. Pattanayak, you're withdrawing those opinions?

A. Yeah, obviously....I assumed he wasn't there, and it was obviously error, and I withdraw that.<sup>11</sup>

Q. So your sole criticism of Dr. Whitney is that he was present and/or participated in the way this fibroid was removed for a frozen section analysis?

A. Correct.<sup>12</sup>

Upon consideration of the overwhelming evidence indicating that Dr. Whitney was present in the operating room and the lack of evidence supporting any contention to the contrary, an award for punitive damages based upon an abandonment claim cannot be sustained as a matter of law. Notwithstanding Plaintiff's recollection of the conversation between Dr. Khan and himself, there is zero evidence supporting any claim for punitive damages based upon the theory of abandonment. Plaintiff's recollection of the conversation even has Dr. Khan placing Dr. Whitney somewhere in the operating room. Accordingly, insufficient evidence exists to support an award for punitive damages based upon a claim of abandonment.

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<sup>11</sup> Dr. Kadar Dep. at 51.

<sup>12</sup> *Id.* at 52.

*Removal of the Fibroid*

Plaintiff contends an award for punitive damages could also be justified based upon Dr. Whitney's "I don't care" attitude. Plaintiff argues that Dr. Whitney performed the operation with deliberate indifference towards the rights of Mrs. Pattanayak when he intentionally removed the malignant fibroid from her uterus while it was still attached inside her abdomen. Plaintiff contends expert testimony exists substantiating a claim for punitive damages based upon the deliberate indifference of Dr. Whitney. Specifically, Plaintiff relies upon the expert testimony of Dr. Nicholas Kadar, M.D. who stated:

- A. ....I can't imagine why anybody would want to do a myomectomy in a postmenopausal woman who is going to have a hysterectomy anyway, number one, doubly not when there's a very high risk preoperative suspicion for a sarcoma. But it's worse than that, they actually chopped the fibroid in half, and that's the end of the story. You know to deliberately, knowingly, for no reason, chop—you know, cut into a tumor....
- A. [I]t's a grievous breach of the standard of care, because there's absolutely no rationale....No justification.<sup>13</sup>

Based upon this testimony, Plaintiff contends sufficient evidence exists that could substantiate an award for punitive damages.

Although these isolated statements appear to support a finding of deliberate indifference and an award for punitive damages, a complete reading of Dr. Kadar's

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<sup>13</sup> *Id.* at 50-51.



deposition relinquishes all suppositions for punitive damages.

Q. Any time one does that –

A. Yes.

Q. –that would be a breach in the standard of care?

A. It wouldn't be a breach, it would be recklessness.

Q. Okay.

A. Almost recklessness. It's a little too strong, but it's a grievous breach in the standard of care, because there's absolutely no rationale.<sup>14</sup>

Even if a factfinder accepts the testimony of Plaintiff's expert in its entirety, there is still insufficient evidence suggesting that Dr. Whitney acted with deliberate indifference. Dr. Kadar explicitly refused to find Dr. Whitney's actions reckless. While Dr. Kadar described his conduct as a breach in the standard of care, he unequivocally stated that such breach was short of reckless.

The primary purpose of punitive damages is to deter defendants rather than compensate plaintiffs.<sup>15</sup> This special class of damages is reserved for those who exhibit a willful and wanton disregard for the rights of others.<sup>16</sup> Punitive damages should only be awarded after a close examination of whether the defendant's conduct is outrageous because of evil motive or reckless indifference.<sup>17</sup> Upon careful consideration of the evidence presented regarding the manner in which the

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<sup>14</sup> *Id.* at 97-98.

<sup>15</sup> *Eby v. Thompson*, 2005 Del. Super. LEXIS 63, at \*7.

<sup>16</sup> *Id.* at \*7-8.

<sup>17</sup> *Id.* at \*8.

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operation was performed, this Court must conclude that any award for punitive damages would be unsubstantiated by the evidence. While there is an adequate evidentiary basis to dispute the medical judgment exercised by Dr. Whitney, such evidence is insufficient to substantiate a finding of deliberate indifference and an award for punitive damages.

Based upon the aforementioned reasons, Defendant's motion for partial summary judgment with respect to punitive damages is hereby *granted*.<sup>18</sup>

IT IS SO ORDERED.

/s/ William L. Witham, Jr.  
Resident Judge

WLW/dmh

oc: Prothonotary

xc: Order Distribution

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<sup>18</sup> Because the motion for partial summary judgment is hereby granted on substantive grounds, this Court need not decide the procedural argument for summary judgment raised by Defendant. This Court will, however, note that the amended complaint appears to be procedurally deficient. Plaintiff was granted leave to amend but never filed an amended complaint. Even if this Court accepts Plaintiff's position that no further action was required when he was granted leave to amend on December 2, 2004, the party sought to be added to the complaint was nonexistent until March 24, 2005. Because this issue has been resolved of substantive grounds, this Court need not determine whether the amended complaint was procedurally defective.