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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

WILLIA PUGH, et al.,
Plaintiffs,

No. C 08-4159 PJH

v.

**ORDER GRANTING MOTION FOR
SUMMARY JUDGMENT AND SETTING
FURTHER CASE MANAGEMENT
CONFERENCE**

DOCTORS MEDICAL CENTER, et al.,
Defendants.

Before the court is the motion of defendant Doctors Medical Center (“DMC”) for summary judgment. Having read the parties’ papers and carefully considered their arguments and the relevant legal authority, the court hereby GRANTS the motion.

BACKGROUND

The background facts are as stated in the March 22, 2010 order granting in part and denying in part defendants’ motions for summary judgement. Briefly, plaintiff Tommie Pugh was seen at the emergency room at DMC by defendant Dr. Malcolm Johnson in the early morning hours of February 19, 2008. Mr. Pugh’s wife, plaintiff Willia Pugh, had driven him there after he began complaining of pain.

Once at DMC, Mr. Pugh requested methadone for his pain. When Dr. Johnson told him the emergency room had no methadone, Mr. Pugh refused to remain at the hospital, despite being given medical advice to do so. He insisted on returning home, where he had some methadone. Although his wife offered to go home and retrieve the methadone, Mr. Pugh would not agree. According to Dr. Johnson, Mr. Pugh became disruptive, but did sign a form indicating that he was leaving the hospital against medical advice.

1 After they returned home and Mr. Pugh took the methadone, Mrs. Pugh drove Mr.
2 Pugh back to DMC, because she believed Mr. Pugh was having a stroke. Mr. Pugh
3 testified in his deposition that after he drank the methadone, he “blacked out,” and that he
4 had no recollection of any events that occurred during the next few weeks – until “a month
5 or so later when I came to.”

6 In her deposition, Mrs. Pugh testified that upon arriving at DMC, she saw two
7 ambulance attendants sitting outside the emergency room entrance. She told them that
8 she had returned with Mr. Pugh, and the attendants went inside. She assumed they were
9 going for a wheelchair, and returned to the vehicle. However, the attendants did not return.
10 Instead, Dr. Johnson came outside with two individuals dressed in green.

11 Mrs. Pugh got out of the vehicle, and approached Dr. Johnson. She testified that Dr.
12 Johnson refused to allow Mr. Pugh to enter the hospital. She then returned to the vehicle
13 and asked Mr. Pugh (who had remained in the vehicle the entire time) whether he wanted
14 to go to Kaiser or to Alta Bates. He responded, “Alta Bates.”

15 The drive to Alta Bates lasted 20-30 minutes, and Mrs. Pugh testified that during that
16 time, Mr. Pugh “kind of went out” and “wasn’t saying or doing anything.” The two did not
17 converse during the drive from DMC to Alta Bates. Mrs. Pugh testified that during the
18 drive, when she looked over at Mr. Pugh, he appeared to be “completely out of it.”

19 In a declaration submitted in opposition to the present motion, Mrs. Pugh states that
20 during the drive, Mr. Pugh was “making moaning noises and some incoherent words,” and
21 that she “tried talking to him to keep him from becoming disoriented.” According to this
22 account, Mr. Pugh “stopped responding around the University Avenue overpass.” She
23 became concerned that perhaps he had died. However, she states, when they arrived at
24 Alta Bates at around 5:10 a.m., Mr. Pugh “regained consciousness as they moved him from
25 the van,” and said, “They’ll help me.”

26 Once at Alta Bates, Mr. Pugh could not recall the emergency room visit to DMC, but
27 did recall some use of recreational drugs earlier the previous evening. He also responded
28 to numerous questions by the emergency room physician concerning the onset of his

1 symptoms, their nature and extent, and some of the other events that had transpired
2 earlier. The treating physician did not make any notes indicating that Mr. Pugh seemed to
3 be in any apparent emotional distress. Mr. Pugh testified in his deposition that he now has
4 no recollection of any of the events that occurred during the second visit to DMC, or at Alta
5 Bates.

6 The medical records indicate that upon evaluation in the ER at Alta Bates, Mr. Pugh
7 was alert, awake, and oriented. He was grossly nontoxic appearing, other than some mild
8 slurred speech and difficulty moving the right side of his body. A CT scan of his head
9 showed a 2.4 cm left thalamic and basal ganglia hemorrhage with some mild edema. A
10 neurological evaluation concluded that no surgical intervention was required. However, Mr.
11 Pugh was admitted to the ICU for further treatment. Approximately three weeks later, on
12 March 14, 2008, he was transferred from Alta Bates to Shields Nursing Center for subacute
13 treatment.

14 Plaintiffs filed the present action on September 3, 2008, alleging three causes of
15 action: (1) a claim of negligence per se, asserted by Tommie Pugh against DMC, based on
16 a violation of the Emergency Medical Treatment and Active Labor Act, 42 U.S.C. §§
17 1395dd, et seq. ("EMTALA") against DMC; (2) a claim under the Unruh Civil Rights Act,
18 California Civil Code § 51 ("Unruh Act"), asserted by both Tommie and Willia Pugh against
19 DMC and Dr. Johnson; and (3) a claim of intentional infliction of emotional distress,
20 asserted by Willia Pugh against Dr. Johnson. Plaintiffs subsequently stipulated to a
21 dismissal of Willia Pugh's claim under the Unruh Act.

22 On December 11, 2008, at the initial case management conference, the court set a
23 non-expert discovery cut-off date of December 2, 2009; a January 4, 2010 deadline to
24 disclose experts; a dispositive motions hearing deadline of January 20, 2010; and a trial
25 date of May 10, 2010.

26 On December 17, 2008, plaintiffs filed a first amended complaint, asserting the same
27 three causes of action as in the original complaint. On December 8, 2009, six days after
28 the close of non-expert discovery, plaintiffs' attorney filed a motion for leave to withdraw as

1 counsel, set for hearing on January 13, 2010. On December 16, 2009, both defendants
2 filed motions for summary judgment. On January 7, 2010, the court granted the parties'
3 request to continue the hearing on the motions for summary judgment and extending the
4 time to file the opposition. On January 13, 2010, the court granted plaintiffs' counsel's
5 motion for leave to withdraw, and approved the substitution of new counsel.

6 On January 21, 2010, the court conducted a further case management conference,
7 at which time plaintiffs' new counsel requested a continuance of the discovery cutoff dates,
8 expert disclosure dates, and hearing date on pending motions for summary judgment. In
9 an order filed January 25, 2010, the court denied the request to reopen discovery and the
10 pleadings, on the ground that the deadlines had already passed and plaintiffs had not
11 established good cause for the request. However, the court did grant plaintiffs an
12 additional 30 days to oppose the motions for summary judgment. The court also continued
13 the pretrial conference date.

14 In the March 22, 2010 summary judgment order, the court dismissed the Unruh Act
15 claim, but denied Dr. Johnson's motion as to the intentional infliction of emotional distress
16 claim. As for the negligence per se claim against DMC, the court granted the motion
17 insofar as Mr. Pugh was seeking damages based on physical injuries, and denied it insofar
18 as he was seeking damages for emotional distress. Not only did DMC's medical experts
19 establish that the failure to admit Mr. Pugh to DMC's ER when he returned to the hospital
20 did not cause or contribute to Mr. Pugh's eventual neurologic injuries, but plaintiff, having
21 failed to designate any medical expert, presented no evidence to the contrary. In the order
22 the court also noted that the pleading of the EMTALA claim as a claim of negligence per se
23 was problematic, as an EMTALA violation does not give rise to a negligence claim, and Mr.
24 Pugh had alleged no other viable underlying claim of negligence.

25 Also on March 22, 2010, because of a conflict in the court's schedule, the trial date
26 was advanced, to May 3, 2010. With their pretrial papers, plaintiffs filed a motion for leave
27 to amend the complaint, to be heard at the pretrial conference. At the pretrial conference,
28 the court denied the motion for leave to amend because it was untimely and granting it

1 would prejudice defendants who would have no opportunity to move for summary judgment
2 in view of the imminent trial date. Plaintiffs were ordered however to file a response to
3 DMC's trial brief to assist the court in determining how the negligence per se claim should
4 be presented to the jury.

5 After reviewing the supplemental trial brief and the proposed jury instructions
6 submitted by the parties, the court ordered additional supplemental briefing regarding a
7 number of issues, including the status of the negligence per se/EMTALA claim. Because
8 the jury instructions for that claim as pleaded were nonsensical, the court vacated the trial
9 date and decided to permit plaintiffs to amend the complaint to remove the negligence per
10 se claim and to plead a straight EMTALA claim. In order to alleviate the prejudice to
11 defendants, the court set a briefing schedule for a further motion for summary judgment to
12 be filed by DMC.

13 In the second amended complaint ("SAC"), plaintiffs allege two causes of action – a
14 claim for violation of EMTALA, asserted by Tommie Pugh against DMC; and a claim of
15 intentional infliction of emotional distress, asserted by Willia Pugh, against Dr. Johnson.
16 Tommie Pugh has conceded that he has no basis for alleging that he suffered any physical
17 injuries as a result of the EMTALA violation. He therefore seeks only emotional distress
18 damages.

19 DMC now seeks summary judgment on the EMTALA claim.

20 **DISCUSSION**

21 A. Legal Standard

22 Summary judgment is appropriate when there is no genuine issue as to material
23 facts and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56.
24 Material facts are those that might affect the outcome of the case. Anderson v. Liberty
25 Lobby, Inc., 477 U.S. 242, 248 (1986). A dispute as to a material fact is "genuine" if there
26 is sufficient evidence for a reasonable jury to return a verdict for the nonmoving party. Id.

27 A party seeking summary judgment bears the initial burden of informing the court of
28 the basis for its motion, and of identifying those portions of the pleadings and discovery

1 responses that demonstrate the absence of a genuine issue of material fact. Celotex Corp.
2 v. Catrett, 477 U.S. 317, 323 (1986). Where the moving party will have the burden of proof
3 at trial, it must affirmatively demonstrate that no reasonable trier of fact could find other
4 than for the moving party. Soremekun v. Thrifty Payless, Inc., 509 F.3d 978, 994 (9th Cir.
5 2007).

6 On an issue where the nonmoving party will bear the burden of proof at trial, the
7 moving party can prevail merely by pointing out to the district court that there is an absence
8 of evidence to support the nonmoving party's case. Celotex, 477 U.S. at 324-25. If the
9 moving party meets its initial burden, the opposing party must then set forth specific facts
10 showing that there is some genuine issue for trial in order to defeat the motion. See Fed.
11 R. Civ. P. 56(e); Anderson, 477 U.S. at 250.

12 B. DMC's Motion

13 DMC concedes that even though Tommie Pugh asserts only emotional distress
14 damages under the EMTALA claim, he will be entitled to recover if there is sufficient
15 evidence of severe emotional distress. In the present motion, DMC argues that summary
16 judgment should be granted because Mr. Pugh lacks sufficient evidence of severe
17 emotional distress suffered as a result of DMC's alleged violation of EMTALA.

18 EMTALA imposes two duties on hospital emergency rooms. First, the hospital must
19 conduct an "appropriate medical screening within the capability of the hospital's emergency
20 department." 42 U.S.C. § 1395dd(a). Second, if the hospital detects an emergency
21 condition, it must stabilize the patient before transferring or discharging him. See 42 U.S.C.
22 § 1395dd(b), (c); Jackson v. East Bay Hosp., 246 F.3d 1248, 1254-55 (9th Cir. 2001).

23 Any person who suffers personal harm as a result of a hospital's violation of its
24 duties under EMTALA is authorized to file a civil claim. 42 U.S.C. § 1395dd(d)(2)(A).
25 However, the claim may be asserted only against the hospital; EMTALA does not provide a
26 private cause of action against individual physicians. See Eberhardt v. City of Los Angeles,
27 62 F.3d 1253, 1256-57 (9th Cir. 1995).

28 Under EMTALA, a plaintiff can recover "those damages available for personal injury

1 under the law of the state in which the hospital is located.” 42 U.S.C. § 1395dd(d)(2)(A). In
2 California, where a plaintiff seeks damages for violation of a statutory duty, the general rule
3 of tort damages – that all detriment proximately caused by a breach of a duty is
4 compensable – applies. Pintor v. Ong, 211 Cal. App. 3d 837, 841-42 (1989). This includes
5 emotional distress damages. Young v. Bank of America N.T. & S.A., 141 Cal. App. 3d 108,
6 126 (1983).

7 In order to recover damages for emotional distress where there is no physical injury,
8 the injury suffered must be “severe” – that is, substantial or enduring, as distinguished from
9 trivial or transitory. Pintor, 211 Cal. App. 3d at 846; Young, 141 Cal. App. 3d at 114; see
10 also Lee v. Bank of America, 218 Cal. App. 3d 914, 920-21 (1990) (while damages for
11 emotional distress unaccompanied by physical injury may be awarded in a tort action, the
12 injury suffered must be severe); Molien v. Kaiser Foundation Hospitals, 27 Cal. 3d 916, 927
13 (1980) (intentional torts will support an award of damages for emotional distress alone in
14 cases involving “extreme and outrageous intentional invasions of one's mental and
15 emotional tranquility”).

16 Courts in California have described “severe” emotional distress as “emotional
17 distress of such substantial quality or enduring quality that no reasonable [person] in
18 civilized society should be expected to endure it.” Girard v. Bell, 125 Cal. App. 3d 772,
19 787-88 (1981) (discussing meaning of “severe” emotional distress in context of claim of
20 intentional infliction of emotional distress); Fletcher v. Western Nat’l Life Ins. Co., 10 Cal.
21 App. 3d 376, 396-97 (1970) (same).

22 DMC argues that plaintiffs lack sufficient evidence to raise a triable issue with regard
23 to whether Tommie Pugh suffered severe emotional distress as a result of DMC’s alleged
24 violation of EMTALA. First, DMC notes that Mr. Pugh did not claim in his discovery
25 responses that he suffered severe emotional distress. For example, in his responses to
26 interrogatories, when asked to state all facts supporting the EMTALA claim and to describe
27 all injuries or damages suffered as a result of any wrongdoing by DMC, Mr. Pugh never
28 asserted that he suffered any emotional distress related to the second encounter with

1 DMC. Instead, the responses focus on Mrs. Pugh’s interaction with Dr. Johnson and the
2 impact of that interaction upon her (not on Mr. Pugh).

3 DMC asserts further that the evidence shows that Mr. Pugh has no recollection
4 whatever of the events that occurred when he and Mrs. Pugh returned to DMC after going
5 home to retrieve the methadone. Thus, DMC argues, it is evident that Mr. Pugh cannot
6 provide any testimony to corroborate a claim that he suffered emotional distress, let alone
7 severe emotional distress. DMC contends that it would therefore be impossible to
8 determine – even assuming that Mr. Pugh did suffer emotional distress – whether that
9 emotional distress was the result of DMC’s alleged violation of EMTALA (refusal to treat
10 him at the emergency room), or whether it was instead related to his physical condition.

11 In addition, DMC argues, it is impossible to determine whether Mr. Pugh even heard
12 or appreciated what transpired between Mrs. Pugh and Dr. Johnson on the second
13 encounter at DMC, because he was in the Pughs’ vehicle with the door closed, and is
14 unable to recall anything of what was going on (thus cannot testify as to whether he heard
15 the conversation or not). Thus, DMC contends, it would be improper to infer that Mr. Pugh
16 suffered any emotional distress as a result of being turned away from DMC as alleged, and
17 even if the court allowed such an inference, it would be impossible for plaintiffs to establish
18 that such emotional distress was “severe,” given the totality of the evidence available.

19 Because Mr. Pugh remained in the van throughout the second encounter, Mrs. Pugh
20 is the only potential witness (other than Mr. Pugh himself) as to his possible emotional
21 distress. DMC argues, however, that Mrs. Pugh’s deposition testimony demonstrates that
22 she will be unable to provide any evidence that her husband was suffering from emotional
23 distress, let alone severe emotional distress, as a result of the alleged EMTALA violation.

24 DMC notes that Mrs. Pugh testified that Mr. Pugh remained in the passenger seat of
25 their vehicle throughout the entire second encounter at DMC, and that following her
26 encounter with Dr. Johnson, she returned to the vehicle and simply asked Mr. Pugh
27 whether he wanted to go to Kaiser or Alta Bates. She did not testify to any additional
28 conversation except as it related to which hospital Mr. Pugh would prefer. She also

1 testified that he was “not saying or doing anything” on the drive to Alta Bates, and that he
2 “looked completely out of it” during the drive.

3 In addition, DMC contends, the Alta Bates records provide no evidence that Mr.
4 Pugh was suffering from emotional distress following the Pughs’ second visit to DMC.
5 Specifically, DMC notes that the emergency admission note includes no indication
6 whatsoever that Mr. Pugh was suffering from any form of emotional distress relating to the
7 encounter at DMC – rather, the admitting physician simply noted that Mr. Pugh had some
8 right-sided weakness and slurred speech.

9 In opposition, plaintiffs argue that there is relevant evidence from which a fact-finder
10 might conclude that Tommie Pugh suffered from emotional distress. Plaintiffs accept
11 DMC’s recitation of the facts and supporting evidence, but assert that the evidence relating
12 to Mrs. Pugh’s testimony is incomplete because it relies solely on her deposition testimony.
13 Plaintiffs note that Mrs. Pugh was never asked in her deposition for her recollection of the
14 full conversation between herself and Mr. Pugh following her encounter with Dr. Johnson.

15 Plaintiffs assert that Mrs. Pugh’s new declaration supports a finding that Mr. Pugh
16 was conscious and coherent at the time that he was denied treatment at DMC, and also
17 when they reached Alta Bates. Plaintiffs argue that under California law, the fact that Mr.
18 Pugh was conscious and aware of events concerning the denial of admission to DMC’s
19 emergency room may be sufficient to create an inference that he suffered from severe
20 emotional distress. In support, plaintiffs rely on Capelouto v. Kaiser Found. Hosp., 7 Cal.
21 3d 889 (1972), and on Duarte v. Zachariah, 23 Cal. App. 4th 1306A (1994).¹

22 Based on these two cases, plaintiffs argue that under certain circumstances
23 emotional distress damages may be inferred merely from the nature of the events and the
24 harm that they may have caused to one either physically or psychically. Plaintiffs assert
25 that there are “[s]ome events and circumstances from our common life experiences we
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27 ¹ The case citation provided by plaintiffs – Duarte v. Zachariah, 23 Cal. App. 4th
28 1306A (1994) – is not available on WestLaw, and no case with this citation appears in the
bound volume of the California Appellate Reports. The only citation for this case that the court
was able to locate is Duarte v. Zachariah, 22 Cal. App. 4th 1652 (1994).

1 know will likely cause extreme emotional distress and pain and suffering,” and that where
2 an event has taken place which “everyone would agree would cause severe emotional
3 distress,” and there is evidence that the person was conscious and aware the incident
4 occurred, it can be presumed they suffered severe emotional distress.

5 Here, plaintiffs contend, it is undisputed that Mr. Pugh was having a stroke at the
6 time Mrs. Pugh was attempting to have him admitted for the second time at DMC. Plaintiffs
7 assert, however, that the fact that Mr. Pugh (as a result of his stroke) cannot recall these
8 events now, does not mean that he did not suffer emotional distress in the minutes
9 following the denial of his admission. For this reason, plaintiffs argue, the existence of
10 triable issues precludes summary judgment.

11 The court finds that the motion must be GRANTED. Plaintiffs have provided no
12 evidence that Mr. Pugh suffered severe emotional distress from the denial of treatment.
13 The evidence shows that Mr. Pugh was in the Pughs’ vehicle when his wife was arguing
14 with Dr. Johnson during the second visit to DMC, and that he did not speak with Dr.
15 Johnson on that occasion. Mrs. Pugh’s declaration may support Mrs. Pugh’s claim that she
16 suffered emotional distress as a result of the encounter with Dr. Johnson, but it does not
17 provide any evidence from which one could infer that Mr. Pugh suffered severe emotional
18 distress as a result of DMC’s denial of treatment.

19 Based on Mrs. Pugh’s description of the discussion of whether to go to Kaiser or to
20 Alta Bates, it seems clear that if Mr. Pugh had been experiencing emotional distress, he
21 would have been able to articulate that in some observable way. However, as DMC notes,
22 there is nothing in the history recounted by Mrs. Pugh that suggests that Mr. Pugh
23 displayed any sign of emotional distress – whether by conduct or statement.

24 Thus, the only question is whether the evidence that Mr. Pugh was sufficiently
25 conscious to “discuss” with Mrs. Pugh whether he wanted to go to Kaiser or Alta Bates, and
26 that he was sufficiently conscious to discuss his symptoms with the admitting physician at
27 Alta Bates, is enough to allow the case to go to the jury to decide whether to “infer” that Mr.
28 Pugh suffered from severe emotional distress as a result of the denial of service.

1 The court finds no support for plaintiffs' position in either Capelouto or Duarte,
2 neither of which provide any authority for the proposition that severe emotional distress can
3 be inferred from an EMTALA violation without any direct evidence that the plaintiff actually
4 suffered emotional distress.

5 Capelouto was a medical malpractice case based on an actual physical injury to the
6 plaintiff, and the minor plaintiff was not seeking stand-alone emotional distress damages,
7 but rather damages for pain and suffering that arose from her proven physical injury. The
8 Capelouto court's statement that a jury may infer physical pain and suffering from physical
9 injury does not support plaintiff's attempt in the present case to argue that the jury can infer
10 severe emotional distress from denial of service at a hospital where there is no evidence or
11 proof that the denial of service caused any physical injury.

12 Similarly, Duarte – also a medical malpractice case – does not establish that a
13 plaintiff can claim for severe emotional distress damages without physical injury. Moreover,
14 while it may be reasonable (as the Duarte court ruled) to infer that a person who has
15 experienced a recurrence of cancer that cannot be treated because of bone marrow injury
16 would suffer emotional distress as a result of that injury, the Duarte court nowhere stated in
17 the opinion that severe emotional distress can be inferred in the complete absence of any
18 physical injury.

19 A plaintiff in an EMTALA action can recover only for personal harm that he in fact did
20 suffer. See 42 U.S.C. § 1395dd(d)(2)(A). Here, the only harm or injury claimed by Tommie
21 Pugh is that he suffered severe emotional distress. Just as in Capelouto where the plaintiff
22 needed to prove that she contracted a disease, and just as in Duarte, where the plaintiff
23 needed to prove that she suffered injury to her bone marrow, Mr. Pugh cannot prevail
24 unless he proves by direct evidence that he suffered severe emotional distress because he
25 was denied service. The existence of the injury cannot be inferred from the fact that he
26 was denied service – even if he was aware of the denial of service at the time.

27 **CONCLUSION**

28 In accordance with the foregoing, DMC's motion for summary judgment is

1 GRANTED.

2 As Mrs. Pugh's claim for intentional infliction of emotional distress against Dr.
3 Johnson remains for trial, the remaining parties shall meet and confer and then shall
4 contact the courtroom deputy for the undersigned to schedule a further case management
5 and trial setting conference to occur at the courthouse or telephonically.

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7 **IT IS SO ORDERED.**

8 Dated: July 16, 2010



PHYLLIS J. HAMILTON
United States District Judge

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