IN THE SUPERIOR COURT OF THE STATE OF DELAWARE IN AND FOR SUSSEX COUNTY

ANGELINE M. SOLWAY,	
Plaintiff,)
v.)
KENT DIAGNOSTIC RADIOLOGY)
ASSOCIATES, P.A., MICHAEL POLISE,)
D.O., MARTIN G. BEGLEY, M.D.,) C.A. No. S11C-01-022 RFS
THOMAS VAUGHAN, M.D.,)
RAPHAEL CACCESE, JR., M.D.,)
BAYHEALTH MEDICAL CENTER, INC.,)
d/b/a KENT GENERAL HOSPITAL,)
CARLOS A. VILLALBA, M.D. and)
INPATIENT SERVICES OF)
DELAWARE, P.A.)
)
Defendant)

MEMORANDUM OPINION

Date Submitted: November 13, 2013 Date Decided: February 18, 2014

Before the Court is the Motion for Partial Summary Judgment of Defendants Kent Diagnostic Radiology Associates, P.A. ("KDRA"), Thomas Vaughan, M.D. ("Dr. Vaughan"), and Martin Begley, M.D. ("Dr. Begley") (collectively "the Radiology Defendants") on the claims of Plaintiff Angeline M. Solway ("Solway"). This Motion is **DENIED**.

Facts

This is a medical malpractice case in which Solway alleges that she received negligent care rising to the level of punitive conduct from a host of physicians at Bayhealth Medical Center's ("Bayhealth") Kent General Hospital ("Kent General") in Kent County, Delaware from Monday, January 26, 2009 to Monday, February 2, 2009. Despite subsequent care she received at Christiana Hospital's ("Christiana") Christiana Care Health Services from February 2, 2009 to Tuesday, February 17, 2009, Solway was rendered a functioning paraplegic.

Dr. Begley

On Monday, January 26th, Solway was involved in an automobile accident and transported to Kent General's Emergency Department. She complained of head, neck, and back pain, and claimed to be tender in her cervical, thoracic, lumbar, and paraspinal areas. She also had blood around her left eye area and no memory of the accident. After a series of examinations, including X-rays of her wrist, Solway was ultimately released from Kent General at 10:35 p.m.

On that date, a computed tomography ("CT") scan of Solway's cervical spine was performed in order to determine whether she had suffered any spinal injuries, including fractures. Dr. Begley, a Delaware-licensed physician and board-certified radiologist with KDRA, opened the scan in order to interpret it and issue a report. In

his report, released twenty-four minutes after opening the scan, he stated that "[n]o acute injury [was] present." By 9:48 p.m., the time Dr. Begley released the report, he had been working at Kent General for over thirteen hours, but had taken lunch and rest breaks.

Dr. Caccese²

On Friday, January 30, 2009, Raphael Caccese, Jr., M.D. ("Dr. Caccese"), a Delaware-licensed physician and board-certified radiologist with KDRA, interpreted a CT scan of Solway's chest. On that date, Dr. Caccese opened the scan at 1:36 p.m., marked the study as dictated at 1:39 p.m., and released a report at 1:42 p.m. Dr. Caccese did not note any acute injuries in this report. While the scan was open, Dr.

¹ At his deposition on September 11, 2012, Dr. Begley was asked to go through each image of the January 26th scan. In her Amended Complaint, Solway points to several statements Dr. Begley made regarding these images. For example, when asked if fractures appearing on some of the images reflected acute injuries, he responded affirmatively. Dep. of Martin G. Begley, M.D. at 28: 11–14. When asked what would be the significance of a finding of an epidural hematoma around the cervical thoracic junction, Dr. Begley responded that it would indicate spinal cord compression. *Id.* at 20–24; 29: 1. When asked whether cord compression could lead to paralysis, he responded affirmatively. *Id.* at 29: 12–14. When asked whether the fractures shown on the images represented unstable fractures, Dr. Begley responded affirmatively. *Id.* at 15–18. When asked what was the significance of unstable fractures, he responded that there could be a higher likelihood of neural injury. *Id.* at 19–22. When asked what Solway's memory loss on the date of her accident meant, Dr. Begley responded that one would suspect a head injury. *Id.* at 42: 3–7. When asked if he agreed that a radiologist reviewing an image study was responsible to look at every image and everything within the field of view of each image, Dr. Begley responded affirmatively. *Id.* at 7: 17–21.

² On February 17, 2014, on the Radiology Defendants' Motion to Continue Trial, the Court ruled that if Solway dismissed her claims against Dr. Caccese, the pending trial will proceed as scheduled.

Caccese a	ilso	opened	and	reviewed	a	chest	X-ray	which	had	been	performed	or
Solway.												

Dr. Villalba

On Thursday, January 29, 2009, Solway was transported back to Kent General, complaining of abdominal discomfort, urinary retention, and back pain. After being admitted, she was seen by Carlos A. Villalba, M.D. ("Dr. Villalba"), a Delaware-licensed physician who was board-certified in internal medicine and served as a hospitalist for Inpatient Services of Delaware, P.A. Dr. Villalba examined Solway for thirty minutes and, having consulted an orthopedic surgeon, found nothing concerning. From January 29th to February 2nd, 2009, Dr. Villalba worked twelve-hour shifts, from 7:00 a.m. to 7:00 p.m.

On January 30th, Dr. Villalba again examined Solway at 11:43 a.m. He found that she was having difficulty moving her left leg, and therefore ordered a magnetic resonance imaging ("MRI") test of Solway's lumbar and thoracic spine in order to rule out spinal cord compression.³ Dr. Villalba ordered the MRI on a routine basis, rather than ordering the test "stat," because he believed that he would receive the

³ At his deposition on July 31, 2012, Dr. Villalba stated that he actually ordered two MRIs. This is an insignificant detail, however, because he then states that both tests were within the same order. Dep. of Carlos A. Villalba, M.D. at 71: 16. The parties repeatedly refer to the January 30th MRI as singular; therefore, the Court will do the same.

of his shift that day, Dr. Villalba had not yet received the results. He was not concerned, however, because, according to him, if the results were problematic, he would have been notified. He also did not call Kent General's radiology department because, according to him, "no news is good news." Dr. Villalba left Kent General at the end of his shift, and informed the relieving physician to look for the results.

On Saturday, January 31, 2009, Dr. Villalba again examined Solway, who was complaining of back pain and neuropathy. Solway's legs, however, appeared normal. Dr. Villalba knew the MRI which he ordered on the day prior had not yet been performed. The test was performed on the morning of January 31st, after Dr. Villalba's examination of Solway. Again, Dr. Villalba did not call the radiology department, believing that he would be notified immediately if something was

⁴ Dr. Villalba stated his reasons for not ordering the MRI stat:

I had my orthopedic surgeon on board. I had two scans that were negative of the neck, one with the head that was negative so at that time I didn't feel that it needed to be a stat order. I mean, I've never had to order a stat test before because it was always done. [R]egardless of the urgency of the test, you write an order and it's done.

Id. at 64: 13–19, 21–22.

⁵ *Id.* at 65: 20. Dr. Villalba explained "I never had to [call the radiology department] because they always have a quick turnaround on all reports and tests. So I never had to, unless there's something abnormal and then you get a call immediately." *Id.* at 66: 2–5.

wrong.⁶ Dr. Villalba again left Kent General at the end of his shift, without knowing the results of the test, and again informed the relieving physician of the pending results.

On Sunday, February 1, 2009, Dr. Villalba again examined Solway, who on this day was having trouble moving her left leg. In fact, on a scale of zero to five, with five representing the ability to move her leg normally, Dr. Villalba gave Solway's left leg a one. Again, Dr. Villalba did not have the results of the MRI, and again, did not make any inquiry regarding them.⁷ He checked on Solway once more

Id. at 76: 2–9.

I was concerned. But, again, . . . like I said, I had my ortho on board and I knew if something was found I would have received a call immediately so I was reassured, especially with an orthopedic note that they were there and they examined the patient and I was confident that okay, well, I'm sure it's in the process of being read.

Id. at 91: 8–15.

⁶ Dr. Villalba again explained his reasons for not following through with the MRI:

[[]A]gain, I also was relying on my orthopedic surgeon because again that was the reason I called him for, for the back pain. So I had the orthopedic surgeon and the radiologist and also I was not hearing anything from any of them, so I was pretty confident or at least waiting for the results if nothing grossly abnormal was found.

⁷ When asked if he was concerned on February 1st that the results of the MRI had not yet been read by a radiologist, Dr. Villalba explained his thought process:

When asked why he did not check on the status of the MRI, Dr. Villalba stated that he "had three negative studies. I had an orthopedic, they were consulted to begin with for the back pain. So I was pretty sure it was just a matter of time that the report would be available." *Id.* at 24; 92: 1–4.

after examining her that day. At the end of his shift, Dr. Villalba again left Kent General without the MRI results, informing the physician relieving him to be on the lookout for them.

On Monday, February 2, 2009, Dr. Villalba returned to Kent General. According to him, he received a telephone call at 10:50 a.m. from the radiology department reporting an abnormal finding on Solway's thoracolumbar MRI, and requesting an additional MRI of her lower cervical spine and upper thoracic. Prior to this call, Dr. Villalba had not reviewed the previous MRI's results, which were released at 8:45 a.m. and 9:08 a.m. that morning. After receiving this call, Dr. Villalba examined Solway, this time giving her left leg a zero out of five. He then ordered the MRI at 11:00 a.m., which was finished at 12:40 p.m. At 1:50 p.m., Dr. Villalba received another call from radiology reporting epidural hematoma, and that appropriate measures needed to be taken. Therefore, he prepared Solway to be transferred immediately to Christiana for a neurosurgical evaluation.

Dr. Vaughan

On Friday, January 30th, Dr. Vaughan, a Delaware-licensed physician, board-certified radiologist with KDRA, and Medical Director for the Radiology Department,

⁸ Solway states that these injuries are the same injuries demonstrated on the CT scan performed by Dr. Begley on January 26th.

interpreted a CT scan of Solway's neck. Dr. Vaughan opened the scan at 6:16 p.m. He then reviewed the scan a second time and, while comparing it to Dr. Begley's January 26th CT of Solway's cervical spine, released a report of his findings at 7:24 p.m. on Sunday, February 1st. On neither occasion did Dr. Vaughan note any acute injuries.⁹

On January 30th, at 3:22 p.m. and 7:17 p.m., Dr. Vaughan reviewed Dr. Begley's January 26th CT scan of Solway's cervical spine. On neither review did Dr. Vaughan note any acute injuries. Also on this date, at 3:21 p.m., 6:16 p.m., and 7:17 p.m., Dr. Vaughan reviewed the CT scan of Solway's chest, which Dr. Caccese had interpreted on January 30th. On each review, he did not note any injuries. At 6:16 p.m., while reviewing the various studies performed on Solway, Dr. Vaughan also saw a note regarding Dr. Villalba's MRI, which Dr. Villalba ordered earlier that day on a routine basis in order to rule out spinal compression.

⁹ At his deposition on July 30, 2012, Dr. Vaughan stated that it was his practice when reviewing a study to examine each of the study's images, including everything within the field of view of each image. After being asked to review the CT scan of the neck, Dr. Vaughan was asked what he would have done on January 30th if he had spotted the fractures demonstrated in the images. He stated "I would have immediately called the referring physician and notified him of the findings." Dep. of Thomas E. Vaughan, M.D. at 66: 3–5. When asked why, he stated "[b]ecause they're critical findings, cervical spine fractures, possibly unstable, probably unstable cervical spine fractures." *Id.* at 7–9. When asked if the CT scan of the neck demonstrated unstable spine fractures, Dr. Vaughan responded affirmatively.

Dr. Polise¹⁰

On Saturday, January 31st, the MRIs of the lumbar and thoracic spine ordered by Dr. Villalba the day prior were performed. On Monday, February 2nd, Michael Polise, D.O. ("Dr. Polise"), a Delaware-licensed physician and board-certified radiologist with KDRA, read the MRI results. Dr. Polise compared the results of the MRI of the thoracic spine with the CT scan of the cervical spine ordered by Dr. Begley on January 26th. He also reviewed the neck CT scan which Dr. Vaughan reviewed and the chest CT scan which Dr. Cassese reviewed, both January 30th. In his report, dictated on February 2nd at 9:05 a.m., Dr. Polise noted "[m]arrow edema in the body of T2 may correspond to subtle fracture seen on a recent CT. Further evaluation with lower cervical and upper thoracic MRI scanning is recommended."

The record contains a factual discrepancy as to the time frame on February 2nd surrounding when Dr. Polise notified Dr. Villalba regarding the MRI's abnormal results. Dr. Villalba claims that Dr. Polise did not contact him until around 11:00 a.m.¹² Dr. Polise claims that he contacted Dr. Villalba around 9:00 a.m.¹³

¹⁰ On August 8, 2013, the parties agreed that any and all claims of Solway against Dr. Polise would be released with prejudice. The parties also agreed that any and all cross-claims against Dr. Polise would be dismissed with prejudice.

¹¹ Ex. L22 to Pl.'s Answering Br.

¹² At his September 24, 2012 deposition, Dr. Villalba described his contact with Dr. Polise:

Q: So Dr. Polise did not call you until about 11:00 a.m.?

A: Correct. My note, on my note – where [are] my notes?

I saw [Solway] at around 10:50 in the morning and ordered the MRI at 11:00 in the morning. And I ordered the MRI after speaking with Dr. Polise at that time.

Q: So Dr. Polise did not speak with you until 11:00 in the morning about ordering the MRI. Is that correct?

A: I don't remember the time, but I do remember seeing . . . Solway and speaking to Dr. Polise, and as soon as I spoke with Dr. Polise I got the additional MRI 10 minutes later.

Dep. Carlos A. Villalba, M.D. at 155: 3–18.

¹³ At his November 5, 2012 deposition, Dr. Polise described his contact with Dr. Villalba:

Q: [Dr. Villalba] indicates that you did not call him until 11:00 a.m. Did you see that testimony?

A: Yes.

Q: Did you call him before 9:00 a.m., 9:05 a.m. or did you wait till 11:00 a.m. to call him and speak to him?

A: I [am] pretty sure I called him at the time I was looking at the exam or immediately thereafter. I would not have waited until 11 o'clock.

Q: Now, do you understand that Dr. Villalba did not order the MRI that you were requesting, the cervical MRI, until 10:50 – excuse me, after 10:50 in the morning, that it took him that long to go up and see the patient?

A: I didn't know that that was the case. It doesn't – to me it's not something I would have even thought of. I called the doctor and I tell them what they want and then they get what they need. Quite often it takes a long time for things to happen, longer than you think.

Dep. of Michael F. Polise, D.O. at 168: 13–23; 169: 20–24; 170: 2–8.

spine which Dr. Villalba ordered. In his report, dictated on that date at 1:48 p.m., Dr. Polise noted "[f]racture at T1 and T2 involving both the vertebral body and posterior elements. There is epidural hematoma resulting in compression of the thoracic cord and probable myelopathy."¹⁴

KDRA

KDRA is a Delaware corporation. Its contract with Kent General laid out its role at the hospital:

The responsibilities of . . . [KDRA] shall [include] . . . [p]rovid[ing] . . . a sufficient number of qualified physicians . . . to furnish the level of patient, consultative and teaching services necessary for the proper functioning of the [h]ospital and to provide required physician services in the [d]epartment. Coverage in the [h]ospital will be provided during the hours of 8:00 a.m. to 5:00 p.m. Monday through Friday, except holidays, and 9:00 a.m. to 12:00 Noon on Saturday. At all other times, coverage will be provided on an on-call basis consistent with the requirements of the [h]ospital's Medical Staff Rules and Regulations. ¹⁵

Dr. Vaughan, a KDRA shareholder, served as its president. KDRA has two categories of agents: shareholders and employees. Shareholders are salaried, but also receive equally-split profit distributions periodically. All shareholders receive the

¹⁴ Ex. L21 to Pl.'s Answering Br.

¹⁵ Ex. 28 to Defs.' Reply Br.

¹⁶ At his August 28, 2013 deposition, in which he was deposed as KDRA's corporate designee, Dr. Vaughan was asked "the fewer the radiologists the greater the distribution to each shareholder?" Dep. of Thomas Vaughan, M.D. at 61: 21–22. He answered affirmatively. Dr. Vaughan was then asked "the more radiologists you have the more people there are to divide the

same compensation. The majority of KDRA's income comes from billings for imaging studies that its radiologists perform, and subsidization from Kent General, which does not partake in the corporation's profit.

In January and February of 2009, KDRA assigned the reading of MRIs to its radiologists with a subspecialty in MRI interpretation. Those radiologists were Dr. Caccese, Dr. Polise,¹⁷ and Dr. Victoria Kong ("Dr. Kong").¹⁸ If one of those radiologists was on duty on a weekend, he or she would read an MRI if that MRI was within that radiologist's particular subspecialty, regardless of whether it was ordered on a stat or routine basis. On certain weekends, about half of the weekends in a month, none of those radiologists were scheduled to work.¹⁹ On those weekends, if an MRI ordered only on a routine basis was ordered, that MRI would not be read until

profits among, correct?" *Id.* at 62: 3–5. He answered affirmatively. When asked why KDRA did not provide information regarding its revenue to a consultant commissioned to evaluate KDRA in 2007, Dr. Vaughan responded that KDRA did not wish to share that information.

¹⁷ Dr. Vaughan made a "[r]ough guess" that it would take Dr. Polise a few minutes to ten minutes to review an MRI. *Id.* at 135: 21. Dr. Vaughan also guessed that the number of MRIs performed from January 31, 2009 to February 1, 2009 could have ranged from six to fifteen.

¹⁸ Dr. Vaughan stated that an additional radiologist with a subspecialty in reading MRIs left KDRA in December 2007. When asked whether the radiologist's physician was filled in 2008 and 2009, Dr. Vaughan responded affirmatively.

¹⁹ Dr. Vaughan, when asked whether an MRI reader would serve the entire weekend, or just one day on a weekend, responded that "it was usually one day. There might be an occasional time when they had them on both days, but usually it was one day, Saturday or Sunday." *Id.* at 110: 18–21.

Plaintiff claims that KDRA was capable of allowing its three MRI readers to review MRIs at home.

the following Monday. KDRA "rel[ied] on the ordering physicians to determine the nature of the urgency of the request." KDRA "developed the schedule to give the best coverage of the department [it] could to maintain a radiology staff. But [it was] aware when [it] made the schedule that all different things can happen in medicine"

On Saturday, January 31st, Dr. Begley served as KDRA's on-site radiologist, working approximately from 7:00 a.m. to 6:00 p.m. Dr. Begley then served as KDRA's on-call radiologist from approximately 6:00 p.m. to 10:00 p.m. On Sunday, February 1st, Dr. Vaughan served as KDRA's on-site radiologist, working approximately from 7:00 a.m. to 6:00 p.m. Dr. Vaughan then served as KDRA's on-call radiologist from approximately 6:00 p.m. to 10:00 p.m. After 10:00 p.m. on both nights, when there was no radiologist, a service called Nighthawk would read MRIs

²⁰ *Id.* at 94: 21–23. When asked whether it would have been a safer practice to have the radiologist who did not have the subspecialty of reading MRIs who was on duty on a weekend to check all MRIs ordered to examine why they were ordered, Dr. Vaughan responded affirmatively, but again stated that KDRA "rel[ied] on the ordering physician to determine the priority of them." *Id.* at 115:19–21.

²¹ Dep. of Thomas Vaughan, M.D. at 97: 11–15. When asked whether KDRA could have hired an additional radiologist with a subspecialty in MRIs, Dr. Vaughan responded affirmatively. According to him, this radiologist, as an employee, would have made around \$250,000 to \$300,000 plus benefits. When asked whether bringing someone new on in 2008 or 2009 would have reduced profit distributions to KDRA's shareholders, Dr. Vaughan responded affirmatively, but added that KDRA "offered two MRI[] readers position in July or August of 2008 and neither accepted." *Id.* at 113: 15–17. When asked if these positions would have helped to resolve the issue of lack of MRI readers on weekends, Dr. Vaughan stated that KDRA "has many things they are trying to improve and that would be one of the many." *Id.* at 114: 2–4.

that were ordered stat. Around this time, Dr. Begley and Dr. Vaughan were qualified to read MRIs, but neither did so as part of his usual practice.²²

In January and February of 2009, Kent General had only one MRI machine. During this time, the turnaround time from ordering an MRI to interpreting it, which takes longer than interpreting an X-ray, would vary.²³ The radiology department would attempt to perform routine MRIs on the day they were ordered. Sometimes, however, routine MRIs would take one, or occasionally two extra days to be performed.²⁴

When asked about Dr. Begley's and Dr. Vaughan's qualifications to read MRIs, Dr. Vaughan stated that they were "credentialed to read them through the department. But [they] had subspecialists who read them. So the subspecialist would read the great majority of them. If an emergency came in or someone requested, [Dr. Begley and Dr. Vaughan] could look at it preliminary, make a review it." *Id.* at 16–21. Further, he stated that "[t]o interpret MRI[s] is a complex thing Initially, once the group got fellowship trained people, [KDRA] decided to have them interpret the overwhelming majority of MRIs." *Id.* at 91: 3–7. Also, in 2009, Dr. Vaughan only read three MRIs for breast biopsies. In 2009, Dr. Begley read nineteen diagnostic MRIs compared to the MRI performed on Solway.

²³ When asked whether the best way to measure the efficiency of a hospital's radiology department would be to examine the time from when a physician orders an exam to when that physician receives the results, Dr. Vaughan responded that such was one way to measure efficiency; but could not state, however, that it was the best way because "too many variables" were involved. *Id.* at 107: 23.

²⁴ When asked about Dr. Villalba's expectation that a routine MRI would be interpreted and the results returned in less than twenty-four hours, Dr. Vaughan stated that he did not "know why [Dr. Villalba] had that expectation. [Dr. Villabla] may have been, it may have been his experience based on that, talking to other people." Dep. of Thomas Vaughan, M.D. at 100: 17–20. Regardless of what Dr. Villalba believed, Dr. Vaughan insisted that his description of the time frame for turning MRI results around was correct. When asked whether there was any effort made to inform Kent General's medical staff that the results of an MRI ordered on a Friday might not be returned until a Monday, Dr. Vaughan stated that "the hospital polices and things were available for . . . review. Most people probably don't look at them. But nothing in addition to

Hornberger Report

Multiple experts on both sides have offered multiple opinions in this matter. The Court, however, believes it necessary to summarize only the report of Solway's expert Keith D. Hornberger, B.S.R.T., M.B.A., D.H.A., FACHE ("Hornberger"), as he is the main expert in this extensive record to specifically opine on the issue of punitive conduct. Although not a medical doctor, Homberger holds a doctorate in health administration. Solway claims, despite his lack of a medical degress, that he has extensive experience in the functioning of hospitals, including radiology departments. Also, one of Solway's experts, Gary S. Kramer, M.D. ("Dr. Kramer"), who is the president of the radiology group at Memorial Medical Center in Johnstown, PA, was asked at his deposition whether he agreed with Hornberger's opinions as they related to KDRA, to which Dr. Kramer responded affirmatively.²⁵

that." *Id.* at 119: 1–4. When asked whether it was general knowledge among Kent General's medical staff that an MRI ordered on a Friday might not be interpreted until the following Monday, Dr. Vaughan replied affirmatively.

A 2007 study commissioned by Bayhealth and performed by Charles Pearson Associates ("the Pearson Report," mentioned *infra*), compared KDRA to eleven other regional private radiology groups. KDRA was found to employ more full-time employed radiologists than the mean, perform more diagnostic tests than the mean, bill less than the mean, and perform less diagnostic tests per radiologist than the mean.

²⁵ After giving this response, Dr. Kramer was then asked whether he agreed with a specific part of Hornberger's report regarding the failure, in relation to KDRA, of the technical staff to inform the radiologist responsible for interpreting MRI studies that an MRI ordered to rule out spinal cord compression was ready for interpretation constituted a breach of the standard of care, to which Dr. Kramer responded affirmatively. Based on his testimony, however, it appears that Dr. Kramer agrees with Hornberger's report in its entirety.

In his report, Hornberger stated that the radiology department's performance of MRI on January 30th breached the standard of care. He noted that the time frame from when Dr. Villalba ordered the study on January 30th to the time Dr. Polise interpreted the study on February 2nd was sixty-six hours and forty-six minutes. KDRA, Hornberger claimed, did not work within an adequate time frame, and this was "a serious breach of the standard of care and represents a deliberate indifference toward and a conscious disregard for patient care." According to Hornberger, "[t]he gold standard for examination and reporting of [d]iagnostic [i]maging [s]tudies is twenty-four hours." This lapse also violated a host of policies governing the Radiology Defendants, including the contract between KDRA and Kent General.

Hornberger also criticized Dr. Villalba's failure to follow up on the MRI once he made the order. Hornberger noted that an ordering physician, just like a radiologist, is responsible for ordered tests. Ultimately, he concluded that "[i]t seem[ed] that there existed a conscious disregard for appropriate care, including Dr. Villalba, on the part of all concerned. There was a call for a response and no one took action. There needed to be an effort and no one showed any effort."²⁸

²⁶ Hornberger Rep. at 4.

²⁷ *Id.* at 3 (citation omitted).

²⁸ *Id.* at 4.

Procedural Background

Solway sought leave to file Second Amended Complaint to add punitive claims against both the Radiology Defendants and Dr. Villalba, as well as a direct claim against KDRA. On February 26, 2013, the Court granted Solway's Motion.

Analysis

Parties' Contentions

The Radiology Defendants remind the Court that although Solway's claims for punitive damages against both them and Dr. Villalba arise from the same factual circumstances, separate consideration must be given to each individual defendant. The Radiology Defendants principally argue that punitive damages are not justified in this case because, based on the record, if Solway's allegations against them are believed, such allegations constitute negligence at most. They stress that errors in judgment, inattentiveness, or even gross negligence cannot justify a finding of punitive conduct.²⁹

According to the Radiology Defendants, the record cannot support that they acted maliciously toward Solway or with willful or wanton disregard toward her.

²⁹ The Radiology Defendants cite, *inter alia*, this Court's decisions in *Rae v. Murphy*, 2006 WL 1067277 (Del. Super. Apr. 19, 2006) and *Pattanayak v. Khan, DO*, 2005 WL 2660080 (Del. Super. Sept. 12, 2005) for support.

According to them, Solway attempts to argue that certain factual circumstances, such as working long hours and lack of additional staffing, constitute fair inferences of punitive conduct. The Radiology Defendants claim that these "inferences" are nothing more than unsupported, baseless conjecture, disproven by the record. In particular, Solway's accusation that the Radiology Defendants were motivated by financial concerns is rebutted by Dr. Vaughan's explanation that KDRA tried to hire additional radiologists during the relevant time period. Furthermore, no expert has opined that KDRA was understaffed; and Solway's pointing to the Pearson Report³⁰ establishes that KDRA was actually adequately staffed and performed *less* studies than those in the comparison group.³¹ Additionally, both Dr. Vaughan and Dr. Begley explained the care they took in examining Solway's tests.

The Radiology Defendants state that out of Solway's multiple experts, only Hornberger, who is not a medical doctor, attested that punitive conduct occurred. Further, Hornberger specifically identified only the actions of Dr. Villalba, and not Dr. Begley or Dr. Vaughan, as constituting punitive conduct. Additionally, although

³⁰ See supra note 23.

³¹ The Radiology Defendants compare this case to this Court's decision in *Sweede v*. *Cigna Healthplan of Delaware, Inc.*, 1989 WL 12608 (Del. Super. Feb. 2, 1989), in which the Court dismissed the plaintiff's charge that the defendant was motivated by financial considerations as too remote to be of any meaningful probative value, ultimately granting the defendant's motion for summary judgment on the issue of punitive damage.

Hornberger stated that KDRA's turnaround time on reading the MRI demonstrated punitive conduct, KDRA's experts, both of whom are medical doctors, unequivocally rebut Hornberger's opinion and defend KDRA's staffing and turnaround time on reading the MRI. The record is void, the Radiology Defendants claim, of any evidence to support Hornberger's assertions. Further, they assert that simply because an expert opines that the facts of a case support a finding of punitive conduct, the Court is not bound to the same conclusion.

The Radiology Defendants note that Dr. Villalba ordered the MRI on a routine basis, rather than as stat, and made no follow-up inquiry regarding the test which would have alerted the radiologists to any imminent danger. They stress that the record is replete with evidence, including testimony from Solway's own experts, that the onus of labeling a test stat rests on the ordering physician, rather than the radiologists.

The Radiology Defendants also state that Kent General had no rule that MRIs needed to be interpreted within twenty-four hours; and no expert in this case, including Hornberger, has opined that the standard of care *mandates* a twenty-four hour turnaround period. Further, KDRA's contract with Kent General specified the hours in which Kent General would be covered by KDRA, and the Bayhealth Policy on Radiologic Interpretation and Release stated that "[r]eports w[ould] usually be

available within 24 hours of the completed examination. Almost all reports w[ould] be available by 48 hours."³² Solway's MRI was performed on January 31st and interpreted on February 2nd, within forty-eight hours. Hornberger himself noted this compliance. Additionally, they note that no expert has criticized either KDRA's contract or Bayhealth's policy.

Also, the Radiology Defendants note that Hornberger incorrectly stated that Dr. Villalba ordered the MRI *for* spinal cord compression, as if such a reason should have alerted the radiologists to a potential problem. In actuality, Dr. Villalba ordered the MRI in order to *rule out* spinal cord compression. The difference, the Radiology Defendants argue, is significant because, as one of their experts explains, compression fractures are common in victims of motor vehicle accidents. Thus, under the appropriate standard of care, an MRI to rule out spinal cord compression would not have received any special attention. Thus, they claim that not only is Hornberger's opinion inaccurate, but it also does not justify the existence of any foreseeable injury.

Solway begins by stating that the record and the inferences therefrom clearly permit her to defeat summary judgment on the issue of punitive damages. She first asserts that in a medical malpractice case, proof of a health care provider being

³² Ex. 5 to Defs.' Reply Br. at 1.

motivated by financial considerations can establish the *mens rea* necessary to establish punitive conduct.³³ Solway claims that the facts suggest that KDRA was understaffed during the relevant time period, with the radiology group trying to perform a lot of work with little help. She also claims that KDRA's organizational structure during this time period demonstrates that the Radiology Defendants were motivated by financial considerations.

Solway also describes how this Court already has observed that, based on discoverable facts of this case, a jury could make a finding of punitive conduct. In granting Solway's Motion to file a Second Amended Complaint to add punitive claims, the Court noted that an inference may be made from discoverable facts that the Radiology Defendants knew or should have known that an issue might occur over a weekend which required an immediate MRI read, that the Radiology Defendants failed to inform Dr. Villalba or any other staff members at Kent General that the onus of labeling orders did not rest on the radiology department, and that, therefore, foreseeable harm might occur.

Solway claims that material fact questions exist in that she has two experts who state that the appropriate standard of care requires MRI reading within twenty-four hours of being ordered; and that these opinions are supported by Hornberger's

 $^{^{\}rm 33}$ Solway cites Strauss v. Biggs, 525 A.2d 992, 999–1000 (Del. 1987) for this proposition.

opinion and Dr. Villalba's testimony. Further, Solway argues that not only could the Radiology Defendants have staffed an MRI reader over the weekend, or sent weekend MRIs to KDRA's MRI readers via computer, but Dr. Begley and Dr. Vaughan, the radiologists who were on-call over the weekend of January 31st, although not subspecialized in MRI interpretation, could have interpreted Solway's MRI if it had been appropriately labeled. Solway describes a host of other possibilities that the Radiology Defendants could have put in place to make their practices safer. She also chastises them for being concerned only with the time from when an MRI was performed to when it was interpreted, ignoring the time gap from when an MRI was ordered to when it was performed.

Additionally, Solway responds to the Radiology Defendants' claim that none of her experts actually claim that the actions of Dr. Begley and Dr. Vaughan were demonstrative of punitive conduct by arguing that the focus should be on the reasonable inferences from the facts, rather than an expert's use of magic words. Dr. Begley had worked a fourteen-hour day on January 26th by the time he read the cervical spine CT scan of Solway, a patient whom he knew had just been in an automobile accident. Dr. Begley failed to find fractures and a fluid collection in this CT as well. Other experts, Solway claims, have described these problems as clearly visible. Solway claims that had KDRA shareholders, of which Dr. Begley was one,

provided an additional radiologist and increased coverage, the result might have been different. Likewise, Solway argues that the multiple errors committed by Dr. Vaughan in reading numerous tests also establish punitive conduct.

Standard of Review

Summary judgment will be granted only if the moving party, who bears the initial burden, can establish that no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law.³⁴ The Court examines all of the evidence, and the reasonable inferences therefrom, in the light most favorable to the non-moving party.³⁵ Using this lens, only if the moving party establishes that no factual questions indeed exist, the burden shifts to the non-moving party to establish the existence of such factual questions which must "go beyond the bare allegations of the complaint."³⁶

Discussion

Although the facts of this case are extremely technical and the record extremely voluminous, the law on this issue is rather clear. The Delaware Code states that "[i]n any action for medical negligence, punitive damages may be awarded only if it is

³⁴ See, e.g., Direct Capital Corp. v. Ultrafine Techs., Inc., 2012 WL 1409392, at *1 (Del. Super. Jan. 3, 2012) (citations omitted) (iterating the exacting standard of summary judgment).

³⁵ *Id*.

³⁶ *Id*.

found that the injury complained of was maliciously intended or was the result of wilful or wanton misconduct by the health care provider"³⁷ In *Jardel Co., Inc. v. Hughes*, the Delaware Supreme Court thoroughly explained the mechanics of punitive damages. Usually a jury question, the evidence in a particular case must invite the reasonable inference that the defendant's conduct rose to a requisite level in order to justify a punitive award.³⁸

"[P]unitive damages serve a dual purpose—to punish wrongdoers and deter others from similar conduct."³⁹ Thus, such damages may "be imposed only after a close examination of whether the defendant's conduct [was] 'outrageous,' because of 'evil motive' or 'reckless indifference to the rights of others."⁴⁰ A punitive award cannot rest on "[m]ere inadvertence, mistake or errors of judgment which constitute mere negligence It is not enough that a decision be wrong. It must result from a conscious indifference to the decision's foreseeable effect."⁴¹ Rather, "the defendant [must] foresee that his unacceptable conduct threatens particular harm to

³⁷ 18 Del. C. § 6855.

³⁸ 523 A.2d 518, 527 (Del. 1987).

³⁹ *Id.* at 529.

⁴⁰ *Id.* (citation omitted).

⁴¹ *Id.* (citations omitted).

the plaintiff"⁴² Even a finding of gross negligence does not satisfy this high standard.⁴³

If the plaintiff argues that the defendant's actions were reckless, thereby justifying a punitive award, two elements must be present: (1) the *actus reas*, and (2), "the actor's state of mind and the issue of foreseeability, or the perception the actor had or should have had of the risk of harm which his conduct would create." "Where the claim of recklessness is based on an error of judgment, a form of passive negligence, the plaintiff's burden is substantial. It must be shown that the precise harm which eventuated must have been reasonably apparent but consciously ignored in the formulation of the judgment." As the Delaware Supreme Court put it in its earlier decision in *Cloroben Chemical Corp. v. Comegys*, "[f]or [the] defendant's conduct to be found wilful or wanton[,] the conduct must reflect a 'conscious indifference' or 'I don't care' attitude."

Based on the record in the present case, the Court cannot conclude, despite the Radiology Defendants' argument to the contrary, that the facts do not justify a

⁴² *Id.* at 529–30.

⁴³ *Id.* at 530.

⁴⁴ *Jardel*, 523 A.2d at 530.

⁴⁵ *Id.* at 531.

⁴⁶ 464 A.2d 887, 891 (Del. 1983).

reasonable inference of punitive conduct. In determining whether punitive conduct occurred, often all that can be examined are the defendants' conduct and the surrounding circumstances. The Court finds that the facts of this case and the reasonable inferences therefrom may provide the requisite foundation for a finding of punitive conduct.

Regarding Dr. Begley and Dr. Vaughan, evidence exists that Dr. Begley and Dr. Vaughan made numerous, obvious, and significant mistakes regarding Solway, a patient whom these physicians knew or should have known presented the possibility of spinal cord injury and paralysis. These mistakes, if a jury finds them to be factually established, constitute the *actus reas*. The physicians' conscious indifference is established by the fact that these mistakes were numerous, obvious, and significant, coupled with the foreseeability of Solway's potential injuries. Thus, potentially, a jury could find that the conduct of Dr. Begley and Dr. Vaughan rose to the level of punitive, given their failure to see the obvious, resulting from reckless indifference to patient safety.

Regarding KDRA, no system was in place at Kent General to read weekend MRIs regardless of whether they were ordered on a routine basis or stat. KDRA did not inform Dr. Villalba or other ordering physicians that routine weekend orders would not be returned expeditiously. This constitutes the *actus reas*. KDRA's

conscious indifference is established in the inference, justified by the facts, of KDRA's knowledge that, although weekend emergencies could occur, ordering physicians were unaware that the onus of labeling weekend orders rested on them, and not the radiology department.

The Court finds KDRA's failure to inform ordering physicians of the delay in ordering routine weekend MRIs particularly important. In *Columbia Medical Center of Las Colinas, Inc. v. Hogue*, a case to which this Court cited in granting Solway's Motion to file Second Amended Complaint to add punitive claims, the Texas Supreme Court found sufficient evidence supporting an award of exemplary damages against a hospital that chose not to provide expedited echocardiogram services, but failed to inform ordering physicians of this deficiency.⁴⁷

On a side-note, it is worth mentioning that a lot of finger-pointing among the defendants exists in this case. The Court, however, finds that the relationship

⁴⁷ See 271 S.W. 3d. 238, 253 (2008) ("[T]here is sufficient evidence to support the jury's conclusion that [the hospital] acted with conscious indifference to an extreme risk of serious injury when it (1) elected to outsource echo services without a guaranteed response time while providing emergency services, (2) failed to communicate this limitation to its medical staff so they could consider other options to treat critical care patients, and (3) delayed obtaining the echo in spite of the serious risk to [the plaintiff's] health. In this case, the hospital knew of the obvious necessity for potentially life-saving stat echo capabilities in connection with the emergency medical services it decided to provide. Notwithstanding that knowledge, the hospital failed to obtain an appropriate response time for critical support services, failed to advise the medical staff of that limitation so they could properly and timely treat patients in acute distress or transfer them to another facility, and failed to provide an effective procedure to respond appropriately to [the plaintiff's] life-threatening situation." (internal quotation marks omitted)).

between an ordering physician and a radiology department is significant. When issues arise between the two parties, one party cannot automatically be rendered blameless over the other party:

The patient who undergoes diagnostic radiology in a nonemergency situation has a reasonable expectation that his or her primary or referring physician will order the appropriate radiologic imaging studies performed, and within a timely fashion; . . . and that the interpreting radiologists will accurately and properly read the resulting radiologic films, and will timely communicate the findings and conclusions . . . to the primary or referring physician in the format of a Radiology report.⁴⁸

Lastly, the Court notes that while the record evidence is sufficient to establish a reasonable inference of punitive conduct regarding the Radiology Defendants, the evidence does not dictate that conclusion. Other than the facts themselves and the reasonable inferences therefrom, only Hornberger specifically attested that punitive conduct existed in this case.⁴⁹ While he may have extensive experience regarding

 $^{^{48}}$ 75 Am. Jur. Trials *Diagnostic Radiology Malpractice Litigation* § 55 (2013) (emphasis added) (internal quotation marks omitted).

⁴⁹ The Court notes that Dr. Kramer, while not specifically opining that KDRA's turnaround time constituted punitive conduct, did discuss his criticism of the time frame in this case:

Q: Do you have any criticisms of [KDRA] . . . as a group?

A: Just in the turn[] around of the way things went it seems that weekend, where studies were done and the MR[I][]s sat around. And it just doesn't seem, you mentioned standard of care earlier, to wait that long for an in-patient MRI study to be read is, to me, below the standard of care.

Q: What would be within the standard of care, what time frame?

hospitals and radiology departments, and his opinions might be agreed with by a medical doctor, Hornberger is not himself a medical doctor. However, this is not a case in which reasonable inferences justifying punitive damages cannot be ascertained at all.⁵⁰

For the foregoing reasons, this Motion is **DENIED**.

IT IS SO ORDERED.

/s/ Richard F. Stokes
Richard F. Stokes, Judge

A: I would think within 24 hours is a reasonable time frame, depending on the acuity. Now, this was – it was my understanding that it was a non-stat MR[I], but on in-patients, within 24 hours if reasonable, is what should be adhered to.

Dep. of Gary S. Kramer, M.D. at 58: 19-25; 59: 1-9.

Additionally, Franklin A. Michota, M.D. ("Dr. Michota"), a hospitalist who is board-certified in internal medicine, agrees with Hornberger's opinions as they relate to Dr. Villalba. Dr. Michota will be referenced *infra* in the Court's ruling on Dr. Villalba's Motion for Partial Summary Judgment.

⁵⁰ But cf. Pattanayak v. Khan, 2005 WL 2660080, at *2–4 (Del. Super. Sept. 12, 2005) (finding insufficient evidence of punitive conduct because one of the plaintiff's theories was supported only by plaintiff's testimony and nothing else, and because an expert upon whom the plaintiff relied in supporting another theory expressly refused to categorize certain conduct as "reckless").

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