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., 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.	)	C.A. No. S11C-01-022 RFS
	)	
Defendant.	)	

MEMORANDUM OPINION

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

Before the Court is the Motion for Partial Summary Judgment of Defendant Carlos A. Villalba, M.D. ("Dr. Villalba") against 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's") 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.

In its memorandum opinion denying 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 Solway, the Court extensively laid out the facts of this case.[1] As Solway's claim for punitive damages against Dr. Villalba arises from the same factual circumstances as her claim for punitive damages against the Radiology Defendants, the Court will not repeat those facts.

Procedural Background

Solway sought leave to file a Second Amended Complaint to add punitive claims against both the Radiology Defendants and Dr. Villalba, as well as a direct

[1] *Solway v. Kent Diagnostic Radiology Assocs., P.A.*, C.A. S11C-01-022 (Del. Super. Feb. 18, 2014) (denying the Radiology Defendants' Motion for Partial Summary Judgment).

claim against KDRA. On February 26, 2013, the Court granted Solway's Motion. Like Dr. Villalba, the Radiology Defendants also moved for summary judgment on the issue of punitive damages, which the Court denied.[2]

Analysis

Parties' Contentions

Dr. Villalba begins by reminding the Court that on January 30, 2009, when he ordered the magnetic resonance imaging ("MRI") test of Solway's lumbar and thoracic spine[3] on a routine basis, rather than as "stat," he did so because he was reassured by the prior negative diagnostic imaging tests performed on Solway and the fact that she had been seen by an orthopedic surgeon. Dr. Villalba was also reassured by the fact that, in his experience, how he labeled a radiology order did not matter because, regardless of an order's label, the radiology department always returned results to him promptly. From prior experience, Dr. Villalba believed that if an issue arose, the department would contact him. Therefore, because he did not hear from the department, he was not concerned. Dr. Villalba also believed that a radiologist, including an after-hours service called Nighthawk, was always available for reading

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[2] *Solway*, C.A. No. S11C-01-022.

[3] As it did in its memorandum opinion denying the Radiology Defendants' Motion for Summary Judgment, referenced *supra*, the Court refers to the MRI which Dr. Villalba ordered in the singular.

and interpreting diagnostic tests. Dr. Villalba posits similar reasoning to explain his lack of checking on the MRI results on January 31, 2009 and February 1, 2009 as well. Thus, he asserts that his actions do not demonstrate a conscious indifference to a foreseeable harm.

Dr. Villalba claims that everything he did throughout his course of treatment was timely and responsible. According to Dr. Villalba, the previous negative x-rays and scans performed on Solway that he had in front of him demonstrated that there was nothing alarming about her spine. Dr. Villalba ordered the MRI on January 30th, and believed it would be returned within twenty-four hours. He examined Solway again on January 31st, and did not record any weakness in her extremities, which he would have done had there been a problem. He examined Solway again on February 1st, and was concerned with the weakness in her left leg. Dr. Villalba asserts, however, that at that point, through no negligence of his own, Solway's paralysis was likely inevitable.

Dr. Villalba argues that his failure to order Solway's MRI stat, at most, constitutes negligence, which he claims is a stretch "given the totality of the circumstances and the totality of the information he received from other health care providers about her condition and test results."[4] Further, Dr. Villalba reminds the

[4] Def.'s Mot. for Partial Summ. J. at 6.

Court that the opinion of Solway's expert, Dr. Keith D. Hornberger, B.S.R.T., M.B.A., D.H.A., FACHE ("Hornberger"), should be given no credence, as Hornberger is not a medical doctor and is in no position to opine that Dr. Villalba's conduct was punitive. Hornberger, Dr. Villalba argues, has minimal experience as a medical expert and was clearly unaware of Dr. Villalba's state of mind while treating Solway. Hornberger even admitted that he had no reason to disbelieve Dr. Villalba when Dr. Villalba stated that he expected to receive the MRI results within twenty-four hours.

Solway begins by stating that when Dr. Villalba first came into contact with her on January 29th, he knew that three days prior she had been in an automobile accident. The next day, Dr. Villalba, seeing the weakness in Solway's legs, ordered an MRI to rule out spinal cord compression, which he knew could be caused by an automobile accident and could lead to paralysis. Instead of taking simple preventive measures, Solway charges that Dr. Villalba essentially stood by and recklessly did nothing, while she, over the course of a few days, became paralyzed.

Dr. Villalba argues that he never had to order a test stat; but Solway points out that Dr. Villalba admitted that he ordered an x-ray of her chest stat just before he placed the order for the MRI. Solway also notes that it is a fair inference that the entire staff at Kent General, including Dr. Villalba, knew that the hospital had only

one MRI machine; and that, therefore, it was reckless of him to assume that the MRI would be performed within twenty-four hours. Dr. Villalba also knew that it was his duty to ensure that Solway's MRI was performed and interpreted; and yet he never made a follow-up inquiry, despite his handwritten notes prompting himself to check.

Solway asserts that on the morning of Saturday, January 31st, Dr. Villalba knew that her MRI had not yet been performed. Also, when he left that day, Dr. Villalba did not know the results of the MRI. His claim that he assumed, based on the radiology department's silence, that the results were negative, is contradicted by his own testimony. Additionally, Solway states that although Dr. Villalba ordered multiple consultations with other medical providers and supposedly checked other scans, although none of which was an MRI, which one expert noted is the most appropriate method of diagnosing a spinal cord injury, he failed to follow-up on any of these measures. Furthermore, Solway claims that he recklessly ignored other scans as well. Worse than that, Solway claims that Dr. Villalba essentially ignored her throughout her stay at Kent General. Solway also ponders why Dr. Villalba ordered the MRI at all, if all the negative tests performed on her up to that point assuaged his concerns.

Solway states that on the morning of Monday, February 2nd, after Dr. Polise contacted Dr. Villalba, which Dr. Polise claims he did around 9:00 a.m., Dr. Villalba

did not go to see Solway until 10:50 a.m. Dr. Villalba may not, Solway asserts, shift focus away from his actions on Monday, February 2nd, by arguing that by Sunday, February 1st, Solway's paralysis was inevitable.

Lastly, Solway notes that although Hornberger is not a medical doctor, Hornberger's opinions regarding Dr. Villalba are agreed with by Franklin A. Michota, M.D. ("Dr. Michota"), a hospitalist who is board-certified in internal medicine.[5]

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.[6] The Court examines all of the evidence, and the reasonable inferences therefrom, in the light most favorable to the non-moving party.[7] 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."[8]

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[5] Dr. Michota is discussed *infra*.

[6] *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).

[7] *Id.*

[8] *Id.*

Discussion

In its memorandum opinion denying the Radiology Defendants' Motion for Partial Summary Judgment, the Court laid out the law in this area. The Delaware Code states that "[i]n 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 . . . ."[9] 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.[10]

"[P]unitive damages serve a dual purpose—to punish wrongdoers and deter others from similar conduct."[11] 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.'"[12] A punitive award cannot rest on "[m]ere inadvertence, mistake or errors of judgment which constitute

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[9] 18 *Del. C.* § 6855.

[10] 523 A.2d 518, 527 (Del. 1987).

[11] *Id.* at 529.

[12] *Id.* (citation omitted).

mere negligence . . . . It is not enough that a decision be wrong. It must result from a conscious indifference to the decision's foreseeable effect."[13] Rather, "the defendant [must] foresee that his unacceptable conduct threatens particular harm to the plaintiff . . . ."[14] Even a finding of gross negligence does not satisfy this high standard.[15]

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."[16] "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."[17] 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

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[13] *Id.* (citations omitted).

[14] *Id.* at 529–30.

[15] *Id.* at 530.

[16] *Jardel*, 523 A.2d at 530.

[17] *Id.* at 531.

indifference' or 'I don't care' attitude.'"[18]

Based on the record in the present case, the Court cannot conclude that the facts do not justify a reasonable inference of the punitive nature of Dr. Villalba's conduct. The facts demonstrate that upon treating her, Dr. Villalba knew that Solway had recently been in an automobile accident. On January 30th, the second day he treated her, Dr. Villalba ordered an MRI of Solway's lumbar and thoracic spine to rule out spinal cord compression due to Solway's condition and problems she was experiencing with her left leg. On that date, Dr. Villalba noted in his treatment plan that the MRI would be checked. He made no follow-up inquiry, however, from Friday, January 30th to the morning of Monday, February 2nd. Dr. Villalba's not taking proactive measures to obtain the results of the MRI constitutes the *actus reas*. Dr. Villalba's conscious indifference state of mind is established by the fact that he did nothing while observing Solway's condition ultimately worsen. Therefore, the facts support a reasonable inference of punitive conduct. Dr. Villalba's argument that his concerns were assuaged by negative tests performed on Solway and that in his experience, the radiology department always returned test results promptly, does not vitiate this. Perhaps a jury might find otherwise, but the Court finds that a reasonable

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[18] 464 A.2d 887, 891 (Del. 1983).

inference exists that Dr. Villalba's conduct, or lack thereof, was punitive.[19]

Aside from Dr. Villalba's excuse that his actions were justified by Solway's negative tests and his prior experience with the radiology department, the record contains a factual discrepancy as to the time frame surrounding when Dr. Polise notified Dr. Villalba of the MRI's abnormal results on the morning of February 2nd. Dr. Villalba claims that Dr. Polise did not contact him until about 11:00 a.m.[20] Dr.

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[19] In granting Solway's Motion to file a Second Amended Complaint to add punitive claims, the Court cited *Wimer v. Macielak*, 2000 WL 33239953, at *2 (Pa. Com. Pl. July 26, 2000) in which the Pennsylvania Court of Common Pleas held that a fact question existed as to whether the defendant physician acted recklessly, thus justifying an award of punitive damages, in not responding to pages sent to his beeper regarding problems that arose after the plaintiff patient's surgery. The *Wimer* Court found it reasonable that a jury could disbelieve the defendant that he did not receive any pages, and that his disregard of these pages, coupled with post-operative problems which arose, constituted punitive conduct. The *Wimer* Court also noted that a jury could just as easily believe the defendant that he had not been paged. What mattered was whether the record contained sufficient evidence to conclude that the defendant's punitive conduct remained a triable fact. This Court finds the same to be true in this case.

[20] 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.

Polise claims that he contacted Dr. Villalba around 9:00 a.m.[21] If Dr. Polise is to be believed, which is just as likely as Dr. Villalba being believed, Dr. Villalba's taking no action until roughly two hours later could be found by a jury to constitute punitive conduct.

Lastly, although Hornberger is not a medical doctor, one of Solway's experts, Franklin A. Michota, M.D. ("Dr. Michota"), a hospitalist who is board-certified in internal medicine, agrees with all of Hornberger's opinions as they relate to Dr.

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

[21] 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.

Villalba.[22] At his deposition, Dr. Michota himself seemed to posit strong feelings regarding Dr. Villalba's conduct:

> Q: Dr. Villalba testified . . . that when he did not get a call from the radiology department about the MRI study, he assumed that there was nothing abnormal. In your opinion, is that in keeping with the standard of care?
>
> A: Absolutely not. That is a serious breach in the standard of care.
>
> Q: Why do you say that?
>
> A: You can't make assumptions like this when you're talking about somebody who could suffer permanent neurologic damage. Dr. Villalba knew or should have known that spinal cord injury can cause permanent neurologic damage. He knew or should have known that a potentially reversible cause for that damage needed to be identified immediately such that treatment could prevent said damage, and certainly with his background and training and practicing as a hospitalist, this idea that well, if I don't hear from radiology, no news is good news is, quite frankly, almost absurd, and I can't imagine that that's in fact the way that he practices today. That would be a serious breach in the standard of care. It's a huge patient safety issue as well.[23]

Therefore, it cannot be said that Hornberger's opinions deserve no credence.

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[22] *See* Ex. I to Pl.'s Answering Br.

[23] Dep. of Franklin A. Michota, M.D. at 53: 11–25; 54: 1–10.

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

IT IS SO ORDERED.

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

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