

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

DANIEL M. LITT, *et al.*,

v.

2007 CA 7961 M

Calendar 8 – Judge Long

SIBLEY MEMORIAL HOSPITAL, *et al.*

ORDER DENYING DEFENDANTS' MOTION FOR PARTIAL SUMMARY
JUDGMENT REGARDING PLAINTIFFS' GROSS NEGLIGENCE AND PUNITIVE
DAMAGES CLAIMS

The purpose of this order is to adjudicate an important motion regarding two aspects of potential damages. This is a medical malpractice case in which the plaintiff alleges, among other things, that Sibley Memorial Hospital and other defendants contributed to the death of the plaintiff's decedent through gross negligence. This is in addition to an allegation of so-called ordinary negligence that arose from breaches of various standards of care.

Defendants contend that the evidence that developed in discovery is legally insufficient to warrant submission to the jury of the claims for gross negligence and punitive damages. The Court has considered the filings of the parties as well as the arguments of counsel made in open court.

For the sake of brevity, the Court will not recount herein the vast array of factual details that illustrate the theories of liability and the theories of the defense on these two

subjects. However, it is important for the Court to synthesize why the record, so far, does not justify granting the relief requested.

In short, the Court will deny the instant motion but, to carefully guard against prejudice to the defendants, the Court will specify certain limitations on verbal references to gross negligence and punitive damages while the parties and counsel are before the jury. The Court concludes that it is not possible to eliminate the issue of gross negligence and punitive damages until at least the end of the plaintiffs' case-in-chief. In the meantime, it would be unfair to allow the jury to be exposed to the discussion of these matters until such time as there is a basis to instruct the jury on such issues.

Relevant Law on Summary Judgment. Rule 56 of the Superior Court Civil Rules governs the litigation of summary judgment motions. The Rule itself provides in pertinent part:

When a motion for summary judgment is made and supported as provided in this Rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this Rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

SCR-Civ. 56(e) [emphasis added].

The decision to grant summary judgment is appropriate if the pleadings, depositions, interrogatories, admissions, and any affidavits in the record demonstrate that there are no material factual issues in dispute and that the moving party is entitled to judgment as a matter of law based on the uncontested, material facts. *Townsend v. Waldo*, 640 A.2d 185, 187 (D.C. 1994). After the movant makes an initial showing that

he or she is entitled to judgment as a matter of law, the non-moving party must demonstrate that there is a genuine issue of material fact that requires a trial. *Id.*

The party opposing summary judgment is entitled to the benefit of all favorable inferences which may reasonably be drawn from the evidentiary materials and uncontested facts. *Colbert v. Georgetown Univ.*, 641 A.2d 469, 472 (D.C. 1994) (en banc); *Beard v. Goodyear Tire & Rubber Co.*, 587 A.2d 195, 198 (D.C. 1991).

In a nutshell, summary judgment is properly granted only “if (1) taking all reasonable inferences in the light most favorable to the nonmoving party, (2) a reasonable juror, acting reasonably, could not find for the nonmoving party, (3) under the appropriate burden of proof.” *Nader v. de Toledano*, 408 A.2d 31, 42 (D.C. 1979), *cert. denied*, 444 U.S. 1078 (1980).

Standards for Proving Gross Negligence. The Court need not tarry on this subject. Neither party appears to quibble about the legal standard for establishing gross negligence. In short, gross negligence is broadly understood to involve an extreme departure from ordinary standards of conduct. In the medical arena, gross negligence certainly amounts to something more than a simple breach of a standard of care.

Standards for Seeking Punitive Damages. The Court must view this motion in the light of how the law defines entitlement to punitive damages. The District of Columbia Court of Appeals has expressed in various ways the elements that must comprise the basis for punitive damages in tort cases. Certain case law illustrates the many ways in which the basis for such an award can arise from the evidence. The most common description of the basis for punitive damages is “tortuous acts which are replete

with malice.” *Zanville v. Garza*, 561 A.2d 1000, 1002 (D.C. 1989). In addition, the Court also has described the basis for punitive damages in this way:

Punitive damages are justified only when the defendant commits a tortuous act accompanied with fraud, ill will, recklessness, wantonness, oppressiveness, willful disregard of the plaintiff’s rights, or other circumstances tending to aggravate the injury. . . Whether punitive damages will lie depends on the intent with which the wrong was done, and not on the extent of the actual damages.

Dalo v. Kivitz, 596 A.2d 35, 40 (D.C. 1991) (emphasis).

In the instant case, the plaintiffs’ theory of why the jury should consider punitive damages is, in many ways, rooted in their characterization of certain actions of certain defendants as “reckless” and/or indicative of “ill will” towards the decedent herein. *See* further discussion, *infra*.

Whether a plaintiff emphasizes “malice” or whether the plaintiff relies on a circumstantial theory of some sort of “ill will,” “wantonness,” or “recklessness,” the Court of Appeals recognizes that “[t]he requisite state of mind need not (and usually cannot) be proven by direct evidence, but may be inferred from all the facts and circumstances of the case.” *Robinson v. Sarisky*, 535 A.2d 901, 906 (D.C. 1988); *Vassiliades v. Garfinckel’s, Brooks Brothers, Miller & Rhoades, Inc.*, 492 A.2d 580, 593 (D.C. 1985).

Why the Punitive Damages Claim Cannot Be Precluded Prior to the Presentation of Trial Evidence. The Court has considered the plaintiffs’ proffer of the kinds of evidence that will be presented to establish the basis for punitive damages. The Court is satisfied that the plaintiffs have identified a number of material issues of fact that

are in dispute. This is set forth in detail in their Opposition. Without listing all of such proffers, it is useful for the Court to recall a prominent example.

The plaintiffs posit that the decedent was victimized by recklessness and/or reckless disregard for the patient's rights by the treatment she received leading up to her admission and for many hours during the night thereafter. For example, in focusing upon the conduct of Dr. Garrett, plaintiffs emphasize the testimony of Karen Jatlow, a key witness. She is the decedent's friend who reportedly had to personally lobby Dr. Garrett not to send the patient home while the patient was in great distress. Deposition of Jatlow at 49-50. Plaintiffs will present a theory that since Dr. Garrett was so dismissive of the patient's symptoms and resistant to admitting her, this had an effect on the failure to put in place certain important orders. Plaintiffs decry the admission of the patient for "observation" that did not include a firm plan for how the medical staff should proceed, how post-admission fluids should be monitored, and other issues. The notion that the patient was grudgingly "warehoused," coupled with more specific breaches of standards of care, embraces at least one distinct basis for punitive damages.

The issue of punitive damages cannot be foreclosed prior to trial. This is because only a jury can weigh the veracity of the testimony of the witnesses and put them in the context of what the actual testimony is. It is conceivable that, upon cross-examination, Jatlow may or may not recede from the emphatic nature of what she initially stated in her deposition. Her description of what happened may be expressed differently and, possibly, in a more damaging way. Moreover, the real value of what this witness has to say should not and cannot be assessed in a vacuum, without knowing the full sweep of the plaintiffs' case. It is not the proper business of the trial judge to draw pre-emptive

conclusions about evidence that is by nature circumstantial and heavily dependent upon the credibility of witnesses. Parsing and weighing circumstantial evidence is a classic jury issue and it is all the more so where punitive damages are concerned.

Why the Gross Negligence Claim Cannot Be Precluded Prior to the Presentation of Trial Evidence. As to proof of gross negligence, the plaintiffs draw a sophisticated picture of serial lapses in the standards of care, not only by physicians but also by the nursing staff. A particularly pointed example evolved in the deposition testimony of Dr. Paul E. Marik, an expert of the plaintiffs. In his opinion, based on a variety of lapses in medical care by certain defendants, the patient's survivability was compromised by more than ordinary or simple mistakes. In describing the level of seriousness of poor treatment decisions and specific failures, he stated at least twice in his deposition that the preoperative care of the patient was "outrageous." Dr. Marik said this in criticizing the failure to perform adequate volume resuscitation prior to administering general anesthesia. He said it also in criticizing the failure to administer appropriate antibiotics prior to surgery. At one point, speaking collectively of numerous departures from the standards of care, he deemed them "pretty outrageous deviations." Deposition of Marik at 106-107, 110, and 113.

While Dr. Marik is but one witness, the plaintiffs are entitled to try to establish gross negligence from the context of the entire body of their evidence. Ultimately, gross negligence may or may not be established as to more than one defendant, by the close of the plaintiff's case. However, there is no way to know this without seeing exactly how each expert's testimony will look after thorough examination and cross-examination at trial. It is always possible that questions asked at trial by either side, may be informed by


facts they did not know prior to any particular deposition. This, too, is a practical reason not to foreclose the gross negligence claim prior to presentation of the plaintiffs' case-in-chief.

For purposes of summary judgment, the Court is required to draw all inferences in favor of the non-moving party. For this reason, the Court is unable to firmly discount that a reasonable jury could find gross negligence on the part of any defendant.

WHEREFORE, it is by the Court this 12th day of March 2009

ORDERED that defendants' Motion for Partial Summary Judgment Regarding Plaintiffs' Gross Negligence and Punitive Damages Claims is denied, without prejudice to revisiting this issue at the close of the Plaintiffs' case-in-chief at trial; and it is

FURTHER ORDERED that all counsel shall refrain from any mention of gross negligence and/or punitive damages during their opening statements and presentations to the jury, until such time as counsel are expressly permitted to do so by the Court.


Cheryl M. Long
Judge