

## **Kinard v. Butler Mem'l Hosp.**

### *Corporate negligence — Certificate of merit — Vicarious liability — Punitive damages*

The court sustained a preliminary objection, because plaintiffs' certificate of merit only supported their claim for vicarious liability, not corporate negligence. The complaint contained sufficient facts to allow plaintiffs' punitive damages claim to go forward.

Plaintiffs Timothy Kinard and his wife filed this medical malpractice suit against several medical providers and a hospital for failing to diagnose a cancerous condition in his esophagus. By the time the cancer was detected, it had spread to his lymph nodes. Mr. Kinard underwent chemotherapy treatment, and he later had surgery which involved the removal of most of his stomach and esophagus.

The defendants filed preliminary objections. The hospital and two of the doctors argued that the complaint lacked specificity and did not adequately explain the nature of the claim. The court noted that plaintiffs alleged a sequence of events beginning from Mr. Kinard's first examination, throughout the time he underwent surgery. The complaint also contained information relating to some abnormal diagnostic imaging. The court found that the facts alleged by plaintiffs provided defendants with adequate information to formulate a defense, so it overruled this preliminary objection.

The hospital asserted a preliminary objection to the legal sufficiency of the certificate of merit presented by plaintiffs. The corporate negligence of a hospital was derived from the negligent acts of the institution itself arising from the policies and actions or inaction of the institution, rather than the specific acts of hospital employees. The certificate of merit presented by plaintiffs derived solely from the negligence of medical professionals providing treatment at the hospital, so it only addressed vicarious liability, not corporate negligence. The court sustained this preliminary objection, striking the corporate negligence claim.

Next, defendants argued that plaintiffs' punitive damages claims were legally insufficient, because plaintiffs did not allege conduct that was willful, wanton or recklessly indifferent to the rights of others. Under Pennsylvania law, a claim for punitive damages had to be supported by sufficient evidence to show that a defendant had a subjective appreciation of the risk of harm to which the plaintiff was exposed, and that the defendant acted or failed to act in conscious disregard of that risk. *Stroud v. Abington Mem'l Hosp.*, 546 F.Supp.2d 238. The complaint contained allegations that defendants failed to properly diagnose and treat Mr.

Kinard's condition despite the existence of diagnostic imaging during his initial treatment at the hospital which showed esophageal thickening. The court concluded that the allegations of the complaint were sufficient to allow the punitive damages claim to go forward.

The nurse practitioner defendant sought to be dismissed from the case because she only saw Mr. Kinard once, and that was for a different matter involving his lower extremity. She also worked under the supervision of a doctor, so she was not responsible for reviewing Mr. Kinard's subsequent imaging results. The court ordered the claim against the nurse practitioner stricken from the complaint.

C.P. Lawrence County, PICS Case No. 20-0357

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For the Defendants Butler Memorial Hospital, Mailinn E.  
Wong-Perez, M.D. and Neha S. Desai, M.D.

*Jeffrey J. Wetzel, Esq., Jeffrey R. Hantz, Esq.*, For the  
Defendants Andrew Cole, M.D. and Linda Billings, FNP-  
BC

MOTTO, *P.J.*, March 11, 2020—Before the Court for disposition are the Preliminary Objections filed on behalf of the defendants, Butler Memorial Hospital, Mailinn E. Wong-Perez, M.D., and Neha S. Desai, M.D., which assert Plaintiff's Complaint lacks specificity as it contains boilerplate language without factual averments, Plaintiff's claim for corporate liability is legally insufficient as the Certificate of Merit concerning Butler Memorial Hospital only addresses vicarious liability and Plaintiffs' claims for punitive damages are legally insufficient because the Complaint does not contain allegations to demonstrate Defendants' conduct was willful or wanton or showed reckless indifference to the rights of others. Also before the Court for disposition are the Preliminary Objections to Complaint filed on behalf of the defendants, Andrew Cole, M.D., and Linda Billings, FNP-BC, which contend

the claims against Linda Billings, FNP-BC, should be dismissed as there is no causal connection between her treatment of Mr. Kinard and his ultimate diagnosis of esophageal cancer, and Plaintiff's claim for punitive damages should be dismissed as there are no allegations Defendants' conduct were outrageous or demonstrated evil motive or reckless indifference to the rights of others.

The Complaint alleges Mr. Kinard was examined by Defendant Billings on March 30, 2017, complaining of lower leg discomfort and was diagnosed with lower extremity DVT. On the next day, Mr. Kinard was examined at Butler Memorial Hospital Emergency Department for difficulty breathing and was diagnosed with an acute bilateral pulmonary embolus. While at Butler Memorial Hospital, Mr. Kinard was treated by Defendant Wong-Perez and Defendant Desai. A chest CT scan was performed on Mr. Kinard, which revealed a "concentric wall thickening distal thoracic esophagus". The CT scan report was transmitted to Defendants Cole and Billings. Mr. Kinard was discharged from Butler Memorial Hospital on April 4, 2017, and advised to follow up with Defendant Cole in a week.

Shortly thereafter, Mr. Kinard continued to have complaints of chest pain and shortness of breath, which prompted him to seek treatment at Jameson Memorial Hospital where he had a computed tomography angiography (hereinafter "CTA") scan of the chest. He was examined by Defendant Cole on April 12, 2017, and was instructed to continue Coumadin. Mrs. Kinard spoke with Defendant Cole's office requesting further testing to determine why Mr. Kinard continued to get blood clots. Defendant Cole responded that no one knew why he was getting the blood clots and Mr. Kinard was permitted to return to work.

Due to a lack of confidence in Defendant Cole, Mr. Kinard sought treatment by the defendant, George M. Zagger, M.D., on May 10, 2017. He also was examined by a pulmonologist on June 22, 2017, who referred him to a gastroenterologist to evaluate a hiatal hernia and esophageal thickening depicted on the CT scan. On July 12, 2017, Defendant Zagger noted Mr. Kinard had neck swelling, difficulty swallowing and questionable silent reflux. An upper gastrointestinal (hereinafter “GI”) study was performed on July 14, 2017, which revealed a “small hiatal hernia, luminal narrowing and mucosal irregularity of the esophagus just above the hernia. This could be related to reflux esophagitis, but the possibility of a malignant lesion cannot be excluded.”

On August 17, 2017, Mr. Kinard underwent an upper endoscopy, which indicated there was concern for early malignancy. A biopsy of the esophageal nodule showed invasive moderately differentiated adenocarcinoma. Mr. Kinard commenced treatment with the Allegheny Health Network Cancer Institute on August 24, 2017. Mr. Kinard underwent surgery in November of 2017. A CT/PET scan was also performed, which revealed the existence of disease in the esophagus and an EUS demonstrated a T3N2 esophageal adenocarcinoma. Mr. Kinard underwent chemotherapy treatment and most of his stomach and esophagus were removed. It was also determined the cancer had spread to his lymph nodes.

On March 13, 2019, Plaintiffs initiated this action by filing a Praecipe for Writ of Summons. Plaintiffs subsequently filed a Complaint along with Certificates of Merit as to all of the named Defendants on July 12, 2019. The Complaint averred claims for Negligence against all of the Defendants, which included claims for vicarious liability and corporate liability against Butler Memorial

Hospital, claims for punitive damages and a cause of action for loss of consortium on behalf of Mrs. Kinard.

Defendants Butler Memorial Hospital, Mailinn E. Wong-Perez, M.D., and Neha S. Desai, M.D., first preliminary objections asserts Plaintiff's Complaint lacks specificity as it contains boilerplate language without factual averments.

The specificity of a pleading is governed by Pa.R.C.P. No. 1019, which states "(a) The material facts on which a cause of action or defense is based shall be stated in a concise and summary form." Pennsylvania is a fact-pleading jurisdiction, which requires the plaintiff to provide the defendant with notice of what the plaintiff's claim is and the grounds for the claim. *Unified Sportsmen of Pennsylvania v. Pennsylvania Game Com'n (PGC)*, 950 A.2d 1120, 1134 (Pa. Cmwlth. 2008) (quoting *Sevin v. Kelshaw*, 417 Pa. Super. 1, 611 A.2d 1232, 1235 (1992)). Additionally, the plaintiff must summarize the facts essential to support the claims. *Id.* "The rule requires a plaintiff to plead all the facts that he must prove in order to achieve recovery on the alleged cause of action. The pleading must be sufficiently specific so that the defending party will know how to prepare his defense." *Commonwealth ex rel. Pappert v. TAP Pharmaceuticals Products, Inc.*, 868 A.2d 624, 635 (Pa. Cmwlth. 2005) (citing *Department of Transportation v. Shipley Humble Oil Co.*, 29 Pa. Cmwlth. 171, 370 A.2d 438 (1977)). The purpose behind the rules of pleading is to enable parties to ascertain, by utilizing their own professional discretion, the claims and defenses that are asserted in the case. *Krajsa v. Key Punch, Inc.*, 424 Pa. Super. 230, 236, 622 A.2d 355, 357 (1993). "The pleadings must adequately explain the nature of the claim to the opposing party so as to permit him to prepare a defense, and they must be

sufficient to convince the court that the averments are not merely subterfuge.” *In re Estate of Schofield*, 505 Pa. 95, 477 A.2d 473 (1984) (citing *Sokoloff v. Strick*, 404 Pa. 343, 172 A.2d 302 (1961); *Hornsby v. Lohmeyer*, 364 Pa. 271, 72 A.2d 294 (1950); *Rice v. Braden*, 243 Pa. 141, 89 A. 877 (1914)). “A more specific complaint will not be required where the details requested are evidentiary in nature.” *Hock v. L. B. Smith, Inc.*, 69 Pa. D. & C. 2d 420, 423 (Pa. Com. Pl. Columbia 1974) (citing *General Acceptance Corp. v. Wilson*, 40 Northumb. L. N. 54).

In *Connor v. Allegheny General Hospital*, 501 Pa. 306, 311, 461 A.2d 600, 603 fn. 3 (1983) (citing *Arner v. Sokol*, 373 Pa. 587, 592-593, 96 A.2d 854, 856 (1953); *King v. Brillhart*, 271 Pa. 301, 114 A. 515, 516 (1921)), the Court determined that an averment stating, “otherwise fail[ed] to use due care and caution under the circumstances,” lacked specificity and the defendant could have filed a motion to strike off that statement, but chose not to do so. However, a complaint is sufficiently specific if the whole complaint contains material facts which set forth a cause of action. *Lipinsky v. Graham*, 88 Pa. D. & C. 156, 158 (Pa. Com. Pl. Mercer 1954). “A more specific complaint will not be required where the details requested are evidentiary in nature.” *Hock v. L. B. Smith, Inc.*, 69 Pa. D. & C. 2d 420, 423 (Pa. Com. Pl. Columbia 1974) (citing *General Acceptance Corp. v. Wilson*, 40 Northumb. L. N. 54).

In order to establish a claim for negligence, a plaintiff must prove the following elements: “(1) the defendant owed a duty to the plaintiff; (2) the defendant breached that duty; (3) a causal relationship between the breach and the resulting injury suffered by the plaintiff; and (4) actual loss suffered by the plaintiff.” *Reeves v. Middletown Athletic Ass’n*, 866 A.2d 1115, 1126 (Pa. Super. 2004) (citing *Burman v. Golay & Co., Inc.*, 420 Pa. Super. 209,

616 A.2d 657 (1992)). Under Pennsylvania law, a plaintiff must establish that the defendant's action was a substantial factor in bringing about the harm incurred. *Mahon v. W.C.A.B. (Expert window Cleaning and State Workers' Insurance Fund)*, 835 A.2d 420, 428 (Pa. Cmwlth. 2003) (citing *Smith v. Philadelphia Transportation Co.*, 202 Pa. Super. 278, 195 A.2d 168, 170 (1963)). "In determining whether a factual cause is a legal cause, the jury must consider many elements, including intervening natural events, the passage of time, intervening actors, and the conduct of the injured party." *Van Buskirk v. Carey Canadian Mines, Ltd.*, 760 F.2d 481, 494 (3d Cir. 1985). It is important to note that determining causation is an issue for the jury to decide, unless the evidence is such that reasonable people cannot disagree. *Kirschner v. K & L Gates LLP*, 46 A.3d 737, 754 (Pa. Super. 2012) (citing *Curran v. Stradley, Ronon, Stevens & Young*, 361 Pa. Super. 17, 521 A.2d 451, 455 (1987)). "Because the negligence of a physician encompasses matters not within the ordinary knowledge and experience of laypersons a medical malpractice plaintiff must present expert testimony to establish the applicable standard of care, the deviation from that standard, causation and the extent of the injury." *Toogood v. Owen J. Rogal, D.D.S., PC.*, 573 Pa. 245, 255, 824 A.2d 1140, 1145 (2003) (citing *Hightower-Warren v. Silk*, 548 Pa. 459, 698 A.2d 52, 54 (1997)).

In the their Complaint, Plaintiffs aver the sequence of events surrounding their claims from the first examination he received from Defendant Billings on March 30, 2017, until he underwent surgery related to the diagnosis of adenocarcinoma in November of 2017. According to the Complaint, during that time, Mr. Kinard was treated at Butler Memorial Hospital by its employees, agents or servants, which included Defendant Wong-Perez and

Defendant Desai. While at Butler Memorial Hospital and under the care of Defendants Wong-Perez and Desai, there was a failure to properly diagnose cancer in his esophagus leading to a decline in his health and quality of life. Plaintiffs also allege Defendants failed to notify the proper specialist to treat Mr. Kinard's condition, failed to arrange for proper gastroenterology follow up examination, and failure to provide and convey findings of the abnormal CT scan to the proper physicians. Moreover, Plaintiffs contend Defendants Wong-Perez and Desai failed to provide Mr. Kinard with proper or adequate medical treatment for his condition as a result of their failure to diagnose the esophageal cancer. They further aver Butler Memorial Hospital failed to properly monitor Defendant Wong-Perez.

The previously referenced allegations establish the grounds Plaintiffs believe Defendants Butler Memorial Hospital, Wong-Perez and Desai breached the standard of care they owed to Mr. Kinard as it related to the diagnosis and treatment of his condition. Plaintiffs provided Defendants Butler Memorial Hospital, Wong-Perez and Desai with adequate information to formulate a defense and to properly respond to the Complaint. Moreover, the factual background provided by Plaintiffs in the Complaint limits any risk of impermissible amplification of their claims as there is a specific timeline and sequence of events set forth therein. Defendants request for more specific facts supporting Plaintiffs' claims are more reasonably addressed in discovery as they appear to be evidentiary in nature. Thus, the first preliminary objection for lack of specificity asserted by Defendants Butler Memorial Hospital, Wong-Perez and Desai is overruled.

Defendant Butler Memorial Hospital asserts Plaintiff's claim for corporate liability is legally insufficient as the

Certificates of Merit filed only address vicarious liability.

A demurrer will only be sustained in cases where the complaint fails to set forth a valid cause of action. *Lerner v. Lerner*, 954 A.2d 1229, 1235 (Pa. Super. 2008) (citing *McArdle v. Tronetti*, 426 Pa. Super. 607, 627 A.2d 1219, 1221 (1993)). If a doubt exists regarding whether a demurrer should be sustained, the doubt must be resolved in favor of overruling the demurrer. *R.W. v. Manzek*, 585 Pa. 335, 351, 888 A.2d 740, 749 (2005) (citations omitted). Fact-based defenses are irrelevant when ruling on a preliminary objection in the nature of a demurrer. *Werner v. Plater-Zyberk*, 799 A.2d 776, 783 (Pa. Super. 2002) (citing *Orner v. Mallick*, 515 Pa. 132, 135, 527 A.2d 521, 523 (1987)). A trial court's review in ruling on preliminary objections is limited to examining the factual averments of the complaint to determine their legal sufficiency for stating a claim upon which relief may be granted. *DeMary v. Latrobe Printing and Pub. Co.*, 762 A.2d 758, 761-762 (Pa. Super. 2000). "When considering preliminary objections, all material facts set forth in the challenged pleadings are admitted as true, as well as all inferences reasonably deducible therefrom." *HRANEC Sheet Metal, Inc. v. Metalico Pittsburgh, Inc.*, 107 A.3d 114, 118 (Pa. Super. 2014) (quoting *Richmond v. McHale*, 35 A.3d 779, 783 (Pa. Super. 2012)).

A cause of action should only be dismissed when it is clear and free from doubt the pleader is unable to prove facts legally sufficient to establish the right to relief. *Id.* If there is any doubt as to whether a demurrer should be sustained, it must be resolved in favor of overruling the preliminary objections. *Id.* "If the facts as pleaded state a claim for which relief may be granted under any theory of law then there is sufficient doubt to require the preliminary objections in the nature of a demurrer to be rejected."

*County of Allegheny v. Commonwealth of Pennsylvania*, 490 A.2d 402, 408 (Pa. 1985). The likelihood of proving those facts at trial is irrelevant as long as recovery is possible under any theory of law. *Sunbeam Corp. v. Liberty Mut. Ins. Co.*, 781 A.2d 1189, 1192 (Pa. 2001).

In *Thompson v. Nason Hosp.*, 527 Pa. 330, 339, 591 A.2d 703, 707 (1991), the Pennsylvania Supreme Court recognized that hospitals may be held liable for a failure to uphold the proper standard of care owed to a patient under the doctrine of corporate negligence. The corporate negligence of a hospital is derived from the negligent acts of the institution itself arising from the policies and actions or inaction of the institution rather than the specific acts of the hospital employees. *Rauch v. Mike-Mayer*, 783 A.2d 815, 827 (Pa. Super. 2001) (quoting *Welsh v. Bulger*, 548 Pa. 504, 513, 698 A.2d 581, 585 (1997)). Thus, the hospital is held directly liable, as opposed to being held vicariously liable for the actions of their employees and the injured party does not need to rely on the liability of the employee. *Id.* A hospital may be liable if it fails to uphold any of the following four duties:

1. a duty to use reasonable care in the maintenance of safe and adequate facilities and equipment;
2. a duty to select and retain only competent physicians;
3. a duty to oversee all persons who practice medicine within its walls as to patient care; and
4. a duty to formulate, adopt and enforce adequate rules and policies to ensure quality care for the patients. *Whittington v. Episcopal Hosp.*, 768 A.2d 1144, 1149 (Pa. Super. 2001) (citing *Thompson, supra.*).

Additionally, a prima facie case for corporate negligence

is established when the plaintiff demonstrates that the following elements exist:

1. the hospital acted in deviation from the standard of care;
2. the hospital had actual or constructive notice of the defects or procedures which created the harm; and
3. the hospital's conduct in question was a substantial factor in bringing about the harm. *Id.*

Failure to uphold the proper standard of care allows an injured party to establish a direct cause of action under the corporate liability doctrine against the hospital, without regard to the negligence of a third party such as a doctor or nurse. *Welsh v. Bulger*, 548 Pa. 504, 513, 698 A.2d 581, 585 (1997) quoting *Moser v. Heistand*, 545 Pa. 554, 558, 681 A.2d 1322, 1325 (1996). In demonstrating that the hospital deviated from an acceptable standard of care, the plaintiff must demonstrate that the hospital's action or non-action "deviated from an accepted standard of care and the deviation was a substantial factor in causing harm to the plaintiff" before a claim of corporate negligence will be found to have merit. *Welsh* at 514, 698 A.2d at 585.

A claim for corporate negligence arises from the policies or action/inaction of the institution rather than the specific acts of the individual employees, which establishes the corporation is directly liable as opposed to being vicariously liable for the actions of the corporations employees. *Brodowski v. Ryave*, 885 A.2d 1045, 1057 (Pa. Super. 2005). Expert testimony is required to establish the first two prongs of the test set forth in *Thompson*, unless the hospital's negligence is obvious. *Id.* Resultantly, any allegations constituting corporate negligence which require expert testimony must be supported by a certificate

of merit. *Rostock v. Anzalone*, 904 A.2d 943, 946 (Pa. Super. 2006). Only corporate negligence claims which are obvious and do not require expert testimony, such as the failure to forward diagnostic reports, can survive the failure to provide a certificate of merit. *Id.* “A [certificate of merit] as to corporate negligence claims that are premised on allegations that a hospital’s actions fell below the applicable medical or professional standard, i.e., where the claim is predicated upon facts constituting medical treatment.” *Stroud v. Abington Memorial Hospital*, 546 F.Supp.2d 238, 248 (E.D. Pa. 2008).

The requirement to supply a certificate of merit is governed by Pa.R.C.P. No. 1042.3, which states in relevant part:

(a) In any action based upon an allegation that a licensed professional deviated from an acceptable professional standard, the attorney for the plaintiff, or the plaintiff if not represented, shall file with the complaint or within sixty days after the filing of the complaint, a certificate of merit signed by the attorney or party that either

(1) an appropriate licensed professional has supplied a written statement that there exists a reasonable probability that the care, skill or knowledge exercised or exhibited in the treatment, practice or work that is the subject of the complaint, fell outside acceptable professional standards and that such conduct was a cause in bringing about the harm, or

(2) the claim that the defendant deviated from an acceptable professional standard is based solely on allegations that other licensed professionals for whom this defendant is responsible deviated from an acceptable professional standard, or

(3) expert testimony of an appropriate licensed professional is unnecessary for prosecution of the claim.

(b) (1) A separate certificate of merit shall be filed as to each licensed professional against whom a claim is asserted.

(2) If a complaint raises claims under both subdivisions (a)(1) and (a)(2) against the same defendant, the attorney for the plaintiff, or the plaintiff if not represented, shall file

(i) a separate certificate of merit as to each claim raised, or

(ii) a single certificate of merit stating that claims are raised under both subdivisions (a)(1) and (a)(2).

In the current case, Plaintiffs provided a Certificate of Merit as to Butler Memorial Hospital which states:

The claim that this Defendant deviated from an acceptable professional standard is based solely on allegations that other licensed professionals for whom this Defendant is responsible deviated from an acceptable professional standard and an appropriate licensed professional has supplied a written statement to the undersigned that there is a basis to conclude that the care, skill or knowledge exercised or exhibited by the other licensed professionals in the treatment, practice or work that is the subject of the Complaint, fell outside acceptable professional standards and that such conduct was a cause in bringing about harm;”

It is clear from the plain language of the Certificate of Merit as to Butler Memorial Hospital that it does not pertain to the claim of corporate negligence as it does not address the

direct negligence of the hospital. Pa.R.C.P. No. 1042.3(b) (2) requires either a separate certificate of merit for claims based upon the negligence of other professionals and direct negligence or a single certificate of merit for both of the aforementioned circumstances, if it clearly states it applies to subsections (a)(1) and (a)(2). The Certificate of Merit as to Butler Memorial Hospital states it is based solely on the allegations other licensed professionals for the Defendant is responsible deviated from the standard of care. It is obvious this Certificate of Merit applies to the vicarious liability claim which is derived solely from the negligence of medical professionals providing treatment within Butler Memorial Hospital. Conversely, a claim for corporate negligence must be derived from the direct negligence of Butler Memorial Hospital and the previously quoted Certificate of Merit does not address that situation. Thus, Defendant Butler Memorial Hospital's second preliminary objection in the nature of a demurrer for failure to provide an appropriate certificate of merit is sustained and Plaintiffs' corporate negligence claim is stricken.

All of the Defendants who filed preliminary objections asserted Plaintiffs' claims for punitive damages are legally insufficient because the Complaint does not contain allegations to demonstrate Defendants' conduct was willful or wanton or showed reckless indifference to the rights of others.

Punitive damages are penal in nature, not compensatory, and are appropriate if the actor's conduct was malicious, willful, oppressive, or exhibited reckless indifference to the rights of others. *Hart v. O'Malley*, 781 A.2d 1211, 1217 (Pa. Super. 2001) (citing *G.J.D. by G.J.D. v. Johnson*, 552 Pa. 169, 713 A.2d 1127 (1998); *Costa v. Roxborough Memorial Hospital*, 708 A.2d 490 (Pa. Super. 1998)). The

Court must determine whether the plaintiff has presented sufficient evidence from which a jury could reasonably conclude that the defendant acted outrageously. *Martin v. Johns-Manville Corp.*, 494 A.2d 1088, 1098 (Pa. 1985). The Court must take into account the egregious conduct, the circumstances surrounding the conduct and the relationship between the parties. *Rubin Quinn Moss Heaney & Patterson, P.C. v. Kennel*, 832 F. Supp. 922, 936 (E.D. Pa. 1993) (citing *Brooks ex rel. Stanton v. Astra Pharmaceutical Prods., Inc.*, 718 F.2d 553, 580 (3d Cir. 1983)).

The Medical Care Availability and Reduction of Error (hereinafter “MCARE”) contains a provision governing an award of punitive damages in 40 P.S. § 1303.505(a), which states:

(a) Award. — Punitive damages may be awarded for conduct that is the result of the health care provider’s willful or wanton conduct or reckless indifference to the rights of others. In assessing punitive damages, the trier of fact can properly consider the character of the health care provider’s act, the nature and extent of the harm to the patient that the health care provider caused or intended to cause and the wealth of the health care provider.

This provides for the same standard as punitive damages in other tort cases. “A defendant acts recklessly when his conduct creates an unreasonable risk of physical harm to another and such risk is substantially greater than that which is necessary to make his conduct negligent.” *Scampono v. Grane Healthcare Co.*, 11 A.3d 967, 991 (Pa. Super. 2010) (*Phillips v. Cricket Lighters*, 883 A.2d 439, 445 (Pa. 2005)). “In Pennsylvania, a punitive damages claim must be supported by evidence sufficient to establish that (1)

a defendant had a subjective appreciation of the risk of harm to which the plaintiff was exposed and that (2) he acted, or failed to act, as the case may be, in conscious disregard of that risk.” *Stroud v. Abington Memorial Hosp.*, 546 F.Supp.2d 238, 257 (E.D. Pa. 2008)(The Court held Plaintiff averred a legally sufficient claim for punitive damages by alleging the defendants were aware he was suffering from an emergent and life threatening condition yet failed to take the necessary action to remedy the condition).

In the current case, Plaintiffs aver Mr. Kinard was experiencing difficulty breathing and shortness of breath on March 31, 2017, when he went to the Butler Memorial Hospital Emergency Department. He underwent a CT scan which demonstrated he had “concentric wall thickening distal thoracic esophagus”. He was discharged from Butler Memorial Hospital on April 4, 2017, and was instructed to follow up with Defendant Cole, which he did on April 12, 2017. Defendant Cole did not order any additional testing at that time and advised Mr. Kinard to continue taking Coumadin. Plaintiffs decided to seek treatment from Defendant Zagger on May 10, 2017, and then a pulmonologist on June 22, 2017, who recommended a gastroenterology consult to evaluate a hiatal hernia and esophageal thickening observed on the CT scan. After several tests, which included an upper endoscopy on August 17, 2017, Mr. Kinard was diagnosed with invasive moderately differentiated adenocarcinoma.

According to the Complaint in the current case, the Defendants failed to properly diagnose and treat his condition despite the existence of the CT scan demonstrating esophageal thickening, which was performed during his initial treatment at Butler Memorial Hospital commencing on March 31, 2017. More specifically, Defendants failed

to arrange for a gastroenterology consultation despite the abnormal findings of the CT scan. Plaintiffs aver Defendants had knowledge of Mr. Kinard's medical condition concerning the esophageal thickening, yet failed to take proper action in conscious disregard for the risk of harm. This is similar to *Stroud* as Plaintiffs have alleged Defendants were aware of Mr. Kinard's condition through the CT scan report indicating there were abnormalities, but failed to take the proper actions or render the necessary treatment. The allegations contained within the Complaint are sufficient to allow a claim for punitive damages to proceed beyond the pleading stage of this litigation. As a result, Defendants' preliminary objection in the nature of a demurrer concerning Plaintiffs' claims for punitive damages are overruled. This ruling does not preclude Defendants from challenging the sufficiency of Plaintiffs' claims for punitive damages at a later stage of these proceedings.

Defendants Cole and Billings contend the claims against Defendant Billings should be dismissed as it is legally insufficient because there is no causal connection between her treatment of Mr. Kinard and his ultimate diagnosis of esophageal cancer.

Defendant Billings examined Mr. Kinard on March 30, 2017, when he was diagnosed with lower extremity DVT after a venous Doppler study and was treated with Xarelto. The Complaint is devoid of any reference to difficulty breathing or shortness of breath at that time. According to the Complaint, it was not until the next day that Mr. Kinard had difficulty breathing and was diagnosed with an acute bilateral pulmonary embolus after being examined at Butler Memorial Hospital Emergency Department. A CT scan was performed and the report was sent to Defendant Cole. He was discharged from Butler Memorial Hospital

on April 4, 2017, and advised to follow up with Defendant Cole, which he did on April 12, 2017. There are not further indications Mr. Kinard was examined or treated by Defendant Billings following March 30, 2017.

Plaintiffs allege Defendant Billings was negligent in failing to review the CT scan, which demonstrated Defendant had concentric wall thickening, distal thoracic esophagus. However, 63 P.S. § 218.2(b) states, “A certified registered nurse practitioner may perform acts of medical diagnosis in collaboration with a physician and in accordance with regulations promulgated by the board.” This indicates the treatment and diagnosis by Defendant Billings was required to have been done in collaboration with Defendant Cole, who Plaintiffs indicate received the CT scan. Moreover, Mr. Kinard had a follow up examination with Defendant Cole and was not examined by Defendant Billings after March 30, 2017. Plaintiffs fail to allege Defendant Billings examined Mr. Kinard when he was exhibiting symptoms of adenocarcinoma and do not indicate she received the CT scan as it was provided to Defendant Cole. There are no allegations to demonstrate Defendant Billings provided any treatment to Mr. Kinard as it relates to his difficulty breathing or shortness of breath nor was she responsible for reviewing the CT scan as Mr. Kinard’s follow up examination was conducted by Defendant Cole, who Defendant Billings was collaborating with in conformance with 63 P.S. § 218.2(b). Therefore, Defendants Cole and Billings’ first preliminary objection in the nature of a demurrer is granted and Count v. of the Complaint is stricken.

Based upon the foregoing, the Preliminary Objection filed by Butler Memorial Hospital, Dr. Wong-Perez and Dr. Desai for lack of specificity is overruled. Their Preliminary Objection in the nature of demurrer for Plaintiffs’ claim

for corporate negligence is sustained and the averments related to that cause of action contained within Count VI of the Complaint are stricken. The preliminary objection by Defendants Cole and Billings for legal insufficiency concerning Count v. of the Complaint is sustained and that Count is stricken. Defendants' preliminary objections in the nature of demurrer regarding Plaintiffs' claims for punitive damages are overruled.

### ORDER OF COURT

AND NOW, this 11th day of March, 2020, this case being before the Court for disposition of the Preliminary Objections filed on behalf of the defendants, Butler Memorial Hospital, Mailinn E. Wong-Perez, M.D., and Neha S. Desai, M.D., and the Preliminary Objections to Complaint filed on behalf of the defendants, Andrew Cole, M.D., and Linda Billings, FNP-BC, the Court having conducted a complete and thorough review of the record, it is hereby ORDERED, ADJUDGED and DECREED as follows:

1. The Preliminary Objection of Butler Memorial Hospital, Mailinn E. Wong-Perez, M.D., and Neha S. Desai, M.D., for lack of specificity pursuant to Pa.R.C.P. No. 1019 is OVERRULED.

2. The Preliminary Objection of Butler Memorial Hospital, Mailinn E. Wong-Perez, M.D., and Neha S. Desai, M.D., in the nature of a demurrer concerning the claim for corporate negligence is SUSTAINED and the portions of Count VI asserting that cause of action are stricken. Any claim of negligence against Butler Memorial Hospital shall proceed on a theory of vicarious liability only.

3. The Preliminary Objection raised by Defendants

Cole and Billings in the nature of a demurrer as it relates to the negligence claim against Defendant Billings is SUSTAINED and Count v. is STRICKEN.

4. Defendants' Preliminary Objection in the nature of a demurrer in regards to Plaintiffs' requests for punitive damages is OVERRULED.

5. Defendants are granted twenty (20) days from the date this Order is docketed to file an answer to the Complaint.

6. The Prothonotary is directed to serve a copy of this Order of Court upon all counsel of record and all unrepresented parties at their last known address.

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### **In re: JM1 & JM2**

#### *Termination of parental rights — Parental duties — Bonding analysis*

Termination of parental rights was in the best interests of the children, because the parents were either unable or unwilling to engage in services to assist them in performing their parental duties.

Mother and father were the parents of two minor children, JM1 and JM2. Lycoming County Children & Youth Services removed the children from mother's home in October 2018. Mother had a history of drug abuse. Father had not seen the children for at least three years, and he had an indicated report of sexual abuse against JM1. The court awarded physical and legal custody of the children to the agency. Father was allowed no contact with the children until he completed a psychological evaluation. Mother was granted supervised visits with the children, but she failed to appear for these visits, so the agency eventually sought and obtained an order allowing it to discontinue mother's supervised visits.

The agency filed a petition for the involuntary termination of parental rights of both parents. Father did not appear for the hearing because he was hospitalized for psychiatric treatment. Previously, father had experienced a stroke as the result of drug use, and he also suffered from