IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA

CIVIL ACTION

ANN CASTRO AND DAVID CASTRO, her husband, Plaintiff	:	
v.	:	No. 06-2746
KAILASH MAKHIJA, M.D., DR. MAKHIJA & ASSOCIATES, AND KANWAL S. KHAN, M.D., Defendants	:	

Civil Law – Medical Malpractice – Punitive Damages – Vicarious Liability

1. For punitive damages to be imposed, Defendant's conduct must be not only unreasonable, it must be outrageous. Outrageous conduct is that undertaken with a bad motive, with a willingness to inflict injury, or with a conscious indifference to whether injury is caused.

2. Conduct subject to the imposition of punitive damages is different not only in degree but in kind from conduct which is negligent, evincing a different state of mind on the part of the tortfeasor. For punitive damages to exist, Defendant's conduct must be willful, wanton, or in reckless indifference to the rights of others.

3. Willful misconduct is characterized by an intent to cause harm; wanton misconduct by conduct that is knowingly done; and reckless misconduct (necessary to support an award of punitive damages) by conduct that displays a conscious indifference to the consequences.

4. Two types or forms of reckless misconduct exist, each exhibiting a different state of mind: (1) where the actor knows, or has reason to know, of facts which create a high degree of physical harm to another, and deliberately proceeds to act, or to fail to act, in conscious disregard of, or indifference to, that risk; (2) where the actor has such knowledge, or reason to know, of the facts, but does not realize or appreciate the high degree of risk involved, although a reasonable man in his position would do so. Only the first form of reckless misconduct, where the Defendant subjectively appreciates the risk of harm to

which the Plaintiff is exposed and acts, or fails to act, in conscious disregard of that risk, will support an award of punitive damages.

5. Whether the evidence is sufficient to support an award of punitive damages and should be submitted to the jury is, in the first instance, a question of law for the court.

6. In the context of professional liability claims, absent facts evidencing outrageous conduct obvious even to a layperson, expert testimony is necessary to establish whether the professional's conduct is outrageous.

7. Where medical malpractice has been alleged, and Plaintiff's experts identify a risk of which the Defendant physician was aware (here the presence of an abdominal abscess) and opined that the failure to provide certain treatment (here the administration of antibiotics and drainage) is a substantial deviation from the standard of professional care owed to the Plaintiff, exhibiting a conscious or reckless disregard of the risk of further infection, Defendant's motion for partial summary judgment as to Plaintiff's claim for punitive damages will be denied.

8. For one professional to be subject to the payment of punitive damages attributable to the willful, wanton or reckless misconduct of another professional, the agent must not only be subject to the principal's control or right of control with respect to the work to be done and the manner of performing, but such work must be performed on the business of the principal or for his benefit. Were the latter element not a prerequisite, the right to supervise the work and the manner of performance alone would subject a supervisory employee to liability for the negligent act of another employee even though he is neither the superior nor master of that employee.

9. Absent unusual circumstances, a primary care physician who consults with a specialist concerning a patient's care is not the agent of the specialist who neither controls nor has the right to control the care provided by the primary care physician.

10. Absent unusual circumstances, where one specialist covers for another, with the covering physician free to use his own discretion, knowledge and skill in the patient's care, without any control, interference or input from the treating physician, the relationship between the two is

that of an independent contractor. Hence, no liability is imposed on the treating specialist for the conduct of the covering physician.

11. With respect to the imposition of punitive damages, Section 505 (c) of the MCare Act creates a vicarious liability standard which is more demanding than that set forth in the common law. Under the MCare Act, before vicarious liability for punitive damages may be imposed upon a principal, there exists an element of scienter: the principal must have known of and allowed the conduct by its agent that resulted in the award of punitive damages.

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v.	:	No. 06-2746
KAILASH MAKHIJA, M.D., DR. MAKHIJA & ASSOCIATES, AND KANWAL S. KHAN, M.D., Defendants	:	

Michael J. Foley, Esquire	Counsel for Plaintiffs
John R. Hill, Esquire	Counsel for Dr. Makhija and Dr. Makhija & Associates
Paul F. Laughlin, Esquire	Counsel for Dr. Khan

MEMORANDUM OPINION

Nanovic, P.J. – October 26, 2010

In 2004, Ann Castro's life was changed forever, because, she contends, of the medical care she received while a patient at the Gnaden Huetten Memorial Hospital. Liability of the Defendant, Kailash Makhija, M.D., for professional medical

malpractice is premised upon principles of both direct and vicarious liability. Dr. Makhija is a trained physician, board certified in gynecology and obstetrics. Mrs. Castro (hereinafter referred to as "Plaintiff")[1] claims as well that Dr. Makhija is liable for punitive damages both for his own conduct and that of other physicians allegedly acting subject to his control and for his benefit. Plaintiff's claim for punitive damages is the subject of Dr. Makhija's instant motion for partial summary judgment.

PROCEDURAL AND FACTUAL BACKGROUND

On August 21, 2004, Ann Castro appeared at the emergency room of the Gnaden Huetten Memorial Hospital with complaints of abdominal pain. A CAT scan of her abdomen and pelvis showed a lobulated lesion in the right lower quadrant suspicious for an ovarian cyst. The following day, Dr. Makhija operated on Plaintiff, performing a diagnostic laparoscopy, which was converted to a formal laparotomy, followed by lysis of adhesions, a partial omentectomy, and a bilateral oophorectomy. Plaintiff was discharged home on August 26, 2004.

Within hours of her discharge, Plaintiff was readmitted to the hospital complaining of right lower quadrant

[1] For ease of discussion, Ann Castro is identified in this Opinion as the Plaintiff since the principal claims are those of Mrs. Castro. For completeness, we note here that Mrs. Castro's husband, David Castro, is also a named Plaintiff. His claim for loss of consortium is derivative from that of his wife's.

pain. A repeat CAT scan on August 26, 2004, revealed an irregular shaped fluid collection in the right lower quadrant. This collection was initially thought to be a hematoma; it did not appear to contain gas.

Given the possibility of an infection, Plaintiff was placed on antibiotics. This was increased to triple broad-spectrum antibiotics on August 27, 2004. The plan was for bed rest and to continue antibiotics and fluids, with a repeat CAT scan in several days. Dr. Kanwal Khan, an associate of Dr. Makhija's who was assisting Dr. Makhija in his treatment of Plaintiff, suggested percutaneous drainage if the fluid collection persisted on the repeat CAT scan.

During the next several days, Plaintiff's signs and symptoms varied. At times her white blood cell count was normal or near normal, she was afebrile, and her clinical evaluation was good. At other times, she exhibited signs of intra-abdominal sepsis as shown by fevers and a rise in her white blood cell count. That an abscess should be considered given Plaintiff's increased white blood cell count and fever was noted in Plaintiff's progress notes of August 28, 2004, by Dr. Deborah Smith, a family doctor covering for Dr. Patrick Hanley, Plaintiff's family physician.

A CAT scan of Plaintiff's abdomen and pelvis taken on August 30, 2004, suggestive of developing abscesses, depicted a

focal fluid attenuation with air fluid level in the right lower posterior abdomen, extending into the right pelvis, and a second focal fluid collection with air bubbles in the posterior of the midline of the pelvis. Close follow up was recommended. The radiologist report noted that Dr. Makhija was consulted.

The standard of care for the treatment of intra-abdominal abscesses, according to Plaintiff's experts, requires drainage of the abscesses in addition to the administration of triple antibiotics.[2] No drainage took place during the period between August 26 and August 30, 2004, and none occurred between August 30, 2004, and Plaintiff's hospital discharge on September 5, 2004.[3] In consequence, Plaintiff contends, the infection in

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[2] According to Plaintiff, abscesses are not effectively treated using triple antibiotics alone since antibiotics cannot penetrate the capsule of the abscess which is avascular. Therefore, in order for the antibiotics to reach the abscess, surgical drainage is necessary to remove the abscess cavity fluid (pus).

[3] Prior to this discharge, Dr. Makhija last saw Plaintiff on the morning of September 2, 2004. Dr. Richard Miller, an experienced gynecologist/obstetrician who was covering for Dr. Makhija over the weekend of September 3 through September 5, 2004, cleared Plaintiff for gynecologic discharge on Saturday, September 4, 2004. Dr. Miller began covering on the evening of September 3, 2004, sometime after 4:00 P.M., and covered for Dr. Makhija until Monday morning at 8:00 A.M. Plaintiff was discharged from an overall medical standpoint by Dr. Hanley, her family physician, on September 5, 2004.

Dr. Hanley is a board certified physician in internal medicine. He was the admitting physician on August 26, 2004, and oversaw Plaintiff's general medical care while in the hospital. Dr. Hanley deferred to Dr. Makhija and Dr. Miller with respect to her gynecological care.

In his progress notes of September 2, 2004, Dr. Hanley contemplated ordering a CAT scan the following morning depending on the results of lab studies still to be taken. When those studies showed an improvement in Plaintiff's condition, Dr. Hanley decided a further CAT scan was unnecessary. As evidenced by Dr. Makhija's progress notes on September 2, 2004, Dr. Makhija erroneously interpreted Dr. Hanley's September 2, 2004, progress notes as ordering a CAT scan for September 3, 2004, rather than what Dr. Hanley wrote: to consider the possibility of a repeat CAT scan after the results of further lab studies were known.

her abdomen and pelvis went unchecked, advancing such that surgical intervention became mandatory by the time Plaintiff was again readmitted to the hospital on September 9, 2004, after experiencing a sudden onset of bloody vaginal discharge and abdominal pain.

A laparotomy was performed the same date as Plaintiff's readmission by Dr. Michael Martinez, a general surgeon, to drain what he suspected were intra-abdominal and pelvic abscesses. By this time inflammation and infectious changes within the peritoneal cavity, complicated by significant preexisting adhesions, made dissection during the surgery extremely difficult, leading to vascular and bowel injury. On account of an injury to the proximal superior mesenteric artery, devascularization of a significant portion of the bowel occurred, which subsequently necessitated a massive small bowel resection. As a result, the Plaintiff today suffers from short gut syndrome, short bowel syndrome, recurrent dehydration, intractable diarrhea, anemia, B-12 deficiency, malnutrition, chronic pain, lethargy, weakness, and depression.

Plaintiff contends that Dr. Makhija breached the standard of care in failing to timely drain the abdominal and pelvic abscesses and that this negligence was the cause of the complications which followed. Plaintiff further contends this delay exhibited willful, wanton, or reckless indifference to

Plaintiff's care warranting the award of punitive damages under Section 505 of the Medical Care Availability and Reduction of Error (MCARE) Act, 40 P.S. § 1303.505 (2002). Before us is Dr. Makhija's motion for partial summary judgment asking us to reconsider our prior decision allowing Plaintiff's claim for punitive damages to stand.

DISCUSSION

Punitive Damages Generally

"As the name suggests, punitive damages are penal in nature and are proper only in cases where the defendant's actions are so outrageous as to demonstrate willful, wanton or reckless conduct." Hutchison v. Luddy, 870 A.2d 766, 770 (Pa. 2005). "Punitive damages are awarded only for outrageous conduct, that is, for acts done with a bad motive or with a reckless indifference to the interests of others." Chambers v. Montgomery, 192 A.2d 355, 358 (Pa. 1963). It is this mental state which justifies the award of damages whose purpose is to punish the defendant and deter the reoccurrence of similar conduct in the defendant and others. Punitive damages are not compensatory. "Punitive damages may not be awarded for conduct which constitutes ordinary negligence such as inadvertence, mistake and errors of judgment." Martin v. Johns-Manville

Corp., 494 A.2d 1088, 1097 (Pa. 1985) (plurality opinion), *abrogated on other grounds*, Kirkbride v. Lisbon Contractors, Inc., 555 A.2d 800 (Pa. 1989) (overturning rule that punitive damages must bear reasonable relationship to compensatory damages). Moreover, "punitive damages are an extreme remedy available in only the most exceptional matters." Phillips v. Cricket Lighters, 883 A.2d 439, 445 (Pa. 2005).

The reprehensibility of the type of conduct required to support an award of punitive damages is best understood by examining what is meant by willful and wanton misconduct, or reckless indifference to the rights of others. In Evans v. Philadelphia Transportation Company, the Pennsylvania Supreme Court stated:

> [W]ilful misconduct means that the actor desired to bring about the result that followed, or at least that he was aware that it was substantially certain to ensue. This, of course, would necessarily entail actual prior knowledge of [another's] peril.

212 A.2d 440, 443 (Pa. 1965). As defined in Evans, "the term 'willful misconduct' is synonymous with the term 'intentional tort'". *See* King v. Breach, 540 A.2d 976, 981 (Pa.Cmwlth. 1988).

The Evans court further distinguished "wanton misconduct" from "willful misconduct" by stating:

> Wanton misconduct, on the other hand, means that the actor has intentionally done an act of an unreasonable character, in disregard of a risk

> known to him or so obvious that he must be taken to have been aware of it, and so great as to make it highly probable that harm would follow. It usually is accompanied by a conscious indifference to the consequences . . . .

212 A.2d at 443. It is not necessary for the tortfeasor to have actual knowledge of the other person's peril to constitute wanton misconduct.

> [I]f the actor realizes *or* at least has knowledge of sufficient facts to cause a reasonable man to realize the existing peril for a sufficient period of time beforehand to give him a reasonable opportunity to take means to avoid the accident, then he is guilty of wanton misconduct if he recklessly disregards the existing danger.

Id. at 444. "Negligence consists of inattention or inadvertence, whereas wantonness exists where the danger to the plaintiff, though realized, is so recklessly disregarded that, even though there be no actual intent, there is at least a willingness to inflict injury, a conscious indifference to the perpetration of the wrong." Lewis v. Miller, 543 A.2d 590, 592 (Pa.Super. 1988).

Finally, with respect to "reckless indifference" the degree of culpability required to sustain an award of punitive damages was considered in Martin, 494 A.2d at 1097. There, the Supreme Court first noted that Section 500 of the Restatement (Second) of Torts sets forth two different states of mind requisite for reckless indifference: (1) "where the 'actor knows, or has reason to know, . . . of facts which create a high

degree of risk of physical harm to another, and deliberately proceeds to act, or to fail to act, in conscious disregard of, or indifference to, that risk;'" and (2) "where the 'actor has such knowledge, or reason to know, of the facts, but does not realize or appreciate the high degree of risk involved, although a reasonable man in his position would do so.'" Martin, 494 A.2d at 1097 (quoting Restatement (Second) of Torts § 500 (1965) Comment *a*).[4] The first state of mind "demonstrates a higher degree of culpability than the second on the continuum of mental states which range from specific intent to ordinary negligence. An 'indifference' to a known risk under Section 500 is closer to an intentional act than the failure to appreciate the degree of risk from a known danger." Id. The second is premised on a "reasonable man standard."

Only the existence of the first state of mind described is sufficient to create a jury question on the issue of punitive damages. Only if a defendant is conscious of the risk and appreciates it can he be deterred from such conduct. *See* id. at 1098 n.12. "Therefore, an appreciation of the risk

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[4] Section 500 of the Restatement (Second) of Torts defines 'Reckless Disregard of Safety' as follows:

> **The actor's conduct is in reckless disregard of the safety of another if he does an act or intentionally fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man to realize, not only that his conduct creates an unreasonable risk of physical harm to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent.**

Restatement (Second) of Torts § 500 (1965).

is a necessary element of the mental state required for the imposition of such damages." Id. As a consequence, "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." *See* Hutchison, 870 A.2d at 772 (summarizing and following the rationale of Martin).

"[W]hen assessing the propriety of the imposition of punitive damages, the state of mind of the actor is vital." Hutchison, 870 A.2d at 770. As defined, conduct which is willful, wanton, or in reckless indifference to the rights of others, is different not only in degree but in kind from conduct which is negligent, or even grossly negligent, evincing a different state of mind on the part of the tortfeasor. *See* Kasanovich v. George, 34 A.2d 523, 525 (Pa. 1943). Each marks a deviation from the standard of care so egregious that there exists, at a minimum, a subjective willingness to inflict injury. For punitive damages to be imposed, the conduct must be not only unreasonable, it must be outrageous.[5]

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[5] This requirement for punitive damages in medical malpractice cases has been codified by statute. Section 505 of the MCARE Act, Punitive Damages, provides in pertinent part as follows:

> **(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**

Direct Liability

The facts presented by Plaintiff do not support a finding that Dr. Makhija intended to cause Plaintiff harm or that he knew to a virtual certainty that harm would result from his treatment of Plaintiff.[6] Dr. Makhija did not act maliciously or with evil motive. His conduct cannot fairly be said to be willful. Nor does Plaintiff contend it was.

With respect to the state of mind necessary to impose punitive damages for wanton misconduct or behavior which exhibits reckless indifference[7], Plaintiff's evidence most

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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.

(b) Gross negligence. – A showing of gross negligence is insufficient to support an award of punitive damages.

40 P.S. § 1303.505 (2002). "This language tracks the test for punitive damages discussed in the case law." Scampone v. Grane Healthcare Company, 11 A.3d 967, 992 (Pa.Super. 2010). Both Section 505 of the MCARE Act and case law emphasize that "a showing of mere negligence, or even gross negligence, will not suffice to establish" a claim for punitive damages. Phillips v. Cricket Lighters, 883 A.2d 439, 445 (Pa. 2005).

[6] Whether the facts are sufficient to permit an award of punitive damages is a question of law. *See* Martin v. Johns-Manville Corp., 494 A.2d 1088, 1098 (Pa. 1985) (plurality opinion) ("[T]he trial judge must determine whether the plaintiff has presented sufficient evidence to support a punitive damages claim, i.e., facts from which the jury might reasonably conclude that the preponderance of the evidence establishes outrageous conduct by the defendant."), *abrogated on other grounds*, Kirkbride v. Lisbon Contractors, Inc., 555 A.2d 800 (Pa. 1989) (overturning rule that punitive damages must bear reasonable relationship to compensatory damages); *see also* Lazor v. Milne, 499 A.2d 369, 370 (Pa.Super. 1985) ("It is for the court to determine, in the first instance, whether the defendant's conduct may reasonably be regarded as so extreme and outrageous so as to permit recovery.").

[7] Wanton misconduct, as already stated, does not require actual knowledge of the other's danger if the risk is "so obvious that [the defendant] must be taken to have been aware of it . . . ." Evans v. Philadelphia Transportation Co., 212 A.2d 440, 443 (Pa. 1965); *see also* Weaver v. Clabaugh, 388 A.2d

favorably viewed permits the inference that Dr. Makhija was aware that Plaintiff likely had an abdominal abscess, that it had not responded to conservative treatment with antibiotics, and that drainage, in addition to the continued use of antibiotics, was the recommended course of treatment to avoid the further spread of infection. Dr. Makhija was aware, at least as of August 30, 2004, when he had received the radiologist's report of the same date and spoken with the radiologist regarding that report, that Plaintiff's most likely diagnosis was an abscess. By then the fluid collection, first observed on August 26, 2004, had progressed from being irregularly shaped, without gas, to being two separate circumscribed fluid collections, with air, a clear sign of infection. Dr. Makhija was also familiar with the textbook "Berek & Novak's Gynecology," which he recognized as authoritative, and which provides that the "[s]tandard therapy for intra-abdominal abscess is evacuation and drainage, combined with appropriate parenteral administration of antibiotics."

1094, 1096 (Pa.Super. 1978) ("[T]here are some dangers which are so obvious or well known that all adults of normal intelligence will be charged with their knowledge."). The law permits "an inference to be drawn that one who looks cannot say that he did not see that which he must have seen." Evans, 212 A.2d at 445.

Wanton misconduct is usually accompanied by either a conscious indifference to the consequences or a reckless disregard of a danger which was or should have been realized from the known facts. *See* id. at 443-44. By incorporating recklessness into the equation for wanton misconduct, the distinction between what is reckless conduct sufficient to support an award of punitive damages and what is wanton misconduct is hopelessly blurred. As noted in Evans, the conduct described in Section 500 of the Restatement (Second) of Torts is often called "wanton or willful misconduct" in judicial opinions. Id. at 444 n.5.

JONATHAN S. BEREK, BEREK & NOVAK'S GYNECOLOGY 698 (14th ed., Wolters Kluwer Health 2006).

The critical question in this case is whether Dr. Makhija consciously or recklessly disregarded the risk posed by an abdominal abscess in his treatment of Plaintiff. More specifically, Plaintiff contends that the failure to begin drainage by August 30, 2004, if not earlier, was inexcusable. In essence, Plaintiff contends that Dr. Makhija not only breached the applicable standard of care, but that such breach was an extreme, substantial deviation from the standard of professional care which he owed to Plaintiff. With respect to the evidentiary basis required before a factfinder can intelligently evaluate whether a physician has acted in accordance with the requisite standard of care, in the absence of that which is obvious even to a layperson, we believe such determination requires expert testimony. *Cf*. Winschel v. Jain, 925 A.2d 782, 789 (Pa.Super. 2007), *appeal denied*, 940 A.2d 366 (Pa. 2008)..

Here, the evidence before us indicates that Plaintiff's symptoms, at times, worsened while she was receiving antibiotics, and also, at times, showed improvement. The evidence also shows that the medication Plaintiff was receiving can mask the signs of an infection. Of particular significance, the CAT scans taken on August 26, 2004 and August 30, 2004,

showed a marked worsening of Plaintiff's condition: from a single irregular shaped fluid collection, without gas, to two separate focused collections, each with gas.

Dr. Paul Gryska, a general and laparoscopic surgeon presented by Plaintiff, in his report dated February 10, 2010, states that "an intra-abdominal abscess cannot be treated with IV antibiotics alone, but requires drainage. Failure to recognize this is indeed well beneath the standard of care." Later in his report, Dr. Gryska states: "While IV antibiotics can contain initial growth and forestall worsening symptoms, there is no acceptable treatment course except for drainage. Failure to act here is beneath the standard of care and is reckless given Mrs. Castro's presentation." Dr. Gryska next observes that "all of the information mandating drainage of the abscesses was known or readily available to . . . Dr. Makhija," yet, "Dr. Makhija took no steps to pursue drainage which was the most important procedure for treating [Plaintiff's] abscesses." Near the end of his report, Dr. Gryska concludes that Dr. Makhija "recklessly failed to act on [the August 30, 2004, CAT scan], despite the fact that these abscesses mandated drainage."

Given the complexities of the human body and the challenges in interpreting divergent data, we have no doubt Dr. Makhija faced difficult decisions in his treatment of Plaintiff. Nevertheless, under the standard by which we must judge a motion

for summary judgment, examining the record in the light most favorable to the nonmoving party and resolving all doubts against the moving party, the evidence is sufficient here to show not only that Dr. Makhija appreciated the risk of intra-abdominal abscesses, but that he either consciously or recklessly disregarded this risk and the relevant standard of care in his treatment of Plaintiff.

Vicarious Liability

Our discussion does not end here since Plaintiff further claims that both Dr. Hanley and Dr. Miller are agents of Dr. Makhija for whose conduct Dr. Makhija is responsible. Although not parties to this suit, to the extent Plaintiff claims Dr. Hanley's and Dr. Miller's conduct was willful, wanton, or reckless, Plaintiff argues Dr. Makhija is subject to the payment of punitive damages.

"A principal may be held vicariously responsible for the acts of his agent where the principal controls the manner of performance and the result of the agent's work." Strain v. Ferroni, 592 A.2d 698, 704 (Pa.Super. 1991).

> In determining whether a person is the servant of another it is necessary that he not only be subject to the latter's control or right of control with regard to the work to be done and the manner of performing it but that this work is to be performed on the business of the master or for his benefit. [Citation omitted.] Actual control, of course, is not essential. It is the right to control which is determinative. On the other hand, the right to supervise, even as to

> the work and the manner of performance, is not sufficient; otherwise a supervisory employee would be liable for the negligent act of another employee though he would not be the superior or master of that employee in the sense the law means it. [Citations omitted.]

Id. (citations omitted in original) (quoting Yorston v. Pennell, 153 A.2d 255, 259-60 (Pa. 1959)). The principle of vicarious liability which binds a principal for the acts of his agent extends equally to the recovery of punitive damages provided the actions of the agent were within the course and scope of the agency relationship. *See* Shiner v. Moriarty, 706 A.2d 1228, 1240 (Pa.Super. 1998), *appeal denied*, 729 A.2d 1130 (Pa. 1998).

Under this standard, Dr. Makhija is not responsible for Dr. Hanley's conduct. Dr. Hanley was Plaintiff's family physician overseeing her general care while in the hospital. Dr. Hanley readily and understandably admitted in his depositions that he had not been trained as a gynecologic specialist, had never served a residency in gynecology, and that as an internist he was not trained to manage post-operative complications arising from gynecological surgery.

As between the two, Dr. Makhija was the specialist regarding Plaintiff's gynecological care and Dr. Hanley the primary care physician concerning her general care. Without question, Dr. Hanley exchanged information with Dr. Makhija, discussing her condition and treatment with him. However, it was Dr. Makhija and his associate, Dr. Khan, who were primarily

responsible for treating Plaintiff for the complications of her surgery on August 22, 2004, and it was Dr. Miller, who was covering for Dr. Makhija, who discharged Plaintiff on September 4, 2004, from a gynecologic standpoint.

There is no evidence that Dr. Makhija controlled, or had the right to control or supervise, Dr. Hanley's care of Plaintiff. The nature of the relationship which existed between the two, that of a general practitioner and a specialist with whom he consults, is not the type of arrangement contemplated by the cases which deal with principal-agency law. *See* Winschel, 925 A.2d at 796-97 (discussing the relationship between specialists and family doctors with specialists being held to a higher standard of care as a matter of law).

The relationship between Dr. Makhija and Dr. Miller was of a different type than that which existed between Dr. Makhija and Dr. Hanley. Here, both were specialists in the same field, with Dr. Miller covering for Dr. Makhija in Dr. Makhija's absence. Ordinarily, this arrangement would not impose any liability on Dr. Makhija for Dr. Miller's decisions. Dr. Miller, the covering doctor, would be free to use his own discretion, knowledge, and skill in the care of Plaintiff, without any control, interference, or input from Dr. Makhija. Under such circumstances, Dr. Makhija would be neither Dr. Miller's "employer" nor "supervisor." Instead, the relationship

would be one of an independent contractor with no liability attributed to Dr. Makhija for Dr. Miller's conduct. *Cf.* Strain, 592 A.2d at 705.

The facts in this case do not make such a clear-cut differentiation. Dr. Miller testified that Dr. Makhija, as the treating physician, provided him with a detailed plan for Plaintiff's care and had the right to tell him what to do and how to treat his patients. Moreover, Dr. Miller was not paid for his services. All billing for Plaintiff's gynecological treatment of Plaintiff, including that provided by Dr. Miller, went through Dr. Makhija's office, as part of Dr. Makhija's business. Given these facts, we cannot say as a matter of law that Dr. Miller was not acting on Dr. Makhija's behalf, subject to his control, and for the financial benefit of Dr. Makhija's business or medical practice.

Nevertheless, for two reasons Dr. Miller's conduct does not subject Dr. Makhija to punitive damages. First, there is an absence of evidence that Dr. Miller acted willfully, wantonly, or with reckless indifference to Plaintiff's care. Dr. Miller first saw Plaintiff on September 4, 2004. Sometime in advance of this meeting, Dr. Makhija reviewed Plaintiff's medical condition and treatment with Dr. Miller and provided Dr. Miller with a treatment plan. There is nothing to suggest that Dr. Miller acted contrary to this plan. Further, because Dr.

Hanley decided against having an additional CAT scan taken on the morning of September 3, 2004, there was no new CAT scan report for Dr. Miller to review. Moreover, at the time of Dr. Miller's gynecological discharge, Plaintiff's symptoms were improved: she was afebrile, her white blood cell count was down, and her pain was much less than it had been before. These facts do not evidence a clear violation of the standard of care Dr. Miller owed to Plaintiff, nor has Plaintiff presented any expert opinion that Dr. Miller breached the relevant standard of care or that such breach, if any, was so substantial as to be egregious or in utter and reckless disregard of Plaintiff's well-being. *See, e.g.,* Medvecz v. Choi, 569 F.2d 1221, 1227-30 (3d Cir. 1977) (abandoning a patient on the operating table for a lunch break without securing a suitable replacement sufficient to state a claim for punitive damages); Hoffman v. Memorial Osteopathic Hosp., 492 A.2d 1382, 1386-87 (Pa.Super. 1985) (concluding that a viable claim for punitive damages existed against a physician who refused to assist a patient with neurological paralysis who had fallen to the floor following an examination, and who also directed hospital staff not to provide assistance, causing the patient to be without assistance and to remain on the floor for two hours).

In addition, Dr. Makhija anticipated and expected that a follow up CAT scan would be taken on the morning of September

3, 2004, before any decision was made to discharge Plaintiff. There is no evidence that Dr. Makhija knew that Dr. Hanley had decided against a repeat CAT scan or that Dr. Miller would discharge Plaintiff without the benefit of an updated CAT scan. As Judge Nealon observed in Wagner v. Onofrey:

> Athough Sections 505(a) and (b) of the MCare Act are consistent with well established Pennsylvania case law, Section 505(c) creates a vicarious liability standard which is more demanding than that set forth in the common law. Under Pennsylvania decisional law, "there is no requirement that an agent commit a tortious act at the direction of his principal, nor must the principal ratify the act, in order for punitive damages to be imposed on [the principal]." Shiner v. Moriarty, 706 A.2d 1228, 1240 (Pa.Super. 1998), *app. denied,* 556 Pa. 711, 729 A.2d 1130 (1998). In contrast, Section 505(c) of the MCare Act provides that "[p]unitive damages shall not be awarded against a health care provider who is only vicariously liable for the actions of its agent that caused the injury unless it can be shown by a preponderance of the evidence that the party knew of and allowed the conduct by its agent that resulted in the award of punitive damages." 40 P.S. § 1303.505(c). Thus, by virtue of this statutory provision ". . . and its injection of a *scienter* element into the *respondeat superior* equation, a health care provider may not be vicariously liable for exemplary damages unless it had actual knowledge of the wrongful conduct of its agent and nevertheless allowed it to occur." Dean, 46 D. & C. 4th at 344 (analyzing identical language in 40 P.S. § 1301.812-A(c)(*repealed*)).

2006 WL 3704801, at *4 (Lackawanna Co. 2006).

CONCLUSION

The facts of this case present a jury question on whether Dr. Makhija acted wantonly or recklessly in his care of Plaintiff. The evidence, if believed, supports a finding either that Dr. Makhija knew Plaintiff had an abdominal abscess, or that such knowledge can be imputed to him from the facts and information of which he was aware, and that Dr. Makhija recklessly disregarded fundamental principles of treatment in failing to drain the abscess to protect Plaintiff against the spread of infection. In contrast, the evidence is insufficient to charge Dr. Makhija with vicarious liability for punitive damages. Accordingly, we have denied Dr. Makhija's Motion for Partial Summary Judgment on the issue of punitive damages.

BY THE COURT:

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P.J.