FILED IN CLERK'S OFFICE
U.S.D.C. Atlanta
JUL 22 2005
LUTHER THOMAS, Clerk
By: Deputy Clerk

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
NEWNAN DIVISION

WILLIAM DAVID MORRISON and KIM L. MORRISON,

Plaintiffs,

v.

BOB B. MANN, JR., M.D., LISA KAY DOUTHITT PARSONS, R.N., and PAPP CLINIC, P.C.,

Defendants.

CIVIL ACTION FILE

NO. 3:04-CV-23-WBH

ORDER

Before the Court are two motions for partial summary judgment on the issue of punitive damages [32, 37] and two motions to strike the affidavit of Gerardo Lionel Sotomayor, M.D. [65, 66]. Also before the Court are Plaintiffs' motions for leave to file excess pages [80, 81], which are more properly titled motions for reconsideration of the Court's Order dated June 9, 2005.

I. The motions to strike

In their initial disclosures, Plaintiffs identified Dr. Gerardo Lionel Sotomayor as a fact witness who had knowledge about the medical condition of Mr. Morrison's wife, Kim Morrison, which necessitated the testing of Mr. Morrison for HPV. Dr. Sotomayor was not identified as an expert in those initial disclosures. At the same

time, Plaintiffs identified Dr. Howard Rottenberg as an expert who had knowledge about the standard of care required for a physician, nurse, and professional corporation providing medical care. The only other expert identified in the initial disclosures was John Lentini, who provided a chemical analysis report.

In response to Defendants' interrogatories, Plaintiffs identified three experts: Dr. Rottenberg, Mr. Lentini, and Dr. Padmashri Komandur Srinivasa. Plaintiffs stated that Dr. Srinivasa had knowledge about the hazardous nature of the substance applied to Mr. Morrison's genitals and about "all aspects of the case." In that same response, Plaintiffs again indicated that Dr. Sotomayor was a fact witness with information about Mrs. Morrison's medical condition.

It was not until Plaintiffs responded to summary judgment – well after the discovery period closed – that Plaintiffs proffered a 185-page affidavit of Dr. Sotomayor which contained his medical opinions about a myriad of topics, including the standard of care. All Defendants have moved to strike Dr. Sotomayor's affidavit. They argue that it should be stricken because it contains his expert opinions, and Dr. Sotomayor was never properly identified as an expert witness.[1]

The Federal Rules require that parties identify their expert witnesses "at the times and in the sequence directed by the court." Fed. R. Civ. P. 26(a)(2)(C). The Local Rules provide that experts must be designated:

---

[1] Additionally, they ask that Dr. Sotomayor be prohibited from providing expert testimony at trial, but the Court will defer ruling on this issue until the pre-trial conference.

> sufficiently early in the discovery period to permit the opposing party the opportunity to depose the expert and, if desired, to name its own expert witness sufficiently in advance of the close of discovery so that a similar discovery deposition of the second expert might also be conducted prior to the close of discovery.

N.D. Ga. R. 26.2(C). If a party does not timely disclose the expert, the Local Rules mandate that the party shall not be permitted to offer the testimony of the expert without Court authorization based upon a showing that the failure to comply was justified. See id.

In response to the motions, Plaintiffs argue that they had to use Dr. Sotomayor as a rebuttal witness to Defendants' expert witness, Dr. Carney, who was not disclosed until the day before the discovery period closed. Dr. Carney, however, was retained by Defendants to provide expert testimony on the issue of damages only. Indeed, at his deposition, Dr. Carney stated that he had been retained to give his opinion about whether the injuries suffered by Mr. Morrison at the PAPP Clinic in 2002 could be the cause of the problems about which Mr. Morrison now complains: a split urine stream, premature ejaculation, and pain. See Carney depo. at 52.

Because the issue of actual damages is not the subject of the pending motions for summary judgment, the Court finds that Plaintiffs' justification for not timely disclosing Dr. Sotomayor as an expert is without factual support. Pursuant to the Local Rules, the Court cannot permit Dr. Sotomayor to provide testimony in response to Defendants' motions for summary judgment on the issue of punitive damages.

The motion to strike, therefore, is granted and the Court has not considered Dr. Sotomayor's affidavit in ruling on the pending summary judgment motions.

II. The motions for partial summary judgment

BACKGROUND[2]

On November 14, 2002, Plaintiff William Morrison was seen by nurse practitioner Lisa Kay Douthitt Parsons ("Nurse Parsons") at the PAPP Clinic for a follow-up visit after his vasectomy. During that appointment, Mr. Morrison indicated that he was interested in being tested for HPV, a virus that causes genital warts. Nurse Parsons then informed Defendant Bob B. Mann, Jr., M.D. ("Dr. Mann") that Mr. Morrison desired an HPV test. Dr. Mann told Nurse Parsons that the "vinegar/3-5% acetic acid test" was an appropriate test for HPV, and he instructed her to use vinegar and gauze.

Unable to find vinegar, Nurse Parsons looked for acetic acid. In a storage cabinet, Nurse Parsons found a bottle labeled "3% Acetic Acid." She did not notice the words "DO NOT USE" written on the back of the bottle. It is undisputed that 3% acetic acid would have been a proper substitute for vinegar, but that, contrary to the indication on the front of the bottle, the bottle did not contain 3% acetic acid; it

---

[2] Because this case is before the Court on Defendants' motion for summary judgment, the Court has viewed the facts in the light most favorable to Plaintiffs, the non-movants. <u>See</u> <u>Hairston v. Gainesville Sun Publishing Co.</u>, 9 F.3d 913, 918 (11th Cir. 1993).

contained a much stronger, more dangerous substance.

Nurse Parsons returned to the room where Mr. Morrison was waiting and proceeded to pour some of the contents of the bottle onto a gauze pad. According to Mr. Morrison, the substance had a strong chemical odor which Nurse Parsons either did not notice, or ignored. Nurse Parsons then applied the saturated gauze to Mr. Morrison's penis and genital area. Within a few seconds of the application of the chemical, Mr. Morrison began complaining of a burning feeling. Nurse Parsons removed the gauze and began irrigating the area. After approximately 15 to 30 second of putting water on the area, she ran out of the room and showed Dr. Mann the bottle. It was only then that she noticed the words "DO NOT USE" on the back. Mr. Morrison had to be rushed to the hospital and suffered serious burns to his genitalia as well as other, related injuries.

Defendants have stipulated that in 1991, another patient undergoing a similar procedure was injured by the same liquid in the same bottle as that used by Nurse Parsons on Mr. Morrison. Dr Mann testified that he kept the mislabeled bottle on the advice of his attorney and so as not to be accused of tampering with evidence. He placed the "DO NOT USE" label on the back of the bottle, and circled the warning with red ink. Although he testified that he placed the bottle on the top shelf of what he considered to be a "clerical cabinet," Nurse Parsons found the bottle stored in the same cabinet as bichloracetic acid, a substance used to treat HPV lesions.

Mr. Morrison and his wife filed suit against Dr. Mann, Nurse Parsons, and the PAPP Clinic, claiming medical malpractice. In their motions for partial summary judgment, Defendants argue that the evidence establishes, as a matter of law, that Plaintiffs cannot make out a case for punitive damages.

DISCUSSION

Summary judgment is proper when no genuine issue as to any material fact is present, and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The movant carries the initial burden and must show that there is "an absence of evidence to support the nonmoving party's case." Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986). "Only when that burden has been met does the burden shift to the non-moving party to demonstrate that there is indeed a material issue of fact that precludes summary judgment." Clark v. Coats & Clark, Inc., 929 F.2d 604, 608 (11th Cir. 1991). The nonmovant is then required "to go beyond the pleadings" and present competent evidence in the form of affidavits, depositions, admissions and the like, designating "specific facts showing that there is a genuine issue for trial." Celotex, 477 U.S. at 324. "The mere existence of a scintilla of evidence" supporting the nonmovant's case is insufficient to defeat a motion for summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986). Resolving all doubts in favor of the nonmoving party, the court must determine "whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented." Id.

Punitive damages are not awarded as a matter of course. Rather, they are awarded only upon a showing that a defendant's actions "showed willful misconduct, malice, fraud, wantonness, oppression, or that entire want of care which would raise the presumption of conscious indifference to consequences." O.C.G.A. § 51-12-5.1(b). Thus, it is not enough to show that the defendant was grossly negligent; a plaintiff must show that the defendant committed either intentional and wilful acts, or acts that exhibit an entire want of care and indifference to the consequences. See MDC Blackshear, L.L.C. v. Littell, 273 Ga. 169, 173 (2000). The issue of whether Plaintiffs may be entitled to an award of punitive damages is a fact intensive inquiry. "Whether a defendant's actions are wilful, wanton, or evince an entire want of care as to authorize punitive damages by clear and convincing evidence under O.C.G.A. § 51-12-5.1 (b) is normally an issue for consideration by a jury." Keith v. Beard, 219 Ga. App. 190, 195 (1995).

Dr. Mann and the PAPP Clinic argue that Dr. Mann's actions in placing a "DO NOT USE" label on the bottle, circling the warning with red ink, and placing the bottle on the top shelf of what he believed to be a clerical cabinet demonstrate that Dr. Mann took specific steps to prevent an incident such as the one that occurred on November 14, 2002. Nurse Parsons, in a separately-filed motion, argues that she had no knowledge that the bottle she found in the cabinet was mislabeled. All Defendants argue that what happened to Mr. Morrison was nothing more than an "unfortunate

accident."

In this case, the Court concludes that Dr. Mann and the PAPP Clinic have failed to carry their initial burden of showing an absence of evidence to support Plaintiffs' claim for punitive damages. Viewed in the light most favorable to Plaintiffs, a reasonable fact finder could conclude that Dr. Mann and the PAPP Clinic's actions, in storing the dangerous substance in a mislabeled bottle in a location where the contents of the bottle could be accessed by staff members such as Nurse Parsons, demonstrate an entire want of care. For this reason, the motion for summary judgment filed by Dr. Mann and the PAPP Clinic is denied. Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986).

As for Nurse Parsons, the Court reaches a different conclusion. The facts before the Court with respect to Nurse Parson's culpability, even when viewed in the light most favorable to Plaintiffs, at most, amount to negligence. There is no evidence whatsoever that she behaved in a willful, malicious, or wanton manner or that her behavior exhibited an entire want of care which would raise the presumption of conscious indifference to the consequences of her actions. Because Plaintiffs have failed to demonstrate that there is a material issue of fact that precludes summary judgment on this issue, Nurse Parson's motion for summary judgment is granted. See Clark v. Coats & Clark, Inc., 929 F.2d 604, 608 (11th Cir. 1991).

CONCLUSION

Dr. Mann and the PAPP Clinic's motion for partial summary judgment [37] is DENIED. Nurse Parson's motion for partial summary judgment [32] is GRANTED. The two motions to strike the affidavit of Gerardo Lionel Sotomayor, M.D. [65, 66] are GRANTED. Plaintiffs' motions for leave to file excess pages [80, 81], which are more properly titled motions for reconsideration, are DENIED.

It is so ORDERED this 22 day of July, 2005.

Willis B. Hunt, Jr.
Judge, United States District Court