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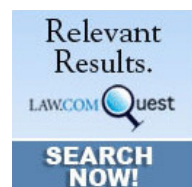
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Deane v. Mount Sinai Hospital, 114984/07
Decided: August 27, 2009

Justice Joan B. Carey
NEW YORK COUNTY
Supreme Court
Justice Carey

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On or about April 1, 2007, Kevin Deane was injured while skiing in Colorado. Mr. Deane suffered a spinal cord injury, and, as a result, was experiencing paralysis. He was first taken to Vail Valley Hospital and was then transferred to Denver Hospital. An MRI and a CT scan were performed, and showed the following: "[m]ultiple vertebral segmentation anomalies with hyperextension injury at C3-C4 and C4-C5 and moderate spinal cord contusion at C3-C4. There is a moderate broad-based disc protrusion at C3-C4, right greater than left, which produces mild anterior spinal cord indentation." On or about, April 2, 2007, Kevin Deane underwent an anterior cervical discectomy and fusion of C3-C5, as well as posterior fusion. The aforementioned surgery involved the placement of a plate and screws into Mr. Deane's cervical spine to provide stabilization. The surgery was performed without complication, and Mr. Deane began to experience neurological improvement. The plan was for Mr. Deane to undergo rehabilitation, with the hope of regaining full function and returning to his job as a fire fighter.

Thereafter, on April 6, 2007, Mr. Deane was discharged from Denver Hospital in stable condition and was transported by air ambulance to the Mount Sinai Hospital (hereinafter "Mt. Sinai"), in New York, where he was to receive rehabilitation services. At the time of his discharge from Denver Hospital and during the flight to Mt. Sinai, Mr. Deane was having difficulty swallowing, requiring suctioning of his secretions. Upon arrival at Mt. Sinai late in the afternoon on April 6, 2007, Adam B. Stein, M.D., a rehabilitation attending physician, admitted Mr. Deane under his services, meaning that he was primarily responsible for Mr. Deane's care. Dr. Stein took a history and performed a physical examination of Mr. Deane, his impression following this examination was that Mr. Deane had decreased mobility, decreased activities of daily living, and difficulty swallowing. Dr. Stein believed Mr. Deane's prognosis for a substantial neurological recovery was quite good, and estimated his length of stay at the rehabilitation facility to be six (6) weeks. However, Dr. Stein had concerns relating to Mr. Deane's difficulty swallowing and ordered a consultation by an ear nose and throat (ENT) specialist. It is noted that Dr. Stein indicated, at his deposition, that he was aware of potential complication of the type of surgery that Mr. Deane underwent that is caused by erosion of hardware placed in the neck. Dr. Stein's shift ended at approximately 7:30 p.m. on April 6, 2007. The weekend on-call attending, Dr. Bryce, was to take over Mr. Deane's care from Dr. Stein the next morning. The attending physician on-call is expected to be physically present at Mt. Sinai on Saturday and Sunday. Notwithstanding, it appears that Dr. Bryce failed to report to work on the morning of Saturday, April 7, 2007. It was later learned during discovery that Dr. Bryce's name was omitted from the list containing the e-mail addresses of physicians receiving the on-call schedule, and, thus, Dr. Bryce was unaware that he was the on-call attending that weekend. According to the deposition of Dr. Steven Flanagan, who was the Vice-Chairman of the Department of Rehabilitation at Mt. Sinai from January of 2000 to March 2008, it was his responsibility to establish schedules for coverage of the physicians in the rehabilitation department. Dr. Flanagan testified that it is expected that two attending physicians be on-call each weekend, and that both on-call attendings are expected to be present at the hospital on Saturday and Sunday. It appears that the other attending on-call that weekend was Dr. Herrera, who was unaware that Dr. Bryce had failed to show up for work, and apparently unaware that half the patients in the rehabilitation facility were not under the care of an attending physician. Dr. Flanagan also testified that it is his expectation that every patient be seen by an attending physician at least once a day, and that the attending physicians make a note of such examination. Dr. Flanagan testified that the physicians in his department are aware of these expectations. With respect to the on-call schedule for attending physicians setting forth their responsibility for weekends, Dr. Flanagan testified that other than sending out the e-mail to the physicians, nothing more is done to make sure that the physicians know when they are required to be at the hospital.

Nurse Awo Sam was the nurse who admitted Mr. Deane on the evening of April 6, 2007. As the admitting nurse, Nurse Sam did an assessment of Mr. Deane at approximately 7:00 p.m., and, at the time of her deposition, she recalled that Mr. Deane was tired, had swelling in his neck, was anxious, had an elevated fever, a high pulse rate and was in pain. During her assessment of Mr. Deane, he was having respiratory difficulties and receiving supplemental oxygen. He also had a cough that was productive of yellow secretions, which, according to Nurse Sam's testimony, could suggest pneumonia or respiratory infection. According to Nurse Sam, during her assessment, Mr. Deane advised her that he was having difficulty swallowing. Nurse Sam testified at some point during her shift, which ended at 7:00 a.m. on the morning of April 6, 2007, she alerted the on-call resident that Mr. Deane had abnormal vital signs, such as an abnormally high fever, high pulse, and high blood pressure.

Dr. Rebecca Brown was the resident on call from 7:00 p.m. on April 6, 2007, until 7:00 a.m. on April 7, 2007. She was a fourth year resident in rehabilitation medicine. During this shift, Dr. Brown was responsible for covering all of the patients on all four floors of the rehabilitation facility, which included spinal cord injured patients, such as Mr. Deane, as well as brain injured patients. She was the only resident physician assigned to the entire rehabilitation facility for that day, where there are approximately 100 patients. These same hundred patients would be cared for by eight or nine attending physicians during the week, in addition to whatever residents, nurses and patient care associates were working in the facility. It is important to note that immediately prior to beginning her shift at the rehabilitation clinic on the evening of April 7, 2007, Dr. Brown worked a 12 hour shift in the outpatient clinic at Mt. Sinai.

Dr. Brown first encountered Mr. Deane when he was examined upon admission by Dr. Stein. At that time, Dr. Brown became aware of Mr. Deane's difficulty swallowing, and was also aware of his respiratory difficulties. At approximately 12:30 a.m. on April 7, 2007, Dr. Brown observed that Mr. Deane had increased difficulty breathing, so she doubled the amount of oxygen he was receiving. At that time, Mr. Deane also had an elevated fever, hoarse breath, and was requesting to sit up to have his chest suctioned to clear out secretions. Additionally, Mr. Deane was also tachycardic, i.e., his heart rate exceeded the normal range. Dr. Brown ordered a stat complete blood count, chem profile and chest x-ray. It appears from the records, and the deposition testimony of Dr. Brown, that she did not see Mr. Deane after approximately 12:30 a.m. on April 7, 2007, and she never notified an attending physician with respect to Mr. Deane's condition. It is noted that the stat chest x-ray that Dr. Brown ordered at approximately 12:30 a.m. on April 7, 2007, was not performed prior to the completion of Dr. Brown's shift. The chest x-ray was ultimately performed at approximately 12:40 p.m. on April 7, 2007. It appears that the x-ray results were not reported, and such results were never sought by any medical provider at Mt. Sinai.

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Dr. Nutini, a second year resident was on duty from 9:00 a.m. on April 7, 2007, until 9:00 a.m. on April 8, 2007. During her 24 hour shift in the rehabilitation facility, she was the sole resident responsible for the care of the patients on all four floors of the facility. It is important to note that upon learning that Mr. Deane was being brought to Mt. Sinai for rehabilitation, Dr. Nutini conducted research relating to patients with hardware in their neck, and learned that erosion of the hardware into the esophagus was a known complication, which can sometimes be life-threatening. Dr. Nutini first saw Mr. Deane at approximately 11:40 a.m. on the morning of April 7, 2007, almost twelve hours after he had last been seen by a physician, i.e., Dr. Brown. At that time, Dr. Nutini was unable to perform a physical examination because Mr. Deane was too agitated. There was an attempt to perform the x-ray ordered the night before by Dr. Brown, and it appears that Mr. Deane became agitated because there was no suction equipment in the x-ray suite, requiring him to be brought back to his room before the x-ray could be completed. As stated above, the chest x-ray was ultimately performed at approximately 12:40 p.m. on April 7, 2007, but the results were not reported.

The ENT consult ordered by Dr. Stein the previous evening was ultimately performed at approximately 5:30 p.m. on April 7, 2007, by Dr. Eunice Park, a resident at Mt. Sinai. Dr. Park was aware that hardware had been placed in Mr. Deane's neck, and was also aware of the potential complication caused by the erosion of the hardware through the esophagus. Dr. Park testified at her deposition that she considered this complication in her differential diagnosis, but due to swelling in the area of the surgical site, Dr. Park was unable to visualize Mr. Deane's esophagus during her physical examination. Dr. Park testified that in order to visualize the esophagus a rigid scope must be used. The use of the rigid scope, however, requires the use of anesthesia in an operating room and also requires the presence of an attending physician. Such examination was not performed, and could not have been performed because there were no attending physicians present at that time. No attending physicians were called for the purposes of performing this examination. According to Dr. Park's testimony, she ruled out the erosion of the esophagus due to the placement of hardware in the neck as the cause of Mr. Deane's difficulty swallowing. Dr. Park testified also that based upon her physical examination of Mr. Deane, as well as his history, she determined that he was not in acute distress.

There is a notation in Mr. Deane's medical records made by Dr. Nutini that relates to her discussions with Dr. Park, following Dr. Park's ENT exam. According to Dr. Nutini's testimony, she thinks she looked in on Mr. Deane around the time she made the aforementioned note. Dr. Nutini believed she discussed Dr. Park's findings with Mr. Deane. The medical records do not indicate that Dr. Nutini saw Mr. Deane at any point after this. Dr. Nutini did testify, however, that she checked Mr. Deane at some point Sunday morning to see how he slept. Dr. Nutini admitted during her deposition that she was not able to do a complete examination of Mr. Deane during her entire 24 hour shift. Dr. Nutini did not make any efforts to contact any attending physician in connection with the condition of Mr. Deane. The next covering physician was Dr. Wang, a fourth year resident. It is unclear if Dr. Wang provided any treatment to Mr. Deane, but it appears that Mr. Deane was not examined by any physician, resident or attending, on Sunday, April 8, 2007.

It is noted that another nurse, Nurse Marie Daniel, was working at Mt. Sinai from Sunday night into Monday morning. Nurse Daniel testified at her deposition that she did not typically work nights at Mt. Sinai, but was asked to work on the night of April 8, 2007, because the facility was short handed. According to Nurse Daniel she had a brief encounter with Mr. Deane at the start of her shift, at approximately 7:00 p.m. on April 8, 2007. She had introduced herself to Mr. Deane and his family, and asked if there was anything that she could do for him. He instructed her to come back in a couple of hours when his family would leave to eat dinner. Nurse Daniel "peeked" in on Mr. Deane at approximately 9:00 p.m., but his family was still in the room. At approximately 10:30 p.m., Mr. Deane informed Nurse Daniel that he was having trouble sleeping. She asked him if he wanted sleep medication, but Mr. Deane advised her he would wait to see if he would be able to fall asleep on his own. At that time, Nurse Daniel examined the skin at the surgical site. When Nurse Daniel checked on Mr. Deane approximately one-half hour to one hour later, he was asleep.

At approximately 2:15 a.m. on April 9, 2007, a patient care associate alerted Nurse Daniel to the fact that Mr. Deane was calling for her assistance. When Nurse Daniel arrived in the room, she observed Mr. Deane cough up a large amount of blood. Mr. Deane was sitting up in bed, suctioning himself at that time. Nurse Sam, who was also working at that time, and went to check on Mr. Deane as well. Nurse Sam similarly observed Mr. Deane sitting up in bed, coughing up blood, and suctioning himself with the suctioning device. Shortly thereafter, Mr. Deane became unresponsive, and a code was called. After a failed attempt to resuscitate Mr. Deane, he was pronounced dead at approximately 2:30 a.m. on April 9, 2007. According to the autopsy report, the cause of death was "HEMORRHAGE AND ASPIRATION OF BLOOD COMPLICATING HARDWARE PLACEMENT FOR TREATMENT OF CERVICAL SPINE INJURY DUE TO BLUNT IMPACT TRAUMA OF HEAD AND NECK." It is noted in the autopsy report sets forth that Mr. Deane was experiencing esophageal erosion. Following Mr. Deane's death, the Department of Health conducted an investigation. Among the several findings made as a result of such investigation were that Mt. Sinai failed to have an attending physician examine Mr. Deane from the time he was admitted on Friday evening, until his death early Monday morning. Further, the Department of Health found because resident physicians are not required to evaluate a patient unless called by a nurse, Mr. Deane was not examined by any physician at all on Sunday.

Plaintiff Valerie Deane, mother of decedent Kevin Deane, commenced the instant action against The Mount Sinai Hospital, Adam B. Stein, M.D., and Mary Katherine Nutini, D.O., s/h/a Marykay Nutini, D.O., on or about November 8, 2007.¹ The complaint asserts causes of actions against all defendants for medical malpractice, wrongful death, as well as a cause of action alleging reckless indifference, which seeks punitive damages. Plaintiff alleges that defendants were negligent, and showed reckless indifference, in connection with the care and treatment rendered to decedent while a patient at Mt. Sinai. Plaintiff specifically alleges that defendants were negligent, and showed reckless indifference, by, inter alia, failing to have attending physicians evaluate and treat decedent, as well as failing to provide proper supervision of inexperienced residents. According to plaintiff, it was such negligence and reckless indifference of defendants that caused the hardware that had been placed in Mr. Deane's neck to erode through his esophagus, and resulted in him drowning in his own blood. Discovery has been completed, a note of issue/certificate of readiness has been filed, and this action is ready to proceed to trial. Defendants presently move for partial summary judgment dismissing any and all claims for punitive damages asserted against them in the complaint.

Defendants seek partial summary judgment dismissing any and all claims for punitive damages asserted in the complaint, arguing that the alleged malpractice does not rise to the threshold of wanton or reckless negligence to support punitive damages. Plaintiff opposes this motion, arguing that issues of fact exist with respect to whether the alleged malpractice is sufficiently egregious to support an award for punitive damages. Punitive damages in medical malpractice actions are recoverable only where a defendant's conduct is wantonly dishonest, grossly indifferent to patient care, or malicious and/or reckless. See [Schiffer v. Speaker](#), 36 AD3d 520 [1st Dept. 2007]; see also [Graham v. Columbia-Presbyterian Medical Center](#), 185 AD2d 753 [1st Dept. 1992][Court denies summary judgment with respect to a punitive damages claim in an action for medical malpractice because issue of fact existed as to whether the defendant doctor's actions were aggravated beyond mere negligence]; [Sultan v. King's Highway Hospital Center](#), 167 AD2d 534 [2d Dept. 1990][Court held that punitive damages in a medical malpractice action were recoverable where a defendant's conduct constitutes gross negligence]. Courts have held that where the evidence can demonstrate that a defendant fails to render medical assistance to a patient in need of emergency treatment, and, in effect, abandons such a patient, punitive damages may be awarded. See [Graham v. Columbia-Presbyterian Medical Center](#), *supra*; [Sultan v. King's Highway Hospital Center](#), *supra*.

In [Sultan v. King's Highway Hospital Center](#), *supra*, plaintiff sought to recover punitive damages against defendant hospital, alleging that the hospital refused to examine, treat or admit his wife when she arrived at the hospital's emergency room. Plaintiff was informed by a nurse at the hospital that they were at full capacity and that his wife would have to be transferred to another hospital. It was alleged that the decedent was transferred to another hospital without receiving any treatment, despite suffering from an acute cardiac event at the time. Decedent passed away the following day at the facility to which she had been transferred. It was held that issues of fact existed as to whether the defendant's failure to admit her in light of her need for immediate medical attention was, inter alia, reckless, and warranted an award of punitive damages.

Similarly, in [Graham v. Columbia-Presbyterian Medical Center](#), *supra*, the Appellate Division, First Department, reversed a Trial Court's decision that granted partial summary judgment dismissing claims for punitive damages in a medical malpractice action. In [Graham](#), it was alleged that plaintiff's decedent was experiencing, inter alia, significant bleeding and a drop in blood pressure following a surgical procedure. Despite the decedent's unstable condition the surgeon who performed the procedure left the hospital to go home. The decedent's condition continued to worsen and the surgeon was telephoned at home. Approximately three and one-half hours after receiving this telephone call the surgeon returned to the hospital and performed a further surgery to stop the bleeding. Notwithstanding, the decedent passed away the following day. Plaintiff alleged that the death was caused by the surgeon's failure to stop the blood loss in a timely manner. The Court found that the surgeon's conduct in that case, just like the conduct of the defendant hospital in [Sultan](#), "amounted to a failure to render assistance to a patient in need of emergency treatment" and concluded that an issue of fact existed with respect to whether the actions of the surgeon "were so 'intentional, malicious, outrageous, or otherwise aggravated beyond mere negligence' as to support an award for punitive damages." *Id.*, citing [McDougald v. Garber](#), 73 NY2d 246 [1989]; [Montemurro v. Dodick](#), 160 AD2d 690 [2d Dept. 1990].

Recently, this Court, in the case of [Melfi v. Mt. Sinai Hospital](#), 19 Misc.3d 1129 [Sup. Ct., NY County, J. Carey, April 30, 2008]² held that issues of fact existed in connection with whether Mount Sinai was grossly negligent and/or reckless

in failing to provide medical assistance to plaintiff's decedent therein, Leonard Melfi, despite his need for emergency treatment, and, thus, whether punitive damages may be awarded. In Melfi, plaintiff was brought via ambulance to the emergency room at Mount Sinai because he was having difficulty breathing, and experiencing an elevated heart rate. A triage assessment was performed, and the medical records indicated that, at that time, Leonard Melfi was still experiencing shortness of breath and was noted to, among other things, have an elevated heart rate. The triage records state that Leonard Melfi was disheveled in appearance and full of feces. Notwithstanding, no medical treatment was administered to Leonard Melfi in triage, rather he was given acute priority, and sent to an acute area of the emergency department.

Thereafter, Leonard Melfi was assessed by defendant Dr. John Joseph Bruns, Jr., an attending physician, in the emergency room at Mount Sinai. He was found to be in respiratory distress, with edema, which is the swelling of the extremities. The emergency room records indicate that Leonard Melfi's heart rate was a very high 160 beats per minute. According to Dr. Bruns's deposition testimony, his preliminary diagnosis was congestive heart failure, as a result of, or a cause of, arterial fibrillation. Dr. Bruns also entertained the possibility of pneumonia and heart ischemia. He considered Leonard Melfi to be a critically ill patient. Notwithstanding Leonard Melfi's dire condition, the medical records indicate that the only treatment administered in the emergency room was the use of a non-rebreather mask, which plaintiff argued was not effective. Plaintiff, in Melfi, argued that the lack of treatment administered to decedent demonstrated that Mount Sinai was grossly negligent and reckless in the failing to provide emergency medical care to decedent while he was known to be in distress, and that such failure ultimately led to his death. Although, Dr. Bruns testified at his deposition as to treatments that he recollected performing on Leonard Melfi immediately prior to his death, this Court held that such testimony merely raised a triable issue of fact as to whether punitive damages may be imposed.

In support of the instant motion, defendants argue, inter alia, that their conduct in connection with the care and treatment of decedent was not so wantonly dishonest, grossly indifferent to patient care, or malicious and/or reckless as to warrant an award of punitive damages. According to defendants, the alleged departures on the part of defendants may raise issues of fact of whether they were negligent in connection with the care and treatment rendered to Mr. Deane, but do not rise to the level of misconduct sufficient to sustain an award for punitive damages. In opposition to the instant motion, plaintiff argues that based upon the many failures by Mt. Sinai, as well as the other defendants, including the failure to have attending physicians evaluate and treat a seriously ill patient, and the failure to provide proper supervision of inexperienced residents, an issue of fact exists with respect to whether the defendants were grossly negligent, reckless, wanton and grossly indifferent to patient care.

Plaintiff has submitted, inter alia, the affidavit of a physician who is board certified by the American Board of Physical Medicine and Rehabilitation. According to this expert, "the care and lack of care received by Kevin Deane while a patient at Mt. Sinai Hospital constituted a gross deviation from the standards of care applicable to patients in Kevin Deane's condition, including his underlying injury and recent surgical history." The expert sets forth that the failure of any attending physician to examine and treat Mr. Deane, as well as the failure of any nurse or resident to obtain an evaluation by an attending physician, were gross deviations from the standards of care. Additional deviations as set forth by this expert were the failure to properly supervise residents caring for rehabilitation patients, such as Mr. Deane, who had suffered serious injuries; the failure on the part of the staff at Mt. Sinai to document significant changes in Mr. Deane's condition; and the failure of any physician to evaluate Mr. Deane, and enter progress notes in the medical records, the entire day prior to his death. Such deviations, according to the expert, were gross deviations from accepted standards of practice.

The expert also states that it the failure on the part of Mt. Sinai "to have a system in place to verify that on-call attending physicians were aware of their responsibilities was a serious systemic administrative failure...." According to the expert, all of the aforementioned deviations were a substantial factor in the failure to diagnose and treat the problem which eventually led to the death of Mr. Deane. Lastly, this expert opines that Mr. Deane was abandoned as a patient by defendants, and sets forth that "the multiple departures from accepted standards of medical practice which contributed to this patient's death are so flagrant as to transcend mere negligence into gross negligence, recklessness and gross indifference to patient care."

In addition to the expert affidavit, plaintiff submitted documents relating to the New York State Department of Health's investigation of Mr. Deane's death, wherein a finding was made that Mt. Sinai failed to have an attending physician examine him from Friday night until his death on Monday morning. Plaintiff also submitted past findings of the New York State Department of Health where deficiencies were found in relation to patient care at Mt. Sinai, and argues that Mt. Sinai's disregard of these prior findings demonstrates its depraved indifference for human life.

In the instant action, this Court finds that issues of fact exist with respect to whether punitive damages may be imposed by a jury. As plaintiff argues, Mr. Deane was effectively abandoned by defendants herein, as he was not examined by an attending physician for a period of over two (2) days prior to his death in the early morning of Monday, April 9, 2007. In addition to this failure on the part of any attending physician to examine Mr. Deane for the two days prior to his death, it appears that he was not examined by any physician, attending or resident, for over a day prior to his passing. Evidence of such failures on the part of defendants are sufficient to raise questions of fact with respect to whether the defendants' actions, or failure to act, constitute gross negligence, recklessness and gross indifference to patient care. Moreover, this Court finds that the failure on the part of Mt. Sinai, as well as Mr. Deane's admitting physician, Dr. Stein, to make sure that an attending physician that has been assigned to care for patients over the course of an entire weekend is aware of such responsibilities, and reports to work when scheduled, is beyond that of mere negligence. This Court is also extremely troubled by the fact that at no point during the weekend did a resident, including defendant Dr. Nutini, a nurse, or any other staff member at Mt. Sinai attempt to notify the administration at the hospital that the on-call attending, Dr. Bryce, failed to report for work, and, as a result, many patients were without an attending physician to care for them. Despite the fact that over the course of the weekend Mr. Deane could not swallow, had difficulty breathing, was anxious, had a high fever, an elevated heart rate, and other abnormal vital signs, an attending physician was never called to examine him.

Defendants state in their motion that Dr. Bryce's failure to examine Mr. Deane was caused by an administrative error where he was not notified of his on-call duties. Defendants further state that this failure was unfortunate, but does not warrant punitive damages. This Court stresses that an award of punitive damages in this action is not simply based on a failure of Mt. Sinai to include Dr. Bryce's e-mail address on the necessary e-mail list, or even based upon Dr. Bryce's failure to show up for work on the weekend beginning on April 7, 2007. It is Mt. Sinai, and its staffs', actions in allowing for patients with significant injuries and health considerations to go unexamined by an attending physician for a period of two (2) days that constitutes gross negligence, recklessness and gross indifference to patient care. Mt. Sinai's failure to have a system in place that would alert an administrator at the facility when an on-call attending fails to appear for work also constitutes gross negligence, recklessness and gross indifference to patient care.

Defendants attempt to distinguish the instant action to those cases discussed above, arguing that plaintiff herein was not abandoned by the defendants while in need of emergency medical care. According to defendants, unlike the plaintiffs in Sultan, Graham and Melfi, Mr. Deane was brought to Mt. Sinai for physical rehabilitation in stable condition. Defendants point out that Mr. Deane was not in acute distress and did not require emergency treatment when he arrived at Mt. Sinai. Furthermore, according to the defendants, unlike the plaintiffs in Sultan, Graham and Melfi, Mr. Deane was treated by various nurses and residents while a patient at Mt. Sinai. Defendants stress that this is not a case where there was complete and intentional non-treatment by defendants of a patient in urgent need of emergency medical care. Although Mr. Deane was discharged from the hospital in Denver in stable condition, he was post spinal surgery, with placement of hardware in his neck. At the time he was discharged Mr. Deane was having difficulty swallowing and required suctioning of his secretions. Moreover, it appears that Mr. Deane was having difficulty breathing around the time of his admission to Mt. Sinai. Soon after the admission, he was noted to have increased difficulty breathing, an elevated fever, hoarse breath, and was requesting to sit up to have his chest suctioned to clear out secretions. Therefore, despite defendants attempt to paint Mr. Deane simply as a rehabilitation patient being brought into the facility in stable condition, he had serious health concerns upon admission to Mt. Sinai, and began to deteriorate further soon after his arrival.

Additionally, the fact that this was not a situation in which Mr. Deane was seeking emergency care makes the defendants alleged actions, or failure to act, even more egregious. Mr. Deane's arrival to Mt. Sinai was known in advance. Dr. Stein and Dr. Nutini, and others at the facility, were anticipating Mr. Deane's arrival. As noted above, upon learning that Mr. Deane was being brought to Mt. Sinai for rehabilitation, Dr. Nutini conducted research relating to patients with hardware in their neck, and learned that erosion of the hardware into the esophagus was a known complication, which can sometimes be life-threatening. Dr. Stein, as well as Dr. Park, also indicated awareness of the potential complication caused by erosion of hardware placed in a patient's neck. Based upon these facts, these physicians who were aware that a patient who was at risk of hardware placed during his spinal surgery erode into the esophagus, ignored the signs and symptoms of this complication and failed to have an attending physician, or a supervised resident, care for the patient for approximately two (2) days.

Defendants further argue that Mr. Deane was not abandoned by defendants because he was continuously cared for by resident physicians, nurses and patient care associates throughout the course of the weekend. However, as a patient who was post spinal surgery, with placement of hardware in his neck, and exhibiting symptoms of a known

complication, Mr. Deane required the care of an attending physician with adequate experience to address the serious nature of his condition. Additionally, it appears from the deposition testimony, that resident physicians working in the rehabilitation facility on the weekends appear to be overworked, caring for approximately 100 patients, and some of whom, such as Dr. Brown and Dr. Nutini, are working 24 hour shifts at the hospital. Based upon the foregoing, this Court finds that issues of fact exist with respect to whether punitive damages may be imposed by a jury.

It is noted that, in their reply papers, defendants submitted the affidavits of two physicians outlining the treatment provided to Mr. Deane while he was a patient at Mt. Sinai. These physicians opine that the care and treatment rendered at Mt. Sinai was within the standard of care, and was not the proximate cause of Mr. Deane's demise. These physicians further opine that based upon the treatment that was provided to Mr. Deane, he was not "abandoned" by defendants herein. These affidavits certainly raise triable issues of facts as to whether punitive damages should be imposed, however, they do not establish, as a matter of law, that punitive damages may not be awarded in this action.

It is further argued by defendants that defendant Mt. Sinai cannot be held liable to plaintiff for punitive damages, even if the Court finds that the alleged acts of medical malpractice could support an award of punitive damages, because such damages may not be imposed upon an employer based upon the acts of employees absent proof of complicity on the employer's part. The Court of Appeal, in *Loughry v. Lincoln First National Bank*, 67 NY2d 369 [1986], set forth that:

"[w]hile the decision to award punitive damages in any particular case, as well as the amount, are generally matters within the discretion of the trier of fact, there is a threshold issue: punitive damages can be imposed on an employer for the intentional wrongdoing of its employees only where management has authorized, participated in, consented to or ratified the conduct giving rise to such damages or deliberately retained the unfit servant."

see also *Sultan v. King's Highway Hospital Center*, *supra*, [affirming Trial Court's denial of defendant hospital's motion to strike so much of plaintiff's complaint as sought punitive damages against it finding that issues of fact existed as to whether hospital could be liable for punitive damages under the "complicity rule"]; *Harrell v. Champlain Enterprises Inc.*, 222 AD2d 876 [3d Dept. 1995] [plaintiff permitted to amend complaint to seek punitive damages from defendant employer where evidence supports claim that defendant knew of the pattern of irresponsibility of its employees and either condoned such behavior or failed to correct it]. Basically, under the "complicity rule," an employer will only be liable for punitive damages "when a superior officer, in the course of his employment, orders, participates in, or ratifies the outrageous conduct." *Loughry v. Lincoln First National Bank*, *supra*.

The Court finds that an issue of fact exists with respect to whether Mt. Sinai, through the actions of Dr. Flanagan, as well as other administrators at the hospital, authorized, participated in, consented to or ratified the conduct giving rise to the punitive damages. As set forth above, an award of punitive damages in this action would be based on Mt. Sinai, and its staffs', actions in allowing patients with significant injuries and health considerations, such as spinal chord injuries and brain trauma, to go unexamined by an attending physician for a period of two (2) days. Moreover an award of punitive damages herein would be based upon Mt. Sinai's failure to have a system in place that would alert an administrator at the facility when an on-call attending fails to appear for work. Dr. Flanagan, as an administrator of a rehabilitation facility where many patients have sustained catastrophic bodily injuries, has a responsibility to make sure that a physician that is scheduled to work on a certain weekend actually appears for work, to have the means to be notified if that physician fails to appear for work, as well as the responsibility to locate that physician or find a replacement on any occasion where that physician does fail to appear. As a hospital, which is entrusted with the lives of its patients, Mt. Sinai cannot simply have an attending physician not show up for an entire weekend, and have inexperienced, and overworked, resident physicians be solely responsible for the handling of the care of these patients. Based upon the foregoing, a jury could reasonably find that Mt. Sinai participated in or authorized these failures, and find complicity on the part of Mt. Sinai.

Lastly, defendants argue that plaintiff failed to plead a cause of action for which punitive damages can be sustained. The Court finds this argument to be without merit. In addition to pleading a cause of action for medical malpractice, plaintiff incorrectly plead a separate cause of action for punitive damages that alleged reckless indifference to patient care. The Court acknowledges, and plaintiff concedes, that a demand for punitive damages does not amount to a separate cause of action for pleading purposes. See *Grazioli v. Ecompass Ins. Co.*, 40 AD3d 696 [2d Dept. 2007]; *Royal Globe Ins. Co. v. Chock Full O'Nuts Corp.*, 86 AD2d 315 [1st Dept. 1982]. Notwithstanding, such error does not warrant the dismissal of any and all claims for punitive damages in this action. It is clear from reading the complaint that plaintiff was alleging that the defendants alleged malpractice committed in connection with Mr. Deane's care constituted negligence and/or reckless indifference to patient care. It is also clear that plaintiff sought punitive damages in connection with the alleged malpractice, as the ad damnum clause expressly states that plaintiff seeks punitive damages from defendant. Accordingly, defendants motion is denied in its entirety.

Based upon the foregoing,

ORDERED that the motion by defendants The Mount Sinai Hospital, Adam B. Stein, M.D., and Mary Katherine Nutini, D.O., s/h/a Marykay Nutini, D.O, for, inter alia, partial summary judgment dismissing any and all claims for punitive damages asserted against them in the complaint is denied; and it is further

ORDERED that counsel for all parties are to appear before the court on September 10, 2009, at 9:30am, at 60 Centre Street, room 228, Part 29, for jury selection.

1. Although Rebecca Brown, M.D. was named as a defendant, she was not served with a complaint and has never appeared in this action. Additionally, although plaintiff named "John Doe, M.D." as a defendant when the action was commenced, no additional physician was subsequently named as a defendant.

2. *Melfi v. Mt. Sinai Hospital*, *supra*, was affirmed in part, and modified in part by, the Appellate Division, First Department (see *Melfi v. Mount Sinai*, 64 AD3d 26 [1st Dept. 2009]). The Appellate Division held that they could not rule, as a matter of law, that the plaintiff had failed to put forth a prima facie case of gross negligence and punitive damages. ;