IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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LISA COOPER, Independent Administrator of the Estate of MATTHEW PATRICK COOPER, deceased,

Plaintiff,

OPINION AND ORDER

99-C-722-C

v.

EAGLE RIVER MEMORIAL HOSPITAL, INC., DIEGO F. PEREZ, N.P. and WISCONSIN PATIENTS COMPENSATION FUND,

Defendants.

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This is a civil action for monetary relief in which plaintiff Lisa Cooper, Independent Administrator of the Estate of Matthew Patrick Cooper, is bringing a claim of medical malpractice against defendants Eagle River Memorial Hospital, Inc., Diego F. Perez and Wisconsin Patients Compensation Fund under Wisconsin state law. Subject matter jurisdiction is present. See 28 U.S.C. § 1332.

Presently before the court are defendants' motion to dismiss plaintiff's claims against defendant Perez pursuant to Fed. R. Civ. P. 12(b)(6) and their motion for sanctions under Fed. R. Civ. P. 11. In their motion to dismiss, defendants contend that plaintiff cannot bring a

medical malpractice claim against defendant Perez because he is not a "health care provider" under Wis. Stat. §§ 655.001(8), 655.002(1) and only health care providers are liable for medical malpractice in Wisconsin. Because I find that defendant Perez cannot be held personally liable for medical malpractice under Chapter 655, defendants' motion to dismiss plaintiff's claims against him will be granted. Defendants' motion for sanctions under Rule 11 will be denied because I find that plaintiff's argument that defendant Perez is personally liable for medical malpractice is not frivolous or legally unreasonable.

It should be noted that both sides have submitted and referred to matters outside the pleadings even though defendants filed a motion to dismiss, not a motion for summary judgment. I will disregard such evidence because it is not appropriate to consider matters outside the pleadings on a motion to dismiss.

For the purpose of deciding defendants' motion to dismiss, the allegations in the complaint are accepted as true.

ALLEGATIONS OF FACT

A. Parties

Plaintiff Lisa Cooper is a citizen and resident of Illinois. Defendant Eagle River Memorial Hospital, Inc. is a Wisconsin corporation with its principal place of business in

Wisconsin. Defendant Diego F. Perez was a nurse practitioner at defendant Eagle River Memorial Hospital. He is a citizen and resident of Wisconsin.

B. Events of June 8, 1998

Plaintiff was 30-plus weeks pregnant with Matthew Patrick Cooper. At approximately 3:55 p.m., plaintiff arrived at the emergency department of defendant Eagle River Memorial Hospital, complaining of lower abdominal discomfort, cramps, a fever and shakiness. Defendant Perez evaluated plaintiff in the emergency department. At approximately 5:35 p.m., defendant Perez discharged plaintiff from the emergency department after diagnosing her with mild dehydration and mild hypoglycemia. Plaintiff was not evaluated by a physician and defendant Perez did not consult with a physician regarding plaintiff's condition.

At approximately 8:45 p.m., plaintiff arrived at the emergency department of Howard Young Medical Center, complaining of symptoms substantially similar to the symptoms she had complained of at defendant Eagle River. Plaintiff was given a diagnosis of *abruptio placentae.* At the Howard Young Medical Center, an emergency cesarean section was performed. At approximately 9:30 p.m., Matthew Patrick Cooper was born in a severely compromised medical state. Matthew was admitted to St. Joseph's Hospital in Marshfield, Wisconsin, where he was diagnosed with severe asphyxia, bilateral intra-cranial hemorrhage, jaundice, pulmonary

bleeding, hyaline membrane disease, patent ductus arteriosis, patent foramen orale and hypocalcemia.

OPINION

I. MOTION TO DISMISS

A. Standard

A motion to dismiss under Fed. R. Civ. P. 12(b)(6) will be granted only if "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations" of the complaint. Cook v. Winfrey, 141 F.3d 322, 327 (7th Cir. 1998) (citing Hishon v. King & Spalding, 467 U.S. 69, 73, (1984)); Gossmeyer v. McDonald, 128 F.3d 481, 489 (7th Cir. 1997)).

B. Chapter 655

1. Background

Wisconsin recognizes the tort of medical malpractice. The elements of a medical malpractice claim in Wisconsin are that the care provider failed to use the required degree of skill, that plaintiff was harmed and that there is a causal connection between the provider's failure and the harm plaintiff suffered. See Wis J-I Civil 1023; see also Wis. Stat. § 893.55(1)

(applicable statute of limitations for medical malpractice claims).

Chapter 655 of Wis. Stat. regulates medical malpractice claims in Wisconsin. See Webb v. Ocularra Holding, Inc., 232 Wis. 2d 495, 606 N.W.2d 552, 556 (Ct. App. 1999). "[Chapter 655] applies only to negligent medical acts or decisions made in the course of rendering professional medical care." McEvoy v. Group Health Cooperative of Eau Claire, 213 Wis. 2d 507, 530, 570 N.W.2d 397, 406 (1997). Wis. Stat. § 655.007 provides that "any patient or the patient's representative having a claim or any spouse, parent or child having a derivative claim for injury or death on account of malpractice is subject to this chapter." Section 655.005(1) states: "Any person listed in § 655.007 having a claim or a derivative claim against a health care provider or an employe of the health care provider, for damages for bodily injury or death due to acts or omissions of the employe of the health care provider acting within the scope of his or her employment and providing health care services, is subject to this chapter."

"Chapter 655 created the [Patients Compensation] Fund to curb the rising costs of health care by financing part of the liability incurred by health care providers as a result of medical malpractice claims." Patients Compensation Fund v. Lutheran Hospital-LaCrosse, Inc., 223 Wis. 2d 439, 452, 588 N.W.2d 35, 40 (1999) (internal citation omitted). Under Chapter 655, "health care providers must maintain a particular amount of liability insurance to protect

themselves from medical malpractice claims," id. at 451, 588 N.W.2d at 40, and pay yearly assessments to the fund, see § 655.27(3). "When a malpractice claim against a health care provider succeeds, the Fund pays the part of the claim which is in excess of either the amount of primary insurance coverage required by the statute or the amount of primary insurance coverage actually carried by the health care provider, whichever is greater." Id. at 452-53, 588 N.W.2d at 40.

2. Health care provider

Chapter 655 applies to health care providers, defined in relevant part as "[a] physician or a nurse anesthetist for whom this state is a principal place of practice and who practices his or her profession in this state more than 240 hours in a fiscal year," § 655.002(1)(a), or "a person who elects to be subject to this chapter under § 655.002," see § 655.001(8), or a hospital, see § 655.002(h). The Supreme Court of Wisconsin has held that a nurse practitioner is not a "health care provider" under Chapter 655. See Patients Compensation Fund, 223 Wis. 2d at 455, 588 N.W.2d at 41.

In Patients Compensation Fund, 223 Wis. 2d at 444, 588 N.W.2d at 37, the state supreme court examined the question whether the "[Patients Compensation] Fund has subrogation rights which would allow it to bring a claim for contribution against an allegedly

negligent employee of a health care provider and/or the employee's insurer, following the Fund's settlement of a malpractice claim against the health care provider." The Fund argued that "it paid more than its fair share of the [] settlement on behalf of the tortfeasors whom it insures because [the nurse], who was also one of the joint tortfeasors, did not pay her proportionate share of the settlement." The court did not agree, holding that "the Fund does not have subrogation rights which would allow it to bring a claim for contribution against one whose alleged negligence arose while he or she was conducting a health care provider's business, when that person is not a Wis. Stat. ch. 55 health care provider or a health care provider's insurer. Any alleged negligence of [non-health care providers] conducting a health care provider's business is included in the limit imposed by ch. 655 on the liability of the health care provider." Id. at 464, 588 N.W.2d at 45.

The court reasoned that one of the ways the Wisconsin legislature accomplished its objective of limiting both the increasing cost of health care and the decreasing availability of health care was "by including any malpractice liability on the part of a non-health care provider conducting the business of a health care provider within the insurance limit of the health care provider." Id. at 457, 588 N.W.2d at 42. The court pointed to several provisions of Chapter 655 in support of its conclusion that the legislature intended "that the Fund cover the employee's liability to the extent that it exceeds the limits of the health care provider's primary

insurance policy." Id. at 460, 588 N.W.2d at 43. See, e.g., § 655.005(2) ("The fund shall provide coverage, under § 655.27, for claims against the health care provider or the employe of the health care provider due to the acts or omissions of the employe acting within the scope of his or her employment and providing health care services.")

Plaintiff contends that defendant Perez is subject to personal liability because he is a "health care practitioner" as defined by § 655.001(7t). Section 655.001 defines "health care practitioner" as "a health care professional, as defined in § 180.1901(lm), who is an employe of a health care provider in § 655.002(1)(d), (e) or (f) and who has the authority to provide health care services that are not under the direction and supervision of a physician or nurse anesthetist." Identifying defendant Perez as a "health care practitioner" is essential to plaintiff's argument because § 655.005(2) states that the fund will not provide coverage for claims against a health care provider or an employe of a health care provider "if the employe is a physician or a nurse anesthetist *or is a health care practitioner who is not providing health care services under the direction and supervision of a physician or nurse anesthetist*." (Emphasis added.) Plaintiff reasons that defendant Perez is personally liable because he was not "under the direction and supervision of a physician or a nurse anesthetist" on June 8, 1998, when he treated her at Eagle River Memorial Hospital.

This argument misconstrues § 655.005(2). The Wisconsin courts have held that

"nurses employed by a hospital to participate in the care of a hospital's patients, with the exception of nurse anesthetists, are not defined as health care providers. Instead, they are treated, generically, as employees, comprising a unit with the health care provider." Patients Compensation Fund v. Lutheran Hospital-LaCrosse, Inc., 216 Wis.2d 49, 56, 573 N.W.2d 572, 575 (Ct. App. 1997). The goal of § 655.005(2) is to exclude coverage for those health care practitioners who are not part of a health care unit. According to her complaint, plaintiff was not evaluated by a physician and defendant Perez did not consult with a physician regarding her condition. Even if defendant Perez did not work under the direct supervision of a physician or nurse anesthetist on June 8, 1998, he performed his duties as a member of the hospital's health care team. See, e.g., Wis. Admin. Code N. 8.10(2) ("Advanced practice nurse prescribers shall facilitate collaboration with other health care professionals, at least 1 of whom shall be a physician, through the use of modern communication techniques.") Because defendant Perez is not a health care provider, he is not required to maintain his own malpractice insurance under § 655.23(4); instead, he is covered by the hospital's insurance policy. Defendant Perez's alleged negligence arose within the scope of his employment for the hospital; therefore, his malpractice liability is limited to the amount covered by the hospital's insurance policy. See Patients Compensation Fund, 223 Wis. 2d at 455, 588 N.W.2d at 41. Because I find that defendant Perez is not subject to personal liability for medical malpractice

under Chapter 655 of Wis. Stat., I need not address defendants' argument that plaintiff has failed to assert a cause of action against defendant Perez.

II. MOTION FOR SANCTIONS

Defendants have requested that plaintiff be sanctioned under Rule 11 for filing claims against defendant Perez despite clear guidance from Wisconsin statutes and case law that a nurse practitioner is not personally liable for medical malpractice. Plaintiff's attorney responds that he is not subject to sanctions because he made a plausible legal argument in support of his position, even though it may turn out to be unsuccessful.

The Court of Appeals for the Seventh Circuit has stated that "[f]rivolous or legally unreasonable arguments . . . may incur penalty, and for Rule 11 purposes a frivolous argument is simply one that is 'baseless or made without a reasonable and competent inquiry." Berwick Grain Company, Inc. v. Illinois Department of Agriculture, No. 98-3394, 99-3880, 2000 WL 862838, at *1 (7th Cir. June 27, 2000) (internal citations omitted.) Although plaintiff argued incorrectly that defendant Perez is personally liable under Wisconsin law, plaintiff's attorney made a plausible argument that defendant Perez fits within an exception to the liability scheme set forth by Patients Compensation Fund, 223 Wis. 2d 439, 588 N.W.2d 35 and Wis. Stat. § 655.005. I am not persuaded by defendants' argument that naming Diego Perez as a

defendant in this lawsuit constitutes sanctionable behavior. Defendants' motion for sanctions will be denied.

ORDER

IT IS ORDERED that the motion of defendants Eagle River Memorial Hospital, Inc., Diego F. Perez and Wisconsin Patients Compensation Fund to dismiss defendant Perez is GRANTED. FURTHER, IT IS ORDERED that defendants' motion for sanctions is DENIED.

Entered this 21st day of July, 2000.

BY THE COURT:

BARBARA B. CRABB
District Judge