

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TENNESSEE  
WESTERN DIVISION

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CARL AND TRACEY WHITEHEAD,	)	
Individually, and as Parents	)	
and Natural Guardians of Minor	)	
Daughter, CW,	)	
	)	
Plaintiffs,	)	No. <u>08-2466</u> P
	)	
v.	)	
	)	
THOMAS F. BOULDEN, M.D., UT	)	
MEDICAL GROUP, INC., and	)	
METHODIST HEALTHCARE - MEMPHIS	)	
HOSPITALS,	)	
	)	
Defendants.	)	

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ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION FOR  
PARTIAL SUMMARY JUDGMENT

Before the court is defendant Methodist Healthcare - Memphis Hospitals' ("Methodist") Motion for Partial Summary Judgment. (D.E. 79.) Plaintiffs Carl and Tracey Whitehead filed a response in opposition, and Methodist filed a reply. On June 29, 2010, the court heard oral argument on the motion. For the reasons below, Methodist's Motion for Partial Summary Judgment is GRANTED in part and DENIED in part.

I. BACKGROUND

This lawsuit arises from alleged acts of malpractice that occurred during the hospitalization of Carl and Tracey Whitehead's minor daughter, "CW," at Le Bonheur Children's Medical Center

("LeBonheur"), one of Methodist's hospitals, as well as the alleged failure by Methodist to provide a complete copy of CW's medical records to the Whiteheads. According to the complaint, on February 20, 2008, CW (who at the time was eleven years old) was admitted to Le Bonheur with a blood clot in her leg. On April 8, 2008, CW underwent an ultrasound examination. According to the complaint, defendant Thomas F. Boulden, M.D., misread the ultrasound results, which caused a delay in the treatment of CW. The Whiteheads were told by hospital staff that a mistake had been made and that CW's ultrasound had been misread. CW was in critical condition following the misreading of her ultrasound, and her parents feared that CW would not survive as a result of the error. On May 15, 2008, CW's ultrasound results were allegedly misread by another doctor at Le Bonheur. Subsequently, the Whiteheads requested a complete set of CW's medical records from Methodist. Methodist allegedly produced some, but not all, of CW's medical records. The Whiteheads claim that they have repeatedly submitted oral and written requests for the complete medical records, and that Methodist has willfully refused to provide certain records relating to the events in question.

On July 21, 2008, the Whiteheads filed this lawsuit on behalf of themselves individually and on behalf of CW against Dr. Boulden, UT Medical Group, Inc., and Le Bonheur. On November 10, 2008, the Whiteheads filed their Second Amended Complaint against Dr.

Boulden, UT Medical Group, Inc., and Methodist. In the complaint, the Whiteheads allege that Dr. Boulden committed medical malpractice by misreading the ultrasound results. The Whiteheads further assert that Methodist violated the Tennessee Medical Records Act, Tenn. Code Ann. § 68-11-301, et seq. ("TMRA"), by failing to provide them with CW's complete medical records without unreasonable delay. The Whiteheads contend that they have sustained actual damages as a result of Methodist's actions. They further contend that Methodist acted in a willful, reckless, and wanton manner in violation of the TMRA.

On November 14, 2008, Methodist moved to dismiss the Second Amended Complaint on the grounds that the Whiteheads failed to state a claim for actual and punitive damages as required under Tenn. Code Ann. § 68-11-311. On July 29, 2009, the court issued an order granting Methodist's motion to dismiss the punitive damages claims, but denying Methodist's motion to dismiss the claims for actual damages.

In the present Motion for Partial Summary Judgment, Methodist argues that there is no genuine issue of material fact as to an essential element of the TMRA claim, specifically, that the Whiteheads did not sustain actual damages as a result of any delay in receiving CW's medical records. Accordingly, Methodist moves for an order granting summary judgment on plaintiffs' TMRA claim. Methodist cites four material facts, which are in relevant part

undisputed by the Whiteheads:

1. Carl Whitehead is the only named Plaintiff who requested CW's medical records during the time in question. (Tracey Whitehead Dep., 84:19-23.)
2. Mr. Whitehead testified unequivocally that any delay that occurred in receiving his daughter's medical records did not cause him financial loss or affect his daughter's subsequent medical care and treatment. (Carl Whitehead Dep., 25:1-10; 26:16-24.)
3. Mr. Whitehead testified that had he received his daughter's medical records sooner, he would not have done anything differently. (Carl Whitehead Dep., 36:15-22.)
4. Mrs. Tracey Whitehead testified that any delay in obtaining her daughter's medical records did not affect her daughter's subsequent medical care and treatment to her knowledge. (Tracey Whitehead Dep., 83:24-25; 84:1-3.)<sup>1</sup>

The Whiteheads argue that a genuine dispute of material fact exists as to whether they sustained "actual damages" under the TMRA because Mr. Whitehead suffered emotional and psychological injuries as a result of Methodist's failure to comply with the TMRA.

## II. ANALYSIS

### A. Summary Judgment Standard

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<sup>1</sup>In their response, the Whiteheads dispute Material Fact #2 as drafted: "Mr. Whitehead testified that, *to his knowledge*, the delay in receiving CW's medical records has not affected [CW's] subsequent care or treatment. (Carl Whitehead Dep., 26:16-21). Mr. Whitehead further testified that the delay in obtaining CW's medical records did not cause him financial hardship. (Carl Whitehead Dep., 26:22-24)." The Whiteheads, however, do not explain why this factual dispute is material or should otherwise prevent summary judgment. The court finds this dispute to be immaterial for purposes of resolving the present motion.

Methodist has moved for partial summary judgment and has attached exhibits in support. Federal Rule of Civil Procedure 56(c) provides that

[t]he judgment sought should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.

Fed. R. Civ. P. 56(c)(2); see Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); Canderm Pharmacal, Ltd. v. Elder Pharms., Inc., 862 F.2d 597, 601 (6th Cir. 1988). In reviewing a motion for summary judgment, the evidence must be viewed in the light most favorable to the nonmoving party. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). When the motion is supported by proof such as depositions and affidavits, the nonmoving party may not rest on the pleadings, but must present some "specific facts showing that there is a genuine issue for trial." Celotex, 477 U.S. at 324. It is not sufficient "simply [to] show that there is some metaphysical doubt as to the material facts." Matsushita, 475 U.S. at 586. Finally, the "judge may not make credibility determinations or weigh the evidence." Adams v. Metiva, 31 F.3d 375, 379 (6th Cir. 1994).

**B. Evidence of Actual Damages**

Mr. Whitehead was deposed on April 21, 2009. At his deposition, Mr. Whitehead was asked whether he suffered a reduction in pay as a result of time spent caring for his daughter while

hospitalized, to which Mr. Whitehead responded, "I did not lose any pay during that time." (Carl Whitehead Dep. 25:1-7.) He agreed that he received "every nickel" of compensation he would have otherwise received had CW not been hospitalized. (Id. at 25:8-10.)

Mr. Whitehead further testified as follows:

Q: Okay. So to your knowledge any delay in receiving these medical records has not affected her subsequent care or treatment?

A: No, sir.

Q: No, it has not?

A: No.

Q: Has it caused you any financial hardship, the delay in getting these records?

A: No, sir.

. . . .

Q: Mr. Whitehead, is there anything you would have done differently had you gotten medical records from Le Bonheur sooner than you did?

A: Meaning what? I'm not understanding you. If I would have got all my medical records, what would I -

Q: Sooner than you got them, is there anything you would have done differently that you know of?

A: Honestly no. May I add something to that last statement? Getting my medical records was not my main priority. My main priority was figuring out what happened to my daughter.

(Carl Whitehead Dep., 26: 16-24; 36:11-22.)

Mrs. Whitehead was also deposed on April 21, 2009, and testified as follows:

Q: Okay. So as far as you know, any delay in obtaining those medical records has not affected [CW's] treatment or care since she's been out of the hospital.

A: No.

(Tracey Whitehead Dep., 83:24-25; 84:1-3.)

Methodist argues that this testimony shows that the Whiteheads did not suffer any financial loss as a result of the delay in receiving their daughter's medical records, and that any delay in the delivery of the requested records did not affect their daughter's subsequent medical care and treatment. As such, Methodist argues, the alleged delay in providing the medical records did not cause the Whiteheads to sustain any actual damages, and therefore Methodist is entitled to partial summary judgment for actual damages under the TMRA.

The Whiteheads contend that there is a genuine dispute of material fact as to whether they sustained actual damages under the TMRA because Mr. Whitehead suffered emotional and psychological injuries as a result of Methodist's failure to comply with the TMRA. In support of this contention, the Whiteheads attach affidavits from Mr. Whitehead and Neil E. Aronov, Ph.D., a Clinical Psychologist who examined and tested Mr. Whitehead for his psychological injuries. Mr. Whitehead states in his affidavit that "My inability to obtain a complete copy of my daughter's medical records caused me to experience severe anxiety and emotional distress, as my wife and I were unable to determine the exact

circumstances leading to [CW's] near fatal blood clot on April 8, 2008." (Carl Whitehead Aff. ¶ 7, D.E. 85-1.) Dr. Aronov's affidavit states that Mr. Whitehead "reported experiencing rude, insensitive, and hostile behavior from the hospital employee responsible for providing such medical records. The hospital employee, who was repeatedly entreated to provide complete copies of those records, did not do so. This caused Mr. Whitehead additional psychological injury in the form of anxiety-based symptoms." (Aronov Aff. ¶ 5, D.E. 85-2.) Thus, according to the Whiteheads, there is evidence that Mr. Whitehead sustained emotional and psychological injuries as a result of Methodist's violations of the TMRA, and therefore they should be entitled to recover damages for those injuries.

In its reply brief, Methodist raises two arguments. First, it argues that damages for emotional and psychological injuries are not recoverable under the TMRA as a matter of law. Second, Methodist contends that even if those types of damages are recoverable, the Whiteheads have failed to assert in their complaint that they are seeking damages for those emotional injuries. The court will address each of these arguments in turn below.

**C. Whether "Actual Damages" Under the TMRA Include Damages for Emotional Injuries**

"The fundamental rule of statutory construction is to ascertain and, if possible, give effect to the intention or purpose

of the legislature as expressed in the statute." Worrall v. Kroger Co., 545 S.W.2d 736, 738 (Tenn. 1977) (citing State ex rel. Rector v. Wilkes, 436 S.W.2d 425 (Tenn. 1968)). "This legislative intent or purpose is to be ascertained primarily from the natural and ordinary meaning of the language used, when read in the context of the entire statute, without any forced or subtle construction to limit or extend the import of the language." Id. This court previously determined that the ordinary definition of "actual damages" includes "compensation or damages for an injury as follows from the nature and character of the acts" and "all damages except exemplary or punitive damages." Whitehead v. Boulden, No. 08-2466-P, 2009 WL 2366473, at \*3 (W.D. Tenn. July 29, 2009) (quoting 25 C.J.S. Damages § 3 (2009)); see also Gifford v. Premier Mfg. Corp., No. 18, 1989 WL 85752, at \*5-6 (Tenn Ct. App. Aug. 1, 1989); Taff v. Media Gen. Broadcast Servs., No. 32, 1986 WL 12240, at \*5 (Tenn. Ct. App. Nov. 3, 1986).<sup>2</sup> Black's Law Dictionary defines "actual damages" as

Real and substantial just damages, or the amount awarded to a complainant in compensation for actual and real loss or injury, as opposed on the one hand to "nominal" damages, and on the other to "exemplary" or "punitive" damages. Synonymous with "compensatory damages" and with

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<sup>2</sup>Methodist argues that Gifford and Taff are not applicable because those cases defined actual damages in the context of the Tennessee Human Rights Act, an anti-discrimination statute. (D.E. 89 at 7.) However, Gifford and Taff equated "actual damages" with "compensatory damages" on the basis of the ordinary definition of "actual damages," not because "actual damages" carried some special significance within the context of the Tennessee Human Rights Act.

"general damages."

Black's Law Dictionary 352 (5th ed. 1979.)

Methodist argues that the Whiteheads have incorrectly interpreted the purpose of the TMRA with respect to actual damages. Citing Pratt v. Smart Corp., 968 S.W.2d 868 (Tenn. Ct. App. 1997), Methodist asserts that the purpose of the TMRA is to "provide patients with access to their records [and] . . . to protect such individuals from excessive charges." Id. at 873. However, the court in Pratt stated that it was only the "reasonable costs" provision of the TMRA that "was clearly intended to protect a requestor of records from excessive charges." Id. ("We agree that the [TMRA] serves to provide patients with access to their records; however, as previously discussed, the Act also is intended to protect such individuals from excessive charges.").

Methodist also argues that the legislature could not have intended a statute that primarily addresses disclosure of records and protection from excessive charges to provide for emotional damages. However, courts that have interpreted the term "actual damages" contained in a variety of statutes, including disclosure statutes similar to the TMRA, have found the term to include damages for emotional injuries. See Cooper v. FAA, 596 F.3d 538, 549 (9th Cir. 2010) (finding that the term "actual damages" in the Privacy Act encompasses both pecuniary and nonpecuniary injuries); Butler v. Sterling, Inc., No. 98-3223, 2000 WL 353502, at \*8 (6th

Cir. Mar. 31, 2000) (finding that "a persuasive argument exists that the 'actual damages' recoverable under [the Truth in Lending Act] include consequential damages," including damages for severe emotional distress) (citing Casella v. Equifax Credit Info. Servs., 56 F.3d 469, 474 (2d Cir. 1995)); Fleet Mortgage Group, Inc. v. Kaneb, 196 F.3d 265, 269 (1st Cir. 1999) (finding that emotional distress damages qualify as "actual damages" under the Bankruptcy Code provision authorizing recovery of actual damages for willful violation of automatic stay); Guimond v. Trans Union Credit Info. Co., 45 F.3d 1329, 1333 (9th Cir. 1995) (finding that "'actual damages' has been interpreted to include recovery for emotional distress and humiliation" in the Fair Credit Reporting Act) (citing, *inter alia*, Bryant v. TRW, Inc., 487 F. Supp. 1234, 1240 (E.D. Mich. 1980), aff'd, 689 F.2d 72 (6th Cir. 1982)); Jones v. United States, 9 F. Supp. 2d 1119 (D. Neb. 1998) (finding that emotional damages are recoverable under Internal Revenue Code provision authorizing recovery of "actual damages" for unauthorized inspection or disclosure of tax returns). But see DiMura v. FBI, 823 F. Supp. 45, 47-48 (D. Mass. 1993) (finding the phrase "actual damages" ambiguous in the Privacy Act, and adopting as a plausible construction that it does not include emotional damages).

Moreover, at least one court has determined that violations of the TMRA can support a claim for damages for emotional distress, albeit in the context of intentional infliction of emotional

distress, otherwise known as the tort of outrageous conduct in Tennessee. See Franklin v. Vencor Hosp., No. 03A01-9704-CV-00121, 1997 WL 581121, at \*2 (Tenn. Ct. App. Sept. 19, 1997) (finding where "refusal of the defendant to produce the records and materials was progressively exacerbative; from a routine request to a reliance on the statute to an action in Chancery Court and, in a sense, to the case at bar, with the requested information *still not forthcoming*" established a cause of action for outrageous conduct). While the Whiteheads have not alleged the tort of outrageous conduct, the court believes that Franklin, at minimum, stands for the proposition that damages for emotional and psychological injuries can flow from violations of the TMRA.

"[I]n the absence of any ambiguity, the [TMRA] need only be enforced as written, without reference to its legislative history." Pratt, 968 S.W.2d at 873 (citing In re Clayton, 914 S.W.2d 84, 90 (Tenn. Ct. App. 1995)). The text of the TMRA is clear: plaintiffs may recover "actual damages" arising from "willful or reckless or wanton acts or omissions" constituting violations of the TMRA. The phrase "actual damages" is not ambiguous, and thus consulting the legislative history of the TMRA is not warranted.<sup>3</sup> As nothing in the text of the TMRA suggests otherwise, the court gives the term "actual damages" its ordinary meaning. Therefore, the court

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<sup>3</sup>The parties have not argued that the legislative history would be helpful in this case, nor have they provided any citations to relevant legislative history.

concludes that, as a matter of law, "actual damages" under the TMRA include all compensatory damages, including damages for emotional and psychological injuries, that can be shown to have a causal connection to a violation of the TMRA.

**D. Whether Methodist Had Notice of Claim for Emotional Damages**

Methodist argues that the Whiteheads should be precluded from claiming damages for emotional and psychological injuries because they did not specifically allege those damages in their complaint. Methodist contends that the Second Amended Complaint is "void of any allegation that any conduct on the part of Methodist caused physical or emotional injury to Plaintiffs." (D.E. 89 at 4-5.) Methodist insists that it "had no reason to believe that either Plaintiff suffered 'emotional and psychological injuries' as a result of the alleged delay in receiving CW's medical records since this assertion has never appeared in any of Plaintiffs' pleadings." (Id. at 6.)

Whether the Second Amended Complaint sufficiently put Methodist on notice that the Whiteheads are seeking damages for emotional and psychological injuries is a close question. However, given the liberal notice pleading standards, the court finds that the complaint's allegations that the Whiteheads individually sustained "actual damages" and that they are seeking "[a]ll such other relief, both general and specific, to which they may be entitled under the premises," were sufficient for purposes of

claiming emotional and psychological damages.<sup>4</sup> Accordingly, at least as to Mr. Whitehead, there is a genuine issue as to whether he has suffered "actual damages" as a result of Methodist's alleged TMRA violations. Therefore, Methodist's Motion for Partial Summary Judgment as to Mr. Whitehead is denied.

Finally, the court finds that as to Mrs. Whitehead, the plaintiffs have not presented any evidence to show that she has sustained any actual damages, including any emotional or psychological injuries, as a result of Methodist's alleged violation of the TMRA.<sup>5</sup> Thus, the Motion for Partial Summary Judgment on the claim for actual damages as to Mrs. Whitehead is

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<sup>4</sup>Methodist's reliance on Falana v. Kent Displays, Inc., No. 5:08 CV 720, 2009 WL 1362603, at \*2 (N.D. Ohio May 13, 2009), is misplaced. Falana concerned both equitable relief and monetary damages, which are different in kind. Emotional and psychological damages are considered "actual damages" and, like the other damages identified in the complaint, are compensatory in nature.

<sup>5</sup>As discussed above, the Whiteheads' response in opposition to Methodist's Motion for Partial Summary Judgment include only Mr. Whitehead's affidavit and Dr. Aronov's affidavit, both of which address only Mr. Whitehead's emotional injuries allegedly caused by Methodist's failure to comply with the TMRA. The court notes that after the parties fully briefed the Motion for Partial Summary Judgment, the Whiteheads provided Methodist with an expert report from Dr. Aronov, in which he opines that Mr. Whitehead has sustained emotional injuries caused by the medical malpractice of Dr. Boulden and by the TMRA violation by Methodist, and that Mrs. Whitehead has sustained emotional injuries caused by Dr. Boulden's malpractice. (See D.E. 92-1, Ex. to Methodist's Motion to Exclude the Report and Testimony of Neil Aronov, Ph.D.) Even if this court were somehow inclined to consider Dr. Aronov's expert report in deciding Methodist's summary judgment motion, the report would only further demonstrate that Mrs. Whitehead was not involved with the efforts to obtain CW's medical records and has not been emotionally or psychologically injured by the TMRA violation.

granted.

**III. CONCLUSION**

For the reasons above, Methodist's Motion for Partial Summary Judgment is GRANTED in part and DENIED in part.

IT IS SO ORDERED.

s/ Tu M. Pham  
TU M. PHAM  
United States Magistrate Judge

September 30, 2010  
Date