UNPUBLISHED

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ABINGDON DIVISION

TAMARA RENA TABOR,	)	
	)	
Plaintiff,	)	Case No. 1:01CV00035
	)	
v.	)	**OPINION AND ORDER**
	)	
FRANK J. SUTHERLAND, D.O., ET AL.,	)	By: James P. Jones
	)	United States District Judge
	)	
Defendants.	)	

Carl E. McAfee, McAfee Law Firm, P.C., Norton, Virginia, for Plaintiff; Wm. W. Eskridge, Penn, Stuart & Eskridge, Abingdon, Virginia, for Defendants.

In this medical malpractice case, the defendants have moved to dismiss the Complaint to the extent it seeks damages in excess of the state statutory medical malpractice cap and punitive damages. The motion will be granted.[1]

In her Complaint the plaintiff contends that the defendants, both osteopathic physicians, were negligent in "excessively prescribing numerous medications" and "did not use the degree of skill and diligence in the care and treatment of [the plaintiff] that a reasonably prudent doctor in the same field of practice or speciality in the

[1] I will dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

Commonwealth of Virginia would have used under the circumstances of this case." (Compl. ¶ 6.) She seeks compensatory damages in the amount of $1,750,000 and punitive damages in the amount of $500,000.

Virginia substantive law, which I must follow in this case,[2] limits recovery in any malpractice action against a health care provider to $1,500,000 for acts occurring on or after August 1, 1999. *See* Va. Code Ann. § 8.01-581.15 (Michie 2000). While an argument can be made that the statute only requires the court to reduce any excessive verdict and does not preclude an action that seeks a greater amount, the better course is to strike any claim for an amount above the cap as immaterial under Federal Rule of Civil Procedure 12(f). *See Paul v. Gomez*, 190 F.RD. 402, 403 (W.D. Va. 2000).

As to the claim for punitive damages, while such damages are theoretically available in this action, the Complaint here charges only that the defendants were negligent and violated the standard of care of a reasonably prudent doctor. Under Virginia law, proof of ordinary negligence does not entitle a plaintiff to recover punitive damages. *See Owens-Corning Fiberglas Corp. v. Watson*, 413 S.E.2d 630, 640 (Va. 1992) (holding that evidence proving negligence or even gross negligence did not constitute willful and wanton negligence justifying punitive damages).

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[2] Jurisdiction of this court exists pursuant to diversity of citizenship and amount in controversy. *See* 28 U.S.C.A. § 1332(a) (West 1993 & Supp. 2000).

While under the federal rules the liberal principles of notice pleading apply, where the pleader has specifically pleaded matters that disqualify her from recovery, a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) ought to be granted. *See Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Bender v. Suburban Hosp., Inc.*, 159 F.3d 186, 192 (4th Cir. 1998).

For the foregoing reasons, it is **ORDERED** that the Motion to Dismiss (Doc. No. 2) is granted and the claims set forth in the Complaint for compensatory damages in excess of $1,500,000 and for punitive damages are stricken.[3]

ENTER: May 16, 2001

_____

United States District Judge

[3] The dismissal of the claim for punitive damages is without prejudice and the plaintiff is not precluded from moving to amend her Complaint to seek punitive damages if the facts justify such a claim and the request does not come so late in the case as to prejudice the defense.