IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA
BIRMINGHAM DIVISION

NEWSOME REGINA, NEWSOME BURTON, Plaintiffs, V. GUNNELLS DREW JEFFREY, ST VINCENTS HOSPITAL, ST VINCENTS HEALTH SYSTEM, ST VINCENTS BIRMINGHAM ET AL, Defendants.	)))))))))))	Case No.: CV-2009-901168.00

ORDER

This court has under consideration the Renewed Motion for Summary Judgment, filed by the defendant, Drew Jeffrey Gunnells, M.D. ("Gunnells"), seeking dismissal of Plaintiff's claim for the tort of outrage. After consideration of the pleadings, submissions of the parties and arguments of counsel, the court finds as follows:

On July 22, 2010, Defendants filed their initial Motion for Summary Judgment in this action. On August 13, 2010, pursuant to a joint stipulation of the parties, this court entered an Order dismissing three Defendants from this action with prejudice, St. Vincent's Hospital, St. Vincent's Health System, and St. Vincent's Birmingham were dismissed with prejudice. Only Defendant Gunnells remained.

On September 9, 2010, this court entered an Order granting Defendant Gunnell's Motion for Summary Judgment on Plaintiff Regina Newsome's outrage claim, and denying Gunnell's Motion for Summary Judgment on Plaintiff Burt Newsome's outrage claim. The only claim remaining in this action was Plaintiff Burt Newsome's

outrage claim against Defendant Gunnells.

On September 12, 2011, this court held a hearing on Plaintiff's Motion to Certify Issue for Interlocutory Appeal. At that hearing, Defendant made an oral Motion to Reconsider Summary Judgment, seeking dismissal of Plaintiff Burt Newsome's outrage claim. The parties and the court engaged in a lengthy discussion of the basis for the denial of Defendant's Motion for Summary Judgment, which centered on the alleged post-delivery handling of Plaintiff's babies. Based on that discussion, it was clear to the court and the parties that additional discovery was needed to determine who had the responsibility for handling the babies post-delivery. Therefore, in an Order dated November 2, 2011, this court denied Defendant's oral motion to reconsider without prejudice, but re-opened discovery on that limited issue. The November 2, 2011 Order specifically informed the parties that the court would hear any renewed dispositive motions filed subsequent to the close of that limited discovery.

Defendant Gunnells filed his Renewed Motion for Summary Judgment on February 1, 2012. In his motion, Defendant notes that Plaintiff conducted no additional discovery during the period allotted. In support of his motion, Defendant submitted all prior motions, including Defendant Gunnell's affidavit, previously excluded because it was not submitted to the court prior to the court's order on Defendants' original Motion for Summary Judgment. Therein, Defendant Gunnells testified that he had no control over the handling of Plaintiff's babies after delivery. Plaintiff has failed to present any evidence to contradict Defendant's affidavit testimony, despite an opportunity to do so.

Therefore, the undisputed evidence shows that Defendant Gunnells had no responsibility for handing Plaintiff's babies post-delivery.

Accordingly, it is hereby **ORDERED, ADJUDGED and DECREED** that

Defendant's Renewed Motion for Summary Judgment on Plaintiff's claim for outrage is due to be and is hereby **GRANTED**.

No claims remain pending in this action. As such, this case is disposed of in its entirety. Costs are taxed as paid.

DONE this 16th day of March, 2012.

/s/ NICOLE GORDON STILL
CIRCUIT JUDGE

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA
BIRMINGHAM DIVISION

NEWSOME REGINA, NEWSOME BURTON, Plaintiffs,	)	
V.	)	Case No.: CV-2009-901168.00
GUNNELLS DREW JEFFREY, ST VINCENTS HOSPITAL, ST VINCENTS HEALTH SYSTEM, ST VINCENTS BIRMINGHAM ET AL, Defendants.	)	

ORDER

The court has before it Defendant Dr. Drew Jeffrey Gunnells' Motion for Summary Judgment, against the plaintiffs, Regina Newsome and Burton Newsome. Upon consideration of the pleadings, submissions of the parties, and arguments of counsel and in viewing the evidence in a light most favorable to the non-movants, the Court finds that Defendant's motion is due to be GRANTED as to Plaintiff Regina Newsome, and DENIED as to Plaintiff Burton Newsome. Plaintiffs voluntarily dismissed St. Vincent's Hospital ("St. Vincent's") prior to the hearing on this motion, leaving Dr. Drew Jeffrey Gunnells ("Dr. Gunnells") as the only remaining defendant. Plaintiffs allege that prior to April 4, 2007, Dr. Gunnells met Plaintiffs during a pre-natal office visit for Regina Newsome who was pregnant with twins. Mrs. Newsome had just returned from a six week trip out of the country during which she had not received medical care. On that occasion, Regina Newsome's regular physician was out of the office and Dr. Gunnells was assigned to her care. Plaintiffs allege that during that visit, Dr. Gunnells asked Mrs. Newsome what religion she was, and she responded that she was non-practicing half-Muslim. Plaintiffs further allege that after disclosing that fact, Dr. Gunnells had an immediate negative reaction, failed to perform an examination, prescribed medication, and left the room abruptly. Thereafter, on or about April 4, 2007, Plaintiffs went to St. Vincent's Emergency Room for a

complication related to Mrs. Newsome's pregnancy. Mrs. Newsome was approximately twenty-two and one-half (22 ½) weeks pregnant with twins, and was experiencing premature contractions. She was admitted to the hospital upon arrival. Dr. Gunnells was on call that night. That night, Plaintiffs allege that they asked Dr. Gunnells to call the doctor who had been treating Mrs. Newsome regularly. They further claim that they asked Dr. Gunnells to call a pediatrician or neonatologist during the four hours of labor. He allegedly refused stating that the reason for the refusal was that the babies were already dead and there was nothing anyone could do. Plaintiffs allege that Dr. Gunnells "ignored the dire gravity of the situation[,]" attempted to have Mrs. Newsome push the babies out, and attempted to physically pull the babies out by force with an instrument, causing great pain to Mrs. Newsome, repeatedly storming out of the room when those tries were unsuccessful. Plaintiffs also allege that Dr. Gunnells informed them that the babies were dead with a smirk, and that he told them the babies were going to die and then sat down at the foot of Mrs. Newsome's bed and began reading a magazine.

Plaintiffs allege that despite Dr. Gunnells' claim that the babies were dead, they were crying and alive, and that neither Dr. Gunnells nor the nurses cleaned the babies up, but instead placed the babies in a box in the same room as Plaintiffs, leaving them there for four (4) hours. Plaintiffs allege that during these four (4) hours, the babies continuously cried, were never cleaned, and were left to die in front of Plaintiffs. Plaintiffs claim this alleged conduct was intended to cause them emotional distress. Dr. Gunnells denies these allegations.

Defendant contends that summary judgment is due because this action (1) is governed by the Alabama Medical Liability Act ("AMLA"), and therefore requires expert testimony to establish a breach of the standard of care by Dr. Gunnells, and (2) even if the AMLA is inapplicable, the facts alleged do not rise to the level of outrageous conduct to establish a claim for Intentional Infliction of Emotional Distress as required by Alabama law. Plaintiffs filed no opposition to Dr. Gunnells' Motion for Summary Judgment. However, at the outset, in their

complaint, Plaintiffs state that "[t]his is **not** a medical malpractice action." Further, at the hearing on this motion, Plaintiffs argued that the AMLA does not apply in this case because their claim is not one of Medical Malpractice, but one of Outrage, outside the context of medical treatment. The AMLA applies "[i]n any action for injury or damages or wrongful death, whether in contract or in tort, against a health care provider for breach of the standard of care." Ala. Code § 6-5-548(a). The plaintiff has "the burden of proving by substantial evidence that the health care provider failed to exercise such reasonable care, skill, and diligence as other similarly situated health care providers in the same general line of practice ordinarily have and exercise in a like case." *Id.* In determining whether the AMLA applies, "it is the substance of the action, rather than the form, that is the touchstone for determining whether an action is actually one alleging medical malpractice." *Mock v. Allen*, 783 So. 2d 828, 832 (Ala. 2000).

Regina Newsome was a patient of Dr. Gunnells, and she was under his care at all times giving rise to this cause of action. The essence of Mrs. Newsome's claim is related to the medical care rendered by Dr. Gunnells prior to and during her visit and stay beginning on April 4, 2007. All wrongful conduct alleged occurred during Dr. Gunnells treatment of Regina Newsome - his alleged attitude to her relgion at the initial office visit, the use of the instrument to remove the babies, failure to call a specialist, and leaving the crying babies in a box for four hours, in the Newsomes' room until they died. The wrongful conduct alleged "occurred during the delivery of professional services, and [are] therefore cognizable as a medical-malpractice claim." *Mock*, 783 So. 2d at 833. The conduct of Dr. Gunnells was inextricably a part of his care of Regina Newsome and the two babies. *See Benefield v. F. Hood Craddock Clinic*, 456 So. 2d 52, 54 (Ala. 1984). Therefore, Mrs. Newsome's claim, though identified in the complaint as Intentional Infliction of Emotional Distress, is, in fact, governed by the AMLA. When a claim falls under the AMLA, expert testimony is required to prove the standard of care, with two exceptions. *Bell v. Hart*, 516 So. 2d 562, 566 (Ala. 1987). The first exception is that expert testimony is not required if "the want of skill or lack of care is so apparent as to be within the

comprehension of the average layman and thus requires only common knowledge and experience to understand." *Id.* The second exception is that no expert testimony is needed if a medical text or treatise is introduced to prove the standard of care. *Id.* Again, Plaintiffs do not claim that this cause of action is one for medical malpractice that falls within the exception to the necessity of expert testimony. Instead, Plaintiffs maintain that the AMLA simply does not apply to these facts and that this is a tort action outside the context of medical care.

However, this court finds that Plaintiff Regina Newsome's claim is governed by the AMLA. Therefore, she is required to produce expert testimony to provide substantial evidence that the standard of care given by Dr. Gunnells was subpar to the traditional standard of care provided by a doctor who is similarly situated. Plaintiffs do not allege that either exception applies, nor did Mrs. Newsome provide such expert testimony. Therefore, Dr. Gunnells' motion is due to be granted on Plaintiff Regina Newsome's claim.In contrast, Plaintiff Burton Newsome does not fall under the AMLA because he was not a patient under Dr. Gunnells at any time giving rise to this action. The AMLA only applies to patients. *George H. Lanier Mem'l Hosp. v. Andrews*, 901 So. 2d 714, 721 (Ala. 2000). Therefore, there is no requirement for Burton Newsome to provide any expert testimony. Dr. Gunnells disputes Plaintiffs' claims, and asserts that he did everything in his power to comfort and calm the Newsomes after he delivered the news that their babies would not survive. However, when looking at a motion for summary judgment, the facts must be viewed in a light most favorable to the non-movant.

The tort of Outrage has been recognized in three areas in Alabama: "(1) wrongful burial in the family-burial context; (2) barbaric methods employed to coerce an insurance settlement; and (3) egregious sexual harassment." *Potts v. Hayes*, 771 So. 2d 462, 465 (Ala. 2000) (citations omitted). As to the first area, the Alabama Supreme Court reasoned that "[g]reat respect is afforded the resting place of the dead." *Whitt v. Hulsey*, 519 So. 2d 901, 906 (Ala. 1987) (citing *Kerlin v. Ramage*, 76 So. 360 (Ala. 1917)). The Supreme Court went on to say "[o]ur decisions lay much stress on the sacredness of the resting ground of the dead." *Id.*

(quoting *Holder v. Elmwood Corp.*, 165 So. 235, 237 (Ala. 1936)). An Alabama Circuit Court, in 2006, discussed American servicemen retrieving the bodies of slain soldiers in battle, and stated that this tradition "is a powerful illustration of the symbolic importance that the bodies of the dead have for the hearts and minds of the living." *Wadley v. St. Vincent's Hosp.*, No. CV-2004-1257-RSV, 2006 WL 2061785, at *6 (Ala. Cir. Ct. July 20, 2006) (quoting *Janicki v. Hosp. of St. Raphael*, 744 A.2d 963, 964 (Conn. Super. Ct. 1999)).

Plaintiffs describe in detail in their complaint and in deposition testimony observing Dr. Gunnells, a physician, disrespect and mishandle Mrs. Newsome and the twin babies physically, verbally and otherwise. While these facts do not arise in a burial context, the same rationale related to the importance of the treatment of bodies of deceased applies. There is a "symbolic importance" that a dead body has "for the hearts and minds of the living." *Id.* Whatever importance or sacredness is offered for burial grounds and the dead is amplified by the relationship present here - that of a parent and his dead or dying children. There can be no more sacred relationship than that between a parent and his child, and thus the alleged mishandling directed toward unborn children, in the presence of the parents, provides facts whereby a jury could conclude that the defendant's actions rose to the level of the egregious conduct necessary for an Outrage claim.

There are four elements necessary to prove Outrage: "(1) that the actor intended to inflict emotional distress or that he knew or should have known that emotional distress was the likely result of his conduct; (2) that the conduct was 'extreme and outrageous,'; (3) that the actions of the defendant were the cause of the plaintiff's distress,; and (4) that the emotional distress sustained by the plaintiff was 'severe.'" *U.S.A. Oil, Inc. v. Smith*, 415 So. 2d 1098, 1100 (Ala. Civ. App. 1982) (citations omitted).

The Alabama Supreme Court has said that "[i]n order to create a jury question on the tort of outrage, there must exist 'sufficient evidence from which permissible inferences could be drawn to support a finding of the extreme conduct necessary to constitute outrageous

conduct.'" *Ex parte Crawford & Co.*, 693 So. 2d 458, 459 (Ala. 1997) (quoting *Empiregas, Inc. v. Geary*, 431 So. 2d 1258, 1261 (Ala. 1983)). Based on the facts alleged in this instance and the testimony of both Plaintiffs, "[a] reasonable jury could determine that [Dr. Gunnells'] conduct exceeded the bounds of decency established by civilized society; that is what is required for [Mr. Newsome] to support [his] outrage claim." *Cunningham v. Dabbs*, 703 So. 2d 979, 983 (Ala. Civ. App. 1997). As such, viewing the facts in a light most favorable to the Plaintiffs, this Court determines that Mr. Newsome has presented sufficient evidence to create a genuine issue of material fact as to whether Dr. Gunnells' alleged conduct and demeanor prior to, during, and subsequent to the delivery of the infants constitutes outrage. Dr. Gunnells' motion is due to be denied as to Mr. Newsome's claim. Accordingly, it is hereby **ORDRED, ADJUDGED, and DECREED** that Defendant's Motion for Summary Judgment is **GRANTED** as to Regina Newsome's claim and **DENIED** as to Burton Newsome's claim.

DONE this 9th day of September, 2010.

/s NICOLE GORDON STILL
CIRCUIT JUDGE