JOSEPH S. HARZINSKI and DARLENE M. STRANGE, individually and as Administrators of the Estates of Joseph L. Harzinski and Stasia Mary Harzinski, Plaintiffs	:	IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA
vs.	:	NO. 98-01,322
SUSQUEHANNA HEALTH SYSTEM and GORDON HASKEL, M.D., Defendants	:	PRELIMINARY OBJECTIONS

OPINION AND ORDER

The matter before this Court concerns the Preliminary Objections (all in the nature of demurrers) filed by Susquehanna Health System (hereinafter "the Hospital"), November 2, 1998, and Gordon Haskell, M.D. (hereinafter "Dr. Haskell"), filed December 23, 1998, in response to the above-captioned Plaintiffs' First Amended Complaint (hereinafter "the Complaint"), filed October 12, 1998.[1]

The allegations giving rise to this cause of action are as follows: Plaintiffs allege that on June 26, 1998, Stasia M. Harzinski (hereinafter "Mrs. Harzinski") was brought to the emergency room of the Hospital around 10:00 a.m. by her husband, Joseph L. Harzinski (hereinafter "Mr. Harzinski"). Mrs. Harzinski was complaining of severe nausea, lack of appetite and no bowel movement for several days. Mrs. Harzinski was examined by Dr. Haskell;

[1] The Original Complaint was filed August 21, 1998; the Hospital filed Preliminary Objections September 17, 1998. The First Amended Complaint was filed in response October 13, 1998. Averment references are to the First Amended Complaint allegations. Argument was held February 5, 1999.

X-rays were taken and other "diagnostic evaluations" were performed (Averment 11). Dr. Haskell discharged Mrs. Harzinski around 4:00 p.m. the same afternoon, instructing her to return if her condition suddenly worsened and, if not, to follow up with her private physician in the next week (Averment 12). Mrs. Harzinski's condition did in fact worsen that evening and into the following day, when she was transported by ambulance back to the emergency room of the Hospital. Mrs. Harzinski died at approximately 3:30 p.m. Mr. Harzinski was not with Mrs. Harzinski at the time of her death. Upon being informed of his wife's death, as alleged in the Complaint, Mr. Harzinski became extremely distraught. At approximately 6:15 p.m. that evening, Mr. Harzinski committed suicide (Averment 19).

Plaintiffs contend Mrs. Harzinski died as a result of the carelessness, recklessness, negligence and/or outrageous conduct of the Hospital and Dr. Haskell. Plaintiffs further aver Mr. Harzinski suffered "extreme mental and emotional distress as a result of the wrongful conduct of the Defendants" from 10:00 a.m. on the 26th of June until his death the following evening (Averment 22).

The Complaint contains Six Counts. Count I is a Survival action and Count II is a Wrongful Death action against Dr. Haskell, brought individually by Joseph S. Harzinski and Darlene M. Strange (Mr. & Mrs. Harzinski's children) and on behalf of the estate of Mrs. Harzinski. Counts IV and V are Survival and Wrongful Death actions, respectively, brought against Dr. Haskell individually by Joseph S. Harzinski and Darlene M. Strange and on behalf of the Estate of Mr. Harzinski. Among the relief sought, Plaintiffs are requesting punitive damages. Counts III and VI are brought against the Hospital under the theory of *respondeat superior*.

The Hospital's Preliminary Objections contend that Plaintiffs fail to state a claim for any assertion of negligent infliction of emotional distress as to Plaintiffs Joseph S. Harzinski, Darlene M. Strange or Mr. Harzinski. Further, the Hospital requests its demurrer with respect to Counts IV, V and VI be granted as Plaintiffs are attempting to assert claims that Mr. Harzinski's suicide was a result of the improper treatment and resultant death of Mrs. Harzinski. The Hospital argues: (1) no duty was owed Mr. Harzinski; (2) his suicide was not caused by any alleged negligence of Defendants, and; (3) suicide is an intervening force breaking the line of causation between the alleged negligence and Mr. Harzinski's death.

Dr. Haskell's Preliminary Objections refer to Counts IV and V of the Complaint. Dr. Haskell contends Mr. Harzinski's suicide was an unforeseeable intervening force and/or superseding cause as a matter of law; further, Dr. Haskell neither owed nor violated any duty to Mr. Harzinski. Also, it is not averred that Mr. Harzinski was present during any of the alleged negligent care of Mrs. Harzinski and no physical impact or injury other than his own suicide was averred. Accordingly, relief cannot be granted upon a theory of negligent infliction of emotional distress. Finally, Dr. Haskell asks for a demurrer as to the requests in Counts I, II, IV and V for punitive damages as: (1) punitive damages are not recoverable as a matter of law in actions for wrongful death (Counts II and V) and; (2) Plaintiffs have failed to aver facts sufficient to constitute outrageous conduct which would give rise to a punitive damages claim.

Preliminary objections in the nature of a demurrer test the legal sufficiency of a complaint. ***Turner v. The Medical Center, Beaver, Pa. Inc.***, 686 A.2d 830 (Pa.Super. 1996) (*allocatur denied).* To sustain preliminary objections in the nature of a demurrer, it must appear certain that upon the factual averments and all inferences which may be fairly deduced from

them, the law will not permit recovery by a plaintiff. ***Halliday v. Beltz***, 514 A.2d 906 (Pa.Super. 1986).

A claim for negligent infliction of emotional distress depends upon three factors: (1) whether plaintiff was located near the scene; (2) whether the shock resulted from a direct emotional impact from the sensory and contemporaneous observance of the event, as opposed to learning of its occurrence afterward; (3) whether plaintiff and victim were closely related. ***Love v. Cramer***, 606 A.2d 1175, 1177, (Pa. Super. 1992) (*allocatur denied), citing* ***Sinn v. Burd***, 404 A.2d 672, 685 (Pa. 1979). Here, Plaintiffs rely on the decision reached in *Love* to support the emotional distress claim: "Plaintiffs believe they have sufficiently pleaded the necessary elements and are entitled to recovery as in the case of ***Love v. Cramer***…" (Plaintiffs' Brief p. 13).

In ***Love***, a daughter alleged emotional harm as a result of a doctor's alleged negligence in the treatment of her mother. The daughter was involved in seeking proper treatment for her mother's health problems and had in fact researched and suggested a diagnosis- a heart condition- to the defendant physician, which he rejected. The daughter was present when the doctor failed to perform specific heart tests, witnessing the negligent medical care of her mother. When her mother's condition worsened and she was hospitalized, the daughter stayed with her mother. The daughter was with her mother at her hospital bedside when she died. The Superior Court found the daughter's observance of the lack of medical care *along with* her observance of her mother's heart attack was sufficient to sustain her claim for negligent infliction of emotional distress. The Court noted the daughter had "witnessed a discrete and identifiable traumatic event…her mother's fatal heart attack." *Id.* at 1177. The Court stated:

> This is not the simple situation wherein the plaintiff did not observe the traumatic event, but nevertheless sought to recover for emotional distress. Rather appellant witnessed the traumatic event, *and* the earlier negligence of the doctor. Her recovery, if proven, would be based upon the fact that her emotional injury was due to her first hand observation of her mother's heart attack, an event caused by Dr. Cramer's negligence, which she had *also* witnessed.

Id. at 1178 (emphasis supplied). Plaintiffs argue the instant case is similar because here, in addition to Mr. Harzinski's observations of the lack of medical care and Mrs. Harzinski's suffering through the night as her condition worsened, '[t]he identifiable traumatic event was lack of treatment causing the death of Mrs. Harzinski less than 24 hours after she was released and the ensuing severe emotional and mental distress experienced by Mrs. Harzinski." Plaintiffs' Brief p. 12. However, Plaintiffs later restate the identifiable traumatic event as having occurred June 27, 1998, when Mr. Harzinski "arrived at the hospital and viewed his expired wife." Plaintiffs' Brief p. 13.

We cannot agree that Plaintiffs have presented a discrete and identifiable traumatic event in this case. We believe such an event, as indicated in ***Love***, *supra*, is the traumatic occasion of witnessing a discrete occurrence, such as an accident involving a close relative, or the death of a close relative. This determination is supported by the Superior Court's discussion of prior cases considered in making its decision in ***Love***. The Court noted the case of ***Mazzagatti v. Everingham by Everingham***, 516 A.2d 672 (Pa. 1986). In ***Mazzagatti***, the Supreme Court undertook a review of ***Sinn v. Burd***, *(supra)* and its parameters for pleading negligent infliction of emotional distress. In the ***Mazzagatti*** case, a mother observed her daughter lying injured in the middle of a road moments after the accident occurred. The daughter did not survive. The mother brought a claim for negligent infliction of emotional

distress as a result of observing her daughter lying in the road. The Supreme Court determined the mother had not made out a sufficient claim. The Supreme Court stated that basic principles of tort liability requiring a defendant's breach of a duty of care proximately cause plaintiff's injury, "have established the jurisprudential concept that at some point along the causal chain, the passage of time and the span of distance mandate a cut-off point for liability." *Id.* at 676. The Court framed the precise issue before it as whether, at the time of the accident, the defendant driver owed a duty of care to the plaintiff, who was approximately one mile away. In concluding he did not, the Court found that when a plaintiff is a distance away and learns about the accident from others after its occurrence, rather than by contemporaneous observance, the total of policy considerations weigh against the conclusion the plaintiff is legally entitled to protection against the harm suffered. "Hence, the critical element for establishing such liability is the contemporaneous observance of the injury to the close relative." *Id*. at 679. Reviewing this case, the ***Love*** Court stated: "In formulating the rule, the Supreme Court 'contemplated a discrete and identifiable traumatic event to trigger recovery.'" ***Love*** at 1177 (citation omitted). In ***Mazzagatti***, the event was the traffic accident. In ***Love***, it was the fatal heart attack. In the instant case, it could have been witnessing Mrs. Harzinski's death.

We believe our understanding of ***Love*** is further supported by that Court's consideration of ***Bloom v. Dubois Regional Medical Center***, 597 A.2d 671 (Pa.Super. 1991), ***Love*** found distinguishable. In ***Bloom***, recovery was denied where a husband, alleging a failure to treat his wife, observed his wife *after* her suicide attempt. The husband was found not to have observed any traumatic infliction of injury by the defendants. The ***Love*** Court intentionally included a

portion of the ***Bloom*** decision in which that Court envisioned a hypothetical circumstance where recovery might be possible:

> We hasten to add, however, that we do not intend to fashion a rule that excludes recovery to all plaintiffs who allege negligent infliction based on their observance of a negligent omission by defendants. There are certainly circumstances where an omission might be construed as a traumatic infliction of injury on the plaintiff's relative and, if the plaintiff observed that occurrence, recovery could be had. Take, for example, the situation where a husband plaintiff seeks to admit his wife to an emergency room for medical care. Because of inaction by the emergency room personnel, the wife is left to languish in the outer office *and expires there. Husband has viewed the entire event.*

Love at 1178, *citing* ***Bloom***, *supra* (emphasis supplied). Once again, the anticipated circumstance wherein recovery may be had includes a discrete, traumatic event which is separate and apart from the other unfortunate observations of the plaintiff. In the case before us, we do not believe the event as averred by Plaintiffs is the type contemplated by the appellate courts. Accordingly, we must find Plaintiffs have not pled facts sufficient to uphold a claim for negligent infliction of emotional distress with respect to Mr. Harzinski. We note further that insufficient facts have been raised to support such claim with respect to Plaintiff Darlene M. Strange and no facts have been pled to support a claim with respect to Plaintiff Joseph S. Harzinski.

We wish to state that, given the tragic nature of the circumstances involved here, we do not reach this determination easily. However, we believe we are constrained to determine this issue within the parameters as set forth by the appellate decisions cited.

Moreover, we are not persuaded Mr. Harzinski's observations were similar to those indicated in ***Love***.[2] It would appear from the Complaint that Mr. Harzinski was not present during Mrs. Harzinski's course of treatment either June 26, 1998, nor June 27, 1998. However, assuming, *arguendo*, that Mr. Harzinski's observations of his wife's condition when he first accompanied her to the emergency room and while at home were found to be analogous to those in ***Love***, such observations alone are insufficient to support a claim for negligent infliction of emotional distress. As indicated, the critical element of a discrete, identifiable traumatic event witnessed by Mr. Harzinski is not present in this case.

Further, to sustain a cause of action for negligent infliction of emotional distress, Plaintiffs must aver physical injury. ***Armstrong v. Paoli Memorial Hospital***, 633 A.2d 605 (Pa.Super. 1993). Plaintiffs argue "Mr. Harzinski's suicide constitutes a severe physical manifestation of his emotional distress that progressed from upset to depression to suicide." Plaintiffs' Brief p. 10.

Mrs. Harzinski succumbed to her illness approximately 3:30 p.m. on June 27, 1998. According to the Complaint, Mr. Harzinski committed suicide approximately 6:16 p.m. that same evening. Assuming Mr. Harzinski suffered extreme depression and grief upon learning of his wife's death, we are compelled to note that "[t]emporary fright, nervous shock, nausea, grief, rage, and humiliation if transitory are not compensable harm; but, long continued nausea or headaches, repeated hysterical attacks or mental aberration are compensable injuries." ***Armstrong*** at 609. Further, "[r]esearch has not disclosed any case law which suggests that a

[2] Further, *cf.* ***Halliday v. Beltz***, 514 A.2d 906 (Pa.Super. 1986) (no cause of action found for negligent infliction of emotional distress in a medical malpractice claim where plaintiffs were in the hospital during the surgery and post-operative remedial measures but did not witness the actual surgery).

party may maintain an action for negligent infliction of emotional distress where a party sustains a physical impact because of his own subjective reaction to conduct which allegedly causes him to react in a way that produces a physical injury." ***Carson v. City of Philadelphia***, 574 A.2d 1184, 1188 (Pa.Cmwlth. 1990). Mr. Harzinski's emotional response to his wife's death doubtless included elements of shock and grief. This experience, however, or at least its severity, was cut short by Mr. Harzinski's own action in taking his life. In essence, Mr. Harzinski was responsible for the physical injury -- his suicide -- which Plaintiffs would now have us find constitutes the requisite manifestation of physical injury necessary to maintain a cause of action for negligent infliction of emotional distress. This we cannot do.

Moreover, suicide is not generally recognized as a legitimate basis for recovery in wrongful death cases. "[S]uicide constitutes an independent intervening act so extraordinary as not to have been reasonably foreseeable by the original tortfeasor." ***McPeake v. Cannon, Esq., P.C.***, 553 A.2d 439, 441 (1989). Limited exceptions to this rule include situations where there is a custodial relationship with hospitals or mental health institutions/providers and the defendant has a recognized duty of care towards the decedent. Otherwise, a clear showing of a duty to prevent the decedent's suicide and a direct causal connection between the alleged negligence and the suicide are required.[3] *Ibid.* Here, we find (1) no duty existed with respect to Mr. Harzinski; (2) the conduct of the Hospital and Dr. Haskell, even if as alleged by Plaintiffs, was not the legal cause of damages resulting from Mr. Harzinski's suicide. We so find because Mr. Harzinski's suicide constituted a superseding cause. "A superseding cause is an act of a third party or other force which, by its intervention, prevents the actor from being liable for harm to another caused

[3] A third type of exception involves suits brought under the worker's compensation statute.

by his antecedent conduct." ***Mike v. Borough of Aliquippa***, 421 A.2d 251, 256 (Pa.Super. 1980). In determining whether an intervening force is a superseding cause, the answer depends upon "whether the (intervening) conduct was so extraordinary as not to have been reasonably foreseeable, or whether it was reasonably to be anticipated." ***Bleman v. Gold***, 246 A.2d 376, 380 (Pa. 1968). We cannot state that suicide is a reasonably foreseeable or anticipated response to a death notification. Mr. Harzinski's suicide, though tragic and regrettable, cannot be legally attributed to the conduct of either Defendant.

Accordingly, we must sustain those Preliminary Objections raised to Counts IV, V and VI of the Complaint as pled for the reasons stated.

Turning to the punitive damages claim, we agree punitive damages are not allowed in a wrongful death action. ***Harvey v. Hassinger***, 461 A.2d 814, 815-816 (Pa.Super. 1983); ***Estate of Cooper by and through Cooper v. Leamer***, 705 F.Supp. 1081, 1085 (M.D.Pa. 1989).[4] Accordingly, Plaintiffs will be precluded from seeking punitive damages under Count II (and also as an element of wrongful death damages in Count III, the "*respondeat superior*" claim against the Hospital).

In a survival action, the estate may recover punitive damages only if the decedent could have recovered them had he or she lived. ***Harvey***, *supra*, at 816. Plaintiffs have averred the conduct of Dr. Haskell and the Hospital concerning Mrs. Harzinski's medical treatment was reckless and/or outrageous. Generally, punitive damages may be awarded where a defendant's conduct is outrageous and/or a defendant exhibits reckless indifference to the interests of others.

[4] *Cf.* ***Burke v. Maasen***, 904 F.2d 178 (3rdCir. 1990) (wherein the federal court disallowed a punitive damages award in a wrongful death claim, but for a different reason. The instant issue- that punitive damages claims are not allowed in wrongful death actions- was apparently not raised).

Field v. Philadelphia Electric Company, 565 A.2d 1170 (Pa.Super. 1989); ***Hoffman v. Memorial Osteopathic Hospital***, 492 A.2d 1382 (Pa.Super. 1985). At this early stage in the proceedings, this Court cannot say that it appears "certain that upon the factual averments and all inferences which may be fairly deduced from" the Complaint, the law will not permit recovery of punitive damages by Plaintiffs. ***Halliday***, *supra.* Accordingly, the preliminary objection raised concerning punitive damages with respect to the survival action on behalf of the Estate of Mrs. Harzinski will be overruled.

O R D E R

AND NOW, this 14th day of June, 1999, it is **HEREBY ORDERED** as follows:

1. The Preliminary Objections of Defendant Susquehanna Health Systems are SUSTAINED. Counts IV, V and VI are dismissed from the First Amended Complaint.
2. The Preliminary Objections of Defendant Gordon Haskell, M.D. with respect to striking of Counts IV and V of Plaintiffs' First Amended Complaint are SUSTAINED.
3. The Preliminary Objections of Defendant Gordon Haskell, M.D. with respect to dismissal of the punitive damages claims are OVERRULED with respect to Count I but SUSTAINED with respect to Count II.

BY THE COURT,

William S. Kieser, Judge

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