RHONDA WILK,	:	IN THE COURT OF COMMON PLEAS OF
	:	LYCOMING COUNTY, PENNSYLVANIA
Plaintiff	:	
	:	
vs.	:	NO. 02-01,367
	:	
JANIE RICHARDSON and	:	
SUSQUEHANNA	:	
GASTROENTEROLOGY	:	
ASSOCIATES, LTD.,	:	
	:	
Defendants	:	PRELIMINARY OBJECTIONS

Date: November 27, 2002

OPINION and ORDER

The motion before the Court is Janie Richardson and Susquehanna Gastroenterology Assoc. LTD., Defendants' Preliminary Objections to Rhonda Wilk, Plaintiff's Complaint filed September 11, 2002.

The following is a brief summary of the facts alleged by Wilk in her complaint. In December 2001, Wilk underwent a colonoscopy at Susquehanna Gastroenterology Associates. Following the colonoscopy, Wilk was diagnosed with cancer. Wilk underwent treatment for the cancer. Wilk decided to disclose her diagnosis only to her close family and friends. Richardson was an employee of Susquehanna Gastroenterology Associates. According to Wilk, Richardson told Larilyn L. Arndt about Wilk's scheduled colonoscopy, the results of the colonoscopy, and that Wilk was being referred to a specialist at Hershey Medical Center for surgical intervention. Wilk alleges that, in the course of her conversations with Arndt, Richardson mentioned how she told the nurses involved with Wilk's colonoscopy "not to give the patient [Ms. Wilk] any sedation because she wanted the patient to hurt."

Arndt asked an employee of Wilk about the health status of Wilk. This employee told Wilk about Arndt's inquiry and from whom Arndt learned about Wilk's medical condition. In addition to Ardnt, Wilk asserts that she believes Richardson disclosed the cancer diagnosis to others and Wilk also believes that Richardson has a history of disclosing confidential patient information.

Richardson argues that Wilk's complaint should be dismissed because she has failed to state any claim upon which relief can be granted. Firstly, Richardson contends that Wilk has failed to allege facts that could establish a claim for intentional infliction of emotional distress. According to Richardson, Wilk has failed to allege: facts that Richardson intended to cause severe emotional distress; facts that Richardson acted recklessly by disregarding a substantial risk that the disclosure would become known to Wilk or that it would cause severe emotional distress; and facts that could demonstrate that the disclosure of the diagnosis constituted extreme and outrageous conduct. *See*, Richardson Brief in Support of Preliminary Objections filed September 3, 2002 (Richardson Brief), 5. Richardson argues all Wilk has pleaded amounts to gossip by Richardson, which is not conduct that goes beyond the bounds of decency in a civilized community. *See*, Richardson Brief, 5.

Richardson also argues that Wilk has failed to plead facts that could establish her claims for invasion of solitude and publicity of private facts. Richardson contends that the Complaint fails to establish these claims because disclosure of a cancer diagnosis is not highly offensive to a reasonable person. *See*, Richardson Brief, 7. With regard to the intrusion upon seclusion claim, the Complaint is deficient because there can be no intrusion upon seclusion as to the patient's medical condition when a patient voluntarily consents to treatment. *See*,

Richardson's Brief, 7. The Complaint also fails to allege facts that establish sufficient publication for publicity to private life. Wilk has only pleaded the identity of one person that received the information and possibly others, but has not identified who the "others" are in the Complaint. *See*, Richardson Brief, 7. Richardson argues that this is insufficient disclosure to constitute publication. *See*, Richardson Brief, 7.

In response, Wilk argues that, if true, the facts alleged in the complaint could entitle her to relief. According to Wilk, she has pleaded facts that could establish a claim for intentional infliction of emotional distress. Wilk argues that the disclosure of confidential information by a medical professional is extreme and outrageous conduct that is beyond the bounds of decency in a civilized society and also upon seclusion and publicity of private facts is established in the pleadings because the disclosure of confidential medical diagnosis would be highly offensive to a reasonable person. *See*, Wilk Brief, 5. Wilk also supports the sufficiency of her complaint arguing she has pleaded that the information was disclosed to one individual and possibly "a great number of individuals," and since the court must accept as true the facts alleged (*i.e.*, that the diagnosis was disclosed to one and others), the complaint pleads facts that could establish publication for the publicity of private facts. *See*, Wilk Brief, 6.

A party can file preliminary objections to any pleading on the grounds of "legal insufficiency of a pleading (demurrer)." *See*, Pa.R.C.P. 1028(a)(4). In reviewing a demurrer, the court must accept as true all "well and clearly pleaded material, factual averments and all inferences fairly deducible therefrom." *See*, ***Sinn v. Burd***, 404 A.2d 672, 673-74 (Pa. 1979). "Conclusions of law and unjustified inferences are not admitted by the pleadings." ***Id***., at 674. The determination of a demurrer must be based on the pleading; "no testimony or other

evidence outside the complaint may be considered." *See*, ***Bailey v. Storlazzi***, 729 A.2d 1206, 1211 (Pa. Super. 1999). If the complaint "sets forth a cause of action, which, if proved, would entitle the party to the relief sought," then the demurrer must be denied. *See*, ***Sinn***, 404 A.2d at 674.

In order for a plaintiff to establish a claim for intentional infliction of emotional distress, one must demonstrate that a person, by extreme and outrageous conduct, intentionally or recklessly caused severe emotional distress to that person. *See*, ***Hoy v. Angelone***, 720 A.2d 745, 753 (Pa. 1998). The conduct must be established as extreme and outrageous, otherwise there is no claim. ***Ibid***. It is insufficient that the "defendant has acted with intent which is tortuous or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by 'malice' or a degree of aggravation that would entitle the Plaintiff to punitive damages for another tort.'" ***Id***. at 754 (quoting, Restatement (Second) Torts §46, comment d).

Conduct is extreme and outrageous when it " 'goes beyond all possible bounds of decency, and [is] to be regarded as atrocious, and utterly intolerable in a civilized society.'" ***Hoy.*** 720 A.2d at 754 (quoting ***Buczek v. First National Bank of Mifflintown***, 531 A.2d 1122, 1125 (Pa. Super. 1987)). Plaintiffs had pleaded facts that could establish extreme and outrageous conduct when the defendant removed their son's body to his garage and later buried the body in a field after striking their son with a car. *See*, ***Papives v. Kelly***, 263 A.2d 118 (Pa. 1970). In ***Banasczek v. Kowalski***, the defendant's conduct could be proven to be extreme and outrageous when he maliciously shot and killed two of plaintiff's dogs. *See*, 10 D. &.C.3d 94 (C.P. 1979). In ***Nardella v. Dattilo***, the defendant's conduct could be proven to be extreme

and outrageous conduct when a priest who was counseling a woman on the recent loss of her mother engages in a sexual relationship with the woman. *See*, 36 D. & C.4th 364 (C.P. 1997). In ***Chuy v. Philadelphia Eagles Football Club***, plaintiff had pleaded facts that could establish that defendants' conduct was extreme and outrageous when the team doctor gave a statement to a reporter saying that the plaintiff had a potentially life threatening disease when the doctor knew the Plaintiff did not have it. *See*, 595 F.2d 1265 (3d Cir. 1979). Plaintiffs had alleged facts that could establish extreme and outrageous conduct when, without the parents consent, a hospital removed their minor child from a ventilator over the parent's vehement opposition and despite assurances that the hospital would not take such action. *See*, ***Rideout v. Hershey Medical Center***, 30 D. & C.4th 57 (C.P. 1995).

Wilk's intentional infliction of emotional distress claim cannot be dismissed at this stage. The Court believes that disclosure of confidential medical information by a medical care professional could be extreme and outrageous conduct. What makes the disclosure of confidential medical information by a health care professional extreme and outrageous conduct is the breach of trust that results in a relationship given high sanctity by society. "Doctors have an obligation to their patients to keep communications, diagnosis, and treatment completely confidential." *See*, ***Haddad v. Gopal***, 787 A.2d 975, 981 (Pa. Super. 2001). Accordingly**,** ***Haddad*** recognized that if a physician who has obtained confidential, highly sensitive information about a patient from that relationship and discloses the information to others without the patient's consent a cause of action against the physician arises. A fiduciary relationship exists between a patient and doctor built "on the highest expectations of trust." *See*, ***Moses v. McWilliams,*** 549 A.2d. 950, 964 (Pa. Super. 1988) (Cirello, J., dissenting and

concurring). To facilitate optimum health care, a patient must reveal personal and sometimes embarrassing information to his/her physician. There exists a promise to keep this information confidential so that there is a free flow of information between patient and physician. "A patient lays bare the sanctum sanctorum of his physical and psychological self to his physician in his belief in the integrity of this promise." ***Id***. at 964. "If the physician then breaks his vow, and divulges these confidences, he outrages the very foundation of society's concept of the physician as healer." ***Ibid***.

However, this Court must recognize a patient does not have an absolute right to confidentiality. *See*, ***Moses***, 549 A.2d at 954. For disclosure of confidential information to be actionable, "the disclosure must be made without legal justification or excuse." ***Ibid***. Examples of when such legal justification or excuse exist include disclosing confidential information relating to "wounds or injuries inflicted by deadly weapons (citation omitted), contagion (citation omitted), … and medical history in cases of adoption (citation omitted)," or when a patient puts her medical condition at issue in a personal injury claim. ***Id***. at 954 –55.

In ***McKay v. Geadah***, 50 D & C 3d 435 (1998), where there was legal justification or excuse for the disclosure of confidential medical information Plaintiff McKay was involved in an automobile accident and suffered facial injuries. Defendant Dr. Geadah treated McKay and performed facial surgery to repair the injuries. Pre-operative and post-operative photographs were taken of these injuries. ***Id***. at 435-36. Later, Dr. Geadah took part in a job fair at a private school, where he displayed the photographs of McKay's injuries and provided some information regarding her treatment. ***Id***. at 436. One of the students attending the job fair was McKay's son. Upon viewing the photographs, it was alleged that he became "upset,

embarrassed, and suffered mental distress." ***Ibid***. McKay learned from her son that the photographs were being shown at the job fair and allegedly became "upset, embarrassed, and suffered emotional distress." ***Ibid***.

The Court in ***McKay*** held that the display of the photographs and disclosure of information regarding McKay's treatment did not constitute extreme and outrageous conduct. ***Id***. at 439. The Court noted that the information was relayed in a school setting to students regarding the practice of medicine. ***Ibid***. The photographs and information were disclosed as part of Dr. Geadah's explanation of his medical practice as examples of results in this type of surgery. ***Ibid***. It was not extreme and outrageous conduct to disclose such information in an educational setting.

The facts as alleged by Wilk appear to place the case *sub judice* outside the educational setting of ***McKay***, or any one of the other situations when disclosure of medical information is permitted. Taking as true the facts alleged, Richardson disclosed the cancer diagnosis and treatment to Arndt. Ardnt then contacted an employee of Wilk regarding Wilk's health. The Court recognizes the facts pleaded do not assert the classification of the relationship between Richardson and Ardnt. It is possible that the status of Ardnt may make the case *sub judice* fall into a situation, which would justify the disclosure of confidential medical information. For instance, if Arndt were a medical care professional involved in the care of Wilk, then the disclosure of the cancer diagnosis and treatment likely would not be extreme and outrageous conduct. Rather, such disclosure would be expected in communication between health care providers regarding a patient. However, Defendant is very much aware of the relationship she has or had with Arndt at the time of making the disclosure. Plaintiff may in

fact not know or may not be able to establish the nature of that relationship at this time. Therefore, if some excusable basis exists for allowing the defendant to make this disclosure to Arndt it is up to Defendant to plead such in response.

Wilk has pleaded facts that could establish extreme and outrageous conduct on behalf of Richardson. Since the Court has not dismissed the intentional infliction of emotional distress claim for failure to plead facts that could establish extreme and outrageous conduct, it is unnecessary to determine if Wilk has pleaded facts that could establish an intentional or reckless state of mind on Richardson's part. The Court believes the allegations of the Complaint which assert that at one point during Wilk's treatment Richardson told nurses to withhold sedation from Wilk so that Wilk would hurt pleads facts which if true would permit a jury to infer Richardson intended harm to Wilk through her various actions. Normally a person's intent cannot be readily ascertained unless the person gives voice to it. Here the voice with which Richardson is alleged to have spoken is one that evidences ill will toward Plaintiff. Richardson's demurrer to the intentional infliction of emotional distress claim will be denied.

The next issue is whether Wilk has pleaded facts that could establish a claim for intrusion upon seclusion. "The right to privacy is a qualified right to be let alone; but to be actionable the alleged invasion of that right must be unlawful or unjustified." *See,* ***Harris v. Easton Publ'g Co.***, 483 A.2d 1377, 1383 (Super. 1984). "An action for invasion of privacy is comprised of four distinct torts: (1) intrusion upon seclusion, (2) appropriation of name or likeness, (3) publicity given to private life and (4) publicity placing the person in a false light." ***Ibid***. To establish a cause of action for intrusion upon seclusion, a "plaintiff must aver that there was an intentional intrusion on the seclusion of their private concerns which was

substantial and highly offensive to a reasonable person." *See*, ***Pro Golf Mfg. v. Tribune Review Newspaper Co.***, 2002 Pa Lexis 2194, at 8 (Pa. 2002); ***Vogul v. W.T. Grant Co.***, 327 A.2d 133, 136 (Pa. 1974). A defendant is subject to liability for intrusion upon seclusion " 'only when he has intruded into a private place, or has otherwise invaded a private seclusion that the plaintiff has thrown about his person or affairs.'" *See*, ***Doe v. Dyer-Goode***, 566 A.2d 889, 891 (Pa. Super. 1989) (quoting ***Harris v. Easton Pub. Co.***, 483 A.2d 1377, 1383 (Pa. Super. 1984)).

The intrusion upon seclusion focuses on the interference with the solitude or seclusion of an individual, and is not concerned with whether there was publicity given to the information obtained by the intrusion. *See*, Restatement (Second) Torts §652B comment a. The incursion into the seclusion of an individual can be done by a physical intrusion into the place where the plaintiff is, the use of a person's senses, with or without the aid of mechanical devices, or an investigation or examination of private concerns.[1] *See*, Restatement (Second) Torts §652B comment b. The tort of intrusion of seclusion requires an affirmative act that pierces the protective cocoon that encompasses the private concerns and affairs of an individual.

In ***Doe v. Dyer-Goode***, John Doe went to the doctor to have a pre-marital blood test performed. *See*, 566 A.2d at 890. Doe gave his consent to have the blood drawn, but not for an AIDS test to be performed on that blood sample. ***Id***. at 890-91. The physician did the AIDS test and told Doe that it was positive. Doe retested and came back negative. ***Id***. at 891.

[1] The form of the investigation or examination into private concerns can include such examples as "opening … private and personal mail, searching [a] safe or [a] wallet, examining … [a] private bank account, or compelling [one] by a forged court order to permit an inspection of … personal documents." See, Restatement (Second) Torts §652B comment b.

Doe instituted a suit against the physician alleging that the physician violated his privacy by "undertaking an examination of [his] HIV status without [his] knowledge or consent." ***Ibid***.

The Superior Court concluded that there was no intrusion upon the seclusion of Doe by the physician performing the AIDS test on the blood sample given to the physician. *See*, ***Doe***, 566 A.2d at 891. The blood sample was "no longer held in 'private seclusion' by Mr. Doe" when he provided it to the doctor. ***Ibid***. Therefore, the fact that an unauthorized test was performed on the sample cannot establish a claim for invasion of privacy. The doctor was given access to the blood sample and the knowledge it contained. Doe removed the veil of privacy from that blood sample, as to the physician.

In ***McGuire v. Shubert***, a pair of neighbors became involved in an equity suit. *See*, 722 A.2d 1087 (Super. 1998). Following the equity suit, the McGuires brought a suit against the Shuberts and Mellon Bank. ***Id***. at 1089. One of the counts was an invasion of privacy claim against the Shuberts. The complaint alleged that the McGuires had bank accounts at Mellon Bank, where Deborah Shubert was employed as a telephone sales representative in the telephone-banking department. ***Ibid***. The McGuires alleged that Deborah Shubert accessed the bank account information and gave it to her attorney, who then used the information to cross examine Charles McGuire regarding the McGuires' net worth during the equity action. ***Ibid***.

The Superior Court concluded that "the amended complaint pled a claim for invasion of privacy against the Shuberts." *See*, 772 A.2d at 1092. The facts pleaded could establish that Deborah Shubert invaded the seclusion of the McGuires by "acquiring knowledge about the McGuires' financial holdings with Mellon." ***Ibid***. The Superior Court does not

mention in its opinion whether or not Deborah Shubert was authorized to access that information but the Superior Court seems to imply that she was not when it uses the language "the security of the bank information … was invaded." ***Ibid***.

In light of the general principles behind the tort of intrusion upon seclusion and the holdings of ***Doe*** and ***McGuire***, Wilk has pleaded sufficient facts that could establish that Richardson made an intrusion upon her seclusion. Taking as true the facts alleged, Wilk's complaint states that Richardson learned of Wilk's diagnosis and treatment for cancer through her position as an employee of Wilk's physician. This could have been through many possible ways but obviously was not learned by Richardson directly from Wilk. This circumstance would allow a *prima facie* showing that Wilk's privacy has been breached. Certainly not every employee in a physician's office has knowledge of all confidences or diagnoses made of a patient, unless the information is necessary for that employee to render care or perform some other necessary job function. Although the complaint does not plead how Richardson acquired that knowledge, Richardson does know and can plead how she justifiably obtained the information in her employment or she can plead she took no affirmative act to breach the barrier erected by Wilk to keep the cancer diagnosis private and hidden from the world, if such be the case. Accordingly, Wilk's claim for intrusion upon seclusion will not be dismissed.

The final question is whether Wilk has pleaded facts that could establish a claim for publicity given to private life. To establish a claim for publicity to private life, "a plaintiff must establish that a private fact was publicized and that such fact was of a type highly offensive to a reasonable person and not of legitimate concern to the public." *See*, ***Santillo v. Reedel***, 634 A.2d 264, 265 (Pa. Super. 1993). Publicity "requires that the matter is made

public, by communicating it to the public at large, or so many persons that the matter must be regarded as substantially certain to become one of public knowledge." *See*, ***Harris***, 483 A.2d at 1384 (citing Restatement (Second) Torts §652D, comment a.).

There is no exact number of individuals that the information must be revealed to in order to establish publication. *See*, ***Vogel***, 327 A.2d at 137. Depending on the facts of the case, the number could be seventeen. *See*, ***Harris***, 483 A.2d at 1385 (Publicity sufficiently established when information disclosed to seventeen individuals through newspaper.). However, the number cannot be one. *See*, ***Nagy v. Bell Telephone Co.***, 436 A.2d 701, 703. The number must be more then four. *See*, ***Vogel***, 327 A.2d at 137-38 (Disclosure of arrearage to four individuals via letter and phone did not constitute publication.).

A party has a duty to plead the material facts on which his claim is based in the complaint, as mandated by the Rules of Civil Procedure. *See*, ***Gross v. United Engineering and Constructors, Inc.***, 302 A.2d 370, 372 (Super. 1973). The requirement to plead the material facts underlying the claim allows the court to determine the issues to be tried. ***Ibid***. The requirement also allows the defense to prepare a proper defense. *See*, ***Itri v. Lewis***, 442 A.2d 591 (Pa. Super. 1980); ***Commonwealth v. Shipley Humble Oil Co.***, 370 A.2d 438, 439 (Pa. Cmwlth. 1977).

In ***Gross v. United Engineers and Constructors, Inc.***, a plaintiff filed a complaint alleging libel and slander. *See*, 302 A.2d at 371. The Superior Court upheld the trial court's grant of defendant's demurrer dismissing the libel and slander claims. The Superior Court stated that the plaintiff did not plead the material facts necessary to support his claims. ***Ibid***. Specifically, the "complaint fails to allege with any particularity the content of the oral or

written statements claimed to have been made, the identity of the person or persons making these statements, the relationship of that person or persons to the defendant company and authority to act in behalf of the defendant company, the identity of the person or persons to whom the statements were made, and the relationship of that person or persons to the companies receiving the alleged communications." ***Ibid***.

In ***Itri v. Lewis***, a plaintiff filed a complaint alleging slander. *See*, 442 A.2d 591, 592 (Pa. Super. 1980). The Superior Court concluded that the slander claim was properly dismissed. The Superior Court stated that a slander "complaint is sufficient when it contains the substance of the spoken words." ***Ibid***. That is, that the complaints sets forth the material facts to establish the cause of action. The Superior Court held that the complaint was deficient because none of the allegations purported to set forth the alleged defamatory statements. ***Id***. at 593.

Like ***Gross*** and ***Itri***, Wilk has failed to set forth the necessary material facts that could establish a claim of publicity to private life. Wilk must set forth material facts that could establish that Richardson disclosed this information in a sufficient manner and to a sufficient number of people in order to constitute publication. The complaint only sets forth the alleged fact that Richardson disclosed the cancer diagnosis and treatment to Arndt and "others". The pleading "of others" is not sufficient. Notwithstanding the fact that the Court must accept as true the facts alleged for disposition of this motion, to hold that "others" would be sufficient would be to belie the Rules of Civil Procedure's requirement that material facts be pleaded with specificity. The pleading of "others" does not meet this standard. It is speculative and cannot be used to support Wilk's claim. Therefore, the only material fact that has been plead is that

Richardson disclosed the information to Ardnt. The disclosure to one person is not sufficient to establish publication. Wilk's claim for publicity to private life must be dismissed.

Finally, the Court believes the issue as to whether the disclosure of the cancer diagnosis would be highly offensive to a reasonable person, is a decision to be left to the fact finder at the time of trial and cannot as a matter of law be said to never be such.

O R D E R

It is hereby ORDERED that Defendants' Preliminary Objections filed September 3, 2002 are granted as to Plaintiff's claim for publicity to private life and that claim is dismissed. Plaintiff may file an amended complaint within twenty days of notice and filing of this Order; if no such amended pleading is filed, Defendant shall file an answer to the remaining claims within forty days of such date.

BY THE COURT:

William S. Kieser, Judge

cc: Thomas Waffenschmidt, Esquire
C. Edward S. Mitchell, Esquire
Judges
Christian J. Kalaus, Esquire
Gary L. Weber, Esquire (Lycoming Reporter)