NORMAN E. JOHNSON, Plaintiff	:	IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA
vs.	:	NO. 02-01,253
ANGELA HAAS, M.D.; WILLIAM KEENAN, M.D.; JEFFREY VERZELLA, M.D.; AJAY KOSHEY, M.D.; KIM POORMAN, NURSE; and JOYCE FAIRFAX, NURSE, Defendants	:	CIVIL ACTION - LAW PRELIMINARY OBJECTIONS

Date: January 8, 2003

OPINION and ORDER

The motion before the Court is Preliminary Objections filed December 12, 2002 by Defendants Kim Poorman and Joyce Fairfax (hereafter Defendants). Plaintiff, Norman Johnson, filed a Second Amended Complaint on November 6. 2002. The Preliminary Objections before the Court were filed in response to that Second Amended Complaint.

Plaintiff has brought a state law tort claim of medical malpractice. Plaintiff alleges that the medical treatment, or lack there of, that he received while an inmate at the Lycoming County Prison caused him to suffer a loss of hearing in his left ear. Plaintiff has alleged that Defendants Poorman and Fairfax were nurses at the Lycoming County Prison. Plaintiff has sued the Defendants individually and in their official capacities. Plaintiff has alleged that the Defendants Poorman and Fairfax were negligent when they rejected his requests for further treatment of his ear pain for four months.

The question before the Court is whether Plaintiff has pleaded in his Second Amended Complaint a cause of action for medical malpractice entitling him to relief when it is alleged that two nurses at a county prison failed to respond to his medical condition and request

for treatment. Defendants' Preliminary Objections contend that Plaintiff's claim is barred by the immunity granted under the Pennsylvania Political Subdivision Tort Claims Act, 42 Pa. C.S.A. §8541. Defendants also object that Plaintiff has not pleaded a claim entitling him to relief because the claim is barred by the Statute of Limitations. With regard to the damages pleaded by Plaintiff, Defendants posit that Plaintiff has not sufficiently pleaded a cause of action for the damages of disfigurement, loss of enjoyment of life, the need for future medical expenses, future lost earning capacity, special damages, statutory damages, unliquidated damages, punitive damages, and/or attorney's fees and costs.

In response, Plaintiff contends that he has pleaded a cause of action against Defendants that would entitle him to relief. Plaintiff argues that immunity does not bar his suit against Defendants because Defendants were employees of the county prison when the alleged negligence occurred and they performed the alleged negligent acts under the color of law. With regard to the Statute of Limitations, Plaintiff argues that the denial of medical treatment for four months constituted a continuing violation and brought his claim within the statutory period.

This Court believes that Plaintiff has failed to plead a cause of action in his Second Amended Complaint against Defendants Poorman and Fairfax, because as alleged employees of the county prison the Defendants have immunity for actions taken in their official capacity. Plaintiff has failed to allege facts that would abrogate this immunity either by bringing his cause of action within one of the eight enumerated exceptions or that the conduct of Defendants constituted willful misconduct. Therefore, the Court will grant Defendants' Preliminary Objections.

A preliminary objection, in the nature of a demurrer, should only be granted when it is clear from the facts pleaded that the party has failed to state a claim upon which relief can be granted. ***Sunbeam Corp. v. Liberty Mut. Ins. Co.***, 781 A.2d 1185, 1191 (Pa. 2001). The reviewing court in making such a determination "is confined to the content of the complaint." ***In re Adoption of S.P.T.***, 783 A.2d 779, 781 (Pa. Super. 2001). "The court may not consider factual matters; no testimony or other evidence outside the complaint may be adduced and the court may not address the merits of matter represented in the complaint." ***Ibid***. The court must admit as true all well pleaded material, relevant facts and any inferences fairly deducible from those facts. ***Willet v. Pennsylvania Med. Catastrophe Loss Fund***, 702 A.2d 850, 853 (Pa. 1997. " 'If the facts as pleaded state a claim for which relief may be granted under any theory of law then there is sufficient doubt to require the preliminary objection in the nature of a demurrer to be rejected.'" ***Ibid***.

Generally, "[i]mmunity from suit is an affirmative defense which must be pleaded in New Matter, not in preliminary objections." ***Bloom v. Dubois Regional Medical Center***, 597 A.2d 671, 675 (Pa. Super. 1991). But if it is raised by preliminary objections and that procedure is not objected to, then the court may decide whether immunity bars the claim. ***Ibid***. The same is true concerning governmental immunity. "Governmental immunity may be raised by preliminary objections in the nature of a demurrer where it is apparent on the face of the pleading that the cause of action does not fall within any of the exceptions to governmental immunity." ***Gallagher v. City of Philadelphia***, 597 A.2d 747, 749 (Pa. Cmwlth. 1991). A preliminary objection raising the governmental immunity issue can also be heard if the opposing party waives the procedural defect by properly failing to object to it. ***Ibid***. The

Plaintiff has not raised any objection to the Court deciding the immunity question on preliminary objections. The only objection raised by Plaintiff on this point is the counter argument that Defendants are not shielded by immunity. Plaintiff's Brief, 1. Therefore, the Court will decide the immunity issue on the preliminary objections.

An employee of a local government agency has official immunity for actions taken within his official capacity. 42 Pa .C.S.A. §8546. This official immunity applies "when the conduct which gives rise to the injury was authorized by law or when the employee, in good faith, believed it was, or when the act was within the policy-making discretion granted the employee by law." ***Simmons v. Moon***, 601 A.2d 425, 429 (Pa. Cmwlth. 1991). An employee's liability for actions taken within his official capacity is limited to "the same extent as his employing local agency." ***Ibid***; 42 Pa. C.S.A. §8546.

The Political Subdivisions Tort Claim Act, 42 Pa. C.S.A. §§8541-8564, governs the immunity from liability of local government agencies. "Under the Act, local government agencies are immune from liability for their negligence unless their actions fall within an enumerated exception." ***Tiedeman v. City of Philadelphia***, 732 A.2d 696, 698 (Pa. Cmwlth. 1999).[1] Therefore, to bring a claim and defeat governmental immunity, the plaintiff must plead facts that demonstrate that "the damages [are] those of which would be recoverable at common law and the injury [was] caused by the negligence of the local agency or its employees while acting within the scope of his or her duties with respect to one of the eight categories of exceptions listed under Section 8542(b)." ***Simmons***, 601 A.2d at 428-29.

[1] There are eight areas of exceptions to governmental immunity, and they include: vehicle liability; care, custody or control of personal property; real property; trees, traffic controls and street lighting; utility services facilities; streets; sidewalks; care, custody or control of animals. 42 Pa.S.C.A. §8542.

Defendants Poorman and Fairfax enjoy the protection of official immunity. The Second Amended Complaint alleges that Poorman and Fairfax were nurses at the Lycoming County Prison. The Lycoming County Prison is a local government agency, thereby triggering the application of 42 Pa.C.S.A. §8541.[2] As alleged employees of that local government agency, Poorman and Fairfax are entitled to official immunity for the actions taken within their official capacity as nurses at the prison. *See*, 42 Pa. C.S.A. §8546. In order to bring a claim against Defendants Poorman and Fairfax, Plaintiff must have pleaded in his Second Amended Complaint facts that would have brought his claim within one of the enumerated exceptions of §8542(b). Plaintiff has failed in this regard.

Plaintiff has alleged a medical malpractice claim in his Second Amended Complaint. The crux of his claim against Defendants Poorman and Fairfax is that they were negligent in failing to respond to Plaintiff's medical condition and requests for treatment. Medical malpractice is not one of the enumerated exceptions to government immunity. ***City of Philadelphia v. Glim***, 613 A.2d 613, 617 (Pa. Cmwlth. 1992); ***Weissman v. City of Philadelphia***, 513 A.2d 571 (Pa. Cmwlth. 1986); ***Henagan v. Katz***, 509 A.2d 1387 (Pa. Cmwlth. 1986). Plaintiff's medical malpractice claim against Defendants Poorman and Fairfax is barred by the Defendants' immunity. Further, Plaintiff has failed to allege any additional facts or advance any theory as to how the alleged conduct of Defendants Poorman and Fairfax comes within the purview of §8542(b). Therefore, Poorman and Fairfax are protected by their official immunity.

[2] A county prison is a local government agency subject to the protections of governmental immunity. ***King v. Breach,*** 540 A.2d 976, 979 ***(***Pa. Cmwlth. 1986***).***

Although not specifically argued by Plaintiff, the Court recognizes that the protective shield of immunity can be pierced under 42 Pa. C.S.A. §8550,[3] "if the employee's conduct "constitutes a crime, actual fraud, actual malice, or willful misconduct." ***Robbins v. Cumberland County Children and Youth Services***, 802 A.2d 1239, 1252 (Pa. Cmwlth. 2002); ***Kuzel v. Krause***, 658 A.2d 856, 859 (Pa. Cmwlth. 1995). "For purposes of the Tort Claims Act, 'willful misconduct' is synonymous with the term 'intentional tort.'" ***Kuzel***, 658 A.2d at 859. Willful misconduct is such conduct "whereby the actor desired to bring about the result that followed or at least was aware that it was substantially certain to follow, so that such desires can be implied." ***Robbins***, 802 A.2d at 1252.

In ***Williams v. City of Philadelphia***, the City of Philadelphia Fire Department was contacted by the mother of an individual that had fallen down a flight of stairs. 569 A.2d 419, 420 (Pa. Cmwlth. 1990). The two fire department paramedics arrived on scene and moved said individual. The paramedics also attempted to revive him with a household ammonia product. The paramedics did not take the individual to a hospital since he had consumed alcohol before falling and they believed he would " 'sleep it off.'" ***Ibid***. Four or five hours later, the fire department was contacted again because the individual had not regained consciousness. The paramedics returned and transported the individual to a hospital where he died a week later of a subdural hematoma sustained when he fell down the stairs. ***Ibid***.

[3] "In any action against a local agency or employee thereof for damages on account of an injury caused by the act of the employee in which it is judicially determined that the act of the employee caused the injury and such act constituted a crime, actual fraud, actual malice, or willful misconduct, the provisions of sections 8545 (relating to official liability generally), 8546 (relating to defense of official immunity), 8548 (relating to indemnity), and 8549 (relating to limitation on damages) shall not apply." 42 Pa. C.S.A. §8550.

The Commonwealth Court held that the allegation regarding the failure of the paramedics to initially take the individual to a hospital did not constitute willful misconduct. ***Williams***, 569 A.2d at 421. Plaintiff had not alleged that the paramedics intended for the individual to die or had the awareness that he would die because of the fall. ***Ibid***. The paramedics had the necessary training and knowledge that made the failure to take "greater precautionary measures" a reckless disregard of the existing danger. ***Ibid***. However, the paramedics conduct constituted wanton, not willful misconduct. ***Ibid***.[4] Therefore, the shield of liability still protected them.

Upon reviewing the allegations in the Second Amended Complaint, the Court believes that the immunity of the Defendants was not abrogated under §8550. In applying the standards enumerated in ***Williams***, *supra,* the alleged conduct of Defendants Poorman and Fairfax, to the extent that it may constitute more than negligence, is more akin to wanton conduct. Giving Plaintiff the most liberal construction of the Second Amended Complaint and attached exhibits, Plaintiff claims that Defendant Poorman had observed redness in his ear canal and that Defendant Fairfax was aware of that redness. Plaintiff asserts that Defendants rejected his requests for further medical treatment and did not refer him to a physician. It may be possible for Defendants to assert that, as nurses, Defendants Poorman and Fairfax likely have the training to recognize that there was a problem with the Plaintiff's ear and that further

[4] Wanton misconduct " 'means that the actor has intentionally done an act of an unreasonable character, in disregard of a risk known to him or so obvious that he must be taken to have been aware of it, and so great as to make it highly probable that harm would follow. It usually is accompanied by a conscious indifference to the consequences.'" ***Williams***, 569 A.2d at 421 (quoting ***Evans v. Philadelphia Transportation Co.***, 212 A.2d 440, 434-44 (Pa. 1965)). " '[I]f the actor realizes *or* at least has knowledge of sufficient facts to cause a reasonable man to realize the existing peril for a sufficient period of time beforehand to give him a reasonable opportunity to take means to avoid the accident, then he is guilty of wanton misconduct if he recklessly disregards the existing danger.'" ***Ibid.***

medical treatment was necessary. However, this asserted refusal does not equate to willful misconduct. There is no indication in the Second Amended Complaint that Defendants Poorman and Fairfax intended for the Plaintiff to suffer a hearing loss. There is no indication in the complaint that Poorman and Fairfax were aware that the hearing loss would result from the redness detected in the ear. Therefore, Defendants' conduct was not willful misconduct and they are protected by immunity.

Defendants' Preliminary Objections must be granted. Defendants are immune form liability. Therefore, Plaintiff cannot state a claim that would entitle him to relief against Defendants Poorman and Fairfax.[5]

O R D E R

It is hereby ***ORDERED*** that the Preliminary Objections filed December 12, 2002 of Defendants Kim Poorman and Joyce Fairfax, are granted. Plaintiff's claim against Defendants Poorman and Fairfax is dismissed.

BY THE COURT:

William S. Kieser, Judge

cc: Robin E. Read, Esquire
Gary L. Weber, Esquire
Norman E. Johnson – ES-6785
SCI Smithfield; P. O. Box 999; Huntingdon, PA 16652
Judges
Christian J. Kalaus, Esquire

[5] The Court having granted the Defendants' Preliminary Objections regarding immunity and dismissing the claim against the Defendants need not address the issues regarding the Statute of Limitations and claimed damages.