

JOYCE A. BLAIR, individually and as the	:	IN THE COURT OF COMMON PLEAS OF
Executrix of the Estate of BRENDA BLAIR,	:	LYCOMING COUNTY, PENNSYLVANIA
deceased, JOSEPH BLAIR, individually	:	
and CATHERINE WINNIE, individually,	:	
Plaintiffs	:	JURY TRIAL DEMANDED
	:	
vs.	:	NO. 03-00,954
	:	
PANKAJ G. MEHTA, M.D.; WOMEN'S	:	
HEALTH CARE ASSOCIATES, P.C.;	:	CIVIL ACTION
AARON D. SIMMS, M.D. BUPHINDER S.:	:	
DATTA, M.D.; WEST BRANCH	:	
EMERGENCY PHYSICIANS; NEW	:	
JERSEY/PENNSYLVANIA EM-1	:	
MEDICAL SERVICES, P.C.;	:	
SUSQUEHANNA PHYSICIAN SERVICES:	:	
THE WILLIAMSPORT HOSPITAL and	:	
MEDICAL CENTER; and	:	
SUSQUEHANNA HEALTH SYSTEM,	:	
Defendants	:	PRELIMINARY OBJECTIONS

Date: September 10, 2004

OPINION AND ORDER

Before the Court for determination are Defendants Pankaj Mehta, M.D. and Women's Health Care Associates, P.C.'s (hereafter "Mehta") Preliminary Objections filed June 21, 2004 to Plaintiffs' Second Amended Complaint. Also for disposition are Plaintiffs' (hereafter "Blairs") Preliminary Objections to the Preliminary Objections of Mehta filed July 1, 2004. The procedural status of the case is somewhat unusual because of this Court's issuing of prior opinions disposing of preliminary objections filed by all Defendants to Plaintiffs' First Amended Complaint. The prior preliminary objections of all Defendants to Plaintiffs' First Amended Complaint had been argued at the same time; however, the Court issued three separate opinions. The first opinion of May 11, 2004 disposed of preliminary objections only of Defendants Simms and Datta and their related organizations. The Order in relation thereto

sustained some of the preliminary objections and granted Plaintiffs leave to file an amended complaint within twenty days, that is, by June 1, 2004. Subsequently, on May 13, 2004 an Order and Opinion relating to the objections of the hospital Defendants was issued which struck certain language from the First Amended Complaint, but did not grant leave for Plaintiffs to amend. Accordingly, Plaintiffs filed a Second Amended Complaint on June 1, 2004. The Second Amended Complaint asserted the same allegations against Mehta as had been asserted in the First Amended Complaint with one exception being that the allegations of negligent infliction of emotional distress in the Second Amended Complaint did not assert any claims arising out of any of the individual Plaintiffs witnessing the death of the decedent.

On June 10, 2004, this Court issued an opinion that dealt with the preliminary objections of Mehta to Blairs' First Amended Complaint. Then, as referenced above, with new counsel at the helm of their defense, the present preliminary objections of Mehta to the Second Amended Complaint were filed. Blairs' preliminary objections to Mehta's second set of preliminary objections then followed.

The parties – and this Court – therefore face the procedural quandary as to whether Mehta can reassert and re-litigate the preliminary objections to Blairs' pleading a second time, or, as Mehta argues, were Mehta's preliminary objections to the First Amended Complaint “mooted” by the Court's June 10th ruling requiring Blair to file a second amended complaint, which is now properly subject to preliminary objections under Pa. R.C.P. 1928(f), or, since the Court's June 10, 2004 ruling did not address Mehta's prior objections were those objections still pending as of the date the Court issued its ruling which thus, as Blair contends, becomes the law of the case under the doctrine law of the case?

Initially, it must be observed that it is conceded by Mehta that the Preliminary Objections to the Second Amended Complaint are the same preliminary objections that were raised to the First Amended Complaint, with one addition. The addition relates to the punitive damages claim. The additional objection that has been lodged is two-fold – first, that the punitive damage claim is set forth as a separate count, and, second, that the punitive damage claim could be interpreted as being applied to the wrongful death action as well as the survival action. Mehta acknowledges that this Court’s prior Opinion of June 10, 2004 would address all of the issues they now raise in support of the objections to the Second Amended Complaint, excepting the issue of punitive damages being set forth in a separate count and the application of punitive damages to the wrongful death action. Mehta states that its current preliminary objections are proper under Pa.R.C.P. 1028(f), which allows new preliminary objections to any amended pleading.

Blairs’ Preliminary Objections to Mehta’s Preliminary Objections assert that Mehta should not now be allowed to raise the same objections to the Second Amended Complaint that had been raised to the First Amended Complaint, as the Court has ruled upon the prior objections and decided the identical issues. Therefore, Blairs argue the preliminary objections filed to the Second Amended Complaint by Mehta are improper and subject to dismissal. Blairs do agree with Mehta that they did not file the Second Amended Complaint as a matter of course under Pa. R.C.P. 1028(c)(1), but did so pursuant to the Court Order of May 11, 2004. Nevertheless, Blairs assert that Pa. R.C.P. 1028(f) does not permit Mehta to file objections to this amended pleading, the Second Amended Complaint, because it was filed in response to the Court’s ruling as to other Defendants and was not intended to raise anything

new or different as to Mehta. Therefore, Blairs contend Mehta's preliminary objections are impermissible serial objections raised in violation of Pa. R.C.P. 1028(b). Mehta, relying upon *Martin v. Gurner*, 481 A.2d 90 (Pa. Super. 1984), counters that the present preliminary objections are not serial inasmuch as they raise additional objections and additional reasons to support the objections. Mehta acknowledges, however, that *Martin* dealt with a situation where other preliminary objections were asserted before the court had entered an order based upon the prior objections.

Neither party has called to this Court's attention, nor is the Court aware of, a ruling that dealt exactly with this procedural quandary. However, resolution of the procedural quandary makes little difference, if any, to the outcome of this Opinion. Suffice it to say that the Court believes the prior preliminary objections of Mehta were still pending when the Order of June 10, 2004 was entered. When the Second Amended Complaint was filed it did not moot the previous preliminary objections inasmuch as it was not filed as a matter of course within twenty days after the prior preliminary objections had been served under Pa.R.C.P. 1028(c)(1) nor was it filed by leave of Court under Pa.R.C.P. 1033. In addition, the Court also believes it technically correct that once the Second Amended Complaint was filed, which contained repeated pleadings as to Mehta (which this Court does not believe was required by its order as to Defendants Simms' and Datta's preliminary objections), that Mehta was put into a position of not only having the right to file preliminary objections under Pa.R.C.P. 1028(f), but was required to file the objections in order to defend her rights. Mehta, however, did not seek to have the pertinent allegations of the Second Amended Complaint stricken as not appropriately filed but seized on the opportunity to re-litigate the issues, with new defense counsel seeking to

effect a change in the outcome. This, however, the Court cannot permit since our prior ruling establishes the law of the case as to these issues barring or estopping Mehta from re-litigating the same issues.

This Court, however, to effect a just disposition of the issues (*see*, Pa. R.C.P. 126) essentially took the position that the present preliminary objections of Mehta (filed June 21, 2004) really were requests to this Court to reconsider its June 10, 2004 disposition of these issues. Accordingly, the Court gave Mehta's counsel significant latitude to make arguments in support of the preliminary objections to the Second Amended Complaint, to see if there was anything now raised that would require the Court to alter its position taken in the June 10th Opinion and Order, which had been issued in relation to Mehta's preliminary objections to the First Amended Complaint.

After hearing the arguments and viewing the Second Amended Complaint, the Court is not persuaded that any change in its rulings is required. The first preliminary objection of Mehta goes to the specificity of Paragraphs 68.4, 68.6, 68.8 and 69.8 of Blairs' Second Amended Complaint. These being the same allegations raised in the First Amended Complaint the Court adopts its reasoning set forth in the Opinion and Order of June 10, 2004. The preliminary objection to subparagraphs 68.4, 68.6 and 68.8 will be denied, but the preliminary objection as to Paragraph 69.8 will be granted.

The second preliminary objection relates to the parental Plaintiffs' damage claims under the Wrongful Death Act to recover for the loss of the companionship, society, comfort, guidance, solace and protection the decedent, Brenda Blair, would have provided to

them. The demurrer to the claims must be denied. Again, the Court believes its prior ruling adequately sets for the reasoning and law that supports the denial of the demurrer.

A recent decision of the Pennsylvania Supreme Court, *Department of Public Welfare v. Shultz*, ___ A.2d ___, 2004 Pa. Lexis 1902 (Pa. 2004), does not alter the determination of the Court. Since the issuance of the Court's prior Opinion, the Supreme Court has affirmed the holding of the Commonwealth Court in *Shultz*, which can be found at 822 A.2d 876 (Pa. Cmwlth. 2003), which held that a parent may not recover for the non-economic losses associated with the death of a child in a suit against the Commonwealth. In *Shultz*, the mother of the deceased brought wrongful death and survival claims against a state hospital. ___ A.2d ___, 2004 Pa. Lexis 1902, 1. As part of the wrongful death claim, the mother sought to recover non-pecuniary losses in the form of the loss of the comfort, society, love, affection, companionship, support, and friendship her son would have provided her. *Id.*, at 2, n.1. The Supreme Court stated that the damages, which are recoverable against the Commonwealth under the Wrongful Death Act, are subject to the limitations imposed by the Sovereign Immunity Act, specifically, 42 Pa.C.S.A. §8528(c). *Id.* at 7 (“We reiterate that here, the Wrongful Death Act must be tempered by the context of the Sovereign Immunity Act.”).

The Sovereign Immunity Act permits recovery for loss of consortium. 42 Pa.C.S.A. §8528(c)(4). The Supreme Court stated that “[d]amages for loss of consortium are available only to spouses, and do not include a parent’s loss of society and companionship of her child.” 2004 Pa. Lexis 1902, 6. As such, the Supreme Court held that “[b]ecause a parent cannot bring an action for loss of consortium resulting from the death of her child, appellant is barred under the Sovereign Immunity Act from bringing an action against the Commonwealth

for non-pecuniary losses.” *Ibid.* While the Supreme Court did address the issue in the context of the Sovereign Immunity Act, it specifically chose not to address whether a parent may recover the non-pecuniary losses associated with the death of a child under the Wrongful Death Act against a private person. *Id.* at 3.

Without any direct guidance on the issue, the court must look to the law that has developed regarding the recovery of non-pecuniary losses under the Wrongful Death Act. As expressed in our prior Opinion on the issue, this Court firmly believes that permitting parents to recover for the loss of society and comfort that would have been provided by their deceased child is appropriately recognized as part of the damages recoverable under the Wrongful Death Act but is not recoverable under a general theory of loss of child consortium nor as the solatium related to the loss due to grief. Again, opposing this Court’s viewpoint in this regard, Mehta’s counsel ably argues that no Pennsylvania court has specifically permitted a parent to recover for the non-pecuniary loss associated with the wrongful death of a child and that it has only been recently recognized by the Superior Court in *Mechado v. Kinkel*, 804 A.2d 1238 (Pa. Super. 2002), that a child may recover for the non-pecuniary losses a parent would have provided. Mehta argues that the Court should proceed slowly in expanding *Mechado*, and particularly should not do so until such a time as society recognizes the validity of the theory that a parent may suffer such a significant loss when a child wrongfully dies.

To the contrary, permitting a parent to recover for the non-pecuniary losses associated with the death of a child is a logical extension of *Mechado* and the body of law that has defined the damages recoverable under the Wrongful Death Act. This Court believes that both the child and the parent have a right to recover non-pecuniary damages under the

Wrongful Death Act. The Court interprets the language in the Wrongful Death Act, which states that the wrongful death cause of action was created for the benefit of the deceased's spouse, children, and parents, as a recognition of this right and a statement of this Commonwealth's public policy on the matter. The Court further believes that recognition of this public policy can be seen in the concurring opinion of Justice Saylor in *Schultz*, *supra*. In his concurring opinion, Justice Saylor states that he would be in favor of applying a broader definition of consortium that would include both filial and parental consortium if not for the Commonwealth's common law precedent of excluding the two. *Schultz*, 2004 Pa. Lexis 1902, 8-9. While being within the context of loss of consortium, Justice Saylor's comment is equally applicable to the loss of non-pecuniary damages under the Wrongful Death Act, as it is a recognition that a parent does indeed suffer a significant loss when he has been deprived of his child's comfort and society and should be compensated for that loss.

However, the holding of this Court's Opinion does not merely rest on an abstract public policy, but finds grounds in the facts of modern society. This Court cannot ignore the fact that many parents receive significant contributions from their adult children, particularly in the form of services that the parents can no longer adequately provide for themselves. This could include transportation to medical care, religious and social events. The services could also include doing every day home-making tasks that are often provided so the parent can remain in the home and not be forced to move into a nursing home. Although often taken for granted, there can be no denying that if a child who provides these services dies, a parent will face a significant expense to receive these services from a third-party. As are the wife's services, identified by Justice Musmanno in *Spangler v. Helms New York-Pittsburgh Motor Express*,

153 A.2d 490 (Pa. 1950), the services provided by a child to a parent do have a value and should be recoverable under the Wrongful Death Act. If a child's death has occurred by the wrongful act of a tortfeasor, then that tortfeasor must be held accountable to the extent of the monetary value of the parent's loss, even though money can never replace a beloved child. Therefore, the preliminary objection to the parental Plaintiffs' claim for the loss of society and comfort that the deceased would have provided them is denied.

The third preliminary objection demurs to the claims for negligent infliction of emotional distress. In this regard, Blair acknowledges that they cannot sustain an emotional distress claim on behalf of Joseph Blair under this Court's prior rationale. As to the negligent infliction of emotional distress claims of Joyce Blair and Catherine Winnie, the Court believes that such claims could be established by the allegations in the Second Amended Complaint. Therefore, the preliminary objection to Joseph Blair's negligent infliction of emotional distress claim is granted, but the preliminary objections to the negligent infliction of emotional distress claims of Joyce Blair and Catherine Winnie are denied.

The final preliminary objections relate to the claim for punitive damages. The preliminary objections again allege that the allegations of the Complaint are insufficient to sustain a punitive damage claim against Mehta, and now add that the punitive damage claim is inappropriately set forth as a separate count and that a reading of that separate count could be such that Blairs are asserting punitive damages under both the wrongful death action and the survival action. As set forth in their First Amended Complaint, Blairs in the Second Amended Complaint raise a claim for punitive damages against Defendants Mehta and also against Defendant Dr. Simms in Count 13. This follows Count 11, which alleges a wrongful death

claim, and Count 12, which alleges the survival action. Dr. Simms has already filed an answer to the Second Amended Complaint, which does not raise an objection to the separation of the punitive damages in this separate Count nor to its inclusive wording.

Addressing Mehta's additional contentions first, the Court agrees that the listing of punitive damages as a separate count is technically improper, since punitive damages are not a separate cause of action. Nevertheless, many counsel, without objection, have set forth punitive damages as a separate count so as to distinguish the specific pleadings of facts that counsel believe support the claim for punitive damages. Although a technical error, little, if any, harm or prejudice results to Dr. Mehta from having the punitive damages claim included as a separate count. The punitive damages claim is not being asserted as a separate cause of action. Blairs' counsel has acknowledged this and stated that the punitive damages claim was being asserted in a separate count simply to amplify the amount of damages being asserted under the survival action. In this regard, Blairs' counsel also acknowledged that the punitive damages claim does not apply to the wrongful death claim. Therefore, the two additional arguments advanced by Mehta, while perhaps technically correct, will be denied with an appropriate limitation as to the effect of the pleading.

Turning now to the insufficiency of the allegations argument, the Court again finds that Mehta's renewed argument fails. The pleadings are the same in the Second Amended Complaint as they were in the First Amended Complaint. The Court believes, as it did in its prior Opinion, that the allegations in the Second Amended Complaint are sufficient, at this stage in the proceedings, to assert a claim for punitive damages against Dr. Mehta. Therefore, the preliminary objections to the punitive damages claim are denied.

Accordingly, the following Order will be entered.

ORDER

The preliminary objection of Defendants Pankaj B. Mehta, M.D. and Women's Health Care Associates filed on June 21, 2004 is hereby disposed of as follows:

1. Paragraphs 68.4, 68.6, 68.8 of Plaintiffs' Second Amended Complaint are deemed appropriately alleged and the Motion to Strike them from the Second amended Complaint is DENIED. Paragraph 69.8 is found to be insufficiently pleaded and it is STRICKEN.

2. The demurrer to the wrongful death claims for loss of services, companionship, society, comfort, guide and protection is DENIED.

3. The demurrer to the claims for negligent infliction of emotional distress relating to claims of Joseph Blair is GRANTED and those claims are STRICKEN.

4. The demurrer to the claims for negligent infliction of emotional distress relating to claims of Joyce A. Blair and Catherine Winnie is DENIED.

5. The motion to strike and/or demurrer to the claims for punitive damages is DENIED; however, it is ORDERED and DIRECTED that the claims for punitive damages are not to be regarded as a separate cause of action and are to be incorporated into and asserted as a claim for damages under the survival action; the claim for punitive damages shall not apply to the wrongful death action.

Plaintiffs' Preliminary Objections to the Preliminary Objections of Defendants Mehta and Women's Health Care Associates, which were filed July 1, 2004 are DENIED.

Plaintiffs shall have the right to file an amended pleading as to the said Defendants within twenty days of the notice of entry of this Order.

BY THE COURT,

William S. Kieser, Judge

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