

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COLLEEN FRITZ, Plaintiff,	:	No. CV-20-0553
	:	
	:	
vs.	:	
	:	Civil Action – Law
BNG AESTHETICS, LLC and BORIS GABINSKIY, M.D.,	:	
Defendants.	:	<i>Preliminary Objections</i>

ORDER

AND NOW, following argument held October 13, 2020, on Defendants' Preliminary Objections to the Complaint, the Court hereby issues the following ORDER.

The foregoing matter involves Plaintiff Colleen Fritz's ("Ms. Fritz" or "Plaintiff") professional liability claim against Defendant Boris Gabinskiy, M.D. ("Dr. Gabinskiy"), and his employer, Defendant BNG Aesthetics, LLC ("BNG Aesthetics" or collectively, "Defendants"). The Complaint, which was filed on July 30, 2020 with an accompanying Certificate of Merit, alleges that on May 25, 2018, Dr. Gabinskiy performed a laser procedure on Ms. Fritz to treat her actinic keratosis. However, despite advising Ms. Fritz prior to treatment that he would use a non-ablative laser and that healing would take seven (7) to ten (10) days, Dr. Gabinskiy in fact used an ablative laser that caused a deep burning wound to Ms. Fritz's face and neck. These burns required additional treatment, including additional laser therapy. Ms. Fritz could not return to work for six (6) weeks, and her injuries took months to fully heal. Count I of the Complaint asserts a claim of Negligence against Dr. Gabinskiy. Count II asserts a claim of Vicarious Liability against BNG Aesthetics. Count III asserts a claim of Lack of Informed Consent/Negligence against Dr. Gabinskiy.

Defendants filed Preliminary Objections to the Complaint on August 19, 2020. Defendants filed a Brief in Support of the Preliminary Objections on September 11, 2020. Plaintiffs filed a Brief in Opposition on September 24, 2020. Within their Preliminary Objections, Defendants request that the Court strike Plaintiff's punitive damages claim, pled under Count III of the Complaint. Defendants acknowledge that a lack of informed consent claim is treated as a "technical battery" under Pennsylvania

law because there is unwanted touching. However, Defendants assert that in pleading punitive damages under a lack of informed consent claim, Plaintiff must still comport with the requirements of the MCARE Act, and therefore must establish Defendants' evil motive or willful, wanton, or reckless conduct.¹ Defendants maintain that the pleadings within the Complaint do not establish such outrageous conduct. Defendants' counsel additionally asserted at argument that under the MCARE Act, Plaintiff must establish that Dr. Gabinskiy's alleged misrepresentations regarding the laser procedure were a "substantial factor" in inducing Plaintiff to undergo the procedure. Plaintiff within her Brief in Opposition asserts that the pleadings were sufficient to establish that Dr. Gabinskiy lied to Ms. Fritz about the laser treatment that he would perform, which would evince within itself the mental state of recklessness supportive of a punitive damages claim.

In Pennsylvania, "a claim based upon a lack of informed consent involves a battery committed upon a patient by a physician, an action which is distinct from a claim of a consented-to, but negligently performed, medical treatment. Since surgery performed without a patient's informed consent constitutes a technical battery, negligence principles generally do not apply."² In a lack of informed consent claim grounded in battery, a party need not demonstrate physical injury, but only unpermitted and therefore offensive contact in order to establish liability.³ Further, "because battery connotes an intentional invasion of another's rights, punitive damages may be assessed in an appropriate case."⁴

The Court is satisfied that under Pennsylvania law, if Plaintiff were to assert a lack of informed consent claim based on allegations that Dr. Gabinskiy intentionally lied to Plaintiff and performed a laser procedure different than the procedure that he discussed with Plaintiff, this in itself would be sufficient to support a punitive damages

¹ 40 P.S. § 1303.505(a) ("Punitive damages may be awarded for conduct that is the result of the health care provider's willful or wanton conduct or reckless indifference to the rights of others. In assessing punitive damages, the trier of fact can properly consider the character of the health care provider's act, the nature and extent of the harm to the patient that the health care provider caused or intended to cause and the wealth of the health care provider.").

² *Montgomery v. Bazaz-Sehgal*, 798 A.2d 742, 748–49 (Pa. 2002).

³ *Montgomery v. Bazaz-Sehgal*, 742 A.2d 1125, 1131 (Pa. Super. 1999), *aff'd*, 798 A.2d 742 (Pa. 2002) (citing *Bowman v. Home Life Ins. Co.*, 243 F.2d 331 (3d Cir. 1957)).

⁴ *Id.* at 1132 (quoting *Grabowski v. Quigley*, 684 A.2d 610, 616 (Pa. Super. 1996)).

claim at the pleadings stage. Further, since negligence principals do not apply to what is in essence a tort claim, the Complaint would not have to establish that Dr. Gabinskiy's alleged misrepresentations were a substantial factor inducing Plaintiff to undergo the surgery.⁵ However, the Court still finds that Count III is not properly plead. First, since a lack of informed consent claim is a tort-based battery action within Pennsylvania and not a negligence action, Plaintiff should not plead Count III as "Lack of Informed Consent/Negligence." Further, the Court finds that the Complaint when read as a whole lacks the specificity and clarity necessary to establish that Dr. Gabinskiy not only provided negligent treatment, but that he knowingly provided a different treatment than that discussed with Plaintiff.⁶

Pursuant to the foregoing, Defendants' Preliminary Objections are SUSTAINED. Plaintiff shall have twenty (20) days from the date of this Order to file an Amended Complaint addressing the deficiencies within the Complaint.⁷

IT IS SO ORDERED this 28th day of October 2020.

By The Court,

Eric R. Linhardt, Judge

ERL/cp

cc:

Michael J. Zicoello, Esq.

Donna L. Adelberger, Esq.

222 E. Pennsylvania Ave., Oreland, PA 19075

Gary Weber, Esq. / Lycoming Reporter

⁵ However, even if this were required, the Court is satisfied that the Complaint establishes that Plaintiff only underwent the laser procedure because Dr. Gabinskiy informed her that he would use a non-ablative laser and that the recovery period would be relatively brief.

⁶ Paragraph 37 of the Complaint does allege that Dr. Gabinskiy advised Plaintiff that the treatment he planned to perform was for actinic keratosis when he knew that not to be true. While this allegation supports the lack of informed consent claim, the Court believes that the factual summary within the Complaint could more clearly establish that Dr. Gabinskiy's use of an ablative laser in the procedure was knowing, rather than the result of negligent oversight.

⁷ The Court notes that Defendants attached as Exhibit B to their Preliminary Objections a document from BNG Aesthetics titled "Informed Consent – Laser Treatment Procedures of Skin" that was signed and dated by Ms. Fritz on May 25, 2018. This document is apparently intended to demonstrate that Ms. Fritz did in fact consent to the procedure that was performed. While the Court has sustained Defendants' Preliminary Objections on other grounds, it notes that any objection that is precipitated upon evidence not appearing on the face of the objected to pleading is an impermissible speaking demurrer that will not be sustained. See *Regal Indus. Corp. v. Crum & Forster, Inc.*, 890 A.2d 395, 398 (Pa. Super. 2005).