

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

JACQUELINE K. O'SHEA, Administrator	: NO. 2023-01142
of the ESTATE OF MEDIA JANE	:
LEVENGOOD,	:
Plaintiff,	:
vs.	:
	: CIVIL ACTION - LAW
LOYALSOCK REHAB CENTER, LLC.	:
d/b/a ARISTACARE AT LOYALSOCK	:
and ARISTACARE HEALTH SERVICES	:
and EMBASSY LOYALSOCK, LLC d/b/a	:
EMBASSY OF LOYALSOCK and	:
EMBASSY HEALTHCARE, and	:
JOHN/JANE DOE,	: Preliminary Objections to
Defendants.	: First Amended Complaint

OPINION AND ORDER

This matter came before the Court on April 4, 2025, for an evidentiary hearing on Defendants' Preliminary Objections to the Second Amended Complaint (for ease of reference, sometimes referred to herein as the "Complaint"). For the reasons more fully set forth below, those Preliminary Objections are granted in part, and denied in part.

BACKGROUND:

This matter was commenced by Plaintiff by her original Complaint filed January 27, 2023, in the Court of Common Pleas of Philadelphia County. Upon Preliminary Objection by Defendants, the matter was transferred to Lycoming County. Plaintiffs filed an Amended Complaint, to which Defendants filed another round of Preliminary Objections. By Order dated November 15, 2024, the Court granted Defendants' Preliminary Objections to Plaintiff's First Amended Complaint, and directed Plaintiff to file a Second Amended Complaint within twenty (20) days. Plaintiff filed a Second Amended Complaint, to which Defendants filed Preliminary Objections on December 26, 2024. Defendants' Preliminary Objections to Plaintiff's Second Amended Complaint raise many of the same issues raised in earlier Preliminary Objections, but now add the additional claim of a request to remand the matter to compulsory arbitration. It appears to the Court that the Defendants or their counsel did not

notice the arbitration provision contained within admission documents until almost two (2) years after this litigation was commenced in Philadelphia County.

Plaintiff's Second Amended Complaint is more than 70 paragraphs long, and asserts claims in four (4) counts. Count I asserts claims of both common law and corporate negligence. Count II is also a claim in negligence, but appears to be a claim of corporate negligence in the hiring and retention of two (2) employees. Since any claim based upon the acts or omissions of those employees would be a claim at common law negligence, it appears to the Court that Count II might simply be redundant of Count I. Count III appears to be a restatement of Count II, but is simply labeled "reckless indifference." Since claims for punitive damages in Pennsylvania are not a separate cause of action but merely an element of claimed damages, the Court cannot understand the significance of Count III. Count IV is yet another restatement of the claim of negligence at Count I, but this time cloaked in the language of *res ipsa loquitor*. That doctrine, arising from the nineteenth century English courts, is a theory of recovery, rather than a separate cause of action.

It appears to the Court that Plaintiff numbered paragraphs 1 through 36 in the Second Amended Complaint, and then numbered Paragraph 37 as Paragraph 30, and continued thereafter. Thus, it appears that the Second Amended Complaint is actually 77 Paragraphs in length. The Court will attempt to refer to Paragraphs in the Second Amended Complaint clearly, in an effort to avoid confusion.

Defendants' Preliminary Objections, filed December 26, 2024, seek relief in ten (10) Counts. At Count A, Defendants seek to have this matter remanded to compulsory arbitration. At Count B, Defendants seek a demurrer to Plaintiff's claims for punitive damages, asserting that the Complaint lacks any allegations of material fact which would support a claim for punitive damages under 40 P.S. § 1303.505(b). At Count C, Defendants seek to strike Plaintiff's claims of *res ipsa loquitor*. At Count D, Defendants seek to strike all claims against unnamed agents. At Count E, Defendants seek to strike all references in the Second Amended Complaint to "neglect." At Count F, Defendants seek to strike all references to increasing revenue, underfunding, and related claims. At Count G, Defendants seek to strike all references to misleading documentation. At Count H, Defendants seek to strike all allegations of

“misleading and misrepresenting facts” to the Department of Health. At Count I, Defendants seek to strike all allegations regarding events which occurred after the injury to Plaintiff’s decedent. At Count J, Defendants seek to strike allegations of damage from Paragraphs 30 and 31 of the Second Amended Complaint.

QUESTIONS PRESENTED:

- Count A: Whether this matter should be transferred to compulsory arbitration.
- Count B: Whether a demurrer should be entered to Plaintiff’s claims for punitive damages (which is not specifically demanded in Plaintiff’s Second Amended Complaint).
- Count C: Whether Count IV of the Second Amended Complaint should be stricken.
- Count D: Whether Second Amended Complaint references to unnamed agents should be stricken.
- Count E: Whether Second Amended Complaint references to “neglect” should be stricken.
- Count F: Whether Second Amended Complaint references to “increasing revenue” or “underfunding” should be stricken.
- Count G: Whether Second Amended Complaint references to misleading documentation should be stricken.
- Count H: Whether Second Amended Complaint references to “misleading and misrepresenting facts” to the Pennsylvania Department of Health should be stricken.
- Count I: Whether Second Amended Complaint references to events occurring after the death of Plaintiff’s decedent should be stricken.
- Count J: Whether Second Amended Complaint paragraphs 30 and 31 should be stricken.

BRIEF ANSWERS:

- Count A: This matter will not be transferred to compulsory arbitration.
- Count B: No demurrer will yet be entered to Count III of Plaintiff’s Second Amended Complaint.

- Count C: Count IV of the Second Amended Complaint will be stricken, without prejudice to the Plaintiff to seek a jury instruction on *res ipsa loquitor* (13.30) if supported by the evidence at trial.
- Count D: Plaintiff's reference to unnamed agents will not yet be stricken, but Plaintiff's reference to unnamed agents will be addressed either in response to a future dispositive motion, or at trial.
- Count E: Plaintiff's reference to "neglect" will not be stricken.
- Count F: Second Amended Complaint references to increasing revenue or underfunding will be stricken.
- Count G: Second Amended Complaint references to misleading documentation will be stricken.
- Count H: Second Amended Complaint references to "misleading and misrepresenting facts" to the Pennsylvania Department of Health" will be stricken.
- Count I: Second Amended Complaint references to events occurring after the death of Plaintiff's decedent will be stricken, without prejudice to Plaintiff to introduce evidence of those events at trial, if relevant.
- Count J: Second Amended Complaint paragraphs 30 and 31 regarding a Medicare lien and other damages will be stricken, without prejudice to Plaintiff to introduce evidence of those events at trial, if relevant, or to claim any damages which are recoverable pursuant to applicable law.

DISCUSSION:

- Count A: This matter will not be transferred to compulsory arbitration.

This Court is fully aware that arbitration agreements are favored at Pennsylvania law.

It is well-settled that "[a]s a matter of public policy, our courts favor the settlement of disputes by arbitration." *Goral v. Fox Ridge, Inc.*, 453 Pa.Super. 316, 683 A.2d 931, 933 (1996). "Nevertheless, the right to enforce an arbitration clause can be waived." *Id.* "Waiver may be established by a party's express declaration or by a party's undisputed acts or language so inconsistent with a purpose to stand on the contract provisions as to leave no opportunity for a reasonable inference to the contrary." *Samuel J. Marranca Gen. Contracting Co., Inc. v. Amerimar Cherry Hill Assocs. Ltd. P'ship*, 416 Pa.Super. 45, 610 A.2d 499, 501 (1992). A party's acceptance of the regular

channels *383 of the judicial process can demonstrate its waiver of arbitration. *See Smay v. E.R. Stuebner, Inc.*, 864 A.2d 1266, 1278 (Pa.Super.2004) (stating acceptance of judicial process includes a party's failure to raise the arbitration issue promptly, a party's engagement in discovery, and a party waiting until it receives adverse rulings on pretrial motions before raising arbitration). “However, a waiver of a right to proceed to arbitration pursuant to the term of a contract providing for binding arbitration should not be lightly inferred and unless one's conduct has gained him an undue advantage or resulted in prejudice to another he should not be held to have relinquished the right.” *Kwalick v. Bosacco*, 329 Pa.Super. 235, 478 A.2d 50, 52 (1984).

Stanley-Laman Group, Ltd. v. Hyldahl, 2007 Pa.Super. 380, 939 A.2d 378, 383-83 (Pa.Super. 2007).

Had the arbitration agreement contained in the admission documents been timely raised, and had Defendants provided the Court with an evidentiary basis upon which to conclude that Jacqueline O’Shea had the authority and the intent to agree to arbitration, compulsory arbitration would almost certainly be the result. As it occurs, the Court finds a multitude of reasons to deny Defendants’ demand for compulsory arbitration.

First, the Court has no evidentiary basis upon which to conclude that Jacqueline O’Shea had either the authority or the intent to sign the arbitration agreement. The Court has reviewed the six (6) page Health Care Power of Attorney dated March 8, 2011. While the scope of the health care agency is very broadly worded, the Court did not locate language which the Court regards as a waiver of the right to trial. The arbitration agreement is buried within the admission documents, and was executed days after Plaintiff’s decedent was already a resident at Defendant’s facility. The Court finds, based upon the testimony at the April 4, 2025 hearing, that Ms. O’Shea never noticed the arbitration agreement, that no one mentioned it to her, and that her only intention in signing the admission documents was to allow Ms. Levengood to continue to receive the care that had been commenced, days before.

Second, Defendants’ demand for arbitration is untimely. Defendants’ demand for arbitration was not asserted through the first two sets of Preliminary Objections, and was not raised until the parties had engaged in many months of discovery. It may be that the Defendants did not notice the arbitration language in the admission agreement until nearly two (2) years

after this litigation commenced. Notwithstanding that possibility, Plaintiff has soldiered on through multiple sets of Preliminary Objections addressing multiple drafts of the Complaint, including the transfer from Philadelphia County to Lycoming County, and many months of discovery. This Court concludes that it would present significant prejudice to the Plaintiff, having engaged nearly two (2) years of litigation, to be directed to “Return to Go” and commence the litigation over through compulsory arbitration. For that reason, Count A of Defendants’ Preliminary Objections will be denied.

Count B: No demurrer will yet be entered to Count III of Plaintiff’s Second Amended Complaint.

The settled law of this Commonwealth is that preliminary objections in the nature of a demurrer are not favored:

A demurrer can only be sustained where the complaint is clearly insufficient to establish the pleader's right to relief. *Firing v. Kephart*, 466 Pa. 560, 353 A.2d 833 (1976). For the purpose of testing the legal sufficiency of the challenged pleading a preliminary objection in the nature of a demurrer admits as true all well-pleaded, material, relevant facts, *Savitz v. Weinstein*, 395 Pa. 173, 149 A.2d 110 (1959); *March v. Banus*, 395 Pa. 629, 151 A.2d 612 (1959), and every inference fairly deducible from those facts, *Hoffman v. Misericordia Hospital of Philadelphia*, 439 Pa. 501, 267 A.2d 867 (1970); *Troop v. Franklin Savings Trust*, 291 Pa. 18, 139 A. 492 (1927). The pleader's conclusions or averments of law are not considered to be admitted as true by a demurrer. *Savitz v. Weinstein, supra*.

Since the sustaining of a demurrer results in a denial of the pleader's claim or a dismissal of his suit, a preliminary objection in the nature of a demurrer should be sustained only in cases that clearly and without a doubt fail to state a claim for which relief may be granted. *Schott v. Westinghouse Electric Corp.*, 436 Pa. 279, 259 A.2d 443 (1969); *Botwinick v. Credit Exchange, Inc.*, 419 Pa. 65, 213 A.2d 349 (1965); *Savitz v. Weinstein, supra*; *London v. Kingsley*, 368 Pa. 109, 81 A.2d 870 (1951); *Waldman v. Shoemaker*, 367 Pa. 587, 80 A.2d 776 (1951). 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. *Packler v. State Employment Retirement Board*, 470 Pa. 368, 371, 368 A.2d 673, 675 (1977); *see also Schott v. Westinghouse Electric Corp.*, *supra*, 436 Pa. at 291, 259 A.2d at 449.

Mudd v. Hoffman Homes for Youth, Inc., 543 A.2d 1092, 1093–94 (Pa. Super. Ct. 1988).

Defendants seek a demurrer to Plaintiff’s claim for punitive damages, despite the fact that no such claim is stated within the demands for relief contained in Plaintiffs’ Second Amended Complaint. The Court infers that Defendants seek a demurrer to Count III, labeled “Reckless Indifference.” The Court sees little need for an Order striking a demand for punitive damages from the Second Amended Complaint, since it contains no such specific demand. In the event that Plaintiff seeks a jury instruction on punitive damages at trial, the Court will be required to consider 40 P.S. § 1303.505, which provides as follows:

(a) Award.--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.

(b) Gross negligence.--A showing of gross negligence is insufficient to support an award of punitive damages.

(c) Vicarious liability.--Punitive damages shall not be awarded against a health care provider who is only vicariously liable for the actions of its agent that caused the injury unless it can be shown by a preponderance of the evidence that the party knew of and allowed the conduct by its agent that resulted in the award of punitive damages.

(d) Total amount of damages.--Except in cases alleging intentional misconduct, punitive damages against an individual physician shall not exceed 200% of the compensatory damages awarded. Punitive damages, when awarded, shall not be less than \$100,000 unless a lower verdict amount is returned by the trier of fact.

(e) Allocation.--Upon the entry of a verdict including an award of punitive damages, the punitive damages portion of the award shall be allocated as follows:

- (1) 75% shall be paid to the prevailing party; and
- (2) 25% shall be paid to the Medical Care Availability and Reduction of Error Fund.

Count C: Count IV of the Second Amended Complaint will be stricken, without prejudice to the Plaintiff to seek a jury instruction (Pa.S.S.C.J.I, 13.30) if supported by the evidence at trial.

Plaintiff claims that Plaintiff's decedent was wrongfully administered an "opioid cocktail" and suffered damages as a result. Plaintiff further claims that the injury to Plaintiff's decedent would not have occurred, absent negligence. The Court notes, however, that the doctrine of *res ipsa loquitur* is a rule of evidence, not a cause of action.

Initially, it is important to remember that *res ipsa loquitur* is merely a rule of circumstantial evidence. Circumstantial evidence is defined as "evidence of one fact, or of a set of facts, from which the existence of the fact to be determined may reasonably be inferred." W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 39, at 242 (5th ed.1984) (footnote omitted). The inference, or process of reasoning by which a conclusion is reached, "must be based upon the evidence given, together with a sufficient background of human experience to justify the conclusion." *Id.* at 243. As Chief Justice Erle opined in 1865:

There must be reasonable evidence of negligence; but where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care.'

D'Ardenne v. by D'Ardennee v. Strawbridge & Clothier, Inc., 712 A.2d 318, 320-21 (Pa.Super. 1998).

It is entirely possible that Plaintiff's evidence at trial will support the trial court providing the jury with Pa. Suggested Standard Civil Jury Instruction 13.30. That rule of circumstantial evidence is not, however, a separate cause of action at Pennsylvania law.

Count D: Plaintiff's reference to unnamed agents will not yet be stricken, but Plaintiff's reference to unnamed agents will be addressed either in response to a future dispositive motion, or at trial.

Despite the Order of November 5, 2024, which directed Plaintiff to provide greater specificity in the allegations regarding unnamed agents of the Defendants, the allegations on that issue in Plaintiff's Second Amended Complaint appear vague. The Court is mindful that discovery is not yet complete, and thus that Plaintiff might not yet know the identity of Defendants' agents who participated in the care of Plaintiff's decedent. For that reason, the Court will not require Plaintiff to file yet another amended pleading, but the Court may further address this issue in response to a future dispositive motion, or at trial.

Count E: Second Amended Complaint references to "neglect" will not be stricken.

Paragraphs 27 and 95 of Plaintiff's First Amended Complaint accused the Defendants of "attempted murder," but contained no material allegations of fact beyond recklessness and negligence. The essence of Plaintiff's claim is that Defendants owed Plaintiff's decedent a duty of care, that they breached that duty by the wrongful administration of opioid medications, and that the breach was the legal cause of her falls and other damages suffered by her. In the Order of November 15, 2024, the Court directed Plaintiff to file a Second Amended Complaint, which deleted some of those references.

The Second Amended Complaint no longer accuses the Defendants of attempted murder, but does include allegations of neglect. In the view of the Court, allegations of neglect in a pleading seeking damages for medical negligence does not constitute scandalous matter.

Count F: Complaint references to increasing revenue or underfunding will be stricken.

The essence of Plaintiff's claim is that Defendants owed Plaintiff's decedent a duty of care, that they breached that duty by the wrongful administration of opioid medications, and that the breach was the legal cause of her falls and other damages suffered by her.

While Plaintiff's First Amended Complaint was replete with references to budgeting, staffing, "survey results," employee background checks, and other operational matters (see Paragraphs 60, 67, 68, and 89), there were no allegations of material fact which suggested that

any of those operational issues had anything to do with Defendants' administration of the alleged "opioid cocktail" to Plaintiff's decedent. Unfortunately, that failure persists in the Second Amended Complaint (i.e. Paragraph 37).

Since references in the Second Amended Complaint to increasing revenue or underfunding are not related to Plaintiff's claim that Defendants wrongfully administered opioid medications, those allegations will be stricken.

Count G: Second Amended Complaint references to misleading documentation will be stricken.

In her First Amended Complaint, Plaintiff repeatedly referred to Defendants' "fraudulent documentation" but failed to allege any material facts which support that conclusion. In the Order of November 15, 2024, the Court directed Plaintiff to either delete those references, or assert material allegations of fact which connect them to the injury to Plaintiff's decedent. Since those allegations do not appear to be material to Plaintiff's claim that Defendants wrongfully administered opioid medications, those allegations will be stricken.

Count H: References in the Second Amended Complaint references to "misleading and misrepresenting facts to the Pennsylvania Department of Health" will be stricken.

Paragraph 26 of Plaintiff's Second Amended Complaint alleges that Defendant reported inaccurate data to the Pennsylvania Department of health. While those events may prove relevant at trial, Plaintiff has no need to plead that evidentiary material. As such, those allegations will be stricken, without prejudice to introduce that evidence at trial, if relevant and otherwise admissible.

Count I: References in the Second Amended Complaint to events occurring after the death of Plaintiff's decedent will be stricken, without prejudice to Plaintiff to introduce evidence of those events at trial, if relevant.

Paragraphs 28 and 29 and 30 of the Second Amended Complaint allege facts related to an investigation which occurred after the events upon which Plaintiff's claim is based. Plaintiff

has no need to plead that evidentiary material. As such, those allegations will be stricken, without prejudice to introduce that evidence at trial, if relevant and otherwise admissible.

Count J: Second Amended Complaint paragraphs 30 and 31 regarding a Medicare lien and other damages will be stricken, without prejudice to Plaintiff to introduce evidence of those events at trial, if relevant, or to claim any damages which are recoverable pursuant to applicable law.

The second Paragraph 30 of Plaintiff's Second Amended Complaint, which is located immediately after Paragraph 36, alleges a medical lien. The following paragraph alleges other economic damages. While those damage claims may or may not be admissible at trial, Plaintiff has no need to plead that evidentiary material. As such, those allegations will be stricken, without prejudice to introduce that evidence at trial, if relevant and otherwise admissible.

ORDER

AND NOW, this ____ day of June, 2025, Defendants' Preliminary Objections to Plaintiff's Second Amended Complaint are **granted in part and denied in part, as follows:**

1. Plaintiff's request to transfer this matter to compulsory arbitration is denied.
2. Plaintiff's request for a demurrer to Count III is denied.
3. Count IV of the Second Amended Complaint is stricken, without prejudice to the Plaintiff to seek a jury instruction on *res ipsa loquitor* (13.30), if supported by the evidence at trial.
4. Plaintiff's references to unnamed agents of the Defendants will not be stricken, but may be addressed in future Orders either in response to a future dispositive motion, or at trial.
5. Plaintiff's references to "neglect" will not be stricken.
6. References in the Second Amended Complaint to increasing revenue or underfunding are stricken.
7. Reference in the Second Amended Complaint to misleading documentation are stricken, without prejudice to Plaintiff to introduce that evidence at trial, if relevant and otherwise admissible.

8. References in the Second Amended Complaint to “misleading and misrepresenting facts” to the Pennsylvania Department of Health are stricken, without prejudice to Plaintiff to introduce that evidence at trial, if relevant and otherwise admissible.
9. References in the Second Amended Complaint references to events occurring after the death of Plaintiff’s decedent are stricken, without prejudice to Plaintiff to introduce evidence of those events at trial, if relevant.
10. Paragraphs 30 and 31 of the Second Amended Complaint alleging the existence of a Medicare lien and other damages are stricken, without prejudice to Plaintiff to introduce evidence of those events at trial, if relevant, or to claim any damages which are recoverable pursuant to applicable law.

Except to the extent otherwise stated herein, Defendants’ Preliminary Objections to Plaintiff’s Second Amended Complaint are denied. Defendants are Ordered and directed to file an Answer with affirmative defenses, if any, within twenty (20) days of the date of filing of this Order.

BY THE COURT,

William P. Carlucci, Judge

WPC/aml

cc: Court Administrator
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