IN THE COMMONWEALTH COURT OF PENNSYLVANIA

David D. Richardson,	:	
Appellant	:	
	:	
v.	:	
	:	No. 547 C.D. 2011
Lori Kwisnek	:	Submitted: June 24, 2011

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE JOHNNY J. BUTLER, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
JUDGE BUTLER FILED: July 22, 2011

David D. Richardson (Richardson) appeals the March 9, 2011 order of the Court of Common Pleas of Westmoreland County (trial court) sustaining the Preliminary Objections filed by Lori Kwisnek (Kwisnek) and dismissing his appeal. There are two issues before the Court: (1) whether this Court's holding in *Portalatin v. Department of Corrections*, 979 A.2d 944 (Pa. Cmwlth. 2009) controls the outcome of this case, and (2) whether Richardson failed to state a claim for negligent infliction of emotional distress. For reasons that follow, we affirm the trial court's order.

Richardson is an inmate at the State Correctional Institution at Greensburg (SCI-Greensburg). Kwisnek is the Chief Health Care Administrator at SCI-Greensburg. Richardson filed a complaint, pro se, against Kwisnek seeking a preliminary injunction or a temporary restraining order prohibiting Kwisnek from charging a medical co-pay fee, and damages for infliction of emotional distress.

Kwisnek filed preliminary objections to the complaint, alleging that Richardson failed to state a claim upon which relief can be granted. On March 9, 2011, the trial court granted Kwisnek's preliminary objections and dismissed Richardson's appeal. Richardson appealed, pro se, to this Court.[1]

Richardson argues that the holding in *Portalatin* does not control this case. Specifically, Richardson contends *Portalatin* specifically referred to Section 93.12(d)(7) of the Department of Corrections (D.O.C.) Regulations (Section 93.12(d)(7)), 37 Pa. Code § 93.12(d)(7), referring to chronic illness; and his complaint refers to Section 93.12(d)(10) of the D.O.C. Regulations (Section 93.12(d)(10)), 37 Pa. Code § 93.12(d)(10), referring to long-term care. Thus, Richardson argues, *Portalatin* does not apply.

The D.O.C. charged Richardson a fee for his treatment pursuant to Section 93.12(d)(7), thus, the trial court's reliance on *Portalatin.* However, since Richardson's treatment is neither a chronic illness nor a treatment requiring long-term care, it is of no consequence that the trial court relied on *Portalatin.*

Section 93.12(d) of the D.O.C. Regulations states, in relevant part:

> (d) The Department will not charge a fee to an inmate for any of the following:
>
> . . . .
>
> (7) Medical treatment for a chronic or intermittent disease or illness.
>
> . . . .

[1] "Our standard of review of an order of the trial court sustaining preliminary objections is limited to a determination of whether the trial court committed an error of law or abused its discretion." *Bradley v. O'Donoghue,* 823 A.2d 1038, 1040 (Pa. Cmwlth. 2003).

> (10) Long-term care to an inmate not in need of hospitalization, but whose needs are such that they can only be met on a long-term basis or through personal or skilled care because of age, illness, disease, injury, convalescence or physical or mental infirmity.

Here, the medical treatment Richardson required was for continued treatment of his planter's wart. The Court in *Portalatin* held that because the treatment being requested in that case (a skin condition called tinea versicolor) did not fall under the definition of chronic, the D.O.C. was permitted to charge a fee.[2] Accordingly, since the treatment of a planter's wart does not fall under the definition of chronic, as stated in *Portalatin,* the D.O.C. is permitted to charge a fee in this case. Further, because treatment of a planter's wart is not a treatment requiring long-term care "because of age, illness, disease, injury, convalescence or physical or mental infirmity," as stated in Section 93.12(d)(10), the D.O.C. is not prohibited from charging a fee pursuant to that section. It is noted that Richardson refused surgery to have the wart removed, thereby requiring further treatment. Original Record, Complaint at 1-3. While we recognize that Richardson specifically referred to Section 93.12(d)(10), we hold that neither section applies. Thus, the D.O.C. was permitted to charge a fee for Richardson's treatment. Accordingly, no cognizable action is available to Richardson.

Richardson next argues that the D.O.C's actions in not following the regulations and charging him a fee have resulted in negligent infliction of emotional distress, thus he has stated a claim for relief. We disagree.

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[2] "Policy 820 provides the following definition of a chronic medical disease or illness: ***Chronic Medical Diseases/illness are defined as: Asthma, Congestive Heart Failure, Coronary Artery Disease, Diabetes, Dislipidemia, Hepatitis C, HIV and Hypertension***[.]" *Portalatin*, 979 A.2d at 950.

As established above, the D.O.C. was following its regulations when it charged Richardson for his treatment. Hence, there was no negligence on the part of the D.O.C. "[A]bsent a finding of negligence, the negligent infliction of emotional distress claim cannot survive." *Brezenski v. World Truck Transfer, Inc.*, 755 A.2d 36, 45 (Pa. Super. 2000). Accordingly, the trial court did not abuse its discretion or commit an error of law in sustaining the preliminary objections filed by Kwisnek.

For all of the above reasons, the order of the trial court is affirmed.

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JOHNNY J. BUTLER, Judge

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O R D E R

AND NOW, this 22nd day of July, 2011, the March 9, 2011 order of the Court of Common Pleas of Westmoreland County is affirmed.

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JOHNNY J. BUTLER, Judge