J-S57004-12

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

LIONEL L. SEASE, Appellant v. DR. MICHAEL J. DOBISH, DR. DALE KRESGE, DR. DAVID NEUBERGER, DR. MINDY NOLL, DR. RANDALL ROWAND, DR. MARK ROWAND, DR. ROCCO ARCIERI, DR. CYNTHIA PATTERSON, AND DALLASTOWN MEDICAL ASSOCIATES, Appellees	:	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1968 MDA 2011

Appeal from the Order entered on October 28, 2011
in the Court of Common Pleas of York County,
Civil Division, No. 2011-CU-000792-81

BEFORE: MUSMANNO, OLSON and STRASSBURGER*, JJ.

MEMORANDUM BY MUSMANNO, J.: Filed: February 21, 2013

Lionel L. Sease ("Sease") appeals, *pro se*, from the trial court's Order granting the preliminary objections filed by Dr. Michael J. Dobish ("Dr. Dobish") and the preliminary objections filed by Dr. Dale Kresge, Dr. David Neuberger, Dr. Mindy Noll, Dr. Mark Rowand, Dr. Randall Rowand, Dr. Rocco Arcieri, Dr. Cynthia Patterson, and Dallastown Medical Associates ("Dallastown")[1] (collectively "the Defendant Associates"), and dismissing Sease's "Amended/Corrected" Complaints with prejudice. We affirm.

[1] Sease averred that Dr. Dobish and the other named doctors were either partners or members of Dallastown.

*Retired Senior Judge assigned to the Superior Court.

Here, Sease avers that between April 2009 and January 2010, Dr. Dobish prescribed him various medications including Vicodin, Percocet and Oxycontin. In June 2009, Sease informed Dr. Dobish that he was experiencing increased bouts of depression and that the medications were making him feel high and intoxicated. Sease also indicates that he became reclusive, experienced a loss of sex drive, and experienced mood swings. In July 2009, Sease alleges his weight began to fluctuate, which resulted in respiratory problems. Sease asserts that Dr. Dobish prescribed him Advair, which interacted negatively with his other medications. Sease avers that his condition did not change through October 2009, during which time Dr. Dobish prescribed higher dosages of the drugs. Sease states that Dr. Dobish continued to prescribe the higher doses of the drugs even after Sease complained of discomfort and disorientation. Sease further states that he became involuntarily dependent on the drugs.

On February 23, 2011, Sease filed a *pro se* Complaint against Dr. Dobish. Subsequently, on March 23, 2011, Sease filed a *pro se* Complaint against the Defendant Associates. Dr. Dobish and the Defendant Associates filed preliminary objections. In May 2011, Sease responded to the preliminary objections by filing separate *pro se* "Amended/Corrected" Complaints against Dr. Dobish and the Defendant Associates. In the amended Complaint against Dr. Dobish, Sease pled the following causes of action: violations of his rights pursuant to the Fifth and Fourteenth

Amendments of the United States Constitution and Article I, § 1 of the Pennsylvania Constitution; medical malpractice; fraudulent misrepresentation; willful, wanton, and reckless misconduct; intentional infliction of emotional distress; and loss of consortium. In the amended Complaint against the Defendant Associates, Sease pled the following causes of action: violations of the Fourth, Fifth, and Fourteenth Amendments of the United States Constitution and Article I, § 1 of the Pennsylvania Constitution; medical malpractice; and negligent, willful, reckless and wanton misconduct. In June 2011, the two actions were consolidated. Dr. Dobish and the Defendant Associates again filed preliminary objections to Sease's amended Complaints. Sease filed responses in opposition to the preliminary objections. The trial court sustained the preliminary objections and dismissed Sease's amended Complaints.

Sease filed a timely *pro se* Notice of appeal. The trial court ordered Sease to file a Pennsylvania Rule of Appellate Procedure 1925(b) concise statement. Sease filed a timely Concise Statement.

On appeal, Sease raises the following question for our review:

> Did the lower court err in ruling that [Sease's] Complaint(s) failed to allege a cause of action upon which relief can be granted and failed to comply with the rules, therefore sustaining the preliminary objections of [Dr. Dobish and the Defendant Associates] and dismissing [Sease's] Complaint(s) while [Sease's] Motion were [*sic*] pending before the Motion court and the ruling court not having [*sic*] all information relative to this action to make a[n] informed decision?

Brief for Appellant at 4 (capitalization omitted).

> [O]ur standard of review of an order of the trial court overruling or granting preliminary objections is to determine whether the trial court committed an error of law. When considering the appropriateness of a ruling on preliminary objections, the appellate court must apply the same standard as the trial court.
>
> Preliminary objections in the nature of a demurrer test the legal sufficiency of the complaint. When considering preliminary objections, all material facts set forth in the challenged pleadings are admitted as true, as well as all inferences reasonably deducible therefrom. Preliminary objections which seek the dismissal of a cause of action should be sustained only in cases in which it is clear and free from doubt that the pleader will be unable to prove facts legally sufficient to establish the right to relief. If any doubt exists as to whether a demurrer should be sustained, it should be resolved in favor of overruling the preliminary objections.

Feingold v. Hendrzak, 15 A.3d 937, 941 (Pa. Super. 2011) (citation omitted).

With regard to his claims involving Dr. Dobish, Sease contends that Dr. Dobish fraudulently misrepresented that his prescription of various drugs for Sease would correct Sease's medical problems and alleviate chronic pain. Brief for Appellant at 10-11. Sease also contends that his amended Complaint set forth a cause of action for medical malpractice against Dr. Dobish. ***Id***. at 11, 13. Sease argues that Dr. Dobish should have known that his manner in prescribing the various drugs would have increased the risk of addiction to the drugs and the risk of injuries, including liver failure, kidney disease, body edema, and high blood pressure. ***Id***. at 12. Sease further asserts that subsequent to Dr. Dobish's malpractice, Dr. Dobish engaged in willful and wanton misconduct in disregarding Sease's complaints

about his physical and mental health. ***Id***. at 13. Sease additionally claims that the trial court erred in granting Dr. Dobish's preliminary objections as to the intentional infliction of emotional distress count. ***Id***. at 13-14. Sease argues that Dr. Dobish's over-prescribing of the drugs caused him to suffer depression, become a recluse, lose his sex drive,[2] and produced involuntary mood swings. ***Id***.

Following our review of the amended Complaint, we conclude that the trial court did not err in granting Dr. Dobish's preliminary objections. ***See*** Trial Court Opinion (Dr. Dobish), 10/28/11, at 4-15. We rely upon the well-reasoned and thorough Opinion of the trial court and adopt it for the purpose of this appeal. ***See id***.[3]

With regard to the Defendant Associates, Sease's only argument is as follows:

> In light of such the Appeal to the Honorable Court is only applicable to Defendant(s) Dr. Michael J. Dobish and the "ENTITY" known as Dallastown …; all other [] formally named Defendants are hereby dropped from this action, and any claim not addressed is considered waived.

Brief for Appellant at 14.

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[2] We note that Sease does not raise an explicit claim regarding his loss of consortium cause of action on appeal. ***See*** Pa.R.A.P. 2119(a).

[3] The trial court also noted that the preliminary objections were granted because Sease had violated Pa.R.C.P. 1021(b) by failing to claim specific relief, and violated Civil Rule 1028(a)(1) for failing to provide proper service. ***See*** Trial Court Opinion (Dr. Dobish), 10/28/11, at 15-17. On appeal, Sease has not raised any issue with these specific findings by the trial court.

Here, Sease has voluntarily abandoned all of his claims against all of the Defendant Associates except Dallastown. Moreover, Sease has failed to develop an argument or provide any pertinent citations to case law or the record to support his claims regarding Dallastown. ***See*** Pa.R.A.P. 2119(a). Thus, we conclude that any claims against Dallastown are waived for lack of development. ***See Umbelina v. Adams***, 34 A.3d 151, 161 (Pa. Super. 2011) (stating that "[w]here an appellate brief fails to provide any discussion of a claim with citation to relevant authority or fails to develop the issue in any other meaningful fashion capable of review, that claim is waived.") (citation omitted). Based upon the foregoing, the preliminary objections as to the Defendant Associates were properly granted.[4]

Order affirmed.

[4] We note that the trial court issued a separate Opinion detailing its reasons for granting the Defendant Associates' preliminary objections. ***See*** Trial Court Opinion (Defendant Associates), 10/28/11, at 3-11.

557004/12

IN THE COURT OF COMMON PLEAS OF YORK COUNTY, PENNSYLVANIA
CIVIL DIVISION

LIONEL L. SEASE, Plaintiff	:	No. 2011-SU-792-81
vs.	:	Preliminary Objections
DR. MICHAEL J. DOBISH, DR. DALE KRESEGE, DR. DAVID NEUBERGER, DR. MINDY NOLL, DR. RANDALL ROWAND, DR. MARK ROWARD, DR. ROCCO ARCIERI, DR. CYNTHIA PATTERSON, and DALLASTOWN MEDICAL ASSOCIATES Defendants	:	

APPEARANCES:

For Plaintiffs:	*Pro Se* Inmate No. JQ-6803 (SCI) Box 244 Graterford, PA 19426
For Defendants Kresege, Neuberger, Noll, R. Roward, M. Roward, Ariceri, Patterson, and Dallastown Medical:	John C. Farrell, Esq., and Samantha L. Kane, Esq.
For Defendant Dobish:	Daniel L. Grill, Esq.

OPINION

This matter is before the Court on the Preliminary Objections of DR. MICHAEL J. DOBISH (herein "Defendant Dobish"). For the reasons set forth herein, the Defendant Dobish's Preliminary Objections are **SUSTAINED**.

FACTUAL and PROCEDURAL HISTORY

This action stems from a professional liability claim. LIONEL L. SEASE (herein "Plaintiff") alleged that from April 2009 until January 2010, Defendant Dobish prescribed him a variety of prescription drugs, including Vicoden, Percocet and Oxycontin. Amended/Corrected Complaint, ¶ 2 at 1. As a result, Plaintiff averred he became addicted and suffered from ongoing depression, alienation from family, decreased sex drive, and involuntary mood swings. *Id.*, ¶ 3 at 1-2. Plaintiff further alleged that even though his condition declined, Defendant Dobish prescribed higher doses of these and other drugs. *Id.*, ¶¶ 3-4 at 2.

On February 23, 2011 and March 23, 2011, Plaintiff filed two separate Complaints for Medical Liability against Defendant Dobish, and DR. DALE KRESEGE, DR. DAVID NEUBERGER, DR. MINDY NOLL, DR. RANDALL ROWAND, DR. MARK ROWARD, DR. ROCCO ARCIERI, DR. CYNTHIA PATTERSON, and DALLASTOWN MEDICAL ASSOCIATES (herein collectively "Defendant Associates").[1] On May 13, 2011, Defendant Dobish filed Preliminary Objections to the Complaint. On May 16, 2011, Plaintiff filed a Motion for Enlargement of Time to Respond to Defendants' Preliminary Objections, which actually requested additional time to file an amended complaint with a Certificate of Merit, pursuant to Pa. R.C.P. 1019(a).

[1] Each Complaint was docketed separately, but involved the same set of facts and same parties. On June 23, 2011, this Court consolidated the two actions into the single present action.

On May 18, 2011 and May 23, 2011, Plaintiff filed two amended complaints, one in each action, both entitled Amended/Corrected Complaint.[2] On June 6, 2011, Defendant Dobish filed the Preliminary Objections to Plaintiff's Amended/Corrected Complaint of May 18, 2011, and filed the brief in support there of on June 7, 2011. On June 15, 2011 Plaintiff filed Response to Defendant Dobish's Preliminary Objections. On June 28, 2011, Defendant Dobish filed Preliminary Objections to Plaintiff's Amended/Corrected Complaint of May 23, 2011, and a brief in support thereof on July 1, 2011. Plaintiff responded to Defendant Dobish's Preliminary Objections to Plaintiff's Amended/Corrected Complaint on June 29, 2011 and on July 19, 2011.

On July 26, 2011, Defendant Dobish praeciped to list the case for a one judge disposition. On August 1, 2011, Plaintiff filed Motion in Opposition to Defendant Dobish's Praecipe to List for One Judge Disposition and Request for Three Judge Disposition.[3] On August 5, 2011, the matter of Defendant Dobish's Preliminary Objections was assigned to this Court.[4]

DISCUSSION

Preliminary objections, the end result of which would be dismissal of a cause of action, should be sustained only in cases that are clear and free from doubt. *Baker v. Brennan*, 419 Pa. 222, 227, 213 A.2d 362, 364 (1965) (citing *Schrader v. Heath*, 408 Pa. 79, 182 A.2d 696 (1962). The test on preliminary objections is "whether it is clear and free from

[2] The May 18, 2011 Amended Complaint contained five counts and listed Defendant Dobish as the lone defendant. The May 23, 2011 Amended Complaint contained two counts and listed all defendants.
[3] Plaintiff's Motion was not presented in Motion's Court, and therefore not ruled upon.
[4] Other motions and activities filed by the parties are not listed.

doubt from facts pleaded that the pleader will be unable to prove facts legally sufficient to establish his right to relief." *Firing v. Kephart*, 466 Pa. 560, 563-64, 353 A.2d 833, 835 (1976). When ruling on preliminary objections, the court must generally accept as true all well and clearly pled facts, together with such reasonable inferences as may be drawn from those facts, but not the pleader's conclusions or averments of law. *Santiago v. Pa. Nat'l Mut. Cas. Ins. Co.*, 418 Pa. Super. 178, 184-85, 613 A.2d 1235, 1238-39 (1992) (internal citations omitted).

> Under Pa. R.C.P. 1028, preliminary objections **are limited** to:
>
> 1) lack of jurisdiction over the subject matter of the action or the person of the defendant, improper venue or improper form or service of a writ of summons or a complaint;
> (2) failure of a pleading to conform to law or rule of court or inclusion of scandalous or impertinent matter;
> (3) insufficient specificity in a pleading;
> (4) legal insufficiency of a pleading (demurrer);
> (5) lack of capacity to sue, nonjoinder of a necessary party or misjoinder of a cause of action;
> (6) pendency of a prior action or agreement for alternative dispute resolution;
> (7) failure to exercise or exhaust a statutory remedy, and
> (8) full, complete and adequate non-statutory remedy at law.

I. Demurrer

Defendant Dobish's first preliminary objection is Plaintiff's Amended/Corrected Complaint is legally insufficient. The Amended/Corrected Complaints contain a total of seven counts: five describe violations of the Fifth and Fourteenth Amendments of the United States Constitution and Article 1, Section 1 of the Constitution of

the Commonwealth of Pennsylvania by Defendant Dobish, and two describe violations of the Fourth Amendment of the United States Constitution, along with the aforementioned violations. Plaintiff alleged his Constitutional rights were violated through Defendant Dobish's medical negligence (Count I); fraudulent misrepresentations (Count II); negligence, willful recklessness, wanton misconduct, and intentional infliction of physical, emotional and psychological distress (Count III); lost of consortium and companionship (Count IV); and medical malpractice (Count V). The additional two counts in the May 23, 2011 Amended/Corrected Complaint restate Count I and Count II of the May 18, 2011, Amended/Corrected Complaint.

Plaintiff did not aver specifically how Defendant Dobish's treatment violated Plaintiff's rights guaranteed under the Fourth, Fifth and Fourteenth Amendments of the U.S. Constitution or Article 1 § 1 of the Pennsylvania Constitution. However, all of the counts alluded that Defendant Dobish's treatment violated Plaintiff's rights by depriving him of life, liberty and freedom guaranteed by the Fourth, Fifth and Fourteenth Amendments, and Article 1 § 1. Defendant Dobish argues that the counts are not tied to any factual allegation necessary to establish a cause of action under the Fourth, Fifth or Fourteenth Amendments, or Article 1 § 1.

Pennsylvania is a fact pleading state, and "[a]s a minimum, a pleader must set forth concisely the facts upon which his cause of action is based." *Line Lexington Lumber & Millwork Co., Inc. v. Pa. Pub. Corp.*, 451 Pa. 154, 162, 301 A.2d 684, 688 (1973). *See also Alpha Tau Omega Frat. v. Univ. of Pa.*, 318 Pa.Super 293, 298, 464 A.2d 1349, 1352 (1983);

Weiss v. Equibank, 313 Pa.Super 446, 453, 460 A.2d 271, 274-75 (1983). To that extent, we will first determine whether the Plaintiff has set forth facts in the pleadings that allow an action under Fourth, Fifth or Fourteenth Amendments, or Article 1 § 1. Then, we will look at the specific causes of action listed in each count.

1. Fifth and Fourteenth Amendment Claims

The Fifth Amendment of the United States Constitution states that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V. It is well established that "the fifth amendment must be understood as restraining the power of the *general government*." *Barron v. City of Baltimore*, 32 U.S. 243, 247 (1833) (emphasis added). The Due Process Clause of the Fourteen Amendment states: ". . . nor shall *any State* deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1 (emphasis added). The Supreme Court has long held that "[l]ike its counterpart in the Fifth Amendment, the Due Process Clause of the Fourteenth Amendment was intended to prevent *government* 'from abusing [its] power, or employing it as an instrument of oppression.'" *DeShaney v. Winnebago Cnty. Dept. of Soc. Servs.*, 489 U.S. 189, 196, 109 S.Ct. 998, 1003 (1989) (emphasis added) (quoting *Davidson v. Cannon*, 474 U.S. 344, 348, 106 S.Ct. 668, 670 (1986)). *See also Daniels v. Williams*, 474 U.S. 327, 106 S.Ct. 662 (1986).

In the case at bar, Defendant Dobish, who at the time of the alleged treatment, was a doctor working in a private practice, which Plaintiff admitted. *See Plaintiff's Response to Defendant Dobish's Preliminary Objections*. Plaintiff has never alleged that Defendant

Dobish was a federal government or state government employee, or in any way acting under the auspices of the government. The Supreme Court has long established that "the purpose [of the Due Process Clause] was to protect the people from the State, not to ensure that the State protected them from each other." *DeShaney*, 489 U.S. at 196, 109 S.Ct. at 1003. Because Defendant Dobish was a physician working in a private practice, not a government actor, the Fifth and Fourteenth Amendments do not apply in this case.

2. Fourth Amendment Claim

The Fourth Amendment of the United States Constitution has long been held to refer to unreasonable searches and seizure done by government entities. *See U.S. v. Jacobsen*, 466 U.S. 109, 104 S.Ct. 1652, (1984); *Walter v. U.S.*, 447 U.S. 649, 100 S.Ct. 2395 (1980); *U.S. v. Janis*, 428 U.S. 433, 96 S.Ct. 3021 (1976); *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S.Ct. 2022 (1971); *Burdeau v. McDowell*, 256 U.S. 465, 41 S.Ct. 574 (1921). As the case at bar involves neither a government actor nor a search and seizure, the Fourth Amendment does not apply in this case.

3. Article 1 § 1 Claims

Article 1 § 1 of the Pennsylvania Constitution states:

> [a]ll men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness.

The Pennsylvania Supreme Court has held "'[t]he requirements of this section are not distinguishable from those of Section 1 of the Fourteenth Amendment to the Federal

Constitution.'" *R. v. Com., Dept. of Public Welfare*, 535 Pa. 440, 461, 636 A.2d 142, 152 (1994) (quoting *Best v. Zoning Bd. of Adjustment*, 393 Pa. 106, 110-11, 141 A.2d 606, 609 (1958). *Accord Minnich v. Rivera*, 509 Pa. 588, 506 A.2d 879 (1986) aff'd. 483 U.S. 574, 107 S.Ct. 3001 (1987); *Krenzelak v. Krenzelak*, 503 Pa. 373, 382, 469 A.2d 987, 991 (1983); *Rubin v. Bailey*, 398 Pa. 271, 157 A.2d 882 (1960); *Wilcox v. Pa. Mutual Life Ins. Co.*, 357 Pa. 581, 55 A.2d 521 (1947). As analyzed above, Plaintiff never claims Defendant Dobish was a government actor; therefore, Plaintiff's claims fail as a matter of law.

4. Medical Malpractice/Negligence

Medical malpractice is a form of negligence. *Quinby v. Plumsteadville Family Practice, Inc.*, 589 Pa. 183, 199, 907 A.2d 1061, 1070 (2006). To establish medical malpractice, a plaintiff must demonstrate: (1) a duty of care owed by the physician to the patient; (2) a breach of duty from the physician to the patient, (3) that the breach of duty was the proximate cause of, or a substantial factor in, bringing about the harm suffered by the patient, and (4) damages suffered by the patient that were a direct result of that harm. *Mitzelfelt v. Kamrin*, 526 Pa. 54, 62, 584 A.2d 888, 892 (1990) (citing *Morena v. South Hills Health System*, 501 Pa. 634, 462 A.2d 680 (1983); Prosser, Law of Torts, Section 30 at 143 (4th ed. 1971)). *See also Farabaugh v. Pa. Turnpike Com'n*, 590 Pa. 46, 60, 911 A.2d 1264, 1272-73 (2006) (establishing the elements in any case sounding in negligence). Medical malpractice actions also require plaintiffs to "provide a medical expert who will testify as to the elements of duty, breach, and causation." *Id.* at 199, 1070-71 (citing *Hightower-Warren v. Silk*, 548 Pa. 459, 698 A.2d 52 (1997)). Moreover, negligence does not necessarily entail

liability unless there is an injury. "No matter how great the negligence of the defendant, nor where it began or continued, there was no cause of action to anybody until an injury was received." *Hoodmacher v. Lehigh Valley R. Co.*, 218 Pa. 21, 23, 66 A. 975, 976 (1907).

In the case at bar, Plaintiff has neither alleged any facts to show that Defendant Dobish failed to exercise the ordinary care and skill of his profession, which would result in a breach of the physician's duty to his patient, nor indicated what injury he suffered. Plaintiff has alleged only that Defendant Dobish prescribed medications, Plaintiff experienced some adverse side effects and complained as such, and then Defendant Dobish adjusted the dosage of these medications. Yet, to support an allegation of medical malpractice, "the burden is upon the plaintiff to show that the physician failed to employ the requisite degree of care and skill." *Toogood v. Owen J. Rogal, D.D.S., P.C.*, 573 Pa. 245, 263, 824 A.2d 1140, 1150 (2003) (citing *Brannan v. Lankenau Hosp.*, 490 Pa. 588, 417 A.2d 196 (1980); *Bierstein v. Whitman*, 360 Pa. 537, 62 A.2d 843 (1949). Physicians, like everyone else, are fallible and capable of making mistakes, which is not negligence as a matter of law. *Id.* As such, prescription writing is a fundamental aspect of practicing physicians, which requires communication between the patient and physician on any side effects and possible re-evaluation by the physician. Without more, this Court cannot find a breach of duty based on the facts alleged. Furthermore, Plaintiff has neither provided a medical expert report, nor alleged any actual physical injury. Therefore, Plaintiff's claim of medical malpractice fails as a matter of law.

5. Fraudulent Misrepresentations

"Averments of fraud or mistake shall be averred with particularity." Pa.R.Civ.P. 1019(b). Courts have held this requires the plaintiff to set forth exact statements or actions by the defendant which constitute the fraudulent misrepresentations. *McClellan v. Health Maint. Org. of Pa.*, 413 Pa.Super. 128, 143, 604 A.2d 1053, 1060 (1992) (quoting *McGinn v. Valloti*, 363 Pa.Super. 88, 91, 525 A.2d 732, 734 (1987)); *accord New York State Electric & Gas Corp. v. Westinghouse Electric Corp.*, 387 Pa.Super. 537, 552-53, 564 A.2d 919, 927 (1989); *Greenwood v. Kadoich*, 239 Pa.Super. 372, 357 A.2d 604 (1976); *Catagnus v. Montgomery Cnty.*, 113 Pa.Cmwlth. 129, 135, 536 A.2d 505, 508 (1988). For a fraud or misrepresentation cause of action, plaintiff must show: (1) a misrepresentation; (2) a fraudulent utterance thereof; (3) an intention by the maker that the recipient will act; (4) justifiable reliance by the recipient upon the misrepresentation; and (5) damages to the recipient as the proximate result. *Neuman v. Corn Exchange Nat'l Bank & Trust*, 356 Pa. 442, 450, 51 A.2d 759, 763 (1947).

In the instant case, Plaintiff averred that Defendant Dobish said he "would provide medical attention and services which would correct plaintiff's medical conditions and alleviate chronic pain the plaintiff was suffering." Amended/Corrected Complaint, ¶7 at 3-4. Plaintiff stated despite his reliance on Defendant Dobish's statement, the result did not happen. However, Plaintiff provided no statement or action by Defendant Dobish to demonstrate Defendant Dobish suppressed the truth, lied, or even intended to deceive Plaintiff as to cause damage. *See* 2 Summ. Pa. Jur. 2d Torts § 16:2. Like in negligence,

errors or mistakes are not fraud or misrepresentation as a matter of law. *Cf. Toogood*, 573 Pa. at 263, 824 A.2d at 1150. Therefore, Plaintiff's claim of fraudulent misrepresentation fails as a matter of law.

6. Willful, Reckless and Wanton Misconduct, and Other Claims of Reckless Conduct

In the Commonwealth, reckless misconduct differs from negligence. As the Court in *Kasanovich v. George*, 348 Pa. 199, 203, 34 A.2d 523, 525 (1943), described, "[n]egligence consists of inattention or inadvertence, whereas wantonness exists where the danger to the plaintiff, though realized, is so recklessly disregarded that, even though there be no actual intent, there is at least a willingness to inflict injury, a conscious indifference to the perpetration of the wrong." *See also* Restatement (First) of Torts § 500, comment (g).

While Plaintiff may argue that Defendant Dobish intentionally prescribed the various medications, there is no evidence to justify a finding that the intention was a willingness, on Defendant Dobish's part, to inflict injury on Plaintiff. Plaintiff has not provided any facts to support that he suffered an actual injury by the conduct of Defendant Dobish. Therefore, Plaintiff's claim of willful, reckless or wanton misconduct fails as a matter of law.

7. Intentional Infliction of Emotional Distress

Pennsylvania courts have had conflicting opinions on whether to allow a cause of action for intentional infliction of emotional distress.[5] When allowed, many courts have followed definition provided in the Restatement (Second) of Torts, which states:

> [o]ne who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.

Restatement (Second) of Torts §46(1); *see Hoy v. Angelone*, 554 Pa. 134, 720 A.2d 745 (1998); *Reeves v. Middletown Athletic Ass'n*, 866 A.2d 1115 (Pa.Super. 2004); *Small v. Juniata College*, 452 Pa.Super. 410, 682 A.2d 350 (1996); *Fewell v. Besner*, 444 Pa.Super. 559, 664 A.2d 577, 582 (1995); *Hackney v. Woodring*, 424 Pa.Super. 96, 622 A.2d 286 (1993); *Buczek v. First National Bank of Mifflintown,* 366 Pa.Super. 551, 531 A.2d 1122 (1987); *Jones v. Nissenbaum, Rudolph & Seidner*, 244 Pa.Super. 377, 368 A.2d 770, (1976). *Compare Kazatsky v. King David Memorial Park*, 515 Pa. 183, 527 A.2d 988 (1987) (did not adopt the definition of the tort of intentional infliction of emotional distress as defined by Restatement (Second) of Torts § 46); *Johnson v. Caparelli*, 425 Pa.Super. 404, 625 A.2d 668 (1993) (discusses the different cases addressing the tort of intentional infliction of emotional distress; notes some cases adopted § 46 of the Restatement (Second) of Torts and some do not); *Kelly v. Resource Housing of America, Inc.*, 419 Pa.Super. 393, 615 A.2d 423 (1992) (does not recognize the tort of intentional infliction of emotional distress); *Strain v. Ferroni*, 405 Pa.Super. 349, 592 A.2d 698 (1991) (does not adopt the Restatement (Second) of Torts §

[5] In the Amended/Corrected Complaint, Plaintiff erroneously refers to "intentional infliction of physical, emotional and psychological distress."

46's definition of the tort of intentional infliction of emotional distress); *Baker v. Morjon*, 393 Pa.Super. 409, 574 A.2d 676 (1990) (declines to adopt the Restatement (Second) of Torts § 46's definition of the tort of intentional infliction of emotional distress).

To prevail on such a claim, the plaintiff must demonstrate (1) intentional outrageous or extreme conduct by the defendant, (2) severe emotional distress to the plaintiff, and (3) a physical injury or harm. *Reeves*, 866 A.2d at 1122 (citing *Hoy*, 544 Pa. at 151, 720 A.2d at 754; *Fewell*, 444 Pa.Super. at 569, 664 A.2d at 582). *See also Rolla v. Westmoreland Health Sys.*, 438 Pa.Super. 33, 38, 651 A.2d 160, 163 (1994); *Hart v. O'Malley*, 436 Pa.Super. 151, 174, 647 A.2d 542, 544 (1994). Our Supreme Court has held that "'[t]he conduct must be so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized society.'" *Hoy*, 544 Pa. at 151, 720 A.2d at 754 (quoting *Buczek*, 366 Pa.Super. at 558, 531 A.2d at 1125)).

In the case *sub judice*, Plaintiff alleged Defendant Dobish prescribed him various medications to alleviate Plaintiff's medical conditions and alleviate chronic pain. But when Plaintiff experienced side effects of the drugs and complained, Defendant Dobish "did nothing to correct it." Amended/Corrected Complaint ¶ 8 at 5. First, Plaintiff fails to allege outrageous or extreme conduct. The action of doing nothing to correct side effects of medications does not connote atrocious or utterly intolerable behavior. Second, as previously stated, Plaintiff alleges no actual physical injury. While Plaintiff vaguely refers to suffering physical problems in the Amended/Corrected Complaint, Plaintiff fails to specifically

indicate what, if any, harm he actually suffered. Plaintiff is not required to provide the medical explanation of the harm, but must provide something more substantial than a vague allegation of physical injuries. Therefore, Plaintiff's claim of intentional infliction of emotional distress fails as a matter of law.

8. Loss of Consortium

A loss of consortium claim is "the right of husbands and wives to recover damages for loss of consortium stemming from a tortious physical injury to a spouse." 1 Summ. Pa. Jur. 2d Torts § 9:64. *See also Burns v. Pepsi-Cola Metropolitan Bottling Co.*, 353 Pa.Super. 571, 510 A.2d 810 (1986); 15 Summ. Pa. Jur. 2d Family Law §§ 2:17-2:28. Moreover, a loss of consortium claim is derivative claim, requiring a primary tort claim. Thus, when the primary tort claims are dismissed, the loss of consortium must be dismissed as well. *See* 1 Summ. Pa. Jur. 2d Torts § 9:64; *see also* 15 Summ. Pa. Jur. 2d Family Law §§ 2:22-2:24.

Plaintiff's claim for loss of consortium fails for two main reasons. First, Plaintiff brings the claim himself. As stated above, a loss of consortium claim is only available to the spouse of the person who experienced the tortious injury. Second, Plaintiff refers to his "commonlaw wife," (sic), Amended/Corrected Complaint, page 2, ¶ 2. However, a loss of consortium claim requires a marriage, evidenced by a legal matrimonial ceremony. 15 Summ. Pa. Jur. 2d Family Law § 2:18. The Pennsylvania Supreme Court distinguished ceremonial marriages from common law by defining ceremonial marriage as "a wedding or marriage performed by a religious or civil authority with the usual or customary

ceremony or formalities." *Staudenmayer v. Staudenmayer*, 552 Pa. 253, 261, 714 A.2d 1016, 1019 (1998) (citing *In re Estate of Manfredi*, 399 Pa. 285, 291, 159 A.2d 697, 700 (1960); 23 Pa.C.S. § 1501, et seq.). Therefore, Plaintiff's loss of consortium claim fails as a matter of law.

II. Plaintiff Failed to Comply with the Rules

Defendant Dobish's second preliminary objection is that Plaintiff's Complaint failed to comply with law or rule of Court by: 1) violating Pa.R.Civ.P. 1021(b) by claiming specific relief; and 2) failing to provide proper service pursuant to Pa.R.Civ.P. 1028(a)(1).

1. Failure to Comply with Rule 1021(b)

Defendant Dobish avers Plaintiff violated Pa.R.Civ.P 1021(b) by requesting specific relief. The damages clause in Plaintiff's Amended/Corrected Complaint requests a judgment against Defendant in the sum of $10,000,000 for compensatory damages, $20,000,000 in punitive damages, and $30,000,000 for consequential damages. Amended/Corrected Complaint ¶¶2-4 at 6-7. Plaintiff admitted to the damages clause, and contends that Rule 1021(b) "is not binding" upon Plaintiff because Plaintiff has no way to know what assets Defendant Dobish has or can liquidate. Plaintiff's Responses to Defendant Dobish's Preliminary Objections ¶72 at 8.

Rule 1021(b) states "[a]ny pleading demanding relief for unliquidated damages shall not claim a specific sum." Pa.R.Civ.P. 1021(b). Unliquidated damages means those damages which cannot be determined by a fixed formula and must be established by a judge or jury; whereas, liquidated damages, in comparison, means those damages

contractually stipulated as a reasonable estimation of actual damages to be recovered by one party in the case of a breach of contract. Black's Law Dictionary (9th ed. 2009). Clearly, this is not a breach of contract case, and therefore, any damages would be unliquidated. Therefore, because Plaintiff listed specific sums in the damages clause, Plaintiff violated Rule 1021(b).

2. Failure to Comply with Rule 1028(a)(1)

Defendant Dobish avers the Amended/Corrected Complaint in both actions, as well as the original Complaints, were mailed to him, which violates Pa.R.Civ.P. 400(a). The Pennsylvania Rules of Civil Procedure provides, with exceptions not relevant here, "original process shall be served within the Commonwealth only by the sheriff." Pa.R.Civ.P. 400(a).

Plaintiff contends he did make proper service of the Amended/Complaint, filed May 18, 2011. In reviewing the docket, Plaintiff filed a Certificate of Service pursuant to Rule 440, which shows he served counsel of record; however, Plaintiff failed to file a Sheriff Return of Service to show service upon Defendant Dobish for either the original Complaint or the Amended/Corrected Complaint. Rule 440 is specifically entitled "Service of Legal Papers *other than* Original Process." Pa.R.Civ.P 440 (emphasis added). Original process, as stated above, must be served by a sheriff. The Pennsylvania Supreme Court has held that plaintiffs must make a good-faith effort at service of original process. *Lamp v. Heyman*, 469 Pa. 465, 478, 366 A.2d 882, 889 (1976). "'Procedural rules relating to service of process must be strictly followed because jurisdiction of the person of the defendant

cannot be obtained unless proper service is made.'" *Miller v. Klink*, 871 A.2d 331 (Pa.Cmwlth. 2005) (quoting *Beglin v. Stratton*, 816 A.2d 370, 373 (Pa.Cmwlth.2003)).

As this action does not fit the exceptions noted in Rule 400(a), Plaintiff was required at least make a good faith effort to serve the Complaint on Defendant Dobish by sheriff. Plaintiff simply failed to do so.

CONCLUSION

Plaintiff had multiple opportunities to correct all the mistakes noted above, as he filed multiple Complaints. In response, Defendant Dobish filed multiple sets of preliminary objections, each of which maintained two primary preliminary objections. While the Court notes the instructions from our Appellate Court to afford *pro se* litigants the broadest favorable reading of their filings and submissions, *pro se* litigants still must comply with the rules of court and rules of law. We, as judges are not to ignore deficiencies, nor are we required to "fix" them in order for litigants to comply. Despite his numerous Complaints, Plaintiff has failed to allege a cause of action upon which relief can be granted and failed to comply with the Rules. Therefore, Defendant Dobish's preliminary objections are sustained and Plaintiff's Amended/Corrected Complaint is dismissed as to Defendant Dobish.

BY THE COURT,

MARIA MUSTI COOK, JUDGE