

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

LAWRENCE HIGGINS

Appellant

v.

ERIC AND DONNA GEORGE

Appellee

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 513 MDA 2016

Appeal from the Order Entered December 4, 2015
In the Court of Common Pleas of Luzerne County
Civil Division at No: 2013-06186

BEFORE: STABILE, DUBOW, and PLATT,* JJ.

MEMORANDUM BY STABILE, J.:

FILED DECEMBER 22, 2016

Appellant, Lawrence Higgins, appeals *pro se* from the December 4, 2015 order entered in the Court of Common Pleas of Luzerne County, sustaining preliminary objections filed by Appellees, Eric and Donna George, and dismissing Appellant's second amended complaint. Following review, we affirm.

In its May 13, 2016 Rule 1925(a) opinion, the trial court explained that Appellant initially filed a *pro se* complaint in May 2013, seeking wrongful death damages for the December 2012 death of his son, Jared Higgins. Appellees filed preliminary objections, which the trial court sustained. The trial court directed Appellant to file an amended complaint and Appellant

* Retired Senior Judge assigned to the Superior Court.

complied. In response to the amended complaint, Appellees filed preliminary objections. The trial court again sustained the objections and ordered Appellant to file a second amended complaint. In his second amended complaint, Appellant contended that Eric George introduced Jared to heroin in 1999 and provided it to him daily until Jared's death, intending that Jared would become addicted. Trial Court Opinion, 5/13/16, at 1 (unnumbered). Appellant also claimed that Jared's mother, Appellant's ex-wife, Donna George, was aware of the action and failed to intervene. **Id.** at 2 (unnumbered). Appellant sought \$250,000 in damages from each Appellee for "severe mental anguish and irreparable harm." **Id.** (quoting Appellant's Second Amended Complaint at 2).

Appellees once again filed preliminary objections, asking the trial court to dismiss Appellant's second amended complaint for failure to comply with various procedural rules. While Appellees waived oral argument, Appellant requested argument in his response. **Id.** at 2-4 (unnumbered).

By order entered on December 4, 2015, the trial court sustained the preliminary objections and dismissed the complaint. This timely appeal followed.¹ Both Appellant and the trial court complied with Pa.R.A.P. 1925.

¹ Appellant is currently incarcerated in Texas, serving a sentence for murder. On July 11, 2016, this Court issued a rule to show cause why the appeal should not be dismissed as untimely and directed Appellant to produce evidence of the date he provided his notice of appeal to the prison authorities for mailing. Appellant complied with the directive and submitted
(Footnote Continued Next Page)

In his *pro se* brief filed with this Court, Appellant violates virtually every appellate rule governing briefs. Although he does not set forth questions for this Court's review as required by Pa.R.A.P. 2111(4) and Pa.R.A.P. 2116(a), it appears he is asking us to find trial court error for dismissing his complaint on procedural grounds and for dismissing his complaint without holding oral argument. Appellant's Brief at 4-5. These are the two errors Appellant suggested by his Rule 1925(b) statement. We shall address them, despite the lack of conformance to our procedural rules, even while recognizing that Appellant's *pro se* status does not confer any special privileges upon him or forgive his disregard of our procedural rules. ***Commonwealth v. Ray***, 134 A.3d 1109, 1114-15 (Pa. Super. 2016); ***Jones v. Rudenstein***, 585 A.2d 520, 522 (Pa. Super. 1991).

As this Court has stated,

Our review of a challenge to a trial court's decision to grant preliminary objections is guided by the following standard:

[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.

(Footnote Continued) _____

the requested documentation. By order dated August 3, 2016, the rule to show cause was discharged and the matter was referred to this panel for consideration. Based on our review of Appellant's submission, we conclude Appellant did, in fact, comply with Pa.R.A.P. 903(a) and Pa.R.A.P. 121(a) by providing timely notice of his appeal to prison authorities for purposes of mailing.

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) (quoting ***Haun v. Community Health Systems, Inc.***, 14 A.3d 120, 123 (Pa. Super. 2011)).

In its Rule 1925(a) opinion, the trial court examines each of the procedural bases for Appellees' preliminary objections² as well as the demurrer grounded on the lack of assertions against Appellee Donna George upon which any relief might be available under the Wrongful Death Act. Trial Court Opinion, 4/13/16, at 2-4 (unnumbered). The trial court then discusses the legal bases supporting its grant of the preliminary objections, including the fact that while a wrongful death action is "designed only to deal

² The procedural rules implicated include Pa.R.C.P. 1028(a)(2) (failure of a pleading to conform to law or rule of court or inclusion of scandalous or impertinent matter) and Pa.R.C.P. 1028(a)(5) (lack of capacity to sue, nonjoinder of a necessary party or misjoinder of a cause of action) (based on Pa.R.C.P. 2202(b) (parties entitled to bring action for wrongful death), Pa.R.C.P. 2204 (averments in a plaintiff's pleading) and Pa.R.C.P. 2205 (notice to persons entitled to damages)).

with the *economic* effect of the decedent's death upon [] specific family members," Appellant here is claiming *non-economic* damages for his own mental anguish. ***Id.*** at 5-8 (unnumbered) (quoting ***Moyer v. Rubright***, 651 A.2d 1139, 1141 (Pa. Super. 1994) (emphasis added)).³

³ In ***Moyer***, this Court reiterated:

An action for wrongful death may be brought only by specified relatives of the decedent to recover damages in their own behalf, and not as beneficiaries of the estate. Wrongful death damages are implemented to compensate the spouse, children, or parents of the deceased for the pecuniary loss they have sustained by the denial of future contributions decedent would have made in his or her lifetime. . . This action is designed only to deal with the economic effect of the decedent's death upon these specified family members.

Id. at 1141 (citation omitted).

This Court has since held that members of a decedent's family may recover wrongful death damages for the value of the loss of a *decedent's* services, including society and comfort. ***Rettger v. UPMC Shadyside***, 991 A.2d 915, 932-33 (Pa. Super. 2010). However, ***Rettger*** is distinguishable from the instant case in which Appellant seeks to recover for *his own* mental anguish resulting from Appellees' actions rather than the value of the society and comfort provided by his son. Further, even more recently our Supreme Court endorsed this Court's ***Moyer*** holding, quoting our 2013 decision in ***Pisano v. Extendicare Homes, Inc.***, 77 A.3d 651, 658-59 (Pa. Super 2013), which includes the above passage from ***Moyer***. ***See Taylor v. Extendicare Health Facilities***, 2016 WL 5630669, at *2 n.1 (Pa. September 28, 2016), recognizing that the wrongful death action is designed to deal only with the economic effect of the *decedent's* death upon specified family members.

The trial court also addresses Appellant's contention that he was wrongfully deprived of the opportunity to present oral argument in opposition to the preliminary objections. Specifically, the trial court recognizes that the terms of Pa.R.C.P. 211 in effect at the time Appellant requested argument provided for the right of any party "to require oral argument." *Id.* at 4 (unnumbered). Nevertheless, as the trial court notes, both this Court and the Commonwealth Court have found that the right to oral argument was a qualified right subject to judicial discretion.⁴ *Id.* at 4-5 (unnumbered) (citing cases).

We find no error in the trial court's decision to sustain the preliminary objections, in ruling on the objections without oral argument, or in dismissing Appellant's second amended complaint. We hereby adopt as our own the trial court's opinion as if fully set forth herein.⁵ A copy of the trial court's opinion shall be attached to this Memorandum and to any future filings by either party.

Order affirmed.

⁴ Rule 211 has since been amended and now specifies that either party may request oral argument but the court may dispose of any motion without argument. Pa.R.C.P. 211.

⁵ In adopting the trial court opinion, we note the correction of a typographical error on page 4 of the opinion, in the last line of the first paragraph following the heading "Law and Discussion," where the trial court mistakenly indicates that "Defendant" requested argument rather than "Plaintiff" (Appellant).

J-S69003-16

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn", written over a horizontal line.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 12/22/2016

IN THE COMMONWEALTH OF PENNSYLVANIA

LAWRENCE HIGGINS,	:	IN THE COURT OF COMMON
	:	PLEAS OF LUZERNE COUNTY
Plaintiff,	:	
	:	
v.	:	CIVIL ACTION – LAW
	:	JURY TRIAL DEMANDED
ERIC GEORGE and DONNA GEORGE,	:	
	:	
Defendants.	:	No. 2013-06186

FILED
 PROTHONOTARY
 LUZERNE COUNTY
 2016 MAY 13 PM 3:54

OPINION

BY: THE HONORABLE DAVID W. LUPAS

I. FACTS AND PROCEDURAL HISTORY:

On May 21, 2013, Plaintiff Lawrence Higgins filed a *pro se* complaint captioned “Civil Action Claims Suit for Wrongful Death” against Defendants Donna George, Plaintiff’s ex-wife, and Eric George, her husband, relating to the December 28, 2012 death of 29-year-old Jared Higgins, son of Plaintiff and Defendant Donna George. Defendants’ preliminary objections to Plaintiff’s complaint were sustained and Plaintiff was directed to file an amended complaint. He did so, but Defendants filed preliminary objections to the amended complaint, which were granted. Plaintiff was again permitted to amend the complaint.

Plaintiff filed a second amended complaint on August 7, 2015. The second amended complaint, titled “Amended Complaint for Wrongful Death,” asserts in pertinent part that Defendant Eric George introduced Jared Higgins to heroin, supplied Higgins with heroin on a daily basis from 1999 until December 2012, and “did in fact with malicious intent cause [Higgins] to become addicted to heroin which led to his death.” Second Amended Complaint filed 8/7/15 at 1-2. The second amended complaint further asserts

that Defendant Donna George was aware of Eric George's actions but failed to intervene and allowed Jared Higgins to become addicted. *Id.* at 2. Based on Defendants' alleged roles in Jared Higgins' death, the second amended complaint seeks \$250,000.00 from each Defendant for Plaintiff Lawrence Higgins' "severe mental anguish and irreparable harm." *Id.*

On August 27, 2015, Defendants filed preliminary objections to the second amended complaint, and a supporting brief. Defendants waived oral argument on their preliminary objections. On September 10, 2015, Plaintiff filed a timely response to Defendants' preliminary objections, and requested oral argument.

In pertinent part, Defendants' preliminary objections initially asked the Court to dismiss Plaintiff's claims pursuant to Pa.R.C.P. 1028(a)(2) (failure of a pleading to conform to law or rule of court or inclusion of scandalous or impertinent matter). The preliminary objections asserted that the second amended complaint fails to conform to Pa.R.C.P. 2202(a)-(b) ("Parties Entitled to Bring Action for Wrongful Death"), which states:

- (a) Except as otherwise provided in clause (b) of this rule, an action for wrongful death shall be brought only by the personal representative of the decedent for the benefit of those persons entitled by law to recover damages for such wrongful death.
- (b) If no action for wrongful death has been brought within six months after the death of the decedent, the action may be brought by the personal representative or by any person entitled by law to recover damages in such action as trustee ad litem on behalf of all persons entitled to share in the damages.

Pa.R.C.P. 2202(a)-(b). The preliminary objections maintained that this action was not brought by a personal representative or a trustee ad litem entitled to recover damages on

behalf of all persons entitled to share the damages, but was instead brought by Plaintiff as an individual, for his own individual benefit.

The preliminary objections also asserted that the second amended complaint fails to conform to Pa.R.C.P. 2204 ("Averments in Plaintiff's Pleading"), which requires that the plaintiff's initial pleading in an action for wrongful death state "the plaintiff's relationship to the decedent, the plaintiff's right to bring the action, the names and last known residence addresses of all persons entitled by law to recover damages, their relationship to the decedent and that the action was brought in their behalf." Pa.R.C.P. 2204.

Additionally, the preliminary objections stated that the second amended complaint fails to conform to Pa.R.C.P. 2205 ("Notice to Persons Entitled to Damages"), which directs that in an action for wrongful death, "the plaintiff shall give notice, by registered mail or in such other manner as the court shall direct by local rule or special order, to each person entitled by law to recover damages in the action, that an action has been instituted for wrongful death, naming the decedent and stating the court, term and number of the action."

The preliminary objections also asked the Court to dismiss Plaintiff's claims pursuant to Pa.R.C.P. 1028(a)(4) (legal insufficiency of a pleading (demurrer)), on the grounds that the second amended complaint asserts no acts by Defendant Donna George for which a claim to relief may be granted, and asserts no relief that may be granted under the Wrongful Death Act.

Finally, the preliminary objections asserted that Plaintiff's claim must be dismissed pursuant to Pa.R.C.P. 1028(a)(5) (lack of capacity to sue, nonjoinder of a necessary party or misjoinder of a cause of action) alleging that Plaintiff only brings this action on behalf

of himself and an individual, and only for his own purported mental anguish, thus failing to comply with Rules 2202(b), 2204 and 2205.

By order filed December 3, 2015, this Court sustained Defendants' preliminary objections and dismissed Plaintiff's second amended complaint. Plaintiff appeals this decision, and was directed to file Pa.R.A.P. 1925(b) Statement of Errors Complained of on Appeal, while Defendants were requested to respond thereto. In compliance with these directives, Plaintiff has filed a timely Rule 1925(b) Statement, and Defendants have filed a response thereto.

This matter is now ripe for an Opinion addressing the alleged errors raised by Plaintiff. For the reasons set forth below, we believe Defendants' preliminary objections to Plaintiff's second amended complaint were properly sustained.

II. LAW AND DISCUSSION:

Plaintiff's Rule 1925(b) statement sets forth two issues for purposes of appeal. The statement initially indicates that Plaintiff wishes to challenge the Court's failure to conduct oral argument on Defendants' preliminary objections to Plaintiff's complaint. As noted above, Defendants waived oral argument on their preliminary objections, but Defendant requested argument in his response thereto.

At the time Defendants filed their preliminary objections and Plaintiff filed his response, Pa.R.C.P. 211 directed in pertinent part that "[a]ny party or the party's attorney shall have the right to argue any motion and the court shall have the right to require oral argument." As the Explanatory Comment to the Rule discusses, however, the Superior Court and the Commonwealth Court have both held that the right to oral argument conferred by Rule 211 is only a qualified right subject to judicial discretion. Pa.R.C.P.

211 Explanatory Comment (citing Gerace v. Holmes Protection of Philadelphia, 516 A.2d 354 (Pa. Super. 1986); City of Philadelphia v. Kenny, 369 A.2d 1343 (Pa. Cmwlt. 1977)).¹

As such, it was within this Court's discretion to decide Defendants' preliminary objections without oral argument.

Plaintiff's Rule 1925(b) statement additionally criticizes the Court for "dismissing the cause for procedural defaults when the complaint was easily construed, Plaintiff is incarcerated in Texas, Plaintiff attempted to have the court provide copy of Rules of Court and Plaintiff has no access to Pa. Rules of Court." Pa.R.A.P. 1925(b) Statement at 1.² To the contrary, the Court is not obligated to act as Plaintiff's counsel, and Defendants' preliminary objections to Plaintiff's wrongful death complaint were properly sustained.

Wrongful death actions are governed by 42 Pa.C.S.A. § 8301. Under the Wrongful Death Act, an action for the death of an individual "caused by the wrongful act or neglect or unlawful violence or negligence of another" may be brought to compensate the

¹ Rule 211 was amended on October 26, 2015, effective January 1, 2016, "[t]o remedy any confusion between the text of the rule and actual practice supported by appellate precedent." Pa.R.C.P. 211 Explanatory Comment. It now states that "[a]ny interested party may request oral argument on a motion. The court may require oral argument, whether or not requested by a party. The court may dispose of any motion without oral argument." Pa.R.C.P. 211.

² To the extent that this issue asserts that Plaintiff is entitled to appellate relief because he was not provided with a copy of court rules or as the result of his *pro se* status, such claims are without merit. See Peters Creek Sanitary Auth. v. Welch, 545 Pa. 309, 316, 681 A.2d 167, 171 (1996) (citing Vann v. Unemployment Compensation Board of Review, 508 Pa. 139, 148, 494 A.2d 1081, 1086 (1985) (*pro se* litigant must to some extent assume the risk that his lack of legal training will prove his undoing); Commonwealth v. Abu-Jamal, 521 Pa. 188, 200, 555 A.2d 846, 852 (1989) (*pro se* litigant "is subject to same rules of procedure as is a counseled defendant; he has no greater right to be heard than he would have if he were represented by an attorney"); Jones v. Rudenstein, 585 A.2d 520, 522 (Pa. Super. 1991) *appeal denied*, 529 Pa. 634, 600 A.2d 954 (1991) (*pro se* litigant not absolved of complying with procedural rules and courts have no affirmative duty to walk *pro se* litigant through the rules)); Rich v. Acrivos, 815 A.2d 1106, 1108 (Pa. Super. 2003) ("The law is well settled that there is no right to counsel in civil cases.").

individual's spouse, children or parents for pecuniary losses sustained by them. Pa.C.S.A. § 8301(a), (b); Sinn v. Burd, 486 Pa. 146, 151 n. 3, 404 A.2d 672, 675 n. 3 (1979); Machado v. Kunkel, 804 A.2d 1238, 1245 (Pa. Super. 2002); Sunderland v. R.A. Barlow Homebuilders, 791 A.2d 384, 390 (2002), aff'd, 576 Pa. 22, 838 A.2d 662 (2003); Hodge v. Loveland, 690 A.2d 243, 246 (Pa. Super. 1997). "This action is designed only to deal with the economic effect of the decedent's death upon these specified family members." Moyer v. Rubright, 651 A.2d 1139, 1141 (Pa. Super. 1994). "As a general rule, pecuniary loss embraces the amount of the deceased's probable earnings that would have gone for the benefit of the children, parent, husband or wife and is broad enough to include the value of probable services that would, in the ordinary course of events, be of benefit to one within this class. Vrabel v. Commonwealth, 844 A.2d 595, 600 (Pa. Cmwlth. 2004)

"An action for wrongful death shall be brought only by the personal representative of the decedent for the benefit of those persons entitled by law to recover damages for such wrongful death." Pa.R.C.P. 2202(a). If an action for wrongful death has not been brought by the personal representative within six months after the decedent's death, an action may be brought "by the personal representative or by any person entitled by law to recover damages in such action as trustee ad litem on behalf of all persons entitled to share in the damages." Pa.R.C.P. No. 2202(b).

In the instant matter, although the second amended complaint states Plaintiff's relationship to the decedent, it does not set forth Plaintiff's right to bring the action, as is required by Rule 2204. Neither does the second amended complaint state the names and last known residence addresses of all persons entitled by law to recover damages

and their relationship to the decedent, as additionally required by that rule. Further, and more significantly, the second amended complaint does not assert that Plaintiff is the personal representative of the decedent bringing the action for the benefit of those persons entitled by law to recover damages for the decedent's wrongful death, as is required by Rule 2202(a).³

Most significantly, regarding damages, the second amended complaint does not state any pecuniary loss on the part of Plaintiff or any other family member entitled to recover such damages under the Wrongful Death Act. Indeed, as is obvious from the damages actually sought by the second amended complaint, Plaintiff has not brought the action for the benefit anyone other than himself, and the damages that he seeks are for his own "mental anguish." This type of damage is not the type recoverable under the Wrongful Death Act. To the contrary, the courts of this commonwealth have determined that damages for a surviving family member's mental anguish are not recoverable under the Wrongful Death Act. See *Sinn*, 486 Pa. at 185, 404 A.2d at 692 (Roberts, J., dissenting) (citing *Pennsylvania R.R. Co. v. Zebe*, 33 Pa. 318, 328 (1858)) (Damages under the Wrongful Death Act are limited to pecuniary damages and nothing is recoverable for the mental suffering occasioned to the survivors); *Papieves v. Lawrence*, 437 Pa. 373, 380, 263 A.2d 118, 122 (1970) ("[N]o recovery has been allowed in wrongful death actions for grief and mental suffering resulting from the loss of a decedent").

As such, even if this Court had permitted Plaintiff to amend the complaint in order to comply with Rules 2202, 2204 and 2205, the Wrongful Death Act simply does not

³ Rule 2202(b) (pertaining to the initiation of a wrongful death action six months after the decedent's death if no action was filed within six months of death) is not applicable, since the complaint was brought within six months of Jared Higgins' death.

permit the recovery sought by the complaint. Defendants' preliminary objections were properly sustained, and Plaintiff's appeal should be denied.