

KEVIN McELWEE, individually as	:	IN THE COURT OF COMMON PLEAS OF
Parent to JESSICA McELWEE,	:	LYCOMING COUNTY, PENNSYLVANIA
deceased, and as Administrator of the	:	JURY TRIAL DEMANDED
Estate of JESSICA McELWEE,	:	
Deceased; KEVIN McELWEE and	:	
JO ANN McELWEE, parents of	:	CIVIL ACTION - LAW
JESSICA McELWEE, individually,	:	
Plaintiff	:	
	:	
vs.	:	NO. 00-01,795
	:	
PAUL E. LEBER, M.D., ADAM M.	:	
EDELMAN, M.D.; DONALD E.	:	
SHEARER, M.D.; JEANINE	:	
SINSABAUGH; CINDY KOONS; JUDY	:	
KERSHNER; MUNCY VALLEY	:	
HOSPITAL; SUSQUEHANNA HEALTH	:	
SYSTEM; SUSQUEHANNA PHYSICIAN	:	
SERVICES; and EM CARE and/or WEST	:	
BRANCH EMERGENCY PHYSICIANS,	:	
Defendants	:	PRELIMINARY OBJECTIONS

**Date: June 29, 2001**

**OPINION and ORDER**

Before the Court are Preliminary Objections filed by Defendants as follows:

1. Preliminary Objections of Defendant Donald E. Shearer, M.D., filed December 18, 2000, demurring/moving to strike from Plaintiffs' Complaint Count VIII, the emotional distress claim and Count X relating to punitive damages. These objections also move to strike paragraphs 44.1 and 44.6 for lack of specificity.
2. Preliminary Objections of Defendants Sinsabaugh, Koons, Kershner, Muncy Valley Hospital, Susquehanna Health Systems and Susquehanna

Physician Services filed December 4, 2000 demurring/moving to strike the emotional distress claim, Count VIII.

3. Preliminary Objections of Defendants Emergency Care and/or West Branch Emergency Physicians filed December 22, 2000, demurring/moving to strike the emotional distress claim, Count VIII.
4. Preliminary Objections of Defendants Leber and Edelman filed December 29, 2000 demurring/moving to strike the emotional distress claim, Count VIII.

These objections to Plaintiff's emotional distress claims will be addressed collectively.

The Preliminary Objections of Dr. Shearer concerning punitive damages must be denied. This Court believes the allegations of the Complaint comply with the controlling case law requirements to set forth a claim for punitive damages. Particularly as set forth under paragraph 75, where allegations appear that assert Dr. Shearer was aware the symptoms created the risk of strep infection and toxic shock and made a decision to not treat his patient or perform further diagnostic tests and subsequently upon being advised of continued illness and symptoms refused to conduct a personal examination of the child/patient. It is also alleged Dr. Shearer was aware of his patient's significant ankle pain but dismissed the ankle pain having any life-threatening implications in a sarcastic manner.

The objections of Dr. Shearer concerning the lack of specificity of paragraphs 44.1 and 44.6 are granted. The allegations are broad and open-ended and inappropriately alleged general terms of medical negligence.

The Defendants' preliminary objections to Count VIII of Plaintiffs' Complaint asserting a cause of action for emotional distress will be treated collectively. Upon review of the Complaint and applicable case law the Court finds that the Preliminary Objections must be sustained.

Both Plaintiff and Defendants have referred the Court in their arguments and briefs to the cases of *Bloom v. DuBois General Medical Center*, 957 A.2d 671 (Pa. Super. 1991), *Love v. Cramer*, 606 A.2d 1175 (Pa. Super. 1992), and this Court's prior opinions in the matter of *Wein v. Williamsport Hospital, et al.*, Lyc. Cty. Court of Common Pleas Case No. 96-01,744, slip opinions of May 24, 1999 and November 24, 1999. At this stage of the proceedings this Court finds that the Plaintiffs, as the Plaintiffs in the first complaint filed in *Wein*, have not set forth sufficient specific pleadings to show they can recover under the claim for emotional distress or shock and physical injuries that result from a direct emotional impact upon the observance of the negligent acts being inflicted upon the deceased, their daughter. Rather, the Complaint in rather broad terms in paragraphs 65, 66 and 67 asserts that at various times beginning December 12<sup>th</sup> the Plaintiff/parents observed by sight and sound a negligent medical care and treatment and a failure to provide medical care including negligent medical care in telephone conversations. This Court does not believe these allegations are sufficient to form a factual basis to support an emotional distress claim. As noted in *Wein*, we recognize that under *Love v. Cramer, supra*, allegations concerning witnessing of a deteriorating condition over a period of several days and witnessing a refusal to provide sufficient medical care may form a sufficient factual basis to support an emotional distress claim, but there must be a specific allegation as to what was observed, when it was observed and the nature of the

impact. Furthermore, as referenced by this Court in its slip opinion of June 14, 1999 in the case of *Harzinski v. Gordon Haskell, M.D.*, No. 98-01,322 that the Pennsylvania Supreme Court in *Mazzagatti v. Irvingham by Irvingham*, 516 A.2d 672 (Pa. 1986) clearly held that the basic principles of liability required Defendant to breach a duty of care owed to the individuals who suffered an emotional distress occurrence and further that the passage of time and remoteness from the impact upon the injured party could serve as cut-off points for liability. The pleading of Plaintiffs does not allow this Court or the defendants the opportunity to determine whether this criteria is met. Finally, in *Harzinski*, this Court noted the cumulative effect of *Love, supra* and *Bloom, supra* showed the anticipated circumstance wherein recovery could be had for emotional distress includes a discreet, traumatic event separate in part from the other unfortunate observations of the Plaintiffs.

This Court cannot say with any degree of certainty whether or not under the facts alleged in the Complaint such factors do or do not exist. However, we can say that Plaintiff has not sufficiently pleaded them. Accordingly, the preliminary Objections in this regard will be denied.

**ORDER**

The Preliminary Objections of Defendant, Dr. Shearer to Count X, Punitive Damages, are denied; the preliminary objections to paragraphs 44.1 and 44.6 are sustained in accordance with the foregoing Opinion. The Preliminary Objections of all other Defendants as they relate to emotional distress are sustained in accordance with this Opinion. Plaintiff is given a period of twenty days from notice of filing of this Order in which to file an amended complaint.

BY THE COURT:

William S. Kieser, Judge

cc: David R. Bahl, Esquire & Kenneth B. Young, Esquire  
Clifford A. Rieders, Esquire  
C. Edward S. Mitchell, Esquire  
M. David Halpern, Esquire  
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Judges  
Suzanne R. Lovecchio, Law Clerk  
Gary L. Weber, Esquire (Lycoming Reporter)