IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

LEGION INSURANCE COMPANY, Plaintiff	: May Term, 2000
	: No. 3174
v.	
	: Commerce Case Program
JAN W. DOEFF, M.D., Defendant	: Control No. 100536

O R D E R

AND NOW, this 18th day of December 2001, upon consideration of the Preliminary Objections of plaintiff Legion Insurance Company to the Second Amended Answer with New Matter and Counterclaim of defendant Jan W. Doeff, M.D., the response of the defendant, the respective memoranda, all matters of record, and in accord with the Opinion being filed contemporaneously with this Order, it is hereby **ORDERED** and **DECREED** that:

1. The Preliminary Objections to Count IV - - Violations of Pennsylvania's Unfair Trade Practices and Consumer Protection Law - - of the Counterclaim are **Sustained**, and Count IV is **Dismissed**.

2. The remaining Preliminary Objections are **Overruled**;

3. The Plaintiff is directed to file an answer to the New Matter and Counterclaim within twenty-two (22) days of this Order.

BY THE COURT,

ALBERT W. SHEPPARD, JR., J.

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O P I N I O N

Albert W. Sheppard, Jr., J. ..... December 18, 2001

The genesis of this case is a prior medical malpractice action filed against Jan W. Doeff, M.D. ("Doeff"). Legion Insurance Company ("Legion"), Doeff's insurer in that case, has filed a Complaint against Doeff in an attempt to recoup costs incurred in its defense of him, and Doeff has filed a counterclaim against Legion. For the reasons discussed, Legion's Preliminary Objections to Doeff's Second Amended Answer with New Matter and Counterclaim ("Objections") are **sustained**, in part, and **overruled,** in part.

BACKGROUND

The background in this matter is set forth more fully in the court's opinion dated June 6, 2001 ("June Order").[1] In summary, Doeff is a licensed psychiatrist who was sued for malpractice by Elizabeth Liss, one of his patients, and her husband, Barnett ("Lisses").[2] Legion, Doeff's insurance carrier for the period in question, originally agreed to defend Doeff against the Lisses' claims. When questions about Doeff's record keeping practices surfaced, however, Legion asked Doeff to confirm the answers he had given in a policy renewal questionnaire.

Doeff's eventual refusal to comply with Legion's request prompted Legion to withdraw its defense of him less than seven weeks before trial on the Lisses' claims was to begin. Legion asserts that its withdrawal was based on Doeff's alleged refusal to cooperate and misrepresentations on his renewal questionnaire, while Doeff contends that Legion's action was done in bad faith. Legion's withdrawal was communicated by its attorney directly to Doeff, although Legion allegedly knew that Doeff was represented by personal counsel,[3] and Doeff was served in this matter on the opening day of the Liss Action trial.

Based on the foregoing, Legion brought the instant action against Doeff for expenses incurred in its defense of him in the Liss Action. In response, Doeff has filed a new matter ("New Matter"), an answer ("Answer") and a counterclaim ("Counterclaim"). In the Counterclaim, Doeff pleads claims against Legion for breach of contract; breach of the covenant of good faith and fair dealing; breach of fiduciary duty;

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[1] Opinion available at http://courts.phila.gov/cptcvcomp.htm.

[2] The action by the Lisses against Doeff is referred to as the "Liss Action."

[3] Doeff asserts that this contact violated Rule of Professional Conduct 4.2, which regulates communications between a party represented by counsel and an opposing attorney.

violations of Pennsylvania's Unfair Trade Practices and Consumer Protection Law ("UTPCPL");[4] statutory bad faith;[5] intentional infliction of emotional distress; and negligent infliction of emotional distress.[6]

DISCUSSION

Doeff does not contest Legion's claim that his UTPCPL claim is legally insufficient, and the Court will sustain the Objection. The remaining Objections are without merit and are overruled.

I. Doeff's Claims for Infliction of Emotional Distress Are Legally Sufficient.

The focus of the Objections is a challenge to the legal sufficiency of Doeff's claims for negligent and intentional infliction of emotional distress.[7] When a court is presented with preliminary objections based on legal insufficiency,

> [I]t is essential that the face of the complaint indicate that its claims may not be sustained and that the law will not permit recovery. If there is any doubt, it should be resolved by the overruling of the demurrer. Put simply, the question presented by demurrer is whether, on the facts averred, the law says with certainty that no recovery is possible.

Bailey v. Storlazzi, 729 A.2d 1206, 1211 (Pa. Super. Ct. 1999).

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[4] 73 Pa. C.S. §§ 201-1-201-9.3.

[5] Doeff has brought his bad faith claim pursuant to 42 Pa. C.S. § 8371.

[6] Originally, the Counterclaim was asserted by Elizabeth Liss, acting as Doeff's assignee. In its current incarnation, the Counterclaim is asserted by Doeff himself, and all allegations that Doeff assigned his claims against Legion to Elizabeth Liss have evaporated.

[7] Legion also asserts that the June Order does not permit Doeff to file a counterclaim and that Doeff has assigned his counterclaim to Elizabeth Liss, rendering his asserted counterclaim scandalous and impertinent. The court limited its order to allowing Doeff to file an amended answer and new matter because it appeared that Doeff's claims had been assigned to Elizabeth Liss. Apparently, this is not so. Rather than force Doeff to file a motion to amend the June Order and then to allow a counterclaim, the Court will consider the Counterclaim and the Objections to it now in the interests of judicial economy.

A. The Doctrines of Collateral Estoppel and the Law of the Case Do Not Bar Doeff's Infliction of Emotional Distress Claims.

Legion invokes the doctrines of collateral estoppel and the law of the case to argue that Doeff's infliction of emotional distress claims are barred by virtue of the June Order. Neither doctrine has any application in the instant dispute.

The doctrine of collateral estoppel, also known as claim preclusion, "operates to prevent a question of law or issue of fact which has once been litigated and fully determined in a court of competent jurisdiction from being relitigated in a subsequent suit." Spisak v. Margolis Edelstein, 768 A.2d 874, 876-77 (Pa. Super. Ct. 2001) (quoting Incollingo v. Maurer, 394 Pa. Super. 352, 356, 575 939, 940 (1990)). The doctrine requires the satisfaction of four elements:

> Collateral estoppel applies when the issue decided in the prior adjudication was identical with the one presented in the later action, there was a final judgment on the merits, the party against whom the plea is asserted was a party or in privity with a party to the prior adjudication, and the party against whom it is asserted has had a full and fair opportunity to litigate the issue in question in the prior adjudication.

In re Iulo, 564 Pa. 205, 210, 766 A.2d 335, 337 (2001) (citing Safeguard Mut. Ins. Co. v. Williams, 463 Pa. 567, 374, 345 A.2d 664, 668 (1975)). Here, the June Order was not a final judgment on the merits, and as such, has no preclusive effective through collateral estoppel.

Similarly, the law of the case doctrine states, in part, that "judges of coordinate jurisdiction sitting in the same case should not overrule each other[']s decisions." Commonwealth v. Starr, 541 Pa. 564, 573, 664 A.2d 1326, 1331 (1995) (citing Okkerse v. Howe, 521 Pa. 509, 516-517, 556 A.2d 827, 831 (1989)) (emphasis added). Even if allowing Doeff to continue with his infliction of emotional distress claims could be construed as overruling the June Order, the doctrine does not apply to a judge confronting his or

her own order. As such, neither the law of the case doctrine nor collateral estoppel bars Doeff's infliction of emotional distress claims.

B. Doeff's Infliction of Emotional Distress Claims Are Not Barred by Either the Gist of the Action or the Economic Loss Doctrine.

Legion next argues that Doeff's infliction of emotional distress claims are barred by the gist of the action and economic loss doctrines. The purpose of the economic loss doctrine, as adopted in Pennsylvania, is "maintaining the separate spheres of the law of contract and tort." New York State Elec. & Gas Corp. v. Westinghouse Elec. Corp., 387 Pa. Super. 537, 550, 564 A.2d 919, 925 (1989). This Commonwealth's version of the doctrine precludes recovery for economic losses in a negligence action where the plaintiff has suffered no physical or property damage. Spivack v. Berks Ridge Corp., 402 Pa. Super. 73, 78, 586 A.2d 402, 405 (1991) ("economic losses may not be recovered in tort (negligence) absent physical injury or property damage").[8] Here, the Counterclaim alleges that Doeff suffered physical harm. Counterclaim at ¶¶ 82-84, 88. As a result, the economic loss doctrine does not bar Liss's claims.

The gist of the action doctrine is also inapplicable. The Pennsylvania Superior Court has outlined the gist of the action doctrine as follows:

> [T]o be construed as a tort action, the wrong ascribed to the defendant must be the gist of the action with the contract being collateral. In addition, . . . a contract action may not be converted into a tort action simply by alleging that the conduct in question was done wantonly. Finally, . . . the important difference between contract and tort actions is that

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[8] Originally, the economic loss doctrine applied solely to strict liability torts but has gradually been extended to negligence claims and, by some courts, to intentional torts as well. See Steven C. Tourek, Thomas H. Boyd & Charles J. Schoenwetter, Bucking the "Trend": The Uniform Commercial Code, The Economic Loss Doctrine and Common Law Causes of Action for Fraud and Misrepresentation, 84 Iowa L. Rev. 875, 885-891 (1999) (tracing the history of the economic loss doctrine nationwide).

> the latter lie from the breach of duties imposed as a matter of social policy while the former lie for the breach of duties imposed by mutual consensus.

Phico Ins. Co. v. Presbyterian Med. Servs. Corp., 444 Pa. Super. 221, 229, 663 A.2d 753, 757 (1995) (citing Bash v. Bell Telephone Co., 411 Pa. Super. 347, 601 A.2d 825 (1992)).

Any contract that Doeff had with Legion is collateral to its conduct, as alleged in the Counterclaim. Legion's purported attempt to harass Doeff into signing a sworn affidavit and alleged violation of the Rules of Professional Conduct would certainly be independent of and unrelated to Doeff's insurance policy, the contract. As a result, the gist of the action doctrine does not bar Liss's action against the Legion.

C. Doeff's Claim for Intentional Infliction of Emotional Distress Is Complete.

Although the Pennsylvania Supreme Court has never expressly recognized the tort of intentional infliction of emotional distress,[9] our Superior Court has held that a claim for such a tort will lie where "[o]ne who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another. . . ." Hunger v. Grand Central Sanitation, 447 Pa. Super. 575, 583, 670 A.2d 173, 177 (1996)

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[9] In Kazatsky v. King David Memorial Park, 515 Pa. 183, 527 A.2d 988 (1987), the Pennsylvania Supreme Court noted that it had "acknowledged but ha[d] never had occasion to specifically adopt" Restatement (Second) of Torts Section 46 ("Section 46"), which sets forth the tort of intentional infliction of emotional distress. 515 Pa. at 185, 527 A.2d at 988. The Kazatsky court ultimately concluded that, "because the evidence adduced in this matter does not establish a right of recovery under the terms of the provision as set forth in the Restatement, we again leave to another day the question of the viability of section 46 in this Commonwealth." 515 Pa. at 185, 527 A.2d at 988-89. See also Hoy v. Angelone, 554 Pa. 134, 151 n.10, 720 A.2d 745, 753 n.10 (1998) (where plaintiff could not establish a right to recovery, even if the tort were recognized, the court would not consider whether to adopt Section 46). Cf. Taylor v. Albert Einstein Med. Center, 562 Pa. 176, 181, 754 A.2d 650, 652 (2000) ("[a]lthough we have never expressly recognized a cause of action for intentional infliction of emotional distress, and thus have never formally adopted this section of the Restatement, we have cited the section as setting forth the minimum elements necessary to sustain such a cause of action").

(quoting Restatement (Second) of Torts § 46 ("Section 46")).[10] A plaintiff must also establish physical injury or harm. Johnson v. Caparelli, 425 Pa. Super. 404, 412, 625 A.2d 668, 671 (1993).

Although it did not recognize the tort of intentional infliction of emotional distress, the Pennsylvania Supreme Court in Kazatsky v. King David Memorial Park, 515 Pa. 183, 527 A.2d 988 (1987), considered what type of conduct was extreme and outrageous:

> The term "outrageous" is neither value-free nor exacting. It does not objectively describe an act or series of acts; rather, it represents an evaluation of behavior. The concept thus fails to provide clear guidance either to those whose conduct it purports to regulate, or to those who must evaluate that conduct. The Restatement tells us that what is prohibited is conduct that is 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 community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, "Outrageous!"

515 Pa. at 195-96, 527 A.2d at 994. The Johnson court specifically adopted these last two sentences, which are quotations from Section 46 comment d. 425 Pa. Super. at 412, 625 A.2d at 672.

Although the Court is skeptical as to whether the conduct alleged by Doeff would cause one to scream, "Outrageous!", it cannot say as a matter of law that it does not. According to the Counterclaim, Legion demanded that Doeff give a sworn statement that he did not alter or fabricate medical records solely for the purpose of protecting Legion, in spite of the fact that such a statement had the potential to damage Doeff's interests in the underlying Liss Action. Counterclaim at ¶¶ 22-25. While the parties were attempting to reach a resolution of this issue, Legion withdrew its defense of Doeff a mere seven weeks

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[10] In considering claims for intentional infliction of emotional distress, "it is for the court to determine in the first instance whether the defendant's conduct may reasonably be regarded as so extreme and outrageous to permit recovery." Johnson v. Caparelli, 425 Pa. Super. 404, 412, 625 A.2d 668, 671 (1993) (citations omitted).

before trial, informing Doeff of its withdrawal directly instead of through his attorney. Counterclaim at ¶¶ 26-29. Legion then made service on Doeff for this action on the day the Liss Action trial began. Counterclaim at ¶¶ 30-31. Moreover, the Counterclaim alleges that Doeff suffered physical harm as a result of Legion's actions. Counterclaim at ¶¶ 82-84. This arguably presents a legitimate claim for intentional interference with emotional distress, and Legion's Objections to this claim are overruled accordingly.

D. Doeff's Claim for Negligent Infliction of Emotional Distress Is Legally Sufficient.

Legion asserts that Doeff's claim for negligent infliction of emotional distress is legally insufficient because Doeff does not allege that he suffered physical harm or that Legion owed Doeff a duty. To recover for negligent infliction of emotional distress, a plaintiff must prove at least one of the following four elements:

> (1) that the Defendant had a contractual or fiduciary duty toward him; (2) that Plaintiff suffered a physical impact; (3) that Plaintiff was in a "zone of danger" and at risk of an immediate physical injury; or (4) that Plaintiff had a contemporaneous perception of tortious injury to a close relative.

Doe v. Philadelphia Community Health Alternatives AIDS Task Force, 745 A.2d 25, 27 (Pa. Super. Ct. 2000) (citations omitted and emphasis added). A plaintiff must also establish the elements of a negligence claim, "i.e., that the defendant owed a duty of care to the plaintiff, the defendant breached that duty, the breach resulted in injury to the plaintiff, and the plaintiff suffered an actual loss or damage." Brown v. Philadelphia College of Osteopathic Med., 760 A.2d 863, 868 (Pa. Super. Ct. 2000) (citation omitted).

The Counterclaim belies Legion's assertion that Doeff has not pled that it had a duty to him or that he suffered physical harm. Doeff asserts that Legion owed him a fiduciary duty and a duty of good faith and fair dealing as his insurer under the Policy. Counterclaim at ¶¶ 3-7. Doeff also maintains that he suffered bodily harm as a result of Legion's actions. Id. at ¶ 88. This is sufficient to sustain the cause of action at this stage, and the Objections to Doeff's claim for negligent infliction of emotional distress are overruled.

II. The Challenged Paragraphs of the New Matter Are Sufficiently Specific.

Pennsylvania requires that a party state the material facts on which a cause of action or defense is based. Pa. R. Civ. P. 1019(a). To determine if a pleading alleges the material facts with sufficient specificity, a court must ascertain whether the allegations are sufficiently specific so as to enable the answering party to prepare a defense. Smith v. Wagner, 403 Pa. Super. 316, 319, 588 A.2d 1308, 1310 (1991) (citation omitted).

Legion challenges the specificity of Paragraphs 10 and 14 through 21 of the New Matter. Standing alone, these paragraphs are insufficiently specific, but when read in the context of the entire New Matter, Answer and Counterclaim, they are more than adequate to allow Legion to prepare a response. As such, the Objections thereto are overruled.

III. Doeff's Allegations of Professional Misconduct Are Neither Scandalous Nor Impertinent.

Legion next objects to Doeff's allegation of violations of Pennsylvania Rule of Professional Conduct 4.2 ("Rule 4.2") as being scandalous and impertinent. The Court cannot agree with this assessment.

Under Pennsylvania Rule of Civil Procedure 1028(a)(2), a party may object to a pleading's inclusion of "scandalous and impertinent matter." "Scandalous and impertinent matter" is defined as "allegations . . . immaterial and inappropriate to the proof of the cause of action." Common Cause/Pa. v. Commonwealth, 710 A.2d 108, 115 (Pa. Commw. Ct. 1998) (citing Department of Envtl. Resources v. Peggs Run Coal Co., 55 Pa. Commw. 312, 423 A.2d 765 (1980)). Pennsylvania courts have been restrained in striking scandalous and impertinent pleadings, however:

> [T]here is some authority for the proposition that, even if the pleading of damages was impertinent matter, that matter need not be stricken but may be treated as "mere surplusage" and ignored. . . . Furthermore, the right of a court to strike impertinent matter should be sparingly exercised and only when a party can affirmatively show prejudice.

Commonwealth, Dept. of Envtl. Resources v. Hartford Accident & Indem. Co., 40 Pa. Commw. 133, 137-38, 396 A.2d 885, 888 (1979) (citations omitted).

Rule 4.2 states that, "[i]n representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so." Doeff alleges that, Legion's contacting him directly instead of through his counsel violated this rule. This allegation forms part of the basis for Doeff's claims against Legion for infliction of emotional distress. In addition, Legion has failed to show how this allegation prejudices it. As a result, the Court will not strike the allegation regarding Rule 4.2.

IV. Doeff's Request for Punitive Damages and Attorneys' Fees Is Legitimate.

When reviewing a pleading, "an allegation of damages or a prayer for damages which are not legally recoverable in the cause of action pleaded is impertinent matter in the sense that it is irrelevant to that

cause of action." Huddock v. Donegal Mut. Ins. Co., 438 Pa. 272, 277 n.2, 264 A.2d 668, 671 n.2 (1970). Counsel fees cannot be recovered "unless there is express statutory authorization, a clear agreement of the parties, or some other established exception." Snyder v. Snyder, 533 Pa. 203, 212, 620 A.2d 1133, 1138 (1993) (citations omitted). The Counterclaim presents a complete count for insurance bad faith under 42 Pa. C.S. § 8371. Because this statute allows an injured party to recover punitive damages and attorneys' fees, Doeff's request for these forms of compensation is appropriate.

CONCLUSION

For the reasons discussed, the Counterclaim generally comports with Pennsylvania law, and, with the exception of the Objections to Doeff's UTPCPL claim, the Objections are **overruled**. The court will enter an appropriate, contemporaneous Order.

BY THE COURT,

ALBERT W. SHEPPARD, JR., J.