LAURIE SMITH and BLAINE SMITH, Plaintiffs vs. JUDITH A. MENTZER, JUDITH A. MENTZER, t/d/b/a MENTZER PRENATAL CENTER, JUDITH A. MENTZER, t/d/b/a MENTZER MATERNITY CARE, JUDITH A. MENTZER, t/d/b/a MENTZER MATERNITY AND HERB SHOPPE, and PENNSYLVANIA MIDWIVES ASSOCIATION, INC., Defendants and RUSSELL C. MCLUCAS, M.D. and ROBERT T. HENRY PHARMACY, Defendants, Franklin County Branch Civil Action - Law (Consolidated A.D. 1996-456 And A.D. 1996-457) NOW: A. D. 1996 - 456

Smith v. Mentzer & McLucas

preliminary objections - demurrer sustained as to claim for fraud/misrepresentation and informed consent

Facts: plaintiffs are suing midwife, who used surgical instruments on plaintiff-wife during a miscarriage and dispensed prescription drugs; plaintiff-wife incurred infection which caused her to become infertile. Plaintiffs are also suing physician whom they allege assisted midwife in her practice by giving her advice and authorizing prescription drugs for her patients. Physician filed preliminary objections.

1. Preliminary objection as to legal insufficiency of count for negligence sustained where plaintiffs alleged wrongful conduct by defendant-physician but did not allege he had a duty to plaintiffs and what that duty consisted of. Plaintiffs are given leave to amend.

2. Motion to strike claim for punitive damages denied; allegation that defendant-physician authorized prescription drugs for midwife's patients without having seen the patient is sufficiently outrageous to state a claim for punitive damages.

3. Demurrer on claim for fraud/misrepresentation is granted. It is clear that plaintiffs cannot make out a claim because:

a. the misrepresentations alleged in the complaint were made by someone other than defendant-physician;

b. the only statements actually made by defendant-physician consist of answering midwife's specific questions regarding her midwife practice; defendant-physician did not make any statements to plaintiffs and cannot be liable for misrepresentations made by midwife unless he had the intent that his statements would be communicated to plaintiffs; this intent cannot be inferred from the mere answering of questions

4. Demurrer on claim for informed consent/battery granted. It is clear that plaintiffs cannot make out a claim because:

a. under Pennsylvania law, which continues to adhere to the battery theory on informed consent cases, only the physician who performed the surgery can be held liable for failure to obtain informed consent; defendant-physician was not even present at time of surgical procedure by midwife;

b. no recovery can be had on theory of "technical battery," where it is sufficient that the defendant *causes* another to incur offensive contact;

c. no recovery can be had on basis of defendant-physician's authorization of prescription drugs because it involved mere therapeutic administration of drugs.

5. Demurrer on claim for negligent and intentional infliction of emotional distress denied; it is not clear that no relief can be had on the basis of the facts alleged but plaintiffs are ordered to file more specific complaint.

Nijole C. Olson, Esq., Counsel for Plaintiffs
Richard M. Morris, Jr., Esq., Counsel for Defendant Mentzer
David R. Polak, Esq., and Barrie B. Gehrlein, Esq., Counsel for Defendant Midwives Association
Timothy J. McMahon, Esq., Counsel for Robert T. Henry Pharmacy
Darlene King, Esq., and Linda Porr Sweeney, Esq., Counsel for Defendant Dr. McLucas
Francis E. Marshall, Jr., Esq., Personal Counsel for Defendant McLucas
Frank Hartye, Esq.

OPINION AND ORDER

Walker, P.J., August 14, 1998:

Factual and Procedural Background

In November 1994, Plaintiff Laurie Smith engaged the services of Judith Mentzer, a "lay midwife." On October 24, 1996, plaintiff and her husband, Blaine Smith, filed a complaint against Ms. Mentzer, alleging that she caused permanent damage to the reproductive organs of Laurie Smith. The complaint alleged that Mrs. Smith experienced some spotting during her pregnancy, and that Ms. Mentzer ordered Mrs. Smith to undergo an ultrasound. Approximately two weeks later, Mrs. Smith experienced cramps and a discharge, and Ms. Mentzer told her she was probably experiencing a miscarriage. Ms. Mentzer came over to the Smiths' house, and injected her with a drug to help her expel the fetus. The complaint furthermore alleges that when the bleeding would not stop, Ms. Mentzer told Mrs. Smith to come over to her facility, where she performed a surgical procedure on Mrs. Smith, pulling out the placenta with various instruments. Ms. Mentzer furthermore provided Mrs. Smith with follow-up care by dispensing more prescription medications when she continued to bleed for several days. When the bleeding would not stop, Mrs. Smith finally saw a physician, who diagnosed her with having bilateral tubo-ovarian abscesses and pelvic inflammatory disease. The complaint alleges that as a result of Ms. Mentzer'

negligence, gross negligence and reckless disregard for plaintiff's welfare, Mrs. Smith incurred permanent injuries to her reproductive organs.

On October 24, 1996, plaintiffs also commenced an action against Russell McLucas, M.D. ("Dr. McLucas"), Robert T. Henry Pharmacy ("Henry Pharmacy"), and the Fulton County Medical Center. Plaintiffs simultaneously filed a petition to engage in pre-complaint discovery in that case, which was granted. On December 2, 1996, plaintiffs filed a praecipe for entry of a default judgment against all three defendants for failure to answer in the action. Defendants filed a motion to open the judgment on the basis that no complaint had yet been filed. Defendants' motion was granted and the judgment was opened by this court's order of January 2, 1997. Plaintiffs were permitted to proceed with pre-complaint discovery. Subsequently, on January 6, 1997, counsel for the Fulton County Medical Center filed a motion to set aside service on the basis of the improper service of the writ. This motion was granted by this court's opinion and order dated April 28, 1997.

Following scheduling conference, this court entered an order dated May 30, 1997, ordering that a pre-complaint disposition of Dr. McLucas was to take place within six weeks from the order, and if additional time was needed, to schedule another deposition within six weeks of the first deposition, and so on until the depositions were completed. Plaintiffs were furthermore ordered to file a complaint within six weeks after the final deposition if plaintiffs intended to bring suit against him. On September 12, and September 17, respectively, Dr. McLucas and Henry Pharmacy filed a motion for entry of non-pros for failure to comply with this court's order to file a complaint within six weeks of the final deposition of Dr. McLucas. By its opinion dated September 25, 1997, this court denied those motions. Dr. McLucas filed a motion for reconsideration of that decision, which was denied by this court's order of October 29, 1997.

On September 15, 1997, plaintiffs filed a complaint against Dr. McLucas and Henry Pharmacy. The complaint alleges that Dr. McLucas held himself out as Ms. Mentzer's mentor, assisted Ms. Mentzer in the surgical procedure, and that he authorized the

ultrasound and prescriptions which Ms. Mentzer dispensed to Mrs. Smith, even though Ms. Mentzer has no license to practice medicine. The complaint furthermore alleges that Henry Pharmacy has provided Ms. Mentzer with the prescriptions and medical equipment using Dr. McLucas' DEA numbers

On November 3, 1997, Defendant Henry Pharmacy filed an answer and new matter to plaintiffs' complaint, as well as a cross-claim against Dr. McLucas. On October 7, 1997, Dr. McLucas filed preliminary objections to the plaintiffs' complaint. Oral argument was held on July 2, 1998. These preliminary objections are the subject of this opinion.

This court further notes that the cases against Ms. Mentzer, Dr. McLucas and Henry Pharmacy were consolidated in an accompanying opinion by this court.

Discussion

Dr. McLucas filed lengthy preliminary objections to plaintiffs' complaint. This court will address them in the order they were raised.

1. **Inclusion of Scandalous or Impertinent Matter**

Pa.R.C.P. 1028(a)(2) permits preliminary objections to the inclusion of scandalous or impertinent matter. "Scandalous matter consists of any unnecessary allegations which bear cruelly on the moral character of an individual or states anything which is contrary to good manners, or anything which is unbecoming to the dignity of a court to hear, and which charges a person with a crime, the proof of which is not necessary to prevail in a cause of action. Goodrich-Amram 2d, §1017(b)(14). However, matters in a pleading which are material may properly be pleaded, even though they are scandalous in the common use of the word. *Id.*

Dr. McLucas argues that the allegation in several paragraphs of the complaint include such scandalous matter. For the reasons set forth below, this court finds that the allegations are not scandalous.

a. Paragraph 93:

The pertinent parts of paragraph 93 of the complaint provide as follows:

Defendant Russell C. McLucas, M.D. is liable to the Plaintiffs for injuries and damages alleged herein which were directly and proximally caused by his negligence, gross negligence, and/or reckless indifference in:

***

(k) assisting Ms. Mentzer in the *unlawful practice of medicine* by authorizing the dispensation of drugs to her in order to cause a miscarriage and to "expel the baby";

(l) assisting Ms. Mentzer in the *Unlawful practice of medicine* by authorizing the dispensation of various surgical equipment and supplies to her;

(m) assisting Ms. Mentzer in the *unlawful performance* of a surgical dilation and evacuation procedure of Mrs. Smith's unborn baby'

(n) authorizing the dispensation of the drug Pitocin to Ms. Mentzer, who he knew was without a license to practice medicine'

(o) assisting Ms. Mentzer in the *unlawful use of surgical supplies and equipment and endangering plaintiffs' baby and endangering the life and welfare of Mrs. Smith;*

(p) assisting Ms. Mentzer in the *destruction of the Smiths' baby by unlawfully administering drugs and surgically aborting their unborn child;*

***

(r) assisting Ms. Mentzer in the *performance of an unlawful abortion/dilatation and evacuation surgery with drugs he authorized to be dispensed to her;*

***

(t) *causing permanent and irreparable damage* to Mrs. Smith's reproductive organs resulting in her infertility.

(emphasis as provided in preliminary objections)

This court does not find the emphasized sections, including the use of the word "unlawful," to be scandalous. All matters pleaded appear to be material to the cause of action. Furthermore, this court does not find that plaintiffs are charging Dr. McLucas with a crime the proof of which is not necessary to prevail in the action; on the contrary, any violation of the law will have an effect on a finding of negligence on the part of Dr. McLucas.

b. Paragraph 101

For the reasons stated in subsection 4 of this opinion, plaintiffs' claim for fraud and misrepresentation is dismissed. Therefore, this court need not address whether paragraph 101, which sets for that claim, includes scandalous matter.

c. Paragraph 105

For the reasons stated in subsection 5 of this opinion, plaintiffs' claim for failure to obtain informed consent and battery is dismissed. Therefore, this court need not address whether paragraph 105, which sets forth that claim, includes scandalous matter.

d. Paragraphs 113 - 116

Paragraphs 113 through 116 state as follows:

(113) Defendant McLucas *assisted Ms. Mentzer in the unlawful practice of medicine* without a license by her improperly making medical diagnoses, unlawfully obtaining, administering, and dispensing prescription medications and unlawfully performing a surgical procedure on Mrs. Smith.

(114) Defendant McLucas *knew or should have known that Ms. Mentzer's unlawful acts were substantially certain to cause serious and permanent injury or death.*

(115) *In fact, Defendant McLucas's actions and/or inactions caused the destruction of the Plaintiffs' baby*

and permanent and irreversible damage to Mrs. Smith's reproductive organs.

(116) As a direct and proximate cause of Defendant McLucas's outrageous conduct in *deliberately, intentionally, and recklessly assisting Ms. Mentzer in the unlawful practice of medicine without a license,* Plaintiff suffered severe emotional distress and experience [sic] nausea, physical exhaustion, involuntarily increased hear rate, respiratory rate, blood pressure, and diaphoresis.

(emphasis as provided in preliminary objections)

These allegation were made as part of the claim for intentional infliction of emotional distress. As such, any allegations of intent and knowledge are material parts of the cause of action. Similarly, any allegation of reckless conduct is a material element of the cause of action for intentional infliction of emotional distress. *See* Restatement (Second) of Torts, § 46. Thus, the allegation need not be stricken.

e. Paragraphs 119-121

Paragraphs 119 through 121 provide:

(119) *The deliberate, willful outrageous , and wanton conduct of Defendant McLucas, Including his misrepresentation to the public as being Ms. Mentzer's mentor and assisting Ms. Mentzer in the unlawful practice of medicine, prescribing medications and performing unlawful surgical procedures, including a dilatation and evacuation with administration of Pitocin, involves bad motive or reckless indifference to the rights of others sufficient to warrant an award of punitive damages to punish and to deter her and others like her from similar conduct in the future.*

(120) Defendant McLucas's conduct represents reckless indifference *in the highest degree* because of the Defendant's *awareness that serious harm would result from assisting Ms. Mentzer in the unlawful practice of medicine* as it did in this case.

(121) The actions and/or inactions of Defendant McLucas represent negligence per se, and therefore warrant an award of punitive damages.

(Emphasis as provided in preliminary objections).

The allegations stated above are material elements to plaintiffs' cause of action for punitive damages because they allege defendant's willful and wanton conduct. Thus, they need not be stricken.

In conclusion, this court finds that the allegation in plaintiffs' complaint are material to their claims, and therefore denies defendant's preliminary objections on the basis of the inclusion of scandalous matter in their entirety.

2. **Legal Insufficiency of Count I For Negligence and Lack of Factual Specificity**

First, defendant alleges that count I of the complaint, alleging negligence, lacks legal sufficiency because plaintiffs have failed to allege the standard of care defendant owed to plaintiffs and the manner in which defendant breached that standard of care.

Pa.R.C.P. 1028(a)(3) permits preliminary objections to be made to the legal insufficiency of a pleading[1] . Such objection is an assertion that the pleading dies not set forth a cause of action or a claim on which relief can be granted. Goodrich-Amram 2d, § 1017(b):25. To sustain this objection, it must be clear that the claim on its face cannot be sustained. *Id,* § 1017 (b):27. In determining a demurrer, the court must deem the party who filed the demurrer to have admitted all relevant facts sufficiently pleaded in a preceding pleading, and all inferences fairly deducible therefrom, but not conclusions of law or unjustified inferences. *Id,* § 1017(b):28.

In order to set forth a cause of action in negligence, a plaintiff must allege that she was owed a duty of care, that the duty was breached, that she was injured, and that the injuries were

---

[1] Formerly called a "demurrer." *See* Explanatory Comment to Pa.R.C.P. 1017 (1990).

proximately caused by the breach o duty. *Waddell v. Bowers,* 415 Pa. Super. 469, 473, 609 A.2d 847 (1992). In a case where the court had to rule on a preliminary objection to the legal sufficiency of a negligence claim for failure to plead duty, the complaint stated:

> Defendant was negligent and/or grossly negligent in her actions, including, but not limited to, testing plaintiff without his knowledge or consent and for no justifiable medical reason, in processing and handling test result information with the result that plaintiffs were wrongly informed that he had tested positive for AIDS, and in informing plaintiffs of that result without proper or adequate counselling [sic].
> *Doe v. Dyer-Goode,* 389 Pa. Super. 151, 157, 566 A.2d 889 (1989).

The Superior Court held that the complaint did not identify any duty by the defendant-physician to restrain him from having an HIV blood test performed on a blood sample when consent had not been obtained, nor what duty the defendant had to notify the patient of available counseling services. *Dyer-Goode,* 389 Pa. Super. at 158.

In the underlying case, Plaintiffs have phrased their negligence claim in similar language: in paragraph 93 of the complaint, plaintiffs allege that Dr. McLucas "is liable to the Plaintiffs for injuries and damages alleged herein which were directly and proximally caused by his negligence, gross negligence, and/or reckless indifference" by engaging in certain conduct set forth in subsections (a) through (t). As in *Dyer-Goode,* plaintiffs did not allege that Dr. McLucas had a duty to plaintiffs and what that duty consisted of. However, this is not a case where it is clear to this court that the claim for negligence cannot be sustained. Therefore, rather than dismissing the claim for legal insufficiency, this court will allow plaintiffs to amend their complaint and plead what duty Dr. McLucas owed to plaintiffs.

Secondly, defendant argues that the allegations of paragraph 93 of the complain lack sufficient specificity. *See* Pa.R.C.P. 1028(a)(3). Subsections (a) through (t) of paragraph 93 set forth what acts or omissions by Dr. McLucas are alleged to be

negligent. The court finds that the following allegations lack sufficient specificity to permit defendant to respond:

> *(c) holding himself out to Ms. Mentzer and the public as Ms. Mentzer's mentor and supervising physician;*

Plaintiffs must allege with more specificity what Dr. McLucas did to hold himself out as Ms. Mentzer's supervising physician and mentor to both Ms. Mentzer and the public.

> *(d) holding himself out to Ms. Mentzer and Mr. and Mrs. Smith as Ms. Mentzer's mentor and supervising physician;*

Similar to the amendment required in subsection (c), plaintiffs must allege with more specificity what Dr. McLucas did to hold himself out to plaintiffs as Ms. Mentzer's supervising physician and mentor.

> (e) *exposing Mrs. Smith to increased risk of harm and danger by the actions and/or inactions of Ms. Mentzer, who received drugs authorized by McLucas;*

Plaintiffs must allege with more specificity how Mrs. Smith was exposed to increased risk of harm through what actions or inactions of Ms. Mentzer, and how Dr. McLucas must be held liable for this.

> (f) *failing to minimize the risks of and/or avoid damage to Mrs. Smith;*

This allegation is extremely vague. Plaintiffs must allege how Dr. McLucas failed to minimize risks or avoid damage to Mrs. Smith.

> (g) *failing to evaluate and manage Mrs. Smith's care;*

Plaintiffs must allege what involvement Dr. McLucas had in Mrs. Smith's care and what he should have done to properly manage it.

> (i) *offering medical diagnoses and advice to Ms. Mentzer, who he knew was without a license to practice medicine and who he knew was administering drugs and managing obstetrical patients, including Mrs. Smith;*

Plaintiffs must allege what medical diagnoses and advice Dr. McLucas gave to Ms. Mentzer.

> (m) *assisting Ms. Mentzer in the unlawful performance of a surgical dilatation and evacuation procedure of Mrs. Smith's unborn baby;*

Because it appears that Dr. McLucas was not present at the time of the surgical procedure, plaintiffs must allege with specificity what Dr. McLucas did to assist in this procedure.

> *(o) assisting Ms. Mentzer in the unlawful use of surgical supplies and equipment and endangering Plaintiff's baby and endangering the life and welfare of Mrs. Smith;*

Because plaintiffs allege that Ms. Mentzer was the person who allegedly used surgical equipment of Mrs. Smith, they must allege what Dr. McLucas did to assist Ms. Mentzer in this.

> *(p) assisting Ms. Mentzer in the destruction of the Smiths' baby by unlawfully administering drugs and surgically aborting their unborn child;*

As stated above, because it appears that Dr. McLucas was not present during any surgical procedures performed on Mrs. Smith, plaintiffs must allege with specificity what Dr. McLucas did to assist Ms. Mentzer.

> *(t) causing permanent and irreparable damage to Mrs. Smith's reproductive organs resulting in her infertility;*

Plaintiffs must allege what acts or omissions of Dr. McLucas caused the pleaded injuries.

Plaintiffs will be permitted to amend their complaint and allege with more specificity the above allegations. This court finds that all other allegations made in paragraph 93 of the complaint are sufficiently specific to permit defendant to prepare an answer.

3. **Motion to Strike Claim for Punitive Damages**

Defendant argues that plaintiffs have failed to set forth a sufficient claim for punitive damages based on their allegations of defendant's negligence, gross negligence, reckless indifference and

reckless disregard for plaintiff's welfare. Defendant's basis for this objection is threefold: (1) Under the Pennsylvania Health Care Services Malpractice Act punitive damages may be awarded only for the health car provider's willful or wanton conduct or reckless indifference to the rights of others, not merely for gross negligence; (2) the complaint fails to set forth any facts which show there was a relationship between Dr. McLucas and the plaintiffs, and thus, there is no factual basis to award punitive damages; and (3) the complaint fails to set forth what conduct of Dr. McLucas can be considered to be willful and wanton.

The Health Care Services Malpractice Act provides that punitive damages may be awarded for "conduct that is the health care provider's willful or wanton conduct or reckless indifference to the rights of others," and that a showing of gross negligence is insufficient to support such an award. 40 Pa.C.S.A. § 1301.812-A. However, it appears that this act is not applicable, because the injuries complained of occurred before its effective date. *see Morgan v. MacPhail,* 704 A.2d 617, 620, n. 6 (Pa. 1997). The Pennsylvania Supreme Court, however, has established a similar standard:

> The assessment of punitive damages are proper when a person's actions are of such an outrageous nature as to demonstrate intentional, willful, wanton or reckless conduct
> ...,and are awarded to punish that person for such conduct.

SHV Coal, Inc. v. Continental Grain Co., 526 Pa. 489, 493, 587 A.2d 702 (1991).

Plaintiffs allege in paragraph 119 of their complaint that Dr. McLucas' conduct, including his misrepresentation to the public as Ms. Mentzer's mentor, the prescription of drugs and the performance of unlawful surgical procedures, are willful, outrageous and wanton. This court finds that the authorization of prescription drugs, without having seen the patient, in itself constitutes conduct which is sufficiently reprehensible to be characterized as outrageous, willful and wanton. Thus, the claim will not be stricken on that basis.

Defendant furthermore argues that there cannot be a factual basis for a punitive damages award because plaintiffs did not allege that any relationship existed between plaintiffs and Dr. McLucas. As this court understands the pleadings, part of plaintiffs' claim against Dr. McLucas is based on just that fact. Plaintiffs allege that Dr. McLucas authorized prescription drugs and an ultrasound for a person he did not have physician-patient relationship with; had Dr. McLucas seen Mrs. Smith himself, there would be no basis to allege outrageous conduct.

This court finds that plaintiffs have sufficiently pleaded a claim for punitive damages, and therefore denies defendant's motion to strike the claim.

4. **Legal Insufficiency of Count III for Fraud and Misrepresentation**

Plaintiffs, in paragraphs 95 - 103 of their complaint, have set forth a claim for fraud and misrepresentation against Dr. McLucas. Dr. McLucas argues that the claim lacks legal sufficiency.

The elements of a cause of action for fraudulent misrepresentation are as follows: (1) a misrepresentation; (2) a fraudulent utterance thereof; (3) an intention by the maker to induce the recipient thereby; (4) justifiable reliance by the recipient on the misrepresentation; and (5) damage to the recipient as a result of the misrepresentation. *Bash v. bell Telephone Co.*, 411 Pa. Super. 347, 358-359, 601 A.2d 825 91992). Furthermore, Pa.R.C.P. 1019(b) requires that averments of fraud or mistake are made with particularity.

This court finds that plaintiffs' allegations in their count for fraud and misrepresentation are not sufficient to state a cause of action on which relief may be granted against Dr. McLucas. Plaintiffs allege that Dr. McLucas' misrepresentations consist of an article in the Birth Gazette (attached as exhibit B to their brief in opposition of preliminary objections) which contains an interview with Ms. Mentzer; a representation in Ms. Mentzer's brochure (attached as exhibit A) in which Ms. Mentzer states that she received training by Dr. McLucas; Ms. Mentzer's application for certification by the National Association of Registered

Midwives (attached as exhibit C), which was filled out by Ms. Mentzer; and further more the "word of mouth" by people in the community. This court points out that all these statements were made by Ms. Mentzer or by undisclosed members of the "community," not by Dr. McLucas. Plaintiffs will have a claim against Ms. Mentzer for representing that Dr. McLucas was supervising her, but Dr. McLucas himself did not make any representations of that nature. Ms. Mentzer's statements to others cannot be imputed to Dr. McLucas.

The only statements actually made by Dr. McLucas consist of his answers to specific questions by Ms. Mentzer regarding her midwife practice. However, these statements were made to Ms. Mentzer, not to the plaintiffs or the public. A person can be liable for fraudulent misrepresentation made to a third person, but only if the maker intends or has reasons to expect that its terms will be repeated or communicated to another. Restatement (Second) of Torts, § 533. It is not sufficient that the maker of the representation recognizes the possibility that the person to whom he made the statement may repeat it to another to influence that person's conduct; rather, the maker must make the statement with the intent to influence the conduct of another, or have information that gives him special reason to expect that it will be communicated to others. *Id.* This court finds that it is not a justifiable inference that by answering Ms. Mentzer's questions regarding specific situations, Dr. McLucas had the intent that it would be communicated to others that he was her mentor and that he had the intent that this would induce others to engage Ms. Mentzer as a midwife.

This court finds that plaintiffs did not allege a legally sufficient cause of action for fraud and misrepresentation by Dr. McLucas, and it is clear to this court that the claim cannot be sustained. Therefore, the claim for fraud and misrepresentation is dismissed.

5. **Legal Insufficiency of Count III for Informed Consent/Battery**

In count III of their complaint, plaintiffs have set forth a cause of action for informed consent and battery. In paragraph 105,

they allege that Dr. McLucas is liable to Mrs. Smith for the following:

Defendant Russell C. McLucas, M.D. is liable to the Plaintiff, Laurie Smith, for battery in the form of intentionally inflicting harmful and offensive bodily contact on Mrs. Smith by:

(a) assisting Ms. Mentzer in performing an unlawful surgical procedure on Mrs. Smith without her informed consent;

(b) causing permanent and substantial injuries to Mrs. Smith as a result of an unlawful and non-consensual surgery;

(c) failing to obtain Mrs. Smith's informed consent for the dilatation an evacuation procedure;

(e) failing to disclose to Mrs. Smith his relationship with Ms. Mentzer and all information material to the decision to undergo the procedure;

(f) assisting Ms. Mentzer in the unlawful performance of a dilatation and evacuation in the absence of safe and sanitary conditions and without consultation with and supervision of a physician would constitute harmful and offensive bodily contact;

(g) assisting Ms. Mentzer in the unlawful destruction of Mrs. Smith's baby by her performing an unlawful surgical procedure without supervision and without a license to practice medicine;

(h) endangering the health and welfare of Mrs. Smith and that of her unborn baby by assisting Ms. Mentzer in the performance of a dilatation and evacuation without her having a license to practice medicine and without his supervision;

(i) failing to advise Mrs. Smith that a physician needed to evaluate her and that Ms. Mentzer was not licensed to perform surgery or administer drugs; and

(j) failing to advise Mrs. Smith that Ms. Mentzer's dilatation and evacuation procedure could cause permanent injury to her reproductive organs.

Dr. McLucas argues that this claim should be dismissed, because it fails to aver that Dr. McLucas ever met, spoke to, touched or performed any surgical procedure on Mrs. Smith, which is necessary to prevail on a claim for lack of informed consent. This court finds that plaintiffs did not plead sufficient facts to state a cause of action for lack of informed consent for two reasons.

First, this court finds that plaintiffs do not state a cause of action for lack of informed consent on the basis of their allegations that Dr. McLucas assisted Ms. Mentzer in the surgical procedure. "It has long been the law in Pennsylvania that a physician must obtain informed consent from a patient before performing a surgical or operative procedure." *Morgan v. MacPhail,* 704 A.2d 617, 619 (Pa. 1997). An operation performed without the patient's consent constitutes a battery on the patient, making the physician liable for the injuries as a result of the surgery. *Shaw v. Kirschbaum,* 439 Pa. Super. 24, 30, 653 A.2d 12 (1994). Pennsylvania continues to adhere to the battery theory in informed consent cases. *Shaw,* 439 Pa. Super. at 31. "Under normal circumstances, only the physician who performs the operation on the patient has the duty of obtaining the patient's informed consent." *Shaw,* at 30. For that reason, the Pennsylvania Superior Court found that the physician who only performed a pre-surgery physical examination and referred the patient to another physician for the surgery could not, as a matter of law, be liable on an action for failing to obtain informed consent. *Shaw,* at 31-32. Plaintiffs argue that the Superior Court has expressed its frustration at the fact that Pennsylvania law still follows the battery "fiction" rather than permitting recovery on a negligence basis. However, this court notes that the Superior Court also stated that it still is Pennsylvania law to impose a duty to obtain informed consent only on the physician actually performing the procedure and that courts are not free to expand that duty. *Shaw,* at 32.

In the underlying case, plaintiffs allege that Ms. Mentzer performed the surgical procedure performed on Mrs. Smith and that Dr. McLucas assisted Ms. Mentzer by providing her with the surgical equipment and advice on how to perform such procedures. Under such circumstances, this court finds that Dr. McLucas' position is analogous to the referring physician in *Shaw*. Dr. McLucas never actually performed the surgical procedure and therefore, as a matter of law, cannot be liable for failing to obtain Mrs. Smith's informed consent.

Plaintiffs further argue that the underlying case is analogous to the situation in *Friter v. Iolab Corp.*, 414 Pa. Super. 622, 607 A.2d 1111 (1992). There, the court held that a hospital could be held liable for failure to obtain informed consent on the theory of a "technical battery." Under that theory, it is not necessary that the contact of the defendant with the other is direct, but it is sufficient that the defendant intended to cause another, directly or indirectly, to come into contact with a foreign substance in a manner which the other would regard as offensive. *Friter*, 414 Pa. Super. at 630-631. However, *Friter* dealt with very specific facts. The court first pointed out that generally hospitals cannot be held liable for failure to obtain informed consent because a hospital cannot commit a battery. In this particular case, however, the hospital had undertaken a specific duty because it had taken steps to become a federally approved institution to perform the experimental eye operations in which plaintiff was injured. The court held that because the hospital, as part of the certification process to become an approved institution, had agreed to ensure that all patients were informed of the experimental nature of the study, it could be held liable for committing a technical battery on the patient.

It appears to this court that *Friter* represents a very specific exception to the general rule that only the physician who performs the surgical procedure can be held liable for failure to obtain informed consent. The facts of the underlying case are not sufficiently analogous to *Friter*. Thus, this court will not expand the duty to obtain informed consent as to allow a claim against Dr. McLucas for having committed a "technical battery" by having provided Ms. Mentzer with the surgical instruments which injured plaintiff.

Secondly, plaintiffs do not state a cause of action for lack of informed consent on the basis that Dr. McLucas authorized the prescription drugs dispensed by Ms. Mentzer to Mrs. Smith. Pennsylvania's doctrine of informed consent does not apply to cases involving the therapeutic administration of medication. *Morgan v. MacPhail,* 704 A.2d 617, 619 (Pa. 1997). Only where the drugs are administered during a surgical procedure, such as anesthesia, must the physician obtain informed consent. *Stover v. Surgeons,* 413 Pa. Super. 11, 25-26, 635 A.2d 1047 (1994).

In the underlying case, this court does not find that the prescription drugs authorized by Dr. McLucas were part of the surgical procedure comparable to the injection of anesthetics. The mere administration of the drug Pitocin at the same time Ms. Mentzer pulled out the placenta and placental tissues does not mean the drug was administered as part of a surgical procedure. Furthermore, plaintiffs seek recovery for the administration of other drugs administered at other times as well. There can be no recovery under a theory of lack of informed consent for such therapeutic administration of drugs. Because it is clear that a claim for lack of informed consent and battery cannot be sustained, it must be dismissed.

6. Count IV for Negligent and Intentional Infliction of Emotional Distress

Dr. McLucas has asserted two preliminary objections to court IV of plaintiffs' complaint, which includes a claim for both negligent and intentional infliction of emotional distress. First, he argues that count IV violates Pa.R.C.P. 1020 which requires that each cause of action be stated in a separate count. Secondly, he argues that plaintiffs have not alleged sufficient facts to state a claim for either negligent or intentional infliction of emotional distress, and that therefore the claims should be stricken.

a. Failure to Comply with Pa.R.C.P. 1020

Pa.R.C.P. 1020 provides as follows:

> (a) The plaintiff may state in the complaint more than one cause of action against the same defendant

> heretofore asserted in assumpsit or trespass. Each cause of action and any special damage related thereto shall be stated in a separate count containing a demand for relief.

Negligent and intentional infliction of emotional distress are separate causes of action with separate elements. Therefore, it appears to this court that defendant is correct in objecting to the fact that they are pleaded in one count. However, this court will not strike the claims for this reason, but rather will grant plaintiffs leave to amend the complaint and plead them in separate counts.

b. **Legal Sufficiency of Claim for Negligent Infliction of Emotional Distress**

Dr. McLucas argues that plaintiffs have failed to set forth a cause of action for negligent infliction of emotional distress because they did not allege that plaintiffs viewed the negligent injury of a close relative nor what emotional distress was suffered, as required under the "bystander theory" of negligent infliction of emotional distress.

The Pennsylvania Supreme Court has adopted a theory for negligent infliction of emotional distress called the "bystander rule.[2]" *Brown v. Philadelphia College,* 449 Pa. Super. 667, 674 A.2d 1130 (1996), citing *Sinn v. Burd,* 486 Pa. 146, 404 A.2d 672 (1979). Recovery on that theory may be had if three factors are present: (1) plaintiff was near the scene of the accident; (2) plaintiff incurred a direct emotional impact from the sensory and contemporaneous observance of the accident; and (3) plaintiff and the victim were closely related. *Brown,* 449 Pa. Super. at 673. However, there is another basis on which relief may be sought for emotional distress, namely under the "impact rule, " which has stated as follows:

> [W}here...a plaintiff sustains bodily injuries, even though trivial or minor in character, which are accompanied by fright or mental suffering directly traceable to the peril in which the defendant's negligence places the plaintiff, then mental suffering is a legitimate element of the damages.

[2] This theory is also called the "zone of danger rule."

Brown, at 679.

This theory of recovery requires that the plaintiff incurred a *physical* impact. *Brown,* at 677. In *Brown,* plaintiff had been admitted to the hospital in her fourth month of pregnancy with bleeding and cramps. She was brought into the examination room where she was left alone for approximately one and a half hours. She experienced a miscarriage with only her husband present and the fetus remained between her legs for fifteen minutes in a pool of blood. She was then given the fetus to hold and the nurse took a picture of them. *Brown,* at 672. The court found that the hospital owed a duty of care to persons receiving emergency room treatment. A breach of that duty provided a sufficient basis for recovery for negligent infliction of emotional distress because she experienced physical harm during her miscarriage as a result of the physician's failure to attend and she furthermore incurred physical impact when she was given the fetus to hold. *Brown,* at 679. Furthermore, the court found that evidence of knots in her stomach, nightmares and being easily frightened was sufficient to show she incurred physical injuries incurred as a result to the emotional distress. *Brown,* at 681.

In the underlying case, plaintiffs have not alleged specific facts either under the impact rule or the bystander rule. If they are seeking recovery under the impact rule, plaintiffs have failed to allege what duty Dr. McLucas owed to plaintiffs, especially in light of the fact that Dr. McLucas was not present during the miscarriage and surgical procedure. Plaintiffs have furthermore not alleged that the duty was breached and how this had a physical impact on plaintiffs. Plaintiffs also have not alleged what physical harm was suffered by which plaintiff as a result of the emotional distress. If plaintiffs seek recovery under the bystander rule, they have failed to allege that they incurred a direct emotional impact from a sensory and contemporaneous observation of the incident. Therefore, this court finds the allegations in the complaint to be insufficient. Because this is not a situation where it is clear to this court that this claim cannot be sustained, this court will not dismiss it at this time but grant plaintiffs leave to amend the complaint in compliance with the above directives.

c. **Legal Insufficiency of Claim for Intentional Infliction of Emotional Distress**

Lastly, Dr. McLucas argues that plaintiffs' claim for intentional infliction of emotional distress lacks legal sufficiency. A cause of action for intentional infliction of emotional distress has been set forth as follows:

> One 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.

Kazatsky v. King David Memorial Park, 515 Pa. 183, 190, 527 A.2d 988 (1987), citing Restatement (Second) of Torts § 46.

The type of conduct covered in this tort has been described as follows:

> Liability has been found only where the conduct has been 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!"'

This court finds that Dr. McLucas' alleged authorization of an ultrasound and the prescription of drugs to a patient without ever having seen her is sufficiently outrageous and reckless to permit this claim to go forward at this time. However, plaintiffs' complaint lacks sufficient specificity on their claim that Dr. McLucas acted outrageously in "assisting" Ms. Mentzer in the surgical procedure when he was not present. Thus, if plaintiffs want to go forward on this claim on that basis, they must specifically allege how Dr. McLucas assisted Ms. Mentzer in that procedure. Furthermore, plaintiffs have not specifically alleged what physical harm each plaintiff incurred as a result of their emotional distress caused by Dr. McLucas. Thus, plaintiffs must amend their complaint in compliance with the above directives.

ORDER OF COURT

August 14, 1998, upon consideration of the preliminary objections filed by Defendant Dr. McLucas, this court enters the following order:

1. Defendant's preliminary objections on the basis of the inclusion of scandalous or impertinent matter are dismissed in their entirety.

2. Defendant's motion to strike plaintiffs' claim for negligence on the basis of legal insufficiency is denied.

3. This court finds that paragraph 93, subsections (c) - (g), (I), (m), (o), (p), and (t) lack sufficient specificity to allow defendant to answer them. Plaintiffs are directed to amend their complaint in compliance with this court's directions as provided in the opinion. Plaintiffs are furthermore directed to amend the complaint within twenty (20) days of the service of this order.

4. Defendants motion to strike plaintiffs' claim for punitive damages on the basis of legal insufficiency is denied.

5. This court finds that plaintiffs have not pleaded a legally sufficient claim for fraud and misrepresentation by Dr. McLucas and hereby dismisses that claim.

6. This court finds that plaintiffs have not pleaded a legally sufficient claim for failure to obtain informed consent and battery by Dr. McLucas and hereby dismisses that claim.

7. This court finds that plaintiffs have pleaded two causes of action in one count in violation of Pa.R.C.P. 1020. Plaintiffs are ordered to amend their complaint and plead their claims for negligent infliction of emotional distress and intentional infliction of emotional distress in two separate counts.

8. This court finds that plaintiffs have not pleaded their claim for negligent infliction of emotional distress with sufficient specificity. Plaintiffs are ordered to amend their complaint in compliance with the directives given in this court's opinion. Plaintiffs must file an amended complaint within twenty (20) days of the date of the service of this order.

9. This court finds that plaintiffs have not pleaded their claim for intentional infliction of emotional distress with sufficient specificity. Plaintiffs are ordered to amend their complaint in compliance with the directives given in this court's opinion. Plaintiffs must file an amended complaint within twenty (20) days of the date of the service of this order.