

Shall is a physician, he is exempted from the OCSPA.² Therefore, that portion of Defendants' Motion seeking dismissal of Plaintiff's OCSPA claims against Dr. Shall is stricken as moot.

OCSPA claims can be raised against hospitals or medical service providers, such as LSI and LSSCC, since they are not specifically exempted by the statute. *Summa Health Sys. v. Viningre*, 140 Ohio App.3d 780, 795, 749 N.E.2d 344 (9th Dist. 2000); *Elder v. Fischer*, 129 Ohio App.3d 209, 215, 717 N.E.2d 730 (1st Dist. 1998); *Monroe v. Forum Health* (11th Dist. No. 2012-T-0026), 2012-Ohio-6133, ¶163, 2012 Ohio App. LEXIS 5307; and *Thorton v. Meridia Suburban Hospital*, 1991 Ohio App. LEXIS 5549 (Nov. 21, 1991), Cuyahoga App. No. 59405. Moreover, the Eleventh District Court of Appeals has rejected the argument that OCSPA claims can be pursued against medical service providers only when they relate to billing, by interpreting the Ninth District Court of Appeals' decision in *Summa Health Sys. v. Viningre, supra*, to mean that the OCSPA applies to hospitals even as it relates to specific medical treatments. *Monroe v. Forum Health, supra*, at ¶164.³

In Count II of Plaintiff's Amended Complaint, Plaintiff alleges that LSI and LSSCC represented to her that they would provide services, specifically evaluation, information, surgery and assistance with recovery from surgery, and "share the road to recovery with her", and that Plaintiff "would recover within 3 days", but these communications or statements were

² R.C. 1345.01(D) defines a "consumer" as a person "who engages in a consumer transaction with a supplier," and R.C. 1345.01(C) defines a "supplier" as a person "engaged in the business of effecting or soliciting consumer transactions." R.C. 1345.01(A) defines a "consumer transaction" in pertinent part, as a sale of an item of goods or a service to an individual for primarily personal purposes, and specifically excludes from the definition of "consumer transaction" transactions between physicians and their patients. R.C. 1345.01(A)(4).

³ In *Summa Health Sys. v. Viningre, supra*, the appellate court reversed the trial court's granting of a directed verdict on the defendant/counterclaimant's CSPA claim against the hospital. The appellate court declared that it could not conclude that reasonable minds could only find against the defendant/counterclaimant on her CSPA claim, where she contended that the hospital engaged in a deceptive manner in a consumer transaction by making representations that it would provide her with hospital services for her surgery without charge due to the hospital's negligent failure to diagnose, and then materially altering those representations by not writing off the bills, but instead suing her for payment of the bills, after the surgery had been performed.

misrepresentations because LSI and LSSCC did not “share the road to recovery with her” and she did not “recover within 3 days”. Additionally and more specifically, Plaintiff alleges that she made several phone calls to LSI and LSSCC seeking assistance with her “road to recovery”, but no assistance was provided and Plaintiff’s phone calls were never communicated to Dr. Shall and Dr. Shall never saw her after the surgery. In Count III of Plaintiff’s Amended Complaint, Plaintiff alleges that by making such misrepresentations or misleading Plaintiff, LSI and LSSCC committed an unconscionable act or practice.

Under Count I, Plaintiff alleges that as a direct and proximate result of the negligence of LSI and LSSCC, and other defendants, she suffered injuries and damages, including but not limited to, severe pain, urine and bowel incontinence, foot and ankle pain, nerve pain, mental anguish, and pain and suffering, i.e., personal injury damages. In Counts II and III, respectively, Plaintiff alleges that the acts and the unconscionable act or practice of LSI and LSSCC were the proximate cause of damages suffered by her, but does not allege or specify the same kind of personal injury damages alleged or specified under Count I. Arguably, then, and construing the material allegations in Plaintiff’s Amended Complaint, with all reasonable inferences to be drawn therefrom, in favor of the nonmoving party, or Plaintiff, as true, as this Court must do,⁴ this Court cannot find beyond doubt, that Plaintiff can prove no set of facts in support of her claim that would entitle her to relief.

This Court has reviewed the First District Court of Appeals’ decision in *Young v. UC Health, West Chester Hosp., LLC*, 2016-Ohio-5526, 61 N.E.3d 34, 2016 Ohio App. LEXIS 3410 (1st Dist. Nos. C-150562 and C-150566), cited and relied upon by LSI and LLSCC to support their

⁴ *State ex rel. Midwest Pride IV, Inc. v. Pontious*, 75 Ohio St.3d 565, 570.

argument that Plaintiff's OCSPA claims against them constitute nothing more than a "dressed-up" medical claim. However, in that case, the court noted that "[t]he only representations allegedly made by the hospital went to Dr. Durrani's qualifications as a spine surgeon and the use of infuse/BMP-2 during surgery", or what the court construed as representations at the heart of the medical malpractice claims against the doctor, i.e., his negligence in performing the surgery and the lack of informed consent. *Young, id.* at ¶24. The representations Plaintiff alleges LSI and LSSCC made to her go beyond negligence in performing the surgery and lack of informed consent.

This court does acknowledge that in *Young*, the court noted that in their complaint the plaintiffs had alleged that they had relied on omissions, suppressions and concealments by the hospital and that had they known the representations were untrue, they would not have used the hospital's services. *Id.* Missing from Plaintiff's OCSPA claims against LSI and LSSCC are allegations that Plaintiff relied upon their representations and had she known the representations were untrue, she would not have used their services. In other words, in Counts II and III of the Amended Complaint, Plaintiff does not allege that the representations she alleges LSI and LSSCC made to her impacted her decision to use their services.

However, the following excerpt from the case of *Reeves v. PharmaJet, Inc.*, 846 F.Supp.2d 791, 2012 U.S. Dist. LEXIS 14957, also cited and relied upon by LSI and LSSCC in support of their Motion, is instructive:

"To establish a prima facie claim under the OCSPA, a plaintiff must 'show a material misrepresentation, deceptive act or omission' that impacted his decision to purchase the item at issue. *Temple v. Fleetwood Enters, Inc.*, 133 Fed. Appx. 254, 265 (6th Cir. 2006) (citing *Mathias v. Am. Online, Inc.*, 2002 Ohio 814, 2002 WL 377159, at *5 (Ohio Ct.App. 2002) and *Janos v. Murduck*, 109 Ohio

*App.3d 583, 672 N.E.2d 1021 (Ohio Ct.App. 1996)). Whether it be termed an issue of reliance or an issue of proximate cause, an appropriate rule is that where the defendant is alleged to have made material representations or misstatements, there must be a cause and effect relationship between the defendant's acts and the plaintiff's injuries.' Lilly v. Hewlett-Packard Co., N. 05-cv-465, 2006 U.S. Dist. LEXIS 22114, 2006 WL 1064063 at *5 (S.D. Ohio Apr. 21, 2006).*

(Emphasis added by bold print.) *Reeves v. PharmaJet, Inc., supra*, at *15-16.

Accordingly, to the extent that Plaintiff has alleged "proximate cause" between the alleged acts or act and practice of LSI and LSSCC and her "damages", independent of personal injury damages, Defendants' Motion is **DENIED**.

 10-31-17
JUDGE PAMELA A. BARKER DATED