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**FOR PUBLICATION**

**IN THE SUPERIOR COURT  
FOR THE  
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS**

<b>JOSE I. QUITUGUA,</b>	)	<b>CIVIL ACTION NO.: 13-0229B</b>
	)	
<b>Plaintiff</b>	)	
	)	
<b>v.</b>	)	<b>ORDER GRANTING IN PART AND</b>
	)	<b>DENYING IN PART MOTION TO</b>
<b>AHMED AL-ALOU, PACIFIC MEDICAL</b>	)	<b>DISMISS AND GRANTING MOTION TO</b>
<b>CORP., and DOES I-X,</b>	)	<b>STRIKE</b>
	)	
<b>Defendants.</b>	)	

**I. INTRODUCTION**

This matter came before the Court on Plaintiff and counter-Defendant, Jose I. Quitugua’s (“Quitugua”), Motion to Dismiss Counterclaims and Strike Twelfth Affirmative Defense on Tuesday, March 1, 2014 at 9:00 a.m. in Courtroom 205A. Quitugua was present and represented by Timothy H. Bellas, Esq. Defendant and counter-Plaintiff, Dr. Ahmed Al-Alou (“Dr. Al-Alou”), was present and represented by Robert T. Torres, Esq.

**II. FACTUAL BACKGROUND**

Quitugua filed this lawsuit on December 9, 2013 with a single cause of action: Negligence – Medical Malpractice. Specifically, Quitugua claims that he told both Pacific Medical Center (“PMC”) staff and Dr. Al-Alou that he stubbed his toe. Compl. ¶¶ 11, 14. However, no one documented that statement in his medical records. *Id.* ¶¶ 12-13. Dr. Al-Alou misdiagnosed

1 Quitugua with gout when he was actually suffering from a broken toe. *Id.* ¶¶ 15, 24-25. Quitugua  
2 sought a second opinion from Dr. Osborne at the Saipan Health Clinic after several weeks of taking  
3 multiple types of gout medication prescribed by Dr. Al-Alou that did not alleviate his pain. *Id.* ¶¶  
4 15-18, 22-23. Dr. Osborne had Quitugua’s toe x-rayed and determined that it was broken. *Id.* ¶ 24-  
5 25. Dr. Osborne immediately sought to immobilize the toe. *Id.* ¶ 26. However, it had fused  
6 improperly because of the substantial passage of time without having been immobilized. *Id.* ¶ 27.

7 Quitugua claims that Doctor Al-Alou, Does I-X, and PMC breached the required standard of  
8 medical care by incorrectly documenting, failing to document, and misdiagnosing his medical  
9 condition. *Id.* ¶¶ 30-31. Quitugua suffered extreme pain and suffering and possible permanent  
10 disfigurement of his right big toe as a result of these alleged breaches. *Id.* ¶ 34-35. Quitugua  
11 contends that these problems were directly and proximately caused by the Defendants’ negligence,  
12 without any act or omission from him directly contributing thereto. *Id.* at ¶ 34-37.

13 Dr. Al-Alou filed a response and counterclaim to Quitugua’s complaint on January 3, 2014.  
14 The counterclaim alleges three causes of action: (1) negligent misrepresentation, (2) breach of the  
15 covenant of good faith and fair dealing, and (3) abuse of process. The counterclaims allege that  
16 Quitugua failed to inform Dr. Al-Alou that he had stubbed his toe or had any history of trauma.  
17 Resp. of Dr. Ahmad Al-Alou to Compl. and Countercl. and Demand for Jury Trial (“Countercl.”)<sup>1</sup>  
18 ¶¶ 12, 15-16, 21-24. The medical diagnosis provided to Quitugua was based upon his history of  
19 gout, a physical examination, and routine questions during which Quitugua never informed Dr. Al-  
20 Alou that he had injured his toe. *Id.* ¶¶ 12-16, 21-24. Quitugua’s failure to accurately inform Dr.  
21 Al-Alou about his injuries prevented the accurate assessment and treatment of his condition. *Id.* ¶¶  
22 21-22.

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24 <sup>1</sup> All paragraphs related to Dr. Al-Alou’s response and counter-claim are referenced from the counter-claim section of  
this pleading.

1 Quitugua filed the instant motion seeking a dismissal of all three counterclaims and to strike  
2 Dr. Al-Alou’s twelfth affirmative defense on February 19, 2014. Dr. Al-Alou filed his opposition  
3 on March 7, 2014, and Quitugua filed his reply on March 27, 2014.

4 **III. DISCUSSION**

5 **A. MOTION TO DISMISS**

6 A motion to dismiss a complaint pursuant to NMI R. Civ. P 12(b)(6) tests the legal  
7 sufficiency of the claims within the complaint. Generally, a complaint must satisfy the notice  
8 pleading requirements of NMI R. Civ. P. 8(a) in order to avoid dismissal under Rule 12(b)(6).  
9 *Cepeda v. Hefner*, 3 NMI 121, 126 (1992). Rule 8(a)(2) requires only “a short and plain statement  
10 of the claim showing that the pleader is entitled to relief,” so that “fair notice of the nature of the  
11 action is provided.” *Govendo v. Maianas Pub. Land Corp.*, 2 NMI 482, 506 (1992) (quoting *In re*  
12 *Adoption of Magofna*, 1 NMI 449 (1990)). A complaint fails to satisfy the pleading requirements of  
13 Rule 8(a) where it lacks a cognizable legal theory or fails to allege facts constituting a cognizable  
14 legal theory. *Bolalin v. Guam Publications, Inc.*, 4 NMI 176 (1994).

15 In considering a motion to dismiss, a court must “review the contents of a complaint by  
16 construing it in the light most favorable to the plaintiff and accepting all well-pleaded facts as true”.  
17 *Zhang Gui Juan v. Commonwealth*, 2001 MP 18 ¶ 11 (citation omitted). However, a complaint  
18 requires “more than a blanket assertion of entitlement to relief”, and the Court is not required to  
19 strain to find favorable inferences. *Sayed v. Mobil Oil Marianas, Inc.*, 2012 MP 20 ¶ 20 and 22.  
20 “[A] ‘complaint must contain either direct allegations on every material point necessary to sustain a  
21 recovery...or contain allegations from which an inference fairly may be drawn that evidence on  
22 these material points will be introduced at trial.’” *Sayed*, 2012 MP 20 ¶ 19, citing *Magofna*, 1 NMI  
23 at 454.

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1           **1. FIRST CLAIM FOR RELIEF: NEGLIGENT MISREPRESENTATION**

2           Negligent misrepresentation occurs when “[o]ne who, in the course of his business  
3 profession or employment, or in any other transaction in which he has a pecuniary interest, supplies  
4 false information for the guidance of others in their business transactions”. Restatement (Second) of  
5 Torts § 552 (1977).

6           In support of this claim, Dr. Al-Alou contends that Quitugua failed to mention any history  
7 of trauma or that he had stubbed his toe, even after Dr. Al-Alou asked direct questions related to his  
8 pain. Countercl. ¶¶ 12, 39-40. Quitugua knew or should have known that Dr. Al-Alou would rely on  
9 the information Quitugua provided in order to develop a diagnosis, prepare a treatment plan, and  
10 prescribe medication. Countercl. ¶ 42. Quitugua failed to exercise reasonable care when he withheld  
11 information critical to the assessment and treatment of his symptoms. Countercl. ¶ 43. These acts  
12 and omissions misled Defendants and interfered with the diagnosis and treatment of Quitugua’s  
13 medical condition. Countercl. ¶¶ 45-47. According to Dr. Al-Alou, Quitugua’s failure to provide  
14 accurate and complete information related to his pain is tantamount to negligent misrepresentation.

15           Quitugua contends that he had no pecuniary interest in this transaction. Therefore, this  
16 counterclaim must be dismissed. In opposition, Dr. Al-Alou argues that Quitugua does have a  
17 pecuniary interest. First, Quitugua came to PMC for a commercial transaction. He expected to  
18 receive a certain level of services for the money he paid. Further, he expected to profit from this  
19 transaction in that his health would improve, and he expected that he would not have to replicate his  
20 costs by consulting and paying for additional services. Here, the alleged misdiagnosis caused  
21 Quitugua financial and personal consequences. As such, he does have a pecuniary interest. Opp’n  
22 ¶¶ 12-13. Finally, Dr. Al-Alou suggests ¶¶ that the outcome of this lawsuit creates a pecuniary interest  
23 because Quitugua is attempting to receive a financial settlement. *Id.* ¶¶ 13-14.

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1 Dr. Al-Alou alleges facts sufficient to suggest that Quitugua provided false information in  
2 the course of a business transaction, but he fails to show that Quitugua had any pecuniary interest in  
3 that business transaction. Dr. Al-Alou’s suggestion that this lawsuit is evidence of a pecuniary  
4 interest is without merit. The Restatement is clear that the pecuniary interest must exist in the  
5 business transaction itself; a subsequent lawsuit cannot produce the required financial interest. The  
6 business transaction in question was one for services, in which Quitugua was to receive a medical  
7 diagnosis and treatment plan, and Dr. Al-Alou was to receive payment. Hence, it was Dr. Al-Alou,  
8 and not Quitugua, who had a pecuniary interest in this transaction. Likewise, the argument that  
9 avoiding subsequent checkups and second opinions also fails to produce the required pecuniary  
10 interest for this claim to proceed.

11 Accordingly, Quitugua’s Motion to Dismiss the First Claim for Relief is granted.

12 **2. SECOND CLAIM FOR RELIEF: BREACH OF COVENANT OF GOOD FAITH AND FAIR DEALING**

13 “[T]he formation of a contract requires a bargain in which there is a manifestation of mutual  
14 assent to the exchange and a consideration.” Restatement (Second) of Contracts § 17 (1981).  
15 “Every contract imposes upon each party a duty of good faith and fair dealing in its performance  
16 and its enforcement.” Restatement (Second) of Contracts § 205 (1981); *Tano v. Department of*  
17 *Public Works*, 2009 MP 18, ¶ 41. The covenant of good faith and fair dealing, thus, “requires the  
18 parties to perform, in good faith, the obligations required by their agreement, and a violation of the  
19 covenant occurs when either party violates, nullifies or significantly impairs any benefit of the  
20 contract.” *Tano*, 2009 MP 18, ¶ 41, citing *Steiner v. Ziegler-Tamura, Co.*, 138 Idaho 238, 242  
21 (2002).

22 For Dr. Al-Alou’s claim to prevail against this motion to dismiss, Dr. Al-Alou must show  
23 (1) the existence of a contract, (2) that Quitugua owed a duty to Dr. Al-Alou, and (3) that Quitugua  
24 breached that duty.

1           **a. THERE ARE SUFFICIENT FACTS TO ESTABLISH THE EXISTENCE OF A CONTRACT**

2           In support of his contention that a contract exists, Dr. Al-Alou alleges that Quitugua  
3 presented himself to PMC seeking medical treatment. Mutual assent is evidenced by Dr. Al-Alou’s  
4 agreement to examine Quitugua and to provide him with a medical diagnosis and treatment plan. In  
5 exchange for Dr. Al-Alou’s medical expertise, Quitugua paid PMC’s fee. Countercl. ¶¶ 29-30.  
6 These facts demonstrate the existence of a contract for medical services, and in fact, Quitugua  
7 conceded this point at oral argument.

8           **b. PATIENTS OWE A DUTY OF ORDINARY CARE**

9           According to Dr. Al-Alou, the existence of a contract means that Quitugua owed a duty to  
10 Dr. Al-Alou and PMC to provide accurate and truthful information related to his medical concerns.  
11 Quitugua, however, contends that a patient owes no affirmative duty to his doctor. However, our  
12 Supreme Court has affirmed the existence of the covenant of good faith and fair dealing in  
13 contractual relationships and has stated that parties to a contract are required “to perform, in good  
14 faith, the obligations required by their agreement”. *Tano*, 2009 MP 18, ¶ 41. A violation of this  
15 covenant occurs “when either party violates, nullifies or *significantly impairs any benefit of the*  
16 *contract.*” *Id.* (emphasis added.)

17           The patient’s benefit in a contract for medical services consists of a proper diagnosis and  
18 treatment plan that adequately deals with his ailment. Part and parcel of providing a proper  
19 diagnosis is a doctor’s ability to obtain requisite information related to the patient’s complaint. “For  
20 his own safety, a patient must exercise ordinary care to give an accurate history to his treating  
21 physician. He must tell the truth. Otherwise, the patient may mislead the physician, with disastrous  
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1 results.” *Mackey v. Greenview Hospital, Inc.*, 587 S.W.2d 249, 254 (Ky App, 1979)<sup>2</sup>; see also  
2 *Carreker v. Harper*, 196 Ga. App. 658, 659 (1990) (Plaintiff’s failure to fully disclose all relevant  
3 information related to her condition resulted in comparative negligence.) While a doctor has “the  
4 primary responsibility for obtaining a complete and accurate history” from his patient, the patient is  
5 “under a duty to exercise ordinary care for [his] own safety in giving [his] medical history.” *Id.* at  
6 255.

7 In fact, many courts have found patients contributorily negligent for failing to provide their  
8 doctors with relevant and accurate medical information. *See*, for instance, *Mackey v Greenview*  
9 *Hospital, Inc.*, 587 SW2d 249 (Ky App, 1979) (patient was properly found contributorily negligent  
10 by failing to reveal a part of her medical history); *Skar v Lincoln*, 599 F2d 253 (CA8 Neb, 1979)  
11 (jury’s verdict of contributory negligence was sustained because the patient was capable of  
12 providing full and complete information about his medical history but voluntarily chose not to do  
13 so); *Haynes v Hoffman*, 164 Ga App 236, 296 SE2d 216 (1982) (patient’s failure to disclose all  
14 relevant information concerning her history of allergies constituted contributory negligence)  
15 (overturned on other grounds).

16 Hence, a patient may have breached an affirmative duty where his doctor has asked direct  
17 questions intended to illicit information necessary to provide an accurate diagnosis, and he has  
18 failed to provide accurate, honest, and complete information. At a minimum, he has impaired the  
19 doctor’s ability to provide an accurate diagnosis, thereby interfering with benefit of the contract in  
20 which he entered.

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23 <sup>2</sup> Note that the *Mackey* case comes from a contributory negligence jurisdiction. The Court recognizes that the  
24 Commonwealth is a comparative negligence jurisdiction but finds this particular ruling compelling, particularly since  
comparative negligence jurisdictions consider the plaintiff’s acts and omissions in determining each party’s liability in  
the resulting injury.

1           **c. SUFFICIENT FACTS ARE ALLEGED TO ESTABLISH THAT QUITUGUA BREACHED HIS DUTY**

2           Dr. Al-Alou has stated throughout his response and counterclaim that Quitugua failed to  
3 provide necessary information, despite being asked questions intended to illicit the requisite  
4 medical information. That failure prevented Dr. Al-Alou from being able to provide an accurate  
5 diagnosis. These facts establish that Quitugua may have breached his disclosure obligations to Dr.  
6 Al-Alou.

7           Accordingly, Quitugua’s Motion to Dismiss the Second Claim for Relief is denied.

8           **3. THIRD CLAIM FOR RELIEF: ABUSE OF PROCESS**

9           Abuse of process occurs when an individual “uses a legal process...against another  
10 primarily to accomplish a purpose for which it is not designed”. Restatement (Second) of Torts §  
11 682 (1977).

12           Quitugua asserts that this counterclaim must be dismissed because an abuse of process claim  
13 requires an additional element. According to Quitugua, the instant case must be decided in favor of  
14 Dr. Al-Alou before he may bring an action for abuse of process. Quitugua cites the Commonwealth  
15 Supreme Court’s decision in *Waibel v. Farber* in support of this contention. *Waibel v. Farber*,  
16 2006 MP 15, ¶ 25. Quitugua, however, is incorrect. The tort of abuse of process was mentioned  
17 briefly in the *Waibel* decision, but that case dealt with an entirely different tort. The tort analyzed in  
18 *Waibel* was wrongful use of civil proceedings, as detailed in the Restatement (Second) of Torts §  
19 674; see also *Waibel*, 2006 MP 15 ¶¶ 1, 24-25. By contrast, Dr. Al-Alou’s counterclaim alleges  
20 abuse of process, which is a separate and distinct tort under the Restatement. *See* Restatement

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1 (Second) of Torts § 682 (1977).<sup>3</sup> Thus, the final element, as proposed by Quitugua is not an  
2 included element in the tort claimed by Dr. Al-Alou.

3           Consequently, in order to defeat the motion to dismiss Dr. Al-Alou’s counterclaim need  
4 only allege facts which directly allege, or from which the Court can fairly infer, that (1) Quitugua  
5 initiated this action against Dr. Al-Alou (2) for a purpose other than proper adjudication of his  
6 claim. Abuse of process is most often used as a “form of extortion, using the [legal] process to put  
7 pressure upon the other to compel him to a different debt or to take some other action or refrain  
8 from it.” Restatement (Second) of Torts § 682 (1977) at cmt. b.

9           In support of his claim, Dr. Al-Alou asserts a plethora of facts which provide the Court with  
10 adequate reason to sustain this claim. Dr. Al-Alou alleges that Quitugua never stated that he had  
11 stubbed his toe, despite having questioned him about any history of trauma. Countercl. at ¶¶ 12, 15-  
12 16, 23. Dr. Al-Alou states that none of the medical charts reflect the notations for a trauma.  
13 Countercl. at ¶¶ 19-20. There was no discoloration at the initial appointment on March 8, 2013.  
14 Countercl. ¶ 13. Dr. Al-Alou states that Quitugua refused to come into the office, did not show up  
15 for appointments, did not provide the requested blood sample until several weeks after the request,  
16 did not come in to the office to discuss his blood work, did not tell Dr. Al-Alou that the skin on his  
17 toe was turning black, and did not tell Dr. Al-Alou that he was experiencing stomach pain, muscle  
18 weakness, and dizziness. Countercl. at ¶¶ 14, 17-18, 52.

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21 <sup>3</sup> The tort of wrongful use of civil proceedings is defined as “[o]ne who takes an active part in the initiation,  
22 continuation or procurement of civil proceedings against another is subject to liability to the other for wrongful civil  
23 proceedings if (a) he acts without probable cause, and primarily for a purpose other than that of securing the proper  
24 adjudication of the claim in which the proceedings are based, and (b) except when they are ex parte, the proceedings  
have terminated in favor of the person against whom they are brought.” Restatement of Torts (Second) § 674 (1977).

23 In comparison, the tort of abuse of process is defined as “[o]ne who uses a legal process, whether criminal or civil,  
24 against another primarily to accomplish a purpose for which it is not designed, is subject to liability to the other for  
harm caused by the abuse of process.” Restatement of Torts (Second) § 682 (1977).

1 Dr. Al-Alou also alleges that Quitugua has a history of dishonest behavior in that he  
2 previously requested that Dr. Al-Alou alter his medical records so that he could receive possible  
3 benefits. Countercl. ¶¶ 4-5, 8-11. Dr. Al-Alou and Quitugua both noted that the discoloration of the  
4 toe did not occur until 27 days after the alleged injury, which may raise suspicion as to when the  
5 injury actually occurred, particularly given Dr. Al-Alou's allegations that Quitugua's pain was  
6 subsiding, that Quitugua continued to play tennis three days per week, and that Quitugua failed to  
7 return for treatment until 20 days after his March 8th appointment. Countercl. ¶¶ 13, 15-16, 24. 47.  
8 Finally, Dr. Al-Alou alleges that this lawsuit was filed to harass, embarrass, and intimidate him and  
9 PMC into giving Quitugua a quick settlement. Countercl. ¶¶ 53-55.

10 Given the facts as alleged by Dr. Al-Alou, the Court can reasonably infer that a claim for  
11 abuse of process exists. Accordingly, the Motion to Dismiss the Third Claim for Relief is denied.

12 **B. MOTION TO STRIKE**

13 “[T]he court may order stricken from any pleading any insufficient defense or any  
14 redundant, immaterial, impertinent, or scandalous matter.” NMI R. Civ. P. 12(f)

15 The twelfth affirmative defense offered by Dr. Al-Alou is contributory negligence. Quitugua  
16 claims that this defense should be dismissed because contributory negligence is not the law in the  
17 Commonwealth. Rather, the Commonwealth has been a comparative negligence jurisdiction for  
18 over thirteen years. Mot. at 2, citing PL 12-26 § 3. Defendant admits that the Commonwealth is not  
19 a contributory negligence jurisdiction but believes that these types of cases barring or limiting a  
20 plaintiff's recovery for failure to disclose information and comply with a physician's instructions  
21 apply in this case. Opp'n at 3. However, at oral argument, Dr. Al-Alou's counsel conceded that this  
22 defense should be stricken.

23 Accordingly, the Motion to Strike Twelfth Affirmative Defense is granted.

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**IV. CONCLUSION**

Quitugua’s Motion to Dismiss the First Claim for Relief: Negligent Misrepresentation is

**GRANTED.**

Quitugua’s Motion to Dismiss the Second Claim for Relief: Breach of Covenant of Good Faith and Fair Dealing is **DENIED.**

Quitugua’s Motion to Dismiss the Third Claim for Relief: Abuse of Process is **DENIED.**

Quitugua’s Motion to Strike Dr. Al-Alou’s twelfth affirmative defense is **GRANTED.**

**SO ORDERED** this 4th day of April 2014.

/s/  
KENNETH L. GOVENDO, Associate Judge