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| ANTHONY KLAY and KAREN KLAY, husband and wife, | : | IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA |
| Plaintiffs | : | |
| vs. | : | NO. 01-01,522 |
| JAN K. HILLIKER, M.D. and BERNSTEIN/HILLIKER/HARTZELL EYE CENTER, | : | CIVIL ACTION - LAW |
| Defendants | : | PRELIMINARY OBJECTIONS |

***Date: October 18, 2002***

***OPINION and ORDER***

The motion before the Court, in this medical malpractice claim, is Plaintiffs' Preliminary Objections to the Answer with New Matter of Defendant filed July 31, 2002. A brief summary of the alleged facts are: On May 12, 2000, Anthony Klay (hereafter "Plaintiff") went to see Dr. Jan K. Hilliker for an evaluation and screening to determine if Plaintiff was an appropriate candidate for bilateral Lasik surgery. *See,* Plaintiffs' Second Amended Complaint, ¶6 (Plaintiffs' Complaint). Topography was part of that initial evaluation. *See*, ***Ibid***. On May 12, 2000, Dr. Hilliker told Plaintiff he was a good candidate for bilateral Lasik eye surgery. *See*, Plaintiffs' Complaint, ¶7. On May 25, 2000, Plaintiff underwent the Lasik eye surgery. *See*, ***Id***. at ¶8. During Plaintiff's follow-up visits at Berrnstein/Hilliker/Hartzel, Plaintiff was told it would take time for his vision to improve. *See*, ***Id***. at ¶9. Plaintiff's vision in his left eye did not improve, and it was recommended that he get a contact lens. *See*, ***Id***. at ¶10-11. On February 27, 2001, the contact lens was inserted into Plaintiff's left eye. *See*, ***Id***. at ¶11. The pain caused by the contact lens prevented Plaintiff from wearing it for long periods. *See*, ***Id***. at

¶12. On March 28, 2001. Dr. Hilliker subsequently prescribed Plaintiff bifocals. *See*, ***Id***. at ¶14.

Plaintiffs allege that paragraphs within the New Matter do not conform to the Pennsylvania Rules of Civil Procedure. The paragraphs at issue are:

> 41. The Defendants plead and preserve all limitations of liability and/or damages claimed pursuant to the Health Care Services Malpractice Act, as amended, and the Medical Care Availability and Reduction of Error (MCARE) Act, to include Section 504 (informed consent), Section 509 (determination and payment of damages), and Section 510 (determination and payment of damages), and Section 510 (determination and payment of loss of future earning capacity).
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> 44. The Defendants plead and preserve the two schools of thought defense regarding whether a diagnosis of keratoconus is warranted based on only topography scan results.

*See*, Answer with New Matter to Plaintiffs' Second Amended Complaint of Defendants Jan K. Hilliker, M.D. and Bernstein/Hilliker/Hartzell Eye Center, ¶¶41, 44.

Plaintiffs contend that the sections of the HCSMA and MCARE pleaded in ¶41 are not affirmative defenses, and that the paragraph is a conclusion of law with no place in New Matter. *See*, Plaintiffs' Brief, 4. Furthermore, Plaintiffs contend that ¶41 lacks the requisite material facts to support the affirmative defenses attempting to be pleaded. *See*, ***Ibid***. Plaintiffs also take issue with ¶44. Plaintiffs argue that ¶44 lacks factual specificity. Plaintiffs contend that ¶44 does not inform them what the issue is, so they can prepare an adequate defense for trial. *See*, Plaintiffs' Brief, 5. Plaintiffs acknowledge that ¶44 pleads the two schools of thought defense, but argue that it does not provide what the two schools are, the levels of acceptance in the medical community, and how they are implicated in this case. *See*, ***Ibid***.

In response, Dr. Hilliker contends that ¶41 is appropriate for New Matter. Dr. Hilliker cites to ***Thurman v. Jones***, No. 02-00,518 (Lycoming County July, 16, 2002), where it was held that the HCSMA and MCARE acts could be pleaded in New Matter. *See*, Defendants' Brief, 1. Dr. Hilliker also argues that ¶41 meets the specificity requirement since it cites to the specific sections of the acts that are implicated in this case. With respect to ¶44, Dr. Hilliker contends that the pleading specificity requirements are met, since ¶44 pleads that there are two schools of thought regarding whether the use of topography alone is sufficient to diagnose keratoconous. *See*, Defendants' Brief, 2. One school says that topography scan results alone are enough to diagnose keratoconous. The other school says that topography scan results alone are not enough. According to Dr. Hilliker, ¶44 gives Plaintiffs notice of what affirmative defense they will have to overcome at trial.

The Court agrees with Plaintiffs on both issues. Paragraph 41 is a conclusion of law, and does not set forth any affirmative defense. Paragraph 44 is an affirmative defense, but lacks the material facts to support it. Therefore, ¶¶41 and 44 must be struck from Dr. Hilliker's New Matter.

Pa. R.C.P. 1030 governs the pleading of new matter. A party must set forth all affirmative defenses in his responsive pleading under the heading "New Matter." *See*, Pa.R.C.P. 1030(a). Statements that are merely denials or conclusions of law have no place in new matter and will be stricken. *See*, ***Trimble v. Beltz***, No. 02-00,518 at 1 (Lyc. Co., April 27, 2000); ***Allen v. Lipson***, 8 D & C 4$^{th}$ 390, 394 (Pa. Cmwlth. 1990). Rule 1030 must be read *in pari materia* with Rule 1019, so that the affirmative defenses set forth in new matter are supported by material facts. *See*, ***Allen***, *supra*. Failure to set forth the material facts will result

in the paragraph containing the affirmative defense being struck from New Matter. *See*, ***Thurman v. Jones***, No. 02-00,518 at 1 (Lycoming County July 16, 2002); ***Trimble***, *supra*. Defenses that are not required to be pleaded, such as "a legal defense to a claim and any other non-waivable defense or objection," are not waived by their absence from New Matter. *See*, Pa.R.C.P. 1032(a).

An affirmative defense is different than a denial of facts. An affirmative defense requires "the averment of facts extrinsic to plaintiff's claim for relief." *See*, ***Coldren v. Peterson***, 763 A.2d 905, 908 (Pa. Super. 2000). An affirmative defense ignores what is alleged in the complaint and through the extrinsic facts disposes of the asserted claim. *See*, ***Ibid***.

The Court will first address the pleading of sections under the HCSMA and MCARE Acts in ¶41. It is unnecessary to raise statutes that do not contain affirmative defenses in New Matter. *See*, ***Thurman***, *supra*. ("We think it is sufficient to raise the statutes, in fact the Defendant may be able to argue the statutes without raising it in the pleadings if they would apply to this case."). The cited sections in ¶41 are not affirmative defenses, since they will not dispose of Plaintiffs' claims. Section 504 establishes who has the duty to obtain the patient's informed consent. This establishes a legal duty, not an affirmative defense. Sections 505, 508, 509, and 510 are concerned with limits on recovery. They have nothing to do with establishing liability or lack there of. Consequently, the cited sections are not affirmative defense and have no place in New Matter. Therefore, ¶41 shall be struck from New Matter.

The Court will now address the pleading of the two schools of thought defense in ¶44. The two schools of thought doctrine is a complete defense to a medical malpractice claim. *See*, ***Levine v. Rosen***, 616 A.2d 623, 627 (Pa. 1992). A physician will not be held

"responsible if in the exercise of his judgment he followed a course of treatment advocated by a considerable number of recognized and respected professionals in his given area of expertise." *See*, ***Ibid***. The defendant physician has the burden of establishing that there are two schools of thought. *See*, ***Jones v. Chidester***, 610 A.2d 964, 969 (Pa. 1992). This is done through an expert who will testify as to the "factual reasons [that] support his claim that there is a considerable number of professionals who agree with the treatment employed by the defendant." *See*, ***Ibid***.

A pleading must state the relevant facts so that the court and the responding party are informed as to the issues in the case. *See*, ***Dravo Corp. v. Key Bellevilles, Inc.***, 75 D. & C. 2d 656, 660 (Pa. Cmwlth. 1976). In doing this, a party must plead specific enough to allow the responding party an opportunity to prepare an adequate defense to the pleading. *See*, ***Commonwealth v. Shipley Humble Oil Co.***, 370 A.2d 438, 439 (Pa. Cmwlth. 1977). The ***Connor*** requirement of precluding boilerplate language and requiring plaintiff to specifically plead the material facts applies to defendants as well in pleading new matter. *See,* ***Riviera v. Arbor Place, Inc.***, 4 D. & C. 4th 44, 47 (Pa. Cmwlth. 1989).

Paragraph 44 fails to meet the level of specificity required under the Pennsylvania Rules of Civil Procedure. It is as non-specific as a plaintiff stating that a defendant was negligent. Paragraph 44 pleads the two schools of thought defense as it relates to whether a diagnosis of keratoconus is warranted based solely on topography scan results. This could imply that the two schools of that are that a diagnosis of keratoconous can be based solely on topography results, and the other school is that a proper diagnosis of keratoconus requires more than the results of topography scan. But what are those additional requirements?

At argument Defense Counsel suggested that the second school of thought ascribes to the theory that when keratoconus is revealed by topography the decrease must be ruled out or ruled in by a clinical exam. There also may have been an indication in Defense Counsel's argument that Lasik surgery could safely proceed, under one school of thought, regardless of the topography result, while another school says never to proceed. While these differences as to the schools of thought were articulated at argument, they have not been set forth in the pleading. The Court and the Plaintiffs should not have to guess as to what are the two schools of thought. Paragraph 44 is unclear as to what the two schools of thought are, and as stated is a mere conclusion.

Also, Paragraph 44 is unclear as to the level of acceptance those schools of thought have in the medical profession. It is also unclear as to which aspect of the Plaintiffs' claim the defense is asserted. Is it being asserted to the diagnosis of keratoconus? Is it being asserted to the performance of the Lasik surgery, keeping in mind the counter indication of keratoconous? The lack of specificity in ¶44 not only leaves Plaintiffs in the dark as to what they must prepare for at trial, it creates the type of situation ***Connor*** envisioned remedying. The lack of specificity could allow Defendants to use a different school of thought on the eve of trial. This could be prejudicial to Plaintiffs who prepared a totally different defense to a totally different school of thought.

While surprise is a good thing on the battlefield, it is not in the legal arena. The Rules of Civil Procedure are designed to prevent surprise, so that both sides have an equal and fair opportunity to present their case. This is so the case can be decided on the merits, and not surrepitiously by a tactical maneuver. Therefore, ¶44 must be stricken from New Matter.

***O R D E R***

It is hereby ordered that Plaintiffs' Preliminary Objections filed July 31, 2002 are granted. Paragraphs 41 and 44 are to be stricken. Defendants have twenty (20) days in which to file an amended answer with new matter.

BY THE COURT:

William S. Kieser, Judge

cc: C. Scott Waters, Esquire
C. Edward S. Mitchell, Esquire
Judges
Christian J. Kalaus, Law Clerk
Gary L. Weber, Esquire (Lycoming Reporter)