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
	:	
	:	MOTION FOR RECONSIDERATION AND/
Defendants	:	OR CLARIFICATION OF COURT'S ORDER

Date: November 19, 2002

OPINION AND ORDER

Before the Court is the Defendants' Motion for Reconsideration of this Court's Order of October 18, 2002, regarding the Order holding that the "two schools of thought" doctrine is an affirmative defense in a medical malpractice case. This defense has been defined by the Pennsylvania Supreme Court, in ***Jones v. Chidester***, 610 A.2d 964 (Pa. 1992), as follows:

> Where competent medical authority is divided, 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.

After considering the arguments of counsel and the briefs submitted, this Court does not believe it appropriate to change the holding in the Order of October 18, 2002. This Court does believe that the defense of the "two schools of thought" doctrine in a medical malpractice action is within the classic definition of an affirmative defense, that is, it does not constitute a denial of facts that make up Plaintiffs' cause of action, it requires the averment of facts extrinsic to Plaintiffs' claim for relief, and if true, would provide a complete defense to the medical malpractice claims.

In support of its decision and reasoning therefore this Court adopts the arguments and legal authority as cited in Plaintiffs' brief filed November 18, 2002. The Court, however, is now

ruling that the procedure to be applied at trial will be the procedure described in Plaintiffs' brief as suggested in Justice Zappala's concurring opinion in ***Jones v. Chidester***, 610 A.2d 964 (Pa. 1992), that the court must make a finding that the evidence is sufficient to establish the defense in the first instance as a question by law, before the defense is submitted to the jury for a factual determination.

This Court also believes that treating this doctrine as an affirmative defense is appropriate because the facts as to whether or not a physician chose a particular course of action based upon his judgment that it was best to follow a course of treatment which is appropriately advocated and accepted in the medical field is within the knowledge of the physician accused of malpractice. Also, if such defense is true and is pleaded such would come to the recognition of Plaintiffs and their experts early in the discovery stage of a case and may result when properly pleaded and backed up by evidence obtained in discovery in either Plaintiff voluntarily withdrawing the claim in the face of that complete defense or also set the stage for an appropriate motion for summary judgment.

Therefore, the following Order will be entered.

O R D E R

Upon reconsideration, this Court's holding that the "two schools of thought" doctrine is an affirmative defense as set forth in the Opinion and Order of October 18, 2002, is reaffirmed and the Motion to reconsider and delete that holding from that Opinion is DENIED. The Opinion of October 18, 2002, is hereby ratified and confirmed as originally issued.

It is also ORDERED and DIRECTED that Defendant shall have a period of twenty days from the entry and notice of this Order in which to file an amended new matter.

BY THE COURT,

William S. Kieser, Judge

cc: C. Scott Waters, Esquire/Rodney Knier, Esquire
C. Edward S. Mitchell, Esquire/Darryl Wishard, Esquire
Judges
Christian J. Kalaus, Esquire
Gary L. Weber, Esquire (Lycoming Reporter)