

KEVIN McELWEE, individually as	:	IN THE COURT OF COMMON PLEAS OF
parent to JESSICA McELWEE,	:	LYCOMING COUNTY, PENNSYLVANIA
deceased, and as Administrator of the	:	
Estate of JESSICA McELWEE,	:	JURY TRIAL DEMANDED
Deceased; KEVIN McELWEE and	:	
JO ANN McELWEE, parents of	:	CIVIL ACTION - LAW
JESSICA McELWEE, individually,	:	
Plaintiffs	:	
	:	
vs.	:	NO. 00-01,795
	:	
PAUL E. LEBER, M.D.; ADAM M.	:	
EDELMAN, M.D.; DONALD E.	:	
SHEARER, M.D.; JEANINE	:	
SINSABAUGH; CINDY KOONS; JUDY	:	
KERSHNER; MUNCY VALLEY	:	
HOSPITAL; SUSQUEHANNA HEALTH	:	
SYSTEM; SUSQUEHANNA PHYSICIAN	:	
SERVICES; and EM CARE and/or WEST	:	
BRANCH EMERGENCY PHYSICIANS,	:	
Defendants	:	

Date: October 18, 2002

OPINION and ORDER

Facts

The case before the court is a medical malpractice claim filed against the above captioned defendants who were involved in the care of Plaintiffs' minor child, Jessica. McElwees filed their original Complaint on November 15, 2000, an Amended Complaint on July 18, 2001, and a Second Amended Complaint on November 9, 2001.

The motions before the Court are as follows:

1. Plaintiffs' Preliminary Objections to the Answer with New Matter to Plaintiffs' Second Amended Complaint of Defendants Donald E. Shearer, M.D. and Donald E. Shearer, M.D., P.C. filed August 9, 2002.

2. Plaintiffs' Preliminary Objections to the Answer with New Matter to Plaintiffs' Second Amended Complaint of Defendants Paul E. Leber, M.D., Adam M. Edelman, M.D., EMCare, Inc., and New Jersey/Pennsylvania EM-1 Medical Services, P.C. filed August 29, 2002.
3. Plaintiffs' Motion to Compel Responses to Plaintiffs' First Set of Interrogatories, Plaintiffs' Expert Interrogatories, and Plaintiffs' other Set of Interrogatories Entitled Plaintiffs' First Set of Interrogatories filed July 16 2002.
4. Plaintiffs' Motion to Compel Production of Original X-rays filed August 27, 2002.

Plaintiffs' Preliminary Objection to the Answer with New Matter to Plaintiffs' Second Amended Complaint of Dr. Shearer was argued before the Court on September 3, 2002. The other Preliminary Objections and Motions were argued before the Court on September 13, 2002.

Discussion

Pa. R.C.P. 1030 governs the pleading of New Matter. A party must set forth all affirmative defenses, including the statute of limitations, in his responsive pleading under the heading "New Matter." *See*, Pa. R.C.P. 1030(a). Rule 1030 and Rule 1019 must be read *in pari materia*, so that material facts must be pleaded to support the affirmative defense. *See, Allen v. Lipson*, 8 D. & C. 4th 390, 394 (Pa. Com. Pl. 1990). If a party fails to assert material facts that support the affirmative defense, then the paragraph containing the affirmative defense must be stricken. *See, Thurman v. Jones*, No. 02-00,518 at 1 (Lyc. Co., July 16, 2002); *Trimble v. Beltz*,

No. 98-01, 720 at 3 (Lyc. Co., April 27, 2000). Also, in pleading New Matter, a party may assert material facts so long as they are not mere denials or conclusions of law. *See*, Pa. R.C.P. 1030(a). Statements in New Matter that are mere denials or conclusions of law will be stricken from New Matter. *See, Trimble, supra; Allen, 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, in that, 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.*

Plaintiffs’ Preliminary Objections to the Answer with New Matter of Defendants Donald E. Shearer, M.D. and Donald E. Shearer, M.D., P.C.

The first motion before the court is Plaintiffs’ Preliminary Objections to the Answer with New Matter of Defendants Donald E. Shearer, M.D. and Donald E. Shearer, M.D., P.C. The paragraphs at issue are:

142. Because some of the Plaintiffs’ claims against the answering Defendants are general, vague, and lacking factual support, specifically those claims objected to via Preliminary Objections to the Complaint, preliminary Objections to the First Amended Complaint, and Preliminary Objections to the Second Amended Complaint, the answering Defendants reserve the right to raise the defense that those claims are barred by the two year statute of limitations under Section 5524(2) of the Judicial Code, 42 Pa. C.C. Section 5524(2), to the extent that Plaintiffs attempt to plead new causes of action against the answering Defendants before trial.

143. Based on the claims stated against them by Plaintiffs, the answering Defendants reserve the right to exercise all limitations of liability available and limitations to the damages claimed

pursuant to the Health Care Services malpractice Act and the Medical Care Availability and Reduction of Error (MCARE) Act, and specifically, Section 505 (punitive damages), Section 508 (collateral sources), Section 509 (determination and payment of damages), and Section 510 (determination and payment of loss of future earning capacity).

McElwees contend that Dr. Shearer's Answer is deficient in two respects. First, ¶142 is deficient, because no material facts were pled to support the statute of limitations defense. McElwees also contend that Dr. Shearer had an opportunity to object to any deficiencies in their complaints, so he cannot claim there is something wrong with it now and bootstrap in the statute of limitations defense. The Court agrees with Plaintiffs that ¶142 shall be stricken.

Paragraph 142 is bereft of material facts to support the statute of limitations defense. Paragraph 142 states that it reserves the right to assert the statute of limitations defense to new causes of actions the McElwees might plead. This is speculative. There are no facts to establish what these causes of action are, never mind how the statute of limitations applies. But more importantly, there are no facts pleaded to support how the statute of limitations applies to the causes of action presently before the Court. Therefore ¶142 is to be stricken.

McElwees next contend that ¶143 must be stricken. Plaintiffs contend that some of the portions of the cited statutes are not in effect as to this case. Plaintiffs argue that the pleading of the statute sections is a conclusion of law and does not belong in New Matter. However, if the statutes are appropriate for New Matter, Dr. Shearer has failed to set forth the material facts to support the defenses. The Court agrees with the McElwees' that ¶143 must be stricken.

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.*” (emphasis added)). The cited sections in ¶143 are not affirmative defenses since they will not dispose of Plaintiffs’ claim. *See, Coldren, supra.* Dr. Shearer asserted that sections 505, 508, 509, and 510 apply to the McElwees’ case. Sections 505, 508, 509, and 510 deal with limits on recovery. They have nothing to do with establishing liability or lack thereof. Consequently, they are not affirmative defense and have no place in New Matter.

Nor is the Court constrained by Judge Brown’s decision in *Thurman* to permit the pleading of these statutes to stand, as Defendants have argued. It is clear Judge Brown did not decide that this type of pleading was acceptable in all cases. Judge Brown let the statutory allegations in the *Thurman* New Matter stand only because there was a possibility the allegations could be an affirmative defense in *Thurman* - “... if they apply to this case.” *See, Thurman, supra.*

Dr. Shearer has failed to plead the material facts that support the alleged affirmative defense. All ¶143 states is that the defense reserves the right to use the liability and damages limits provided by the cited sections, but provides no facts to support that assertion. It is a naked assertion of the statutes sections with nothing more. Since the cited acts do not provide affirmative defenses in this case and there is a lack of material facts, ¶143 does not belong in New Matter and must be stricken.

Plaintiffs’ Preliminary Objections to the Answer with New Matter of Defendants Paul E. Leber, M.D., Adam M. Edelman, M.D., EMCare, Inc., and New Jersey/Pennsylvania EM-1 Medical Services, P.C.

The next motion before the Court is Plaintiffs’ Preliminary Objections to the Answer with New Matter of Defendants Paul E. Leber, M.D., Adam M. Edelman, M.D.,

EMCare, Inc., and New Jersey/Pennsylvania EM-1 Medical Services, P.C. filed August 29, 2002.

The paragraphs at issue are:

143. By virtue of the vague and ambiguous manner in which the causes of action have been asserted in this Complaint, most of which have been previously objected to by the various Defendants in this case, these Answering Defendants reserve the right to raise the defense that some or all of the claims alleged are barred by the two year Statute of Limitations set forth in 42 Pa. C.S. § 5524(2), to the extent that Plaintiffs may attempt to utilize said allegations to assert new causes of action up to and including time of trial.

144. These Defendants reserve all affirmative defenses available including defenses available under the Comparative Negligence Law and the HealthCare Malpractice Act.

145. These Defendants reserve the right to exercise all defense and limitations with respect to liability and damages including any limitations to damages claimed pursuant to the Healthcare Services Malpractice Act and the Medical Care Availability and Reduction of Error Act including but not limited to Sections 505, 508, 509, and 510 thereof.

See, Lebers' Answer with New Matter, ¶¶143, 144, 146. McElwees raise four contentions with regard to Dr. Leber's Answer. The first is that paragraph 143 should be stricken. Paragraph 143 reserves the right to assert the statute of limitations defense against any new causes of action that McElwees might bring based on the claimed vague and ambiguous causes of action contained in the complaint. Plaintiff contends that paragraph 143 lacks the material facts to support the claimed statute of limitations defense. The Court agrees with McElwees.

Paragraph 143 is devoid of material facts to support the claimed defense of statute of limitations. The paragraph offers no material facts that would give rise to the statute of limitations application to the case at bar. The only explanation for its inclusion in New Matter is that it is a reservation of the right to use the defense should new causes of action appear. New

Matter is for affirmative defenses that exist to the present causes of action. If such defenses exist, then they must be pled and supported by the material facts. *See, Thurman, supra, Trimble, supra.* Thus, the speculative ¶143 must be stricken.

McElwees' second contention is that paragraph 144 must be stricken. Plaintiffs contend that ¶144 lacks the support of material facts. The Court agrees with McElwees.

Again, ¶144 does not contain any material facts to support any affirmative defense. It is merely a broad allegation that pleads all affirmative defenses. The paragraph not only lacks the specificity of material facts, but also the specificity of which affirmative defense applies. Such a broad and sweeping assertion cannot place the plaintiff on adequate notice as to what affirmative defense it must prepare for. *See, Commonwealth v. Shipley Humble Oil Co.,* 370 A.2d 438, 439 (Pa. Cmwlth. 1977). Therefore, the lack of material facts requires that ¶144 be stricken.

McElwees' third contention is that ¶146 should be stricken. McElwees contend that ¶146 lacks the needed material facts to support it. The Court agrees with McElwees.

To reiterate, it is unnecessary to raise statutes that do not contain affirmative defenses in New Matter. *See, discussion supra* as to ¶143 of Defendant Shearer's New Matter. The cited sections in ¶146 are not affirmative defenses since they will not dispose of Plaintiffs' claims. *See, Coldren, supra.* Dr. Leber asserted that sections 505, 508, 509, and 510 apply to McElwees' case. Sections 505, 508, 509, and 510 deal with limits on recovery. They have nothing to do with establishing liability or lack thereof. Consequently, they are not affirmative defense and have no place in New Matter.

Also, Leber has failed to provide the material facts that support the alleged affirmative defense. All ¶146 states is that the defense reserves the right to use the liability and damages limits provided by the cited sections, but provides no facts to support that assertion. It is a naked assertion of the statutes sections with nothing more. Since the cited acts do not provide affirmative defenses, ¶146 does not belong in New Matter and must be stricken.

The Court does not have to address the fourth contention under this motion, because the verification issue has been addressed by a separate order. Also, Plaintiffs' motions regarding answers to the interrogatories and the production of the original x-rays have been addressed by separate orders.

ORDER

It is HEREBY ORDERED that Plaintiffs' Preliminary Objections to Dr. Shearer's Answer with New Matter to Plaintiffs' Second Amended Complaint are granted. Paragraphs 142 and 143 are stricken. Plaintiffs' Preliminary Objections to Dr. Leber et al's Answer with New Matter to Plaintiffs' Second Amended Complaint are granted. Paragraphs 143, 144, and 145 are stricken. Defendants Shearer and Leber shall have twenty (20) days to file an amended New Matter.

BY THE COURT:

William S. Kieser, Judge

cc: C. Scott Waters, Esquire
David R. Bahl, Esquire
C. Edward S. Mitchell, Esquire
M. David Halpern, Esquire
P. O. Box 2024; Altoona, PA 16601
Judges
Christian J. Kalas, Law Clerk
Gary L. Weber, Esquire (Lycoming Reporter)