IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

LARRY A. BRION and BARBARA, BRION,	:	
Plaintiffs	:	
	:	
vs.	:	**No. 99-00008**
	:	
R. SOUNDARARAJAN, M.D., F.A.C.S., and SANDY & ROCKOFF UROLOGICAL ASSOCIATES,	:	**Summary Judgment**
Defendants	:	

OPINION AND ORDER

This matter came before the Court on the defendant's Motion for Summary Judgment and the plaintiffs' Motion to Amend/Motion to Compel. The relevant facts are as follows.

On or about November 5, 1996, Plaintiff Larry Brion (hereinafter Mr. Brion) went to the office of Defendant Dr. Soundararajan (hereinafter Dr. Sandy) seeking medical advice and treatment for urological and prostate problems. Plaintiffs' Complaint, ¶ 6. Dr. Sandy diagnosed Mr. Brion's condition as localized carcinoma of the prostate. Plaintiffs' Complaint, ¶ 11. On January 17, 1997, Dr. Sandy performed a radical retropubic prostatectomy on Mr. Brion. Plaintiffs' Complaint, ¶ 13. During surgery Dr. Sandy cut the left external iliac vein. Plaintiffs' Complaint, ¶ 14. Mr. Brion was discharged from the hospital on January 21, 1997.

On January 27, 1997, Barbara Brion called Dr. Sandy to report Mr. Brion was very sick and short of breath. Plaintiffs' Complaint, ¶ 16. Dr. Sandy sent Mr. Brion for x-rays and a thoracic CT scan. Plaintiffs' Complaint, ¶ 18, 19. Dr. Sandy told Mr. Brion to see his internist, Dr. Vasudevan, within the next couple of days. Plaintiffs'

Complaint, ¶ 18. Later that day, Mr. Brion was taken to the hospital by ambulance. He remained hospitalized until February 3, 1997. Plaintiffs' Complaint, ¶ 22. During this time, Mr. Brion was treated for deep vein thrombosis and acute pulmonary embolus. Plaintiffs' Complaint, ¶ 23.

On or about February 8, 1997, Dr. Sandy telephoned Mr. Brion and informed him he was prescribing a medication known as Floxin. Plaintiffs' Complaint, ¶ 24. In accordance with Dr. Sandy's instructions, Mr. Brion began taking Floxin as prescribed. Plaintiffs' Complaint, ¶ 24. Mr. Brion became ill the next day. Mrs. Brion contacted Dr. Sandy, who referred Mr. Brion to other doctors. Plaintiffs' Complaint, ¶ 25-30. On February 17, 1997, Mr. Brion was hospitalized for arthralgia, myalgia and fever secondary to Floxin therapy. Plaintiffs' Complaint, ¶ 31, 32. He remained hospitalized through February 23, 1997. Plaintiffs' Complaint, ¶ 35. Following discharge from the hospital and up to the filing of the Complaint, Mr. Brion suffered from incontinence. Plaintiffs' Complaint, ¶ 33.

On January 5, 1999, the plaintiffs field a writ of summons against the defendants. On April 13, 1999, the plaintiffs filed their complaint, which contained three (3) counts: (1) medical negligence against Dr. Sandy; (2) respondeat superior against Sandy & Rockoff Urological Associates, P.C.; and (3) loss of consortium against both the defendants. On May 3, 1997, the defendants filed preliminary objections to the plaintiffs' complaint challenging paragraph 36(H). By stipulation, the parties agreed to strike paragraph 36(H).

The parties engaged in discovery. On or about January 9, 2001, the plaintiffs provided a copy of the report of Eric Hochberg, M.D. to the defendants. On or

about July 12, 2001, the defendants provided a copy of the report of John Belis, M.D., to the plaintiffs.

On or about August 1, 2001, the plaintiffs filed a motion to amend/motion to compel in which they requested leave to amend the complaint to assert Dr. Sandy was negligent for failing to perform a nerve-sparing radical prostatectomy (hereinafter nerve-sparing procedure) instead of the radical retropubic prostatectomy performed on January 17, 1997, and to seek damages for the permanent post-operative impotence experienced by Mr. Brion. On or about August 6, 2001, the defendants filed their motion for summary judgment. In their motion the defendants assert the plaintiffs do no have expert testimony to support the allegations in their complaint or their new allegations regarding the nerve-sparing procedure. The defendants further contend the plaintiffs should not be permitted to amend their complaint because they are seeking to assert a new cause of action after the expiration of the statute of limitations. The plaintiffs counter that their allegations regarding the nerve-sparing procedure are merely an amplification of the allegations contained in paragraphs 36 (E) and (G) of the Complaint or, in the alternative, they did not know about the nerve-sparing procedure until they received Dr. Hochberg's report in late 2000. Therefore, the plaintiffs argue the discovery rule exception to the statute of limitations applies. In response to the defendants' motion for summary judgment, the plaintiffs also obtained a supplemental report from Dr. Hochberg on or about September 6, 2001.

The Court held argument on both parties' motions on October 24, 2001. After review of the parties' briefs and the relevant case law, the Court finds in favor of the defendants.

Pennsylvania Rule of Civil Procedure 1035.2 states:

> After the relevant pleadings are closed but within such time as to not unreasonably delay trial, any party may move for summary judgment in whole or in part as a matter of law
>
> (2) if, after the completion of discovery relevant to the motion, including the production of expert reports, an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issues to be submitted to a jury.

Pa.R.Civ.P. 1035.2(2). In order to establish a prima facie case of medical negligence, a plaintiff must establish: (1) a duty owed by the physician to the patient; (2) the physician's breach of that duty to the patient; (3) that the breach of that duty was the proximate cause of, or a substantial factor in, bringing about the harm suffered by the patient; and (4) that the damages suffered by the patient were a direct result of that harm. Mitzefelt v. Kamrin, 526 Pa. 54, 62, 584 A.2d 888, 891 (1990); Miller v. Sacred Heart Hospital, 753 A.2d 829, 833-34 (Pa.Super. 2000). A plaintiff must be able to offer an expert witness who will testify to a reasonable degree of medical certainty that the acts of the physician deviated from acceptable standards and that such deviation was the proximate cause of the harm suffered for the case to be submitted to a jury. Miller, supra; see also, Mitzefelt, supra., 584 A.2d at 892; Eaddy v. Hamaty, 694 A.2d 639, 642 (Pa.Super. 1997).

The plaintiffs in this case cannot meet their burden of proof with respect to the theories pled in their complaint. In their complaint, the plaintiffs assert Dr. Sandy negligently performed the surgery by cutting the left external iliac vein, he failed to recognize Mr. Brion was suffering from deep vein thrombosis and pulmonary embolus on or about February 8, 1997 and he should not have prescribed Floxin. The plaintiffs

aver these deviations caused the deep vein thrombosis, pulmonary embolus, incontinence, rigors, fever chills, other general pain and suffering, and a loss of consortium. Dr. Hochberg's report, however, does not support these theories. Although Dr. Hochberg opined that Dr. Sandy deviated from the standard of care when he cut the left external iliac vein and failed to diagnose pulmonary embolus, he further opined that these deviations did not cause the right-sided deep venous thrombosis and acute pulmonary embolus or any other deleterious effects. Dr. Hochberg also opined that there was no deviation of the standard of care regarding the use of Floxin and that Mr. Brion merely had an unexpected and unfortunate adverse reaction to this medication. Since the plaintiffs do not have expert testimony to establish a deviation with respect to the use of Floxin or causation on the other theories pled in the complaint, the plaintiffs have failed to produce evidence of facts essential to their cause of action. Therefore, summary judgment is appropriate under Rule 1035.2(2).

The only theory that Dr. Hochberg expresses an opinion regarding both a deviation and causation is that Dr. Sandy failed to perform a nerve-sparing procedure, which increased the risk of erectile dysfunction. This theory, however, is not pled in the plaintiffs' complaint. The plaintiffs' filed a motion to amend the complaint to raise this theory.

Rule 1033 provides that a party, by leave of court, may amend his pleading at any time. Pa.R.Civ.P. 1033. The decision whether to allow a proposed amendment of a pleading is within the sound discretion of the court, and that decision will not be disturbed on appeal absent an abuse of discretion. Pastore v. Anjo Construction Company, 396 Pa.Super. 58, 68, 578 A.2d 21, 27 (1990). A party may not

amend a pleading, though, if it adds a new cause of action after the running of the statute of limitations. Becker v. Copeland Corp., 785 A.2d 1003, 1005 (Pa.Super. 2001); Romah v. Hygienic Sanitation Co., 705 A.2d 841, 857-58 (Pa.Super. 1997). A new cause of action does not exist if plaintiff's amendment merely adds to or amplifies the original complaint. Reynolds v. Thomas Jefferson University Hospital, 676 A.2d 1205, 1211 (Pa.Super. 1996). A new cause of action arises if the amendment proposes a different theory or a different kind of negligence than the one previously raised or if the operative facts supporting the claim are changed. Romah, supra; Reynolds, supra.

The plaintiffs claim they are merely amplifying paragraphs 36(E) and (G) of the original complaint. This Court cannot agree. These paragraphs state:

> 36. The negligence of the Defendant, Dr. R. Soundararajan, consists of the following:
>
> E. failing to possess the requisite skills necessary to properly treat and care for Larry A. Brion for prostate cancer;
>
> G. failing to possess the skills necessary to properly carry out the operative procedure on January 16, 1997, to treat Larry A. Brion's prostate carcinoma;

Plaintiffs' Complaint, ¶ 36 (E) and (G). Clearly, paragraph 36(G) refers to the radical retropubic prostatectomy actually performed by Dr. Sandy. When the complaint is read as a whole, paragraph 36(G) alleges Dr. Sandy did not possess the skills to perform the radical retropubic prostatectomy without cutting the left external iliac vein. It does not in any way put the defendants on notice that the plaintiffs believed a different surgery should have been performed. Similarly, paragraph 36(E), when read in the context of the entire complaint, does not give any indication to the defendants that a different surgery should have been performed. The operative facts in the original complaint are

that: (1) Dr. Sandy cut the left external iliac vein when he performed the surgery; (2) he failed to recognize Mr. Brion was suffering from deep vein thrombosis and pulmonary embolus after surgery; and (3) he should not have given Mr. Brion a prescription for Floxin. For the theory which the plaintiffs have sufficient expert testimony, the operative facts are: (1) that Mr. Brion was a good candidate for the nerve-sparing procedure; (2) this procedure would have decreased the likelihood of impotence as compared to the radical retropubic prostatectomy; and (3) the nerve-sparing procedure should have been chosen by Dr. Sandy instead of the surgery he performed. Since these operative facts are different from those contained in the original complaint, the plaintiffs' theory that a nerve-sparing procedure should have been performed would be a new cause of action.

The statute of limitations for a personal injury claim is two (2) years. 42 Pa.C.S. §5524(2). Mr. Brion's surgery occurred on or about January 16, 1997. Following surgery, Mr. Brion suffered from erectile dysfunction. He did not have this problem prior to the surgery.

The plaintiffs contend the statute of limitations is tolled in this case due to the discovery rule. Plaintiffs assert that they had no knowledge that a nerve-sparing procedure existed and was a treatment option for Mr. Brion until they received Dr. Hochberg's report dated November 19, 2000. Thus, the plaintiffs argue they are entitled to the benefit of the discovery rule and the statute of limitations for this claim would not begin to run until November 2000.

The discovery rule is a judicially created device which tolls the running of the applicable statute of limitations until the point when the plaintiff knows or reasonably should know: (1) that he has been injured, and (2) that his injury has been caused by

another party's conduct. Capelli v. York Operating Co, Inc., 711 a.2d 481, 485 (Pa.Super. 1998), quoting Pearce v. Salvation Army, 449 Pa.Super. 654, 658, 674 A.2d 1123, 1125 (1996). The limitations period begins to run when the injured party possesses sufficient critical facts to put him on notice that a wrong has been committed and that he need investigate to determine whether he is entitled to redress. Id. The discovery rule is an exception to the general rule that the statute of limitations begins to run as soon as the right to institute and maintain a suit arises. Therefore, one claiming the benefit of the exception bears the burden of establishing that he falls within it. Cochran v. GAF Corp., 542 Pa. 210, 216, 666 A.2d 245, 248-49 (1995). Lack of knowledge, mistake or misunderstanding does not toll the running of the statute of limitations. Hayward v. Medical Center of Beaver County, 530 Pa. 320, 324, 608 A.2d 1040, 1042 (1992), quoting Pocono International Raceway, Inc. v. Pocono Produce Inc., 503 Pa. 80, 84, 468 A.2d 468, 471 (1983).

In order to meet their burden, the plaintiffs are required to establish that they acted with reasonable diligence to determine the fact of their injury and its cause. Capelli, supra at 485. Reasonable diligence is just that, a reasonable effort to discover the cause of an injury under the facts and circumstances present in the case. Cochran, supra at 217, 666 A.2d at 249. There are few facts which diligence cannot discover, but there must be some reason to awaken inquiry and direct diligence in the channel in which it would be successful. Id. Reasonable diligence is an objective standard. Id. Under this standard, the plaintiffs' actions must be evaluated to determine whether they exhibited those qualities of attention, knowledge, intelligence and judgment which

society requires of its members for the protection of their own interests and the interests of others. Id.

In the case at bar, the plaintiffs have not offered any evidence to show that they acted with reasonable diligence. Although the claim they did not know of the existence of a nerve-sparing procedure until Dr. Hochberg's report dated November 16, 2000, no evidence was submitted regarding their efforts to discover this information. The plaintiffs filed a writ of summons in January 1999. Obviously, by this time Mr. Brion believed he suffered injuries as a result of the surgery performed by Dr. Sandy or he would not have hired an attorney to file suit on his behalf. Certainly by this point, the plaintiffs would have an obligation to use diligence to determine if they were entitled to redress and, if so, under what theories. The plaintiffs need only know that they were injured and it was caused by the treatment rendered by Dr. Sandy; they need not know that the medical treatment was negligent. Szpynda v. Pyles, 433 Pa.Super. 1, 6, 639 A.2d 1181, 1184 (1994). Furthermore, a diligent investigation may require one to seek further medical examination as well as competent legal representation. Cochran, supra at 217-18, 666 A.2d at 249. Plaintiffs have neither offered evidence to establish the efforts they took to seek medical advice to ascertain whether Dr. Sandy's conduct was negligent nor have they given any explanation why they could not have obtained Dr. Hochberg's report prior to November 16, 2000, nearly two (2) years after the filing of the writ of summons. Furthermore, although Dr. Hochberg's report was dated November 16, 2000, the plaintiffs made no effort to amend their complaint to add this new theory until they filed their motion to amend on or about August 1, 2001. Based on the facts of this case, the Court must conclude that the plaintiffs knew Mr. Brion suffered

incontinence and impotence as a result of the surgery performed by Dr. Sandy no later than the filing of the writ of summons in January 1999. In fact, in their brief in support of the discovery rule to extend the statute of limitations, the plaintiffs admit they knew Mr. Brion's impotence was an injury caused by the surgery performed by Dr. Sandy prior to receiving Dr. Hochberg's report. The plaintiffs stated: "Certainly, there came a time when Mr. Brion became aware his impotence was not merely a post-operative complaint that would resolve. Mr. Brion ascertained that his impotence was an injury. Mr. Brion connected the cause of his impotence to Dr. Sandy's negligence during the surgery. However, at no time after the surgery did the plaintiffs realize that there existed an option of nerve-sparing surgery until they received the information contained in Dr. Hochberg's report." Plaintiffs' Brief in Support of the Discovery Rule to Extend Statute of Limitations, page 6. As previously stated, however, the plaintiffs need not know a defendant's conduct was negligent for the statute of limitations to begin to run. Szpynda, supra. Once the plaintiffs realized Mr. Brion's impotence was an injury caused by Dr. Sandy's surgery, they had an obligation to diligently investigate whether Dr. Sandy's conduct was negligent, including seeking medical consultation or advice. If plaintiffs did not realize there existed the option of a nerve-sparing procedure, it appears it was simply because they did not inquire.

ORDER

AND NOW, this ___ day of January, 2002, it is ORDERED and DIRECTED as follows:

1. The Court GRANTS the defendants' Motion for Summary Judgment.

2. The Court DENIES the plaintiffs' Motion to Amend because the proposed amendment would add a new cause of action beyond the statute of limitations. Since the Motion to Compel seeks to require Dr. Sandy to answer questions regarding the nerve-sparing procedure, which is a theory not pled in the complaint and amendment is not allowed, questions regarding the nerve-sparing procedure are not relevant. Thus, the motion to compel also is DENIED.

By The Court,

_____
Kenneth D. Brown

cc: Bret J. Southard, Esquire
William Hebe, Esquire
Work file
Gary Weber, Esquire (Lycoming Reporter)
Law clerk