KEITH WITMER, as the Administrator for the Estate of KATHLEEN WITMER, and KEITH WITMER, individually, Plaintiff	:	IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA
vs.	:	NO. 02-00,639
HAACK AND SPEICHINGER, P.C., Defendant	:	**PRELIMINARY OBJECTIONS**

Date: April 22, 2003

OPINION and ORDER

Facts

Before the Court for determination are the Preliminary Objections of Defendant Haack and Speichinger, P.C. ("Haack") to Plaintiff Keith Witmer's Amended Complaint filed January 9, 2003. The case *sub judice* is a medical malpractice action brought by Plaintiff Keith Witmer ("Witmer") regarding the medical care rendered by W. Clark Ridley, M.D. at Haack and Speichinger, P.C. Witmer has alleged that Dr. Ridley failed to diagnose and treat the endrometrial cancer of Kathleen Witmer, Plaintiff's wife. Witmer initiated the present action by filing a Writ of Summons on April 19, 2002. Witmer filed a Complaint on November 14, 2002. Haack filed preliminary objections to that complaint on December 3, 2002. Before a determination was made on those preliminary objections, Witmer filed an amended complaint on December 23, 2002. The present preliminary objections are to the amended complaint.

Haack has alleged that Witmer's amended complaint is deficient in three respects. First, Haack contends that paragraph 20 of the amended complaint does not set forth facts with the requisite level of specificity with regard to the vicarious liability claim. Haack

contends that the amended complaint does not name or identify any person acting as an actual or ostensible agent of Haack other then Dr. Clark Ridley. Haack also asserts that the complaint does not identify any acts or omissions of the unidentified agents that would allow Haack to identify the individual.

Second, Haack argues that the allegations in paragraphs 20.7 and 20.13 contain "catch-all" language that is contrary to the requirements of Pa.R.C.P 1019(a) and the directive of ***Connor v. Allegheny Hosp.***, 461 A.2d 600, 602-3 n. 3 (Pa. 1983). Haack alleges that the language "including, but not limited to" in those paragraphs is vague and overbroad so as to allow Witmer to later raise new theories of liability under the guise of being an amplification of Witmer's timely allegations against the Haack. Haack contends that this general language prevents it from preparing a defense to those yet unnamed theories and would waste resource and effort in preparing to defend one theory to have it later abandoned by Witmer.

Finally, Haack demurrers that Witmer cannot assert a claim of direct/corporate negligence against it. Haack argues that while the application of the corporate negligence doctrine, which was originally applied to a hospital, has been expanded to include health maintenance organizations (HMOs), no Pennsylvania appellate court has expanded the doctrine to include physician practice groups like Haack. Haack contends that the courts of common pleas that have extended the doctrine to physician practice groups have restricted the doctrine to the parameters set in ***Thompson v. Nason Hosp.***, 591 A.2d 703, 707 (Pa. 1991) and ***Shannon v. McNulty***, 718 A.2d 828 (Pa.Super. 1998). Haack argues that the doctrine of corporate negligence should not be applied to it because a specialty practice like Haack is not a comprehensive health care center like a hospital, does not act like a gate keeper in the health

care of a patient like an HMO, and the facts that give rise to the allegations of corporate negligence did not involve an invasive surgical procedure that was conducted on site.

In response, Witmer argues that the allegations in Count I regarding the vicarious liability claim against Haack are adequately specific. Witman asserts that the amended complaint has only named and identified the acts of Dr. Ridley as the basis for the vicarious liability claim. Witmer contends that paragraphs 21, 22, and 23 specifically name Dr. Ridley as an agent of the defendant acting within the scope of his authority. Witmer contends that the intent was to hold Haack liable for the conduct of Dr. Ridley and no one else. Witmer argues that if the amended complaint is read as a whole, it is clear that the cause of action arises out of the actions of Dr. Ridley. If the allegations as to vicarious liability and its basis are confusing, Witmer asserts that the Court should permit Witmer to clarify that the only person he contends Haack is vicariously liable for is Dr. Ridley.

As to the allegation that the "catch-all" language in paragraphs 20.7 and 20.13, Witmer asserts that it is merely used to provide "further details" of what Dr. Ridley should have done. Witmer argues that the complaint is not designed to be an inclusive narrative of the events, but must set forth enough material facts to allow the defendant to prepare a defense. Witmer states that the allegations of negligence against Dr. Ridley stem from his failure to adequately perform diagnostic studies to rule out cancer and failure to advise Witmer about further options regarding her care. Witmer contends that examples of what tests Dr. Ridley should have done or what advice he should have given are matters of evidence that need not be plead, but Witmer include such examples in paragraphs 20.7 and 20.13 to provide Haack with even more details regarding his claim. Witmer argues that the "including, but not limited to"

language is used so that Witmer does not have to list every conceivable test or instruction that should have been given.

Regarding Haack's demurrer to the corporate negligence claim against Haack, Witmer argues that a corporate negligence claim can be brought against a physician practice group like Haack. Witmer recognizes that no Pennsylvania appellate court has addressed the extension of corporate negligence to "professional corporations, partnerships, or associations," but the doctrine has been expanded by the Superior Court in ***Shannon***, *supra*, by extending it to "other healthcare entities that involve themselves in decisions affecting their patients' medical care." Plaintiff's Brief in Opposition to Preliminary Objections, ***Witmer v. Haack and Speichinger, P.C.***, No. 02-00,639, at 9 (Lycoming Cty.). Witmer asserts that determining whether the doctrine applies should depend upon whether the duties of ***Thompson,*** *supra*, apply, and not the corporate form of the defendant. Therefore, Witmer asserts that a claim for corporate negligence can be made against Haack because a corporation that is in the business of providing health care services has a duty to ensure that its employees are competent to render those services.

Discussion

There are three issues before the Court. The first is whether the language in paragraph 20 provides the requisite level of specificity to establish whose conduct provides the basis for Witmer's vicarious liability claim against Haack. The second is whether the "including, but not limited to" language of paragraphs 20.7 and 20.13 is too general as to permit Witmer to plead new theories of liability on the basis of negligently failing to perform a test that was not listed in the complaint. The third issue is whether Witmer's amended

complaint sets forth a viable corporate negligence cause of action against a physician's practice group that offers gynecological medical care and is alleged to have failed to provide a competent physician to provide that care since the physician negligently failed to diagnose endometrial cancer.

The Court can dispose of the first two specificity issues together. Pennsylvania is a fact pleading state. ***Miketic v. Baron***, 675 A.2d 324, 330 (Pa. Super. 1986); ***Santiago v. Pennsylvania Nat'l Mut. Casualty Ins. Co.***, 613 A.2d 1235, 1239 (Pa. Super 1992). The complaint must set forth the material facts upon which a cause of action is based in a concise and summary form. Pa.R.C.P. 1019(a). The complaint must apprise the defendant of the claim being asserted and summarize the material facts needed to support that claim. ***Cardenas v. Schober,*** 783 A.2d 317, 325 (Pa. Super. 2001); ***Alpha Tau Omega Fraternity v. Univ. of Pennsylvania***, 464 A.2d 1349, 1351 (Pa. Super. 1993).

The amount of detail or level of specificity required is "incapable of precise measurement." ***Pike County Hotels Corp. v. Kiefer***, 396 A.2d 677, 681 (Pa. Super. 1978). However, the complaint must set forth enough material facts to allow the defendant to prepare a defense to the allegations contained within the complaint. ***Weiss v. Equibank***, 460 A.2d 271, 274 (Pa. Super. 1983); ***Commonwealth Dep't of Transp. v. Shippley Humble Oil Co.***, 370 A.2d 438, 439 (Pa. Cmwlth. 1977). Based on ***Connor***, *supra*, and its progeny, the language used in the complaint must also be specific enough as not to allow the plaintiff to assert new causes of action or theories of liability at a later date under the guise of merely amplifying what has been timely pleaded. In examining the complaint, the focus is not upon one particular paragraph in isolation. ***Yacoub v. Lehigh Valley Med. Associates, P.C.***, 805 A.2d 579, 589

(Pa. Super. 2001). The paragraph at issue must be read in conjunction with the complaint as a whole to determine if there is the requisite level of specificity. ***Ibid.***

With regard to the vicarious liability claim, " 'a complaint must allege, as a minimum, facts which (1) identify the agent by name or appropriate description; and (2) set forth the agent's authority and how the tortuous acts of the agent either fell within the scope of that authority, or if unauthorized, were ratified by the principal.'" ***Rachlin v. Edmison***, 813 A.2d 862, 870 (Pa. 2001) (quoting ***Alumni Assoc., Delta Zeta Zeta of Lambda Chi Alpha Fraternity v. Sullivan***, 535 A.2d 1095, 1100 n. 2 (Pa. Super. 1987)). Paragraph 20 states:

> Haack and Speichinger, P.C. is responsible for the actions or inactions of its employees, agents and servants and/or partners, ostensible or otherwise, who provided medical care to Kathleen Witmer from 1999 to 2001, and who failed to provide a standard level of care, to wit:

Plaintiff's First Amended Complaint, ***Witmer v. Haack and Speichinger, P.C.***, No. 02-00,639, ¶20 (Lycoming Cty.). Reading the amended complaint as a whole, it is unclear who the employees, agents, servants, or partners are that are referred to in paragraph 20.

The amended complaint identifies only Dr. Ridley by name and the allegations within the amended complaint deal with his conduct, as would relate to the medical care of Kathleen Witmer. If the vicarious liability cause of action arises only out of the conduct of Dr. Ridley, then the language in paragraph 20 creates a question as to how else's conduct Witmer is alleging the cause of action is based on. The use of plural nouns in paragraph 20 would indicate that Haack is responsible for the conduct of more then one person. If the vicarious liability cause of action is based only on the conduct of Dr. Ridley, then the language in paragraph 20 should reflect that.

The "including, but not limited to" language contained in paragraphs 20.7 and 20.13 also does not rise to the requisite level of specificity. The language is too open ended. If Witmer chooses to specifically list what Dr. Ridley should have done to demonstrate his negligence, then Witmer will be bound by what he pleads in the complaint. Witmer must make a decision to either list what specific conduct he believes should have been done or list none at all. Witmer cannot list some conduct and use the "including, but not limited to" language to qualify the list and leave the door open to raise other failures at a late date to support in order to support a different theory of liability. Therefore the Court will grant Haack's preliminary objections to paragraphs 20, 20.7 and 20.13.

The Court will now address Haack's demurrer as to Witmer's claim against Haack for corporate negligence. A preliminary objection, in the nature of a demurrer, should only be granted when it is clear from the facts that the party has failed to state a claim upon which relief can be granted. ***Sunbeam Corp. v. Liberty Mut. Ins. Co.***, 781 A.2d 1185, 1191 (Pa. 2001). The reviewing court in making such a determination "is confined to the content of the complaint." ***In re Adoption of S.P.T.***, 783 A.2d 779, 781 (Pa. Super. 2001). "The court may not consider factual matters; no testimony or other evidence outside the complaint may be adduced and the court may not address the merits of matter represented in the complaint." ***Ibid.*** The court must admit as true all well pleaded material, relevant facts and any inferences fairly deducible from those facts. ***Willet v. Pennsylvania Med. Catastrophe Loss Fund***, 702 A.2d 850, 853 (Pa. 1997). " 'If the facts as pleaded state a claim for which relief may be granted under any theory of law then there is sufficient doubt to require the preliminary objection in the nature of a demurrer to be rejected.'" ***Ibid***

As pleaded, Witmer's amended complaint does not set forth a claim for corporate negligence against Haack. Within the overall context of the allegations in the amended complaint, the Court agrees that there are insufficient allegations to sustain a claim of corporate negligence, particularly when the allegations of corporate negligence are intertwined with allegations of vicarious liability.[1] The Court is not ruling as a matter of law that a claim for corporate negligence cannot be made against a physician's practice organization. The Court will not make this determination because the claim, as pleaded, does not set forth the requisite facts to support the cause of action. Therefore, the paragraphs that would relate to the claim of corporate negligence are stricken from the amended complaint.

Thus, the Court will grant all of Haack's preliminary objections to Witmer's amended complaint.

[1] Count I of the amended complain essentially asserts a vicarious liability claim against Haack. However the assertions in paragraphs 20.1, 20.16, and 20.18 are such as would normally be associated with a corporate negligence claim. If Witmer wishes to pursue a corporate negligence claim against Haack, he would be well advised to state that claim in a separate count and set forth sufficient factual allegations to establish the claim. *See*, Pa.R.C.P. 1020(a).

O R D E R

It is hereby ORDERED that the Preliminary Objections of Defendant Haack and Speichinger, P.C. to Plaintiff Keith Witmer's Amended Complaint filed January 9, 2003 are GRANTED.

The following paragraphs are stricken form the amended complaint: 20; 20.1; 20.7; 20.13; 20.16; and 20.18.

The Plaintiff shall have twenty days to file an amended complaint consistent with this Opinion.

BY THE COURT:

William S. Kieser, Judge

cc: Clifford A. Rieders, Esquire
Hugh P. O'Neill, III, Esquire
305 N. Front Street; Harrisburg, PA 17108
Judges
Christian J. Kalaus, Esquire
Gary L. Weber, Esquire (Lycoming Reporter)