KAREN ADAMS and KANDI Y. WINDER, Co-Administrators of the Estate of DAVID F. ADAMS and KAREN ADAMS, Individually, Plaintiffs	:	IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA JURY TRIAL DEMANDED
vs.	:	NO. 01-01,767
MARK BEYER, D.O., WEST BRANCH EMERGENCY PHYSICIANS, NEW JERSEY EM-1 MEDICAL SERVICES (a/k/a EMCARE), PETER B. TREVOULEDES, M.D., EAST LYCOMING SURGICAL ASSOCIATES, DILIP K. ELANGBAUM, M.D., PENN STATE GEISINGER MEDICAL GROUP, MANUEL V. MORENO, M.D., ERIC MELLENCAMP, M.D., SUSQUEHANNA IMAGING ASSOCIATES, INC., MUNCY VALLEY HOSPITAL and SUSQUEHANNA HEALTH SYSTEMS, Defendants	:	CIVIL ACTION PRELIMINARY OBJECTIONS

Date: August 5, 2004

OPINION and ORDER

Facts

The case before the Court is a medical malpractice action, in which Plaintiffs allege, *inter alia*, that on or about October 29, 1999 David F. Adams (Adams) went to the emergency room of Muncy Valley Hospital with abdominal pain on his right side. Adams had a medical history of heart problems, high blood pressure, sleep apnea, and obesity. In the afternoon of October 31, 1999, Adams underwent surgery. During the operation Adam's appendix ruptured, he became bradycardic, "coded" on the operating table, and died. Plaintiffs

filed their original Complaint on October 25, 2001, a First Amended Complaint on December 27, 2001, and a Second Amended Complaint on May 22, 2002.

Before the Court are the following motions:

1. Preliminary Objections to Plaintiffs' Second Amended Complaint by Defendant Manuel V. Moreno, M.D., filed June 3, 2002.

2. Preliminary Objections to Defendants' New Matter asserted in response to Plaintiffs' Second Amended Complaint by Plaintiffs as to the following:

2.1 Defendant Peter B. Trevouledes, M.D. filed June 26, 2002.

2.2 Defendant Dilip K. Elangbam, M.D. and Geisinger Clinic filed June 26, 2002.

2.3 Defendant Muncy Valley Hospital and Susquehanna Health System filed June 26, 2002.

2.4 Defendant Mark Beyer, D.O. and New Jersey/Pennsylvania EM-1 Medical Services (a/k/a EMCARE) filed July 31, 2002.

2.5 Defendant Susquehanna Imaging Associates and Eric Mellencamp, M.D. filed January 14, 2002, which objected to Defendants' New Matter filed in response to Plaintiffs' First Amended Complaint. By stipulation these objections are now asserted to the New Matter filed in response to Plaintiffs' Second Amended Complaint. The reason for the stipulation was that Plaintiffs, prior to disposition of their initial preliminary objections, filed a Second Amended Complaint and Defendant filed a response to the Second Amended Complaint, which

included replication of the prior New Matter. The averments in the New Matter were the subject of the original objections.

All of the foregoing Motions were argued before the Court on September 4, 2002.

Discussion

The Court will dispose of these motions in two parts. First, the Court will address Defendant Moreno's challenge to Plaintiffs' Second Amended Complaint. The Court will then address Plaintiffs' challenge to the New Matter asserted by Defendants in their responses to the Second Amended Complaint.

PART 1

Preliminary Objections of Dr. Moreno

Plaintiffs' Second Amended Complaint alleges Defendant Manuel V. Moreno, M.D. failed to obtain the informed consent of Adams before he administered anesthesia to Adams during the surgical procedure performed by Dr. Trevouledes. Dr. Moreno raises three issues in his Preliminary Objections. The first is whether Plaintiffs' cause of action based upon Dr. Moreno's alleged failure to obtain Adams' informed consent should be stricken from the Second Amended Complaint. Dr. Moreno contends that the Health Care Services Malpractice Act (HCSMA) codified the law of informed consent and that the HCSMA does not impose a duty upon an anesthesiologist to obtain the informed consent of the patient prior to the administration of anesthesia. Dr. Moreno contends that the duty to obtain such informed consent is on the surgeon who performs the surgical procedure based on the plain, unambiguous language of the statute.

If the words of a statute are clear and unambiguous, then a court cannot ignore the plain meaning of those words "under the pretext of pursuing [the statute's] spirit." 40 Pa. C.S.A. §1921(b); ***Nationwide Mutual Ins. Co. v. Wickett***, 762 A.2d 813, 818 (Pa. 2000). However, if the language of the statute is ambiguous, then a court may engage in statutory construction to determine and give effect to the intent of the General Assembly. ***Ramich v. W.C.A.B.,*** 770 A.2d 318, 322 (Pa. Super. 2001). To determine the intent of the General Assembly, a court should look at, among other factors, the harm to be remedied, the objective to be obtained, and the legislative history. 1 Pa. C.S.A. §1921(c).

The language of §1301.811-A of the HCSMA is not clear and unambiguous.[1] The pertinent language of §1301.811-A states:

> (a) Except in emergencies, a physician owes a duty to obtain the informed consent of the patient....prior to conducting the following procedures:
>
> (1) Performing surgery, including the related administration of anesthesia.
>
> (2) Administering radiation or chemotherapy.
>
> (3) Administering a blood transfusion.
>
> (4) Inserting a surgical device or appliance.
>
> (5) Administering an experimental medication, using an experimental device or using an approved medication or device in an experimental manner.
>
> (b) Consent is informed if the patient has been given a description of a procedure set forth in subsection (a) and the risks and alternatives that a reasonably prudent patient

[1] The informed consent section of the HCSMA, 40 P.S. §1301.811-A, was repealed on March 20, 2002. The pertinent language of the section was re-enacted as part of the Medical Availability and Reduction of Error (MCARE) Act, 40 P.S. §1303.504. The informed consent language of §1303.504 is identical to that of §1301.811-A.

> would require to make an informed decision as to that procedure. The physician shall be entitled to present evidence of the description of that procedure and those risks and alternatives that a physician acting in accordance with accepted medical standards of medical practice would provide.

40 P.S. 1301.811-A(a)-(b). The HCSMA is clear as to the procedures for which informed consent must be obtained prior to their performance. But, the HCSMA is ambiguous as to which physician has the duty to obtain the informed consent.

The case *sub judice* deals with §1301.811-A(a)(1), which require informed consent be obtained prior to the performance of surgery and the administration of anesthesia. The language of §1301.811-A is not clear as to which physician has the duty to obtain the informed consent prior to the administration of anesthesia. The duty could fall on the surgeon that would perform the operation. The duty could also fall on the anesthesiologist who would be administering the anesthesia.

The Court believes that a physician who administers anesthesia undertakes a duty to obtain the patient's informed consent prior to its administration. In certain situations, it may be that the anesthesiologist would delegate or relinquish to the surgeon the function of actually obtaining the patient's informed consent, but the duty to see that the consent is in fact obtained cannot be surrendered and remains with the anesthesiologist. If the surgeon does obtain a proper informed consent, including the administration of anesthesia, then the anesthesiologist's duty has been performed. Otherwise, the anesthesiologist remains responsible if the duty has not been fulfilled.

The purpose of the HCSMA was to streamline "the legal process relating to medical negligence lawsuits… ." 40 Pa. C.S. §1301.811-A. As part of this streamlining, the

General Assembly also sought to protect the interests of the patients. D. Durst, Cutting Through Pennsylvania's Medical Informed Consent Statute, 104 Dick. L. Rev. 197, 219 n. 171 (making reference to statements of Rep. Barley. H. 180-62, 2nd Legis. Sess. 2453 (P. 1996)). This is evidenced by the informed consent provision of §1301.811-A. Prior to the enactment of the section, informed consent was not required for blood transfusions, unless incident to surgery, or for the administration of radiation or chemotherapy. ***Hoffman v. Brandywine Hospital***, 661 A.2d 397 (Pa. Super. 1995); ***Dible v. Vagley*** 612 A.2d 493 (Pa. Super. 1992). Through §1301.811-A, the General Assembly has opened the informed consent umbrella to cover these procedures.

Informed consent requires that the physician describe the procedure and the risks and alternatives associated with the procedure so that "a reasonably prudent patient" could "make an informed decision as to that procedure." 40 Pa. C.S. §1301.811-A(b). The HCSMA places the burden of obtaining informed consent on the physician performing the prescribed procedure. Taking the definition of informed consent and the HCSMA's stress on performance, it is logical that the duty to obtain the informed consent for the administration of anesthesia falls upon the physician who will be administering it. The best way to assure that a patient gives an informed consent is to have the one responsible for performing the procedure obtain the informed consent. Here, the anesthesiologist is trained in the administration of anesthesia and would be more then competent to describe how the anesthesia will be administered, the risks associated with the administering of anesthesia, and any alternatives, which would permit a reasonably prudent patient to make an informed decision. The determination that §1301.811-A imposes a duty upon the physician performing the

administration of anesthesia to obtain the patient's informed consent is consistent with the definition of informed consent contained within the HCSMA and the fact that the requirement of §1301.811-A is placed on the physician performing the procedure.

Thus, the physician who performs the procedure has a duty to obtain the informed consent. The physician charged with the performance of the procedure is in the best position to provide the patient with the necessary material facts because of his intimate knowledge of the procedure and expertise. If the purpose of requiring informed consent is to be achieved, then the physician who performs the administration of anesthesia must be required to obtain the informed consent. Therefore, Dr. Moreno's Preliminary Objections to Plaintiffs' informed consent allegations must be denied.

Dr. Moreno's second contention is that if Plaintiffs have an informed consent claim against Dr. Moreno, then those allegations should be pleaded in a separate count apart from the negligence allegations. The Court agrees with Dr. Moreno.

A plaintiff can state more then one cause of action against the same defendant in a complaint, but each "cause of action and any special damage related thereto shall be stated in a separate count containing a demand for relief." Pa. R.C.P. 1020(a). Failure by a physician to obtain the patient's consent "sounds in battery." ***Montgomery v. Bazaz-Sehgal***, 798 A.2d 742, 747 (Pa. 2002); ***Dutly v. Paterson***, 771 A.2d 1255, 1258 (Pa. 2001); ***Grouse v. Cassel***, 615 A.2d 331, 333 (Pa. 1992). Since the failure of the physician to obtain the informed consent of the patient prior to the procedure is a battery, "negligence principles generally do not apply." ***Montgomery***, 798 A.2d at 747.

The alleged failure of Dr. Moreno to obtain the informed consent of Adams prior to the administration of the anesthesia is a battery claim. This alleged failure is separate and distinct from Plaintiffs' negligence claim against Dr. Moreno. Under Pa. R.C.P. 1020(a), the informed consent claim against Dr. Moreno must be asserted in a separate count.

The third contention of Dr. Moreno is that the Plaintiffs' negligence claims should be stricken based on lack of factual specificity. The language at issue is as follows:

> 82.1 Failure to obtain an adequate and complete medical history prior to proceeding with surgery .
>
> 82.2 Failure to appropriately assess Mr. Adams' anesthesia risk.
>
> 82.5 Failure to ensure a thorough cardiac/pulmonary evaluation/assessment prior to initiating anesthesia.
>
> 82.7 Failure to ensure adequate and proper administration of anesthesia prior to and during the surgical procedure.
>
> 82.12 Failure to follow proper ACLS procedures and protocols during cardiac arrest/resuscitation as duly set forth above.
>
> 82.13 Failure to ensure proper and adequate documentation throughout the surgical procedure and subsequent cardiac arrest.
>
> 82.14 Failure to follow and adhere to procedures and protocols as they relate to documentation during surgery and the subsequent cardiac arrest.

Plaintiffs' Second Amended Complaint. Dr. Moreno contends that Plaintiffs' negligence allegations are not supported by material facts. Dr. Moreno contends that the negligence allegations do not state the specific acts or omissions which constitute the alleged negligence of Dr. Moreno, and that under ***Connor v. Allegheny General Hospital***, 461 A.2d 600 (Pa. 1983), the allegations are so general they would permit Plaintiffs to subsequently raise a new cause of

action. Plaintiffs contend that the negligence allegations against Dr. Moreno do not run afoul of Pa. R.C.P 1019(a) nor ***Connor***. The Plaintiffs contend that they are only required to plead enough material facts to give the defendant notice of what the their claim is and the grounds upon which it rests.

Pennsylvania is a fact pleading state. ***Miketic v. Baron***, 675 A.2d, 324, 330 (Pa. Super. 1986). A complaint must set forth the material facts upon which the 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 the 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); ***Dep't of Transp. v. Shippley Humble Oil Co.***, 370 A.2d 438, 439 (Pa. Cmwlth. 1977). Based on ***Connor v. Allegheny Hospital***, 461 A.2d 600, 602-03 n.3 (Pa. 1983), 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. Assocs. 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***.

The negligence allegations against Dr. Moreno contained in the Second Amended Complaint do not lack factual specificity. When the negligence allegations and factual averments are read as a whole, the negligence cause of action is sufficiently limited. In line with ***Connor***, the Second Amended Complaint does not assert open-ended negligence allegations that would allow a new cause of action to be asserted later. Further, the Second Amended Complaint sets forth sufficient information to apprise Dr. Moreno of the basis of the negligence claim against him and allows him to prepare a defense. Therefore, Dr. Moreno's Preliminary Objection on this issue will be denied.

PART 2

Plaintiffs' Objections to New Matter of Defendants

Plaintiffs have raised preliminary objections that seek to strike specific paragraphs from the New Matter asserted by the Defendants. Many of the allegations pleaded by Defendants in their the respective New Matter are similar, including allegations that:

- the Plaintiffs' claims are barred by the statute of limitations; the Plaintiffs' claims are barred or limited by the HCSMA;
- Adams gave an informed consent to the medical treatment rendered to him;
- the injuries suffered by Adams were the result of his medical condition not the acts or omissions of the Defendants;
- Adams' injuries were caused by others not under the control of the Defendants;
- the acts or omissions of the Defendants were not the proximate cause or a substantial factor in causing the injuries suffered by Adams; and the Defendants' conduct conformed to the applicable standard of care.

Plaintiffs seek to strike many of these allegations as legal conclusions, and further object that the named affirmative defenses are asserted without factual support. Plaintiffs also object that many of these allegations merely constitute improper denials of Plaintiffs' earlier allegations. In addition, Plaintiffs object to the pleading of various statutes' applicability as being irrelevant and impertinent pleadings. Plaintiffs' arguments against these pleadings include: 1) that it is impossible for them to file a meaningful answer to these pleadings; 2) that to attempt to file a responsive pleading requires them to engage in unnecessary work; and, 3) the statutory provisions limiting recovery are improper insertions of insurance issues and the statutes' applicability is a matter of law and not a matter to be determined by the trier of fact.

Defendants argue that their allegations are appropriate because: 1) they recite affirmative offenses by name so Plaintiffs know the defenses may become an issue; 2) the allegations put Plaintiffs on notice that their claims may be statutorily limited; and 3) they have always pleaded these contentions, and, even if wrong, no harm results by allowing the pleadings to stand.

The pleading of New Matter is controlled by Pa. R.C.P. 1030. It states that a party must set forth all affirmative defense in his responsive pleading under the heading "New Matter." Pa.R.C.P. 1030(a). Rule 1030(a) lists several affirmative defenses that must be pleaded in New Matter, but that list is not exhaustive and the Rule indicates that other affirmative defenses not listed must still be pleaded in New Matter. Normally a failure to plead an affirmative defense in New Matter waives that defense, but defenses that are not required to

be pleaded are not waived; that includes a "legal defense to a claim and any other non-waivable defense or objection." Pa.R.C.P. 1032(a).

An affirmative defense is different then a denial of facts, in that, an affirmative defense requires "the averment of facts extrinsic to plaintiff's claim for relief." ***Coldren v. Peterman***, 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. ***Ibid***. In pleading an affirmative defense, a party must comply with Pa.R.C.P. 1019 and set forth the material facts upon which the defense is based in a concise and summary form. ***Allen v. Lipson***, 8 D. & C. 4th 390, 394 (Lycoming Cty. 1990). If a party fails to assert material facts that support the affirmative defense, then the paragraph containing the affirmative defense must be stricken. ***Thurman v. Jones***, No. 02-00,518 at 1 (Lycoming Cty. July 16, 2002); ***Trimble v. Beltz,*** No. 98-01,720 at 3 (Lycoming Cty. April 27, 2000); ***Allen***, *supra*.

Furthermore, a "party may set forth as new matter any other material facts which are not merely denials of the averments of the preceding pleading." Pa. R.C.P. 1030(a). Statements that are "merely denials of the allegations in the complaint" are not affirmative defense and have "no place in New Matter." ***Trimble***, *supra*. Such statements belong in the Answer to the complaint and will be struck from New Matter. ***Ibid***.

With these principles in mind, the Court now addresses the specific objections made as to the various Defendants' New Matter.

Plaintiffs' Preliminary Objections to Dr. Trevouledes' Answer with New Matter to Plaintiffs' Second Amended Complaint

Plaintiffs' Preliminary Objections to the Answer with New Matter of Defendant Trevouledes, M.D., to Plaintiffs' Second Amended Complaint assert that Paragraphs 160, 161 and 162 of the New Matter contravene the applicable pleading rules. Those paragraphs allege:

> 160. The Plaintiffs' claim against Dr. Trevouledes may be barred by the applicable two-year statute of limitations for personal injury claims under §5524(2) of the Judicial Code, 42 Pa.C.S. §5524(2).
>
> 161. The injuries and damages claimed by Plaintiffs are the natural progressive result of Mr. Adams' medical condition, and not as a result of any negligence by Dr. Trevouledes.
>
> 162. Dr. Trevouledes pleads and preserves 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 Act.

Defendant Trevouledes, M.D's Answer with New Matter to Plaintiffs' Second Amended Complaint. Plaintiffs raise three issues with respect to Dr. Trevouleds' New Matter.

The first is that Paragraph 160, which raises the statute of limitations defense, does not set forth material facts to support the affirmative defense and should be stricken. The Court agrees that Paragraph 160 should be stricken. Dr. Trevouledes does not support his assertion of the statute of limitations defense with material facts. Paragraph 160 merely states that the Plaintiffs' claim may be barred by the applicable statute of limitations and that future discovery could supply the material facts to support the defense. Therefore, Paragraph 160 must be stricken.

Plaintiffs' second issue is that Paragraph 161 of Dr. Trevouledes' New Matter should also be stricken because it is not supported by material facts. The Court agrees with Plaintiffs that Paragraph 161 must be stricken. Paragraph 161 is a mere denial of the

allegations in the Second Amended Complaint and has no place in New Matter. Paragraph 161 contends that the injuries suffered by Adams were the result of Adams' medical condition, and not negligence. This goes to the causation element of the Plaintiffs' negligence cause of action against Dr. Trevouledes.[2] As such, this is a denial to one of the elements Plaintiffs must prove and allege in their Second Amended Complaint. Therefore, Paragraph 161 must be stricken.

Plaintiffs' third issues is that Paragraph 162 of Dr. Trevouledes' New Matter, which pleads the limitations on liability and damages under the HCSMA and the Medical Care Availability and Reduction of Error Act, should be stricken because the pleading lacks specificity, is not supported with necessary material facts, and states an irrelevant legal conclusion, not an affirmative defense. The Court agrees with Plaintiffs that Paragraph 162 must be stricken. It is not necessary to raise statutes that do not contain affirmative defenses in New Matter. ***Thurman v. Jones***, No. 02-00,518 at 1 (Lycoming County July 2002) ("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."). However, if the particular facts of the case create an affirmative defense under a section of a statute, then a defendant would have to plead it in New Matter with the supporting material facts. ***Trimble***, *supra*. (If a party fails to assert material facts that support the affirmative defense, then the paragraph containing the affirmative defense must be stricken.) Since the statutes as pleaded do not establish an affirmative defense, Paragraph 162 does not belong in New Matter and must be stricken.

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[2] In order to establish a medical negligence claim, a plaintiff must prove: (1) that the defendant owed the plaintiff a duty; (2) the defendant breached that duty; (3) the breach of duty was the proximate cause in bringing about the harm suffered; and (4) the damages suffered by the plaintiff resulted directly from that harm. ***Mitzelfelt v. Hamrin***, 584 A.2d 888, 891 (Pa. 1990); ***Rauch v. Mike-Mayer***, 783 A.2d 815, 824 (Pa. Super. 2001),

It is true that Judge Brown, in ***Thurman***, *supra*, permitted a similar allegation to stand. However, upon reading Judge Brown's opinion closely, it becomes clear that this was a permissive holding. The decision was limited to the arguments on that case where, perhaps, the facts alleged might have raised an affirmative defense. Such an affirmative defense might be the statute of repose set forth in section 513 of the MCARE Act. Dr. Trevouledes did not plead that section, nor did Dr. Trevouledes plead any facts barring Plaintiffs' action under that section. Therefore, it is clear that the pleadings do not set up any facts which might support any possible affirmative defense that may exist under the HCSMA or MCARE. This Court is not stating that the statutes are inapplicable to this case, but they are not affirmative defenses and are impertinent New Matter.

Plaintiffs' Preliminary Objections to Dr. Elangbam and Geisinger Clinic's Answer with New Matter to Plaintiffs' Second Amended Complaint

Plaintiffs' Preliminary Objections to the Answer with New Matter of Defendants Elangbam, M.D. and Geisinger Clinic contend that Paragraphs 163 and 164 should be stricken. Paragraphs 163 and 164 assert:

> 163. Whatever injuries and damages, if any, sustained by Plaintiffs and/or the Decedent as averred in the Second Amended Complaint were or may have been caused in whole or in part or were contributed to by the pre-existing medical condition of the Decedent.
>
> 164. At all times relevant to the within cause of action, the Answering Defendants conformed their conduct to the state of medical and hospital knowledge, common and accepted procedures in the medical and hospital profession, the state-of-the-art medical and hospital practice and other available information.

Defendant Elangbam, M.D. and Geisinger Clinic's Answer with New Matter to Plaintiffs' Second Amended Complaint,.

Statements that are "merely denials of the allegations in the complaint" are not defenses and "have no place in New Matter." ***Trimble***, *supra.* Paragraph 163 asserts that the alleged injuries suffered by Adams were the result of his "pre-existing medical condition." This is a denial of causation and belongs in the Answer, not New Matter. Nor does this pleading state any new facts such as what pre-existing condition and how such condition was a causative factor. Rather the allegation is a mere conclusion. Paragraph 164 alleges that Dr. Elangbam and Geisinger Clinic followed appropriate medical procedures, conformed their conduct to the state of medical and hospital knowledge, common and accepted procedures in the medical and hospital practices and other available information. This is a denial that Elangbam & Geisinger Clinic did not breach their duty since their conduct did not fall below the standard of care. Therefore, Paragraphs 163 and 164 must be stricken.

Plaintiffs' Preliminary Objections to Muncy Valley Hospital and Susquehanna Health Systems' Answer with New Matter To Plaintiffs' Second Amended Complaint

Plaintiffs' Preliminary Objections to the Answer with New Matter of Defendants Muncy Valley Hospital and Susquehanna Health Systems challenge Paragraph 161and Paragraph 167. The specific language of the paragraphs is as follows:

> 161. To the extent that Answering Defendant is considered a health care provider, all care and treatment rendered to the Plaintiff by Answering defendant was appropriate, reasonable and within the required standard of care.
>
> 167. Plaintiff gave an informed consent for all medical treatment provided by the Defendants and thus, Plaintiffs' claims are barred and/or limited.

Defendant Muncy Valley Hospital and Susquehanna Health Systems' Answer with New Matter to Plaintiff's Second Amended Complaint.

Initially, Muncy Valley Hospital contends that Plaintiffs cannot attack Paragraph 161 by preliminary objection because Plaintiffs failed to object to the same allegations when they filed their Preliminary Objections to Muncy Valley Hospital's Answer with New Matter to Plaintiffs' First Amended Complaint. Muncy Valley Hospital also contends that Plaintiffs cannot attack Paragraph 167 via Preliminary Objections because Plaintiffs failed to file Preliminary Objections to Defendant Beyer, West Branch Emergency Physicians and New Jersey/Pennsylvania EM-1 Services' Answer with New Matter to Plaintiffs First Amended Complaint, which contained a similar paragraph raising the informed consent defense. Defendants argue that Plaintiffs are barred from bringing the current preliminary objections before the Court, because all preliminary objections are required to be raised at one time.

The Rules of Civil Procedure do require all preliminary objections to be raised at one time. Pa.R.C.P. 1028(b). "'The basis for the rule that all preliminary objections be raised at one time is that otherwise the court would have to rule on preliminary objections on a piecemeal basis.'" ***Ellenbogen v. PNC Bank, N.A.***, 731 A.2d 175, 185 (Pa. Super. 1999) (quoting ***Martin v. Gerner***, 481 A.2d 903, 906 (Pa. Super. 1984)). However, piecemeal results do not occur when a second set of preliminary objections are filed before the court rules on the first set of preliminary objections. ***Id***. A party may file a second set of preliminary objections before the court rules on the first set and may also introduce additional and new grounds for preliminary objections. ***Martin v. Gerner***, 481 A.2d 903, 905 (Pa. Super.1984).

Consequently, Muncy Valley Hospital's argument fails. The Court had not ruled on Plaintiffs' first set of preliminary objections. Therefore, Plaintiffs can bring their present Preliminary Objections.

With this preliminary hurdle overcome, the Court agrees with Plaintiffs that Paragraphs 161 and 167 must be stricken. Statements that are "merely denials of the allegations in the complaint" are not affirmative defenses and have "no place in New Matter." ***Allen***, *supra*. Those statements "belong in the Answer to the complaint." ***Ibid***. Paragraphs in New Matter that generally allege that the defendants were not negligent, that there was no causal relationship between the injuries and the alleged negligence, and that the alleged negligence was not a substantial factor in causing the injuries are mere denials of the allegations. ***Id***. at 2.

Paragraph 161 alleges that Muncy Valley Hospital acted within the standard of care. This is a denial. It denies that Muncy Valley Hospital breached its duty and was negligent. It belongs in the Answer, not New Matter. Paragraph 167 alleges that Muncy Valley Hospital had obtained informed consent. Obtaining informed consent is not an affirmative defense. Alleging that it was obtained is a denial of the allegation that it was not. It therefore belongs in the Answer and not New Matter. Thus, Paragraphs 161 and 167 must be stricken.

Plaintiffs' Preliminary Objections to Beyer and New Jersey/Pennsylvania EM-1 Medical Services' Answer with New Matter to Plaintiffs' Second Amended Complaint

The next motion before the Court is Plaintiffs' Preliminary Objections to the Answer with New Matter of Defendants Mark Beyer, D.O. and New Jersey/Pennsylvania EM-

1 Medical Services (hereafter collectively referred to as Beyer). Plaintiffs contend that a number of the paragraphs contained in Beyer's New Matter fail to conform to the Rules of Civil Procedure, which, for discussion purposes are grouped as follows:

Paragraphs 159, 165, 166, 175 – setting forth the affirmative defenses of statute of limitations, two schools of thought, application of a release agreement, and all affirmative defenses listed in Pa. R.C.P. 1030(a). (Group A).

Paragraphs 160-164, 170, 173 – which asserts Defendants' negligence did not proximately cause Plaintiffs' injuries and losses and, to the extent future discovery reveals, they were caused by others, by unknown causes, intervening events and that Adams failed to use due care and follow instructions. (Group B).

Paragraphs 168 – Informed consent was given to the care in question. (Group C)

Paragraphs 174 – Delay damages under the provision of Pa. R.C.P. 238 is asserted to be unconstitutional and also that liability for delay damages should be suspended to the extent Plaintiffs do not convey a settlement figure. (Group D).

Paragraphs 176-184 – which assert that Defendants were insured by PHICO, which was declared insolvent and that the statutory provisions of 40 Pa. C.S. §991.1817(a), relating to the Pennsylvania Property and Casualty Insurance Guaranty Association (PIGA) obligation to make payments, applies to Plaintiffs' right of recovery. (Group E).

To reiterate, a party must set forth all affirmative defenses in his responsive pleading under the heading "New Matter." Pa. R.C.P. 1030(a). If a party fails to assert material facts that support the affirmative defense, then the paragraph containing the affirmative defense must be stricken. ***Trimble***, *supra*; ***Thurman***, *supra*; ***Allen***, *supra*. In pleading New Matter, a "party may set forth … any other material facts which are not merely denials of the averments of the proceeding pleading." Pa. R.C.P. 1030(a). Statements that are "merely denials of the allegations in the complaint" are not affirmative defenses and have "no place in New Matter." ***Trimble***, *supra*. Those statements "belong in the Answer to the complaint." ***Ibid***. The Court will dispose of the preliminary objections by addressing the contentions as grouped (and lettered) above.

A. ***Affirmative Defenses***

Paragraphs 159, 165,[3] 166, and 175 state affirmative defenses that Beyer wishes to assert. Beyer does not provide material facts to support the affirmative defense he asserts. Beyer only states the name of the affirmative defense and that future discovery may lead to evidence that could provide the material facts to support his asserted affirmative defense. This is insufficient, and Paragraphs 159, 165, 166, and 175 will be stricken.

B. ***Assertions Denying Negligence and Causation***.

Paragraphs 160 to 164, 170, and 173 all deal with statements regarding the Plaintiffs' negligence claim against Beyer. Paragraphs 160 to 164, 170, and 173 are denials

[3] Paragraph 165 asserts the defense of the two schools of thought doctrine. The doctrine is a complete defense to a medical malpractice claim. ***Levine v. Rosen***, 616 A.2d 623, 627 (Pa. 1992). "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." ***Id***. To establish this defense, Beyer will have to produce evidence regarding the course of treatment he followed and its acceptance by other physicians in his field.

of Plaintiffs negligence claim. The statements made in these paragraphs counter what the Plaintiffs must prove in their cause of action. The paragraphs belong in the Answer, not New Matter. Paragraphs 160 to 164, 170, and 173 shall be stricken.

C. ***Informed Consent***.

Paragraph 168 asserts that the Plaintiffs' claims are barred by the informed consent received by Beyer. Paragraph 168 is a denial to Plaintiffs' lack of informed consent claim. A statement that Beyer had Adam's informed consent would be a direct contradiction to Plaintiffs' assertion. Therefore, Paragraph 168 is a denial and should be stricken from New Matter.

D. ***Delay Damages***.

Paragraph 174 asserts a conclusion of law. Further it is not a matter to be determined at trial. It also is a non-waivable legal defense to the claim for delay damages. Therefore, it too shall be stricken.

E. ***Insurance Remedies***

Paragraphs 176–184 assert that 40 P.S. §991.1817(a) bars Plaintiffs from asserting their claims against Beyer. Beyer contends that if Plaintiffs fail to exhaust their insurance rights under other insurance policies, then §991.1817(a) bars their recovery. In his brief, Beyer argues that "a statutory bar that limits recovery [*i.e.* 40 P.S. §991.1817(a)] has the same impact of a statutory bar to bring an untimely action. [42 Pa.C.S.A. §5524]." Beyer Brief, 6. The Court disagrees with Beyer. To the extent these insurance provisions are "defenses" they would be classified as non-waivable legal defenses to payment. There is absolutely no basis to

contend otherwise, that is, that if a defendant's liability was subject to the PIGA statute that a failure to plead the statute would constitute a waiver.

40 P.S. §991.1817(a) does not require a plaintiff to exhaust his insurance remedies before bringing an action. One of the purposes of §991.1817 is to "provide a means for the payment of covered claims under certain property and casualty insurance policies, to avoid excessive delay in the payment of such claims and to avoid financial loss to claimants or policyholders as a result of the insolvency of an insurer." 40 P.S. §991.1817(a). The section was created to provide protection for claimants and insured against an insolvent insurer. ***Panea v. Isander***, 773 A.2d 782, 789-90 (Pa. Super. 2001); ***McCarthy v. Bainbridge***, 739 A.2d 200, 202 (Pa. Super. 1999). 40 P.S. §991.1817(a) also protects the insurance industry by preventing duplication of recovery. ***Panea***, 773 A.2d at 790. The exhaustion requirement of §991.1817(a) is the mechanism used to accomplish this goal.

As is evident, 40 P.S. §991.1817(a) deals with recovery, not liability. The section centers on the payment of claims, not liability. ***Ibid*** ("As a practical matter if Dr. Myers successfully defends and is not fastened with liability then Mr. Baker [the plaintiff] has no claim to assert, and the Act is not implicated."). That is, it states what the Plaintiff must do to secure payment of his claim and what happens if he does not. ***Strickler v. DeSai***, 768 A.2d 862 (Pa. Super. 2001); ***Burke v. Valley Lines, Inc***., 617 A.2d 1335 (Pa. Super. 1992).

Since 40 P.S. §991.1817(a) has nothing to do with the determination of liability, it is irrelevant to the Answer and New Matter. A party must set forth all affirmative defenses in his responsive pleading under the heading "New Matter." Pa.R.C.P. 1030(a). "'New matter ignores what the adverse party has averred and adds new facts to the legal dispute on the theory

that such new facts dispose of any claim or claims which the adverse party had asserted in his pleading.'" ***Coldren***, 763 A.2d at 908 (quoting ***Sechler v. Ensign-Bickford Co.***, 469 A.2d 233, 235 (Pa. Super. 1983). The assertion that the Plaintiffs have not exhausted their claim under insurance polices would not dispose of Plaintiffs' claim. The exhaustion requirement impacts the payment of Plaintiffs' claim. As such, the exhaustion requirement has no bearing on the issue of liability. 40 P.S. §991.1817(a) deals with from whom and when a Plaintiff can collect when an insured's insurer is insolvent.[4] Therefore, Paragraphs 176 – 184 are stricken since the exhaustion requirement is not an affirmative defense and has no place in New Matter.

Plaintiffs' Preliminary Objections to Dr. Mellancamp and Susquehanna Imaging Associates' Answer with New Matter to Plaintiffs' Second Amended Complaint

The next motion before the Court is Plaintiffs' Preliminary Objections to Paragraphs 159 – 161 and 164-167 of Defendants Eric Mellencamp, M.D. and Susquehanna Imaging Associates' Answer with New Matter to Plaintiffs Second Amended Complaint. Plaintiff contends that the New Matter contains paragraphs which lack the requisite specificity, are conclusions of law, and are denials. Specifically, Plaintiff contends that paragraph 159 and 165 are conclusions of law. The language of the paragraphs is as follows:

> 159. Plaintiffs' Amended Complaint fails to state claims upon which relief may be granted against answering defendants.
>
> 165. Pursuant to the Healthcare Services Malpractice Act (40 P.S.§1301.102 et sec. [sic]), Defendants are neither guarantors nor warrantors of a cure.

[4] Although it is not appropriate for New Matter, that does not mean that Beyer cannot raise the requirements of 40 P.S. §991.1817(a) if Plaintiffs settle or receive a verdict. ***Panea***, 773 A.2d at 793 (Post trial motions can be used to assert the statutory offset, since the offset can be raised "at any time from verdict to execution on the judgment." ***Id***. n.8.).

Answer with New Matter of Defendant Mellencamp, M.D. and Susquehanna Imaging Services, Inc. to Plaintiffs' Second Amended Complaint.

The Court finds that Paragraphs 159 and 160 should be stricken. Paragraph 159 is a demurrer and should have been raised as a preliminary objection. Paragraph 165 is a non-waivable legal defense that does not need to be pleaded. The paragraphs also constitute conclusions of law and have no place in New Matter. Therefore, Paragraphs 159 and 165 are stricken.

Paragraphs 161, 164, 166, and 167 all deal with statements regarding the Plaintiffs' negligence claim against Dr. Mellencamp. Paragraphs 161, 164, 166, and 167 are denials of assertions made in Plaintiffs' negligence claim. The statements made in these paragraphs counter what the Plaintiffs must prove in their negligence cause of action. Statements in New Matter that are merely denials of the allegations in the complaint are not affirmative defenses and have no place in New Matter. ***Trimble***, *supra*. The paragraphs belong in the Answer, not New Matter. Therefore, Paragraphs 161, 164, 166, and 167 are stricken.

Paragraph 160 asserts that the Plaintiffs causes of actions are barred or limited by the HCSMA. As stated before, it unnecessary to raise statutes which do not contain affirmative defenses in New Matter. (Discussion of Paragraph 162 of Dr. Trevouledes' New Matter, *infra*.). However, if Dr. Mellancamp believes the facts of this case create an affirmative defense under the HCSMA to be pleaded as New Matter he must set forth the material facts to support the defense. ***Trimble,*** *supra*. Paragraph 160 merely asserts that the causes of action may be barred and/or limited by the HCSMA. Since Paragraph 160 does not

set forth a specific affirmative defense under the HCSMA and the material facts to support it, Paragraph 160 must be stricken.

O R D E R

Accordingly, the following Preliminary Objections are denied and granted:

1. Dr. Moreno's Preliminary Objection to Plaintiffs' informed consent claim under the Health Care Services Malpractice Act is **DENIED**.

2. Dr. Moreno's Preliminary Objection to Plaintiffs' inclusion of the informed consent claim with in the negligence count is **GRANTED** and Plaintiffs must assert the informed consent claim in a separate count. Plaintiffs may file an amended complaint within twenty days of notice of this order.

3. Dr. Moreno's Preliminary Objection that Plaintiffs' negligence claim lacks factual specificity is **DENIED**.

4. Plaintiffs' Preliminary Objections to Dr. Trevouledes' Answer with New Matter to Plaintiffs' Second Amended Complaint are **GRANTED**. Paragraphs 160, 161, and 162 are stricken.

5. Plaintiffs' Preliminary Objections to Dr. Elangbam and Geisinger Clinic's Answer with New Matter to Plaintiffs' Second Amended Complaint is **GRANTED**. Paragraphs 163 and 164 are stricken.

6. Plaintiffs' Preliminary Objections to Muncy Valley Hospital and Susquehanna Health System's Answer with New Matter to Plaintiffs' Second Amended Complaint are **GRANTED**. Paragraphs 161 and 167 are stricken.

7. Plaintiffs' Preliminary Objections to Mark Beyer, D.O. and New Jersey/Pennsylvania Em-1 Medical Services' Answer with New Matter to Plaintiffs' Second

Amended Complaint are **GRANTED**. Paragraphs 159, 160-164, 165, 166, 168, 170, 173, 174, 175, 176-184 are stricken.

8. Plaintiffs' Preliminary Objections to Dr. Mellencamp and Susquehanna Imaging Associates' Answer with New Matter to Plaintiffs' Second Amended Complaint are **GRANTED**. Paragraphs 159, 160, 161,164, 165, 166, 167 are to be stricken.

9. The Defendants may file an amended New Matter within 20 days of notice of this order.

BY THE COURT:

William S. Kieser, Judge

cc: Clifford A. Rieders, Esquire
Lauralee B. Baker, Esquire
Margolis Edelstein; P. O. Box 932; Harrisburg, PA 17108-0932
C. Edward S. Mitchell, Esquire
Robert A. Seiferth, Esquire
Edwin A.D. Schwartz, Esquire; Michael B. Volk, Esquire
McKissock & Hoffman, P.C.
2040 Linglestown Road -Suite 302; Harrisburg, PA 17110
David R. Bahl, Esquire
Donna L. Rae, Esquire, Litigation Counsel
Geisinger Health System; Department of Legal Services
M.C. 30-21; 100 North Academy Avenue; Danville, PA 17822
Judges
Christian Kalaus, Esquire
Gary L. Weber, Esquire (Lycoming Reporter)