

JOYCE A. BLAIR, individually and as the	:	IN THE COURT OF COMMON PLEAS OF
Executrix of the Estate of BRENDA BLAIR,	:	LYCOMING COUNTY, PENNSYLVANIA
deceased, JOSEPH BLAIR, individually	:	
and CATHERINE WINNIE, individually,	:	
Plaintiffs	:	JURY TRIAL DEMANDED
	:	
vs.	:	NO. 03-00,954
	:	
PANKAJ G. MEHTA, M.D.; WOMEN'S	:	
HEALTH CARE ASSOCIATES, P.C.;	:	CIVIL ACTION
AARON D. SIMMS, M.D. BUPHINDER S.:	:	
DATTA, M.D.; WEST BRANCH	:	
EMERGENCY PHYSICIANS; NEW	:	
JERSEY/PENNSYLVANIA EM-1	:	
MEDICAL SERVICES, P.C.;	:	
SUSQUEHANNA PHYSICIAN SERVICES:	:	
THE WILLIAMSPORT HOSPITAL and	:	
MEDICAL CENTER; and	:	
SUSQUEHANNA HEALTH SYSTEM,	:	
Defendants	:	MOTION TO AMEND

Date: July 22, 2004

OPINION and ORDER

Before the Court for determination is the Motion for Leave to Amend the Second Amended Complaint of Plaintiffs Joyce Blair, Joseph Blair, and Catherine Winnie filed June 15, 2004. The Court will deny the Motion.

The present case is a medical malpractice action. Plaintiffs allege that the decedent, Brenda Blair, received inadequate medical care and treatment while a patient at the Williamsport Hospital. Plaintiffs initiated this action on June 18, 2003 by filing a Writ of Summons. Plaintiffs filed a Complaint on September 8, 2003. Plaintiffs filed an Amended Complaint on October 21, 2003. Preliminary objections were filed to the Amended Complaint. Defendants Susquehanna Physicians Services, The Williamsport Hospital and Medical Center, and Susquehanna Health System (hereafter "the Hospital; Defendants") filed preliminary

objections on October 21, 2003. Defendants Pankaj Mehta, M.D. and Women's Health Care Associates, P.C. filed preliminary objections on November 7, 2003. Defendants Aaron D. Simms, M.D. and Buphinder S. Datta, M.D. filed preliminary objections on November 19, 2003. On May 11, 2004, the Court granted in part and denied in part Defendants Aaron D. Simms, M.D. and Buphinder S. Datta, M.D.'s preliminary objections and gave Plaintiffs twenty days to file an Amended Complaint. On May 13, 2004, the Court granted in part and denied in part the Hospital Defendants' preliminary objections. On June 10, 2004, the Court granted in part and denied in part Defendants Pankaj Mehta, M.D. and Women's Health Care Associates, P.C.'s preliminary objections and gave Plaintiffs twenty days to file an Amended Complaint.

On June 1, 2004, Plaintiffs filed a Second Amended Complaint. Plaintiffs now seek leave to amend the Second Amended Complaint in an effort to clarify allegations to support their claims of vicarious liability and corporate negligence against the Hospital Defendants. In the May 13, 2003 Opinion and Order granting in part and denying in part the Hospital Defendants' preliminary objections to the First Amended Complaint, the Court struck from it the following language: "and/or other medical care providers" from Paragraph 96; "and/or other medical care providers" from Paragraph 97; "and/or its/their employees" from Paragraph 98; and "and the aforesaid agents, servants, or employees, ostensible or otherwise" from Paragraph 99. The Court concluded that the language was not sufficiently specific and not factually supported by the allegations made in the First Amended Complaint. The Court stated that the factual allegations set forth the conduct of the defendant physicians as would relate to the treatment of Brenda between June 19-21, 2001 and only set forth causes of action based upon their conduct.

Plaintiffs are requesting that the stricken language be reinstated because the additional proposed amendments would provide factual allegations to support a vicarious liability claim against the Hospital based on conduct of individuals other than the Defendant physicians. Plaintiffs contend that the amendments would permit a vicarious liability claim to be based on the conduct of the emergency room physician on duty on June 27, 2001 and the nurse and/or other staff person who handled the telephone inquiry from Brenda Blair on June 24, 2001.¹ Plaintiffs seek to modify and amend as follows:

Paragraph 55: Brenda was not seen by an emergency room physician, however, until approximately 7:00 a.m. Brenda's pulse was elevated to 120-130 and a respiratory rate was elevated to 20-30. Her abdomen was distended and tender.

Paragraph 81.1: Failure to provide competent emergency room physicians to see Brenda on June 19, June 23 and June 27, 2001.

Paragraph 81.4: Failure to perform appropriate diagnostic tests including tests ordered/performed by defendant physicians.

Paragraph 81.11: Failure to provide reasonable, adequate and competent medical care by Defendant physicians, emergency room physicians and nursing staff, including the nurse and/or staff person who handled the telephone inquiry set forth in Paragraph 49, to evaluate the patient and ascertain the significance of signs and symptoms exhibited and/or relayed by Brenda.

If the amendments were allowed in Paragraph 55, the general factual allegation section of the proposed Amended Complaint and Paragraphs 81.1, 81.4, and 81.11 would be added to the

¹ Plaintiffs had also sought to amend the Second Amended Complaint in order to support a vicarious liability claim on the basis of the radiologist's conduct. Plaintiffs have withdrawn this request. *Blair v. Mehta*, (Lycoming Cty. 2003), Memorandum of Law Regarding Plaintiffs' Motion for Leave to Amend, at 3, n.1. Therefore, the Court will deem the request to amend Paragraph 25 of the Second Amended Complaint, as well as the portion of Paragraph 81.4 relating to the radiologist's conduct, as withdrawn.

corporate negligence count against The Williamsport Hospital and Susquehanna Health System (Count IV).

Plaintiffs assert two arguments on why they should be allowed to amend. The first is that the right to amend under Pa.R.C.P. 1033 should be liberally granted unless there is an error of law or resulting prejudice to an adverse party. The second is that the Court abused its discretion when it failed to give Plaintiffs an opportunity to file an amended complaint after the Hospital Defendants' preliminary objections were partially granted in the May 13, 2004 Opinion and Order. Plaintiffs argue that no prejudice will result from the amendments because they merely amplify what has already been pleaded and clarify whose conduct supports the vicarious liability claim against the Hospital Defendants.

The Court will permit Plaintiffs to amend Paragraph 81.4 of the Second Amended Complaint. The proposed amendment merely amplifies the allegations previously made against the named defendant physicians and the Hospital Defendants. As to the remaining proposed amendments, the Court will address Plaintiffs' motion in two parts. First, the Court will address Plaintiffs' right to amend pursuant to Pa.R.C.P. 1033. Second, the Court will address whether its failure to permit Plaintiffs to file an amended complaint after partially granting the Hospital Defendants' preliminary objections entitles Plaintiffs to now amend the Second Amended Complaint.

Amendment Pursuant to Pa.R.C.P. 1033

The right to amend a pleading is set forth in Pa.R.C.P. 1033. It provides the following:

A party, either by filed consent of the adverse party or by leave of court, may at any time change the form of action, correct the name of a party or amend his pleading. The amended pleading may aver transactions or occurrences which have happened before or after

the filing of the original pleading, even though they give rise to a new cause of action or defense. An amendment may be made to conform the pleading to the evidence offered or admitted.

Pa.R.C.P. 1033. The decision as to whether to permit an amendment is within the sound discretion of the trial court. *Sejpal v. Corson, Mitchell, Tomhave, & McKinley, M.D.'s, Inc.*, 665 A.2d 1198, 1200 (Pa. Super. 1995); *Matos v. Rivera*, 648 A.2d 337, 340 (Pa. Super. 1994), *app. denied*, 658 A.2d 795 (Pa. 1995). Generally, amendments should be liberally permitted so as to allow cases to be decided on the merits. *Sejpal*, 665 A.2d at 1200. However, an amendment will not be permitted “where it is against a positive rule of law, where it states a new cause of action after the statute of limitations has run, or when it will surprise or prejudice the opposing party.” *Somerset Cmty. Hosp. v. Allan B. Mitchell & Assocs., Inc.*, 685 A.2d 141, 142 (Pa. Super. 1996).

The amendments concerning the emergency room physician and the nurse/staff person will not be permitted. The proposed amendments assert a new cause of action. “ ‘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 v. Hygienic Sanitation Co.*, 705 A.2d 841, 857 (Pa. Super. 1997), *aff’d*, 737 A.2d 249 (Pa. 1999) (quoting *Matos*, 648 A.2d at 340); *Reynolds v. Thomas Jefferson Univ. Hosp.*, 676 A.2d 1205, 1210 (Pa. Super. 1996). A new cause of action does not arise if the proposed amendment merely adds to or amplifies what has been pleaded. *Reynolds*, 676 A.2d at 1210.

The amendments concerning the emergency room physician and the nurse/staff person assert a different theory of liability. The factual allegations pleaded in the original and

First Amended Complaint set forth the conduct of the named defendant physicians and how it fell below the standard of care. The vicarious liability and corporate negligence claims were based on the conduct of the named defendant physicians. The proposed amendments allege that the Hospital Defendants are now liable for the conduct of two new individuals. This is a new theory concerning the liability of the Hospital Defendants. Before, the Hospital Defendants were only liable for the conduct of the named defendant physicians, now they are alleged to be liable for the conduct of the emergency room physician and the nurse/staff person. This is a different basis for liability than previously alleged.

The proposed amendments are not mere additions or amplifications of what has been pleaded. The original and First Amended Complaint do state that Brenda was seen by an emergency room physician on June 27, 2001 and that someone in the emergency room handled a call from Brenda on June 24, 2001 advising her to take Gas X. However, a fair reading of both the original and First Amended Complaint would not allow one to conclude that the conduct of the emergency room physician or the nurse/staff person was alleged to have been negligent, and thereby form the basis of a vicarious liability or corporate negligence claim against the Hospital Defendants. The factual assertions relating to the emergency room physician and the nurse/staff person were included to provide an understandable and coherent picture of the events that transpired from June 16-28, 2001. To allow the amendments would be to give new significance to what has been pleaded and change its meaning entirely. There is no indication from the prior pleadings that the conduct of the emergency room physician and the nurse/staff person was negligent or caused the injury to Brenda. As such, the amendments

do not add to or amplify what has been pleaded, but instead, they introduce new theories of liability and new causes of action.

The fact that the amendments concerning the emergency room physician and the nurse/staff person assert new causes of action does not in and of itself prohibit amending the Second Amended Complaint. The problem is that the causes of action are beyond the statute of limitations. Generally, the statute of limitations starts to run as the right to institute and maintain a suit arises. *Dalrymple v. Brown*, 701 A.2d 164, 167 (Pa. 1997); *Gatling v. Eaton Corp.*, 807 A.2d 283, 289 (Pa. Super. 2002). As soon as the statutorily prescribed period for instituting a cause of action has expired, the injured party is barred from bringing the action. *Baumgart v. Keene Bldg. Prods. Corp.*, 666 A.2d 238, 240 (Pa. 1995); *Pocono Int'l Raceway, Inc. V. Pocono Produce*, 468 A.2d 468, 471 (Pa. 1983). The statute of limitations that governs wrongful death and survival actions is 42 Pa.C.S.A. §5524. *Baumgart*, 633 A.2d 1189, 1192 (Pa. Super. 1993). The act provides that a wrongful death or survival action must be commenced within two years. 42 Pa.C.S.A. §5524(2).

The new causes of action asserted by the proposed amendments are beyond the two-year statute of limitations. Any cause of action arising out of the medical care rendered Brenda would have had to have been initiated by June 28, 2003. The vicarious liability and corporate negligence claims based on the conduct of the emergency room physician and the nurse/staff person are almost one year past the deadline. Therefore, the amendments regarding the conduct of the emergency room physician and the nurse/staff person cannot be permitted as they assert new causes of action beyond the statute of limitations.

Accordingly, the Motion for Leave to Amend based upon the right under Pa.R.C.P. 1033 will be denied.

Failure to Give Opportunity to Amend

The Court will now address whether its failure to permit Plaintiffs to file an amended complaint after granting the preliminary objections entitles Plaintiffs to now amend the Second Amended Complaint. Generally, a court should give a party an opportunity to amend his pleading after the court grants preliminary objections concerning that pleading. *See, In re Luongo*, 823 A.2d 942, 969 (Pa. Super. 2003). “The right to amend should not be withheld where there is some reasonable possibility that an amendment can be accomplished successfully.” *Otto v. American Mut. Assurance Co.*, 393 A.2d 450, 451 (Pa. 1978). However, there may be cases where it is clear that amendment is impossible or futile. *Ibid.; In re Luongo*, 823 A.2d at 969.

The Court did not abuse its discretion by not giving Plaintiffs an opportunity to amend after partially granting the Hospital Defendants’ preliminary objections in the May 13, 2003 Opinion and Order. Any amendment to the First Amended Complaint designed to remedy the shortcomings of the First Amended complaint could not have been accomplished. In order for the Plaintiffs to remedy the vague language of the First Amended Complaint Plaintiffs would have had to allege facts to support a cause of action against another physician or agent of the Defendant Hospitals whose conduct was negligent. Plaintiffs may not do this. As stated earlier in this Opinion, the original and First Amended Complaint only allege facts that support causes of action based on the conduct of the named defendant physicians. Basing a cause of action on the conduct of another individual would give rise to a new cause of action

and be beyond the statute of limitations. Therefore, it was no an abuse of discretion to not give Plaintiffs an opportunity to amend as it would have been impossible and futile.

Accordingly, the Motion for Leave to Amend based on the Court's failure to permit Plaintiffs to amend after the Hospital Defendants' preliminary objections were partially granted shall be denied.

ORDER

It is hereby ORDERED that Motion for Leave to Amend the Second Amended Complaint of Plaintiffs Joyce Blair, Joseph Blair, and Catherine Winnie filed June 15, 2004 is GRANTED IN PART and DENIED IN PART.

The Plaintiffs may amend Paragraph 81.4 of the Second Amended Complaint to read as follows: "Failure to perform appropriate diagnostic tests including tests ordered/performed by Defendant physicians."

All other proposed amendments shall not be permitted and the Motion is denied in all other respects.

BY THE COURT:

William S. Kieser, Judge

cc: Eileen A. Dgien, Deputy Court Administrator
C. Scott Waters, Esquire/Clifford A. Rieders (Plaintiff)
Matthew P. Keris, Esquire (Defendants W.H. & Mehta)
The Perry Law Firm; 300 Bank Towers
321 Spruce Street; Scranton, PA 18503
David R. Bahl, Esquire
Alan S. Baum, Esquire (Defendants NJ/PA; Datta; Simms)
Gaca, Matis, Baum & Rizza
300 Four PPG Place, Pittsburgh, PA 15222-5404
Judges
Christian J. Kalas, Esquire
Gary L. Weber, Esquire (Lycoming Reporter)