IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

THOMAS J. WICKHAM, JR., as Administrator on behalf of the Estate of JOSEPH J. GALLAGHER, Deceased, and on behalf of JOSEPH JOHN GALLAGHER, JR., a minor, Plaintiff	:	NO. 01-01,389
vs.	:	CIVIL ACTION - LAW
SUSQUEHANNA HEALTH SYSTEM, WILLIAMSPORT HOSPITAL, SURGICAL ASSOCIATES OF WILLIAMSPORT, INC., WILLIAM R. BELTZ, M.D., DEMETRI POULIS, M.D., and STEPHEN J. WOLFSON, M.D., Defendants	:	Motion in Limine

OPINION AND ORDER

Before the Court is a motion in limine filed by Defendants Susquehanna Health System and Williamsport Hospital on January 7, 2004. Argument was heard May 26, 2004.

As set forth in Defendants' motion, the gravamen of Plaintiff's complaint is that Plaintiff's decedent received improper or inadequate healthcare incident to his diagnosis and treatment in September 1999 and such led to his death on September 18, 1999. The Fourth Amended Complaint sets forth six counts: (1) a count of negligence directed at Dr. Wolfson, (2) a count of negligence directed at Drs. Beltz and Poulis and Surgical Associates, (3) a count alleging failure to obtain informed consent directed at Dr. Beltz, (4) a wrongful death action directed at all defendants, (5) a survival action directed at all defendants, and (6) a count of corporate negligence directed at Susquehanna Health System and Williamsport Hospital. The instant motion was prompted by Plaintiff's production of an expert report dated November 9, 2003, authored by Sheila J. DeRiso, R.N., in which it is concluded, inter alia, that Plaintiff's decedent was subjected to "deficient nursing care".

Defendants seek to preclude Plaintiff from presenting at trial any evidence of alleged nursing negligence, arguing that the Fourth Amended Complaint does not set forth any cause of action for such, and that amendment at this time is barred by the statute of limitations. Plaintiff

contends its theory of nursing negligence is indeed adequately set forth in the complaint, and also argues that the expert report specifically sets forth the theory of liability at issue. After a thorough reading of the Fourth Amended Complaint, the Court agrees with Defendants.

Plaintiff points to Paragraphs 25 through 31 in support of its argument that an action for nursing negligence is adequately set forth in the complaint.[1] Those paragraphs are contained in the introductory portion of the complaint (as opposed to any of the six counts) and read as follows:

> 25. Postoperatively, it was evident that Mr. Gallagher's color had changed, and he didn't look well.
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> 26. From that point on, Mr. Gallagher's condition continued to rapidly deteriorate. Ms. Gallagher Wickham alerted the nursing staff several times that Mr. Gallagher's stomach tube was backed up, but the nurses did not respond.
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> 27. Mr. Gallagher then told his mother that he felt sick to his stomach, and at approximately 10:00 a.m. on September 15, 1999, he began to frequently throw up bright red blood.
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> 28. Mr. Gallagher continued to throw up more and more blood as time went on.
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> 29. Ms. Gallagher Wickham continued to seek help, and finally, Mr. Gallagher was taken back to surgery on September 15, 1999.
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> 30. During the second surgery, an (sic) large abdominal blood clot was found.
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> 31. After the second surgery, Mr. Gallagher was taken to the ICU, where he remained in a comatose state.

Contrary to Plaintiff's contention, however, the Court believes these factual allegations are insufficient to put Defendants on notice that they must defend a nursing negligence cause of action.

The purpose of the pleadings is to place the defendants on notice of the claims upon which they will have to defend. McClellan v. Health Maintenance Organization of

[1] Defendants acknowledge Plaintiff has adequately alleged vicarious liability of Susquehanna Health System and Williamsport Hospital for any actions of the nurses involved herein; it is simply the failure to further allege negligence of the nurses which is at issue.

Pennsylvania, 604 A.2d 1053 (Pa. Super. 1992). A complaint must give the defendants fair notice of the plaintiff's claims and a summary of the material facts that support those claims. Id.; Pa.R.C.P. 1019(a). Further, the entire complaint must be considered in determining whether the defendant has been put upon adequate notice of the claim against which he must defend. Yacoub v. Lehigh Valley Medical Associates, 805 A.2d 579 (Pa. Super. 2002). A reading of the instant complaint would fairly lead the reader to conclude Plaintiffs were setting forth only those causes of action specifically set out in the six counts contained therein. That is, the allegations contained in paragraphs 25 through 31 are fairly read to apply to the claims of negligence against Drs. Beltz and Poulis and Surgical Associates contained in Count II,[2] and/or to the claim of corporate negligence against Susquehanna Health System and Williamsport Hospital contained in Count VI.[3] It is not apparent from paragraphs 25 through 31, or from anything else in the complaint, that a separate cause of action for nursing negligence is being pled.

Plaintiff contends nevertheless that Defendants have notice of the claim inasmuch as the theory of nursing negligence is specifically stated in the nurse expert's report. Specifically, Ms. DeRiso states: "All of the nurses who were involved in caring for this patient in the 7:00 a.m. shift to the 3:00 p.m. shift on September 15, 1999 should have recognized a number of important factors which were indicative of a gastrointestinal bleed: the hemoglobin and hematocrit continued to drop post-surgery and the patient was anemic on the morning of the 15th, the magnesium was also low at 1.2 and moreover, the patient was draining blood from his NG tube, there was an indication that the patient was vomiting red blood, and the patient's pulse rate was increasing and other vital signs showed evidence of hemodynamic compromise."

[2] In Paragraph 40(q) it is alleged Drs. Beltz and Poulis and Surgical Associates were negligent in "failing to ensure that prompt medical attention would be provided to plaintiff's decedent in the event he suffered abdominal hemorrhaging during and/or after the performance of the Whipple's procedure on September 13, 1999", and in Paragraph 40(s) it is alleged Drs. Beltz and Poulis and Surgical Associates were negligent in "failing to act within the accepted standards of medical care regarding the postoperative treatment of plaintiff's decedent and to ensure that prompt and corrective treatment would be provided in the event he sustained abdominal hemorrhaging."

[3] In Paragraph 54(a) it is alleged Susquehanna Health System and Williamsport Hospital are liable for corporate negligence for "failing to monitor the competence of its medical staff and the adequacy and propriety of the diagnostic skill and treatment rendered to plaintiffs' decedent", and in Paragraph 54(d) it is alleged Susquehanna Health System and Williamsport Hospital are liable for corporate negligence for "failing to establish and/or

She goes on to state: "all of these nurses deviated from the accepted standards of nursing care by failing on their part to notify a physician or other appropriate hospital personnel of the patient's deteriorating condition…" and "failure to recognize and manage the persistent decompensation of this patient represent blatant deviations from accepted nursing standards…." While these factual allegations and the conclusions the expert draws therefrom do indeed state a theory of nursing negligence,[4] the notice of a claim to which the cases refer must come from the complaint, or a proper amendment thereto.

It is well settled that a variance between the pleadings contained in a plaintiff's complaint and the theory the party later attempts to prove at trial may result in preclusion of the new theory if it constitutes a new cause of action and is prejudicial to the defense. Rachlin v. Edmison, 813 A.2d 862 (Pa. Super. 2002: Reynolds v. Thomas Jefferson University Hospital, 676 A.2d 1205 (Pa. Super. 1996). With respect to the first issue, a proposed amendment of the complaint which adds or changes the theory of recovery through the introduction of new factual allegations generally constitutes a new cause of action. Id. With respect to the issue of prejudice, an attempt to introduce a new cause of action after the statute of limitations has run has been determined to constitute prejudice such as would support preclusion. Id.

In the instant case, the allegations contained in the expert report differ materially from the allegations actually contained in the complaint, thus constituting a new cause of action. Further, Plaintiff appears to concede that the statute of limitations has run.[5] Therefore, to allow Plaintiff at this time to pursue a separate theory of nursing negligence[6] would unfairly prejudice Defendants and the motion in limine must be granted.

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enforce appropriate policies relating to emergency procedures to be utilized in the event a patient, like plaintiff's decedent, suffers abdominal hemorrhaging in connection with a surgical procedure."

[4] Actually, after reading the nurse expert's report, the Court is convinced that Plaintiff has not set forth a theory of nursing negligence in the complaint itself.

[5] The Court draws this conclusion from the fact Plaintiff does not argue that it has not.

[6] The Court wishes to point out that by granting the motion in limine, it is not precluding evidence of actions or inactions taken by nurses that relates to the theory of corporate negligence.

ORDER

AND NOW, this 16th day of June 2004, for the foregoing reasons, the motion in limine filed by Defendants Susquehanna Health System and Williamsport Hospital is hereby GRANTED. Plaintiff is hereby precluded from introducing any evidence in support of a claim of nursing negligence.

BY THE COURT,

Dudley N. Anderson, Judge

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