

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

DANIEL EZERO, Individually and as Administrator of the : Estate of Abby Ezero, M.D., Deceased, : Plaintiff :	DOCKET NO. 10-01023 CIVIL ACTION – LAW
vs. :	JURY TRIAL DEMANDED
THE WILLIAMSPORT HOSPITAL AND MEDICAL : CENTER; SUSQUEHANNA HEALTH SYSTEM; : SUSQUEHANNA HEALTH; JOEL OLIVER D’HUE, : M.D.; SUSQUEHANNA HEALTH MEDICAL GROUP; : HARRY DEAN MINTZER, D.O., and ANESTHESIA : ASSOCIATES OF WILLIAMSPORT, : Defendants :	ORDER RE: MOTION <i>IN</i> <i>LIMINE</i> – CONSENT and RENEWED MOTION TO AMEND RE: PUNITIVE DAMAGES CLAIM

OPINION AND ORDER

AND NOW, this ___ day of July, 2012, following oral argument on Plaintiff’s Motion *in Limine* to Preclude all Testimony, Evidence, Inference, and/or Argument that Plaintiff and/or Plaintiff’s Decedent Consented to the Procedures Planned and/or Performed by Defendants on October 23, 2009, and Renewed Motion for Leave to Amend Complaint to Set Forth a Claim for Punitive Damages, it is hereby ORDERED and DIRECTED that Plaintiff’s motions are DENIED. The Court will address each of these motions in turn.

I. Motion in Limine

Within its instant motion, Plaintiff requests that the Court preclude testimony, evidence, inference, or argument regarding Plaintiff or Abby Ezero’s choosing of, authorizing of, or consenting to Dr. D’Hue’s placement of the tracheotomy tube, as opposed to an endotracheal tube. This Court declines to do so. Initially, the Court notes that Plaintiff does not claim informed consent in the controlling complaint. Motion, 13. However, Plaintiff’s motion clearly seeks precluding evidence that tends to show that Abby Ezero was a *physician* who chose the procedure that she was to undergo on October 23, 2009. Within Plaintiff’s motions, Plaintiff

cites the statement that Dr. D'Hue did not know that Abby Ezero was a physician until after the surgery on October 23, 2009. Motion, Exhibit G, 38-39. Therefore, Plaintiff's counsel is attempting to preclude evidence from trial that indicates that Abby, a physician herself, conversed with another physician, Dr. D'Hue, about her two treatment options and then chose the option that put her in Dr. D'Hue's operating room on October 23, 2009. Defendants The Williamsport Hospital and Medical Center, Susquehanna Health System, Susquehanna Health, Joel Oliver D'Hue, M.D., and Susquehanna Medical Group oppose this motion because a portion of Plaintiff's negligence claims are based upon Dr. D'Hue's performance of the tracheotomy revision instead of the placement of an endotracheal tube. The Court notes that Defendants Dr. Mintzer and Anesthesia Associates of Williamsport did not take a position regarding this motion. Response, 8-9.

The Pennsylvania Rules of Evidence provide that relevant evidence is generally admissible. Pa. R.E. 402. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Pa. R.E. 401. The admission and exclusion of evidence is within the sound discretion of the trial court. *Jacobs v. Chatwani*, 922 A.2d 950, 960 (Pa. Super. Ct. 2007).

Additionally, the trial court has the discretion to entertain motions *in limine*. *Commonwealth v. Pikur Enterprises, Inc.*, 596 A.2d 1253, 1259 (Pa. Cmwlth. Ct. 1991). Motions *in limine* are pre-trial rulings regarding the admissibility of evidence. *Yacoub v. Lehigh Valley Med. Associates, P.C.*, 805 A.2d 579, 588 (Pa. Super.2002). Motions *in limine* exclude from the trial anticipated prejudicial evidence, keep extraneous issues out of the underlying

proceeding, preclude references to prejudicial matters, and prevent encumbering the record with immaterial evidence. *Id.*

In this matter, Defendants filed *in limine* motions to preclude the introduction of evidence regarding Plaintiff and/or Abby Ezero's consent, authorization, or agreement to the October 23, 2009 tracheotomy revision. In *In Re: Duran*, 769 A.2d 497 (Pa. Super. Ct. 2001), our Superior Court addressed an individual's right to control one's bodily integrity and informed consent. *Id.* at 503. That case addressed the right to refuse medical treatment. *Id.* at 500. While that case is not directly on point, the Court believes it is useful in addressing the issue before it.

Instantly, Plaintiff seeks preclusion of evidence that on October 23, 2009, at 15:47 hours, Plaintiff Daniel Ezero, husband of Abby Ezero, consented and authorized, on behalf of Abby Ezero, to Dr. D'Hue's surgery. Motion, Exhibit H; Hospital/Dr. D'Hue Response, Exhibit A. The authorization relays that Dr. D'Hue's should perform "direct laryngoscopy, bronchoscopy, revision tracheotomy" on Abby Ezero. *Id.* This authorization was not only signed by Plaintiff himself, but by Dr. D'Hue and a witness. Additionally, Plaintiff attempts to preclude portion of the deposition of Abby Ezero's father, Robert Stanley Borow, stating Abby Ezero chose to have her tracheotomy tube placed back in so that she could be conscious, rather than sedated, while traveling back to UPMC Shadyside. Hospital/Dr. D'Hue Response, Exhibit B, 20-21. Also, Plaintiff wants to preclude the portion of Dr. D'Hue's deposition, stating that Plaintiff and Abby Ezero told Dr. D'Hue that he could place the tracheotomy tube in Abby to secure her airway for transport to UPMC Shadyside. Hospital/Dr. D'Hue Response, Exhibit C, 84-85.

In the above-captioned matter, Plaintiff's motion attempts to preclude evidence that Abby Ezero chose, authorized, or consented to the procedure that she underwent on October 23, 2009. This Court finds that this evidence is relevant to Plaintiff's claim, especially those negligence

claims that pertain to the choice of the tracheotomy revision. Pa. R.E. 401-02. Additionally, this Court finds that the probative value of this evidence outweighs, substantially, any prejudice that Plaintiff might suffer. Pa. R.E. 403. The crux of Plaintiff's complaints against the objecting Defendants pertains to the choice and execution of the tracheotomy revision. This Court declines to preclude any evidence that was relayed from Abby Ezero or her family to Dr. D'Hue. Additionally, this Court notes that Plaintiff's damages claim is based upon the fact that Abby Ezero is a physician. Plaintiff may present evidence that Dr. D'Hue did not know Abby Ezero was a physician prior to the October 23, 2009 surgery. Therefore, based upon the foregoing, Plaintiff's above-mentioned motion *in limine* is DENIED.

II. Motion to Amend

Within its instant motion, Plaintiff requests this Court to revisit an issue that it has recently ruled upon. This Court declines to do such a thing. On November 23, 2011, Plaintiff moved for leave to amend the complaint to add a claim for punitive damages. At that time, Defendants responded to that issue raised by Plaintiff, and all parties briefed the topic. This Court issued an Opinion and Order dated January 5, 2012, and filed January 6, 2012, denying Plaintiff's motion to amend. On May 29, 2012, Plaintiff filed a renewed motion for leave to amend complaint to add a claim for punitive damages. Motion 17-18. In this renewed motion, Plaintiff merely attached and incorporated by reference the November 23, 2011 Motion for Leave to Amend Complaint to Set Forth a Claim for Punitive Damages and its supplemental brief. At oral argument on July 9, 2012, Plaintiff's counsel stated that the second motion to amend added no new facts or cited to no new authority on the topic of punitive damages.

In *Goldey v. Trustees of University of Pennsylvania*, 675 A.2d 264 (Pa. 1996), our Supreme Court held that "a later motion should not be entertained or granted when a motion of

the same kind has previously been denied, unless intervening changes in the fact or the law clearly warrant a new look at the question.” *Id.* at 267 (emphasis in original). In this instance, it is undeniable that the later motion to amend is a “motion of the same kind” as the current motion to amend, due to the fact that they are in fact the same motion. *Id.* Under the Pennsylvania Rules of Civil Procedure, a party may amend its pleading at any time by either a filed consent or leave of court. *See* Pa. R.C.P. 1033; *see also* *Ryan v. Berman*, 813 A.2d 792 (Pa. 2002) (Nigro, J., concurring). Trial courts should liberally grant motions to amend based upon changes in factual circumstances unless there is an error of law or resulting prejudice to the opposing party. *Conner v. Allegheny General Hospital*, 461 A.2d 600, 602 (Pa. 1983) (citing *Schaffer v. Larzelere*, 189 A.2d 267, 270 (Pa. 1963)).

In the instant matter, Plaintiff offers a second motion to amend to add a claim of punitive damages, yet this second motion to amend is identical to Plaintiff’s first motion to amend. Plaintiff offers no new facts or authority in support of its second motion to amend; Plaintiff merely files the exact same motion with the Court, five months after the Court’s initial ruling on the matter. The Court finds that its January 5, 2012 Opinion and Order constitutes the law of the case in regards to punitive damages, and the Court will not revisit such an issue without citation to new evidence or case law that would support Plaintiff’s current motion to amend. *See Goldey*, 675 A.2d at 267. Therefore, Plaintiff’s above-mentioned motion to amend is DENIED.

BY THE COURT,

Richard A. Gray, J.

RAG/abn

cc: Thomas Kline, Esquire/Amy Guth, Esquire
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