

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

MARK PALMER,	:	
Plaintiff,	:	
	:	NO. 13-01,871
v.	:	
MARK RACKISH, M.D., and	:	CIVIL ACTION – MEDICAL
WEST BRANCH ORTHOPEDICS AND SPORTS	:	PROFESSIONAL LIABILITY
MEDICIN, INC.,	:	
Defendants	:	MOTION IN LIMINE

OPINION AND ORDER

This matter is scheduled for a jury trial from September 15 – 17, 2015. At this time there are two matters before the Court. The first is the Defendants’ motion in limine, filed July 10, 2015, to preclude Plaintiffs’ experts, Carl T. Hasselman, M.D. and D. Stewart Macintyre, M.D., from testifying 1) that Dr. Rackish deviated from the standard of care by using or failing to remove internal fixation or 2) that the use or failure to remove the internal fixation was a cause of Plaintiff Mark Palmer’s injuries. Defendants’ primary contention is that expert opinions and testimony about the use and failure to remove internal fixation used in the care of Mr. Palmer are beyond the scope of the Complaint and not relevant to the issues of negligence that were pleaded. Argument was held on August 18, 2015. The second matter is Plaintiff’s oral motion made at argument held on August 18, 2015 to amend the complaint to specifically include the Defendants’ negligence for using and failing to remove internal fixation in the care of Mr. Palmer.

Factual Background.

The facts derived from Plaintiff’s complaint are as follows. This is a medical professional liability claim arising from the medical treatment of Mark Palmer following a Jet Ski accident on or about July 29, 2011. The accident occurred in the Susquehanna River. Dr.

Mark Rackish performed an open reduction surgery with internal fixation on Palmer's left ankle fracture. Palmer was discharged from the hospital on August 3, 2011 with a cast on his left ankle and foot. On August 4, 2011, Palmer reported to Dr. Rackish's staff that there was a foul odor coming from his cast. On August 5, 2011, Palmer was seen by staff at Dr. Rackish's office. The cast, dressing and pad were removed. The wound was "wet with oozing from blisters." The staff "washed the wounds with diluted peroxide, redressed it, and applied a new cast." Complaint, ¶13. On the morning of August 8, 2011, Palmer reported to the staff at Dr. Rackish's office that the foul odor returned the previous day. Palmer was "told that this issue would be addressed during his regular post-operative appointment on August 11, 2011." Complaint, ¶15. On August 11, 2011, Palmer had the same oozing that was present on August 5. Dr. Rackish took a culture to check for infection. Complaint, ¶16. The culture identified "serious infections affecting" the wound caused by bacteria of a type expected to be encountered from a traumatic fresh water injury. Complaint, ¶¶ 18, 19.

In the complaint, Mr. Palmer avers that Dr. Rackish "failed to exercise the judgment, care and skill of a reasonable health care provider *under the circumstances* as follows:

- a. ***Failed to recognize that Plaintiff Mark Palmer, having sustained an ankle fracture in the Susquehanna River, was at heightened risk for infections typical to injuries sustained in fresh water accidents;***
- b. Failed to wash out the wound properly in connection with surgery;
- c. Failed to prescribe prophylactic antibiotics designed to fight infections typical to injuries sustained in fresh water accidents;
- d. Failed to determine that Plaintiff Mark Palmer suffered from an infection when his office was first advised of a foul odor emanating from Plaintiff's cast on August 5, 2011;
- e. Failed to take appropriate action by ordering a culture on August 5, 2011;
- f. Failed to modify and/or alter Plaintiff's antibiotics on August 5, 2011;
- g. Failed to take any action whatsoever on Monday, August 8, 2011, when Plaintiff Mark Palmer advised Defendants that the foul odor emanating from his cast had returned;

- h. Failed to instruct Plaintiff Mark Palmer to seek any medical attention on Monday, August 8, 2011, when advised by Plaintiff Mark Palmer the foul odor emanating from his cast had returned;
- i. Failed to alter and/or modify Plaintiff's antibiotics as a result of being advised on August 8, 2011, that he foul odor emanating from Plaintiff's cast had returned;
- j. Failed to identify and appreciate that on August 11, 2011, Plaintiff Mark Palmer was indeed suffering from the effects of an infection;**
- k. Failed to modify and or alter Plaintiff's antibiotic to account for Plaintiff's risk and/or the signs of infection caused by bacteria known to be prevalent in fresh water while the culture was pending." Complaint, ¶ 22 (emphasis added).

Beyond the Scope of the Complaint

Defendants' contend that the use and failure to remove internal fixation in the care of Mr. Palmer are new theories of negligence beyond the scope of the complaint and not relevant to the issues of negligence that were pleaded. In particular, Defendants emphasize that the complaint fails to specifically mention the use and removal of internal fixation. By contrast, Mr. Palmer asserts that "the failure to use and remove the internal fixation hardware are part and parcel of the crux of their claim of negligent treatment by Dr. Rackish[.]" This Court agrees with Mr. Palmer.

The gist of the complaint is that, under the circumstances of a an open fracture sustained in the Susquehanna River, the heightened risk for infection required different care than that provided by Dr. Rackish. See, Complaint, ¶ 22 a. Further, since - under the circumstances - Mr. Palmer faced a heightened risk for infections typical to injuries sustained in fresh water accidents, Dr. Rackish failed to properly identify and treat Mr. Palmer on August 11, 2011 as he presumably would have if he had appreciated the effects of the infection at that time. See, Complaint, ¶ 22 j. As noted by Dr. Hasselman, "[u]pon examination by Dr. Rackish on August 11, 2011, the patient should have been admitted immediately for urgent irrigation and debridement, removal of hardware and application of an external fixator." Dr. Hasslemans' Expert Report, at 1-2, cited in Plaintiff's brief at 5-6. As such, the Court concludes that the use

and failure to remove the hardware was part of the theory of negligence alleged in the complaint. The use of internal hardware was well within the scope of the complaint. The Court's conclusion is supported by the opinion in Plaintiff's expert reports which explain the standard of care treatment for an individual sustaining an open fracture in the Susquehanna River.

Leave to Amend to Amplify the Complaint

Even if the use and failure to remove internal fixations was beyond the scope of the complaint, it is appropriate to grant Mr. Palmer's motion to amend because the use and failure to remove the internal fixation is an amplification of the negligence pleaded and because there is no prejudice to the Defendants.

The Pennsylvania Supreme Court has long held that "the right to amend should be liberally granted at any stage of the proceedings unless there is an error of law or resulting prejudice to an adverse party[.]" Conner v. Allegheny General Hospital, 501 Pa. 306, 461 A.2d 600 (Pa. 1983), *quoting*, Schaffer v. Larzelere, 410 Pa. 402, 406-07, 189 A.2d 267, 270 (Pa. 1963) *and citing*, Laursen v. General Hospital of Monroe County, 494 Pa. 238, 243, 431 A.2d 237, 239 (Pa. 1981). *See also*, Pa. R.C.P. 1033. Once the statute of limitations has run, "a plaintiff may not introduce a new cause of action ... but may ... amplify what has already been averred ..." as negligence. Arner v. Sokol, 373 pa. 587, 96 A.2d 854 (Pa. 1953)(citations omitted). "[I]f the proposed amendment does not change the cause of action but merely amplifies that which has already been averred, it should be allowed even though the Statute of Limitations has already run[.]" Schaffer, *supra*, 189 A.2d at 270 (*citing*, Arner, *supra*, other citations omitted.) *see also*, Laursen, *supra* (Amendment allowed to correct dates of negligent acts.). The applicable test recognized in Arner, involves the following inquiry:

...whether an amended statement presents a new and different cause of action..., would a judgment bar any further action on either, does the same measure of damages support

both, is the same defense open in each and is the same measure of proof required? Arner, supra, 96 A.2d at 856.

If the answer is “yes” then there is no new cause of action and the amendment should be granted.

In Arner, the Supreme Court poignantly noted the following.

The day of tight-rope walking in pleading when one slight misstep on the part of the attorney plunged his client’s cause into the abyss of extinction is happily gone. “It is the consistent policy of the courts to give full opportunity to parties to plead their cause of action, if they have one, and not turn them out of court for technical errors. Arner, supra, 96 A.2d at 856 (citations omitted.)

In the present case, the amendment merely amplifies the negligence already plead in the complaint. The question of negligence posed by the complaint is whether Dr. Rackish complied with the standard of care in his initial treatment of Mr. Palmer’s open fracture that occurred in the Susquehanna River, given the heightened risk for infection, and whether, in light of the examination of Mr. Palmer on August 11, 2015, Dr. Rackish’s continued course of treatment complied with the standard of care.

Furthermore, Defendants suffer no prejudice from the amendment. No prejudice occurs when, as in the instant matter, an amendment is a mere amplification of the negligence already pled. In addition, the expert report dated October 30, 2013 provided a clear picture of the negligence in the complaint as to the initial treatment and continuing treatment. The issue was discussed at the pre-trial and at argument in other motions. The topic was the subject of depositions of the experts, including Dr. Rackish himself. The Court concludes that there is no prejudice or surprise to allowing the amendment; rather it would be an abuse of discretion not to do so.

ORDER

AND NOW, this 20th day of **August, 2015**, for the foregoing reasons, it is ORDERED and DIRECTED that Defendants' motion in limine is DENIED,¹ and Plaintiff's oral motion to amend the complaint is GRANTED.

BY THE COURT,

August 20, 2015

Date

Richard A. Gray, J.

cc: Michael J. Zicoello, Esq.
Robert A. Seiferth, Esq.
C. Edward S. Mitchell, Esq. & Jessica L. Harlow, Esq.

¹ By prior order of court filed July 9, 2015, Dr. MacIntyre is precluded from providing standard of care testimony or providing testimony that would permit the jury to speculate that using internal fixation or failing to get a consult was a deviation as to the standard of care. However, Dr. MacIntyre is permitted to provide causation testimony as to whether the use or failure to remove the internal fixation was a cause of Mr. Palmer's injuries.