IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

ROBIN BARNES and WILLIAM V. AMES as Husband and Wife, Plaintiffs,	:	No. 20-0092
vs.	:	CIVIL ACTION - LAW
WILLIAMSPORT PETROLEUM, INC.; SUNOCO RETAIL, LLC; AND MURTZA SHAH, Defendants.	:	*Plaintiffs' Preliminary Objections to Defendants' New Matter*

O R D E R

AND NOW, following argument held October 6, 2020 on Preliminary Objections to New Matter, the Court hereby issues the following ORDER.

By Complaint filed on June 12, 2020, Plaintiffs Robin Barnes and William V. Ames (collectively "Plaintiffs") allege that Defendants Williamsport Petroleum, Inc., Sunoco Retail, LLC, and Murtza Shah are liable for Plaintiff Robin Barnes' slip-and-fall accident, which occurred at a parking lot owned, operated and maintained by Defendants while Ms. Barnes was present as a business invitee. Plaintiffs assert claims of negligence and loss of consortium. Defendants Williamsport Petroleum, Inc., and Sunoco Retail, LLC (collectively "Defendants"), who precede jointly, filed an Answer and New Matter to the Complaint on August 4, 2020.[1] Plaintiffs filed Preliminary Objections to New Matter on August 26, 2020, endorsed with a Notice to Plead. Defendants filed an Answer to the Preliminary Objections on September 4, 2020. Defendants then filed a Brief in Opposition to the Preliminary Objections on October 5, 2020.

The substance of Plaintiffs' Objections to New Matter is that paragraphs 20-36, comprising the entirety of the affirmative defenses raised in Defendants' New Matter, merely assert boilerplate legal conclusions absent any facts. Plaintiffs assert that pursuant to Pa.R.C.P. 1019(a), a party must plead the material facts forming the basis of a cause of action or defense. Plaintiffs cite this Court's prior *en banc* ruling in *Allen v. Lipson* for the proposition that Rule 1019(a) applies not only to the pleadings in a

[1] Defendant Murtza Shah has yet to file a response.

Complaint, but to New Matter as well.[2] Plaintiffs request that the entirety of New Matter be stricken.

In *Allen v. Lipson*, Judge Clinton W. Smith, writing the majority Opinion joined by Judge Kenneth D. Brown, ruled that just as the Pennsylvania Supreme Court's decision in *Connor v. Allegheny General Hospital* effectively required that general averments within a complaint be stricken upon objection for lack of specificity, affirmative defenses pled within new matter unsupported by material facts should also be stricken upon objection. The Court reasoned that a party asserting an allegation should bear the onus of supporting that allegation and maintained that allowing a defendant to assert factually unsupported defenses in new matter could subject the plaintiff to unfair surprise at time of trial. The Court held that Pa.R.C.P. 1030, which required all affirmative defenses be pled in new matter or be subject to waiver, was not inconsistent with the mandates of Pa.R.C.P. 1019(a), which required the pleading of material facts forming the basis of a cause of action or defense.[3] In response to defense counsel's argument that defendants could not reasonably determine the factual basis for all affirmative defenses within the statutory timeframe for filing an answer and new matter, the Court provided that fairness could be assured by providing defendants a reasonable time to amend their new matter.[4] The Court noted that absent such a ruling, "there is no doubt that boilerplate affirmative defenses could become commonplace and this would greatly increase the plaintiffs' burden in discovery and the possibility of plaintiffs having to defend a surprise claim at the time of trial."[5]

Judge Brown, in his concurring Opinion, noted that, "[t]o allow a party in defense to engage in non-factual pleading by simply asserting a defense does not help define the real issues of a case or put the opposing party on notice of the claims (defenses) which will actually be litigated."[6] In his dissenting Opinion, President Judge Thomas C. Raup asserted that the *Connor* decision should not be interpreted as applying to pleadings within new matter as with a complaint, noting that while a plaintiff has years to prepare a complaint, a defendant has only twenty days to file a response or risk

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[2] *See Allen v. Lipson*, 8 Pa. D & C 4th 390 (Lyco. Cty. 1990).
[3] *Id.* at 393.
[4] *Id.* at 395.
[5] *Id.*

suffering a default judgment.[7] However, he acknowledged that the majority opinion would provide certainty for litigants as to the manner in which the Lycoming County Court would henceforward address this issue.[8]

Defendants in their Brief in Opposition to the Preliminary Objections do not challenge Plaintiffs' characterization of New Matter, but instead assert that Pa.R.C.P. 1019(a) does not apply to New Matter and that *Allen v. Lipson*, which was decided in 1990, no longer remains good law following the 1994 revisions to Rule 1030. At the time *Allen v. Lipson* was decided, Rule 1030 provided:

> All affirmative defenses including but not limited to the defenses of accord and satisfaction, arbitration and award, assumption of risk, consent, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fair comment, fraud, illegality, immunity from suit, impossibility of performance, justification, laches, license, payment, privilege, release, res judicata, statute of frauds, statute of limitations, truth and waiver shall be pleaded in a responsive pleading under the heading "New Matter". A party may set forth as new matter any other material facts which are not merely denials of the averments of the preceding pleading.

Following the 1994 revisions, this language was amended into subdivision (a) of Rule 1030, with a subdivision (b) added that provides, "[t]he affirmative defenses of assumption of the risk, comparative negligence and contributory negligence need not be pleaded." The explanatory note to Rule 1030 states that if assumption of the risk, comparative negligence, or contributory negligence are pled in new matter, those defenses are presumed denied and do not require a response. Further, if assumption of the risk, comparative negligence, or contributory negligence are not pled within new matter, those defenses will not be deemed waived.[9]

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[6] *Id.* at 396 (Brown J., concurring).
[7] *Id.* at 398 (Raup C.J., dissenting).
[8] *Id.* at 397 (Raup C.J., dissenting).
[9] Pa.R.C.P. 1032(a) ("A party waives all defenses and objections which are not presented either by preliminary objection, answer or reply, except a defense which is not required to be pleaded under Rule 1030(b), the defense of failure to state a claim upon which relief can be granted, the defense of failure to join an indispensable party, the objection of failure to state a legal defense to a claim, the defenses of failure to exercise or exhaust a statutory remedy and an adequate remedy at law and any other nonwaivable defense or objection.").

As Plaintiffs correctly note, *Allen v. Lipson* remains binding authority within this County even after the 1994 revision to Rule 1030.[10] The doctrine of *stare decisis* applies; while the Court will not continue to adhere to precedent clearly in error, the reasoning provided in support of the majority opinion within *Allen v. Lipson* remains sound.[11] The Court agrees it is inequitable to "put the onus on plaintiffs to conduct extensive discovery to disprove a factually unsupported allegation rather than requiring the defendants who asserted the allegation to marshal the facts to support it."[12] The only alteration that the revised Rule 1030 presents to this calculus is that defendants are no longer required to plead assumption of the risk, comparative negligence, or contributory negligence within new matter to preserve those claims, which only lessens the pleading burden upon the defendants.[13]

The Court finds that the litany of affirmative defenses raised in Defendants' New Matter are mere legal conclusions unsupported by any facts raised or claimed, and as such could fairly be described as "boilerplate." The Court therefore SUSTAINS Plaintiffs' Preliminary Objections to paragraphs 20-36 of Defendants' Answer and New Matter. Defendants shall be provided sixty (60) days from the date of this Order to file an Amended Answer and New Matter providing factual support for the asserted affirmative defenses.

IT IS SO ORDERED this 22nd day of October 2020.

BY THE COURT,

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Eric R. Linhardt, Judge

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[10] *See e.g.*, *Meyers v. Carey*, CV-11-1166; Op. & Ord. (Lyco. Cty. April 24, 2012) (holding that general averments within new matter would be stricken on objection).

[11] *See Ario v. Reliance Ins. Co*980 A.2d 588, 599 (Pa. 2009) (Castille C.J., concurring) ("The precedential decisions of [the Pennsylvania Supreme] Court are binding throughout Pennsylvania, including upon this Court, and the precedential decisions of the lower courts bind those courts as well."); *see also Pries v. W.C.A.B. (Verizon Pennsylvania)*, 903 A.2d 136, 144 (Pa. Commw. 2006) (citing *Pa. Ass'n of Milk Dealers v. Pa. Milk Mktg. Bd.*, 685 A.2d 643 (Pa. Commw. 1996)) ("Under stare decisis, we are bound to follow the decisions of our Court unless overruled by the Supreme Court or where other compelling reasons can be demonstrated.").

[12] *Allen*, 8 Pa. D & C 4th at 393.

ERL/cp

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[13] The Court notes that a failure to set forth a cause of action upon which relief can be granted, as asserted in paragraph 21 of Defendants' New Matter, is also a defense that cannot be waived. However, it is also not an affirmative defense and therefore does not need to raised in New Matter.