

**IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA**

|                                |                                |
|--------------------------------|--------------------------------|
| ALDEN J. EVANS, SR.,           | : No. CV 20-0879               |
| Plaintiff                      | :                              |
| VS                             | :                              |
|                                | :                              |
| NATHALIE LAVALLEE, M.D.;       | : Civil action, Law            |
| TIMOTHY PASTORE, M.D.; KRISTIN | :                              |
| ADKINS, CRNA; THE WILLIAMSPORT | :                              |
| HOSPITAL; THE WILLIAMSPORT     | :                              |
| HOSPITAL d/b/a WILLIAMSPORT    | :                              |
| REGIONAL MEDICAL CENTER;       | :                              |
| UPMC SUSQUEHANNA f/k/a         | :                              |
| SUSQUEHANNA HEALTH SYSTEM      | :                              |
| and ANESTHESIA ASSOCIATES OF   | :                              |
| WILLIAMSPORT, INC.,            | : Motion to assert crossclaims |
| Defendants                     | :                              |

**OPINION AND ORDER**

This matter came before the Court on Plaintiff's Motion to Establish Jury Trial Dates and on the Motion of Defendants Timothy Pastore, M.D. and Anesthesia Associates of Williamsport, Inc. (hereinafter "Movants") to assert cross claims. After oral argument on the Motion as originally filed, Movants filed an Amended Motion, seeking to file an Amended New Matter to both assert affirmative defenses, and to assert cross claims. It appears to this Court that the planned cross claims are a response to the fact that other Defendants have settled with the Plaintiff, with the result that Movants will be the only remaining Defendants at trial.

Amendment of pleadings is controlled by Pa.R.C.P. 1030, which provides that "an amendment may be made to conform the pleading to the evidence offered or admitted." Thus, the Rule has been repeatedly interpreted to favor liberal amendment, in order to secure a determination of each case on its merits. Conversely, amendment will not be permitted where the amendment will surprise or prejudice the opposing party. *Horowitz v. Universal Underwriters Insurance Company*, 397 Pa.Super. 473, 479, 580 A.2d 395 (1990), citing *Robinson Protective Alarm Company v. Bolger & Picker*, 512 Pa. 116, 516 A.2d 299, n. 6 (1986); and *Soxman v. Goodge*, 372 Pa.Super. 343, 346-47, 539 A.2d 826, 828 (1988). Even

where the party proposing amendment is tardy, the lateness of the proposed amendment may only be considered in the context of potential prejudice to the non-moving party *Horowitz v. Universal Underwriters Insurance Company*, 397 Pa.Super. 473, 479, 580 A.2d 395 (1990), citing *Gutierrez v. Pennsylvania Gas & Water Company*, 352 Pa. Super 282, 286, 507 A.2d 1230, 1232 (1986).

Based upon the initial oral argument, it appears that this matter will be the subject of a jury trial in early January 2023. The facts of the matter were thoroughly reviewed by the Honorable Ryan M. Tira in his Opinion filed December 3, 2020. The matter arose out of a surgical procedure which occurred on October 30, 2019. Defendant, Dr. Lavallee, failed to announce that she was about to use Bovie cautery. She also failed to turn off oxygen for at least 60 seconds prior to its use. When she began use of the Bovie cautery, a fire ignited resulting in severe burns and other injuries to the Plaintiff.

On January 19, 2021, Plaintiff filed Preliminary Objections to the New Matter filed by Movants on January 14, 2021. Plaintiff cited the *en banc* decision of this Court in the matter of *Allen v. Lipson*, 8 D. & C. 4<sup>th</sup> 390 (1990), and attached both a copy of the Opinion and Order of the Honorable Clinton W. Smith, P.J. in the matter of *Trimble v. Beltz, et. al.*, Lycoming County docket 98-01,720, and the Opinion and Order dated August 5, 2004, of the Honorable William S. Kieser, in the matter of *Adams v. Beyer, et. al.*, Lycoming County docket 01-01,767. Simply stated, Plaintiff asserted that Movant's original New Matter lacked the material facts required by Rules 1019(a) and 1030 of the Pennsylvania Rules of Civil Procedure. By stipulation filed February 16, 2021, the parties agreed that Defendants Pastore and Anesthesia Associates of Williamsport, Inc. could file an Amended New Matter, through sixty (60) days prior to the close of discovery.

A scheduling Order was filed on February 24, 2021, and later amended by Order filed December 10, 2021. The scheduling Order filed to December 10, 2021, provided a cut off for

completion of discovery of January 10, 2021, and the exchange of expert reports thereafter. At this stage of the proceeding, discovery is completed, the parties have exchanged both expert reports and pretrial memos, and the matter is clearly ready for a jury trial.

The sole consideration for this Court in judging the instant Motion is whether it presents prejudice to the Plaintiff. The Courts of this Commonwealth have suggested that, even in the presence of prejudice, the Court should consider permitting the requested amendment, and continuing the case to mitigate prejudice.

To the extent that Movants seek to file an Amended New Matter for the purpose of asserting affirmative defenses, the Motion will be granted. Plaintiff agreed long ago that Movants would be permitted to file an Amended New Matter. While now untimely, this Court finds little prejudice to the Plaintiffs from permitting the filing of affirmative defenses which were raised long ago, but stricken by stipulation. Movants are reminded that the permitted affirmative defenses must contain the material facts required by Rule 1019(a). See, *Donegal Mutual Insurance Company v. Stroker*, 2010 WL 5571389 (Pa. Monroe County 2010), citing *Lee v. Denner*, 76 Pa. D. & C. 4<sup>th</sup> 181, 190 (2005). The proposed New Matter attached to Movant's Amended Motion is woefully inadequate. If Movants' Amended New Matter fails to comply with Rule 1019(a), this Court may be compelled to grant Preliminary Objections in the nature of a Motion to Strike.

With regard to Movants' request to file "eleventh hour" cross claims, that Motion will be denied. The Court finds that the requested cross claims will prejudice the Plaintiff, and that a mere continuance would be inadequate to remedy that prejudice. The facts of this matter were well known to Movants, long ago. Movants made a conscious strategy decision to defend Plaintiff's claim on the merits, and to forgo any cross claims. The parties have completed discovery and exchanged expert reports, and the matter is now ripe for trial. The requested cross claims are obviously intended to "redirect" Plaintiff's case away from Movants, and toward other

Defendants with whom Plaintiff has settled his claims. The requested cross claims would invariably result in amendment or replacement of exchanged experts reports. Plaintiff would be required to re-analyze his entire trial strategy, and a lengthy continuance of the trial would result.

This Court finds that requiring the Plaintiff to undergo that new analysis within a few months of the planned jury trial would present manifest prejudice, which cannot be mitigated merely through a continuance of the trial. For that reason, Movants' request to amend the pleadings to assert cross claims will be denied.

And now, this \_\_\_\_\_ day of October, 2022, the Motion of Defendants Timothy Pastore, M.D. and Anesthesia Associates of Williamsport, Inc. seeking to file an Amended New Matter is granted in part and denied in part. Movants are granted leave of Court to file an Amended New Matter, asserting affirmative defenses. That Amended New Matter shall comply with the applicable provisions of the Pennsylvania Rules of Civil Procedure, including Rule 1019(a). The Motion of Defendants Timothy Pastore, M.D. and Anesthesia Associates of Williamsport, Inc. seeking to file an Amended New Matter asserting cross claims is denied.

By The Court,

William P. Carlucci, Judge

cc: Brian J. Bluth, Esquire  
Clifford A. Rieders, Esquire/  
Sean P. Gingerrich, Esquire  
John R. Hill, Esquire

WPC/TSR