IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

MARY J. MYERS and GARY MYERS, husband and wife,	:	
Plaintiffs	:	**NO. CV-20-1013**
vs.	:	
	:	**CIVIL ACTION - LAW**
R. CLIFFORD MIHAIL, M.D.; EAR, NOSE, AND THROAT of UPMC SUSQUEHANNA; SUSQUEHANNA HEALTH ENT; SUSQUEHANNA PHYSICIAN SERVICES; and SUSQUEHANNA HEALTH MEDICAL GROUP,	:	**Preliminary Objections to Defendant's New Matter**
Defendants	:	

OPINION AND ORDER

This matter is before the Court on Plaintiffs' Preliminary Objections to Defendant, R. Clifford Mihail, MD's [hereinafter "Dr. Mihail"] Amended Answer and New Matter to Plaintiffs' Second Amended Complaint. For the following reasons, the Preliminary Objections are sustained in part and overruled in part.

I. Factual History

The following relevant facts are set forth in Plaintiffs' Complaint:

On February 26, 2018, Plaintiff, Mary Myers [hereinafter "Ms. Myers] was diagnosed with an enlarged thyroid gland. *See Plaintiffs' Complaint at Paragraph 11.* She first saw Dr. Mihail for a consult on April 25, 2018. *See Plaintiffs' Complaint at Paragraph 12.* Upon Dr. Mihail's recommendation, Ms. Myers underwent a total thyroidectomy performed by Dr. Mihail on February 26, 2019. *See Plaintiffs' Complaint at Paragraph 22.* Plaintiffs claim that Ms. Myers never consented to the procedure because no one explained the risks and potential complications to her. *See Plaintiffs' Complaint at Paragraph 21.*

In March 2019, it is noted that Ms. Myers was complaining of hoarseness. *See Plaintiffs' Complaint at Paragraph 27.* On August 2, 2019 and October 8, 2019, Ms. Myers was diagnosed by a subsequent treating physician with bilateral vocal cord paralysis and glottal incompetence with dysphagia. *See Plaintiffs' Complaint at Paragraphs 31 and 42*. Since then, Ms. Myers has undergone several treatments and procedures and continues to suffer complications including shortness of breath, breathing and swallowing, hoarseness, and inability to speak. *See Plaintiffs' Complaint at Paragraphs 33—50.* Among other things, Plaintiffs claim that Dr. Mihail was negligent in his performance of the total thyroidectomy on Ms. Myers when he failed to "protect her nerves during [the procedure] or failed to test them for integrity or transected them." *See Plaintiffs' Complaint at Introduction Paragraph.*

II. Procedural History

This medical malpractice action was initiated by the filing of a Complaint on October 14, 2020. Following the filing of preliminary objections to the Complaint, an Amended Complaint was filed December 7, 2020 and a Second Amended Complaint, which is now the operative Complaint, was filed January 13, 2021. The Second Amended Complaint contains four (4) Counts: Negligence against Dr. Mihail; Informed Consent against Dr. Mihail; Vicarious Liability against all Defendants except Dr. Mihail; and Loss of Consortium against all Defendants.

Dr. Mihail filed an Answer and New Matter to Plaintiffs' Second Amended Complaint on July 6, 2021 to which Plaintiffs filed Preliminary Objections. In response, Dr. Mihail filed an Amended Answer and New Matter on August 5,

2021. Plaintiffs again filed Preliminary Objections to the New Matter on August 20, 2021. The parties have briefed the issues and argument was held on October 1, 2021. This matter is now ripe for decision.

III. Discussion

Plaintiffs take issue with the following paragraphs of Dr. Mihail's New Matter and ask that they be stricken: Paragraphs 69 through 74 and 76 through 78.

a. Standard of Review

Preliminary objections may be filed by any party to any pleading for "failure of a pleading to conform to law or rule of court" or "for insufficient specificity in a pleading." Pa.R.C.P. 1028(a)(2) and (3). Affirmative defenses, including consent and statute of limitations, are to be pled in New Matter and are waived if a party so fails. Pa.R.C.P. 1030(a); Pa.R.C.P. 1032(a). "When considering preliminary objections, all material facts set forth in the challenged pleadings are admitted as true, as well as all inferences reasonably deducible therefrom." *Richmond v. McHale*, 35 A.3d 779, 783 (Pa. Super. 2012). Conclusions of law, unwarranted inferences from the facts, argumentative allegations or expressions of opinion, however, should not be accepted as true. *Myers v. Ridge*, 712 A.2d 791, 794 (Pa.Cmwlth. 1998).

It is well settled that Pennsylvania is a fact pleading state, meaning that pleadings must put the opponent on notice of the issues. *Foster v. UPMC*, 2 A.3d 655, 666 (Pa.Super. 2010). According to the Rules of Civil Procedure, "the material facts on which a cause of action *or defense* is based shall be stated in concise and summary form." Pa.R.C.P. 1019(a) (emphasis added). "The Rules of

Civil Procedure are in place to ensure that new matter not only gives the opposing party notice of any affirmative defenses, but also makes clear the grounds upon which it rests by including a summary of the facts essential to support that defense." *Lee v. Denner*, 76 Pa.D.&C.4th 181, 191 (C.P. Monroe 2005) (internal citations omitted). This Court, in *Allen*, extended the holding in *Connor v. Allegheny General Hospital*,[1] and stated that "defendants must plead in their new matter the material facts on which an affirmative defense is based." *Allen v. Lispon*, 8 Pa.D.&C.4th 390, 394 (C.P. Lycoming 1990).

b. Analysis

Plaintiffs' argument is essentially broken down into the following four sections and therefore, the Court will address each separately:

1. Paragraphs 69 and 76;
2. Paragraphs 70 – 73;
3. Paragraph 74; and
4. Paragraphs 77 and 78.

i. Paragraphs 69 and 76

Paragraph 69 states that "Plaintiff's claims are limited and/or barred because the Plaintiff knowingly consented to medical treatments provided by the within named Answering Defendant and all normal and acceptable risks, benefits and alternatives of such medical procedures were fully explained to the Plaintiff prior to rendering any such medical care."

[1] *Conner* is the seminal case in which the Pennsylvania Supreme Court held that general allegations in a complaint could allow plaintiffs amend it even after the running of the statute of limitations. *Conner v. Allegheny General Hospital*, 461 A.2d 600 (Pa. 1983). Since then, this rule has been used by Pennsylvania courts to preclude general allegations in complaints.

Paragraph 76 states that "Plaintiffs' claims are time-barred by failing to institute suit within the applicable Statute of Limitations."

Plaintiffs argue that these paragraphs are devoid of any material facts and therefore, should be stricken. Dr. Mihail argues that consent and statute of limitations are affirmative defenses, which would have been waived if not pled.

This Court has previously held, in *Trimble v. Beltz*, that New Matter raising "the statute of limitations to the extent that evidence obtained during discovery or during trial may indicate that the plaintiffs' claims are time barred" was overly broad, contained no material facts and was stricken from the pleadings. *Trimble, et al v. Beltz, et al*, No. 98-01720, at **2, n3 and 6 (C.P. Lycoming April 27, 2000).

The Rules of Civil Procedure are clear that consent and statute of limitations are affirmative defenses which must be pled. Pa.R.C.P. 1030(a). However, the Court agrees with Plaintiffs that Paragraph 76 relating to statute of limitations entirely lacks any facts that support the allegation that Plaintiffs have not timely filed their cause of action. For example, Dr. Mihail should have at the very minimum provided the date he alleges the statute to have run with accompanying reasons. For this reason, Plaintiffs' Preliminary Objection is sustained.

The Court finds though, as relates to Paragraph 69, that Dr. Mihail pled sufficient supporting factual allegations relating to consent. This allegation goes past simply stating that consent was given. Rather, Dr. Mihail also alleges that the risks, benefits, and alternatives of the procedure were provided to Plaintiff. Therefore, Plaintiffs' Preliminary Objection relating to Paragraph 69 is overruled.

ii. Paragraphs 70 – 73

Paragraph 70 states that "the within Answering Defendant herewith incorporates by references the applicable defenses provided under the [MCARE] Act with regard to Plaintiffs' claims for past medical expenses or past loss [sic] earnings incurred to the time of trial under 40 P.S. §1303.508 . . . and with regard to Plaintiffs' claims for future damages for loss of earnings or earning capacity being reduced to present value under 40 P.S. §1303.510 . . . ."

Paragraph 71 states that "any award given to the Plaintiffs shall be offset by any public collateral source of compensation or benefits . . . under Section 508 . . . ."

Paragraph 72 states that "in the absence of a special contract in writing, a healthcare provider is neither a warrantor nor a guarantor of a cure, and such provision bars the claims of the Plaintiffs in this case" pursuant to 40 P.S. §1303.105.

Paragraph 73 states that "the Plaintiffs' claims are barred as there was no contract between the Plaintiff and the Answering Defendant regarding the care and treatment provided by said Answering Defendant."

"An affirmative defense, by definition, raises new facts and arguments that, if true, defeat the plaintiff's claim, even if all the allegations contained in the complaint are true." *R.H.S. v. Allegheny Cty. Dep't of Hum. Servs., Off. of Mental Health*, 936 A.2d 1218, 1227 (Pa.Cmwlth. 2007). Trial courts have previously held that New Matter invoking "all affirmative defenses of the [MCARE Act]" is "so broad that it [sic] difficult for Plaintiffs to determine which particular provision the

Defendants' are relying upon as their defense." *Weaver, et al v. Barnes, et al*, No. 2008-214, at *1-2 (C.P. Centre Dec. 17, 2008).

Specifically, this Court in *Klay v. Hilliker, MD, et al*, held that the following sections of the MCARE Act are not affirmative defenses since they will not dispose of the plaintiffs' claims and therefore, are improper New Matter: Section 504 relating to informed consent; Section 509, relating to determination and payment of damages; Section 508, relating to determination and payment of damages; and Section 510, relating to loss of future earning capacity. *Klay v. Hilliker, MD, et al*, 01-01522, at **2 and 4 (C.P. Lycoming Oct. 18, 2002). These sections are concerned with either establishing a legal duty or are concerned with limits of recovery, and "have nothing to do with establishing liability or lack there of [sic]." *Id.* at *4.

This Court has previously held that new matter claiming that "Defendants are neither guarantors nor warrantors of a cure" is a non-waivable legal defense that does not need to be pled. *Adams, et al v. Beyer, et al*, No. 01-01767, at *23-24 (C.P. Lycoming August 5, 2004). See also *Trimble,* No. 98-01720, at **2, n3 and 6 (striking new matter that stated "the defendant healthcare providers are not guarantors or warrantors of a cure" for failure to set forth supporting material facts).

Based on the above precedent, Paragraphs 70 through 73 are improper for new matter because, even if proven as true, do not defeat Plaintiffs' claims and therefore, they need not be pled. Additionally, even if they were appropriate topics for new matter, they are nevertheless conclusions of law, lacking any

supporting factual allegations. Therefore, because Paragraphs 70 through 73 are improper for new matter, they are stricken.

iii. Paragraph 74

Paragraph 74 states that "the acts or omissions of others, whose identity can only be determined through the course of discovery, and not the Answering Defendant constitutes an intervening and/or superseding cause of the injuries and/or damages alleged to have been sustained by the Plaintiff; the Answering Defendant, therefore, cannot be held liable for the alleged injuries to the Plaintiff . . . ."

Trial courts have previously opined on issues similar to this and have consistently held that additional detail is required. For example, the Court in *Hand* held that, "[t]o the extent the Defendants claim . . . that any injuries or damages sustained by the Plaintiff were caused by other persons or entities over whom the Defendants had no control, the Defendants should substantiate such a claim with facts." *Hand v. Pinnacle Health Hospitals*, No. 4538, at *2 (C.P. Dauphin Oct. 18, 2001). Additionally, "[t]he Defendants should identify the acts or omissions . . . which constitute intervening and/or superseding causes." *Id.*

The Court agrees that Paragraph 74 is vague and lacks the requisite specificity as required by the Rules of Civil Procedure. New Matter is designed to put plaintiffs on notice of defenses raised. Allegations such at this provides Plaintiffs with no indicia of, for example, what the alleged intervening event was or who it was that intervened.

For these reasons, Plaintiffs' Preliminary Objection is sustained for want of specificity. Dr. Mihail has the opportunity to amend his New Matter to provide

such requisite specificity if that information is available to him. If, as he states, the information can only be learned through the course of discovery, Dr. Mihail has the option to amend its New Matter upon newly discovery information, if applicable.

iv. Paragraphs 77 and 78

Paragraph 77 states that "if the Plaintiffs should be awarded any money damages, such possibility being specifically denied, then the amount of said damages must be reduced by the total amount of any and all medical expenses charged but not actually paid by or on behalf of the Plaintiffs . . . ."

Paragraph 78 states that "the Collateral source rule does not apply in that if the Plaintiffs should be awarded any money damages, such possibility being specifically denied, then the amount of said damages must be reduced by the total amount of any and all payments that the Plaintiffs received from any and all collateral sources for any injuries and/or damages that the Plaintiffs allegedly suffered in this matter."

As set forth above, an affirmative defense is proper when, if true, would defeat a plaintiff's claim entirely. *R.H.S.*, 936 A.2d at 1227. Paragraphs 77 and 78, based upon the collateral source rule, would not defeat Plaintiffs' claims here. Therefore, they are improper new matter and are stricken.

IV. Conclusion

For the reasons set forth above, Plaintiffs' Preliminary Objections to Paragraph 69 is overruled and Paragraphs 70 through 74 and 76 through 78 are sustained. As to Paragraphs 74 and 76, Dr. Mihail shall have twenty (20) days to

file an Amended New Matter setting forth supporting factual allegations regarding these defenses. The remaining Paragraphs are stricken.

ORDER

AND NOW, this **20th** day of **January, 2022**, upon consideration of Plaintiffs' Preliminary Objections to Defendant, R. Clifford Mihail, MD's Amended New Matter, and Defendant's responses thereto, and for the reasons set forth above, the Court hereby enters the following Order:

1. The Preliminary Objections to Paragraph 69 is **OVERRULED**;
2. The Preliminary Objections to Paragraphs 74 and 76 are **SUSTAINED**. Defendant shall have twenty (20) days from the date of this Order to file a second amended New Matter with facts to support the defenses set forth in Paragraphs 74 and 76; and
3. The Preliminary Objections to Paragraphs 70, 71, 72, 73, 77, and 78 are **SUSTAINED**. These Paragraphs are hereby **STRICKEN** from Defendant's New Matter.

BY THE COURT,

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Hon. Ryan M. Tira, Judge

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