

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY,  
PENNSYLVANIA

RUTH KIESER, and EUGENE KIESER, :  
Husband and wife, : No. CV 23-00,923  
 :  
 : Plaintiffs, :  
 :  
 vs. : CIVIL ACTION – MEDICAL  
 : PROFESSIONAL LIABILITY  
 :  
 MARK D. BEYER, D.O., UPMC MUNCY, :  
 EMERGENCY CARE SERVICES OF :  
 PENNSYLVANIA, PC, TEAM HEALTH :  
 HOLDINGS, INC. t/d/b/a TEAMHEALTH, :  
 DAVID H. BRESTICKER, M.D., and FAMILY :  
 PRACTICE CENTER, P.C. :  
 :  
 : Defendants. :

**OPINION AND ORDER**

AND NOW, this 11<sup>th</sup> day of September, 2024, upon consideration of the preliminary objections<sup>1</sup> filed by the Plaintiffs against to the new matters filed by Defendants UPMC Muncy<sup>2</sup> and David H. Bresticker, M.D. and Family Practice Center, PC<sup>3</sup> and Defendants' responses to the preliminary objections,<sup>4</sup> as well as to

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<sup>1</sup> The following preliminary objections are pending before the Court: (i) "Plaintiffs' Preliminary Objections to New Matter of Defendant UPMC Muncy," filed January 10, 2024 (the "Preliminary Objections to UPMC"), and (ii) "Plaintiffs' Preliminary Objections to Amended New Matter of Defendants David H. Bresticker, M.D. and Family Practice Center, PC," filed January 22, 2024 (the "Preliminary Objections to Bresticker"). Plaintiffs' had previously filed additional preliminary objections on January 8, 2024, to include (a) "Plaintiffs' Preliminary Objections to New Matter of Defendant Mark D. Beyer, D.O. to Plaintiffs' Second Amended Complaint," (b) "Plaintiffs' Preliminary Objections to Amended New Matter of Defendant Team Health Holdings, Inc. t/d/b/a Team Health to Plaintiffs' Second Amended Complaint," and (c) "Plaintiffs' Preliminary Objections to New Matter of Defendant Emergency Care Services PC to Plaintiffs' Second Amended Complaint." Plaintiffs' objections to Team Health's new matter were resolved by "Stipulation of Counsel to Amendment of Defendant's Answer with New Matter to Plaintiffs' Second Amended Complaint Pursuant to Pa. R.C.P. 1033 and Withdrawal of Plaintiff's Preliminary Objections," filed February 6, 2024. Plaintiffs' objections to the amended new matters of Beyer and Emergency Care Services were resolved by "Stipulation of Counsel to Amendment of Defendants' Answer with New Matter to Plaintiffs' Second Amended Complaint Pursuant to Pa. R.C.P. 1033 and Withdrawal of Plaintiff's Preliminary Objections," filed April 10, 2024. Accordingly, the Court will only consider the Preliminary Objections to UPMC and the Preliminary Objections to Bresticker.

<sup>2</sup> "Amended Answer and New Matter of Defendant UPMC Muncy to Plaintiffs' Second Amended Complaint," filed December 21, 2023 (the "UPMC New Matter").

<sup>3</sup> "Answer with Amended new Matter of Defendants David H. Bresticker, M.D. and Family Practice Center, PC to Plaintiffs' Second Amended Complaint," filed January 2, 2024 (the "Bresticker New Matter").

<sup>4</sup> Defendants filed the following responses to the preliminary objections: (i) "Answer of Defendant UPMC Muncy to Plaintiffs' Preliminary Objections to Amended New Matter," filed February 2, 2024 (the "UPMC Response"), (ii) "Answer of Defendants David H. Bresticker, M.D. and Family Practice Center, PC to Plaintiffs' Preliminary Objections to Amended New Matter," filed February 9, 2024 (the "Bresticker Response").

the briefs<sup>5</sup> and arguments<sup>6</sup> of the parties, it is hereby ORDERED and DIRECTED that the Preliminary Objections to the UPMC New Matter are OVERRULED, and the Preliminary Objections to the Brestecker New Matter are SUSTAINED, as more fully explained below.

**I. BACKGROUND.<sup>7</sup>**

Plaintiffs commenced this Medical Professional Liability Action by Complaint filed on August 23, 2023.<sup>8</sup> Preliminary objections and amendment followed, and, on November 17, 2023, Plaintiffs filed their Second Amended Complaint (the “Complaint”),<sup>9</sup> which is the operative Complaint presently. The Defendants filed answers with new matter in due course. Plaintiffs preliminarily objected to each new matter, and additional pretrial litigation ensued. Some of the objections ultimately were resolved by stipulation, but the Preliminary Objections to UPMC and the Preliminary Objections to Bresticker remain pending.<sup>10</sup>

The affected Defendants have responded to the pending objections,<sup>11</sup> and the Court heard argument on them on April 10, 2024.<sup>12</sup> They are now ripe for resolution.

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<sup>5</sup> The Court did not order that the parties file briefs, and Defendants did not do so; however, Plaintiffs filed the following: (i) “Plaintiffs’ Brief in Support of Preliminary Objections to Answer and New Matter of UPMC Muncy to Plaintiffs’ Second Amended Complaint,” filed February 4, 2024 (“Plaintiffs’ UPMC Brief”), and (ii) Plaintiffs’ Brief in Support of Preliminary Objections to Amended New Matter of Defendants David H. Bresticker, M.D. and Family Practice Center, PC, filed April 4, 2024 (“Plaintiffs’ Bresticker Brief”).

<sup>6</sup> The Court heard argument on the pending preliminary objections on April 10, 2024. Scheduling Order dated April 16, 2024 and entered April 15, 2024. Clifford A. Rieders, Esq. presented argument for Plaintiffs. For the Defendants, Brian Bluth, Esq. presented argument for UPMC Muncy, and Tasha R. Stoltzfus Nakerville, Esq. presented for Dr. Bresticker and Family Practice Center.

<sup>7</sup> Because this matter comes before the Court on preliminary objections, the facts contained here are provided merely by way of background and are not factual findings of the Court.

<sup>8</sup> Plaintiffs’ “Complaint,” filed August 23, 2023.

<sup>9</sup> Plaintiffs’ “Second Amended Complaint,” filed November 17, 2023.

<sup>10</sup> See, *supra*, n.1.

<sup>11</sup> See, *supra*, n.4.

<sup>12</sup> See, *supra*, n.6. See also the briefs filed by Plaintiffs in anticipation of argument, *supra*, n.5.

### **A. The Preliminary Objections to UPMC.**

Plaintiffs object that the UPMC New Matter fails to conform to law or rule of court and is insufficiently specific.<sup>13</sup> They contend that “[m]ere denials, conclusions of law, and factually unsupported defenses have no place in New Matter.”<sup>14</sup>

Specifically, they take issue with Paragraph 83 of the UPMC New Matter, which, they contend, does not comply with Pennsylvania’s rules of pleading.<sup>15</sup>

Paragraph 83 states:

83. The alleged injuries and/or damages sustained by plaintiffs were caused or contributed to, in whole or in part, by persons or entities other than the answering defendants, and over whom the answering defendants had no control and for whose action the answering defendants are not liable, as set forth in Plaintiffs’ Second Amended Complaint, if proven at trial.<sup>16</sup>

Plaintiffs contend that Paragraph 83 is insufficiently specific because it does not contain sufficient information to allow them to “make an educated reply” to what they will be required to meet at trial.<sup>17</sup> They complain that Defendant UPMC “does not specify whether they are referring to others named in the Amended Complaint or other unnamed persons/entities” and that they “should not be forced to proceed to discovery until further specificity is provided by Defendant.”<sup>18</sup>

In response, Defendant UPMC asserts that Paragraph 83 of its New Matter must be read in conjunction with Paragraph 81, which avers that “Dr. Beyer was not employed by the answering defendant at any time material to plaintiffs’ Second Amended Complaint.”<sup>19</sup> In addition, UPMC points out that Paragraph 83, by its own terms, is limited to the allegations in the Complaint, in that it includes the words, “as

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<sup>13</sup> Preliminary Objections to UPMC.

<sup>14</sup> *Id.*, ¶ 5.

<sup>15</sup> *Id.*, ¶¶ 6-7.

<sup>16</sup> UPMC New Matter, ¶ 83.

<sup>17</sup> Plaintiffs’ UPMC Brief, at 7.

<sup>18</sup> *Id.*, at 8.

<sup>19</sup> UPMC Response, ¶ 7.

set forth in Plaintiffs' Second Amended Complaint." UPMC contends that "[a]ny suggestion that plaintiffs are unable to ascertain whether the persons or entities referenced in the Second Amended Complaint were responsible for plaintiffs' alleged injuries seems to be at odds with the verified allegations contained in plaintiffs' Second Amended Complaint."<sup>20</sup> UPMC contends that the Complaint does not allege direct negligence against UPMC and only alleges that it is vicariously liable for the acts and omissions of Dr. Beyer.<sup>21</sup> Thus, UPMC argues, Paragraph 83, when coupled with Paragraph 81, simply "alleges that [UPMC] did not control the only alleged agent for whom [UPMC] is allegedly vicariously liable, Dr. Beyer" and sufficiently puts Plaintiffs on notice of the claims they must meet.<sup>22</sup>

***B. The Preliminary Objections to Bresticker.***

Similarly, Plaintiffs object that the Bresticker New Matter fails to conform to law or rule of court and is insufficiently specific.<sup>23</sup> They contend that "[m]ere denials, conclusions of law, and factually unsupported defenses have no place in New Matter."<sup>24</sup> Specifically, they take issue with Paragraphs 82-86 of the Bresticker New Matter, which, they contend, do not comply with Pennsylvania's rules of pleading.<sup>25</sup>

Paragraphs 82-86 state:

82. To the extent that discovery or the evidence at trial may establish that the Plaintiff was negligent and that such negligence caused or contributed to cause the injuries and damages of which Plaintiff complains, Answering Defendants expressly reserve the right to assert the affirmative defense of contributory/comparative negligence and/or assumption of risk.

83. To the extent that Plaintiffs sustained any injury or damage as alleged in Plaintiffs' Second Amended Complaint, which is specifically

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<sup>20</sup> *Id.*

<sup>21</sup> *Id.* See also Complaint, Count III.

<sup>22</sup> UPMC Response, ¶ 7.

<sup>23</sup> Preliminary Objections to Bresticker.

<sup>24</sup> *Id.*, ¶ 5.

<sup>25</sup> *Id.*, ¶¶ 6-11.

denied, Answering Defendants aver that any such injury or damage was the result of the acts or omissions of third parties, including co-defendants, for whom Answering Defendants are in no way liable.

84. The injuries and damages claimed by Plaintiffs are the natural and progressive result of the Plaintiff's medical condition, and not the result of any negligence by Answering Defendants.

85. To the extent Answering Defendants are found liable to Plaintiffs, Answering Defendants are entitled to apportionment or a set-off of any damages based on the negligence of one or more third parties, including by way of apportionment and contribution under the Pennsylvania Fair Share Act.

86. To the extent currently applicable, or to the extent that it later may become applicable, Answering Defendants plead the affirmative defenses of release and accord and satisfaction.<sup>26</sup>

Plaintiffs contend that Paragraph 82 asserts the defenses of contributory/comparative negligence and assumption of the risk, which are non-waivable defenses and need not be plead.<sup>27</sup> They complain that Paragraph 83 asserts that any injuries or damages were the result of the acts or omissions of third parties for whom they are not liable without alleging any facts in support and without identifying the third parties or the acts or omissions at issue<sup>28</sup> and that Paragraph 84 similarly asserts a vague allegation that the injuries and damages are caused by the natural progression of Plaintiff's medical condition and not their own negligence without alleging material facts in support, without specificity, and as a mere reassertion of the denials in their answer.<sup>29</sup> They assert that Paragraph 85 claims right of apportionment or set off without specificity and without alleging material facts in support and that such defenses are non-waivable and can be raised after liability is found and damages are determined to exist.<sup>30</sup> They contend that Paragraph 86

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<sup>26</sup> Bresticker New Matter, ¶¶ 82-86.

<sup>27</sup> Plaintiffs' Bresticker Brief, at 8-9.

<sup>28</sup> *Id.*, at 9.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*, at 10.

asserts affirmative defenses that are speculative only and that also are asserted without specificity and without alleging material facts in support.<sup>31</sup> Finally, Plaintiffs argue that Defendants do not risk waiving an affirmative defense by virtue of failing to allege an affirmative defense that the facts do not support presently but which might become applicable should grounds for it emerge through discovery. To the contrary, they assert that the liberal allowance of amendment and the lack of a statute of limitations applicable to affirmative defenses protects and preserves speculative defenses without requiring Plaintiffs to respond to and conduct discovery regarding matters that may never be at issue.<sup>32</sup>

In response, Defendants acknowledge that Paragraph 82 raises defenses that need not be pleaded but claim that this does not mean that they cannot be pleaded.<sup>33</sup> They acknowledge that Paragraphs 83, 84 and 86 assert conclusions of law without factual support but contend that they should not be stricken because they are deemed denied and no response is required and because the Rules of Civil Procedure require that all affirmative defenses must be raised in new matter or be deemed waived.<sup>34</sup> They contend that Paragraph 85 is permissible for similar reasons and that the context of the pleadings as a whole provide sufficient factual basis for establishing potential joint liability and, thereby, sufficiently inform Plaintiffs of the allegations they face.<sup>35</sup>

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<sup>31</sup> *Id.*, at 10-11.

<sup>32</sup> *Id.*, at 11-14.

<sup>33</sup> Bresticker Response, ¶ 7. See also Pa. R. Civ. P. 1030(b) Note ("If a defendant pleads the affirmative defenses [of assumption of the risk, comparative negligence and contributory negligence], they shall be deemed denied and the plaintiff need not reply").

<sup>34</sup> Bresticker Response, ¶¶ 8-9, 11.

<sup>35</sup> *Id.*, ¶ 10.

## **II. LAW AND ANALYSIS.**

When ruling on preliminary objections, a court accepts as true all well-pleaded averments within the challenged pleading, as well as any reasonable inferences which may be drawn therefrom;<sup>36</sup> however, the court need not accept conclusions of law, argumentative allegations or opinions.<sup>37</sup> Plaintiffs' preliminary objections assert that the UPMC New Matter and the Bresticker New Matter fail to conform to Pennsylvania law and are insufficiently specific. As such, the Court will sustain the Preliminary Objections only if it determines that they fail to conform to law or rule of court or are insufficiently specific.<sup>38</sup>

### **A. New matter.**

"New matter" is matter that, taking all the allegations of the complaint to be true, is nevertheless a defense to the action, and includes affirmative defenses. New matter can include any legal defense of substance to the action other than a denial, setoff, counterclaim, or recoupment.

All affirmative defenses must be pleaded under the heading "New Matter." Also, any other material facts that are not merely denials of the averments of the complaint can be pleaded as new matter.... The Rules require that a defendant plead matters relating to an affirmative defense and that the plaintiff reply to them so that the issues in the dispute may be sharpened at an early stage.<sup>39</sup>

"The term 'New Matter' ... 'has been defined as matter which, taking all the allegations of the complaint to be true, is nevertheless a defense to the action.'"<sup>40</sup> It "ignores what the adverse party has averred and adds new facts to the legal dispute on the theory that such new facts dispose of any claim or claims which the adverse

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<sup>36</sup> *Preiser v. Rosenzweig*, 614 A.2d 303, 305 (Pa. Super. 1992).

<sup>37</sup> *Erie County League of Women Voters v. Com., Dep't of Environmental Resources*, 525 A.2d 1290, 1291 (Pa. Commw. 1987) (citing *Ohio Casualty Group of Insurance Cos. v. Argonaut Insurance Co.*, 500 A.2d 191 (Pa. Commw. 1985)).

<sup>38</sup> Pa. R. Civ. P. 1028(a)(2), (3).

<sup>39</sup> 5 Std. Pa. Prac. 2d § 26:51 (footnotes and citations omitted).

<sup>40</sup> *Coldren v. Peterman*, 763 A.2d 905, 908 (Pa. Super. 2000) (quoting *Sechler v. Ensign-Bickford Co.*, 469 A.2d 233, 235 (Pa. Super. 1983)).

party had asserted in his pleading.”<sup>41</sup> Thus, an affirmative defense is distinguished from a denial of the facts supporting plaintiff’s claims because an affirmative defense requires the defendant to allege facts extrinsic to the complaint.<sup>42</sup>

New Matter is governed by Rule 1030, Pennsylvania Rules of Civil

Procedure, which states:

(a) Except as provided by subdivision (b), all affirmative defenses including but not limited to the defenses of accord and satisfaction, arbitration and award, consent, 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.

(b) The affirmative defenses of assumption of the risk, comparative negligence and contributory negligence need not be pleaded.<sup>43</sup>

Accordingly, the “new matter” pleaded by a party may include (1) affirmative defenses and (2) “material facts which are not merely denials of the averments of the preceding pleading.”

### ***B. Pleading material facts.***

Plaintiffs assert in their preliminary objections that the UPMC New Matter and the Bresticker New Matter are insufficiently specific and, therefore, fail to comport with Pennsylvania’s rules of pleading. “Pennsylvania is a fact-pleading state,”<sup>44</sup> and inquiry into the sufficiency of a pleading begins with Rule 1019(a), Pennsylvania Rules of Civil Procedure, which provides that “[t]he material facts on which a cause

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<sup>41</sup> *Id.*

<sup>42</sup> *Id.* (citing *Falcione v. Cornell School Dist.*, 557 A.2d 425, 428 (Pa. Super. 1989)); see also *American Southern Insurance Co., Inc. v. Halbert*, 203 A.3d 223, 227-29 (Pa. Super. 2019).

<sup>43</sup> Pa. R. Civ. P. 1030. The Note to Rule 1030 indicates that if the defenses listed in subdivision (b) are pleaded, they are deemed denied, and Plaintiff need not reply. It also states that Defenses not required to be pleaded are not waived.

<sup>44</sup> *Catanzaro v. Pennell*, 238 A.3d 504, 507 (Pa. Super. 2020) (quoting *Foster v. UPMC S. Side Hosp.*, 2 A.3d 655, 666 (Pa. Super. 2010)).



of action or defense is based shall be stated in a concise and summary form.<sup>45</sup> “Material facts’ are ‘ultimate facts,’ *i.e.*, those facts essential to support the claim. Evidence from which such facts may be inferred not only need not but should not be alleged.”<sup>46</sup>

Although parties must plead the material facts upon which their claims are based, they need not plead the evidence upon which they will rely to establish those facts.<sup>47</sup> While “the line between pleading facts and evidence is not always bright[,]” two conditions “must always be met: [t]he pleadings must adequately explain the nature of the claim to the opposing party so as to permit him to prepare a defense and they must be sufficient to convince the court that the averments are not merely subterfuge.”<sup>48</sup>

In *Connor v. Allegheny General Hospital*, our Supreme Court held that a proposed amendment to a complaint in trespass and assumpsit arising out of alleged medical malpractice was not barred by the statute of limitations where the amendment did not add new allegations of negligence based on a different theory but merely amplified an existing allegation of the original complaint.<sup>49</sup> The Court so held because the right to amend a pleading should be granted liberally at any stage in the proceeding, absent “resulting prejudice” to the adverse party. Thus, an

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<sup>45</sup> Pa. R. Civ. P. 1019(a).

<sup>46</sup> *Baker v. Rangos*, 324 A.2d 498, 505 (Pa. Super. 1974) (citing *United Refrigerator Co. v. Applebaum*, 189 A.2d 253 (Pa. 1963) (allegation of defense by accommodation parties that plaintiff was accommodated party to whom they were not liable sufficient; reason for accommodation evidentiary fact that need not be alleged); *Smith v. Allegheny County*, 155 A.2d 615 (Pa. 1959) (complaint accusing defendants of failure to provide adequate drainage sufficient; source and means of flow either through pipes or strata of rock a matter of evidence)).

<sup>47</sup> *Com. by Shapiro v. Golden Gate National Senior Care LLC*, 194 A.3d 1010, 1029-30 (Pa. 2018) (citing *United Refrigerator*, *supra*, 189 A.2d at 255; *Unified Sportsmen of Pa. v. Pa. Game Comm'n*, 950 A.2d 1120, 1134 (Pa. Commw. 2008)). “[T]he complaint need not cite evidence but only those facts necessary for the defendant to prepare a defense.” *Unified Sportsmen*, *supra*, 950 A.2d at 1134.

<sup>48</sup> *Bata v. Cent.-Penn Nat. Bank of Philadelphia*, 224 A.2d 174, 179 (Pa. 1966)

<sup>49</sup> *Connor v. Allegheny General Hospital*, 461 A.2d 600, 602 (Pa. 1983).

amendment that merely amplifies what has already been averred must be permitted, while an amendment introducing a new cause of action after the statute of limitations has run in favor of the defendant constitutes “resulting prejudice” to the adverse party and must not be allowed.<sup>50</sup> Accordingly, a party must preliminarily object to a general allegation in order to foreclose the opponent’s ability to amend to assert a claim not previously advanced.

When a pleading fails to satisfy the necessary requirements, the adverse party may move to strike the pleading for failure to conform to law or rule of court<sup>51</sup> or move for a more specific pleading.<sup>52</sup> Such motions may be granted when the pleading fails to conform to law or rule of court or when it is otherwise so insufficient that the adverse party cannot understand the claims it sets forth.<sup>53</sup> “As a minimum, a pleader must set forth concisely the facts upon which his cause of action is based,”<sup>54</sup> and a pleading “must not only apprise the defendant of the claim being asserted, but it must also summarize the essential facts to support the claim.”<sup>55</sup>

A court tasked with determining whether a claim has been pled with the requisite specificity views the pleading as a whole, rather than merely analyzing a particular paragraph or allegation standing alone,<sup>56</sup> and may exercise “broad discretion in determining the amount of detail that must be averred.”<sup>57</sup> Ultimately, the court must ascertain “whether the complaint is sufficiently clear to enable the

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<sup>50</sup> *Id.* (citing *Schaffer v. Larzelere*, 189 A.2d 267, 270 (Pa. 1963)).

<sup>51</sup> Pa. R. Civ. P. 1028(a)(2) (“Preliminary objections may be filed by any party to any pleading ... [for] failure of a pleading to conform to law or rule of court....”).

<sup>52</sup> Pa. R. Civ. P. 1028(a)(3) (“Preliminary objections may be filed by any party to any pleading ... [for] insufficient specificity in a pleading.”).

<sup>53</sup> *Connor, supra*, 461 A.2d at 602-03.

<sup>54</sup> *McShœa v. City of Phila.*, 995 A.2d 334, 339 (2010) (quoting *Line Lexington Lumber & Millwork Co., Inc. v. Pa. Publ'g Corp.*, 301 A.2d 684, 688 (Pa. 1973)).

<sup>55</sup> *Id.* (quoting *Landau v. W. Pa. Nat'l Bank*, 282 A.2d 335, 339 (Pa. 1971)).

<sup>56</sup> *Yacoub v. Lehigh Valley Med. Assocs., P.C.*, 805 A.2d 579, 589 (Pa. Super. 2002) (en banc).

<sup>57</sup> *United Refrigerator, supra*, 189 A.2d at 255.

defendant to prepare his defense,' or 'whether the plaintiff's complaint informs the defendant with accuracy and completeness of the specific basis on which recovery is sought so that he may know without question upon what grounds to make his defense.'"<sup>58</sup>

### **C. Analysis of the outstanding objections.**

#### **1. The Preliminary Objections to UPMC.**

In isolation, Paragraph 83 of the UPMC New Matter is insufficiently specific and fails to conform to our rules of pleading; however, when viewing the UPMC New Matter as a whole<sup>59</sup> in the context of the Plaintiffs' claims against UPMC, it becomes apparent that UPMC's affirmative defense is sufficiently specific. Plaintiffs make two claims against UPMC: (1) a vicarious liability claim by Ruth Kieser, premised on the alleged negligence of Dr. Beyer as an employee or agent of UPMC;<sup>60</sup> and (2) a loss of consortium claim by Eugene Kieser alleging that he has lost and will continue to lose the companionship, consortium, services and society of his wife, Ruth Kieser, as a proximate result of the acts and omissions of the Defendants.<sup>61</sup>

Vicarious liability may attach to an employer when its agent, acting within the course and scope of the agency, negligently causes harm to a third party.<sup>62</sup> Paragraph 81 of the UPMC New Matter alleges that "Dr. Beyer was not employed by [UPMC] at any time material to plaintiffs' Second Amended Complaint."<sup>63</sup> Paragraph

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<sup>58</sup> *Rambo v. Greene*, 906 A.2d 1232, 1236 (Pa. Super. 2006) (quoting *Ammlung v. City of Chester*, 302 A.2d 491, 498 n. 36 (Pa. Super. 1973) (quoting 1 Goodrich-Amram § 1017(b)-9)); see also *Unified Sportsmen*, *supra*, 950 A.2d at 1134.

<sup>59</sup> *Yacoub*, *supra*, 805 A.2d at 589 (stating that a court will view the challenged allegation in the context of the pleading as a whole when determining whether it was made with the requisite specificity).

<sup>60</sup> Complaint, Count III.

<sup>61</sup> *Id.*, Count V.

<sup>62</sup> See, e.g., *R.A. ex rel. N.A. v. First Church of Christ*, 748 A.2d 692, 699 (Pa. Super. 2000) (citing *Fitzgerald v. McCutcheon*, 410 A.2d 1270, 1271 (Pa. Super. 1979)).

<sup>63</sup> UPMC New Matter, ¶ 81

83, when read with Paragraph 81 in the context of the vicarious liability claim, simply asserts that Plaintiffs' injuries or damages, if any, were caused by Dr. Beyer, who is someone over whom UPMC has no control.

Liability may attach for loss of consortium when an uninjured spouse is deprived of his injured spouse's society and services.<sup>64</sup> "It is well-settled that the claim is derivative, emerging from the impact of one spouse's physical injuries upon the other spouse's marital privileges and amenities."<sup>65</sup> Thus, UPMC can be found liable to Eugene Kieser for loss of consortium only if it is first found vicariously liable to Ruth Kieser for the acts or omissions of Dr. Beyer.

Thus, when read as a whole in the context of the claims against UPMC, the allegation in Paragraph 83 of the UPMC New Matter that Plaintiffs' injuries or damages were caused by someone other than UPMC, or by someone over whom UPMC has no control, comports with the Rules of Civil Procedure and is sufficiently specific to enable Plaintiffs to prepare a response. Accordingly, the Preliminary Objections to UPMC are OVERRULED.

## **2. *The Preliminary Objections to Bresticker.***

### **a. *Paragraph 82 of the Bresticker New Matter.***

Paragraph 82 alleges that the Bresticker Defendants reserve the right to assert the affirmative defenses of contributory/comparative negligence and assumption of the risk.<sup>66</sup> Generally, affirmative defenses that are not properly pleaded are waived,<sup>67</sup> however, the affirmative defenses in Paragraph 82 need not

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<sup>64</sup> *Darr Constr. Co. v. W.C.A.B (Walker)*, 715 A.2d 1075, 1079-80 (Pa. 1998).

<sup>65</sup> *Id.* (citing *Kowal v. Com., Dep't of Transp.*, 515 A.2d 116, 119 (Pa. Commw. 1986)).

<sup>66</sup> *Bresticker New Matter*, ¶ 82.

<sup>67</sup> *See, e.g., Wilson v. Transport Ins. Co.*, 889 A.2d 563, 573 (Pa. Super. 2005).

be pleaded<sup>68</sup> and are not waived when not pleaded.<sup>69</sup> The Notes to our Rules of Civil Procedure provide, *inter alia*, that “[i]f a defendant pleads the affirmative defenses [of assumption of the risk, comparative negligence and contributory negligence], they shall be deemed denied and the plaintiff need not reply.”<sup>70</sup> This suggests that while these defenses need not be pleaded, it may not be improper for a party to do so. It is unnecessary to consider that question, however, because a party must plead the material facts upon which every claim or defense that is pleaded are based.<sup>71</sup> The Bresticker New Matter does not plead any facts in support of these defenses and, in fact, specifically couches them in terms of facts that may later emerge through discovery or at trial.

Accordingly, the Preliminary Objections to Bresticker are SUSTAINED with respect to Paragraph 82 of the Bresticker New Matter, and this Paragraph is STRICKEN from the Bresticker New Matter, with leave to amend.<sup>72</sup>

***b. Paragraphs 83, 84 and 86 of the Bresticker New Matter.***

Paragraph 83 alleges that Plaintiffs’ damages, if any, were caused by persons other than the Bresticker Defendants, and Paragraph 84 alleges that they were caused by the natural progression of Plaintiff’s medical condition.<sup>73</sup> Paragraph 86

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<sup>68</sup> Pa. R. Civ. P. 1030(b).

<sup>69</sup> Pa. R. Civ. P. 1032(a).

<sup>70</sup> See Pa. R. Civ. P. 1030(b) Note.

<sup>71</sup> See Pa. R. Civ. P. 1019(a).

<sup>72</sup> “[I]t is generally an abuse of discretion to dismiss a complaint without leave to amend.” *Harley Davidson Motor Co., Inc. v. Hartman*, 442 A.2d 284, 286 (Pa. Super. 1982). “There may, of course, be cases where it is clear that amendment is impossible and where to extend leave to amend would be futile.... [However], [t]he right to amend should not be withheld where there is some reasonable possibility that amendment can be accomplished successfully.” *Otto v. American Mutual Insurance Company*, 393 A.2d 450, 451 (Pa. 1978). Here, the Court sustains the preliminary objections because Defendants have failed to plead facts in support of the affirmative defenses they assert. Leave to amend is granted to enable Defendants to plead material facts in support of them. In view of the fact that the affirmative defenses pleaded in Paragraph 82 need not be pleaded in the first place, however, Defendants may choose not to amend this Paragraph.

<sup>73</sup> Bresticker New Matter, ¶¶ 83-84.

pleads the affirmative defenses of release and of accord and satisfaction.<sup>74</sup> The Bresticker Defendants have not pleaded any material facts in support of these affirmative defenses.

Accordingly, the Preliminary Objections to Bresticker are SUSTAINED with respect to Paragraphs 83, 84 and 86 of the Bresticker New Matter, and these Paragraphs are STRICKEN from the Bresticker New Matter.

***c. Paragraph 85 of the Bresticker New Matter.***

Paragraph 85 of the Bresticker New Matter alleges that, in the event the Bresticker Defendants are found liable for Plaintiffs' injuries, the Bresticker Defendants are entitled to set-off of any damages based on the negligence of third parties,<sup>75</sup> including pursuant to the Pennsylvania Fair Share Act.<sup>76</sup> As with the affirmative defenses referenced above, the Bresticker Defendants have not pleaded any material facts in support of this affirmative defense. Furthermore, it may be premature to consider apportionment of damages, as no damages have been awarded at this time. Should a damage award be made, Defendants may move for its apportionment at that time.

Accordingly, the Preliminary Objections to Bresticker are SUSTAINED with respect to Paragraph 85 of the Bresticker New Matter, and this Paragraph is STRICKEN from the Bresticker New Matter, with leave to amend.

***III. CONCLUSION AND ORDER.***

For the reasons explained above, the Plaintiffs' Preliminary Objections to the UPMC New Matter are OVERRULED, and their Preliminary Objections to the Bresticker New Matter are SUSTAINED. Paragraphs 82-86 of the Bresticker New

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<sup>74</sup> *Id.*, ¶ 86.

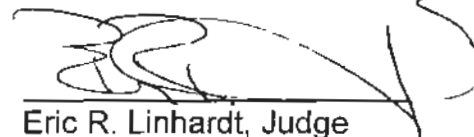
<sup>75</sup> Bresticker New Matter, ¶ 85.

<sup>76</sup> See 42 Pa. C.S. § 7102.

Matter are STRICKEN, with leave to amend within twenty (20) days after entry of this Order.<sup>77</sup> Plaintiff shall answer UPMC's New Matter within twenty (20) days after entry of this Order.

IT IS SO ORDERED.

BY THE COURT,



Eric R. Linhardt, Judge

ERL/bel

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<sup>77</sup> This is not meant to imply that leave to amend will be denied in the future. If Defendants are unable to assert some of the more speculative affirmative defenses stricken here because they cannot assert material facts in support of them at the present time, and if facts subsequently emerge through discovery or at trial that would support these defenses, Defendants may move to amend their New Matter at the appropriate time, in accordance with Rule 1033, Pennsylvania Rules of Civil Procedure.