

**THE FIRST JUDICIAL DISTRICT OF PENNSYLVANIA, PHILADELPHIA COUNTY
IN THE COURT OF COMMON PLEAS**

RANDY AXELROD	:	
	:	CIVIL TRIAL DIVISION
Appellant/Plaintiff,	:	
	:	JANUARY TERM, 2007
v.	:	No. 2617
	:	
	:	Superior Court Docket No.
THE TRUSTEES OF THE UNIVERSITY OF	:	2688 EDA 2007
PENNSYLVANIA HEALTH SYSTEM,	:	
UNIVERSITY OF PENNSYLVANIA HEALTH	:	
SYSTEM, PENNSYLVANIA HOSPITAL,	:	
ARTHUR BARTOLOZZI, M.D., BOOTH,	:	
BARTOLOZZI, BALDERSTON	:	
ORTHOPEDICS, BARBARA LAMB, DEPUY	:	
ORTHOPEDICS, INC., AND DR. JESS LONER:	:	
	:	
Appellees/Defendants	:	

OPINION

PROCEDURAL HISTORY

Plaintiff, Randy Axelrod, appeals from the Order dated September 7, 2007 and docketed on September 10, 2007, which granted Defendant DePuy Orthopedics, Inc.'s Preliminary Objections to Plaintiff's Complaint.

FACTUAL BACKGROUND

It is alleged by Plaintiff in the instant matter (Axelrod II Complaint) that from November 12, 1999 to November 18, 1999, the Plaintiff underwent a left knee arthroplasty at University of Pennsylvania Health System (UPHS)¹. (Complaint, ¶17).

¹ For purposes of this Opinion the reference to the University of Pennsylvania Health System includes: The Trustees of the University of Pennsylvania Health System, University of Pennsylvania Health System and Pennsylvania Hospital. For clarification purposes plaintiff's Complaint does not articulate where the arthroplasty procedure took place.

Plaintiff states that the arthroplasty procedure was performed by Dr. Jess Lonner (Dr. Lonner) at the direction of Arthur Bartolozzi of Booth, Bartolozzi and Balderston Orthopedics (3B Orthopedics). (Id.). The prosthesis used in the procedure was manufactured by Depuy Orthopedics, Inc. (Depuy). In May 2000 and February 2001, plaintiff was readmitted UPHS for subsequent procedures of the left knee arthroplasty, but alleges he continued to experience severe pain, swelling and complications. (Complaint, ¶18).

On November 9, 2001, Plaintiff commenced an underlying action in the Philadelphia County Court of Common Pleas (November Term, 2001, No. 0813) (hereinafter Axelrod I) asserting claims of medical negligence in connection with the three surgeries previously mentioned against UPHS, Dr. Lonner, 3B Orthopedics and Depuy. (UPHS Motion to Determine Preliminary Objections, ¶2, See also Docket November 2001, No. 0813). By Order dated October 24, 2003, this Court granted 3B Orthopedics' Motion to Dismiss thereby ending Plaintiff's negligence action against them. (See Docket). On January 20, 2005, this Court granted Summary Judgment in favor of UPHS Defendants and Depuy. (See Docket). Plaintiff did not file an Appeal to this Order. (See Docket, November 2001, No.0813).

On January 22, 2007, Plaintiff filed his Complaint in the instant matter (Axelrod II) against The Trustees of the University of Pennsylvania Health System, University of Pennsylvania Health System and Pennsylvania Hospital and Dr. Lonner (collectively known as UPHS Defendants), Arthur Bartolozzi, M.D., Booth, Bartolozzi and Balderston Orthopedics (3B Orthopedics) and Barbara Lamb (collectively known as 3B Orthopedic Defendants) and DePuy. The Axelrod II Complaint appears to set forth allegations of Conspiracy, Fraud, Indemnification, Abuse of Process and Negligence against all Defendants for what Plaintiff alleges is their failure to cooperate during the discovery

phase of litigation in Axelrod I. (Axelrod II Complaint). After pleading the facts detailing the course of treatment Plaintiff received as part of his left knee arthroplasty, Plaintiff then asserts numerous facts about the discovery process of Axelrod I intertwined with unsupported allegations of misconduct by the defendants and the Court (Axelrod II Complaint, ¶24-98). Plaintiff then pled counts of his Complaint without identifying what the causes of action are in the various counts. (Axelrod II Complaint, 99-130).

Specifically, the Counts of Axelrod II are pled as follows:

Count I states that defendants:

100. The defendants entered into an agreement to injure the plaintiff and deprive him of his rights, monies, benefits, settlements or a fair trial, or [sic] the below action.
101. The defendants, in concert deprive [sic] deprive the plaintiff of monies, rights, benefits, and a fair trial, by engaging in wrongful, improper conduct during the various meetings, hearings, pre-trials, settlement conferences, discovery, negotiations, trial and subsequent, [sic] as well as other dealings.

Count II states that defendants:

105. Defendants' representations, actions, inactions, as set forth above, were untrue, improper and false and were intended to induce the plaintiff and the Court, as well as others related to this case, to proceed under the misunderstanding of the defendants' actions, as being proper and complete.
106. The plaintiff justifiable [sic] relied upon defendants' representations, actions and inactions without knowledge of the false, fraudulent, incomplete and improper nature [sic] of the same.
107. The defendants, individually, severally and jointly, made various misrepresentations or committed various other improper acts, upon which the plaintiff relied.

Count III states that defendants:

110. As a result of the actions, misrepresentations, statements, fraud, inaction, incomplete statements, described in this Complaint, plaintiffs have incurred costs, losses and attorney's fees in this action and the underlying action for which the defendants are obligated, jointly and severally, to indemnify them. These costs and losses include: losses in the settlement monies [sic] from the underlying action, reduction in the verdict of the underlying action, as well as, the following cost, among others:

- (a) all transaction costs incurred by the plaintiffs in the underlying action and this action;
- (b) all attorney's fees and costs associated with the litigation and the prior or underlying related litigation;
- (c) all other losses caused or necessitated by the defendants' actions in or related to the underlying action or this action.

Count IV states that defendants:

- 111. The defendants forced the plaintiff to begin this action because they did everything improperly in the underlying action.
- 112. The defendants forced the plaintiff to begin this action because they did everything improperly in the underlying action.
- 113. Plaintiff started suit against some of the defendants in the underlying action and those defendants and all of these defendants entered into a course of conduct in violation of the rules of discovery, the rules of civil procedures [sic], broke all agreements, misused and abused the process for the sole purpose of injuring the plaintiff and benefiting themselves.
- 114. The defendants' actions, which caused this suit to be initiated, were that throughout the entire discovery process, procedures and all phases of the underlying action, were wanton, willful, intentional, reckless, fraudulent, as well as their statements, were incomplete and or false and their handling of the underlying action was improper and for the sole purpose of depriving the plaintiff of her [sic] rights and precluding the plaintiff from obtaining a fair trial or compensation.

Count V, *inter alia*, states that defendants:

- 118. As a result of defendants' negligence, as aforesaid, the plaintiff sustained multiple bruises and contusions in and about the head, teeth, body and extremities, multiple internal and external injuries in and about the head, body, back and limbs, injury to the back and neck, resulting in possible injury to muscles, nerves, discs, bones and ligaments, connected thereto and/or aggravation of a pre-existing condition concerning these parts, which injuries are or may be serious, severe and permanent and a severe shock to the nervous system, severe physical pain, mental anguish and humiliation, and suffered serious and/or permanent impairment of a bodily function.

On February 12, 2007, UPHS Defendants and 3B Orthopedic Defendants filed separate Preliminary Objections to Plaintiff's Complaint arguing *inter alia*, that the Plaintiff's Complaint has failed to sufficiently plead proper claims pursuant to Pa.R.C.P.

1019 and 1028(a)(4). DePuy filed its Preliminary Objections on February 20, 2007 arguing the same principles. Plaintiff filed his responses to the Preliminary Objections. (See Docket). On March 9, 2007, this Court granted UPHS's Preliminary Objections. *Id.* The Preliminary Objections of 3B Orthopedics were also granted on the same date. *Id.* A dispositive Order was entered when, this Court granted DePuy's Preliminary Objections and dismissed the Plaintiff's Complaint. This Order was entered on September 7, 2007 and docketed on September 10, 2007.

On October 9, 2007, Plaintiff filed his Notice of Appeal to the Superior Court and timely issued his Statement of Matters.

The Statement of Matters includes claims that this Court considered affirmative defenses in ruling on the preliminary objections. The record developed below shows that affirmative defenses were never considered, nor did they have to be because of plaintiff's deficient complaint. The Statement of Matters also claims that the plaintiff's amended complaint stated viable causes of action, that the Court erred in not allowing plaintiff to amend the complaint. However, the record shows that there was no amended complaint and the plaintiff never requested to file an amended complaint.

LEGAL ANALYSIS

Pa.R.C.P. 1019(a) states, "[t]he material facts on which a cause of action or defense is based shall be stated in a concise and summary form." Pa.R.C.P. 1028(a)(4) states that Preliminary Objections in the form of a demurrer may be filed for legal insufficiency of a pleading when accepting all of the Plaintiff's material averments as true, the question is whether the Complaint states a claim for relief cognizable under the law. *Schwarzwaelder v. Fox*, 2006 PA Super 61, 895 A.2d 614, 618 (Pa.Super. 2006). The question presented by the demurrer is whether, on the facts averred, the law says

with certainty that no recovery is possible. *Corestates Bank, Nat'l Assn. v. Cutillo*, 1999 PA Super 14, 723 A.2d 1053, 1057 (Pa. Super. 1999).

Because Plaintiff's Complaint is completely devoid of specific averments of material fact that would support any counts of his cause of action against any of the Defendants, this Court dismissed the Plaintiff's Complaint without leave to amend. Plaintiff, in his Complaint, did not articulate sufficient facts in Axelrod II, which would establish a cause of action for Civil Conspiracy, Fraud, Indemnification, Abuse of Process or Negligence. When read in context and in its entirety, Plaintiff is actually complaining in Axelrod II about alleged discovery violations in Axelrod I. He failed to file an appeal in Axelrod I and therefore any claims regarding these alleged violations have been waived.

This Court believes that because the vague and unsupportable allegations advanced by Plaintiff in his Complaint are substantially deficient, there is no basis to grant permission to file an amended pleading. *Feingold v. Hill*, 360 Pa.Super. 539, 521 A.2d 33, 39 (1987). The decision to grant or deny a party leave to amend his pleadings is within the sound discretion of the trial Court and that decision will not be reversed on Appeal absent a clear abuse of discretion. *Id.*

For these reasons the Court maintains that the granting of DePuy's Preliminary Objections should be affirmed by the Superior Court.

Additionally, this Court finds that both Plaintiff's Notice of Appeal and his Statement of Matters lack specificity with regard to the issues to be addressed and the dates of the Orders which are the subject of this Appeal. As previously stated, on March 9, 2007 this Court granted UPHS Preliminary Objections and 3B Orthopedic Preliminary Objections. In addition, this Court sustained DePuy's Preliminary Objections on September 7, 2007 making this Order a dispositive one. The Superior Court docket

reflects the Order appealed from as the October 9, 2007 Order entering final judgment in the case. Since this praecipe was filed by Plaintiff, his appeal is from his own praecipe for entry of judgment.²

The Statement of Matters also lacks any reference to the date of an Order alleged to be entered in error. In order to prepare an Opinion, which would effectively address the issues raised by Plaintiff, the Court needs to know which order(s) are being appealed.

"When an appellant fails adequately to identify in a concise manner the issues sought to be pursued on appeal, the trial court is impeded in its preparation of a legal analysis which is pertinent to those issues." *Id.* (citing *In re Estate of Daubert*, 2000 PA Super 219, 757 A.2d 962, 963 (Pa. Super. 2000)). If the Rule 1925(b) Statement is so overly broad and vague that the trial court has to guess what issues an appellant is appealing, then the statement is insufficient to enable meaningful review. *Commonwealth v. Dowling*, 2001 PA Super 166, 778 A.2d 683, 686 (Pa. Super. 2001). "In other words, a Concise Statement which is too vague to allow the court to identify the issues raised on appeal is the functional equivalent of no Concise Statement at all." *Dowling*, 778 A.2d at 686-87. Therefore, the issues contained in a vague Rule 1925(b) statement will be deemed waived on appeal. *Dowling*, 778 A.2d at 687.

In *Commonwealth v. Lord*, 553 Pa. 415, 719 A.2d 306, 309 (Pa. 1998), the Supreme Court of Pennsylvania held that issues not included in a Rule 1925(b) Statement are deemed waived on appeal. *Wells v. Cendant Mobility Fin. Corp.*, 2006 PA Super 363, 913 A.2d 929 (2006).

Specifically, the Court stated:

The absence of a trial court opinion poses a substantial impediment to meaningful and effective appellate review.

² This Court found the plaintiff's filing of his Praecipe for Entry of Judgment has no legal significance in the case because the Order of September 7, 2007 granting DePuy's preliminary objections was a dispositive order which began the thirty (30) day appeal period.

Rule 1925 is intended to aid trial judges in identifying and focusing upon those issues which the parties plan to raise on appeal. Rule 1925 is thus a crucial component of the appellate process. *Id.* (Citing *Lord*, 719 A.2d at 308).

In applying these principles to the case at bar, this Court cannot be expected to guess which orders are appealed and the issues that plaintiff is requesting it address when the Court is writing its Opinion. For this reason, we ask the Superior Court to dismiss Plaintiff's Appeal for failure to state, with particularity, the orders and issues sought to be addressed by Plaintiff's Statement of Matters.

Evidence of Plaintiff's defective appeal is further demonstrated by the inaccuracies between the errors alleged in his Statement of Matters and the actual facts of the case.

Plaintiff lists several errors alleging that this Court considered affirmative defenses in granting the Preliminary Objections. (Plaintiff's Statement of Matters, ¶1, 2, 4, 5). Although all Defendants raised defenses of *res judicata* and collateral estoppel as part of their preliminary objections, they were not considered by this Court as a defense. Rather defendants successfully argued preliminary objections based on demurrers. This Court found Defendants' demurrer arguments convincing and granted the Preliminary Objections because the Complaint was legally insufficient pursuant to Pa.R.C.P. 1019 and 1028 (a)(4). Since the Court did not consider any of the affirmative defense arguments advanced by Defendants in their Preliminary Objections, any issues pertaining to this Court's consideration of affirmative defenses are meritless.

Plaintiff's Statement of Matters also references alleged errors committed by this Court in reference to an Amended Complaint. (Statement of Matters, ¶3, 4, 5, 6). However, a careful review of the record does not indicate that an Amended Complaint was filed in this case, nor did plaintiff request to file an amended complaint. For these

reasons, this Court believes that the Plaintiff has not effectively preserved his issues for appeal.

CONCLUSION

In light of the foregoing analysis, this Court believes that the Defendant's Preliminary Objections were properly granted by this Court, and respectfully requests that it be affirmed by the Court above.

BY THE COURT:

ALLAN L. TERESHKO, J.

5-15-2008

DATE

cc:
Jeffry Stephen Pearson, Esq.
Daniel F. Ryan, III, Esq.
Peter Lynch, Esq.
Alan Cotler, Esq.