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Sauce for Goose and Gander

I always thought it was a ridiculous expression, but we still hear people say; "What's sauce for the goose is sauce for the gander." While I do not know much about sauce for goose or gander, I know a little something about preliminary objections.

Preliminary objections, in the world occupied by most lawyers, are typically about the party being sued raising a number of issues to be determined at the outset of the case, such as jurisdiction, venue and whether a legal claim is stated. However, it is now a small "cottage industry" for the defendants to file preliminary objections based upon the lack of the requisite specific facts pled by a plaintiff.

Our office, along with many others, have suggested that the same basting sauce with respect to the necessity to plead facts, applies to a defendant in pleading new matter, just as it applies to the plaintiff in pleading the averments of his or her complaint.

A lengthy discussion concerning this issue is found in Pennsylvania Medical Malpractice Law and Forms, by this author, Chapter 24.4.4. The chapter addresses objections to both the complaint and new matter and finds it original inspiration in the bellwether case of *Connor vs. Allegheny General Hospital*, 461 A.2d 600 (Pa. 1983). As recently as 2014, in *Village of Four Seasons Ass'n, Inc. v. Elk Mountain Ski Resort, Inc.*, 103 A. 3d 814, 821-22 (Pa. Super. 2014), *appeal denied*, 125 A. 3d 778 (Pa. 2015), a panel of the Pennsylvania Superior Court confirmed that the principle established in *Connor,* in the context of boilerplate allegations in a complaint, that a party must file preliminary objections or waive any challenge to the lack of specificity in a pleading, also applies to boilerplate allegations in new matter.

After many years of litigating what sort of facts need to be in a complaint and new matter, preliminary objections raising lack of specificity in new matter has become rather a garden variety issue in trial courts. A good example on the subject is the recent decision in Lycoming County, *Barnes vs. Williamsport Petroleum*, No. 20-0092 (C.P. Lycoming October 22, 2020)(Judge Linhardt). The opinion relies upon a case out of the office of this author, *Allen vs. Lipson*, 8 Pa. D&C 4390 (Lyco. Cty. C. P. 1990).

The Court in *Barnes* found that it is inequitable to put the onus on plaintiffs to conduct excessive discovery to uncover the facts underlying a conclusory allegation in new matter rather than requiring the defendants who asserted the allegation to marshal the facts to support it.

> In *Allen vs. 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 vs. 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 materials facts forming the basis of a cause of action or defense. 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. 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. (Footnotes omitted)

Defendants took the position in *Barnes*, as they usually do, that Pennsylvania Rule of Civil Procedure 1019(a) does not apply to new matter and that *Allen vs. Lipson* is no longer good law following the 1994 revision to Rule 1030. At the time *Allen vs. Lipson* was decided, Rule 1030 provided as follows:

> 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 pleadings.

The 1994 language was amended as subdivision (a) of Rule 1030, excluding assumption of risk and contributory negligence. Subdivision (b) was added which provides, "[t]he affirmative defenses of assumption of the risk, comparative negligence and contributory negligence need not be pleaded."

As Judge Linhardt correctly stated in *Barnes*, the Explanatory Note to Rule 1030 explains that if assumption of the risk, comparative negligence, or contributory negligence are pled in new matter, those defenses are automatically considered denied. They do not require a response. If assumption of the risk, comparative negligence, or contributory negligence are not pled in New Matter, the defenses are not waived.

Therefore, *Allen vs. Lipson* remains binding authority in Lycoming County, and is followed in most of the other counties in the Commonwealth that this author is aware of. Since defendants are no longer required to plead certain defenses in New Matter in order to preserve those claims, the burden on defendants in connection with their pleading requirements is simply reduced. It does not mean that where defendants choose to assert a defense, they may be factually vacuous. If the Supreme Court had intended not to require the remaining affirmative defenses to be pleaded with specificity

it would have dispense with the requirement that they be pleaded altogether, as it did with the defenses specified in Rule 1030(b).

A litany of affirmative defenses raised in new matter, not supported by facts constitute legal conclusions and hence are simply "boilerplate." In state court, unlike federal court where affirmative defenses abound like pollen on a spring day, Pennsylvania applies factual pleading requirements to both defendant and plaintiff.

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