

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

<b>ARMANDO LOPES</b>	:	<b>CIVIL TRIAL DIVISION</b>
	:	
<b>Appellant/Plaintiff</b>	:	
	:	<b>FEBRUARY TERM, 2006</b>
<b>v.</b>	:	<b>No. 00148</b>
	:	
<b>ALEKSANDR SHPIGEL, M.D.,</b>	:	<b>Superior Court Docket No.</b>
<b>THOMAS JEFFERSON UNIVERSITY,</b>	:	<b>789 EDA 2007</b>
<b>and THOMAS JEFFERSON UNIVERSITY</b>	:	
<b>HOSPITAL</b>	:	
	:	
<b>Appellee/Defendant</b>	:	

**OPINION**

**PROCEDURAL HISTORY**

Plaintiff Armando Lopes appeals from the Court’s Order, dated November 2, 2006, wherein the Court sustained Preliminary Objections of Defendants Aleksandr Shpigel, M.D., Thomas Jefferson University, and Thomas Jefferson University Hospital, striking paragraphs 6, 14(d), 14(e), 15, 16, 17, 18, 19, 20, 23(d), 24, 25, 26, 27, 28, 29, 32(d), 33, 34, 35, 36, 37, 38, 43(d), 44, 45, 46, 47, 48, and 49 from Plaintiff’s Amended Complaint with prejudice.

**FACTUAL BACKGROUND**

Plaintiff Armando Lopes is a gay man living with AIDS in Philadelphia. (Amended Complaint, ¶¶ 1, 6, 12, 14(d)). In July 1997, prior to his diagnosis, Plaintiff began treating at Thomas Jefferson University Hospital in its Department of Internal Medicine. (*Id.*, ¶ 5). He treated with Aleksandr Shpigel, M.D., a licensed physician and a professor at Thomas Jefferson University, for regular check-ups and sick visits from October, 2000, to October, 2004. (Amended Complaint, ¶¶ 6, 7, Defendant’s Answer with New Matter, ¶ 2). These visits included

“at least three” CBC<sup>1</sup> blood screenings. (*Id.*, ¶ 7). There is no allegation in his Complaint or Amended Complaint that Mr. Lopes requested a test for HIV, the virus that causes AIDS, at any time between 1997 and 2004. Mr. Lopes presented to the Department of Internal Medicine eight times between May 11, 2004, and the end of August, 2004, complaining of “fatigue, anxiety, weight loss, memory loss and dizziness.” (*Id.*, ¶ 8). Upon referral to a neurology resident, he underwent an HIV test, which came back positive. (*Id.*, ¶ 9). On August 27, 2004, Plaintiff was diagnosed with HIV<sup>2</sup> infection and the AIDS<sup>3</sup> virus. (*Id.* ¶12).

Plaintiff filed his Complaint on May 8, 2006, alleging negligence by Defendant Shpigel and unnamed others at Defendants Thomas Jefferson University and Thomas Jefferson University Hospital. (*See* Amended Complaint). Specifically, Mr. Lopes alleges that Defendant Shpigel “knew or should have known” that Mr. Lopes was gay; that Defendant Shpigel never ordered an HIV test or advised Mr. Lopes to have one; and that Defendant Shpigel did not document in Mr. Lopes’s records that Mr. Lopes is gay “so as to alert other providers” of this information. (Amended Complaint, ¶¶ 6, 10, 14(d)). Mr. Lopes further alleges that, “as a result,” he “was not prescribed drug therapy for HIV and was thereby subject to an increased risk of harm for contracting the AIDS virus [sic] and did in fact contract AIDS virus [sic].” (Amended Complaint, ¶ 15). Mr. Lopes’s original complaint also included allegations of negligence based upon a theory of corporate liability against Thomas Jefferson University and Thomas Jefferson University Hospital. (*See* Complaint, ¶¶39-49).

---

<sup>1</sup> Complete blood count, a routine, diagnostic laboratory screening. Douglas M. Anderson, M.A., ed., *Mosby’s Medical Dictionary* 404 (6th Edition 2002).

<sup>2</sup> HIV, or Human Immunodeficiency Virus, is the pathogen that causes the disorder known as AIDS, or Acquired Immunodeficiency Syndrome. (Douglas M. Anderson, M.A., ed., *Mosby’s Medical Dictionary* 22 (6th Edition 2002)).

<sup>3</sup> AIDS (acquired immunodeficiency syndrome) is a syndrome involving a defect in cell-mediated immunity that has a long incubation period, follows a protracted and debilitating course, is manifested by various opportunistic infections, and without treatment has a poor prognosis. (Douglas M. Anderson, M.A., ed., *Mosby’s Medical Dictionary* 22 (6th Edition 2002)).

On July 10, 2006, a judgment of non pros was entered as to all Defendants for failure to file separate and distinct certificates of merit as to each individual defendant within the time required by Pa. R.C.P. 1042.3. (*Id.*). On August 17, 2006 Plaintiff filed a Motion to Vacate the non pros judgment as a miscellaneous motion. (*Id.*). This Court subsequently vacated the judgment of non pros, ordering the causes of action for corporate liability to remain dismissed and ordering Plaintiff to file an amended certificate of merit within 20 days. (*Id.*). Plaintiff filed his Amended Complaint, which did not include allegations of corporate liability, on September 6, 2006 and filed his amended certificates of merit on September 26, 2006. (Complaint, ¶¶39-49, Amended Complaint).<sup>4</sup>

Defendants filed Preliminary Objections and a Motion to Determine Preliminary Objections on October 5, 2006, to which Plaintiff filed a response on October 25. (*See* Docket). In their Preliminary Objections, Defendants sought to strike several paragraphs (¶¶5-12) as insufficiently specific under Pa. R.C.P. 1028(a)(3) and legally insufficient under Pa. R.C.P. 1028(a)(4). (*See* Defendants' Preliminary Objections). Defendants' argument to strike these paragraphs were not the subject of this Court's Order and therefore will not be addressed in this Opinion.

The Defendants also sought to strike several other paragraphs<sup>5</sup> with prejudice as impertinent under Pa. R.C.P. 1028(a)(2) because Plaintiff fails to establish that Defendants committed medical negligence. *Id.* at ¶29. On November 2, 2006, this Court sustained Defendants' Preliminary Objections, striking the paragraphs that Defendants had asserted were scandalous and impertinent pursuant to Pa.R.C.P. 1028(a)(2). (Order of November 2, 2006).

---

<sup>4</sup> Because corporate liability was not plead in the Amended Complaint, the trial Court can only surmise that Paragraphs 43(d), 44, 45, 46, 47, 48 and 49, which were contained under the corporate liability count were erroneously included in the proposed order and will not be addressed by the Court

<sup>5</sup> Specifically, Paragraphs 6, 14(d), 14(e), 15, 16, 17, 18, 19, 20, 23(d), 24, 25, 26, 27, 28, 29, 32(d), 33, 34, 35, 36, 37, 38, 43(d), 44, 45, 46, 47, 48, and 49.

Plaintiff filed his Motion for Reconsideration of the November 2, 2006, Order on November 13. (*See* Docket). In his Motion for Reconsideration, Mr. Lopes asserts that the allegedly negligent “four year delay in diagnosis of HIV infection increas[ed] plaintiff’s risk of harm for contracting the AIDS virus for which he alleges damages in the nature of a shorter life expectancy.” On November 28, Defendants filed a response to Plaintiff’s Motion for Reconsideration, summarizing and briefly reiterating their arguments as set forth in their Preliminary Objections. (*See* Docket). This Court denied Plaintiff’s Motion for Reconsideration on December 8, 2006 and the case proceeded on the remaining allegations. (*Id.*)

In their Answer and New Matter, Defendants specifically denied the counts of negligence and contended that Defendants’ care of Mr. Lopes was in accordance with the prevailing standards of care. (*See* Defendants’ Answer and New Matter).

On February 2, 2007, Defendants filed a Motion for Judgment on the Pleadings. (*See* Docket). Defendants asserted in their Motion for Judgment on the Pleadings that the “[Amended] Complaint is insufficient as a matter of law” because it “fails to state a valid and complete claim for medical negligence against the defendants.” (Defendants’ Motion for Judgment on the Pleadings, ¶¶ 13, 17). On February 22, Plaintiff responded to this Motion with a Response to Motion for Summary Judgment. (*See* Docket). “As Plaintiff’s response had nothing to do with the Motion before [the] Court and determining Plaintiff did not allege an adequate cause of action in light of [this Court’s] rulings on Preliminary Objections, [the Honorable Judge Sandra Mazer Moss] granted the Motion for Judgment on the Pleadings March 1, 2007.” (Opinion of Sandra Mazer Moss, J., of June 13, 2007). Plaintiff appealed that ruling on March 28. (*See* Docket). Because Judge Moss’s ruling was based upon this Court’s November 3, 2006, Order sustaining Defendants’ Preliminary Objections, the Superior Court directed this Court to write an Opinion addressing the November 3 Order.

The sole issue on appeal is whether this Court erred in sustaining Defendants' Preliminary Objections, ordering Paragraphs 6, 14(d), 14(e), 15, 16, 17, 18, 19, 20, 23(d), 24, 25, 26, 27, 28, 29, 32(d), 33, 34, 35, 36, 37, 38, 43(d), 44, 45, 46, 47, 48, and 49 stricken from Plaintiff's Amended Complaint with prejudice.

### LEGAL ANALYSIS

Under Pa.R.C.P. 1028(a)(2), a court may sustain preliminary objections in the form of a motion to strike a complaint or portions of a complaint for the "inclusion of scandalous or impertinent matter." Allegations are scandalous or impertinent if they are "immaterial and inappropriate to the proof of the cause of action." *Common Cause/ Pennsylvania v. Commonwealth*, 710 A.2d 108, 115 (Pa. Commw. 1998), citing *Commonwealth v. Peggs Run Coal Company*, 55 Pa. Commw. Ct. 312, 320, 423 A.2d 765, 769 (1980). Allegations are immaterial to the action at hand if "whether proven or not, or whether admitted or denied, [the allegations] can have no influence in leading to the result of the judicial inquiry." *Fromm v. Fromm*, 42 Pa. D. & C.2d 77, 83 (Common Pleas Court of Dauphin Cnty., 1967). Inaccurate statements of the law relevant to the action constitute "impertinent matter which should be stricken" from the pleadings by the court. *Piunti v. DOL & Indus., Unemployment Comp. Bd. of Review*, 900 A.2d 1017, 1020, 2006 Pa. Commw. LEXIS 320, \*5-6 (Pa. Commw. Ct. 2006).

In a medical malpractice action, a plaintiff must plead that "(1) the physician owed a duty to the patient; (2) the physician breached that duty; (3) the breach of duty was the proximate cause of, or a substantial factor in, bringing about the harm suffered by the patient; and (4) the damages suffered by the patient were a direct result of that harm." *Winschel v. Jain*, 2007 PA Super 121, \*12 (Pa. Super. 2007), citing *Corrado v. Thomas Jefferson University Hospital*, 2001 PA Super 363, 790, A.2d 1022, 1030 (Pa. Super. 2001). In the instant case, paragraphs 6, 14(d), 14(e), 15, 16, 17, 18, 19, 20, 23(d), 24, 25, 26, 27, 28, 29, 32(d), 33, 34, 35, 36, 37, 38, 43(d), 44, 45, 46, 47, 48, and 49 were struck from Plaintiff's Amended Complaint with prejudice because

the averments therein repeatedly and impertinently allege that Defendants owed Plaintiff a higher duty of care because of his sexual orientation.

Paragraph 6 of the Amended Complaint reads, in relevant part, that Dr. Shpigel “had actual or constrictive [sic] notice and either knew or should have known of plaintiff’s sexual orientation.” Paragraphs 14(d), 23(d), 32(d) and 43(d) allege “[f]ailure to review plaintiff’s medical records to identify significant and relevant personal and social history of male patients and specifically preference for same sex partners and/or to document the patient chart with his history so as to provide adequate and complete medical care.” Paragraph 14(e) contends that Dr. Shpigel failed “to realize that male patients with same sex partners are at a higher risk for HIV and/or AIDS viruses.” Paragraphs 15, 24, 33 and 44 allege that, “[a]s a result of the aforesaid, plaintiff was not prescribed drug therapy for HIV and was thereby subject to an increased risk of harm for contracting the AIDS virus and did in fact contract the AIDS virus.”

Paragraphs 16, 17, 25, 26, 34, 35, 45, and 46 allege, *inter alia*, illness, disability, diminished life expectancy, and increased risk of contracting future illnesses as “further result[s]” of Defendants’ alleged negligence. Paragraphs 18, 27, 36, and 47 allege damages of “mental anguish, anxiety, emotional distress and loss of life’s pleasures” as “further result[s]” of Defendants’ alleged negligence. Paragraphs 19, 28, 37, and 48 allege damages of past and future medical expenses. Paragraphs 20, 29, 38, and 49 allege damages in the nature of economic hardship due to disability. In the event that the Superior Court finds that the Court was acting within its discretion in striking paragraphs 6, 14(d), 14(e), 15, 23(d), 24, 32(d), 33, 43(d), and 44 of Plaintiffs Complaint, the remaining paragraphs addressing alleged injuries by the Plaintiff must also be stricken because liability for medical malpractice was not proven.

As a minimum, a pleader must set forth concisely the facts upon which his cause of action is based." *Line Lexington Lumber & Millwork Co., Inc. v. Pennsylvania Publishing Corp.*, 451 Pa. 154, 162, 301 A.2d 684, 688 (1973). Pa.R.C.P. 1019(a) requires that a pleading contain

the material facts on which a cause of action or defense is based shall be stated in a concise and summary form. *McNeil v. Jordan*, 586 Pa. 413 , 429, 894 A.2d 1260, 1269 (2003). Under the Pennsylvania system of fact pleading, the pleader must define the issues; every act or performance essential to that end must be set forth in the complaint. *Cafazzo v. Central Medical Health Services, Inc.*, 430 Pa.Super. 480, 483, 635 A.2d 151, 152.

Here, Plaintiff's Amended Complaint fails to include factual averments to support his contention that moving Defendants committed medical malpractice. Pennsylvania courts have also held that in order to grant a motion to strike for impertinent material, "[A] complaint's allegations must be immaterial and inappropriate to the proof of the cause of action." *Brennan v. Smith*, 6 Pa.Comm.w.Ct. 342, 299 A.2d 683 (1972). The allegation that moving defendants had actual or constructive notice of Plaintiff's sexual preferences is inappropriate in that Plaintiff avers that his homosexuality should have increased the standard of care to this patient. (Amended Complaint, ¶6, 14(d), 23(d), 32(d) and 43(d)). The standard of care does not increase as to a particular patient because of their sexual preference. To the contrary, physicians have a duty to protect a patient's privacy. Had moving Defendants disclosed Plaintiff's sexual preference to other "providers" without authorization, they would have violated the Plaintiff's constitutional right of privacy. Likewise there is no assertion that Dr.Shpigel or Thomas Jefferson had received a request by Plaintiff to forward any medical documentation to other medical personnel or providers. Plaintiff does not cite the names of any other doctors other the neurologist, Dr. Daniel Kantor, who recommended the HIV test. (Amended Complaint, ¶9). Although Plaintiff states that he was under the care of Thomas Jefferson Department of Internal Medicine before July 26, 1997, he did not come under the care of Dr. Shpigel for over three (3) years after coming to Jefferson. The Plaintiffs Amended Complaint is devoid of any details of his advising Dr. Shpigel, Thomas Jefferson or any other Jefferson medical employee of his sexual preference, which allow them to have knowledge of such. Without these facts, Plaintiff

cannot establish that Shpigel and Thomas Jefferson owed him a duty to be on notice of a possible HIV infection. Therefore paragraphs 6, 14(d), 23(d), 32(d) and 43(d) were properly stricken.

Plaintiff also contends that Dr. Shpigel and Thomas Jefferson were negligent because they have failed to realize “that male patients with same sex partners are at a higher risk for contracting HIV and/or AIDS viruses.” (Amended Complaint, ¶14(e)). This allegation is inappropriate because this assertion implies that plaintiff, because his sexual preference, can contract HIV and AIDS through no fault of his own. It has been universally accepted and medically proven that HIV/AIDS is spread through unprotected sexual activity, sharing drug needles, receiving infected blood transfusions, accidental injury involving contact with an infected person or material, or HIV positive mothers passing the infection to their babies in the womb or through breast milk. (U.S. Department of Health and Human Services, National Institutes of Health, National Institute of Allergy and Infectious Diseases, *HIV Infection and AIDS: An Overview*, <http://www.niaid.nih.gov/factsheet/hivin.htm>).

Assuming that Plaintiff did not contract HIV at birth, through blood transfusion or through accidental contact, in order for him to contract HIV/AIDS he had to make a conscious and independent decision have unprotected sex or share a drug needle. In making such a decision Plaintiff simultaneously made an independent decision to put his life at risk knowing that he could be infected with such viruses. Without participating in such activities, the risk of contracting HIV and/or AIDS by other means is negligible.

Plaintiff therefore made a conscious decision in knowingly subjecting himself to a lifestyle, which carried fatal risks that could affect his health. It is this participation, alone that placed him at risk for his contracting HIV and the AIDS viruses.

In addition, paragraph 14(e) should be stricken because it implies that Defendants owed Plaintiff a heightened duty of care due to his sexual orientation. To maintain an action for medical malpractice, a plaintiff must plead, at the outset, that “the physician owed a duty to the

patient.” *Winschel*, 2007 PA Super 121, at \*12 . But Plaintiff has not provided any authority for the apparent theory that his sexual orientation would increase his physician’s duty of care to him, and this Court has found none. To the contrary, if Dr. Shpigel had “alter[ed] other providers” to Plaintiff’s sexual orientation, he would have breached his duty of maintaining patient confidentiality. Our Supreme Court in *Hodgson v. Bigelow*, 335 Pa. 497, 7 A.2d 338 (1938) reiterated that the standard of care of physicians in medical negligence cases is not one that carries a heightened duty.

...[T]he standard by which the degree of care, skill and diligence required by physicians is to be determined, is not the highest order of qualification obtainable, but is the care, skill and diligence which are ordinarily possessed by the average of the members of the profession in good standing; that the acquisition of professional learning and skill being required by law, it is the duty of a physician and surgeon to acquire the same, and he is liable for injuries caused by the failure of duty to exercise such learning and skill.”

citing *Wohlert v. Seibert*, 23 Pa. Superior Ct. 213, 218 (1903).

Thus, Plaintiff’s negligence claims in paragraphs 14(e) alleging a heightened duty of care owed to him because of his sexual preference require an element that is not associated with a claim for medical negligence and should be stricken as inappropriate for a negligence case such as this.

Alternatively, even if Plaintiff’s sexual orientation did increase Defendants’ duty of care to him, Plaintiff does not allege sufficient causation between Defendants’ acts or omissions and Plaintiff’s contracting HIV. “HIV is not spread by casual contact but rather by sexual intercourse or exposure to contaminated blood, semen, breast milk, or other body fluids of infected persons.” Douglas M. Anderson, M.A., ed., *Mosby’s Medical Dictionary* 22 (6th Edition 2002). Paragraphs 15, 24 and 33 allege that, “[a]s a result of the aforesaid [delay in ordering an HIV test], plaintiff was not prescribed drug therapy for HIV and was thereby subject to an increased risk of harm for

contracting the AIDS virus and did in fact contract the AIDS virus.” As it stands, this wording is an inaccurate statement of the mechanism of HIV infection and the progression of the disease into AIDS. Drug therapy for HIV does not prevent or reduce the risk of harm of “contracting the AIDS virus.” Assuming Plaintiff intends to allege that Defendants’ alleged failure to order an HIV test caused him to contract HIV and develop AIDS, then paragraphs 15, 24 and 33 are invalid because they do not allege any of the known routes of HIV transmission. That is, Plaintiff does not and cannot allege that Defendants negligently infected him or proximately caused him to be infected with HIV, because an HIV test, even a delayed one, could never prevent Plaintiff from contracting HIV in the first place. Because paragraphs 15, 24 and 33 do not allege a cognizable claim for negligence, they were properly stricken as impertinent and immaterial to the proof of his cause of action.<sup>6</sup>

Alternatively, Plaintiff has stated, “[t]he simple allegation in this case is that Plaintiff requested full complete blood screens including HIV testing, which was not performed and Plaintiff was inaccurately advised that his HIV screen was negative.” (Memorandum of Law in Support of Plaintiff’s Motion for Reconsideration, 4, *see also* Plaintiff’s Response in Opposition to Defendants’ Preliminary Objections, ¶36). This “simple allegation” is never repeated anywhere in Plaintiff’s pleadings, and “[a] memorandum of law is not a pleading.” *Jubelirer v. Rendell*, 904 A.2d 1030, 1035 (Conn. Ct. 2006). Plaintiff must allege his cognizable claim in his pleadings, not in a memorandum of law. Furthermore, Plaintiff has provided no evidence that would tend to support this assertion. His lack of response to discovery requests, and the resulting sanction that was ultimately imposed, do not persuade this Court that he will be able to.

---

<sup>6</sup> Taking the pleading in the light most favorable to the non-moving party, this Court assumes that Plaintiff meant to allege in Paragraphs 15, 24 and 33 that Defendants’ alleged delay in ordering an HIV test resulted in a delay in treatment for Plaintiff’s HIV infection, which then resulted in a failure to possibly slow down the onset of AIDS. Again, such a theory appears to rely on the untenable premise that Defendants owed him a heightened duty of care, that is, to order an HIV test, simply because of Plaintiff’s sexual preference.

## CONCLUSION

For the foregoing reasons, the Court believes that it properly granted the Preliminary Objections of Defendants, Aleksandr Shpigel, M.D., Thomas Jefferson University, and Thomas Jefferson University Hospital, and this Court respectfully requests the Superior Court to affirm its decision.

**BY THE COURT:**

11-28-07

\_\_\_\_\_  
**Date**

\_\_\_\_\_  
**ALLAN L. TERESHKO, J.**

cc:

Alan R. Zibelman, Esq., for Appellant  
Mary Ellen Reilly, Esq., for Appellee