

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

PAUL APPENZELLER, an individual,	:	
	:	CIVIL TRIAL DIVISION
Appellant/Plaintiff,	:	
	:	APRIL TERM, 2006
	:	No. 3592
	:	
v.	:	
	:	
	:	Superior Court Docket No.
PHILADELPHIA PROTESTANT HOME, and JOSEPH F. MAMBU, M.D.	:	2810 EDA 2006
	:	
Appellees/Defendants.	:	

OPINION

PROCEDURAL HISTORY

Plaintiff appeals from the Order dated October 12, 2006, wherein this Court granted Defendants' Preliminary Objections and dismissed Plaintiff's Complaint.

FACTUAL BACKGROUND

Plaintiff Paul Appenzeller (hereinafter Plaintiff) was the son of Abraham Appenzeller (hereinafter Abraham). (Complaint, ¶11). Abraham was a "care-dependant individual" residing at Philadelphia Protestant Home's (hereinafter PPH) Philadelphia facility. (Complaint, ¶13). PPH was in the business of providing skilled nursing, medical and/or long-term institutional care and related medical services available twenty-four hours a day. (Complaint, ¶7). In essence, PPH operated a nursing home facility, an assisted living facility (including dementia unit), and an independent living facility. (Complaint, ¶7). Joseph Mambu, M.D. (hereinafter Dr. Mambu) was a licensed

physician, privately retained by Plaintiff to provide medical care for his father during the time that Abraham resided at PPH. (Complaint, ¶6).

Abraham first became a resident of PPH on January 21, 2003. (Complaint, ¶ 15). Prior to his transfer to PPH, Abraham had resided at Willow Lake Assisted Living for approximately two (2) years and four (4) months. (Complaint, ¶16). Abraham was 87 years old when he was admitted to PPH. (Complaint, ¶17). It is contended that upon Abraham's admission to PPH it was noted that he suffered from a history of falling, +3 edema, bi-lateral feet and gait disorder, degenerative joint disease, dementia and osteoporosis among other diagnosis. (Complaint, ¶18).

Plaintiff alleges that Abraham suffered several falls over a period of approximately fourteen (14) months, while residing at PPH. (Complaint, pgs. 3-7). Since the time of these incidents, Abraham has passed away. It is alleged by Plaintiff that Abraham was admitted to Abington Memorial Hospital on May 5, 2004 with a diagnosis of subdural hematoma resulting from a fall at PPH; he then died on May 10, 2004 from blunt force trauma. (Complaint, ¶57-59).

This action for nursing home and medical negligence was commenced by Writ of Summons on April 27, 2006. (See Docket). On June 29, 2006, Plaintiff filed his Complaint naming "Paul Appenzeller, an individual" and not Abraham as the only Plaintiff in the action. (See Docket). In the Complaint, Plaintiff alleges that Defendant PPH and Dr. Mambu were negligent in the care, monitoring and treatment of Abraham. (Complaint, ¶64-65).

Dr. Mambu and PPH filed their Preliminary Objections to the original Complaint and Plaintiff filed an Amended Complaint on July 31, 2006. In addition to the Amended

Complaint, Plaintiff also filed a Praecipe to Amend the Caption on the same day. (See Docket). On August 16, 2006, Dr. Mambu filed his Motion to Determine Preliminary Objections to Plaintiff's Amended Complaint and a Motion to Strike Plaintiff's Praecipe to Amend the Caption. (See Docket, Control # 59-06081059, 60-0608081060). PPH's Motion to Determine Preliminary Objections and Motion to Strike followed on August 18, 2006. (See Docket, Control # 10-06081410, 11-06081411).¹

The docket does not reflect that a response was filed to either of these Motions, despite Plaintiff's contention that their responses were filed and returned to Plaintiff's counsel due to an error by the Court's motion clerk. (Plaintiff's Statement of Matters). On September 14, 2006, the Court granted Defendants' PPH and Dr. Mambu's Preliminary Objections to Plaintiff's Amended Complaint. (See Docket). On October 5, 2006, Plaintiff's filed their Notice of Appeal with the Superior Court. A request for Statement of Matters was sent to Plaintiff on October 12, 2006 and they issued their 1925(b) Statement of Matters on October 31, 2006.

The issues Plaintiff raises on appeal are as follows:

1. Whether the trial court committed an error of law or abused its discretion in granting defendants Preliminary Objections to Amended Complaint wherein the Amended Complaint and Caption failed to adhere to the Rules of Civil Procedure.
2. Whether the trial court committed an error of law or abused its discretion in not ruling on Plaintiff's Motion for Reconsideration, where the trial Court is given discretion in Pa.R.A.P. as to whether or not it wishes to address such motions when an appeal has been filed.

¹ Both issues of Amending the Complaint and Caption were discussed in each of defendants' respective Motions to Amend and the Motions to Strike the Caption and therefore will be addressed collectively in one analysis below.

LEGAL ANALYSIS

Plaintiff raises the issue that the Court failed to consider Plaintiff's Responses to Preliminary Objections, which, according to Plaintiff, were returned to Plaintiff's counsel due to error by the Court's motion clerk. A review of the docket does not indicate that response to Defendants' Preliminary Objections were filed by Plaintiff either prior to or subsequent to their response period. However, Dr. Mambu did file a sur-reply to both of his Motions referencing responses by Plaintiff in his motions. Had a clerical error occurred in this case, Plaintiff should have attempted to re-file their response or contact the Court to advise it of the situation so that an accommodation could be made until the responses were filed. Despite Plaintiff's contention, this Court granted these motions on their merits and the responses of Plaintiff would not have altered the outcome because Plaintiff would be without recourse to rectify the error as the applicable statute of limitations had passed.

Plaintiff's Amended Complaint was dismissed because it was filed in violation of Pa.R.C.P. 1033 without obtaining permission of the Court or consent of the parties.

Pa.R.C.P. 1033 states, "A party, either by filed consent of the adverse party or by leave of court, may at any time change the form of action, correct the name of a party or amend his pleading." On July 31, 2006, Plaintiff filed a Praeceptum to Amend the Caption and his Complaint from "Paul Appenzeller, an individual" to "Paul Appenzeller, Individually and as Personal Representative of the Estate of Abraham Appenzeller, deceased, Plaintiff." Neither PPH nor Dr. Mambu consented to the amendment to the caption, and Plaintiff failed to petition the Court for leave to amend the caption. As such, Plaintiff's praecipe to amend the caption fails to comply with the Pa.R.C.P. 1033.

Furthermore, Plaintiff's Praecipe to Amend the Caption seeks to add a new party after the expiration of the statute of limitations. Where the statute of limitations has expired, amendments which introduce a new cause of action or bring in a new party or change the capacity in which that party is being sued, will not be allowed. *Tork-Hiis v. Commonwealth of Pennsylvania*, 558 Pa. 170, 175, 735 A.2d 1256, 1258 (1999); see also *Lafferty v. The Alan Wexler Agency, Inc.*, 393 Pa.Super. 400, 574 A.2d 671 (1990). The cause of action for Abraham accrued on the date of his death, May 10, 2004, however Plaintiff's praecipe to amend the caption was filed on July 31, 2006, which is more than 2 years since the cause of action arose and outside the statute of limitations. Thus it is clear from the pleadings that Paul Appenzeller, in his capacity as personal representative of the estate of Abraham, was not a party in this action prior to the expiration of the statute of limitations. The fact that an amendment is not allowed, where it amounts to the addition of a new party to the matter, is undisputed in Pennsylvania case law. *Tork-Hiis*, 735 A.2d at 1258, *Saracina v. Cotoia*, 417 Pa. 80, 208 A.2d 764 (1965); *Anderson Equipment Company v. Shirley Huchber*, 456 Pa.Super. 535, 541, 690 A.2d 1239, 1241 (1997).

In *Saracina*, the Plaintiff filed an action against Mr. Cotoia, the owner of the vehicle, and not Robert Cotoia, the operator of the vehicle. The Supreme Court held that although it was likely that plaintiffs intended to sue the operator of the vehicle, the amendment of the complaint was disallowed, since it would have brought in a new and distinct party to the action. *Id.* In both *Anderson* and *Tork-Hiis*, the plaintiffs were prohibited from amending their pleadings, after the statute of limitations had run, to include a new and distinct party to the action. *Anderson*, 690 A.2d at 1241, *Tork-Hiis*, 735 A.2d at 1258.

In the case *sub judicie*, Plaintiff seeks to amend the caption to read “Paul Appenzeller, Individually and as Personal Representative of the Estate of Abraham Appenzeller, deceased, Plaintiff.” Paul Appenzeller, as personal representative of the estate of Abraham Appenzeller, deceased, was not an original party to this action, and therefore does not amount to a mere substitution of names, but rather the addition of a new party. The original Writ and Complaint were filed in the name of Paul Appenzeller, an individual who had no standing to bring such actions. Paul Appenzeller, an individual, is not a proper plaintiff to bring a wrongful death action, which must be brought by the personal representative of the decedent’s estate. See Pa.R.C.P. 2202. Likewise, a survival action is brought by the personal representative of the decedent, and is an action that the decedent himself could have brought had he survived. *In re Pozzuolo Estate*, 433 Pa. 185, 249 A.2d 540 (1969). Paul Appenzeller, an individual, is not a permissible party to bring either of these actions.

Plaintiff is now attempting to add a new plaintiff by way of an Amended Complaint and caption in an effort to preserve these claims. However, the statute of limitations has since expired and Plaintiff cannot now add a new party to correct the defect in the original Writ and Complaint pursuant to the caselaw and the applicable Rules of Civil Procedure. Accordingly, Plaintiff’s amended Complaint and amended caption were properly dismissed for failure to have a proper party-plaintiff.

Plaintiff also raises the issue that the Court erred in not ruling on his Motion for Reconsideration. However, pursuant to Pa.R.A.P. 1701, the trial Court is given discretion as to whether or not it wishes to rule on Motions for Reconsideration. Pa.R.A.P. §1701 states in pertinent part that:

(a) Except as otherwise prescribed by these rules, after an appeal is taken or review of a quasijudicial order is sought, the trial court or other government unit may no longer proceed further in the matter.

(b) Authority of a trial court or agency after appeal. After an appeal is taken or review of a quasijudicial order is sought, the trial court or other government unit *may*:

(3) Grant reconsideration of the order which is the subject of the appeal or petition, if:

(i) an application for reconsideration of the order is filed in the trial court or other government unit within the time provided or prescribed by law; and

(ii) an order expressly granting reconsideration of such prior order is filed in the trial court or other government unit within the time prescribed by these rules for the filing of a notice of appeal petition for review of a quasijudicial order with respect to such order, or within any shorter time provided or prescribed by law for the granting of reconsideration. (emphasis added).

The comments to 1701(b)(3) also specifically state that:

Subdivision (b)(3) is intended to handle the troublesome questions of the effect of application for reconsideration on the appeal process. The rule (1) permits the trial court or other government unit to grant reconsideration if action is taken during the applicable appeal period, which is not intended to include the appeal period for cross appeals, or, during any shorter applicable reconsideration period under the practice below, and (2) eliminates the possibility that the power to grant reconsideration could be foreclosed by the taking of a “snap” appeal. The better procedure under this rule will be for a party seeking reconsideration to file an application for reconsideration below and a notice of appeal, etc. *If the application lacks merit the trial court or other government*

unit may deny the application by the entry of an order to that effect or by inaction. The prior appeal will remain in effect, and appeal will have been taken without the necessity to watch the calendar for the running of the appeal period. If the trial court or other governmental unit fails to enter an order “expressly granting reconsideration” (an order that “all proceedings shall stay” will not suffice) within the time prescribed by these rules for seeking review, Subdivision (a) becomes applicable and the power of the trial court or other government unit to act on the application for reconsideration is lost. (emphasis added).

According to this Rule and its comments, the trial Court was vested with full discretion whether or not it wishes to rule on Plaintiff’s Motion for Reconsideration. The fact that the Court did not rule on Plaintiff’s Motion in this case is fully permitted according to the rules and does not amount to an error under the circumstances.

CONCLUSION

In light of the foregoing analysis, this Court believes that the Complaint was properly dismissed, and should be affirmed by the Court above.

BY THE COURT:

3-12-07

Date

ALLAN L. TERESHKO, J.

cc:
Maribeth Wolfe Blessing for Appellant
John Michael Pumphrey for Appellee
Donald N. Camhi for Appellee