siderations have any application in civil matters. However, we do agree litigants who realistically expect to assert a claim that counsel fees shall be taxed as costs under Section 2503(9) should give notice of that fact to the opposing party.

Pending appellate court or legislative guidance on the procedure to be followed in asserting a claim for counsel fees under Section 2503(9) of the Judicial Code, notice of such claim may appropriately be made by inclusion in the ad damnum clause. In our judgment the inclusion or exclusion of counsel fees as well as the amount to be included must be determined by the well-established procedure for taxing costs, and is not a proper subject for determination at trial by the trier of fact. Section 15 Standard Penna. Practice 624 et seq. (Costs Sec. 71, et seq. and 39th Jud. Dist. R. Jud. Adm. 86-88.

ORDER OF COURT

NOW, this 22nd day of May, 1981, Plaintiff's preliminary objection in the nature of a motion to strike is granted. Plaintiff's demurrer is denied.

The Defendant is granted leave to amend within twenty (20) days of date hereof.

Exceptions are granted Plaintiff and Defendant, Peggy D. Miller.

COLLEGE v. GOTHIE, No. 2, C.P. Fulton County Branch, No. 291 of 1978-C

Assumpsit - Pa. R.C.P. 1033 - Amendment of Pleadings - Diligence in Preparing Case

1. Pa. R.C.P. 1033 allowing the amendment of pleadings has been liberally construed except in cases where the statute of limitations has run.

2. Absent the pleading of facts or agreement by counsel, the Court may not assume the ultimate fact that the statue of limitations ran prior to a request for leave to amend.

3. An amendment to a pleading that would be directly contradictory to a party's prior pleading should be denied absent a satisfactory explanation for the inconsistencies.

GLUCK First and final account, statement of proposed distribution and notice to the creditors of Hazel Ernestine Stevens, executrix of the estate of M. Pauline Gluck, late of the Borough of Waynesboro, Franklin County, Pennsylvania, deceased.

JONES, SR. First and final account, statement of proposed distribution and notice to the creditors of Harold F. Jones and Ruth Zody, executors of the estate of Charles S. Jones, Sr., late of Mont Alto, Franklin County, Pennsylvania, deceased.

MOATS First and final account, statement of proposed distribution and notice to the creditors of Helen K. Sweigert, executrix of the estate of Harry E. Moats, late of the Borough of Chambersburg, Franklin County, Pennsylvania, deceased.

PIPER First and final account, statement of proposed distribution and notice to the creditors of John A. Guyer, executor of the last Will and Testament of Annie M. Piper, late of Fannett Township, Franklin County, Pennsylvania, deceased.

SMITH First and final account, statement of proposed distribution and notice to the creditors of Howard H. Smith, administrator of the estate of Katrina Sue Smith, late of the Borough of Waynesboro, Franklin County, Pennsylvania, deceased.

SLAUGHENHAUP First and final account, statement of proposed distribution and notice to the creditors of The Fidelity Bank and Sarah Louise Madson, executors of the Will of Helen E. Slaughenhaup, late of the Borough of Chambersburg, Franklin County, Pennsylvania, deceased.

UNGER First and final account, statement of proposed distribution and notice to the creditors of Howard D. Gingrich, Jr., executor of the estate of Lydia A. Unger, late of Antrim Township, Franklin County, Pennsylvania, deceased.

GLENN E. SHADLE
Clerk of Orphans' Court of
Franklin County, Pennsylvania

(7-10-81, 7-17-81, 7-24-81, 7-31-81)

LEGAL NOTICES, cont.

4. A party who seeks to amend his pleadings because he has failed to exercise diligence in preparation of his case may be required to reimburse the opposing party for additional expenses incurred as a result of the failure to diligently prepare.

Walter F. Wall, Esquire, Counsel for Plaintiff

P. Daniel Altland, Esquire, Counsel for Defendant

OPINION AND ORDER

KELLER, J., April 14, 1981:

This action in assumpsit was commenced by the filing of a praecipe for a writ of summons on July 7, 1978, and the issuance of the same on the same date with service being made by the Sheriff of Fulton County on the defendant on July 27, 1978. A praecipe for a rule on the plaintiff to file a complaint within twenty (20) days or suffer judgment of non pros was filed by counsel for the defendant on August 8, 1978, and served upon counsel for the plaintiff by mailing the same on August 17, 1978. The complaint in assumpsit was filed on August 28, 1978, in the Office of the Prothonotary of Fulton County. The defendant filed preliminary objections to the complaint on September 13, 1979. Arguments were heard by the Court, and on July 29, 1980 an Opinion and Order was filed sustaining one of the preliminary objections and overruling the others.

An amended complaint was filed on October 16, 1980. On October 29, 1980 an answer to the amended complaint pleading new matter was filed on behalf of the defendant. On November 17, 1980 the plaintiff's reply (incorrectly captioned "Answer to New Matter," See Pa. R.C.P. 1017) was filed. Counsel for both parties on October 27, 1980 executed certificates of readiness for trial. A Pre-trial Conference was held on January 29, 1981, and was attended by counsel for the parties. The Pre-trial Conference Memorandum prepared by the Court, together with a Supplemental Memorandum requested by counsel, was filed on March 9, 1981 with trial set to commence without jury on March 26, 1981.

The amended complaint in assumpsit alleged that prior to April 2, 1973 the plaintiff inspected the defendant's property, and on April 2, 1973 the parties entered into a written agreement for the cutting of certain timber at McConnellsburg and Valley-Hi Lodge; a copy of the contract was attached as Exhibit A. The plaintiff alleges that he cut out a log yard and advised the defendant he would return at a later date to commence

cutting, and thereafter without advising the plaintiff the defendant had Leo O'Brian cut the timber and remove it. The plaintiff alleged that the timber on the defendant's property would have yielded at least 250,000 board feet; his anticipated profit would have been $200.00 per thousand board feet less a total of $900.00 expenses for cutting and removal of the timber, and he sues for $49,100.00 plus interest and costs.

In answer the defendant admitted the plaintiff cut out the log yard, and averred he never paid for the wood that was cut out and removed. The defendant also admitted that Leo O'Brien timbered some lands and that Mr. O'Brien was brought in to timber the land after the plaintiff had repeatedly ignored the defendant's request or demand that he begin timbering operations. Under new matter the defendant inter alia alleged that the plaintiff advised him that he would not cut any timber on the defendant's land and that the defendant should get another person to cut it.

In the plaintiff's reply (Answer to New Matter), he alleges inter alia that at no time did the defendant make any request of him to commence cutting the timber other than the request indicated by the contract, and denies that he at any time refused to commence cutting of said timber. Paragraph 4 of the reply alleges:

> "Paragraph 14 of defendant's new matter is denied. On the contrary, it is alleged that the plaintiff had completed the log yard to the extent necessary for cutting. *It is further denied that the plaintiff removed any timber whatsoever from the property of the defendant . . .*"

On March 4, 1981, the plaintiff filed in the office of the Prothonotary of Fulton County a motion for a continuance alleging that while preparing for the trial scheduled for 9:30 a.m. on March 26, 1981, it was discovered during the week of February 16, 1981, from records of VanHessen Lumber Company that contrary to the knowledge of plaintiff's counsel and/or the memory of plaintiff work had actually been commenced by the plaintiff and his agents pursuant to the agreement with the defendant; that these facts are contrary to the allegations contained in the plaintiff's amended complaint, and plaintiff's "answer to new matter of defendant"; and therefore it will be necessary for the plaintiff to file another amended complaint correctly alleging the facts as it has now been determined they are. There being no objection to the continuance requested, an order was signed on March 12, 1981, continuing the trial for rescheduling.

On March 4, 1981, the plaintiff also filed his petition for leave of court to file an amended complaint, and therein also alleged the finding of the information in the records of Van-Hessen Lumber Company, which had not previously been known to plaintiff's counsel and which revealed that work had actually been commenced by the plaintiff and his agents pursuant to the agreement with the defendant; that those additional facts are contrary to the allegations contained in the plaintiff's pleadings; and praying for leave to file an amended complaint to conform the allegations to the facts and legal issues now revealed by the newly discovered information. The defendant opposed the granting of leave to the plaintiff to amend his pleading at this stage of the proceedings. By agreement of counsel the issue whether the plaintiff should be permitted to amend his complaint at this stage of the proceedings was briefed by counsel for both parties and submitted to the Court on April 2, 1981. The matter is now ripe for disposition.

Pa. R.C.P. 1033 provides:

> "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 pleadings. The amended pleading may aver transactions or occurrences which have happened before or after the filing of the original pleading, even though they give rise to a new cause of action or defense. An amendment may be made to conform the pleading to the evidence offered or admitted."

Counsel for both parties agree that the Rule of Civil Procedure authorizing amendments has been liberally construed in Pennsylvania where the statute of limitations has not yet run.

> "It is the general rule that the amendment of pleadings is a matter within the wise and judicial discretion of the court below. In the absence of plain error its action will not be reversed...However the right to amend should be liberally granted at any stage of the proceedings unless there is an error of law or resulting prejudice to an adverse party...The Pennsylvania Rules of Civil Procedure have embodied the modern philosophy of jurisprudence and court procedure and allow amendments with great liberality to the end that justice by all parties may be achieved." *Bell, et al. v. Shetrom*, 214 Pa. Super. 309, 314 (1969). *Mott v. Sewickley S & L Association*, 211 Pa. Super. 357 (1967); *Cellutron Production Corp. v. Stewart*, 223 Pa. Super. 391 (1972); *Wood v. W. T. Grant Company*, 60 D&C 3rd 140 (1977); *Mychlyk v. Allstate Insurance Company*, 14 D&C 3rd 217 (1980). See also 2 Goodrich Amram 2d Sec.1033:4.1.

Here, however, all agreement between the parties ends.

The plaintiff contends that the amendment of his pleadings to correct the erroneous allegation of facts concerning the cutting and removal of timber will neither change nor enlarge the existing cause of action, and it will still proceed in assumpsit for loss of profit allegedly suffered by the plaintiff as a result of the defendant's breach of the agreement pleaded in the original and amended complaints. Citing 2B Anderson Pa. Civil Practice Sec.1033.41(b), he urges that the defendant will suffer no "prejudice" justifying the refusal to grant an otherwise proper amendment to the pleadings in accordance with the prevailing liberal construction of the Rules of Civil Procedure.

To the contrary the defendant contends that the amendment should not be permitted on a multitide of grounds which we will hereafter consider.

Initially, the plaintiff asserts in his history of the case that is is presumed that the plaintiff will aver the defendant had a third party cut the timber contrary to the contract; "the alleged breach occurred within one year, at a maximum, from the date of the agreement. Thus, the cause of action, if any, occurred during 1974, or in excess of six years prior to the filing of the petition for leave to amend. Therefore, this amendment would be after expiration of the applicable statute of limitations." In his argument the defendant correctly cites various appellate court cases which hold that an amendment will not be allowed which changes the cause of action after the statute of limitations has run.

We have no difficulty in agreeing wholeheartedly with the law cited and relied upon by the defendant. However, having read and re-read all of the pleadings in this case, the Pre-Trial Conference Memoranda filed by the Court, and the stipulation of counsel, we find nothing justifying the defendant's assumption of the fact that the alleged breach occurred within one year of April 2, 1973, which would, of course, cause the statute to run some time in 1980. Absent the pleading of such facts or a finding of an agreement by counsel of such facts, this Court may not assume the ultimate fact that the statute of limitations ran prior to the plaintiff's request for leave to amend. Consequently, we also cannot deny the plaintiff leave to amend on this ground.

If the facts justified us in concluding that the statute of limitations had run prior to the date of the plaintiff's petition for leave to amend, we are not persuaded that the amendment would necessarily be disallowed on the theory that the pro-

posed amended complaint would state a new and different cause of action which is the "prejudice" which would prohibit such an amendment. In *Arner v. Sokol*, 373 Pa. 587, 96 A. 2d 854 (1953), the Supreme Court suggested application of a four-part standard to determine whether an amended complaint states a new and different cause of action:

1. Would a judgment bar any further action on either?

2. Would the same measure of damages apply to both?

3. Would the same defense be applicable to both?

4. Is the same measure of proof required? (Page 591)

The defendant contends in the case at bar the plaintiff's proposed amendment fails to satisfy Nos. 2, 3 and 4 of the Supreme Court standards as above set forth in that:

> (a) "...the measure of damages would be different than as averred where no timber was removed since plaintiff claims lost profit for timber he was precluded from cutting." (See standard No. 2)
>
> (b) "The defense in the original complaint was, in part, that plaintiff removed and did not pay for timber. Clearly, this defense would be inapplicable to the second amended complaint because plaintiff would not agree that he removed the timber." (Standard No. 3.)
>
> (c) "Likewise, evidence as to the original and first amended complaint--cutting out a log yard but not removing timber--and why plaintiff did not commence cutting would be distinct from evidence which would be presented to the second amended complaint--the amount of timber removed, the number of veneer logs removed, the amount of pulpwood removed, whether Plaintiff paid Gothie, why Plaintiff stopped cutting." (Presumably Standards 3 and 4.)

At the risk of appearing obtuse, we have grave difficulty in comprehending how the defendant's contentions as set forth above violate any of the three standards prescribed by the Supreme Court. It would appear to us:

> (a) The only difference in the measure of damages which we can perceive would be that the defendant would be entitled to compensation for the timber removed by the plaintiff; and if the plaintiff recovered any amount as loss of profit the defendant would be entitled to a setoff for the value of the timber

> removed.
>
> (b) If the defendant intended to rely in whole or in part upon the defense that the plaintiff removed timber and did not pay for it, it would seem to us that far from being prejudiced the plaintiff's proposed amendment would admit that he did, in fact, remove timber without paying for it as provided in the written agreement. How then has the defendant been deprived of the defense which he envisioned.
>
> (c) We have grave difficulty in understanding precisely what point the defendant intends to make by his third contention, but assuming his complaint is based upon the fact that the plaintiff will introduce different evidence if his second amended complaint is allowed, then if he were limited to his first amended complaint, we fail to see how the defenses asserted by the defendant will be altered or how the measure of proof required will change. We understand that initially the defendant intended to assert as one defense that the plaintiff had failed to commence cutting timber as envisioned under the contract, and persisted in his failure notwithstanding the request of the defendant to proceed. Under the proposed amended complaint, it would seem the defense would remain intact with the defendant's contention that the plaintif had commenced cutting, but then stopped without justification and did not renew cutting despite the request of the defendant.

We have reviewed the various cases cited by the defendant in support of his contention that the plaintiff's proposed amendment would state a new cause of action, and we conclude that all of those cases are readily distinguished either on the facts or the applicable law from the case at bar.

The defendant also contends that the plaintiff's petition to amend should be denied on the grounds that the amended pleading would be directly contradictory to plaintiff's prior pleadings of record. In support of his contention he cites *Marino v. Hare*, 6 Bucks L.R. 199 (1956) and *Penn Mutual v. Manhattan Mutual*, 348 Pa. 605 (1944). Had defendant examined the cases cited he would have found that in *Penn Mutual v. Manhattan Mutual*, the proceeding was a rule for judgment for want of a sufficient affidavit of defense and the Supreme Court held that in the case of contradictory affidavits of defense the entry of judgment was proper where the party failed to give a satisfactory explanation for the inconsistencies. In *Marino*, the Bucks County Court of Common Pleas arrived at the same conclusion in denying the pleader leave to amend a complaint where he had failed to give a satisfactory

explanation for the inconsistencies. In the case at bar the plaintiff has alleged in the petition sworn to by him that only upon obtaining the records of VanHessan Lumber Company during the week of February 16, 1981, was he aware of the cutting and removal of plaintiff's timber and plaintiff's counsel was also unaware of the fact. In our judgment the plaintiff's allegation does constitute an explanation for the contradictory pleadings, but it does not relieve the plaintiff of the abvious burden of explaining to the trier of fact the patent contradiction in his sworn pleadings. The credibility of the plaintiff, of course, is for the trier of fact but at this stage of the proceeding it is not a proper issue.

The final contention of the defendant is that the petition to amend should be denied on the grounds that the records of the VanHessan Lumber Company have been in existence and plaintiff never obtained them or inquired as to their existence until the week of February 16, 1981 after certification that the case was ready for trial, after the Pre-Trial Conference held to narrow issues and after the setting of a trial date. The defendant contends that the plaintiff failed to exercise due diligence in the preparation of his own case for trial, and has put the defendant to additional expense by the untimely request as well as wasting judicial time. In support of the contention *Lawrence v. Yusem*, 11 Cumberland L.J. 179 (1958) is cited.

We have read *Lawrence v. Yusem*, a Perry County case decided by Judge Crytzer, and we find it inapplicable to the case at bar on the facts and the law. We note that the court found the additional defendant guilty of laches in inexcusably failing to file his answer for many months and even up to the day set for trial before jury. Therefore, we find no merit in the contention.

We note the defendant's contention that to allow the plaintiff's amendment at this late date "would be an affront to the orderly administration of justice," and with his contention we do agree. We understand his argument that if the plaintiff could not remember cutting and removing timber from the defendant's land at the time of the filing of his other pleadings, it is difficult to conceive how he will be able to recall other essential facts at this late date. However, this is more appropriately a question to be raised at trial and in arguments to the trier of fact rather than at this stage.

However, we do recognize that the plaintiff's failure to exercise diligence in the preparation of his own case may have caused the defendant to incur additional and unnecessary expenses. In the trial of a case if a party properly pleads surprise

ing of the local Rules relates to the number of the Pa. Rules of Civil Procedure and where there is an omission in the sequence of the local rules it was considered unnecessary to make a rule to supplement, for local purposes, the Pa. rule.

Rule 1910.4. Commencement of Action.

(a) The action shall be commenced by filing a complaint with the Domestic Relations Section, in Franklin County at the Court House Annex, 100 Lincoln Way East, Chambersburg, PA 17201 and in Fulton County at 208-R North Second Street, McConnellsburg, PA 17233. Upon filing the record shall be immediately transferred to the Prothonotary's office. All subsequent support papers may likewise be filed in the Domestic Relations Section and thereafter transferred to the Prothonotary's office. This procedure is adopted to continue the practice of numbering all of the several actions, support, divorce, custody, etc. between the parties under the same Family Relations number.

(b) No filing fee shall be required in advance, but a filing and other fees shall be required as provided by law and order of the court to be paid by the person ordered to do so to the Prothonotary of the County.

Rule 1910.10. Hearing Procedures.

Actions shall proceed to hearing as prescribed by Rule 1910.11 of the Rules of Civil Procedure, but only after informal adjustment at the Domestic Relations Section as heretofore conducted has failed.

Rule 1910.11. Office Conference, Subsequent Proceedings, Order.

(a) The office conference shall be conducted by a hearing officer designated from time to time by the Chief of the Domestic Relations Section.

(d) The written agreement provided for in Pa. R.C.P. 1910.11(d), the order in conformity with the agreement and the form of the hearing officer's recommendation shall be in a form as prescribed from time to time by the Domestic Relations Section.

(e) If no agreement is reached, then the hearing officer shall prepare the conference summary required by Pa. R.C.P. 1910.11(e) and file a proposed order on a form to be prescribed from time to time by the Domestic Relations Section.

(j) Motions for separate listing under Pa. R.C.P. 1910.11(j) shall be on a form prescribed from time to time by the Domestic Relations Section.

upon the offering of evidence not admissible under the pleadings, the court is authorized in the interest of justice to permit a continuance of the trial and the amendment of the pleadings on the condition that the offending and surprising party pay to bhe surprised party those reasonable expenses incurred by the latter as a result of the surprise. By analogy to that rule, we will require the plaintiff to reimburse the defendant for additional expenses incurred as a result of the plaintiff's failure to exercise diligence in the preparation of his case.

ORDER OF COURT

NOW, this 14th day of April, 1981, the petitioner is granted leave to amend his complaint pursuant to the allegations of his petition for leave to amend on the condition that the plaintiff shall pay to the defendant those reasonable expenses incurred by the defendant as a result of the plaintiff seeking leave to amend and amending his pleadings.

Exceptions are granted both parties.

KURTZ v. KURTZ, C.P. Franklin County Branch, No. A.D. 1980 - 263

Civil Action - Law - Assumpsit - Accounting - Form of Account - Distribution Prior to Trial

1. A Court Order requiring a defendant to file an accounting requires that the account conform to the Supreme Court and Local Rules of Court applying to Orphan's Court accountings.

2. It is proper for a court to enter judgment prior to trial for an amount admitted to be due and at the same time to order an accounting for all further sums remaining in controversy.

William H. Kaye, Esquire, Attorney for Plaintiff

Joseph J. Dixon, Esquire, Attorney for Defendant

OPINION AND ORDER

Keller, J., June 9, 1981:

This action in assumpsit and for an accounting was commenced by the filing of a complaint on September 10,