JOHN MEHALL,	:	IN THE COURT OF COMMON PLEAS
Plaintiff	:	OF LACKAWANNA COUNTY, PA
	:	CIVIL ACTION – LAW
	:	
v.	:	Docket #: 2009-CV-5849
	:	
DANIEL BENEDETTO and	:	
CHRISTOPHER BENEDETTO,	:	
ERIE INSURANCE EXCHANGE and	:	
JOHN JOE DOE INSURANCE AGENT,	:	
Defendants	:	JURY TRIAL DEMANDED

PRELIMINARY OBJECTIONS OF DEFENDANTS DANIEL BENEDETTO AND CHRISTOPHER BENEDETTO TO THE AMENDED AMENDED COMPLAINT OF PLAINTIFF

Defendants DANIEL BENEDETTO and CHRISTOPHER BENEDETTO by and through their attorneys, Forry|Ullman, hereby preliminarily object to the Amended Complaint of Plaintiff JOHN MEHALL pursuant to Pennsylvania Rules of Civil Procedure 1028(a)(2), 1028(a)(3) and 1028(a)(4) and moves to strike the Complaint as not being properly verified, strike the words "wanton," "reckless," "recklessness," and "willful misconduct" from wherever they may appear in Plaintiff's Amended Complaint, strike Paragraphs 22 and 28(j) in their entirety and sever the claims in Counts Two, Three, Four, and III from Count One and state the following in support thereof:

1. On or about September 10, 2009, Plaintiff filed his Complaint against Defendants DANIEL BENEDETTO and CHRISTOPHER BENEDETTO.

2. On or about October 9, 2009, Defendants file Preliminary Objections to the Plaintiff's Complaint.

3. On or about November 2, 2009, Plaintiff filed his Amended Complaint, a copy of which is attached hereto as Exhibit "A."

4. By the language in the Amended Complaint, Plaintiff seeks damages from Defendants DANIEL BENEDETTO and CHRISTOPHER BENEDETTO arising out of a motor vehicle accident that allegedly occurred on or about September 10, 2007 on South Keyser Avenue in the City of Scranton, Lackawanna County, Pennsylvania. See generally, Exhibit "A."

5. By the language of the Amended Complaint, Plaintiff appears to seek damages from Defendants ERIE INSURANCE EXCHANGE and JOHN JOE DOE INSURANCE AGENT for underinsured motorist benefits (Count Two), breach of contract (Count Three), negligence (Count Four), and negligence (Count III) arising out of a contractual arrangement and or understanding between the Plaintiff and an insurance company and/or an insurance agent.

6. According to the Amended Complaint, the automobile accident involving Defendants DANIEL BENEDETTO and CHRISTOPHER BENEDETTO occurred when a Defendant reached for a bottle of water while operating his vehicle and crossed the yellow line striking the Plaintiff's vehicle. (See Paragraph 10).

7. Paragraphs 11, 20, 27, 29 and 30 of Plaintiff's Amended Complaint make reference to conduct of the Defendant(s) which is allegedly "wanton," "reckless," "recklessness," and "willful misconduct".

8. Paragraphs 24 and 30(j) of Plaintiff's Amended Complaint makes broad and sweeping reference to "the rules of the road, the ordinances of the City of Scranton, the ordinances of the County of Lackawanna and the laws of the Commonwealth of Pennsylvania, *including but not limited to*, the Pennsylvania Motor Vehicle Code, 75 Pa. C.S.A, §101 et seq." (Emphasis added).

9. Vague and ambiguous allegations in a Amended Complaint are a violation of Rule of Civil Procedure 1019(a) and Connor v. Allegheny General Hospital, 461 A.2d 600 (PA., 1982) at Fn 3, p. 603.

OBJECTION FOR FAILING TO CONFORM TO LAW OR RULE OF COURT PURSUANT TO PA.R.C.P. 1028(A)(2)

10. Defendants DANIEL BENEDETTO and CHRISTOPHER BENEDETTO incorporate Paragraphs 1 through 9, inclusive, as if set forth herein at length.

11. Under Rule 1028(a)(2), Preliminary Objections may be granted for "failure of a pleading to conform to law or rule of court."

12. Rule of Civil Procedure 1019(a) requires a party to formulate the issues by summarizing the facts essential to support the claim in a concise and summary manner.

13. General conclusions of law violate the requirement of Rule 1019(a) mandating the pleading of material facts. Pennsylvania Public Utility Com. v. Zanella Transit, Inc., 417 A.2d 860 (Pa.Cmwlth., 1980).

14. As pled, Plaintiff's Amended Complaint, with reference to "the rules of the road, the ordinances of the City of Scranton, the ordinances of the County of Lackawanna and the laws of the Commonwealth of Pennsylvania, including but not limited to, the Pennsylvania Motor Vehicle Code, 75 Pa. C.S.A, §101 et seq." in Paragraphs 24 and 30(j), fails to conform to law and rules of court in that such references are merely general conclusions of law and fail to make out a valid claim with the requisite high degree of precision and specificity.

15. Rule of Civil Procedure 1024 requires a party to sign the verification to the Complaint, unless all of the parties are outside the jurisdiction and will not return in time for filing the pleading.

16. The Verification attached to the Complaint is signed by a non party and fails to state that all parties capable of executing the Verification are outside the jurisdiction.

OBJECTION FOR INSUFFICIENT SPECIFICITY PURSUANT TO PA.R.C.P. 1028(A)(3)

17. Defendants DANIEL BENEDETTO and CHRISTOPHER BENEDETTO incorporate Paragraphs 1 through 16, inclusive, as if set forth herein at length.

18. Under Rule 1028(a)(3), Preliminary Objections may be granted for "insufficient specificity in a pleading."

19. Under Pennsylvania Law, punitive damages may be awarded only if a defendant's conduct is outrageous because of the defendant's evil motive or his reckless indifference to the rights of others. Feld v. Merriam, 475 A.2d 742 (PA., 1984). Reckless conduct is considered outrageous conduct which can give rise to punitive damages. Id at 748.

20. It has been held that allegations to support a claim for punitive damages must be pled with a high degree of precision and specificity. See Smith v. Brown, 423 A.2d 743 (Pa.Super., 1980).

21. Pennsylvania does not allow award of punitive damages for mere inadvertence, mistakes, errors of judgment, and the like, which constitute ordinary negligence.

22. No court in Pennsylvania has ruled that reaching for a water bottle while operating a motor vehicle constitutes outrageous conduct or evidence of evil motive or reckless indifference to the rights of others.

23. As pled, Plaintiff's Amended Complaint, with reference to "wanton," "reckless," "recklessness," and "willful misconduct" in Paragraphs 11, 20, 27, 29 and 30, fails to conform to law and rules of court in that such references are merely general conclusions of law and fail to make out a punitive damage claim with the requisite high degree of precision and specificity.

24. As pled, Plaintiff's Amended Complaint, with reference to "wanton," "reckless," "recklessness," and "willful misconduct" in Paragraphs 11, 20, 27, 29 and 30, fails to conform to law and rules of court in that such references are merely general conclusions of law and fail to make out a punitive damage claim with the requisite high degree of precision and specificity.

25. As pled, Plaintiff's Amended Complaint fails to allege with sufficient specificity in Paragraphs 11, 20, 27, 29 and 30 any factual averments regarding any specific acts or alleged omissions on the part of the Defendants which rise to the level of conduct sufficient to sustain a cause of action for punitive damages.

OBJECTION FOR LEGAL INSUFFICIENCY PURSUANT TO PA.R.C.P. 1028(A)(4)

26. Defendants DANIEL BENEDETTO and CHRISTOPHER BENEDETTO incorporate Paragraphs 1 through 25, inclusive, as if set forth herein at length.

27. Under Rule 1028(a)(4), Preliminary Objections may be granted for "legal insufficiency of a pleading (demurrer)."

28. As pled, Plaintiff's Amended Complaint, with use of the words "wanton," "reckless," "recklessness," and "willful misconduct" in Paragraphs 11, 20, 27, 29 and 30 fails to make out a legally sufficient claim for punitive damages in that there are no facts alleged that would constitute outrageous conduct, an evil motive or a reckless indifference to the rights of others.

OBJECTION FOR MISJOINDER OF CAUSES OF ACTION PURSUANT TO PA.R.C.P. 1028(A)(5)

29. Defendants DANIEL BENEDETTO and CHRISTOPHER BENEDETTO incorporate Paragraphs 1 through 28, inclusive, as if set forth herein at length.

30. Pa. R.C. P. 1028 (a)(5) provides that a Preliminary Objection may be filed to contest the misjoinder of a cause of action.

31. Pa. R.C.P. 2229(b) provides that a plaintiff may join defendants against whom the plaintiff asserts any right to relief jointly, severally, separately or in the alternative, in respect of or arising out of this same transaction, occurrence, or series of transactions or occurrences if any common question of law or fact affecting the liabilities of all such persons will arise in the action.

32. However, while Plaintiff may argue that his claims against all the Defendants arise out of the automobile accident of September 10, 2007, in fact only the claims against Defendants DANIEL BENEDETTO and CHRISTOPHER BENEDETTO arise out of that accident while the claims against ERIE INSURANCE EXCHANGE and JOHN JOE DOE INSURANCE AGENT arise out of a contract, agreement or understanding, an entirely a different set of circumstances and matters involving vastly different determinations of fact and/or law.

33. Plaintiff's claims against the Defendants ERIE INSURANCE EXCHANGE and JOHN JOE DOE INSURANCE AGENT and Defendants DANIEL BENEDETTO and CHRISTOPHER BENEDETTO are different in nature. The claims against Defendants DANIEL BENEDETTO and CHRISTOPHER BENEDETTO are based on negligent behavior in the operation of a motor vehicle while Plaintiff's claims against the Defendants ERIE INSURANCE

EXCHANGE and JOHN JOE DOE INSURANCE AGENT involve a claim for breach of contract and negligence in the contract process, claims to which Defendants DANIEL BENEDETTO and CHRISTOPHER BENEDETTO are not parties.

34. Defendants DANIEL BENEDETTO and CHRISTOPHER BENEDETTO contend that Plaintiff has joined separate and distinct causes of action which contain very different questions of fact and law.

35. The combined trial of the causes of action against Defendants DANIEL BENEDETTO and CHRISTOPHER BENEDETTO and Defendants ERIE INSURANCE EXCHANGE and JOHN JOE DOE INSURANCE AGENT will cause undue prejudice, as well as confusion.

36. Further, the introduction of insurance may result in an inflated award against Defendants DANIEL BENEDETTO and CHRISTOPHER BENEDETTO, who are entitled to have their trial conducted in a matter free from references to insurance coverage under Pennsylvania Rule of Evidence 411 and the numerous cases supporting this principle to avoid undue prejudice.

WHEREFORE, Defendants DANIEL BENEDETTO and CHRISTOPHER BENEDETTO respectfully request that this Honorable Court enter an appropriate Order to:

- Strike the Complaint in its entirety for not being properly verified;
- Strike and eliminate the words “wanton” and “reckless” from Paragraph 11, without substitution;
- Strike and eliminate the word “recklessness” from Paragraph 20, without substitution;
- Strike and eliminate the word “reckless” from Paragraph 27, without substitution;

- Strike and eliminate the words “and/or reckless and/or wanton and/or willful misconduct” from Paragraphs 29 and 30, without substitution;
- Strike and eliminate Paragraphs 24 and 30(j) in their entirety without substitution; and
- Sever and/or separate the claims against Defendants DANIEL BENEDETTO and CHRISTOPHER BENEDETTO from those against Defendants ERIE INSURANCE EXCHANGE and JOHN JOE DOE INSURANCE AGENT.

Respectfully submitted,
FORRY|ULLMAN

By: _____

ROBERT L. GOODMAN, ESQUIRE.
I.D. #39795
425 Spruce Street, Suite 300
Scranton, PA 18503
(570) 687-9500
Attorneys for Defendants DANIEL BENEDETTO and CHRISTOPHER BENEDETTO

Date: November 23, 2009

Exhibit A
Plaintiff's Amended Complaint

JOHN MEHALL,	:	IN THE COURT OF COMMON PLEAS
Plaintiff	:	OF LACKAWANNA COUNTY, PA
	:	CIVIL ACTION – LAW
	:	
v.	:	Docket #: 2009-CV-5849
	:	
DANIEL BENEDETTO and	:	
CHRISTOPHER BENEDETTO,	:	
ERIE INSURANCE EXCHANGE and	:	
JOHN JOE DOE INSURANCE AGENT,	:	
Defendants	:	JURY TRIAL DEMANDED

CERTIFICATE OF SERVICE

I, Robert L. Goodman, Esquire, hereby certify that a copy of Defendants DANIEL BENEDETTO and CHRISTOPHER BENEDETTO's Preliminary Objections to Plaintiff's Amended Complaint and Brief in support thereof were forwarded, this date, by first-class mail, postage prepaid, addressed as follows:

Michael J. Pisanchyn, Esquire
108 North Washington Avenue, Suite 500
Scranton, PA 18503

Erie Insurance Exchange
2200 West Broad St.
Bethlehem, PA

John Joe Doe, Insurance Agent
(address unknown and unfurnished)

FORRY|ULLMAN

By: _____
ROBERT L. GOODMAN, ESQ.

Date: November 23, 2009

JOHN MEHALL,	:	IN THE COURT OF COMMON PLEAS
Plaintiff	:	OF LACKAWANNA COUNTY, PA
	:	CIVIL ACTION – LAW
	:	
v.	:	Docket #: 2009-CV-5849
	:	
DANIEL BENEDETTO and	:	
CHRISTOPHER BENEDETTO,	:	
ERIE INSURANCE EXCHANGE and	:	
JOHN JOE DOE INSURANCE AGENT,	:	
Defendants	:	JURY TRIAL DEMANDED

ORDER OF COURT

AND NOW, this _____ day of _____, 2009, upon consideration of the Preliminary Objections of Defendants DANIEL BENEDETTO and CHRISTOPHER BENEDETTO to Plaintiff' Amended Complaint and any response thereto, it is hereby ORDERED, ADJUDGED and DECREED that said Preliminary Objections are SUSTAINED and

- The Amended Complaint is stricken in its entirety for not being properly verified;
- The words "wanton" and "reckless" are stricken and eliminated from Paragraph 11, without substitution;
- The word "recklessness" is stricken and eliminated from Paragraph 20, without substitution;
- The word "reckless" is stricken and eliminated from Paragraph 27, without substitution;
- The words "and/or reckless and/or wanton and/or willful misconduct" are stricken and eliminated from Paragraphs 29 and 30, without substitution;
- Paragraphs 24 and 30(j) are stricken and eliminated in their entirety without substitution and
- The claims against Defendants DANIEL BENEDETTO and CHRISTOPHER BENEDETTO are severed and separated from those against Defendants ERIE INSURANCE EXCHANGE and JOHN JOE DOE INSURANCE AGENT, with Plaintiff directed to file a separate action against Defendants ERIE INSURANCE EXCHANGE and JOHN JOE DOE INSURANCE AGENT.

BY THE COURT:

_____

J.

JOHN MEHALL,	:	IN THE COURT OF COMMON PLEAS
Plaintiff	:	OF LACKAWANNA COUNTY, PA
	:	CIVIL ACTION – LAW
	:	
v.	:	Docket #: 2009-CV-5849
	:	
DANIEL BENEDETTO and	:	
CHRISTOPHER BENEDETTO,	:	
ERIE INSURANCE EXCHANGE and	:	
JOHN JOE DOE INSURANCE AGENT,	:	
Defendants	:	JURY TRIAL DEMANDED

DEFENDANTS DANIEL BENEDETTO AND CHRISTOPHER BENEDETTO'S BRIEF IN SUPPORT OF THEIR PRELIMINARY OBJECTIONS TO THE AMENDED COMPLAINT OF THE PLAINTIFF

Defendants DANIEL BENEDETTO and CHRISTOPHER BENEDETTO (the "Defendants BENEDETTO"), by and through their attorneys, Forry|Ullman, hereby file the following Brief in Support of Defendants' Preliminary Objections to the Amended Complaint filed by Plaintiff JOHN MEHALL (the "Plaintiff"). The Preliminary Objections are in the nature of a Motion to Strike for Failure to Conform to Law or Rule of Court, insufficient specificity, legal insufficiency (Demurrer) and misjoinder of causes of action.

I. FACTS/HISTORY OF THE CASE:

On or about November 2, 2009, Plaintiff filed his Amended Complaint. By the language in the Amended Complaint, Plaintiff seeks damages from Defendants BENEDETTO arising out of a motor vehicle accident that allegedly occurred on September 10, 2007 on South Keyser Avenue in the City of Scranton, Pennsylvania, when the vehicle operated by Defendant CHRISTOPHER BENEDETTO and owned by Defendant DANIEL BENEDETTO crossed the yellow line and collided with the vehicle operated by Plaintiff JOHN MEHALL after Defendant

CHRISTOPHER BENEDETTO reached for a bottle of water. Further, Plaintiff also appears to seek damages from Defendants ERIE INSURANCE EXCHANGE and JOHN JOE DOE INSURANCE AGENT for underinsured motorist benefits (Count Two), breach of contract (Count Three), negligence (Count Four), and negligence (Count III) arising out of a contractual arrangement and or understanding between the Plaintiff and an insurance company and/or an insurance agent.

Unfortunately, in addition to allegations of carelessness and negligence against the Defendants BENEDETTO, Plaintiff has also, at various points in the Amended Complaint, asserted that the accident resulted from Defendants' "wanton," "reckless," "recklessness," and "willful misconduct". Defendants BENEDETTO seek to remove the words "wanton," "reckless," "recklessness," and "willful misconduct" from the Amended Complaint in addition to the removal of general and unspecified averments of negligence.

Defendants BENEDETTO also seek to sever and/or separate the negligence claims of the Plaintiff arising from the motor vehicle accident of September 10, 2007 from the breach of contract claims and negligence claims arising from the insurance contract between the Plaintiff and Erie Insurance Exchange and the actions of an insurance agent who purportedly procured Plaintiff with insurance coverage.

II. ISSUES:

A. SHOULD THE GENERAL AVERMENTS OF NEGLIGENCE IN PARAGRAPHS 24 AND 30(j) THAT DOE NOT STATE MATERIAL FACTS UPON WHICH A CLAIM IS BASED IN A CONCISE AND SUMMARY FORM BE STRICKEN?

Suggested Answer: YES.

B. SHOULD THE WORDS “WANTON,” “RECKLESS,” “RECKLESSNESS,” AND “WILLFUL MISCONDUCT” IN PARAGRAPHS 11, 20, 27, 29 AND 30 OF PLAINTIFF’S AMENDED COMPLAINT BE STRICKEN BECAUSE THEY FAIL TO COMPLY WITH THE LAW OR RULES OF COURT?

Suggested Answer: YES.

C. SHOULD THE COMPLAINT BE STRICKEN BECAUSE IT IS IMPROPERLY VERIFIED?

Suggested Answer: YES.

D. SHOULD THE WORDS “WANTON,” “RECKLESS,” “RECKLESSNESS,” AND “WILLFUL MISCONDUCT” IN PARAGRAPHS 11, 20, 27, 29 AND 30 OF PLAINTIFF’S AMENDED COMPLAINT BE STRICKEN BECAUSE THEY FAIL TO STATE A CAUSE OF ACTION UPON WHICH RELIEF CAN BE GRANTED?

Suggested Answer: YES.

E. SHOULD THE WORDS “WANTON,” “RECKLESS,” “RECKLESSNESS,” AND “WILLFUL MISCONDUCT” IN PARAGRAPHS 11, 20, 27, 29 AND 30 OF PLAINTIFF’S AMENDED COMPLAINT BE STRICKEN BECAUSE THEY ARE INSUFFICIENTLY SPECIFIC?

Suggested Answer: YES.

F. HAVE THE PLAINTIFF'S NEGLIGENCE CLAIMS AGAINST DEFENDANTS BENEDETTO BEEN MIS-JOINED WITH HER CLAIMS AGAINST THE ERIE INSURANCE EXCHANGE AND JOHN JOE DOE INSURANCE AGENT FOR UIM BENEFITS, BREACH OF CONTRACT AND BREACH OF FIDUCIARY DUTY?

Suggested Answer: YES.

III. ARGUMENT:

A. GENERAL AVERMENTS OF NEGLIGENCE IN PARAGRAPHS 24 AND 30(j) THAT DO NOT STATE THE MATERIAL FACTS UPON WHICH A CAUSE OF ACTION IS BASED IN A CONCISE AND SUMMARY FORM AND SHOULD BE STRICKEN.

B. THE WORDS "WANTON," "RECKLESS," "RECKLESSNESS," AND "WILLFUL MISCONDUCT" IN PARAGRAPHS 11, 20, 27, 29 AND 30 OF PLAINTIFF'S AMENDED COMPLAINT SHOULD BE STRICKEN BECAUSE THEY FAIL TO COMPLY WITH THE LAW OR RULES OF COURT.

Under Rule 1028(a)(2), Preliminary Objections may be granted for "failure of a pleading to conform to law or rule of court."

Pennsylvania Rule of Civil Procedure 1019(a) requires that the material facts upon which a cause of action is based be stated in a concise and summary form. Pa.R.C.P. 1019(a). Further, general conclusions of law violate the requirement of Rule 1019(a) mandating the pleading of material facts. Pennsylvania Public Utility Com. v. Zanella Transit, Inc., 417 A.2d 860 (Pa.Cmwlth., 1980).

In fact, where general, vague, and unspecified allegations are made, the Supreme Court in Connor v. Allegheny General Hospital, 501 Pa. 306, 461 A.2d 600 (1983) suggested:

> "If appellee did not know how it "otherwise failed to use due care and caution under the circumstances," it could have filed preliminary objection in the nature of a request for more specific pleadings or it could have moved to strike that portion of appellant's Amended Complaint."

Connor, at footnote 3, page 602. In fact, if the party against whom such "allegations" are made fails to file preliminary objections to such averments, that party can not later claim that it was prejudiced by a late amplification of such an allegation. Id.

Paragraphs 24 and 30(j), which reference violating the "the rules of the road, the ordinances of the City of Scranton, the ordinances of the County of Lackawanna and the laws of the Commonwealth of Pennsylvania, including but not limited to, the Pennsylvania Motor Vehicle Code, 75 Pa. C.S.A, §101 et seq." are little more than allegations of unspecified acts or omissions by the Defendants. With such language, Defendants have no idea exactly what they are being accused of violating. Essentially, they are accused of violating ***each and every*** rule of the road, ordinance of the City, ordinance of the County (if such exist), and law of the Commonwealth of Pennsylvania. Arguably, if let stand, Plaintiff could later claim that violations which occurred years earlier and having nothing to do with the operation of a motor vehicle are relevant and could be used against the Defendants. As a general averment of negligence, the vague, unstated acts or omissions contained in Paragraphs 24 and 30(j) of Plaintiff' Amended Complaint should, therefore, be stricken or dismissed with prejudice.

Plaintiff's use of the words "wanton," "reckless," "recklessness," and "willful misconduct" in Paragraphs 11, 20, 27, 29 and 30 of his Amended Complaint also fail to conform to law and rules of court in that such references are merely general conclusions of law and fail to make out a punitive damage claim with the requisite high degree of precision and specificity. As another example of a general averment of negligence, the words "wanton," "reckless," "recklessness," and "willful misconduct" should be stricken from where they appear in Paragraphs 11, 20, 27, 29 and 30.

C. THE COMPLAINT SHOULD BE STRICKEN BECAUSE IT IS IMPROPERLY VERIFIED

Defendants BENEDETTO also notes that the Amended Complaint filed by the Plaintiff is not verified by a party of the action; it is verified by his counsel. Rule 1024 requires that a party sign the verification. While Rule 1024(b) does permit verification by a nonparty when all of the parties are outside the jurisdiction and will not return in time for filing the pleading, the Verification attached to the Complaint fails to state that all parties capable of executing the Verification are outside the jurisdiction. Accordingly, Plaintiff's Amended Complaint, in this additional regard, fails to comply with rules of court.

D. THE WORDS "WANTON," "RECKLESS," "RECKLESSNESS," AND "WILLFUL MISCONDUCT" IN PARAGRAPHS 11, 20, 27, 29 AND 30 OF PLAINTIFF'S AMENDED COMPLAINT SHOULD BE STRICKEN BECAUSE THEY FAIL TO STATE A CAUSE OF ACTION UPON WHICH RELIEF CAN BE GRANTED.

Under Rule 1028(a)(4), Preliminary Objections may be granted for "legal insufficiency of a pleading (demurrer)."

Even if it is assumed, solely for purposes of deciding this motion for a demurrer, that all well-pleaded material facts set forth in Plaintiff' Amended Complaint are true, Plaintiff' Amended Complaint is, nevertheless, wholly insufficient to either establish recklessness or justify an award of punitive damages in the instant case. See Yocca v. The Pittsburgh Steelers Sports, Inc., et al., 578 Pa. 479 (2004) (holding that "when considering a motion for a demurrer, the trial court must accept as true all well-pleaded material facts set forth in the Amended Complaint . . . .").

Pennsylvania is a fact pleading state and under Rule 1019(a) of the Pennsylvania Rules of Civil Procedure, "[a] Amended Complaint must not only give the defendant notice of what the Plaintiff' claim is and the grounds upon which it rests . . . it must also formulate the issues by summarizing those facts essential to support the claim." Pa. R.C.P. 1019(a); See also Smith v. Brown, 423 A.2d 743, 745 (Pa. Super. 1980), citing Baker v. Rangos, et al., 229 Pa. Super. 334, 324 A.2d 498 (1974). Thus, certain facts must be pleaded to support allegations that the conduct in question was deliberately and maliciously undertaken with "evil motive" or "reckless indifference" to the substantial certainty that such misconduct would result in severe harm to others. Id.

Pennsylvania courts have held that to establish "reckless" conduct, a Plaintiff' proof must meet the requirements of Section 500 of the Restatement (Second) of Torts. See Parker v. Jones, 223 A.2d 229, 232 (Pa. 1966); Evans v. Philadelphia Transportation Company, 418 Pa. 567, 574, 212 A.2d 440, 444 (Pa. 1965); Stubbs v. Frazer, 454 A.2d 119, 120-21 (Pa. Super. 1982). Section 500 of the Restatement (Second) of Torts provides:

> "The actor's conduct is in reckless disregard of the safety of another if he does an act or intentionally fails to do an act which is his duty to the other to do, knowing or having reason to know of the facts which would lead a reasonable man to realize not only that his conduct creates an unreasonable risk of physical harm to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent.'

Restatement (Second) of Torts §500. Krivijianski vs. Union Railroad Co., 515 A.2d 933 (Pa. Super. 1986).

In order to support a claim of reckless conduct, facts amounting to "outrageous conduct" must be pled and proved. That is, what must be alleged is an act done with bad/evil motive or

reckless indifference to the rights or interests of others, sometimes referred to "wanton misconduct." Smith vs. Brown, Supra. Wanton misconduct means the actor has intentionally done an act of unreasonable character and disregard of a risk known to him or so obvious that he must be taken to have been aware of it, and so great as to make it highly probable that harm would follow. Summit Fasteners, Inc. vs. Harleysville National Bank and Trust Co., 599 A.2d 203 (Pa. Super. 1991). In determining whether conduct is "outrageous" the Court should look only at the defendant's conduct and not at the results of his conduct. See Feld v. Merriam, 506 Pa. 383 (1984).

Similar standards have been established for the award of punitive damages. Pennsylvania has adopted Section 908 of the Restatement (Second) of Torts and its provisions governing punitive damages. See Hoffman v. Memorial Osteopathic Hosp., 342 Pa.Super. 375, 383, 492 A.2d 1382, 1386-87 (1985). Section 908 provides:

> (1) Punitive damages are damages, other than compensatory or nominal damages, awarded against a person to punish him for his outrageous conduct and to deter him and others like him from similar conduct in the future.
>
> (2) Punitive damages may be awarded for conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others.

Restatement (Second) of Torts § 908.

Pennsylvania case law makes it clear that punitive damages are an "extreme remedy" available in only the most exceptional matters. See Martin v. Johns-Manville Corp., 508 Pa. 154, 494 A.2d 1088, 1098 n.14. (Pa. 1985), rev'd on other grounds sub nom., Kirkbride v. Lisbon Contractors, Inc., 521 Pa. 97, 555 A.2d 800 (Pa. 1989). Essentially reiterating Restatement § 908, the Court noted that punitive damages may be appropriately awarded only when the

plaintiff has established that the defendant has acted in an outrageous fashion due to either "the defendant's evil motive or his reckless indifference to the rights of others." Martin, 494 A.2d at 1096; see also Hutchison v. Luddy, 582 Pa. 114, 870 A.2d 766, 770 (Pa. 2005) (finding that punitive damages may be appropriately awarded only when the plaintiff has established that the defendant has acted in a fashion "so outrageous as to demonstrate willful, wanton or reckless conduct").

Further, in recognizing the long-standing rule regarding allegations of reckless behavior and punitive damages, the Supreme Court in Phillips v. Cricket Lighters, 584 Pa. 179, 883 A.2d 439, 445 (Pa. 2005), noted as follows:

> A defendant acts recklessly when his conduct creates an unreasonable risk of physical harm to another and such risk is substantially greater than that which is necessary to make his conduct negligent. **Thus, a showing of mere negligence, or even gross negligence, will not suffice to establish that punitive damages should be imposed.**

Id, at 189, 445. (emphasis added). It has also been noted that punitive damages cannot be awarded in Pennsylvania for mere “errors in judgment” and/or a defendant’s negligence. See McDaniel v. Merck, 367 Pa.Super. 600 (1987).

In the instant case, Plaintiff’ Amended Complaint entirely fails to meet the requirements necessary to maintain a claim for punitive damages because there is absolutely no factual basis to support any conclusion that the Defendant acted with any evil motive or reckless disregard in his operation of the car on the date in question when he reached for a bottle of water and crossed a yellow line.

The true gravamen of Plaintiff' Amended Complaint is that the Defendant "carelessly and negligently" operated his vehicle and caused an accident. Thus, the only factual allegations made by Plaintiff if not otherwise vague and ambiguous, if proven, would amount, at most, to a showing of mere negligence on the part of the Defendants.

In the instant case, the factual allegations set forth in the Amended Complaint are clearly insufficient as a matter of law to support or constitute allegations of "recklessness", "outrageous, willful, malicious conduct so as to indicate wanton disregard of the rights and safety of members of the traveling public" on behalf of the Defendants and/or to support the Plaintiff' demand for punitive damages.

Thus, even assuming that the factual allegations in the Amended Complaint are true, the allegations are sufficient to support a finding of negligence on the Defendants' behalf, but not one of recklessness, outrageousness and/or gross negligence under Pennsylvania law. See Martin v. Johns-Manville Corp., Supra. Accordingly, all references to "wanton," "reckless," "recklessness," and "willful misconduct" should be stricken from Plaintiff' Amended Complaint.

E. THE WORDS "WANTON," "RECKLESS," "RECKLESSNESS," AND "WILLFUL MISCONDUCT" IN PARAGRAPHS 11, 20, 27, 29 AND 30 OF PLAINTIFF'S AMENDED COMPLAINT SHOULD BE STRICKEN BECAUSE THEY ARE INSUFFICIENTLY SPECIFIC.

Under Rule 1028(a)(3), Preliminary Objections may be granted for "insufficient specificity in a pleading."

As noted above, in order to support a claim of reckless conduct, facts amounting to "outrageous conduct" must be pled and proved. That is, what must be alleged is an act done with

bad/evil motive or reckless indifference to the rights or interests of others, sometimes referred to "wanton misconduct." Smith vs. Brown, Supra.

As also noted above, the "facts" alleged to constitute "outrageous conduct" in the Plaintiff's Amended Complaint do not rise to the level of wanton misconduct as acts undertaken with bad/evil motive or reckless indifference to the rights or interests of others. Further, Plaintiff' mere recitation of the words "wanton," "reckless," "recklessness," and "willful misconduct" in Paragraphs 11, 20, 27, 29 and 30 of the Amended Complaint without any factual averments that would rise to the level of conduct sufficient to sustain a cause of action for punitive damages render the Amended Complaint insufficiently specific under the civil rules.

F. THE PLAINTIFF'S NEGLIGENCE CLAIMS AGAINST DEFENDANTS BENEDETTO HAVE BEEN MIS-JOINED WITH HER CLAIMS AGAINST THE ERIE INSURANCE EXCHANGE AND JOHN JOE DOE INSURANCE AGENT FOR BREACH OF CONTRACT.

Pa. R.C.P. 2229(b) provides that a plaintiff may join defendants against whom the plaintiff asserts any right to relief jointly, severally, separately or in the alternative, in respect of or arising out of this same transaction, occurrence, or series of transactions or occurrences if any common question of law or fact affecting the liabilities of all such persons will arise in the action. However, while on the surface it may appear that Plaintiff's claims against the Defendants arise out of the automobile accident of September 10, 2007, it is clear that these claims arise from entirely a different set of circumstances and involve vastly different determinations of fact and law. As such, the breach of contract claim, UIM claim or claim of breach of fiduciary duty by the insurance agent fail to comply with Rule 2229's requirement of a "common question of law or fact."

Plaintiff's claims against Defendants BENEDETTO are based on negligent behavior in the use and operation of a motor vehicle on September 10, 2007. The claims against ERIE INSURANCE EXCHANGE and JOHN JOE DOE INSURANCE AGENT (hereinafter "the INSURANCE Defendants") and Defendants BENEDETTO are different in nature. The claims against the INSURANCE Defendants are based on a contract between the Plaintiff and the INSURANCE Defendants or the actions of an insurance agent in procuring insurance. Plaintiff's claims for underinsured motorist benefits and allegations of breach of contract against the INSURANCE Defendants instead arise from Erie's handling of Plaintiffs claim subsequent to the motor vehicle accident.

Pursuant to the Pennsylvania Supreme Court decision in Stokes v. Moose Lodge, 466 A.2d 134, 502 Pa. 460 (1983), issues such as insurance bad faith cannot be joined with an action for tortfeasor negligence. In Stokes, the plaintiffs, Jacqueline and Robert Stokes, filed a complaint against the Loyal Order of Moose No. 696 ("Moose Lodge"). The cause of action arose when Jacqueline Stokes was injured after a folding chair collapsed at the Moose Lodge. The Moose Lodge filed a complaint to join an insurance agency and an insurer for breach of contract and indemnification.

The Pennsylvania Supreme Court held that the trial court properly disallowed the joinder of the insurer as an additional defendant to decide issues of insurance in the case against the tortfeasor. The Pennsylvania Supreme Court held as follows:

> "The Complaint against [the Moose Lodge] was based on wife plaintiffs fall on the [the Moose Lodge] premises. The Complaint to Join [the insurer] was based upon [the insurer's] alleged obligation to insure and defend [the Moose Lodge]. We find that this was a distinct transaction and that the complaints did not arise out of the same transaction or occurrence. We are persuaded by the

> reasoning in Hottner that such complaints should not be joined because they do not involve a common factual background or common factual or legal questions. The evidence that would establish [the insurer's] obligation to insure is distinct from the evidence that would establish [the Moose Lodge's] liability. [The Moose Lodge] may bring a separate action for damages caused by wrongful denial of insurance coverage .... We therefore conclude that the amendment to Rule 2252(a) dos not allow a complaint alleging wrongful denial of coverage under a general policy of insurance to be joined in a liability action."

Id., 502 at 467, 466 A.2d at 1345 (citations omitted).

Just as the complaint against the Moose Lodge was based on a fall, Plaintiff's claim against Defendants BENEDETTO is based on a motor vehicle accident. Just as the complaint to join in Stokes was based on the failure to insure the Moose Lodge, the UIM claim and breach of contract claim here are based on the INSURANCE Defendants' actions after the motor vehicle accident and arise from an agreement entered into well before the motor vehicle accident. As in Stokes, these are distinct "transactions" and do not arise out of the same occurrence. As in Stokes, these complaints cannot be joined because they do not involve a common factual or legal question. Just as the evidence to establish the insurer's liability was distinct from evidence regarding the Moose Lodge's liability, the evidence regarding the INSURANCE Defendants' alleged breach of contract and UIM liability are distinct from the evidence regarding Defendants BENEDETTO liability. As the Moose Lodge could bring a separate action for wrongful denial of coverage, Plaintiff could bring a separate breach of contract and/or UIM action against the INSURANCE Defendants.

Similarly, in Genesis Leasing Corp. v. Maryland Casualty Co., 490 A.2d 930, 340 Pa. Super. 576 (1985), Genesis Leasing Corporation initiated an action against Maryland Casualty alleging that the insurance company was liable under an insurance contract for the loss of

Genesis Leasing Corporation's cattle. The insurer then petitioned to join additional defendants on the basis that the loss was caused by the negligent care of the cattle by those individuals joined as additional defendants. The Pennsylvania Superior Court, citing Stokes held:

> "The initial complaint is a cause of action for wrongful denial of insurance coverage. It is the insurer who seeks to join parties whose negligence it claims release its obligation to cover the losses incurred by Plaintiff. Just as in Stokes, where the Court concluded that Rule 2252(a) does not allow a complaint alleging wrongful denial of coverage under a general policy of insurance to be joined in a liability action, we see no reason to permit an insurer defendant to join parties against whom the plaintiffs may have a cause of action in negligence. "

Genesis. 490 A.2d at 931, 340 Pa. Super, at 577.

In Kalker v. Moyer, 921 A.2d 21 (Pa. Supra. 2007), the Plaintiff had filed an action in Philadelphia County based upon two (2) separate motor vehicle accidents, the first occurring in Philadelphia County and the second occurring in Bucks County. In this matter, the case held that the actions were improperly joined based upon the rules of misjoinder as found in Pa. R.C.P. 2229 (b). The Court reasoned that there were two (2) different actions involving totally different theories of liability so that no common question of fact predominates. Additionally, the Court reasoned that it would be prejudice to the Defendants from Bucks County if this case were brought in Philadelphia County, as they were not involved in an accident in that County and may never have even been present in Philadelphia County. The Court noted "there are two (2) different actions involving totally different theories of liability, so there is no common question of fact that predominates." Id, at 21.

Further, to permit the actions against Defendants BENEDETTO and the INSURANCE Defendants to remain joined would require the admission of the existence and possibly the

amount of Plaintiff's liability insurance. Pennsylvania law is clear that evidence of insurance is irrelevant and prejudicial and justifies the grant of a mistrial as "fact-finders should not be tempted to render decisions based upon the extraneous consideration that an insurance company will actually pay the bill." Pennsylvania law also recognizes that there is prejudice against insurance companies when they are named parties to a case. Paxton National Insurance Company v. Brickajlik, 522 A.2d 531, 633 (Pa. 1987). This prejudice could adversely affect Defendants BENEDETTO if a jury decided to inflate the award to punish the INSURANCE Defendants.

Pennsylvania Rule of Evidence 411 specifically prohibits the introduction into evidence of liability insurance as follows:

> Liability insurance – evidence that a person was or was not insured against liability is not admissible upon the issue of whether that person acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, Ownership, or control, or bias or prejudice of the witness.

The Supreme Court of Pennsylvania has addressed the issue of liability insurance and admissibility in a trial stating that by allowing jurors to consider the extent to which parties have insured themselves there is a risk that, in determining liability, the jury will depart from the relevant standards and definitions on which they have been charged and instead consider the fact of a party's insurance coverage, or lack thereof, as relevant on the issue of liability. Price v. Guy, 735 A.2d 668, 672 (Pa. 1998). "By allowing jurors to consider the extent to which parties have elected to insure themselves, trial courts afford jurors the opportunity to determine the issue of liability in accordance with their own notions of fairness, cost allocation, and risk management, rather than in accordance with the law in which they have been instructed. Id.

While in the claims against the INSURANCE Defendants there may be legitimate reasons to admit the amount of Plaintiff's insurance coverage policy, there is no legitimate reason to penalize Defendants BENEDETTO by admitting the existence or amount of his liability coverage.

Count One of the Plaintiff's Complaint states a cause of action against Defendants BENEDETTO on a theory of negligence. It is well established that, in a negligence action, a plaintiff must prove four elements: (1) a legal duty or obligation to conform to a certain standard of conduct; (2) a failure to conform to that standard; (3) a reasonably close causal connection between the conduct and the resulting injury; and (4) actual damage or loss. See Wiltams v. Syed, 782 A.2d 1090 (Pa. Cmwlth. 2001).

Plaintiff's claims against the INSURANCE Defendants for breach of contract and/or underinsured motorist benefits and/or breach of fiduciary duty by the insurance agent may require admission into evidence into the amount of liability limits that Plaintiff had through his automobile insurance policy. It is clear that with regard to an underinsured motorist claim, that the carrier is entitled to a credit for whatever coverage the tortfeasor has. See, Boyle v. Erie Insurance Company, 441 Pa. Supra, 103656 A.2nd 941 (Pa. Supra 1995). As such, Plaintiff will need to prove the amount of that credit to prove their case that the INSURANCE Defendants undervalued Plaintiff's damages. In this way, the coverage of Defendants BENEDETTO would be revealed to the jury.

In addition to evidence of insurance's inadmissibility pursuant to Pa.R.E. 411, evidence of insurance is not relevant, and would be inadmissible under Pa.R.E. 401 and 402, as its

admission would not tend to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Further still, as noted by Judge Horan in the recently decided and well reasoned case of Baptiste v. Strobel and State Farm Mutual Insurance Co., (A.D. 09-11444, Butler County, November 5, 2009) (see copy attached), even if evidence of insurance were relevant to the negligence claims, Pa.R.E. 403 would bar its admissibility. See Pa.R.E. 411, Official Commentary. Generally, even relevant evidence "may be excluded if its probative value is outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Pa.R.E. 403. Judge Horan noted that the inclusion of insurance evidence in the negligence counts against the tortfeasor would yield minimal, if any, probative value in comparison to the potential for undue prejudice to the tortfeasor's defense. Thus, she concluded, such insurance evidence would be both irrelevant and prejudicial in relation to the negligence liability and damage issues.

As was the case in Stokes, Genesis and Kalker, here the evidence that would establish Plaintiff's right to recover on Defendants BENEDETTO alleged negligence is distinct from the evidence that would establish Plaintiff's right to recover under the breach of contract claim, UIM claim or claim of breach of fiduciary duty by the insurance agent. Plaintiff's breach of contract claim, UIM claim or claim of breach of fiduciary duty by the insurance agent do not arise out of the same series of transactions or occurrences and, as such, joinder in the same complaint is not appropriate. The negligence allegations against Defendants BENEDETTO concern whether their negligence caused the motor vehicle accident and if so, what damages Plaintiff sustained.

Issues relative to liability for a motor vehicle accident do not arise out of the same set of operative facts as issues relative to whether specific actions or inactions of the INSURANCE Defendants during the course of securing the insurance before the accident and claims handling after the accident constituted a breach of contract or breach of fiduciary duty. Because Plaintiff's breach of contract claim, UIM claim or claim of breach of fiduciary duty by the insurance agent are not predicated upon the same set of operative facts as the other causes of action raised by Plaintiff's Complaint, Plaintiff's claims against the INSURANCE Defendants are misjoined and are contrary to law and rule of court and should be stricken. To permit this action to proceed to trial in this matter would cause undue prejudice and/or confusion as the jury would be asked to resolve very different questions of law and fact.

Pennsylvania courts have recognized that while concern for judicial economy and that a multiplicity of lawsuits by the same or related parties are to be avoided where possible, this concern can never rise above the court's primary obligation to dispense justice and this end cannot be achieved where unrelated claims become so entangled that comprehension is impossible. C. R. Realty, Inc. v. Cox, 372 A.2d 721, 729, quoting, Cf. Falsetti v. Local U. No. 2026 U. M. W. A., 161 A.2d 882 (1960). Clearly, this is one such instance.

IV. CONCLUSION:

For all the aforesaid reasons, Defendants DANIEL BENEDETTO and CHRISTOPHER BENEDETTO respectfully request that this Honorable Court dismiss with prejudice or otherwise strike the words "wanton," "reckless," "recklessness," and "willful misconduct" from the Amended Complaint and strike Paragraphs 24 and 30(j) in their entirety from Plaintiff' Amended

Complaint as impermissible general averments of negligence. Further, Defendants DANIEL BENEDETTO and CHRISTOPHER BENEDETTO respectfully request that this Honorable Court enter an order separating the claims against them from the claims against Defendants ERIE INSURANCE EXCHANGE and JOHN JOE DOE INSURANCE AGENT.

Respectfully submitted,
FORRY|ULLMAN

By: _____

ROBERT L. GOODMAN, ESQUIRE.
I.D. #39795
425 Spruce Street, Suite 300
Scranton, PA 18503
(570) 687-9500
Attorneys for Defendants DANIEL BENEDETTO and CHRISTOPHER BENEDETTO

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Exhibit A

Baptiste v. Strobel and State Farm Mutual Insurance Co.