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JOHN MEHALL	:	IN THE COURT OF COMMON
Plaintiff	:	PLEAS OF LACKAWANNA
	:	COUNTY
	:	
v.	:	
	:	
	:	
DANIEL BENEDETTO and	:	CIVIL ACTION - EQUITY
CHRISTOPHER BENEDETTO,	:	
ERIE INSURANCE EXCHANGE and	:	
JOHN JOE DOE INSURANCE	:	09-CV-744
AGENT,	:	
Defendants	:	
	:	

MEMORANDUM AND ORDER

THOMSON, S.J.

Before this Court are two sets of Preliminary Objections filed by both Defendants, Erie Insurance Exchange (hereinafter "Erie") and Daniel and Christopher Benedetto to the amended Complaint of Plaintiff, John Mehall. After full consideration of the record, applicable law, briefs and arguments of counsel, this Court is now prepared to dispose of this matter.

PROCEDURAL AND FACTUAL HISTORY

On or about November 2, 2009, Plaintiff filed his amended complaint seeking damages from Defendant arising out of a motor vehicle accident that allegedly occurred on September 10, 2007 on South Keyser Avenue in Scranton, PA, Lackawanna County when the vehicle operated by the Defendant, Christopher Benedetto, and owned by Daniel Benedetto, crossed the yellow dividing line and collided with a vehicle operated by the Plaintiff after the Defendant Christopher Benedetto reached for a bottle of water.

Plaintiff is also seeking damages from Erie and John Joe Doe, Insurance Agent for underinsured motorist benefits, breach of contract, and two counts of negligence, arising out of a

contractual arrangement and/or understanding between the Plaintiff and an insurance company, and/or insurance.

STANDARD OF REVIEW

Pennsylvania Rule of Civil Procedure 1028 provides the following:

(a). Preliminary Objections may be filed by any party to any pleading and are limited to the following grounds:

- (1) lack of jurisdiction over the subject matter of the action or the person of the defendant, improper venue or improper form of service of a writ of summons or a complaint;
- (2) failure of a pleading to conform to a law or rule of court or inclusion of scandalous or impertinent matter;
- (3) insufficient specificity in a pleading;
- (4) legal insufficiency of a pleading (demurrer); and
- (5) Lack of capacity to sue.

(b). All preliminary objection shall be raised at one time. They shall state specifically the grounds relied upon and may be inconsistent. Two or more preliminary objections may be raised in one pleading. Pa.R.Civ.P. 1028. The Pennsylvania Appellate Courts have held that Preliminary Objections may only be granted when the case is clear and free from doubt. McCullough v. Clark, 784 A.2d 156 (Pa. Super. 2001). To be clear and free from doubt, it must appear with certainty that the law will not permit recovery by the Plaintiff upon the facts averred. Shumosky v. Lutheran Welfare Services of Northeastern Pennsylvania, Inc., 784 A.2d 196 (Pa. Super. 2001). As stated by the Commonwealth Court in Richardson v. Beard: "We need not accept as true conclusions of law, unwarranted references from facts, argumentative allegations, or expressions of opinion." Richardson v. Beard, 942 A.2d 911, 913 (Pa. Cmwlth. 2008) *citing* Mitstick Inc. v. Northwestern Nat'l Cas. Co., 806 A.2d 39, 42 (Pa. Super. 2002) (citation omitted). However, in considering preliminary objections, the Commonwealth Court must consider as true all well-pleaded material facts set forth and all reasonable inferences that may be

drawn from those facts. Sheffield v. Department of Corrections, 894 A.2d 836 (Pa. Cmwlth. 2006). If there is any doubt as to whether a Preliminary Objection should be granted, it should be resolved in favor of overruling the objection. Id.

“Preliminary objections in the nature of [a] *demurrer* test the legal sufficiency of the plaintiff’s complaint.” Sexton v. PNC Bank, 792 A.2d 602, 604 (Pa. Super. 2002) (citation omitted), *appeal denied*, 814 A.2d 678 (2002). “The question presented by the *demurrer* is whether, on the facts averred, the law says with certainty that no recovery is possible.” Mistick Inc. v. Northwestern Nat’l Cas. Co., 806 A.2d 39, 42 (Pa. Super. 2002).

1. Preliminary Objections of Defendants Daniel and Christopher Benedetto

Defendants Daniel and Christopher Benedetto submitted the following Preliminary Objections to Plaintiff’s Complaint:

a. Plaintiff’s Complaint fails to comply with a law or rule of court as required by Pa.R.C.P. 1028(a)(2), more specifically Rule 1019(a).

Defendants Benedetto assert that Plaintiff’s complaint fails to set forth concisely the facts upon which the cause of action is based. Defendants contend that **general averments of negligence** referenced in Paragraphs 24 and 30(j) of the Plaintiffs complaint should be stricken or dismissed with prejudice because the language does not inform the Plaintiffs of which specific statutes they have allegedly violated.

Pennsylvania Rule of Civil Procedure 1019(a) states: “The material facts on which a cause of action or defense is based shall be stated in a concise and summary form.” Pa.R.C.P. 1019(a). “Material facts” are “ultimate facts,” that is, those facts essential to support the claim. Baker v. Rangos, 324 A.2d 498 (Pa. Super. 1974); Hess v. M. Aaron Co., 4 Pa. D. & C.3d 153, (C.P. 1977). The requirement that “material” facts be pleaded requires merely the pleading of

those facts essential to the cause of action. Duquesne Light Co., Inc. v. Com., Dept. of Environmental Protection, 724 A.2d 413 (Pa. Comm. Ct. 1999);

Pennsylvania is a fact pleading state, and under the system of fact pleading, a pleader must define issues, with every act or performance essential to that end set forth in the complaint. Estate of Swift v. Northeastern Hosp. of Philadelphia, 456 690 A.2d 719 (Pa. Super. 1997); Miketic v. Baron, 675 A.2d 324 (Pa. Super. 1996). Thus, in civil actions where facts in the complaint constitute a cause of action, the plaintiff need not specify a statute that plaintiff contends the defendant violated. Pennsylvania State Troopers Ass'n v. Pennsylvania State Police, 667 A.2d 38 (Pa. Comm. Ct. 1995). If the complaint sets out facts which make a good cause of action, it is sufficient. The defendant cannot say that there are other facts which are "material" and that their omission makes the complaint inadequate. Such other facts become the subject of the defense pleadings. Porter v. Arnold, 63 Pa. D. & C. 109, (C.P. 1948). Thus, if the plaintiff has pleaded the material facts, and the defendant wants to learn more details, discovery procedures are available. Huntington v. Bloomsburg Area Indus. Development Ass'n, Inc., 53 Pa. D. & C.2d 138, (C.P. 1971).

Based on the aforementioned case law, it is clear that the Plaintiff need not plead a specific violation of a statute in order to for his pleadings to remain valid. As such, the preliminary objection of Defendants Benedetto is OVERRULED, DISMISSED, and DENIED.

- b. Plaintiff's use of the words "wanton," "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.

Defendants Benedetto allege that the language referenced above are merely general conclusions of law and fail to make out a punitive damage claim with the requisite degree of precision and specificity. These words are simply examples of general averments of negligence and should be stricken.

General averments of negligence without allegations of supporting facts are not objectionable if other specific charges of negligence are pleaded which aver in chronological order the alleged negligent acts. Hindermeyer v. Harrisburg Glass, Inc., 82 Dauph. 50 (Pa. Com. Pl., 1964). The Plaintiff's complaint specifies in paragraph 30, sections (a) through (s) the specific conduct on which the allegations of negligence are based. As such, Defendants Benedetto's Preliminary Objection to strike the language in the nature of general averments of negligence is OVERRULED, DISMISSED, and DENIED.

c. Preliminary Objection in the Nature of a Motion to Strike pursuant to Pa.R.C.P. 1024(b).

Defendant's submit that the Plaintiff's Complaint should be stricken pursuant to Rule 1024(b) because of improper verification.

Rule 1024 states:

(a) Every pleading containing an averment of fact not appearing of record in the action or containing a denial of fact shall state that the averment or denial is true upon the signer's personal knowledge or information and belief and shall be verified. The signer need not aver the source of the information or expectation of ability to prove the averment or denial at the trial. A pleading may be verified upon personal knowledge as to a part and upon information and belief as to the remainder.

(b) If a pleading contains averments which are inconsistent in fact, the verification shall state that the signer has been unable after reasonable investigation to ascertain which of the inconsistent averments, specifying them, are true but that the signer has knowledge or information sufficient to form a belief that one of them is true.

(c) The verification shall be made by one or more of the parties filing the pleading unless all the parties (1) lack sufficient knowledge or information, or (2) are outside the jurisdiction of the court and the verification of none of them can be obtained within the time allowed for filing the pleading. In such cases, the verification may be made by any person having sufficient knowledge or information and belief and shall set forth the source of the person's information as to matters not stated upon his or her own knowledge and the reason why the verification is not made by a party.

In dealing with a defect in verification, the courts have found that such defect is not of the magnitude requiring that the pleading be stricken absent any averment of prejudice by the objecting party. George H. Althof, Inc. v. Spartan Inns of America, Inc., 441 A.2d 1236 (Pa. Super. 1982). The rule requiring verification does not restrict the authority of a court to consider a petition or answer if there is a verification that is defective in its form. Because a deficient verification does not raise a question of jurisdiction, at a bare minimum, a court confronted by such a verification may grant leave to amend before dismissing a petition or answer. See Appeal of Noll, 27 Pa. D. & C.2d 780, 1962; Dallmeyer v. Giroux, 65 Pa. D. & C.2d 250, 1974; Monroe Contract Corp. v. Harrison Square, Inc., 405 A.2d 954 (Pa. Super. 1979).

Additionally, Courts should not be astute in enforcing technicalities to defeat apparently meritorious claims. Verification must not be transformed into an offensive weapon designed to strike down an otherwise valid petition or answer on a hypertechnical error. Davis v. Safeguard Inv. Co., 361 A.2d 893 (Pa. Super. 1976); Monroe Contract Corp. v. Harrison Square, Inc., 405 A.2d 954 (Pa. Super. 1979).

It is clear that the improper verification is merely a technical defect in pleading. As such, the Defendant's Preliminary Objection is SUSTAINED and GRANTED. Plaintiff is to amend his Complaint within twenty (20) days of the date of filing of this Memorandum and Order.

**d. Preliminary Objections in the Nature of a Motion to Strike and Demurrer
(Legal Insufficiency of the Complaint) Pursuant to Pa.R.Civ.P. 1028(a)(4)**

Defendants Benedetto submit that the words “wanton,” “reckless,” and “willful misconduct” referenced in paragraphs 11, 20, 27, 29, and 30 of the Plaintiff’s Amended Complaint should be stricken because they fail to state a cause of action upon which relief can be granted. As such, Defendants Benedetto move for a demurrer, stating that Plaintiff’s Amended Complaint 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 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 the yellow line.

As previously stated, at this stage of legal proceedings, this Court is bound by the legal standards parsed by the Pennsylvania Rules of Civil Procedure and Pennsylvania jurisprudence. With regard to Preliminary Objections, these lucid standards direct us to accept as true all well-pleaded material facts. Because this case has not yet been fully explored nor factually developed through discovery, this Court is reluctant to find that Defendants Benedetto cannot be found liable for punitive damages at this time. This is a decision better made at through a motion for summary judgment once discovery and pleadings are complete. We thus elect to DISMISS and DENY the Preliminary Objections in the Nature of a Demurrer of Defendants Benedetto.

**e. Preliminary Objection in the Nature of a Motion to Strike Pursuant to
Pa.R.C.P. 1028(a)(3).**

Defendants Benedetto argue that 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. Defendants Benedetto cite the case of Smith v. Brown in support of their position. Smith v. Brown, 423 A.2d 743 (1980). The Smith

Court held, on appeal, that Pennsylvania is a fact pleading state in which a complaint must not only give the defendant notice of the plaintiff's claim and the grounds upon which it rests but must also formulate the issues by summarizing those facts essential to the issues. *Id.* at 120, *citing Baker v. Rangos*, 324 A.2d 498 (1974). Essentially, Defendants claim that the Plaintiff has pled the language necessitating punitive damages without pleading any supporting facts.

In *Focht v. Rabada*, the Court held that Pennsylvania has adopted the rules of punitive damages as set forth in Section 908 of the Restatement of Torts.¹ *Focht v. Rabada*, 268 A.2d 157 (Pa. Super. 1970). It is a well settled principle of law that punitive damages are damages other than compensatory or nominal damages awarded against a person to punish him for his outrageous conduct. In *Focht*, the Court held that punitive damages are awarded only for outrageous conduct done with a bad motive or with a reckless indifference to the interests of others. *Id.* at 38, *citing Chambers v. Montgomery*, 192 A.2d 355, 358 (Pa. 1963).

Under these facts, this Court finds that the inclusion of the above referenced language indicating outrageous or wanton conduct will be struck from the complaint with prejudice. Specifically, the Plaintiff fails to plead facts supporting the use of the referenced language in paragraphs 11, 20, 27, and 29. The language present in paragraph 30 shall remain intact because it immediately precedes specific averments of negligence. As such, Defendant's Preliminary Objection is GRANTED and SUSTAINED, and Plaintiff is ordered to file an Amended Complaint within twenty (20) days of the date of filing of this Order.

f. Preliminary Objection in the form of a Motion for Severance

Defendants Benedetto have filed a preliminary objection in the nature of a misjoinder of causes of action with respect to Plaintiff's joinder of tort and contract claims. Specifically,

¹ Section 908 of the Restatement of Torts has been replaced by the Restatement Second of Torts, in which the language is substantially the same.

Plaintiff has joined a tort action against Defendants Benedetto with a breach of contract claim against Erie Insurance. Defendants Benedetto cite a myriad of reasons to persuade this Court to sever these claims. Specifically, Defendants Benedetto aver that the statutes of limitations for the negligence and breach of contract claims begin to run at different times. Additionally, there is no question of common questions of law or fact pursuant to Pennsylvania jurisprudence. Finally, Pennsylvania Rule of Evidence 411 prohibits the introduction of liability insurance into evidence, and such admission would be inevitable should the claims remain joined.

Defendants Benedetto cite Stokes v. Moose Lodge in favor of their position that a claim against an insurance carrier does not arise out of the same transaction or occurrence as the underlying claim against a tortfeasor, thus preventing joinder in accordance with Pa.R.C.P. 2229(b). Stokes v. Moose Lodge, 466 A.2d 134 (Pa. 1983). In Stokes, the Pennsylvania Supreme Court held that issues such as insurance bad faith cannot be joined with actions for tortfeasor negligence. Id. The Court held that the obligation to insure was separate and distinct from the alleged negligence and as such there is no question of common factual or legal questions. Id.

This Court agrees with Defendants Benedetto and hereby finds that the Plaintiff's negligence claim against Defendants Benedetto should be severed from the underinsured motorist benefits and breach of contract claims against Defendants Erie Insurance and John Joe Doe Insurance Agent. Plaintiff is hereby ordered to refile its claim against Defendants Erie Insurance and John Joe Doe Insurance Agent under a new docket number within twenty (20) days of the date of filing of this Memorandum and Order.

2. Preliminary Objections of Defendants Erie

Defendants Erie in return filed Preliminary Objections to the Amended Complaint of Plaintiff.

Defendant Erie submitted the following Preliminary Objections to Plaintiff's Amended Complaint. Defendant's Preliminary Objections are GRANTED in part and DISMISSED and DENIED in part.

a. Preliminary Objection in the Nature of a Motion to Strike allegations of recklessness from paragraphs 74 and 82 of Plaintiff's Amended Complaint.

Defendant Erie adopts the arguments asserted by Defendants Benedetto as to their objections to allegations of "wanton," "reckless," "recklessness," and "willful misconduct" as contained in the Complaint. Defendant Erie adopts the legal argument advanced by the Defendants Benedetto to strike the allegations of recklessness from paragraphs 74 and 82 of the Amended Complaint. Based on the reasoning and analysis presented in section 1(c) *supra*, this Court finds that the Plaintiff has presented general averments of negligence followed by a listing of specific instances of conduct supporting the allegations. As such, Defendant Erie's preliminary objection is DISMISSED and DENIED.

b. Preliminary Objection pursuant to Pa.R.C.P. 1019(i) based upon Plaintiff's failure to attach the contract.

Pennsylvania Rule of Civil Procedure 1019(i) provides: "When any claim or defense is based upon a writing, the pleader shall attach a copy of the writing, or the material part thereof, but if the writing or copy is not accessible to the pleader, it is sufficient so to state, together with the reason, and to set forth the substance in writing." Pa.R.C.P. 1019(i). Defendants Erie correctly aver that Plaintiffs failed to attach a copy of the insurance contract to the complaint. As such, Defendant Erie's Preliminary Objection is SUSTAINED and GRANTED. Plaintiff is

ordered to attach a copy of the insurance contract when refiling his severed Amended Complaint against Erie Insurance Exchange and John Joe Doe Insurance Agent.

c. Preliminary Objection to Count III of the Plaintiffs Amended Complaint based upon the fact that punitive damages are not permitted for Breach of Contract claims.

Defendant Erie correctly submits by way of preliminary objection that punitive damages are not permitted for breach of contract claims under Pennsylvania law. "It is well settled that punitive damages may be recovered in tort but not in contracts."

Commonwealth v. Kitchen Appliance Distributors, 27 Pa. D. & C.3d 91 (1981). As stated in Daniel Adams Associates v. Rimbach Publishing, Inc.: "Punitive damages could not be assessed for breach of mere contractual duties, even if defendants were motivated solely by malicious intent to cause harm to plaintiffs." Daniel Adams Associates v. Rimbach Publishing Inc., 429 A.2d 726 (Pa. Super. 1981). Accordingly, the claim for punitive damages asserted in Count III of the complaint must be stricken. Thus Defendant Erie's Preliminary Objection is SUSTAINED and GRANTED, and Plaintiff is ordered to refile his Amended Complaint without a request for punitive damages under his breach of contract claim against Defendant Erie within twenty (20) days of the date of this Order.

d. Preliminary Objection in the Nature of a Motion to Strike Pursuant to Pa.R.Civ.P. 1028(a)(2) to Defendant Old Forge's Preliminary Objection in the form of *demurrer* to Count II of Plaintiffs' Amended Complaint

Defendant Erie avers that a demurrer is appropriate with regard to Plaintiff's claim that he will sustain a loss because the relevant insurance contract requires the claim for underinsured motorist benefits to be litigated in court as opposed to arbitrated. Additionally Defendant Erie avers that a demurer is appropriate because the Plaintiff's

claims of negligence were not filed within two (2) years of the date of the loss and are therefore time barred.

Although Defendant Erie has attached a copy of the insurance contract allegedly in question, it has not attached a copy of the specific insurance contract between Defendant Erie and Plaintiff. As such, this Court has no proof of Plaintiff's notice of the contract and the terms stated, as provided by Defendant Erie, especially since Plaintiff's Amended Complaint also fails to attach a copy of this very writing at issue.

At this point in the pleadings, this Court is hesitant to grant a demurrer since discovery is not complete. This Court may be in a better posture to assess the issue of dismissing Counts III and IV of Plaintiff's Amended Complaint once the pleadings are closed through a Motion for Summary Judgment. Pursuant to Pa.R.C.P. 1030, the affirmative defense of a statute of limitations which has run should be raised in an Answer under the heading New Matter. Thus, at this time, Defendant Erie has not satisfied the standard prescribed by the Rules of Civil Procedure for this Court to dismiss the specified counts or the Amended Complaint in its entirety. Defendant Erie's Preliminary Objections are therefore DENIED and DISMISSED.

e. Preliminary Objection for Insufficient Specificity Pursuant to Pa.R.C.P. 1028(a)(3).

Defendant Erie avers that Plaintiff has alleged reckless conduct against Defendant Erie in paragraphs 74 and 82 of the Amended Complaint. For the reasons stated in paragraph 1(c) and 2(a) *supra*, Defendant's Preliminary Objection is DENIED and DISMISSED.

An appropriate Order follows.

JOHN MEHALL
Plaintiff

v.

DANIEL BENEDETTO and
CHRISTOPHER BENEDETTO,
ERIE INSURANCE EXCHANGE and
JOHN JOE DOE INSURANCE
AGENT,
Defendants

IN THE COURT OF COMMON
PLEAS OF LACKAWANNA
COUNTY

CIVIL ACTION - EQUITY

09-CV-744

ORDER

AND NOW, this 12th day of May, 2010 consistent with this Court's Memorandum, it
is hereby **ORDERED** and **DECREED** as follows:

- (1) Defendants Benedetto's Preliminary Objections are decided as follows:
 - a. Plaintiff's Complaint fails to comply with a rule of law or court as required by Pa.R.C.P. 1028(a)(2), more specifically Rule 1019(a) – **DISMISSED** and **DENIED**.
 - b. Plaintiff's use of the words "wanton," "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 – **DISMISSED** and **DENIED**.
 - c. Preliminary Objection in the Nature of a Motion to Strike pursuant to Pa.R.C.P. 1024(b) – **SUSTAINED** and **GRANTED**. Plaintiff is further **ORDERED** to file an Amended Complaint within twenty (20) days of the date of this Order.
 - d. Preliminary Objections in the Nature of a Motion to Strike and Demurrer (Legal Insufficiency of the Complaint) Pursuant to Pa.R.Civ.P. 1028(a)(4) – **DISMISSED** and **DENIED**.
 - e. Preliminary Objection in the Nature of a Motion to Strike Pursuant to Pa.R.C.P. 1028(a)(3) – **GRANTED** and **SUSTAINED**. Plaintiff is

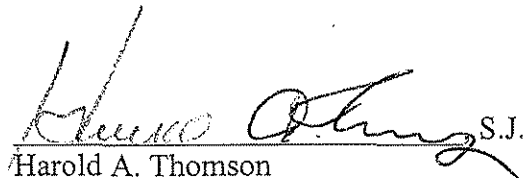
further **ORDERED** to file an Amended Complaint within twenty (20) days of the date of this Order.

- f. Preliminary Objection in the form of a Motion for Severance – **GRANTED** and **SUSTAINED**. Plaintiff is further **ORDERED** to refile his claim against Defendants Erie Insurance and John Joe Doe Insurance Agent under a new docket number within twenty (20) days of the date of this Order.

(2) Defendant Erie's Preliminary Objections are decided as follows:

- a. Preliminary Objection in the Nature of a Motion to Strike allegations of recklessness from paragraphs 74 and 82 of Plaintiff's Amended Complaint – **DISMISSED** and **DENIED**.
- b. Preliminary Objection pursuant to Pa.R.C.P. 1019(i) based upon Plaintiff's failure to attach the contract – **SUSTAINED** and **GRANTED**. Plaintiff is further ordered to attach a copy of the insurance contract when refiling its severed Amended Complaint against Erie Insurance Exchange and John Joe Doe Insurance Agent.
- c. Preliminary Objection to Count III of the Plaintiffs Amended Complaint based upon the fact that punitive damages are not permitted for Breach of Contract claims – **SUSTAINED** and **GRANTED**.
- d. Preliminary Objection in the Nature of a Motion to Strike Pursuant to Pa.R.Civ.P. 1028(a)(2) to Defendant Old Forge's Preliminary Objection in the form of *demurrer* to Count II of Plaintiffs' Amended Complaint – **DENIED** and **DISMISSED**.
- e. Preliminary Objection for Insufficient Specificity Pursuant to Pa.R.C.P. 1028(a)(3) – **DENIED** and **DISMISSED**.

BY THE COURT:

 S.J.
Harold A. Thomson

CC: Please note that written notice of the foregoing Order has been provided to each party pursuant to Pa.R.Civ.P. 236(a)(2) by mailing time-stamped copies to:

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MARY F. RINALDI
LACKAWANNA COUNTY
2010 MAY 16 P 4:44
CLERK OF
JUDICIAL RECORDS