IN THE COURT OF COMMON PLEAS OF NORTHAMPTON COUNTY, PENNSYLVANIA
CIVIL DIVISION

ERNESTO LOPEZ,	:	**NO: CV-2015-8420**
	:	
Plaintiff,	:	
v.	:	
	:	
REGINALD M. WILSON, III and KERRY A. WILSON,	:	
	:	
Defendants.	:	

ORDER OF COURT

AND NOW, this 20th day of January, 2017, upon consideration of the Preliminary Objections and Memorandum of Law in Support of the same filed by Defendants, Reginald M. Wilson, III and Kerry A. Wilson (collectively "Defendants"), and the Amended Complaint, Brief in Opposition, and Response of Defendants filed by Plaintiff, Ernesto Lopez ("Plaintiff"), it is hereby **ORDERED** that Defendants Preliminary Objections are **OVERRULED**.

STATEMENT OF REASONS

I. Factual and Procedural History

Plaintiff avers that on September 16, 2013, while stopped at a traffic light at the intersection of Linden Street and Washington Street in Bethlehem, Northampton County, Pennsylvania, Defendant, Reginald M. Wilson, III ("Mr. Wilson"), collided with the back of Plaintiff's vehicle. Am. Compl. ¶¶ 4-5. Plaintiff avers that the vehicle Mr. Wilson was driving at the time of this motor vehicle accident is owned by Mr. Wilson and/or

Defendant, Kerry A. Wilson ("Ms. Wilson"). Id. at ¶ 5. Plaintiff asserts that Mr. Wilson was driving the vehicle with Ms. Wilson's permission. Id. at ¶ 6.

On September 14, 2016, Plaintiff initiated the present matter by filing a Writ of Summons. On July 11, 2016, Plaintiff filed his Complaint. After Defendants filed Preliminary Objections to the Complaint, Plaintiff filed an Amended Complaint on August 22, 2016. Plaintiff's Amended Complaint contains two negligence counts with the first count against both Defendants and the second count against Ms. Wilson alone. In short, Plaintiff's negligence allegations contend, *inter alia*, that Defendants' vehicle was not properly maintained and/or would not have passed a vehicle inspection, that Mr. Wilson failed to properly abide by traffic regulations, and that Mr. Wilson was using his cellphone to communicate with Ms. Wilson while he operated the vehicle. See generally id.

Defendants filed their Preliminary Objections to Plaintiff's Amended Complaint on September 19, 2016, with their Memorandum of Law in Support of the same on September 9, 2016.[1] Plaintiff filed his Response on September 28, 2016, and his Brief in Opposition to Defendants' Preliminary Objections on October 3, 2016. This matter was placed on the November 8, 2016, Argument List and was submitted on brief.

[1] Although Defendants' Memorandum of Law is entitled, "Memorandum of Law in Support of the Preliminary Objections of Defendants to Plaintiff's Complaint" and is filed prior to the filing of the Preliminary Objections, it appears to mirror the arguments set forth in Defendants' Preliminary Objections to Plaintiff's Amended Complaint.

II. Discussion

A. Standard of Review

A court may properly grant preliminary objections when the pleadings are legally insufficient for one or more of the reasons enumerated in Rule 1028 of the Pennsylvania Rules of Civil Procedure. In ruling on preliminary objections, "we will consider as true all well-pleaded facts and inferences reasonably deducible therefrom, but not conclusions of law, argumentative allegations or opinions." Erie Cty. League of Women Voters v. Com., Dep't of Envtl. Res., 525 A.2d 1290, 1291 (Pa. Commw. 1987). In considering a preliminary objection that seeks the dismissal of a cause of action, a court must only sustain such a preliminary objection "in cases in which it is clear and free from doubt that the pleader will be unable to prove facts legally sufficient to establish the right to relief." Feingold v. Hendrzak, 15 A.3d 937, 941 (Pa. Super. 2011).

A demurrer tests the legal sufficiency of the evidence. Pa.R.C.P. 1028(a)(4). A preliminary objection in the nature of a demurrer "is deemed to admit all well-pleaded facts and all inferences reasonably deduced therefrom." Penn Title Ins. Co. v. Deshler, 661 A.2d 481, 482–83 (Pa. Commw. Ct. 1995). "In determining whether to sustain a demurrer, the court need not accept as true conclusions of law, unwarranted inferences from facts, argumentative allegations, or expressions of opinion." Id. at 483. Further, "[i]f any doubt exists as to whether a demurrer should be

sustained, it should be resolved in favor of overruling the preliminary objections." Feingold, 15 A.3d at 941.

A. Defendants' Preliminary Objection in the Nature of a Demurrer

Defendants' sole Preliminary Objection is in the nature of a demurrer and moves to strike Plaintiff's allegations of recklessness and demands for punitive damages. The thrust of Defendants' argument is that Plaintiff's allegations that Mr. Wilson was using his cellphone while driving is insufficient to amount to the level of recklessness required to support a claim for punitive damages.

Pennsylvania has adopted the rule of punitive damages as set forth in the Restatement of Torts, which provides, "Punitive damages' are damages other than compensatory or nominal damages awarded against a person to punish him for his outrageous conduct." See Focht v. Rabada, 268 A.2d 157, 159 (Pa. Super. 1970) quoting Restatement of Torts § 908(1). In Hutchison ex rel. Hutchison v. Luddy, our Supreme Court summarized the standard governing the award of punitive damages:

> 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." As the name suggests, punitive damages are penal in nature and are proper only in cases where the defendant's actions are so outrageous as to demonstrate willful, wanton or reckless conduct. The purpose of punitive damages is to punish a tortfeasor for outrageous conduct and to deter him or others like him from similar conduct. Additionally, this Court has stressed that, when assessing the propriety of the imposition of punitive damages, "[t]he state of

> mind of the actor is vital. The act, or the failure to act, must be intentional, reckless or malicious."

870 A.2d 766, 770–71 (Pa. 2005) (internal citations omitted).

Given the relatively recent advent of widespread cell phone use, there remain few cases that deal the particular facts presented in the matter before this Court. See Pietrulewicz v. Gil, No. CV-2014-0826, 2014 WL 11226404, at *2 (Lehigh Pa. Com. Pl. June 6, 2014) (In as recent as 2014, one trial court opined, "In Pennsylvania, there is a paucity of case law regarding the question of whether cell phone usage while driving may give rise to allegations of reckless misconduct and a claim for punitive damages."). However, Pennsylvania Courts have addressed and permitted punitive damages claims against motorists in other limited set of scenarios. See Dillow v. Myers, 916 A.2d 698, 702 (Pa. Super. 2007) (Affirming jury verdict that truck driver's conduct was outrageous for driving an improperly loaded truck, exceeding the speed limit, driving with limited visibility because the listing of the back of the truck obscured the view from the truck's side mirror, and changing lanes under these conditions without the use of a turn signal); Focht, 268 A.2d at 160 (Concluding "under the appropriate circumstances, evidence of driving while under the influence of intoxicating liquors may constitute a sufficient ground for allowing punitive damages."); Claypoole v. Miller, 43 Pa. D. & C.4th 526, 528 (Com. Pl. 1999) (Holding "a jury could reasonably interpret defendant Miller's actions of operating a vehicle when she knew she was having trouble staying awake as

reckless, wanton and outrageous conduct."); Rockwell v. Knott, No. CV-2012-1114, 2013 WL 10215759, at *9 (Lacka. Pa. Com. Pl. Aug. 13, 2013) ("If the record contained some evidence suggesting that Knott was viewing the GPS device positioned in the lower center console as he proceeded to make a left turn without yielding the right of way to Rockwell, in violation of . . . the Vehicle Code . . . an issue of fact would exist as to whether Knott's recklessly indifferent conduct warrants the submission of Rockwell's punitive damages claim to the jury.").

We turn to the few Pennsylvania courts that have addressed whether cell phone use while driving warrants punitive damages. In Xander v. Kiss, a case from Northampton County, the trial court summarized the plaintiff's averments as follows: "the Defendant simply lost control of his vehicle while speaking on his cellular telephone, causing a motor vehicle accident . . . " No. CV-2010-11945, 2012 WL 168326 (Northampton Pa. Com. Pl. Jan. 11, 2012). The Court concluded that "no such additional indicia of recklessness" was present to permit punitive damages. Id. The Court's decision hinged on the lack of "additional indicators of gross negligence or reckless disregard for the rights of others." Id. In Piester v. Hickey, the Court reasoned that "Plaintiffs allege only that [the defendant] 'looked at his cell phone just before driving into the rear of [the plaintiff's] car.'" No. CV-2011-4720, 2012 WL 935789, at *4 (E.D. Pa. Mar. 20, 2012). The Court heavily relied on Xander in finding that the aforementioned averment was insufficient to

support a claim for outrageous behavior sufficient to establish recklessness or evil motive. Id. In Pietrulewicz v. Gil, a trial court order from Lehigh County, the defendant "was talking on her cell phone and slowly moved into a lane of oncoming traffic at an intersection where she was required to yield." 2014 WL 11226404, at *3. The Court noted that the plaintiffs "failed to set forth additional allegations of erratic driving." Id. The Court found that the plaintiffs' allegations supported a claim of negligence but did not "give rise to an evil motive or a conscious indifference to Plaintiff's rights." Id.

There are fewer related cases that address texting while driving. In Kondash v. Latimer, a Lackawanna County trial court judge overruled the defendant's preliminary objection to strike the plaintiff's allegations of the defendant's texting and cell phone use while driving. No. CV-2009-8622 (Lacka. Pa. Com. Pl. Nov. 19, 2012). The trial court held "we are ruling that it is possible that a jury may be called on [to] consider whether communicating on a PDA, [a personal digital assistant, or other cellular device] while driving is a wanton and reckless act." Rockwell, 2013 WL 10215759, at *6 quoting Kondash, No. CV-2009-8622.

Here, Plaintiff's Complaint alleges, in relevant part:

> At the time, date and place aforesaid, the careless and negligent acts of the Defendant, Reginald M. Wilson, III, acting individually and/or as an actual and/or apparent agent of Kerry Wilson, consisted of the following:

> In operating said vehicle with a reckless and/or negligent disregard for the rights and safety of the Plaintiff in that Defendant was distracted driving at an excessive speed for conditions, using a cell phone at the time of the accident, [and] knowing that distracted driving greatly increased the risk of causing other drivers potentially serious injury and/or death.

Am. Compl. ¶ 9(n). We find that Plaintiff's averments differ from those considered in the aforementioned three cases. First, Plaintiff's allegations of Mr. Wilson's alleged cell phone use are not limited to talking on a cell phone but also include texting. See id. at ¶¶ 9(t), 21(d). Second, Plaintiff avers that Mr. Wilson's conduct was reckless because he was driving at an excessive speed *while* using a cell phone. Third, Plaintiff also alleges that Mr. Wilson's vehicle was not safe for operation and that he failed to stop at a red light. See id. at ¶ 9(b), (c), (h), (p)-(r). Taken together, these allegations constitute a basis for pleading punitive damages in an automobile accident involving the use of a cell phone, especially texting. In light of Plaintiff's texting allegations read in conjunction with Plaintiff's other allegations, we find that Plaintiff's allegations are sufficient to survive Defendants' demurrer.

BY THE COURT:

/s/ Samuel P. Murray
SAMUEL P. MURRAY, J.