

MICHELLE KELLER Administratrix for the ESTATE OF RICHARD B. KELLER v. SUPERIOR PLUS ENERGY SERVICES, INC., t/d/b/a/ SUPERIOR PLUS ENERGY SERVICES and DAVID ROMERO

Wrongful Death and Survival Action – Preliminary Objections – Punitive Damages

1. The Court overruled Defendants’ Preliminary Objections because it was premature based upon the allegations contained in the complaint, to dismiss the counts for punitive damages.
 2. Plaintiff should be permitted to present evidence at trial to determine whether Defendants’ conduct establishes reckless conduct that is sufficient to submit the claim for punitive damages to the jury.
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**IN THE COURT OF COMMON PLEAS OF YORK COUNTY, PENNSYLVANIA
CIVIL DIVISION**

MICHELLE KELLER,	:	No. 2015-SU-003210-69
Administratrix for the	:	
ESTATE OF RICHARD B. KELLER,	:	
Plaintiff,	:	
	:	
v.	:	
	:	
SUPERIOR PLUS ENERGY	:	
SERVICES, INC., t/d/b/a/ SUPERIOR	:	
PLUS ENERGY SERVICES	:	
and	:	Civil Action – Law
DAVID ROMERO	:	
Defendants	:	

APPEARANCES:

For Plaintiff: David R. Lutz, Esquire

For Defendant: Matthew A. Glazer, Esquire

**MEMORANDUM OPINION OVERRULING
DEFENDANT’S PRELIMINARY OBJECTIONS**

Before the Court are Defendants, Superior Plus Energy Services, Inc. and David Romero’s Preliminary Objections to Plaintiff, Michelle Keller’s Complaint. For the following reasons, Defendants’ Preliminary Objections to Counts III and VI are **OVERRULED**.

FACTS AND PROCEDURAL HISTORY

On September 28, 2015, Plaintiff commenced this wrongful death and survival action against Defendants Superior Plus Energy Services, Inc. (hereinafter “Defendant Superior”) and David Romero (hereinafter “Defendant Romero,” collectively, “Defendants”) by filing a Praecipe for Writ of Summons, which was issued the same day. On April 15, 2016, Plaintiff filed a Complaint with this Court to recover damages allegedly caused when Defendant Romero, an employee of Defendant Superior, failed to yield the right of way to Decedent Richard B. Keller (hereinafter “Decedent”) while Defendant Romero was driving a commercial fuel truck. According to the Complaint, the result of Defendant Romero’s failure to yield the right of way to Decedent caused a collision between Defendant Romero’s fuel truck and Decedent’s motorcycle, resulting in Decedent’s death. Plaintiff filed a substituted Verification on April 28, 2016. Defendants filed Preliminary Objections to Counts III and VI of Plaintiff’s Complaint and a Memorandum of Law in Support thereof on May 4, 2016. Plaintiff responded to Defendants’ Preliminary Objections and filed a Memorandum of Law in Opposition on

May 23, 2016. This case was listed for one-judge disposition on September 28, 2016, and assigned to this Honorable Court on October 13, 2016.

DISCUSSION

Preliminary objections which, if sustained, would result in the dismissal of a cause of action, “should be sustained only in cases that are clear and free from doubt.” *Bower v. Bower*, 611 A.2d 181, 182 (Pa. 1992). Further, preliminary objections should be granted “only where it appears with certainty that, upon the facts averred, the law will not allow the plaintiff to recover.” *Snare v. Ebensburg Power Co.*, 637 A.2d 296 (Pa. Super. Ct. 1993) (citation omitted), *appeal denied* 538 Pa. 627, 646 A.2d 1181 (1994). In ruling on preliminary objections, “the court must consider the evidence in the light most favorable to the non-moving party.” *Maleski by Taylor v. DP Realty Trust*, 653 A.2d 54, 61 (Pa. Commw. Ct. 1994).

Defendants’ Preliminary Objections request that this Court dismiss all claims for punitive damages in Counts III and VI of the Complaint alleging that Plaintiffs’ claim for damages is legally insufficient pursuant to Pa. R. Civ. P. 1028(a)(4). Plaintiff’s Complaint arises from an incident in which Plaintiff alleges that the driver of a commercial vehicle failed to “keep a proper lookout” for oncoming vehicles and “suddenly and without warning” entered an intersection when it was unsafe to do so. In its Complaint, Plaintiff claims that Defendant Romero’s conduct was so outrageous as to warrant the grant of punitive damages, and that Defendant Superior is liable under the doctrine of respondeat superior.

“Punitive damages are awarded only in rare instances, to punish and deter outrageous, extreme, egregious behavior.” *Hutchinson v. Penske Truck Leasing Co.*, 876 A.2d 978, 983 (Pa. Super. 2005), *aff’d*, 922 A.2d 890 (Pa. 2007) *citing* *Martin v. Johns-Manville Corp.*, 494 A.2d 1088, 1096-97 (Pa. 1985), *abrogated on other grounds*, and *Kirkbride v. Lisbon Contractors, Inc.*, 555 A.2d 800 (Pa. 1989). Punitive damages are appropriate when a defendant’s actions “are of such an outrageous nature as to demonstrate intentional, willful, wanton, or reckless conduct resulting from either an evil motive or because of a reckless indifference to the rights of others.” *Ruffing v. 84 Lumber Co.*, 600 A.2d 545, 551 (Pa. Super. 1991).

“An essential fact needed to support a claim for punitive damages is that the defendant's conduct must have been outrageous.” *Smith v. Brown*, 423 A.2d 743, 745 (Pa. Super. 1980). Reckless indifference to the interests of others occurs where an actor intentionally engages in unreasonable conduct “in 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.” *Evans v. Philadelphia Transportation Company*, 212 A.2d 440, 443 (Pa. 1965).

The type of conduct required to establish a right to punitive damages is not mere reckless indifference to the rights of others. *Hutchison v. Luddy*, 582 Pa. 114, 123, 870 A.2d 766, 771, (2005) reiterates the Supreme Court’s findings in *Martin v. Johns-Manville Corp.*, 508 Pa. 154, 170-173, 494 A.2d 1088, 1097-1098 (1985)) which outlines the state of mind which would constitute reckless indifference. “Reckless indifference to

the rights of others and conscious action in deliberate disregard of them (see § 500) may provide the necessary state of mind to justify punitive damages.” Restatement (Second) of Torts § 908, comment b.

Comment b following Section 908 further states that “[r]eckless indifference to the rights of others and conscious action in deliberate disregard of them (see § 500) may provide the necessary state of mind to justify punitive damages.” However, our courts have not construed this statement as authority for the proposition that “reckless indifference to the rights of others,” which provides a basis for an award of punitive damages, is equivalent to both distinct types of wanton or willful misconduct included in the Section 500 definition of those terms. In fact, “[w]anton misconduct as defined in § 500 of the Restatement of Torts 2d and in *Evans v. Philadelphia Transportation Co.*, 418 Pa. 567, 212 A.2d 440 (1965), is not the same as the ‘outrageous conduct ... done with a reckless indifference to the interests of others....’” *McSparran v. Pennsylvania Railroad Company*, 258 F.Supp. 130, 134 (E.D.Pa.1966) (applying Pennsylvania law) (citations omitted), *quoted in Focht v. Rabada*, 217 Pa.Superior Ct. 35, 39–40, 268 A.2d 157, 160 (1970).

Comment a to Section 500 describes two distinct types of reckless conduct which represent very different mental states: (1) where the “actor knows, or has reason to know, ... of facts which create a high degree of risk of physical harm to another, and deliberately proceeds to act, or to fail to act, in conscious disregard of, or indifference to, that risk;” and (2) where the “actor has such knowledge, or reason to know, of the facts, but does not realize or appreciate the high degree of risk involved, although a reasonable man in his position would do so.” The first type of reckless conduct described in Section 500 demonstrates a higher degree of culpability than the second on the continuum of mental states which range from specific intent to ordinary negligence. An “indifference” *495 to a known risk under Section 500 is closer to an intentional act than the failure to appreciate the degree of risk from a known danger. This distinction is particularly important in determining what facts justify punitive damages in cases where, as here, liability is based on failure to warn against the risk of a disease with a long latency period arising out of exposure to a useful but unavoidably dangerous product.

Under Pennsylvania law, only the first type of reckless conduct described in comment a to Section 500, is sufficient to **705 create a jury question on the issue of punitive damages. Thus, “punitive damages are awarded only for outrageous conduct, that is, for acts done with a bad motive or with a *reckless indifference* to the interests of others.” *Chambers v. Montgomery*, 411 Pa. 339, 344, 192 A.2d 355, 358 (1963) (quoting comment b to Section 908[1] of the Restatement of Torts) (emphasis added). See *Feld v. Merriam*, 506 Pa. at [393–95,] 485 A.2d at 747. Comment b to Section 500, read in light of preceding comment a to that section, indicates that Section 908 damages are not justified where the defendant's mental state rises to no more than gross negligence. *Accord Thomas v. American Cystoscope Makers, Inc.*, 414 F.Supp. 255, 267 (E.D.Pa.1976) (applying Pennsylvania law in a products liability action). See also *Campus Sweater & Sportswear v. M.B. Kahn Constr. Co.*, 515 F.Supp. 64, 104 (D.S.C.1979), *affirmed*, 644 F.2d 877 (4th Cir.1981) (“South Carolina, as do most other jurisdictions, requires misconduct above and beyond mere negligence or gross negligence”). (Footnotes omitted). *SHV Coal, Inc. v. Continental Grain Co.*, 526 Pa. 489, 494, 587 A.2d 702, 704, (1991)(quoting *Martin v. Johns-Manville Corp.*, 508 Pa. 154, 170-173, 494 A.2d 1088, 1097-1098 (1985)). See also, *Hutchison v. Luddy*, 582 Pa. 114, 123, 870 A.2d 766, 771, (2005).

Plaintiff claims that Defendant Romero acted with reckless indifference to the interests of others by violating several portions of the Motor Vehicle Code, failing to “keep a proper lookout” for vehicles, failing to exercise the high degree of care required of a motorist entering an intersection, and driving a fuel truck with a “wanton disregard for the safety of persons or property.” Compl. ¶ 49(a)-(e) and Compl. ¶ 73(a)-(e). Plaintiff alleges that because Defendant Romero was a driver of a commercial vehicle carrying hazardous material, he knew or should have known that his actions would put others at risk of harm, raising his conduct from merely negligent to the level of outrageous. Paragraphs 49(b) and 73(b) of the Complaint alleges that Defendant failed to violate the same statute by “entering

and continuing within the Intersection when it was unsafe to do so because of the proximity of Mr. Keller's Motorcycle." Compl. ¶ 49(b) & 73(b). Paragraphs 49(c) and 73(c) of the Complaint alleges that Defendant failed "to keep a proper lookout for vehicles such as Mr. Keller's Motorcycle traveling on Campground Road." Compl. ¶ 49(c) & 73(c). Paragraphs 49(d) and 73(d) of the Complaint alleges that Defendant failed "to exercise the high degree of care required of a motorist entering an intersection." Compl. ¶ 49(d) & 73(d). Paragraphs 49(e) of the Complaint alleges that Defendant drove "a fuel truck with a wanton disregard for the safety of persons or property in violation of 75 Pa. C.S. § 3736," while Paragraph 73(e) of the Complaint alleges that Defendant drove "A tractor trailer with a wanton disregard for the safety of persons or property..." Compl. ¶ 49(e) & 73(e).

Plaintiff further alleges that at "all times material hereto, it was daylight and there were no adverse weather or road conditions." Compl. ¶ 19. Paragraph 23 alleges that "Romero, suddenly and without warning, attempted to make a left turn onto northbound Campground Road, pulling directly into the path of Mr. Keller's Motorcycle." Compl. ¶ 23.

It is important to note that this is not a motion to request removing the punitive damages issue from the jury on the grounds that the evidence does not support it. Instead, it is a motion to strike two counts in Plaintiff's complaint. "The issue is not whether the Plaintiff's will prevail at the end but only whether they should be entitled to offer evidence to support their claim." *Lindsay v. Kvortek*, 865 F.Supp. 264 (1994), citing *Neitzke v. Williams*, 490 U.S. 319, 109 S.Ct. 1827, 104 L.Ed.2d 338 (1989); *Scheuer v. Rhodes*, 416

U.S. 232, 236, 94 S.Ct. 1683, 1686, 40 L.Ed.2d 90 (1974). The Lindsay Court goes on to note that “[t]he complaint must be read in the light most favorable to the plaintiffs and all well-pleaded material allegations in the complaint must be taken as true.” *Estelle v. Gamble*, 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976). Here, at this early point in litigation, the court cannot say as a matter of law that Defendant's conduct, if proven as alleged in the complaint, was not reckless. See *McClellan v. Health Maint. Org. of Pa.*, 604 A.2d 1053, 1061 (Pa. Super. 1992) (explaining it would be premature to dismiss plaintiff's claim for punitive damages in medical malpractice action based on allegations contained in complaint), appeal denied, 616 A.2d 985 (Pa. 1992). Defendant has the opportunity to determine before trial whether the evidence which the Plaintiff believes establishes reckless conduct is sufficient to submit the claim for punitive damages to the jury. See *Moran v. G. & W.H. Corson, Inc.*, 586 A.2d 416, 422, 422-425 (Pa. Super. 1991) (determining evidence of alleged outrageous conduct was insufficient to permit issue of punitive damages to jury). It is premature, however, based upon the allegations contained in the complaint, to dismiss the counts for punitive damages.

CONCLUSION

Plaintiff's Complaint is legally sufficient. As a result, Defendant's Preliminary Objections are **OVERRULED**.

BY THE COURT,

DATE: January 13, 2017

ANDREA MARCECA STRONG, JUDGE

**IN THE COURT OF COMMON PLEAS OF YORK COUNTY, PENNSYLVANIA
CIVIL DIVISION**

MICHELLE KELLER,	:	No. 2015-SU-003210-69
Administratrix for the	:	
ESTATE OF RICHARD B. KELLER,	:	
Plaintiff,	:	
	:	
v.	:	
	:	
SUPERIOR PLUS ENERGY	:	
SERVICES, INC., t/d/b/a/ SUPERIOR	:	
PLUS ENERGY SERVICES	:	
and	:	Civil Action – Law
DAVID ROMERO	:	
Defendants	:	

ORDER OVERRULING
DEFENDANT’S PRELIMINARY OBJECTIONS

AND NOW, this ____ day of January 2017, for the reasons set forth in the Memorandum Opinion of this date, Defendants Superior Plus Energy Services, Inc. and David Romero’s Preliminary Objections to Plaintiff’s Complaint, are **OVERRULED**.

BY THE COURT,

ANDREA MARCECA STRONG, JUDGE