

Pennsylvania District & County Reports

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TITLE OF CASE

Mary Lou Gallatin, Estate of Daniel E. Gallatin v Laura E. Gargiulo and Joseph M. Gargiulo d/b/a Gargiulo Landscape and Timothy J. Fend

All the parties when practicable
Give term and number or session
and number

No. 10401 of 2015 CA

Cross out parts not used.

_____ Term, _____ Sess. _____

COURT AND DATE OPINION WAS HANDED DOWN OR FILED

Strike out words not used.
Set out the month, day and year.

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Court of Common Pleas of Lawrence County

March 9, 2016

NAME OF JUDGE WHO RENDERED THE OPINION

Judge John W. Hodge

FORM OF PROCEEDING

Preliminary Objections

_____ for garnishee.
_____ for exceptant.
_____ contra.

ATTORNEYS' NAMES

**Douglas J. Olcott, Esq for Plaintiff
LeeAnn A. Fulena, Esq. for Defendants Laura E. Gargiulo and Joseph M. Gargiulo d/b/a Gargiulo Landscape
Michael E. Lang, Esq. for Defendant Timothy J. Fend**

NAME OF PERSON SENDING CASE

**James W. Manolis, Esquire
Lawrence County D&C Reporter**

MARY LOU GALLATIN, Individually
and as Executrix of the ESTATE OF
DANIEL E. GALLATIN,

Plaintiff,

v.

LAURA E. GARGIULO, individually
and d/b/a GARGIULO LANDSCAPE, an
unregistered fictitious name,

JOSEPH M. GARGIULO, individually
and d/b/a GARGIULO LANDSCAPE, an
unregistered fictitious name, and,

TIMOTHY J. FEND,

Defendants.

: IN THE COURT OF COMMON PLEAS
:
: LAWRENCE COUNTY, PENNSYLVANIA
:
: No. 10401 of 2015, C.A.

APPEARANCES

FOR THE PLAINTIFF:

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FOR DEFENDANTS LAURA E. GARGIULO,
INDIVIDUALLY AND D/B/A GARGIULO
LANDSCAPE, AN UNREGISTERED
FICTITIOUS NAME, AND JOSEPH M.
GARGIULO, INDIVIDUALLY AND D/B/A
GARGIULO LANDSCAPE, AN
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FOR DEFENDANT TIMOTHY J. FEND:

Michael E. Lang, Esq.
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983 Third Street
Beaver, PA 15009

OPINION

Hodge, J.

March 9, 2016

Before the Court for disposition are the Preliminary Objections to Plaintiff's Complaint filed by Laura E. Gargiulo, individually and d/b/a Gargiulo Landscape, an unregistered fictitious name and Joseph M. Gargiulo, individually and d/b/a Gargiulo Landscape, an unregistered fictitious name. Also before the Court are Preliminary Objections filed by Defendant Timothy J. Fend (hereinafter, "Defendant Fend"). The Plaintiff in this matter is Mary Lou Gallatin, individually and as Executrix of the Estate of Daniel E. Gallatin (hereinafter, "Plaintiff").

The Plaintiff filed a Complaint on July 16, 2015. According to the Complaint, Daniel E. Gallatin (hereinafter, "Decedent") was slowing down to make a right turn while operating a motorcycle. The Complaint provides that at the same time, Defendant Laura E. Gargiulo, operating a vehicle owned by Defendant Joseph M. Gargiulo, individually and d/b/a Gargiulo Landscaping, was traveling behind the Decedent on the roadway. It is averred that as Defendant Laura E. Gargiulo was nearing the Decedent's motorcycle, she was text messaging on her cellular telephone in violation of Section 3316 of the Vehicle Code. The Complaint further avers that Defendant Laura E. Gargiulo was distracted by the cell phone and was inattentive, causing her to strike the rear of Decedent's motorcycle. The Decedent was pinned and dragged under the vehicle operated by Defendant Laura E. Gargiulo approximately 100 feet. It is believed by the Plaintiff that Defendant Laura E. Gargiulo was operating the vehicle with the permission of and for the benefit of Defendant Joseph M. Gargiulo, individually and d/b/a Gargiulo Landscaping. It is further believed

that Defendant Laura E. Gargiulo was reading and/or responding to a text message from telephone number (724) 991-9693 sent by either Defendant Joseph M. Gargiulo, individually and d/b/a Gargiulo Landscaping or Defendant Fend, a paramour of Defendant Laura E. Gargiulo. The Decedent died as a result of the injuries sustained in the accident.

The Plaintiff's Complaint contains the following six counts: Count I – Negligence-Survival Action against Defendant Laura E. Gargiulo, individually, and d/b/a Gargiulo Landscaping; Count II – Negligence-Wrongful Death Action against Laura E. Gargiulo, individually, and d/b/a Gargiulo Landscaping; Count III – Negligence-Survival Action against Joseph M. Gargiulo, individually, and d/b/a Gargiulo Landscaping; Count IV – Negligence-Wrongful Death Action against Joseph M. Gargiulo, individually, and d/b/a Gargiulo Landscaping; Count V – Negligence-Survival Action against Defendant Fend; and Count VI – Negligence-Wrongful Death against Defendant Fend. Defendant Fend filed Preliminary Objections to the Complaint on July 30, 2015. Preliminary Objections were filed on behalf of Laura E. Gargiulo, individually and d/b/a Gargiulo Landscape, and Joseph M. Gargiulo, individually and d/b/a Gargiulo Landscape on July 31, 2015. All parties have filed briefs, and oral argument regarding the preliminary objections was conducted on November 30, 2015.

Preliminary Objections of Defendant Fend

When a court is presented with preliminary objections to a complaint, all material facts averred in the complaint, as well as all reasonable inferences deducible therefrom, must be accepted as true. Hess v. Fox Rothchild, LLP, 925 A.2d 798, 805

(Pa.Super. 2007); Tucker v. Philadelphia Daily News, 757 A.2d 938, 941-42 (Pa.Super. 2000). The Court must further determine, as a matter of law, whether, based on the facts averred in the complaint, the plaintiff may be entitled to recovery. Wiernik v. PHH U.S. Mortg. Corp., 736 A.2d 616 (Pa.Super. 1999). Preliminary objections should only be sustained when the court determines with certainty that, upon the facts averred, the law will not permit the recovery sought by the plaintiff. R.W. v. Manzek, 888 A.2d 740, 749 (Pa. 2005); Bourke v. Kazara, 746 A.2d 642, 643 (Pa.Super. 2000).

Pennsylvania is a fact-pleading jurisdiction, which requires the plaintiff to provide the defendant with notice of what the plaintiff's claim is and the grounds for the claim. Unified Sportsmen of Pennsylvania v. Pennsylvania Game Com'n (PGC), 950 A.2d 1120, 1134 ((Pa. Cmwlth. 2008) (quoting Sevin v. Kelshaw, 417 Pa. Super. 1, 611 A.2d 1232, 1235 (1992))). Additionally, the plaintiff must summarize the facts essential to support the claims. Id. "The rule requires a plaintiff to plead all the facts that he must prove in order to achieve recovery on the alleged cause of action. The pleading must be sufficiently specific so that the defending party will know how to prepare his defense." Commonwealth ex rel. Pappert v. TAP Pharmaceuticals Products, Inc., 868 A.2d 624, 635 ((Pa. Cmwlth. 2005) (citing Department of Transportation v. Shipley Humble Oil Co., 29 Pa. Cmwlth. 171 370 A.2d 438 (1977))). The purpose behind the rules of pleading is to enable parties to ascertain, by utilizing their own professional discretion, the claims and defenses that are asserted in the case. Krajsa v. Key Punch, Inc., 424 Pa. Super. 230, 236, 622 A.2d 355, 357 (1993). "The pleadings must adequately explain the nature of the claim to the opposing party

so as to permit him to prepare a defense, and they must be sufficient to convince the court that the averments are not merely subterfuge.” In re Estate of Schofield, 505 Pa. 95, 477 A.2d 473 (1984) ((citing Sokoloff v. Strick, 404 Pa. 343, 172 A.2d 302 (1961); Hornsby v. Lohmeyer, 364 Pa. 271, 72 A.2d 294 (1950); Rice v. Braden, 243 Pa. 141, 89 A. 877 (1914)). A trial court has broad discretion in determining the amount of detail that must be averred in a pleading, because the standard of pleadings set forth in Rule 1019 does not lend itself to precise measurement. United Refigerator Company v. Applebaum, 410 Pa. 210, 213, 189 A.2d 253, 255 (1963).

Defendant Fend’s Preliminary Objections are based upon Pennsylvania Rule of Civil Procedure, Rule 1028(a)(4). Rule 1028(a)(4) provides that preliminary objections in the nature of a demurrer may be raised alleging that a claim is insufficient as a matter of law. Pa.R.C.P. 1028(a)(4). “A preliminary objection in the nature of a demurrer is properly granted where the contested pleading is legally insufficient.” Cooper v. Frankford Health Care System, Inc., 960 A.2d 134, 143 (Pa.Super. 2008) (citing, Cardenas v. Schober, 783 A.2d 317, 321 (Pa.Super. 2001)). A demurrer must be resolved based solely on the pleadings, no testimony or evidence outside of the complaint may be considered to dispose of the legal issue presented. Id. A preliminary objection in the nature of a demurrer is properly granted when the court finds, based on the complaint alone, that there are no legal grounds upon which the claim can stand. Weiley v. Albert Einstein Med. Ctr., 51 A.3d 202, 208 (Pa.Super. 2012). “All material facts set forth in the pleading and all inferences reasonably deducible therefrom must be admitted as true.” Hess, supra (citing, Cardenas, supra).

The standard of review for a preliminary objection in the nature of a demurrer is as follows:

A preliminary objection in the nature of a demurrer admits as true all well-pled material, relevant facts and every inference fairly deducible from those facts. The pleader's conclusions or averments of law are not considered to be admitted as true by a demurrer. Since the sustaining of a demurrer results in a denial of the pleader's claim or a dismissal of his suit, a preliminary objection in the nature of a demurrer should be sustained only in cases that clearly and without a doubt fail to state a claim upon which relief may be granted. If the facts as pleaded state a claim for which relief may be granted under any theory of law, there is sufficient doubt to require the preliminary objection in the nature of a demurrer to be rejected.

Baker v. Central Cambria School Dist., 24 A.3d 488, 492 n.6 (Pa. Cmwlth. 2011)

(citing, Palmer v. Bartosh, 959 A.2d 508, 512 n.2 (Pa. Cmwlth. 2008) (internal citations omitted)).

A demurrer will only be sustained in cases where the complaint fails to set forth a valid cause of action. Lerner v. Lerner, 954 A.2d 1229, 1235 (Pa.Super. 2008) (citing, McArdle v. Tronetti, 426 Pa.Super. 607, 627 A.2d 1219, 1221 (1993)). If a doubt exists regarding whether a demurrer should be sustained, the doubt must be resolved in favor of overruling the demurrer. R.W., supra (citations omitted). Fact-based defenses are irrelevant when ruling on a preliminary objection in the nature of a demurrer. Werner v. Plater-Zyberk, 799 A.2d 776, 783 (Pa.Super. 2002) (citing, Orner v. Mallick, 515 Pa. 132, 135, 527 A.2d 521, 523 (1987)). Where a trial court sustains preliminary objections on the merits, it is generally an abuse of discretion to dismiss a complaint without leave to amend. Jones v. City of Philadelphia, 893 A.2d 837 (Pa.Cmwlth. 2006).

Defendant Fend argues that there is no statute or case law which imposes a duty of liability for a person who merely sends a text message, as Defendant Fend allegedly did, to a person operating a vehicle, in this case, to Defendant Laura E. Gargiulo. Defendant Fend therefore submits that the causes of action filed against him by the Plaintiff should be dismissed with prejudice.

Section 3316(a) of the Vehicle Code provides the following:

(a) Prohibition.--No driver shall operate a motor vehicle on a highway or trafficway in this Commonwealth while using an interactive wireless communications device to send, read or write a text-based communication while the vehicle is in motion. A person does not send, read or write a text-based communication when the person reads, selects or enters a telephone number or name in an interactive wireless communications device for the purpose of activating or deactivating a voice communication or a telephone call.

75 Pa.C.S.A., §3316(a).

Section 876 the Restatement (Second) of Torts, states as follows:

§ 876 Persons Acting in Concert

For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he

- (a) does a tortious act in concert with the other or pursuant to a common design with him, or
- (b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself, or
- (c) gives substantial assistance to the other in accomplishing a tortious result and his own conduct, separately considered, constitutes a breach of duty to the third person.

Restatement (Second) of Torts, § 876.

The Court is unaware of Pennsylvania precedent specifically regarding the duties or liability of the sender of a text message to a person who is simultaneously operating a motor vehicle. However, the Superior Court of New Jersey, in the case of Kubert v. Best, 432 N.J.Super. 495, 75 A.3d 1214 (2013), addressed this very issue.

In Kubert, the Court held that as a matter of civil common law, the sender of a text message can potentially be liable if an accident is caused by texting, but only if the sender knew or had special reason to know that the recipient would view the text while driving and thus be distracted. Kubert, supra,

Here, the Complaint avers that Defendant Laura E. Gargiulo was texting on her cellular telephone while operating her vehicle and was thereby distracted at the time of the accident. The Complaint also avers that Defendant Fend sent a text message to Defendant Laura E. Gargiulo who he knew, or in the exercise of reasonable care, should have known, was operating a vehicle. The Complaint continues that Defendant Fend knew or should have known that by sending texts to Defendant Laura E. Gargiulo, she would read and/or respond to the text message while operating her vehicle. Lastly, it is averred that the actions of Timothy J. Fend aided and encouraged Defendant Laura E. Gargiulo's violation of 75 Pa.C.S.A §3316, thereby providing a basis for imposing liability against himself pursuant to Restatement (Second) of Torts §876 and his actions aided Defendant Laura Gargiulo in having acted in reckless indifference to the interests of the Decedent.

The Court is well aware that the averments do not indicate that numerous text messages were sent, and that it is quite possible that Defendant Fend may not have in fact known or should have known that Defendant Laura E. Gargiulo was operating a motor vehicle at the time of the text messaging. The Court also acknowledges that many of the averments made in the Complaint are conclusory, rather than fact-based. However, it must be remembered that this case is now simply at the preliminary objection stage, and all averments should be considered in the light most favorable to

the Plaintiff. Section 876 of the Restatement (Second) of Torts provides that a third party can be liable if he/she encourages another in violating a duty. The New Jersey case of Kubert, supra, although not binding on the Court here, suggests that the sender of a text message can be liable for sending a text message while the recipient is operating a motor vehicle if the sender knew or had reason to know the recipient was driving. In reflecting upon Section 876 of the Restatement and Kubert, and in considering the averments in the light most favorable to the Plaintiff as the law requires, the Court concludes that Defendant Fend should remain a party in this case at this time, and Plaintiff may explore through discovery whether Defendant Fend violated a duty owed to third person. As such, Defendant Fend's preliminary objection is OVERRULED.

Preliminary Objections of Defendants
Laura E. Gargiulo, individually and d/b/a Gargiulo Landscape,
and Joseph M. Gargiulo, individually and d/b/a Gargiulo Landscape

The first preliminary objection filed by the Defendants referenced in this section regards a demurrer of claims against Joseph M. Gargiulo based on two grounds: 1) that he has no duty to the Plaintiff in a claim for negligence or derivative claims; and, 2) that he has no duty to the Plaintiff by allegedly texting Defendant Laura E. Gargiulo while she was driving. With respect to the first objection, the law is clear in Pennsylvania that a wife or husband using by permission the other's car, or a child using by permission a parent's car, does not make his or her negligence imputable to the owner of the car not present therein, unless such user is engaged upon the owner's business. Toenges v. Schleihauf, 368 Pa. 247, 82 A.2d 15 (1951); Lutz v. Force, 185 Pa.Super. 610, 139 A.2d 566 (1958); see, 1994 WL 161244 (E.D. Pa

1994). Here, a review of the Complaint reveals that there are no factually based averments that Defendant Laura E. Gargiulo was engaged in the scope of the business of either Joseph M. Gargiulo or Gargiulo Landscaping, at the time of the accident. As such, Defendant Joseph M. Gargiulo's preliminary objection in this regard is SUSTAINED. The Court shall permit Plaintiff to file an amended complaint to address the issue of whether Defendant Laura E. Gargiulo was using the vehicle while engaged in business.

The Court notes that paragraph 44 of the Complaint is directed towards attempting to establish a claim for negligent entrustment. Paragraph 44 of the Complaint provides that Defendant Joseph M. Gargiulo, individually and d/b/a Gargiulo Landscaping also owed a duty to the Plaintiff's Decedent to refrain from entrusting his motor vehicle to a driver who he knew, or in the exercise of reasonable care should have known, was an unsafe and unfit driver. Pursuant to a negligent entrustment theory of recovery, "[i]t is negligence to permit a third person to use a thing or to engage in an activity which is under the control of the actor, if the actor knows or should know that such person intends or is likely to use the thing or to conduct himself in the activity in such a manner as to create an unreasonable risk of harm to others." Phillips v. Lock, 86 A.3d 906, 913 (Pa. Super. 2014) ((quoting, Christiansen v. Silfies, 446 Pa. Super. 464, 667 A.2d 396, 400 (1995)); Restatement (Second) of Torts § 308. This liability is imposed based upon the actions of the "entrustor" and is not derivative or imputed from the actions of the "trustee". Christiansen v. Silfies, supra (citing, Johnson v. Johnson, 410 Pa. Super. 631, 600 A.2d 970 n. 5 (1991)). It must be noted that the "trustee" must be held liable prior to negligent entrustment to attach to the

"entrustor". Id. (citing Erie Ins. Exchange v. Transamerica Ins. Co., 352 Pa. Super. 78, 507 A.2d 389 (1986)).

The Court finds Paragraph 44 of the Complaint to be conclusory only. No other information is averred in the Complaint that Defendant Joseph M. Gargiulo knew or should have known that Defendant Laura E. Gargiulo was an unsafe driver. As such, Joseph M. Gargiulo's preliminary objection in this regard is SUSTAINED.

Likewise, the Court shall permit Plaintiff to file an amended complaint to address the issue of whether Joseph M. Gargiulo possessed knowledge that Defendant Laura E. Gargiulo is an unsafe driver.

The issues surrounding the second ground of Defendant Joseph M. Gargiulo's first preliminary objection, i.e., that he had no duty to the Plaintiff by allegedly text messaging Defendant Laura E. Gargiulo while she was operating a motor vehicle, was covered with great detail above in reference to Defendant Fend's preliminary objection. Based upon the same logic as set forth above, this preliminary objection of Defendant Joseph M. Gargiulo is also OVERRULED.

The next preliminary objection is filed on behalf of Defendant Gargiulo Landscaping and argues that a demurrer should be sustained with any claims made against the business entity, Gargiulo Landscaping. To establish liability against an absent owner, it must be shown not only that the driver was the owner's servant but also that such servant was at the time engaged in the master's business so as to be subject to the master's control or right of control. Breslin by Breslin v. Ridarelli, 308 Pa. Super 179, 454 A.2d (1982); Smalich v. Westfall, 440 Pa. 409, 269 A.2d 476 (1970). In the case *sub judice*, a review of the Plaintiff's Complaint reveals that

insufficient factual averments are made indicating that Defendant Laura E. Gargiulo was engaged in the course and scope of any business relationship with Gargiulo Landscaping. Therefore, a claim against Defendant Gargiulo based upon vicarious liability cannot be made. As a result, this preliminary objection of Defendant Gargiulo Landscaping is SUSTAINED. Notwithstanding, Plaintiff shall be granted leave of Court to file an amended complaint to address the issue of whether Defendant Laura E. Gargiulo was using the vehicle while engaged in business for Defendant Gargiulo Landscaping.

The next preliminary objection filed by the Gargiulo group of Defendants concerns whether punitive damages should be struck from the Complaint. The function of punitive damages is to deter and punish egregious behavior. G.J.D. by G.J.D. v. Johnson, 552 Pa. 169, 713 A.2d 1127 (1998); Martin v. Johns-Manville Corp., 508 Pa. 154, 169, 494 A.2d 1088, 1096 (1985) (citations omitted). Punitive damages may be imposed for "torts that are committed willfully, maliciously, or so carelessly as to indicate wanton disregard of the rights of the party injured." Thompson v. Swank, 317 Pa. 158, 159, 176 A. 211, 211 (1934). Punitive damages are not awarded as additional compensation but are purely penal in nature. See, Colodonato v. Consolidated Rail Corp., 504 Pa. 80, 470 A.2d 475 (1983); Int'l Electronics Co. v. N.S.T. Metal Prod. Co., 370 Pa. 213, 88 A.2d 40 (1952). In Smith v. Brown, 283 Pa.Super. 116, 423 A.2d 743 (1980), the Court stated that an essential fact to support a punitive damages claim is outrageous conduct by the offending party. Outrageous conduct is defined as an "act done with bad motive or with a reckless

indifference to the interests of others." See, Focht v. Rabada, 217 Pa.Super. 35, 38, 268 A.2d 157 (1970).

The Plaintiff submits that that in consideration of the allegations as stated in the Complaint, punitive damages should be awarded against Defendant Laura E. Gargiulo, individually, and d/b/a Gargiulo Landscaping in Count I of the Complaint, Joseph M. Gargiulo, individually, and d/b/a Gargiulo Landscaping in Count III of the Complaint and against Defendant Fend in Count V of the Complaint. Plaintiff's Complaint asserts, *inter alia*, Defendant Laura E. Gargiulo, individually and d/b/a Gargiulo Landscaping operated a vehicle wantonly, willfully and/or in reckless indifference to the interest of others. The Complaint also asserts that Defendant Fend and Defendant Joseph M. Gargiulo, individually and d/b/a Gargiulo Landscaping, aided and abetted Defendant Laura E. Gargiulo, individually and d/b/a Gargiulo Landscaping in being recklessly indifferent to the interest of Decedent.

Counsel for the Gargiulo Defendants presents a number of cases, including Leonard v. Schlabach, (Pa.Com.Pl. Crawford Co., No. 172 of 2012, A.D., July 16, 2012); Platukis v. Pocono Seaway Tours, LLC, (Pa.Com.Pl. Monroe Co., No. 6941 of 2012, C.V., April 8, 2013); Samaniego v. Rodgers, (Pa.Com.Pl. Allegheny Co., No. 019955 of 2011, G.D., Dec. 2, 2011); Piester v. Hickey, 2012 WL 935789 ((E.D.Pa 2012), (No. 11-cv-04720, Mar. 20, 2012)); Rockwell v. Knott, 32 Pa.D.&C. 5th 157 (Lackawanna Co. 2013); and, Sondej v. Post, (Pa.Com.Pl. Butler Co., No. 10083 of 2014 G.D., May 16, 2014) for the general proposition that mere allegations of phone usage alone while driving do not in and of themselves amount to reckless behavior, reckless indifference or a viable punitive damages claim. However, the Court notes

that all of these cases are persuasive, non-precedential and non-binding. Moreover, in certain cases, the accidents in the underlying matters occurred at a time prior to the effective date of 75 Pa.C.S.A. §3316, that is March 8, 2012, a violation of which could support Plaintiff's argument that a Defendant's actions warrant a finding for punitive damages.

In deciding this preliminary objection, the Court finds that when the allegations of the Complaint are viewed as a whole, sufficient evidence exists to support a claim for punitive damages at this stage in the proceedings. Plaintiff has pled facts which provide that Defendant, Laura E. Gargiulo, while driving, was distracted by a text message from either Defendant Joseph M. Gargiulo or Defendant Fend, who knew or should have known, that Defendant Laura E. Gargiulo was driving and would be distracted by such a text message; and this distraction immediately led to the death of the Decedent. The Court cannot without doubt determine that Plaintiff will be unable to establish a case for punitive damages against the individual Defendants on a basis of willful, outrageous, or reckless conduct. Since a genuine issue of material fact exists, the preliminary objection in this instance should be denied. As such, the preliminary objection asking that the claim for punitive damages be stricken is **OVERRULED**. The Court notes that this ruling does not preclude the individual Defendants from subsequently challenging Plaintiff's right to punitive damages after completion of the pleadings by motion for judgment on the pleadings or after completion of discovery by motion for summary judgment. The Court also notes that as previously discussed, Plaintiff's actions against Defendant Gargiulo Landscaping

shall be dismissed. Accordingly, any claims for punitive damages against Defendant Gargiulo Landscaping are likewise dismissed.

The final preliminary objection to be addressed concerns allegations of "willful and wanton disregard," "recklessness" and "'reckless' conduct" and these terms being stricken. The argument is that the Complaint states claims for negligence, that use of the cell phone at the time of the accident does not rise above the level of negligence, and references to words and phrases such as willful, wanton and reckless are therefore irrelevant and unnecessary.

Rule 1028(a) provides that a preliminary objection may be filed regarding inclusion of scandalous or impertinent matter. Pa.R.C.P. 1028(a)(2). It is clear that a pleading should be read in its entirety, not by individual paragraphs, to determine if a claim has been established. Cercone v. Cercone, 254 Pa. Super. 381, 391, 386 A.2d 1, 6 (1978) (citation omitted); Ditch v. Waynesboro Hosp., 917 A.2d 317, 322 (Pa. Super. 2007); Baird v. Congello, 39 Pa.D.&C.4th 7, 12 (1998). "To be scandalous and impertinent, the allegations must be immaterial and inappropriate to the proof of the cause of action." Common Cause/Pennsylvania v. Commonwealth, 710 A.2d 108, 115 (Pa. Cmwlth. 1998) (citing, Department of Environmental Resources v. Peggs Run Coal Company, 55 Pa.Cmwlth. 312, 423 A.2d 765 (1980)). It must be noted that in benign situations, an impertinent matter need not be stricken and may be treated as mere surplusage and ignored. Com., Dept. of Environmental Resources v. Hartford Acc. and Indem. Co., 40 Pa.Cmwlth. 133, 137, 396 A.2d 885, 888 (1979).

In the case *sub judice*, it has been decided above that claims for punitive damages regarding all three individual Defendants remain viable. Conduct classified

as willful, wanton and reckless must be considered when considering a claim for punitive damages. As such, the preliminary objection seeking to strike such words from the Complaint as they relate to an individual Defendant's conduct is
OVERRULED. As an aside, since the claims against Defendant Gargiulo Landscaping are dismissed as previously discussed in this Opinion, it follows that the above-quoted language clearly does not apply to this business entity.

MARY LOU GALLATIN, Individually
and as Executrix of the ESTATE OF
DAN E. GALLATIN,

Plaintiff,

v.

LAURA E. GARGIULO, individually
and d/b/a GARGIULO LANDSCAPE, an
unregistered fictitious name,

JOSEPH M. GARGIULO, individually
and d/b/a GARGIULO LANDSCAPE, an
unregistered fictitious name, and,

TIMOTHY J. FEND,

Defendants.

: IN THE COURT OF COMMON PLEAS
:
: LAWRENCE COUNTY, PENNSYLVANIA

: No. 10401 of 2015, C.A.

ORDER

AND NOW, this 9th day of March, 2016, this case being before the Court on November 30, 2015 regarding the Preliminary Objections of Defendant Laura E. Gargiulo, individually and d/b/a Gargiulo Landscape, an unregistered fictitious name, of Defendant Joseph M. Gargiulo, individually and d/b/a Gargiulo Landscape, an unregistered fictitious name, and of Defendant Timothy J. Fend, with Douglas J. Olcott, Esquire, appearing for and representing the Plaintiff, Mary Lou Gallatin, Individually and as Executrix of the Estate of Daniel E. Gallatin, LeeAnn A. Fulena, Esquire, appearing for and representing Defendant Laura E. Gargiulo, individually and d/b/a Gargiulo Landscape and Defendant Joseph M. Gargiulo, individually and d/b/a Gargiulo Landscape, and Michael E. Lang, Esquire, appearing for and representing Defendant Timothy J. Fend, and upon review of the applicable record, the Court hereby **ORDERS AND DECREES** as follows:

1. Defendant Timothy J. Fend's Preliminary Objection based upon the argument that there is no duty of liability imposed upon Defendant Fend for allegedly text messaging Defendant Laura E. Gargiulo and that the causes of action filed against Defendant Timothy J. Fend should be dismissed is **OVERRULED**. Counts V and VI of the Complaint remain viable against Defendant Timothy J. Fend.

2. The Preliminary Objections filed by Defendant Laura E. Gargiulo, individually and d/b/a Gargiulo Landscape and Defendant Joseph M. Gargiulo, individually and d/b/a Gargiulo Landscape are **SUSTAINED IN PART AND OVERRULED IN PART** pursuant to the Opinion of same date.

3. Defendant Joseph M. Gargiulo's preliminary objection that he has no duty to the Plaintiff in a claim for negligence or derivative claims is **SUSTAINED** as to a claim for negligent entrustment. The Plaintiff is permitted to amend this claim in accordance with the Opinion of same date.

4. Defendant Joseph M. Gargiulo's Preliminary Objection based upon the argument that he has no duty to the Plaintiff by allegedly text messaging Defendant Laura E. Gargiulo is **OVERRULED**. Counts III and IV remain viable against Defendant Joseph M. Gargiulo, individually, not including the claim for negligent entrustment as described in the preceding paragraph.

5. Defendant Gargiulo Landscaping's Preliminary Objection regarding Plaintiff having insufficiently pled that the conduct of Defendant Laura E. Gargiulo and/or Defendant Joseph M. Gargiulo was within the scope of employment with Gargiulo Landscaping and that claims made against Defendant Gargiulo Landscaping should be dismissed is **SUSTAINED**. Accordingly, all claims made against the

business entity, Gargiulo Landscaping, are dismissed. The Plaintiff shall be permitted to amend the claims in accordance with the Opinion of same date.

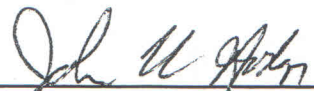
6. The Preliminary Objections of Defendant Laura E. Gargiulo and Defendant Joseph M. Gargiulo regarding the striking of punitive damages from the Complaint is OVERRULED. Claims for punitive damages remain viable against Defendant Laura E. Gargiulo, individually, and Defendant Joseph M. Gargiulo, individually. Any claim for punitive damages against Defendant Gargiulo Landscaping is dismissed in accordance with the preceding paragraph.

7. The Preliminary Objection of Defendant Laura E. Gargiulo and Defendant Joseph M. Gargiulo regarding striking the terms, "willful and wanton disregard," "recklessness" and "'reckless' conduct" from the Complaint is OVERRULED. The quoted language does not apply to Gargiulo Landscaping as claims against Gargiulo Landscaping have been dismissed pursuant to paragraph 5.

8. The Plaintiff shall have twenty (20) days from the date of this Order to file an Amended Complaint

9. The Prothonotary of Lawrence County shall provide a copy of this Order of Court and Opinion upon counsel of record in accordance with the provisions of Pa.R.C.P. 236 and Rule L236.

BY THE COURT:



John W. Hodge, Judge J.