MARY JANE PHILLIPS,	: IN THE COURT OF COMMON PLEAS OF
	: LYCOMING COUNTY, PENNSYLVANIA
Plaintiff	:
	:
vs.	: NO. 05-00,909
	:
	:
	:
PAUL BESWICK and	:
KOPPERS, INC.,	:
	:
Defendants	: PRELIMINARY OBJECTIONS

Date: September 30, 2005

OPINION and ORDER

Before the court for determination are the Preliminary Objections of Defendants Paul Beswick and Koppers, Incorporated filed June 9, 2005. The preliminary objections will be granted in part and denied in part.

I. BACKGROUND

A. Facts

The complaint alleges the following facts. On May 31, 2003, at approximately 1:20 p.m., Mary Jane Phillips (hereafter "Phillips") and Michael Sees (hereafter "Sees") were riding their bicycles on Smoketown Road in Lewisburg, Union County, Pennsylvania.[1] On the same date and at approximately the same time, Paul Beswick (hereafter "Beswick") was driving an

[1] At case number 05-00,910, Michael Sees has filed a separate complaint against Beswick and Koppers, Incorporated based upon the May 31, 2003 accident. On June 9, 2005, Beswick and Koppers, Incorporated filed preliminary objections to that complaint. The court has disposed of those preliminary objections in an opinion and order dated September 30, 2005.

automobile on Stein Road in Lewisburg, Union County, Pennsylvania. Smoketown Road and Stein Road intersect near the Bucknell Golf Course.

As they approached the intersection, Phillips and Sees stopped at the posted stop sign on Smoketown Road. Phillips and Sees then proceeded through the intersection. While in the intersection, Beswick struck the bicycles Phillips and Sees were riding with the vehicle he was operating. Beswick either failed to stop at the posted stop sign on Stein Road or proceeded through the intersection without first observing Phillips and Sees enter the intersection. Beswick exited his vehicle and approached Phillips and Sees. Phillips was able to detect an odor of alcohol on Beswick's breath. Beswick returned to his vehicle and left the scene. Witnesses were able to obtain the license plate of the vehicle Beswick was operating, which enabled law enforcement to track Beswick down. Beswick admitted to law enforcement personnel that he struck Phillips and Sees with the vehicle he was operating.

As a result of the accident, Phillips alleges that she suffered injuries in the form of back, neck, and leg pain, a hematoma of the head, and post-concussive disorder/mild traumatic brain injury.

Phillips alleges that Koppers, Incorporated (hereafter "Koppers") employs Beswick as one of its plant managers. Phillips further alleges that Koppers owns the vehicle Beswick was driving at the time of the accident. Phillips also alleges that Koppers permitted Beswick to use that vehicle.

B. Preliminary Objections

Beswick and Koppers raise four preliminary objections. The first is a demurrer to the negligent entrustment cause of action asserted against Koppers. Beswick and Koppers assert

that Phillips has failed to allege sufficient facts which could establish that Koppers knew or should have known that Beswick would operate the vehicle in a negligent manner. The second preliminary objection is to the punitive damages claim asserted against Koppers. Beswick and Koppers assert that Phillips' claim for punitive damages against Koppers must fail because the underlying negligent entrustment cause of action has not been sufficiently pleaded. The third preliminary objection is to the punitive damages claim asserted against Beswick. Beswick and Koppers assert that that complaint fails to establish a claim for punitive damages against Beswick because it fails to plead facts that could establish Beswick was intoxicated while he was operating the vehicle at the time of the accident. The fourth preliminary objection is to the language in Paragraph 14 of the complaint. Beswick and Koppers assert that Paragraphs 14(l) and 14(r), which allege that Beswick left the scene of an accident involving injuries and that Beswick committed a simple assault, must be stricken per Pa.R.C.P. 1028(a)(2) because the paragraphs are scandalous and impertinent matter.

II. ISSUES

There are four issues before the court. First, whether the complaint has set forth sufficient factual allegations, which if true, would establish a negligent entrustment cause of action against Koppers for permitting Beswick the use of a company motor vehicle. Second, whether the complaint pleads sufficient facts to support an award of punitive damages against Koppers for entrusting a company motor vehicle to Beswick. Third, whether the complaint sufficiently alleges facts that could support an award of punitive damages against Beswick when it is alleged that there was an odor of alcohol on his breadth at the time of the accident. Fourth, whether the language "leaving the scene of an accident involving injuries" and "simple

assault" constitutes scandalous and impertinent matter that must be stricken from the complaint.

III. DISCUSSION

A. Negligent Entrustment Cause of Action Against Koppers

1. Standard of Review

A preliminary objection in the form of a demurrer tests the legal sufficiency of a pleading. ***Ins. Adjustment Bureau, Inc. v. Allstate Ins. Co.***, 860 A.2d 1038, 1041 (Pa. Super. 2004). A demurrer will be granted where the challenged pleading is legally insufficient. ***Williams v. Nationwide Mut. Ins. Co.***, 750 A.2d 881, 883 (Pa. Super. 2000). That is, a demurrer will be granted when it is clear from the facts that the party has failed to state a claim upon which relief may be granted. ***Sunbeam Corp. v. Liberty Mut. Ins. Co.***, 781 A.2d 1185, 1191 (Pa. 2001).

The demurrer must be resolved solely on the basis of the pleading; no testimony or evidence outside of the pleading may be considered. ***Williams***, 750 A.2d at 883. Furthermore, the court may not address the merits of the matter presented in the pleading. ***In re S.P.T.***, 783 A.2d 779, 781 (Pa. Super. 2001). All material facts set forth in the pleading as well as all inferences reasonably deducible therefrom shall be admitted as true for purposes of deciding the demurrer. ***Willet v. Pennsylvania Med. Catastrophe Loss Fund***, 702 A.2d 850, 853 (Pa. 1997); ***Ins. Adjustment Bureau***, 860 A.2d at 1041. "'The question presented by the demurrer is whether, on the facts averred, the law says with certainty that no recovery is possible. Where any doubt exists as to whether a demurrer should be sustained, it should be resolved in favor of

overruling the demurrer.'" ***Ins. Adjustment Bureau***, 860 A.2d at 1041 (quoting ***Vulcan v. United of Omaha Life Ins. Co.***, 715 A.2d 1169, 1172 (Pa. Super. 1998)).

2. Sufficiency of Factual Allegations

The complaint fails to set forth a cause of action for negligent entrustment against Koppers for permitting Beswick the use of a company motor vehicle because the factual allegations do not demonstrate that Koppers knew or should have known that Beswick would likely operate the company motor vehicle in such a manner as to cause a risk of harm to others. Section 308 of the Restatement (Second) of Torts defines negligent entrustment as:

> It 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.

Donegal Mut. Ins. Co. v. Fackler, 835 A.2d 712, 720 (Pa. Super. 2003), *app. denied*, 857 A.2d 679 (Pa. 2004). Under this theory, a defendant's liability is based on his conduct with regard to the instrumentality or activity under his control. ***Ibid***; ***Ferry v. Fisher***, 709 A.2d 399, 400 (Pa. Super. 1995). The entrustor's liability is not dependant on, derivative from, or imputed from the entrustee's liability. ***Donegal***, 835 A.2d at 720; ***Ferry***, 709 A.2d at 400.

For liability to be imposed under the negligent entrustment theory, the defendant must have had a right of control over the activity or instrumentality at issue. ***Congini v. Portersville Valve Co.***, 470 A.2d 515, 519 (Pa. 1983). Also, the defendant must posses or should posses the knowledge of the third party's incompetence or unfitness at the time of the entrustment. ***Gibson v. Bruner***, 178 A.2d 145, 148 (Pa. 1961); ***Robare v. Pekarcik***, 530 A.2d 534, 537 (Pa. Cmwlth. 1987), *app. denied,* 542 A.2d 1373 (Pa. 1988).

The complaint fails to allege sufficient facts to establish that Koppers knew or should have known that Beswick was likely to operate the vehicle in a manner that would cause injury to others. The complaint alleges in Paragraph 28 that Beswick had a poor driving record and some type of disability or illness that affected his mental state. A poor driving record and some type of disability/illness that affected Beswick's ability to safely operate the vehicle could likely form a sufficient basis of knowledge from which the conclusion that the vehicle should not have been entrusted to Beswick may be drawn. *See*, ***Moore v. McMillan***, 14 D. & C. 3d 302 (Luzerne Cty. 1980) (Parents had knowledge of son's poor driving record.). But, the complaint fails to allege facts from which a conclusion may be drawn that Koppers had actual or constructive knowledge of Beswick's bad driving record or his disability/illness. Mere conclusions are insufficient.

Accordingly, the demurrer to the negligent entrustment claim against Koppers is granted and the claim dismissed.

B. <u>Punitive Damages Claim Against Koppers</u>

The complaint fails to set forth facts that could support an award of punitive damages against Koppers for entrusting a company motor vehicle to Beswick. Punitive damages are only elements of damages. ***Shanks v. Alderson***, 582 A.2d 883, 885 (Pa. Super. 1990), *app. denied*, 598 A.2d 994 (Pa. 1991). A request for punitive damages does not constitute a cause of action in and of itself. ***Nix v. Temple Univ.***, 596 A.2d 1132, 1138 (Pa. Super. 1991); ***Shanks***, 582 A.2d at 885. Punitive damages are incidental to a cause of action. ***Nix***, 596 A.2d at 1138; ***Shanks***, 582 A.2d at 885. If an independent cause of action does not exist, then there can be no claim for punitive damages. ***Shanks***, 582 A.2d at 885.

The complaint fails to set forth a claim for punitive damages against Koppers because it fails to set forth an independent cause of action against Koppers. The independent cause of action the complaint asserted against Koppers was the negligent entrustment claim in Count III. The dismissal of that claim also dismissed Phillips' claim for punitive damages against Koppers since it was incidental to the negligent entrustment claim. Absent the negligent entrustment claim there is no cause of action asserted against Koppers in the complaint.

Accordingly, the claim for punitive damages against Koppers is dismissed.

C. <u>Punitive Damages Claim Against Beswick</u>

The complaint fails to set for sufficient facts that could support a punitive damages claim against Beswick. The purposes of punitive damages are to punish a defendant for his conduct and to deter others from engaging in similar conduct. ***Judge Tech. Servs. v. Clancy***, 813 A.2d 879, 888 (Pa. Super. 2002). Punitive damages will not be awarded for ordinary negligence or even gross negligence. ***Slappo J's Dev. Assoc. Inc.***, 791 A.2d 409, 417 (Pa. Super. 2002). Punitive damages are only awarded in cases of outrageous behavior. ***Ibid.*** Outrageous behavior is conduct that shows an evil motive or reckless indifference to the rights of others. ***Ibid***. An individual acts recklessly when he knows or has reason to know of facts that create a high degree of risk of physical harm to another and deliberately proceeds to or fails to act in conscious disregard of or indifference to that risk. ***Martin v. Johns-Manville Corp.***, 494 A.2d 1088, 1097 (Pa. 1985).

Under the appropriate circumstances, evidence of driving while under the influence of alcohol may constitute sufficient grounds for awarding punitive damages. ***Focht v. Rabada***, 268 A.2d 157, 161 (Pa. Super. 1970). The reason for this is that "[a]utomobiles represent the

most lethal and deadly weapons today entrusted to our citizenry." ***Ibid***. As such, the possibility of death and serious bodily injury increases substantially when vehicles are operated by intoxicated individuals. ***Ibid***.

The complaint fails to allege facts that could support an award of punitive damages against Beswick because it fails to allege facts that could establish intoxication. Phillips' punitive damages claim against Beswick is based on the allegation that he was operating the motor vehicle while under the influence of alcohol at the time of the accident. Complaint, ¶23. The factual allegations which would support a conclusion that alcohol affected Beswick's ability to safely operate the motor vehicle would be these: the odor of alcohol on his breath at the time of the accident; his failure to stop at the posted stop sign or that he did stop but failed to observe Phillips and Sees in the intersection before he proceeded through it; and, him leaving the scene of an accident involving injuries. By themselves, the odor of alcohol, the failure to stop or failure to observe, and leaving the scene of an accident are insufficient to establish that Beswick was intoxicated. *See, e.g.*, ***Critzer v. Donovan***, 137 A. 665 (Pa. 1927) (Standing alone, odor of alcohol does not establish intoxication); ***Whyte v. Robinson***, 617 A.2d 380 (Pa. Super. 1992) (Odor of alcohol on breath by itself insufficient to establish intoxication).

Phillips must plead factual allegations which would reasonably establish a degree of intoxication that would prove unfitness to drive in order to plead facts that could support an award of punitive damages. *See*, ***Morreale v. Prince***, 258 A.2d 508 (Pa. 1969) (Evidence of alcohol consumption inadmissible unless it reasonably establishes a degree of intoxication which proves unfitness to drive.). Thus, even if the odor of alcohol, the failure to stop or failure to observe, and the leaving the scene of an accident are taken together, the complaint still fails

to establish that alcohol impaired Beswick's ability to safely operate the motor vehicle. The odor of alcohol on his breath could indicate that Beswick had consumed alcohol. However, it does not indicate the amount of alcohol Beswick consumed or that the amount was sufficient to intoxicate Beswick. In order to determine whether Beswick's alcohol consumption lead to his intoxication, one must look to see if there were any characteristic manifestations of intoxication.

On this issue, there is the manner in which Beswick operated the motor vehicle and his conduct following the accident. The failure to stop and the failure to observe are only allegations of negligence, not recklessness. The failure to stop and the failure to oberve are not of such an unusual nature that their cause must be alcohol intoxication. The same may be said about leaving the scene of an accident.

It may be inferred from the fact that Beswick left the scene of the accident that he had a consciousness that he did something wrong - the traditional consciousness of guilt argument. While this may be a strong inference, the question is guilty of what? Leaving the scene of an accident is not such a universal consequence of alcohol intoxication that its occurrence establishes intoxication. In order for the leaving the scene of an accident to become grounds for a permissible inference that Beswick was intoxicated, it must be coupled with some other factual allegations that are characteristic of intoxication. The odor of alcohol on Beswick's breath and the manner in which he operated the vehicle are insufficient to establish this link. Without some other evidence demonstrating an unfitness to drive due to alcohol consumption, the complaint fails to allege intoxication.

Accordingly, Phillips' claim for punitive damages against Beswick is dismissed.

D. Scandalous and Impertinent Matter

A preliminary objection may be filed on the basis that the pleading includes scandalous and impertinent matter. Pa.R.C.P. 1028(a)(2). "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. 1988), *aff'd*, 757 A.2d 367 (Pa. 2000).

The "leaving the scene of an accident involving injuries" language in Paragraph 14(l) is not scandalous and impertinent matter, but the "simple assault" language of Paragraph 14(r) is. The "leaving the scene of an accident involving injuries" language is relevant to proving the negligence cause of action against Beswick. To prove the cause of action, Phillips must establish that Beswick owed her a duty to operate his vehicle in a reasonable manner, that Beswick failed to meet this duty, and that this failure caused Phillips' injuries. The fact that Beswick left the scene may be evidence of a recognition on his part that he failed to reasonably operate his vehicle and that once he knew this failure resulted in an injury to another he fled to avoid detection and responsibility. Such may be viewed as similar to a non-verbal admission by Beswick that he breached the duty owed to Phillips. As such, the fact that Beswick left the scene of the accident is material to Phillips' negligence cause of action against him.

On the other hand, the "simple assault" language is irrelevant to proving Phillips' negligence cause of action. There are three possible interpretations that may be made of the language. The first is that it is a recharacterization of the accident. If this is so, then the "simple assault" language is surplusage and adds nothing to establishing Phillips' negligence cause of action against Beswick.

The second is that Beswick committed a battery upon Phillips when he struck her with the vehicle he was operating. A battery is " 'a harmful or offensive contact with a person resulting from an act intended to cause the plaintiff or a third person to suffer such a contact or apprehension that such a contact is imminent.' " ***Herr v. Booten***, 580 A.2d 1115, 1117 (Pa. Super. 1990), *app. denied*, 615 A.2d 338 (Pa. 1992) (quoting ***Levenson v. Souses***, 557 A.2d 1081, 1088 (Pa. Super. 1989)) (emphasis added). Intent is not an issue in a negligence cause of action. Therefore, whether or not Beswick intended to strike Phillips with the vehicle he was operating is not relevant to her negligence cause of action against him. If Phillips intends to hold Beswick liable for battery, then she must plead that intentional tort apart from her negligence cause of action.

The third possible interpretation of the "simple assault" language is that Beswick violated a criminal statute when he struck Phillips with the vehicle he was operating. The Pennsylvania Crimes Code defines simple assault as:

> A person is guilty of assault if he:
>
> > (1) attempts to cause or intentionally, knowingly or recklessly causes bodily injury to another;
> >
> > (2) negligently causes bodily injury to another with a deadly weapon;
> >
> > (3) attempts by physical menace to put another in fear of imminent serious bodily injury; or
> >
> > (4) conceals or attempts to conceal a hypodermic needle on his person and intentionally or knowingly penetrates a law enforcement officer or an officer or an employee of a correctional institution, county jail or prison, detention facility or mental hospital during the course of an arrest or any search of the person.

18 Pa.C.S.A. §2701(a). A violation of a statute may serve as the basis for a negligence per se cause of action. ***Mahan v. Am-Gard, Inc.***, 841 A.2d 1052, 1059 (Pa. Super. 2003), *app. denied*, 858 A.2d 110 (Pa. 2004); ***Minnich v. Yost***, 817 A.2d 538, 541 (Pa. Super. 2003), *app. denied*, 827 A.2d 1202 (Pa. 2003). However, a violation of a statute is not relevant to an ordinary negligence cause of action. *See*, ***McCloud v. McLaughlin***, 837 A.2d 541, 544 (Pa. Super. 2003) (Negligence per se is a separate legal theory having elements and underlying rationale different from ordinary negligence.). If Phillips wants to hold Beswick liable for violation a statute, then she needs to plead a separate negligence per se cause of action.

Accordingly, the "simple assault" language is stricken from the complaint as scandalous and impertinent matter.

IV. CONCLUSION

Beswick and Kopper's preliminary objections will be granted in part and denied in part.

ORDER

It is hereby ORDERED and DIRECTED that the Preliminary Objections of Defendants Paul Beswick and Koppers, Incorporated filed June 9, 2005 are GRANTED IN PART and DENIED IN PART.

The preliminary objections are GRANTED IN PART in that Count II, Count III, and Count VI are DISMISSED.

The preliminary objections are GRANTED IN PART in that Paragraph 14(r) is hereby STRICKEN from the complaint.

The preliminary objections are DENIED IN PART in that Paragraph 14(l) is not scandalous and impertinent matter.

Plaintiff shall have twenty (20) days from notice of this order to file an amended complaint.

BY THE COURT:

William S. Kieser, Judge

cc: Scott B. Cooper, Esquire
209 State Street
Harrisburg, PA 17101
Gary L. Weber, Esquire
Judges
Christian J. Kalaus, Esquire
Gary L. Weber, Esquire (Lycoming Reporter)