

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

DWAYNE CORTER, Administrator of the Estate of : CV-22-00100
GORDON L. CORTER, Deceased, :
Plaintiff :
vs. :
WALMART REAL ESTATE BUSINESS TRUST *et al.*, :
Defendants :

OPINION AND ORDER

AND NOW, this 11th day of April 2023, the Court issues the following Opinion and Order addressing the Preliminary Objections of Defendant Walmart Real Estate Business Trust and Wal-Mart Stores East, L.P. (collectively, "Walmart") filed on January 24, 2023.

BACKGROUND

Decedent Gordon L. Corter commenced this case by filing a Praecipe for Writ of Summons on February 1, 2022, followed by a Complaint on March 2, 2022. Decedent died on March 4, 2022. Plaintiff filed a Notice of Death pursuant to Rule of Civil Procedure 2355 on May 9, 2022, and a praecipe to substitute Dwayne Corter as Plaintiff in his capacity as Administrator of the Estate of Gordon L. Corter, deceased, on June 8, 2022.

Plaintiff filed an Amended Complaint on January 4, 2023. The Amended Complaint alleges that on January 7, 2022, Decedent was a business invitee at Walmart Store No. 2528, located in Mill Hall, Pennsylvania. Plaintiff avers that when

Decedent exited his vehicle, which he had parked in the store's handicap parking spot, he slipped and fell "on an accumulative amount of snow and/or ice," suffering serious injury and hospitalization, ultimately leading to his death.¹

The Amended Complaint contains causes of action for premises liability against Walmart; Defendant Timothy P. Hummer, Individually and d/b/a Timothy Hummer Snow Removal Operator and/or Landscaping Company; and various unknown snow removal or landscaping companies. The Amended Complaint also includes claims for wrongful death and a survival action against all Defendants.

PRELIMINARY OBJECTIONS

A. Walmart's Preliminary Objections

On January 24, 2023, Walmart filed Preliminary Objections to Plaintiff's Amended Complaint, asserting three objections.

Walmart first objects to all allegations of recklessness in the Amended Complaint, contending that the Amended Complaint "contains absolutely no material facts whatsoever to support or suggest the allegation that Walmart acted with recklessness...." Walmart contends that the allegations of recklessness fail to conform to Pennsylvania's fact-pleading requirements, or alternatively that the

¹ Specifically, Plaintiff contends that Decedent fractured both shoulders and his pelvis, and sustained various other injuries including traumatic brain injuries, requiring hospitalization. Plaintiff contends that Decedent was "expos[ed] to Covid as a result of his hospitalization and in-patient treatment, which caused and/or contributed to his death...."

factual averments in the Amended Complaint are insufficiently specific to support the allegations of recklessness.

Walmart's second preliminary objection seeks to strike as scandalous and impertinent Paragraphs 37 and 49 of the Amended Complaint, relating to Plaintiff's exposure to COVID. Walmart asserts that these allegations "have no bearing on the issues attendant to the substance of Plaintiff's claims of negligence against Walmart, the cause(s) of the accident and resulting harm and/or the damages recoverable by Plaintiff..." Additionally, Walmart contends that these allegations "should be stricken because they plead evidence," which "should not be alleged," rather than "material facts" which are a proper subject of pleadings.²

Walmart's third preliminary objection seeks to strike "general allegations" in Paragraphs 19, 31, and 42 of the Amended Complaint. Specifically, Paragraph 19 asserts that Walmart was negligent in committing various acts "such as" those specifically enumerated; Walmart maintains that this language renders the list of specific negligent acts in that paragraph exemplary rather than exhaustive, allowing Plaintiff to introduce novel theories of liability on the eve of trial. Regarding

² Walmart cites *Baker v. Rangos*, 324 A.2d 498, 505 (Pa. Super. 1974) for this proposition. Although the Superior Court stated in *Baker* that "[e]vidence from which [material] facts may be inferred not only need not but should not be alleged," *Baker* and the cases it cites do not address whether "evidence" in pleadings should or must be stricken for that reason alone, rather than treated as surplusage. Inasmuch as the pleading of evidence in a complaint would only further narrow a plaintiff's claims, the Court does not see how the pleading of evidence would prejudice a defendant.

Paragraphs 31 and 42, Walmart highlights the assertions in each that Walmart violated Plaintiff's rights by:

- "e. Failing to keep, maintain and manage the aforesaid premises in a reasonably safe condition for use by residents and invitees...
- r. Disregarding the rights and safety of the plaintiff as a business invitee on the premises... and
- s. Failing to exercise due care under the circumstances."

Each of these allegations, Walmart contends, is so open-ended as to permit Plaintiff to raise any essentially any theory of liability at trial, whether specified in the Amended Complaint or not. For these reasons, Walmart contends, Paragraphs 19, 31 and 42 of the Amended Complaint are insufficiently specific to confine Plaintiff's allegations of negligence to those fairly supported by the averments of fact in the Amended Complaint.

B. Plaintiff's Response to Preliminary Objections

Plaintiff responds to Walmart's first preliminary objection by citing *Archibald v. Kemble* and its progeny as standing for the proposition that recklessness is a "condition of the mind that may be averred generally."³ Specifically, Plaintiff contends that the Amended Complaint avers "sufficient facts to establish that [Walmart] had a subjective appreciation of the risk of harm to which Plaintiff's

³ *Archibald v. Kemble*, 971 A.2d 513, 519 (Pa. Super. 2009).

decedent was exposed and acted or failed to act in a manner that showed conscious disregard of that risk.”

Regarding Walmart’s second preliminary objection, Plaintiff responds that the allegations in Paragraphs 37 and 49 concerning COVID are “material, relevant, and supportive of [Plaintiff’s] cause of action,” and therefore neither scandalous nor impertinent as a matter of law. Regarding Walmart’s claim that these allegations are improperly pled evidence, Plaintiff asserts that “[t]here is no bar under Pennsylvania decisional, statutory, and/or regulatory authorities preventing a Plaintiff from averring allegations of personal injuries and medical bills in an Amended Complaint for Wrongful Death and Survival.”

In response to Walmart’s third preliminary objection, Plaintiff asserts that the Amended Complaint asserts “sufficiently detailed and definite” material facts when read in the context of the entire pleading. Plaintiff disputes Walmart’s suggestion that the highlighted portions of Paragraphs 19, 31 and 42 are impermissible “catch-all allegations,” replying that “[i]t is not necessary for a Plaintiff to plead every fact in minute detail since the Defendants may use discovery proceedings to prepare their defense.”

C. Argument

The Court held argument on Walmart’s preliminary objections on March 2, 2023. At argument, Walmart withdrew its first preliminary objection without

prejudice to challenge Plaintiff's allegations of recklessness at a later stage of proceedings.

Regarding its second preliminary objection, Walmart expressed skepticism over the viability of Plaintiff's theory that a slip-and-fall could lead to liability for death from an infectious disease that Decedent allegedly contracted in a facility while receiving treatment for injuries stemming from the fall. Essentially, Walmart asserted that Decedent's death due to COVID is, as a matter of law, too attenuated from his fall in the Walmart parking lot to be causally attributable to that incident. Walmart argued that the allegations relating to COVID were therefore not relevant to Plaintiff's claims, but rather incendiary and intended to impermissibly evoke sympathy and an emotional response by the factfinder.

Plaintiff first replied by asserting that, had he not included this allegation in detail, he risked waiver of multiple claims. Plaintiff argued that when the highly unusual nature of the COVID pandemic is set aside, this claim asserts an unremarkable chain of causation. Plaintiff acknowledged that this is a factual issue that he will ultimately bear the burden of proving, but asserted that the theory is appropriate as pled, and neither scandalous nor impertinent.

Regarding its third preliminary objection, Walmart contended that the language in Paragraphs 19, 31 and 42 was the functional equivalent of allegations that a defendant was liable for breaches "including but not limited to" those

enumerated, thus allowing Plaintiffs to raise new theories of liability without limitation.

Plaintiff responded that this contention overreads *Connor v. Allegheny General Hospital*,⁴ and that the language used in Paragraphs 19, 31 and 42 is innocuous when read in the context of the entire Amended Complaint. Plaintiff argued that it would be improper to strike these averments prior to discovery, and suggested that courts should generally err on the side of limiting, rather than extending, *Connor*.

ANALYSIS

A. Applicable Law

Allegations in a pleading are scandalous or impertinent when they are “immaterial and inappropriate to the proof of the cause of action.”⁵ When considering objections that allegations are scandalous and impertinent, courts should strike those matters “sparingly... and only when a party can affirmatively show prejudice.”⁶

Under Pennsylvania law, “conduct is a proximate cause of the plaintiff’s harm where the conduct ‘was a substantial factor in bringing about the harm inflicted upon

⁴ *Connor v. Allegheny General Hosp.*, 461 A.2d 600 (Pa. 1983), discussed *infra*.

⁵ *Breslin v. Mountain View Nursing Home, Inc.*, 171 A.3d 818, 829 (Pa. Super. 2017) (quoting *Common Cause/Pennsylvania v. Commonwealth*, 710 A.2d 108, 115 (Pa. Cmwlth. 1998)).

⁶ *Id.* (quoting *Commonwealth Dep’t of Env’tl. Res. v. Hartford Accident and Indem. Co.*, 396 A.2d 885, 888 (Pa. Cmwlth. 1979)).

a plaintiff.”⁷ The Supreme Court of Pennsylvania has explained that “ordinarily the determination of whether the defendant’s conduct was a substantial cause of the injuries complained of should not be taken from the jury if the jury may reasonably differ as to whether the conduct of the defendant has been a substantial factor in causing the harm.”⁸ Factors to be considered “in determining whether negligent conduct is[a] substantial factor in producing harm” include:

“(a) the number of other facts which contribute in producing the harm and the extent of the effect which they have in producing it;

(b) whether the actor’s conduct has created a force or series of forces which are in continuous and active operation up to the time of the harm, or has created a situation harmless unless acted upon by other forces for which the actor is not responsible; [and]

(c) lapse of time.”⁹

In *Connor v. Allegheny General Hospital*, the plaintiff’s complaint included an allegation that in addition to certain specific violations, the defendant “otherwise fail[ed] to use due care and caution under the circumstances.”¹⁰ Shortly before trial the plaintiff moved to amend the complaint to include a previously unspecified theory of liability, arguing that this did not constitute a new allegation after the statute of limitations because it was fairly encompassed within the allegation that the defendant “failed to use due care” in ways other than those explicitly described in

⁷ *Straw v. Fair*, 187 A.3d 966, 993 (Pa. Super. 2018).

⁸ *Id.* at 994 (quoting *Vattimo v. Lower Bucks Hosp., Inc.*, 465 A.2d 1231, 1233-34 (Pa. 1984) (plurality opinion)).

⁹ *Id.* (quoting Restatement (Second) of Torts § 433).

¹⁰ *Connor*, 461 A.2d at 601.

the complaint.¹¹ The Supreme Court of Pennsylvania held that the trial court erred in denying this motion to amend, explaining that if the defendant “did not know how it ‘otherwise failed to use due care and caution under the circumstances,’ it could have filed a preliminary objection in the nature of a request for a more specific pleading or it could have moved to strike that portion of [the plaintiff’s] complaint.”¹² A party that failed to do so, the Court held, could not later “claim that it was prejudiced by the late amplification of” the general allegation.¹³

B. Walmart’s Second Preliminary Objection

Under Pennsylvania law, the Court may deem Plaintiff’s contention that Walmart is responsible for Decedent’s eventual death due to COVID scandalous and impertinent only if it is immaterial and inappropriate to Plaintiff’s claims. Although Walmart premises its objection solely on the allegation that Plaintiff’s claim is scandalous and impertinent, this question depends on the appropriateness of Plaintiff’s claim that Walmart’s negligence was a legal cause of Decedent’s death. If this is a legally cognizable claim, then Plaintiff’s explanation of the mechanism of that harm is clearly material and appropriate to the claim. If, however, Decedent’s death cannot be attributed to Walmart’s negligence as a matter of law, Decedent’s death from COVID would be inappropriate and immaterial to those harms legally caused by Walmart’s alleged negligence.

¹¹ *Id.* at 601-02.

¹² *Id.* at 602 n.3.

¹³ *Id.*

At this stage, the Court cannot conclude as a matter of law that Walmart's alleged negligence was not a legal cause of Decedent's eventual death from COVID, and therefore the circumstances of Decedent's death are neither scandalous nor impertinent. Certainly, Plaintiff will ultimately bear the burden of proving that Walmart's negligence was not just a cause, but a *substantial cause*, of Decedent's death. Factors relevant to this determination – including the eight weeks that passed between Decedent's fall and his death and the unprecedented nature of the COVID pandemic – may cut against such a conclusion. That question, however, is one for the factfinder in all but the clearest of cases. Prior to discovery, the Court cannot say that this is one of those rare cases in which, as a matter of law, the harm complained of is so attenuated from the underlying allegations of negligence that no jury “may reasonably differ as to whether the conduct of the defendant has been a substantial factor in causing the harm.”¹⁴

C. Walmart's Third Preliminary Objection

The Court agrees with Walmart that, as written, Paragraphs 19, 31 and 42 of the Amended Complaint are insufficiently specific to prevent Plaintiff from asserting new theories of liability at a late stage of litigation. Under *Connor*, a defendant may insist that the plaintiff either confine its allegations of liability to those factual averments in the complaint, or plead specific facts to support its allegations.

¹⁴ *Straw*, 187 A.3d at 994.

Although Plaintiff is correct that he need not plead each of its allegations in minute detail, he cannot use language that leaves Walmart to guess at the nature of its alleged negligence. Allegations that Walmart failed to keep the premises safe, violated the Decedent's rights, failed to exercise due care under the circumstances, and committed acts such as (but not limited to) those enumerated, impermissibly allow the expansion of Plaintiff's claims beyond the factual averments of the Complaint.

ORDER

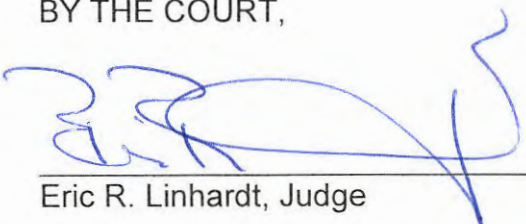
For the foregoing reasons, the Court overrules Walmart's second preliminary objection. The Court sustains Walmart's third preliminary objection.

Paragraph 19 of the Amended Complaint shall be limited to those "[o]ther dangers, hazards, and defects" enumerated in that paragraph. Subparagraphs 31(e), (r) and (s) and 42(e), (r) and (s) are stricken from the Amended Complaint.

Walmart shall file an Answer to the Amended Complaint within twenty (20) days of the date of this Order.

IT IS SO ORDERED.

BY THE COURT,



Eric R. Linhardt, Judge

ERL/jcr

cc: John Gerard Devlin, Esq.

1500 JFK Blvd., Suite 1000, Philadelphia, PA 19102

Ryan C. Blazure, Esq. and Joseph J. Shields, Esq.

1065 Highway 315 – Suite 403, Wilkes Barre, PA 18702

Gary Weber, Esq. (Lycoming Reporter)