

pickup truck which was followed by Officer Haldeman.

2. That the defendant was under the influence of alcohol is established beyond a reasonable doubt by the evidence of the odor of alcohol on his breath, his glassy eyes, his slurred speech, his statement that he was drunk or wasn't exactly drunk, and the blood alcohol test results of 0.12.

3. His rapid and unexplained acceleration after each stop, his exceeding the speed limit on Queen Street and Lincoln Way East, his swing into the center of West Queen Street while effecting a gradual right turn, the unexplained veering five times from his established lane of travel into the adjoining lane, and his failure to promptly come to a stop upon being signaled to do so by Officer Haldeman, established beyond a reasonable doubt that the defendant was under the influence of alcohol to a degree which rendered him incapable of safe driving.

#### ORDER OF COURT

NOW, this 7th day of February, 1979, the defendant's motions in arrest of judgment and for a new trial are dismissed.

The Probation Department of Franklin County is directed to prepare a Pre-Sentence Investigation Report. Upon the filing of the same the District Attorney shall notify the defendant to appear for sentencing.

Exceptions are granted the defendant.

WOODS v. LUM, ET AL, C.P. Franklin County Branch, No. 335 A.D. 1978

*Procedure - Preliminary Objections - Breach of Promise - Damages*

1. In an assumpsit action where claim for damages is indefinite as to whether the amount represents the cost of repairs or the difference in market value, the plaintiff will be required to re-plead the paragraph containing the claim.

*George E. Wenger, Jr., Esq., Counsel for Plaintiff*

*Michael B. Finucane, Esq., Counsel for Defendant*

#### OPINION AND ORDER

KELLER, J., March 1, 1979:

This action was commenced by the filing of a complaint in

assumpsit on June 27, 1978, and service of the same upon the defendant, Howard M. Lum, Jr., on June 28, 1978. The defendant Lum filed preliminary objections on July 17, 1978, and an amended complaint was filed by plaintiff on October 10, 1978. Preliminary objections to the amended complaint in the nature of a demurrer, motion to strike, and motion for more specific complaint were filed by defendant Lum on November 2, 1978.

The defendant's demurrers allege only that the two counts of the plaintiff's complaint "fail to state a cause of action against the defendant, Howard M. Lum, Jr." General demurrers of this nature are prohibited by Pa. R.C.P. 1028(a) which provides that "preliminary objections shall state specifically the grounds relied upon." "General averments in preliminary objection that the complaint is indefinite, vague and lacking in particularity or that it fails to state a cause of action, without amplification are inadequate." Goodrich-Amram, 238 Section 1020(a), and cases cited thereunder. The demurrers will be dismissed.

While we will not dispose of defendant's demurrers on the merits, we do take note of the plaintiff's statement that count 2 is against defendant, Ohio Casualty Insurance Company, and not against the individual defendant Lum. The plaintiff has offered to recaption count 2 to identify the defendant as Ohio Casualty Insurance Company only.

In the defendant's motion to strike, he alleges that paragraph 8 of the amended complaint fails to state the time and place of the verbal promise in violation of Pa. R.C.P. 1019(a). He similarly claims that the time and place of the verbal promise stated in paragraph 16 of the amended complaint is also not pled. Reading paragraph 7 and paragraph 8 of the amended complaint, it is clear that the alleged verbal promise to provide the change of insurance to the Blazer and to include collision coverage was made during the phone call between the parties at around 9:00 A.M. on November 2, 1977. The place at which the call was made, office or home, is not averred. However, we do not believe that it is material to the defendant in preparing an answer. "Good pleading requires that the opponent be sufficiently apprised of what he has to meet." *Daus v. Karr*, 61 D&C 479, 481 (1948). We find the allegations of the verbal promise in paragraph 8 and paragraph 16 are sufficiently pled to meet the requirement of Pa. R.C.P. 1019(a) and, therefore, paragraphs 3 and 4 of the preliminary objection are dismissed.

In paragraph 16.5 of the amended complaint, the plaintiff

**LEGAL NOTICES, cont.**

formerly of J. H. Walker, now Leslie Park and extending along the same 166 feet more or less.

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(4-27)

**IN THE COURT OF COMMON PLEAS OF THE 39TH JUDICIAL DISTRICT OF FRANKLIN COUNTY, PENNSYLVANIA, ORPHANS' COURT DIVISION**

The following list of Executors, Administrators and Guardian Accounts, Proposed Schedules of Distribution and Notice to Creditors and Reasons Why Distribution cannot be Proposed will be presented to the Court of Common Pleas of Franklin County, Pennsylvania, Orphans' Court Division for CONFIRMATION: May 3, 1979.

**BENDER** First and final account, statement of proposed distribution and notice to the creditors of Earl J. Baker, executor of the estate of George Bender, late of the Borough of Waynesboro, Franklin County, Pennsylvania, deceased.

**BREAM** First and final account, statement of proposed distribution and notice to the creditors of Daniel W. Long, executor under the will of Ethel V. Bream, late of the Borough of Chambersburg, Franklin County, Pennsylvania, deceased.

**DAVIS** First and final account, statement of proposed distribution and notice to the creditors of Nancy A. Smith and Harry Frank Davis, executors of the estate of Anne Z. Davis, late of the Borough of Waynesboro, Franklin County, Pennsylvania, deceased.

**GONTZ** First and final account, statement of proposed distribution and notice to the creditors of The Valley Bank and Trust Company, executors of the estate of M. Luther Gontz, late of the Borough of Chambersburg, Franklin County, Pennsylvania, deceased.

**HENNEBERGER:** First and final account, statement of proposed distribution and notice to the creditors of Philip Gibson, executor of the estate of Raymond A. Henneberger, late of the Borough of Chambersburg, Franklin County, Pennsylvania, deceased.

**HORN** First and final account, statement of proposed distribution and notice to the creditors of Gertrude Shaffer and Ruth High

**LEGAL NOTICES, cont.**

Stubbler, otherwise known as Ruth High Stubler, executrices of the estate of Eliza Ann Horn, late of the Borough of Chambersburg, Franklin County, Pennsylvania, deceased.

**KEEFER** First and final account, statement of proposed distribution and notice to the creditors of John Chamberlin and Genevieve Chamberlin, executors under the will of Pearl E. Keefe, late of the Borough of Greencastle, Franklin County, Pennsylvania, deceased.

**McKINNEY** First and final account, statement of proposed distribution and notice to the creditors of The Valley Bank and Trust Company, executor of the last will and testament of Virginia L. McKinney, late of Greene Township, Franklin County, Pennsylvania, deceased.

**POE** First and final account, reasons why distribution can not be proposed and notice to the creditors of The Farmers and Merchants Trust Company of Chambersburg, Pa., executor of the estate of Ralph Poe, late of Antrim Township, Franklin County, Pennsylvania, deceased.

**SACKMAN** First and final account, statement of proposed distribution and notice to the creditors of Louella E. Stinson and Judy L. Peters, executors of the estate of Lillie B. Sackman, late of the Borough of Chambersburg, Franklin County, Pennsylvania, deceased.

**SHOEMAKER** First and final account, statement of proposed distribution and notice to the creditors of Robert P. Shoemaker, executor of the estate of M. Anna Shoemaker, late of the Borough of Chambersburg, Franklin County, Pennsylvania, deceased.

**VARNER** First and final account, statement of proposed distribution and notice to the creditors of The Citizen's National Bank and Trust Company of Waynesboro, Pennsylvania, executor of the estate of Rebecca W. Varner, late of the Borough of Waynesboro, Franklin County, Pennsylvania, deceased.

GLENN E. SHADLE  
Clerk of the Orphans' Court  
Franklin County, Pennsylvania

(4-6, 4-13, 4-20, 4-27)

avers his damages which include the damages to the vehicle, loss of transportation, towing charge, and storage charge. The defendant asserts in his preliminary objection No. 5 that the plaintiff's measure of damages is improper and should be stricken. The plaintiff contends that the complaint is based upon a breach of promise and not the insurance policy. Thus, the damages set forth are not just those covered by the policy, but also those sustained as a direct result of the defendant's breach of promise to provide the coverage.

The plaintiff concedes that the proper measure of damages for the automobile is the cost of repair or the difference in fair market value before and after the accident, *Holt v. Pariser*, 161 Pa. Super. 315 (1947). The plaintiff claims "damage to the 1973 Chevrolet Blazer in the amount of \$3,913.28 plus open estimate for frame and interior." This claim is indefinite as to whether the amount represents cost of repair or difference in market value. Also, the "open estimate for frame and interior" is vague and unclear.

The plaintiff need not plead both cost of repair and difference in fair market value, for if defendant concludes that the amount of damages claimed is not accurate or the correct measure, then he has the option of so pleading and offering to prove at trial. The other damages claimed, towing, storage, and loss of use are properly claimed as direct damages from the breach of promise. The motion to strike will not be sustained, but plaintiff will be required to amend his pleading of the damages to the vehicle to comply with this Opinion.

Paragraph 15.5 of the amended complaint states:

"Plaintiff does not have available a copy of his insurance before or after the purchase of the Chevrolet Blazer and therefore, no copy is attached to the complaint."

The defendant claims that the plaintiff has violated Pa. R.C.P. 1019(h) by failing to attach the material part of the writing upon which the claim is based and failing to set forth the substance of the writing. The plaintiff has explained in paragraph 15.5 that he doesn't have the insurance policy. Rule 1019(h) provides that if a writing or copy is not available, it is sufficient to so state together with a reason. The plaintiff has met the requirements by paragraph 15.5.

Rule 1019(h) also requires the plaintiff, who does not attach the writing or copy, to set forth the substance of the writing. Paragraph 6 of the amended complaint alleges that the original policy was on the 1964 Buick and provided only liability coverage. Paragraph 8 avers that the policy was to be

changed to cover the Blazer and collision coverage was to be added. Paragraph 13 alleges that the damages itemized in paragraph 12, viz., damages to the vehicle and towing charge, were covered by the collision portion of the insurance policy. We conclude that the plaintiff has sufficiently set forth the substance of the insurance policies. In addition, paragraph 6 of the amended complaint provides the insurance policy number and the defendant should have available a copy of the policy. When the defendant has a copy and is a party to the writing, the attachment requirement may be waived, *Leiby v. New Hampshire Ins. Co.*, 51 D&C 2d 643 (1971).

In addition, this cause of action is not based solely on the writing but on the defendant's breach of promise to provide proper coverage. The defendant's preliminary objection in the nature of a motion to strike, paragraph 6, is dismissed.

Motions to strike Nos. 7 and 9, concern count 2, paragraph 18 and 20 of the amended complaint. Count 2, as above noted, is against defendant, Ohio Casualty Insurance Company only, and not the defendant Lum. Thus, Lum's preliminary objections to count No. 2 are dismissed for lack of standing to object on behalf of the corporate defendant.

The defendant, in his motion for a more specific complaint, first contends that paragraph 4 of the amended complaint lacks specificity as to facts in support of the allegation that defendant Lum is an agent of the Ohio Casualty Insurance Company. Paragraph 4 of the amended complaint alleges that defendant Lum "is in the business of selling insurance and is an agent for Ohio Casualty Insurance Company." This averment, together with the allegation of paragraph 6 that the plaintiff "purchased through Howard M. Lum, Jr. with the Ohio Casualty Insurance Company" the insurance policy, is sufficient for the averment of agency and this preliminary objection is dismissed.

In paragraph 10 of the motion for more specific complaint, the defendant desires to know the manner, time, and place of the promise alleged in paragraph 9 of the amended complaint. Paragraph 9 specifically states that this defendant orally agreed to include the collision coverage during a phone call on November 2, 1977. The defendant is sufficiently informed of the material facts to enable him to investigate the plaintiff's claim and prepare a responsive pleading. The motion for a more specific pleading is dismissed.

We also dismiss paragraph 11 of the preliminary objections, for plaintiff avers in paragraph 14 of the amended

complaint that he orally notified the defendant of the accident on November 12, 1977, and defendant Lum assured him he had collision coverage. We find the paragraph sufficiently specific.

Finally, defendant objects in the nature of a motion for more specific complaint to paragraph 15 of the amended complaint which states:

"Subsequent to the notice to Howard M. Lum, Jr., the exact date and time and method of notice being unknown, the plaintiff was informed by Ohio Casualty insurance Company and Howard M. Lum, Jr., separately that no collision coverage was on the Chevrolet Blazer at the time of the accident."

Defendant Lum wishes more facts on date, time and method of notices. The plaintiff has not specifically averred time and place of the notice. However, if the exact time is not a material factor, then it need not be specifically pleaded. *Goodrich-Amram*, 153 Section 1019(f). The plaintiff stated that the notice of not being covered for collision was given to him subsequent to the plaintiff giving notice of the accident to defendant Lum on November 12, 1977. The fact that there was no collision coverage in the policy is the main issue in this action. The date, time, and method of notice from defendants to the plaintiff that there was no collision coverage on the Blazer at the time of the accident is neither material nor necessary to the preparation of a responsive pleading. Accepting the plaintiff's allegation under oath that the exact date, time and method of notice is unknown to him, it is difficult to imagine how he could be ordered to plead with more specificity that which he does not know. Preliminary objection No. 12 is dismissed.

#### ORDER OF COURT

NOW, this 1st day of March, 1979, the defendant's preliminary objections are dismissed. The plaintiff will replead paragraph 16.5(a) of the amended complaint to comply with this Opinion within twenty (20) days of date hereof.

Exceptions are granted the plaintiff and defendant.

STEPHEY v. STEPHEY, C.P., Franklin County Branch, F.R.  
Docket 1978-317-S

*Non-support - Modification of Order - Parent's Right to Continue Education*