PLESSINGER V. JLG INDUSTRIES, INC., ET AL., C.P. Fulton County Branch, Civil Action-Law, No. 3 of 1988—C

Amend Complaint - Punitive Damages - New Cause of Action-Statute of Limitations

1. An amendment may not be made to a complaint if it introduces a new cause of action after the Statute of Limitations has run.
2. An amendment which expands the addendum clause to add a claim for punitive damages is mere incident to a cause of action and not the subject of an action itself.
3. Where a proposed amendment would introduce a new theory of negligence based on additional factual averments, it is barred by the Statute of Limitations.

Thomas A. French, Esq., Counsel for Plaintiff
Arthur H. Stroyd, Jr., Esq., Counsel for Defendant, JLG.
William A. Addams, Esq., Counsel for Defendant, Douglas

Kaye, J., February 5, 1991:

OPINION

On January 11, 1988, Grover E. Plessinger, (Hereinafter "Plaintiff"), filed a complaint seeking damages from JLG Industries, Inc., (hereinafter "Defendant"), for injuries which Plaintiff allegedly incurred while using a 1972 Model 40-F manlift manufactured by Defendant. Plaintiff alleges that, on July 19, 1986, the lift experienced a hydraulic malfunction while he was positioned in the personnel basket. As a result, the basket allegedly dropped approximately eighteen (18') feet to the ground causing Plaintiff to suffer severe injuries. Plaintiff was assisting his neighbor, Garth Douglas, in construction work on his home when the accident occured. Plaintiff has also filed suit against Mr. Douglas, alleging negligent operation of the lift. The two causes of action were consolidated by court order dated September 29, 1988.

Currently before the Court for disposition are three motions filed by Plaintiff, each of which concern Defendant JLG Industries, Inc., alone. In the first motion, Plaintiff seeks to compel the production of certain documents allegedly in the possession of Defendant which relate, generally, to Defendant's knowledge regarding the need to install a safety device known as

an "orifice" in JLG lifts. Plaintiff contends that the presence of an orifice in the lift in which he was injured would have prevented a "freefall" of the basket, such as was allegedly experienced in this case. The second motion seeks release of two deposition transcripts, taken in another unrelated action, which include information regarding Defendant's recordkeeping practices with respect to product safety and accidents. In the third motion, Plaintiff requests leave to amend his complaint to include a claim for punitive damages against Defendant.[1]

We will first address Plaintiff's motion to amend, since our ruling on that aspect of the case will affect our determination of the two remaining motions. Plaintiff seeks to amend his complaint to add a separate count, captioned "Outrageous Conduct". Numerous factual allegations regarding Defendant's failure to install an orifice in the manlift at issue in this case are set forth in the proposed amendment. The new factual allegations are apparently based on an engineering release form which was provided by Defendant during the extensive discovery which has been conducted in this matter. In essence, the document indicates that a design modification on certain JLG lifts was implemented by Defendant in October, 1975. The modification required the installation of orifices on all 60, 42, and 40-foot lift cylinders then in stock or in production. The form futher states that units alredy in the field should be reworked "with field complaints or upon request only." Plaintiff contends that, in view of the 1975 design modification, Defendant's failure to install an orifice in the 1972 lift in which he was injured[2] or to warn foreseeable users of the absence of the safety device constituted outrageous and reckless conduct which would warrant the imposition of punitive damages.

Defendant argues that Plaintiff's claim for punitive damages would introduce a new cause of action and is barred by the

[1] The motion to compel production of documents and the motion to amend the complaint were both filed on May 16, 1990. The motion for release of deposition transcripts was filed on June 27, 1990. All three motions were argued before the undersigned on October 16, 1990.

[2] The lift at issue in this case was refurbished in 1986 by Defendant. An orifice apparently was not installed in the lift cylinder at that time.

applicable two-year statute of limitations.[3] For the reasons which follow, we conclude that Plaintiff's action for punitive damages is, indeed, time-barred. We must, accordingly, deny the motion to amend Plaintiff's complaint.

The right to amend pleadings is governed by Pa.R.C.P. No. 1033, which provides as follows:

RULE 1033. AMENDMENT

> "A party, either by filed consent of the adverse party or by leave of court, may at any time change the form of action, correct the name of a party or amend his pleading. The amended pleading may aver transactions or occurrences which have happened before or after the filing of the original pleading, even though they give rise to a new cause of action or defense. An amendment may be made to conform the pleading to the evidence offered or admitted".

Adopted June 25, 1946, effective Jan. 1, 1947. Leave to amend is generally granted with liberality in the interest of obtaining a full determination of the merits of the case. *Saracina v. Cotoia*, 417 Pa. 80, 208 A.2d 764 (1965). It is well settled, however, that an amendment may not be made if it serves to introduce a new cause of action after the statute of limitations has run. *Junk v. East End Fire Dept.*, 262 Pa.Super. 473, 396 A.2d 1269 (1978). Plaintiff's complaint states that the accident in this case occurred on July 19, 1986. Therefore, the two-year limitations period in this matter expired on or about July 19, 1988. Thus, the proposed amendment, which was filed on May 16, 1990, is sought to be made nearly two years after the running of the statute.

The determination of whether a proposed amendment presents a new and different cause of action from the original complaint involves the following inquiry:

> "Would a judgment bar any further action on either? Does the same measure of damages support both? Is the same defense open in each? and, Is the same measure of proof required?"

[3] The two-year limitation period is set at Section 5524 of the Judicial Code, 42 Pa.C.S. §5524.

Saracino, 417 Pa. at 85, 308 A.2d at 767, *quoting Arner v. Sokol*, 373 Pa. 587, 591, 96 A.2d 854, 855 (1953). With regard to the specific issue of the addition of a punitive damages claim, the case law appears to differentiate between those amendments which seek to merely expand the addendum clause to add a request for punitive damages from those cases where the theory or kind of negligence is altered from that originally claimed.

In the case of *Hilbert v. Roth*, 395 Pa. 270, 276, 149 A.2d 648, 652 (1959) it was stated that

> "[t]he right to punitive damages is a mere incident to a cause of action - an element which the jury may consider in making its determination - and not the subject of an action in itself."

This holding has been applied in numerous cases where a claim for punitive damages can be established within the scope of the cause of action as already pleaded. *Daley v. John Wanamaker, Inc.*, 317 Pa.Super. 348, 464 A.2d 355 (1983) (amendment to addendum clause allowed). *Clark v. Century Innovations, Inc.*, 48 Fayette L.J. 111 (1985) (enlargement of addendum clause to include punitive damages allowed). *Taylor v. Ryder Truck Rental, Inc.*, 33 Chester Co. R. 234 (1985) (where complaint as drafted could support award of punitive damages, amendment to addendum clause allowed). *Bilbow v. Pennsylvania Gas & Water Co., 43 D&C 3d 529 (C.P. Luzerne 1986) (amendment merely adds new element of damages to cause of action alrady pleaded); Schneider v. Chalfonte Builders, Inc.*, 11 Bucks Co. 122 (1961) (punitive damages alleged within compass of cause of action already pleaded).

In the case of *Junk v. East End Fire Dept.*, 262 Pa. Super. 473, 396 A.2d 1269 (1978), the Court analyzed a proposed amendment which would not simply enlarge the scope of the addendum clause, but which would instead introduce a new theory of negligence based on additional factual averments. The Court summarized its analysis as follows:

> A new cause of action does not exist if plaintiff's amendment merely adds to or amplifies the original complaint or if the original complaint states a cause of action showing that plaintiff has a legal right to recover what is claimed in the subsequent

complaint...*A new cause of action does arise,* however, *if the amendment proposes a different theory or a different kind of negligence than the one previously raised or if the operative facts supporting the claim are changed.*

Id. at 490, 396 A.2d at 1277 (emphasis added; citations omitted.)

The Court concluded, under this analysis, that leave to amend was properly denied since the amendment at issue attempted to introduce a new theory of negligence based on a different set of facts.

A review of Plaintiff's original complaint against Defendant reveals that the three counts included therein set forth claims based on theories of negligence, strict products liability and breach of warranty. The original complaint includes no factual averments of reckless, wanton or outrageous conduct by Defendant which would be supportive of a punitive damages claim. It would only be by addition of the factual averments set forth in the proposed amendment that a claim for punitive damages could be supported. Thus, we conclude that a different theory or kind of misconduct is alleged by Plaintiff's amendment.

It has been held that a new cause of action is presented where an amendment proposes to aver reckless and wanton conduct by a defendant when the original complaint alleges only negligence. *Leech v. Wilkinson Match,* 42 D&C 3d 29 (C.P. Beaver 1983); *Shotts v. Kough,* 5 Franklin C. L.J. 218 (1982); *Bellefonte School District v. Modernfold,* 24 D&C 3d 303 (C.P. Centre 1981); *Jackson v. Waddle,* 11 D&C 3d 59 (C.P. Phila. 1979); *Dierolf v. Fioritto,* 42 D&C 2d 689 (C.P. Mont. 1967). This result is based on the fact that wanton misconduct and negligence differ significantly. Wanton or outrageous misconduct evinces a difference state of mind on the part of the tortfeasor from that of negligence.

"'[I]t exists where the danger to the plaintiff, though realized, is so recklessly disregarded that, even though there be no actual intent, there is at least a willingness to inflict injury, a conscious indifference to the perpetration of the wrong.'" *Stewart v. Pittsburgh railways Co.,* 379 Pa. 260, 263, 108 A.2d 767, 768 (1954), *quoting Zawacki v. Pennsylvania Railroad Co.,* 374 Pa. 89, 91, 97 A.2d 63, 65 (1953).

We, accordingly, conclude that Plaintiff's proposed amendment does attempt to introduce a new cause of action. The amendment alleges facts and conduct of a nature different from those included in the original complaint. To allow the requested amendment after the statute of limitations has run would be prejudicial to Defendant. *See Junk v. East End Fire Dept.,; Leech v. Wilkinson Match.*

We will next address Plaintiff's assertion that the statute of limitations was tolled in this case due to Defendant's alleged concealment of the engineering release form which provides the basis for the proposed punitive damages claim. Plaintiff contends that the pertinent information was not produced by Defendant until 1990, despite earlier requests.

It is the duty of one asserting a cause of action

"to use all reasonable diligence to properly inform himself of the facts and circumstances upon which the right of recovery is based and to institute the suit within the prescribed statutory period.. Mere mistake, misunderstanding or lack of knowledge is not sufficient to toll the running of the statute..." *Schaffer v. Larzelere,* 410 Pa. 402, 405, 189 A.2d 267 (1963).

A defendant will be estopped from invoking the bar of the statute of limitations, however, if the defendant causes the plaintiff to relax his vigilance through fraud or concealment, *Schaffer.*

Our review of the numerous discovery requests made in this case by Plaintiff reveals that the earliest specific request for information regarding the installation of an orifice in JLG Model 40-45 lifts was served on Defendant on August 7, 1989. This, of course, was more than one year after the running of the statute of limitations. Plaintiff contends that his first discovery request, served on or about May 24, 1988, also included a request for information like that contained in the engineering release form. We note, however, that the first request for documents referred to by Plaintiff specifically limited the inquiry to information regarding "the product actually involved in the accident." Since the 1975 engineering release form was not applicable to the 1972 lift involved in this case, we can find no error in Defendant's failure to provide the form in response to Plaintiff's first inquiry.

In sum, we have found no evidence of fraud or concealment by Defendant which would warrant the tolling of the statute of limitations. Having found no basis to toll the limitations period, we will order that Plaintiff's motion to amend his complaint is denied.

We will next address Plaintiff's motion to compel the production of documents. The motion seeks to compel production of the following documents.

> 1/ All documents, correspondence, records memoranda, or files in your possession, custody or control regarding any request or other communication in which a customer, distributor or user of JLG lifts advised JLG of the rapid descent of any 40-foot JLG manlift including the Model 40-45 or any later generation of said lift.
>
> 2/ All records maintained by your safety department or outside safety consultants under your direction and control which reflect or relate to incidents in which it was reported that an unexpected or uncontrolled descent of the personnel platform on any JLG lift occurred.
>
> 3/ All records in your possession, custody, or control which reflect notice to JLG by a customer, dealer, or JLG lift user that the personnel platform on any JLG lift descended more rapidly than desired or expected.
>
> 4/ All accident reports or similar reports for any JLG 40-foot lift wherein it was claimed that injury occurred during the descent of the personnel platform.

Defendant does not, apparently, object to the relevance of the requested material, but rather, contends that the request is oppressive and unduly burdensome. The basis for this objection is that Defendant's machine history files allegedly number in the thousands[4] and a search of those individual files would be unduly

[4] Defendant alleges that it maintains more than 13,600 machine history files for boom lifts which have been manufactured to date. More than 5,000 of those files are maintained on 40-foot lifts.

time consuming. Defendant concedes that it does maintain a separate file on accident reports which are filed chronologically.

We observe preliminarily that the discovery request here at issue appears, in large part, to be intended as a means to develop Plaintiff's claim for punitive damages. We have, of course, previously ruled that the punitive damages claim sought to be added by way of amendment to the complaint is barred by the statute of limitations. Although the information sought to be disclosed through the motion to compel cannot, therefore, be used to develop a claim for punitive damages, we are nevertheless satisfied that the information sought remains reasonably calculated to lead to the discovery of admissible evidence regarding the claims set forth in Plaintiff's original complaint. *See* Pa.R.C.P. No. 4003.1. Thus, a ruling on the motion to compel remains necessary despite our denial of leave to amend the complaint.

Plaintiff argues that Defendant has waived its right to object to the discovery request at issue since its objections to the request were served beyond the thirty day time limit provided by Pa.R.C.P. No. 4009 (b)(2). [5] Our review of the discovery requests and responses in this case shows, in general, less than stringent attention by the parties to the service deadlines provided by procedural rules. [6] While we do not condone the failure to abide by the strictures of the procedural rules, we would also be loath to find a waiver of objections under the facts of this case. Pa. R.C.P. No. 126 permits the Court to "disregard any error or defect of procedure which does not affect the

[5] Pa. R.C.P. No. 4009 (b) (2) provides, in pertinent part, as follows:

> The party upon whom the request is served shall serve a written response within thirty (30) days after the service of the request, except that a defendant may serve a response within forty-five (45) days after service of the original process upon him.

[6] By way of illustration, Plaintiff's Interrogatories and Request for Production (First Set) was served on or about May 24, 1988, with Defendant's response dated July 7, 1988. Plaintiff's second request for production of documents was served on or about December 29, 1988. Defendant's response is dated March 22, 1989. Plaintiff's third request for documents was made on August 7, 1989, with the response dated October 4, 1989. Plaintiff has similarly delayed response to the discovery requests of Defendant.

substantial rights of the parties." Plaintiff does not argue that he has been prejudiced by the delayed response. We will, therefore, proceed to rule on the merits of the discovery request here at issue.

Pa.R.C.P. No. 4011(e) limits the scope of discovery where a request "would require the making of an unreasonable investigation by . . . any party . . ." The standard of unreasonableness to be applied by the courts is an indefinite one. An inquiry may be found to be unreasonable if it necessitates sifting through large numbers of records or documents. The proper limits of a search, however, requires a case-by-case analysis. Pennsylvania Standard Practice 2d §34:23-24. It bears noting that the issue of reasonableness is strongly linked to that of relevancy. *Id.*

Plaintiff argues in his brief in support of the motion to compel that his request for production of documents is not unduly burdensome since it is believed that accident report files, separate from the individual machine history files, are maintained by Defendant. Defendant has conceded that such accident reports do, in fact, exist. Post-argument correspondence directed to the Court by counsel for both parties indicates some common ground regarding a search of accident or other reports maintained by Defendant. Based on this correspondence, we will order that a search be conducted of any accident or incident reports, including any notices related thereto, which are maintained by Defendant. Any such report or notice which relates to the sudden, rapid, undesired or unexpected descent of a boom in which an orifice was not installed must be produced for inspection by Plaintiff. To the extent that machine history files must be individually searched. we will limit the extent of that search to those 40-foot lifts in which an orifice was not installed at the time of production. This limitation is intended to narrow the search to those lifts which remained unaffected by the 1975 engineering release form. If Defendant finds that such a search remains overly burdensome, it may seek further direction from the Court.

With respect to the motion for release of deposition transcripts, the Court is satisfied that Plaintiff has already been provided with those portions of the transcripts which relate to Defendant's record-keeping practices.

The requested relief in Plaintiff's motion is that the depositions be released for use "in the fair determination of the two Motions currently pending before the Court in this matter." We find that the depositions have been utilized as requested in Plaintiff's motion and that no further order regarding the depositions is necessary.

We will, accordingly, enter the attached order.

ORDER OF COURT

AND NOW, this 5th day of February, 1991, it is hereby ordred that Plaintiff's Motion for Leave to File Amendment to Complaint is denied, Plaintiff's Motion to Compel Discovery is granted, subject to the limitations set forth in the foregoing opinion, and Plaintiff's Motion for Order Authorizing Release of Deposition Transcripts is denied.

FIRST NATIONAL BANK AND TRUST COMPANY OF WAYNESBORO, TRUSTEE V. LONG, ET AL., C.P. Civ. D., Franklin County Branch, No A.D. 1991-31*

Declaratory Judgment - Interpretation of Trust - Closing of Class

1. Where nothing appears to the contrary, the members of the class will be ascertained as of the date of death of the testator.

Jeffrey S. Evans, Esquire., Attorney for Plaintiff
Joseph A. Macaluso, Esquire, Guardian for Living great-grandchildren
Richard K. Hoskinson Esquire, Guardian for unborn great-grandchildren

KAYE, J., September 24, 1991:

OPINION

On February 4, 1976, Hazel M. Rinehart (hereafter "testatrix") executed her last will and testament. Thereafter, on April 9, 198

* Editor's Note: See, also, O.C. #90 Of1991, O.C. Doc Vol. 097 page 769, for transferred record.