



# VERDICT

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## Motions to Amend: Adding Punitive Damages After the SOL



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It has come to the attention of the *Verdict's* Editorial Board and this author that some individuals appear to be nervous and/or dissuaded from filing a Motion to Amend the Complaint to add a claim for punitive damages after the statute of limitations has run based on a Superior Court opinion in *Wilson v. U.S. Sec. Assocs.*<sup>1</sup> We felt it necessary and prudent to point out, remind, and/or explain to our readers that this seemingly concerning opinion has, officially, been withdrawn by a further Superior Court opinion, which specifically held:

Upon consideration of the application for re-argument, IT IS HEREBY ORDERED:

THAT en banc re-argument is GRANTED;

THAT the decision of this COURT filed July 18, 2017 is withdrawn . . .<sup>2</sup>

As such, the *Wilson* opinion, which still appears on numerous blogs and websites in this Commonwealth, and which defendants still mistakenly rely on, is a nullity. The opinion, in fact, was removed from both Westlaw and Lexis. Punitive damages may still be added via a Motion to Amend after the discovery deadline and after the statute of limitations has run. Below is a basic primer and refresher on the law surrounding Motions to Amend.

The overarching Pennsylvania Rule of Civil Procedure that governs amendment, Rule 1033, states:

A party, either by filed consent of the adverse party or by leave of court, **may at any time** change the form of action, add a person as a party, correct the name of a party, or otherwise amend the 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.**<sup>3</sup>

Leave to amend a complaint under Rule 1033 is to be “freely allowed” and liberally granted.<sup>4</sup> The decision to grant or deny permission to amend any pleading is within the sound discretion of the trial court.<sup>5</sup> In light of this lenient standard, courts have “allowed amendments of pleadings **at any time**” during the litigation.<sup>6</sup> A party should be granted leave to amend so long as there is no undue prejudice or surprise to the adverse party.<sup>7</sup>

Specifically, with regard to amendments to add punitive damages, a plaintiff is permitted to amend the *ad damnum* clause of the complaint to include a claim for punitive damages since amendment of the *ad damnum* clause merely recharacterizes or amplifies the existing facts and **does not state a separate cause of action**<sup>8</sup> As explained by the Pennsylvania Supreme Court when discussing the character of punitive damages, “[i]f no cause of action exists, then no independent action exists for a claim of punitive damages since punitive damages is [sic] only an **element** of damages.”<sup>9</sup> The right to punitive damages is merely an incident to a cause of action and **not a cause of action in and of itself**.<sup>10</sup> As a result, Pennsylvania courts have held, “[a]mendment

of the *ad damnum* clause is permissible **at any point in the litigation.**<sup>11</sup> Pennsylvania Courts have therefore permitted a pleading to be amended “after pleadings are closed, while a motion for judgment on the pleadings is pending, at trial, after judgment, or after an award has been made and appeal taken therefrom.”<sup>12</sup> Courts have allowed a plaintiff to amend the complaint to include a claim for punitive damages after the running of the statutes of limitations or even on the eve of trial.<sup>13</sup>

It bears repeating: claims for punitive damages are **not** separate causes of action, and **may** be added after the statute of limitations has run. It has been this author’s experience that when stipulating to withdraw a claim for punitive damages at the beginning of the litigation, a clause should be added preserving the right to reinstate the claim, such as: “. . . with leave for Plaintiff to file a Motion to Amend reinstating punitive damages, should discovery permit. Defendant further stipulates and agrees to waive any statute of limitations defense with regard to any claims for punitive damages.” Remember, punitive damages require a showing of some kind of reckless and/or outrageous conduct on the part of the defendant. Start early with this kind of discovery and you will be ready to file your Motion to Amend on or before the discovery or Motion deadline. ♦

<sup>1</sup> 2017 Pa. Super. LEXIS 537 (Pa. Super. Ct. 2017).

<sup>2</sup> *Wilson v. U.S. Sec. Assocs.*, 2017 Pa. Super. LEXIS 750 (Pa. Super. Ct. 2017). Note that the case set- tled before argument en banc occurred; therefore, the panel’s opinion remains withdrawn.

<sup>3</sup> *Pa. R.C.P. 1033* (emphasis added).

<sup>4</sup> *Stalsitz v. Allentown Hospital*, 814 A.2d 766, 776 (Pa. Super. Ct. 2002), appeal denied, 854 A.2d 968 (Pa. 2004); *Connor v. Allegheny General Hospital*, 461 A.2d 600, 602 (Pa. 1983); *Daley v. Wanamaker*, 464 A.2d 355, 361 (Pa. Super. Ct. 1983); *Sands v. Forrest*, 434 A.2d 122, 124 (Pa. Super. Ct. 1981).

<sup>5</sup> *Berman v. Herrick*, 227 A.2d 840, 841 (Pa. 1967); *W.I. Snyder Corp. v. Caracciolo*, 541 A.2d 775, 778 (Pa. Super. Ct. 1988). 6

<sup>6</sup> *Winterhalter v. West Penn Power Co.*, 512 A.2d 1187, 1189 (Pa. Super. Ct. 1986) (emphasis original).

<sup>7</sup> *Somerset Community Hosp. v. Allan B. Mitchell & Associates, Inc.*, 685 A.2d 141, 147 (Pa. 1996).

<sup>8</sup> *Daley v. Wanamaker*, 464 A.2d 355, 362 (Pa. Super. Ct. 1983). <sup>9</sup> *Kirkbride v. Lisbon Contractors, Inc.*, 555 A.2d 800, 802 (Pa. 1989)(emphasis original).

<sup>10</sup> *Nix v. Temple Univ. of Commonwealth Sys. of Higher Educ.*, 596 A.2d 1132, 1138 (Pa. Super. Ct. 1991) (“A request for punitive damages does not constitute a cause of action in and of itself. Rather, a request for punitive damages is merely incidental to a cause of action”); *Shanks v. Alderson*, 582 A.2d 883, 885 (Pa. Super. Ct. 1990) (“The right to punitive damages is merely an incident to a cause of action and not a cause of action in and of itself”); *Robbins v. Cumberland County Children and Youth Servs.*, 802 A.2d 1239, 1253 (Pa. Commw. Ct. 2002) (“[P]unitive damages are a form of relief, not a separate cause of action under Pennsylvania law”).

<sup>11</sup> *Sullivan v. Philadelphia*, 460 A.2d 1191, 1192 (Pa. Super. Ct. 1983) (emphasis added).

<sup>12</sup> *Biglan v. Biglan*, 479 A.2d 1021, 1025-26 (Pa. Super. Ct. 1984).

<sup>13</sup> *Rivera v. Philadelphia Theological Seminary*, 474 A.2d 605, 614 (Pa. Super. Ct. 1984)(holding “[a]mendments which merely restate in a more distinct form

the grounds set forth originally as the basis of the Plaintiff’s cause of action . . . or merely vary the cause of action, as originally stated, so that the subject matter remains the same, may be made

at any time, even after the statute of limitations has run on the claim sued for”); see also *Daley supra*, 464 A.2d at 362 (allowing plaintiff to amend her Complaint just prior to trial to include a claim for punitive damages even though amendment was made more than one year after the statute of limitations had run because the amendment did not affect pleadings and was only an addition to *ad damnum* clause); *Bilbow v. Pennsylvania Gas & Water Co.*, 43 Pa. D. & C., 3d 529, 531 (C.P. Luzerne 1986) (permitting an amendment to the Complaint “to carry out the liberal policy

pre-scribed in *Pa. R.C.P. 1033* by permitting plaintiff to amend in this respect, even though the statute of limitations would have run on a new action”); *Taylor v. Ryder Truck Rental, Inc.*, 41 Pa. D. & C.3d 396 (C.P. Chester 1984)(allowing plaintiff to amend the Complaint after the running of the statute of limitations because it was for the jury to determine whether the factual allegations warranted an award of punitive damages).

***Editor’s Note:*** Sarah Dooley is an attorney at Duffy + Fulginiti, where she focuses her practice on representing the catastrophically injured. She is also a member of the *Verdict* Editorial Board. You may contact Ms. Dooley at: [sdooley@duffyfirm.com](mailto:sdooley@duffyfirm.com).