

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION**

HARRY WILLIAM PERRY,)	
)	
Plaintiff,)	Civil Action No. 7:00-CV-00466
)	
v.)	<u>MEMORANDUM OPINION</u>
)	
TRUCKERS EXPRESS, INC.,)	By: Samuel G. Wilson,
)	Chief United States District Judge
and)	
)	
JOHN W. FRANKLIN,)	
)	
Defendants.)	

This matter is before the court on defendant John W. Franklin’s motion to dismiss and plaintiff Harry William Perry’s motion for leave to amend his complaint. Franklin asserts that the claims against him should be dismissed (1) pursuant to Federal Rule of Civil Procedure 4(m) because Perry failed to serve process within 120 days after the filing of his amended complaint; (2) pursuant to Rule 12(b)(1) because Perry failed to allege facts in his complaint to support complete diversity of the parties and thereby the jurisdiction of this court; and (3) pursuant to Rule 12(b)(6) because Perry failed to allege facts sufficient to support his claim for punitive damages. Finding that Franklin is not prejudiced by late service of process and that the flaws in Perry’s complaint can be remedied through an amendment, the court will grant Perry’s motion for leave to amend his complaint and will hold Franklin’s motion to dismiss under advisement pending this amendment.

I.

The plaintiff, Harry William Perry, filed this action on June 12, 2000, alleging that an agent or employee of defendant Truckers Express, Inc., (“Truckers”) negligently and recklessly

caused a collision of tractor trailers, which in turn caused injury to Perry. On September 8, 2000, pursuant to leave of court, Perry amended his complaint to add the driver of Truckers' tractor trailer, John W. Franklin. Substitute service was obtained on Franklin on February 6, 2001. On February 14, 2001, Franklin filed his answer, including a motion to dismiss, asserting that Perry's claims should be dismissed (1) pursuant to Federal Rule of Civil Procedure 4(m) because Perry failed to serve process within 120 days after the filing of his amended complaint; (2) pursuant to Rule 12(b)(1) because Perry failed to allege facts in his amended complaint to support complete diversity of the parties and thereby the jurisdiction of this court; and (3) pursuant to Rule 12(b)(6) because Perry failed to allege facts sufficient to support his claim for punitive damages. The court will consider each argument in turn.

II.

First, Franklin moves to dismiss Perry's claims for failure to serve process within 120 days, as required by Federal Rule of Civil Procedure 4(m). Rule 4(m) states in part:

If service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint, the court, upon motion or on its own initiative after notice to the plaintiff, shall dismiss the action without prejudice as to that defendant or direct that service be effected within a specified time; provided that if the plaintiff shows good cause for the failure, the court shall extend the time for service for an appropriate period.

Rule 4(m) allows a court to exercise its discretion to relieve a plaintiff of the consequences of late service even if there is no good cause shown. See Fed. R. Civ. P. 4(m) Advisory Committee Notes. In any case, the court finds that Franklin has not been prejudiced by the late service. Perry served Franklin via substitute service on February 6, 2001, well before the current scheduled trial date of July 24-25, 2001. Additionally, the court notes that, although Franklin

filed his motion to dismiss on February 14, 2001, he did not bring the motion on for hearing until June 15, 2001. Consequently, the court will not dismiss Perry's claims against Franklin on this ground.

III.

Second, Franklin moves to dismiss because Perry has failed to allege facts sufficient to support diversity jurisdiction. Specifically, Perry's amended complaint fails to state the citizenship of Franklin. Perry has asked for leave of court to amend his complaint to remedy this oversight. Consequently, the court will grant Perry leave to amend his complaint and hold Franklin's motion to dismiss under advisement pending the filing of this amendment.

IV.

Third, Franklin moves to dismiss Perry's claim for punitive damages, asserting that Perry has failed to allege facts sufficient to maintain a claim for punitive damages. Punitive damages "may be recovered only when there is misconduct or actual malice, or such recklessness or negligence as to evince a conscious disregard of the rights of another." Simbeck, Inc. v. Dodd Sisk Whitlock Corp., 257 Va. 53, 58, 508 S.E.2d 601, 604 (1999); see also Lucher v. Hildenbrandt, 794 F. Supp. 581, 583 (E.D. Va. 1992). An allegation of willful and wanton negligence is sufficient to form the basis for punitive damages. See Philip Morris Inc. v. Emerson, 235 Va. 380, 407-08, 368 S.E.2d 268, 283 (1988). Willful and wanton negligence is defined as "acting consciously in disregard of another person's rights or acting with reckless indifference to the consequences, with the defendant aware, from his knowledge of existing circumstances and conditions, that his conduct probably would cause injury to another." Id.

In this case, the Perry has alleged that "the defendants' tractor trailer truck was traveling

at a high rate of speed,” (Amend. Compl. at ¶ 9); that the defendants acted “recklessly,” (Id. at ¶ 11); and that the “defendants acted with reckless disregard of the protected rights of plaintiff so as to support an award of punitive damages,” (Id. at ¶ 14). Traveling at a high rate of speed does not, in and of itself, give rise to punitive damages. Furthermore, Perry never explains with factual allegations exactly *how* “defendants acted with reckless disregard of the protected rights of plaintiff so as to support an award of punitive damages.” The court finds that those conclusory allegations are insufficient to state a claim for punitive damages. However, Perry has asked the court for leave to amend his complaint to add additional factual allegations that would support his claim for punitive damages. Consequently, the court will grant him leave to amend his complaint and will hold Franklin’s motion to dismiss under advisement pending the filing of this amendment.

V.

For the reasons stated above, the court will grant Perry leave to amend his complaint and will hold Franklin’s motion to dismiss under advisement pending the filing of this amendment. An appropriate order will be entered this day.

ENTER: This 5th day of July, 2001.

CHIEF UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

**FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION**

HARRY WILLIAM PERRY,)	
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Plaintiff,)	Civil Action No. 7:00-CV-00466
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v.)	<u>ORDER</u>
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TRUCKERS EXPRESS, INC.,)	By: Samuel G. Wilson,
)	Chief United States District Judge
and)	
)	
JOHN W. FRANKLIN,)	
)	
Defendants.)	

For the reasons stated in the court’s memorandum opinion entered this day, it is **ORDERED and ADJUDGED** that plaintiff Harry William Perry’s motion for leave to amend his complaint is **GRANTED**. Perry is **DIRECTED** to file an amendment on or before Thursday, July 12, 2001.

It is further **ORDERED** that Franklin’s motion to dismiss is **HELD UNDER ADVISEMENT** pending the filing of this amendment.

ENTER: This 5th day of July, 2001.

CHIEF UNITED STATES DISTRICT JUDGE