

SUPERIOR COURT
OF THE
STATE OF DELAWARE

T. HENLEY GRAVES
RESIDENT JUDGE

SUSSEX COUNTY COURTHOUSE
ONE THE CIRCLE, SUITE 2
GEORGETOWN, DE 19947

August 3, 2007

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Re: *Zigman v. Daprile*
C.A. No. 06C-06-034
Letter Opinion

Date Submitted: July 23, 2007

Dear Counsel:

Before the Court is Defendant's Motion for Partial Summary Judgment as to Plaintiffs' Claim for Punitive Damages. Trial is scheduled to begin on September 17, 2007 with a pretrial conference next week. For the reasons set forth herein, that motion is denied.

Factual and Procedural Background

This case arose out of a motor vehicle accident that took place on or about November 23, 2005, on Kings Highway in Lewes, Delaware. On that date, Diane Zigman¹ was traveling westbound on Kings Highway and was stopped at a red light. Denise Daprile² also was traveling westbound on Kings Highway. Defendant was unable to stop her vehicle in time to avoid colliding into Plaintiffs' vehicle. The force of the impact with Plaintiffs' car forced Plaintiffs' car forward so that it collided

¹ Hereinafter, Mrs. Zigman and her husband, Anthony Zigman, who filed a loss of consortium claim, will collectively be referred to as "Plaintiffs".

² Hereinafter, "Defendant".

with the vehicle in front of it. Plaintiffs claim the accident was proximately caused by Defendant's reckless conduct, said conduct reckless or willful and wanton in nature because Defendant was intoxicated at the time of the accident.

The Alcohol Influence Initial Report, completed by the responding police officer, describes Defendant as having a "strong" odor of alcohol emanating from her and otherwise notes that Defendant's speech was "lethargic". The investigating officer observed further that Defendant did not properly perform the walk and turn test and was unable to perform the one leg stand test ("She could not keep her balance whatsoever!"). The investigating officer also watched Defendant "stagger" when she walked. Similarly, the accident report states Defendant was "very obviously intoxicated". Documentation from the Delaware State Police Crime Laboratory indicates that Defendant's blood alcohol concentration ("BAC") was 0.28 %.

Defendant filed a Motion for Partial Summary Judgment as to Plaintiffs' Claim for Punitive Damages on June 13, 2007. Plaintiffs filed an answer to that motion on July 20, 2007, and further supplemented that response with the Alcohol Influence Initial Report as well as the Blood Alcohol Concentration Report from the Delaware State Police referenced above. Defendant responded to these supplemental filings by urging the Court to disregard Plaintiffs' answer to Defendant's motion because it was untimely filed.

Discussion

Standard of Review

This Court will grant summary judgment only when no material issues of fact exist, and the moving party bears the burden of establishing the non-existence of material issues of fact. *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979). Once the moving party has met its burden, the burden

shifts to the non-moving party to establish the existence of material issues of fact. *Id.* at 681. Where the moving party produces an affidavit or other evidence sufficient under Superior Court Civil Rule 56 in support of its motion and the burden shifts, the non-moving party may not rest on its own pleadings, but must provide evidence showing a genuine issue of material fact for trial. Super. Ct. Civ. R. 56(e); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-323 (1986). If, after discovery, the non-moving party cannot make a sufficient showing of the existence of an essential element of his or her case, summary judgment must be granted. *Burkhart v. Davies*, 602 A.2d 56, 59 (Del. 1991), *cert. denied*, 504 U.S. 912 (1992); *Celotex Corp.*, *supra*. If, however, material issues of fact exist, or if the Court determines that it does not have sufficient facts to enable it to apply the law to the facts before it, summary judgment is inappropriate. *Ebersole v. Lowengrub*, 180 A.2d 467, 470 (Del. 1962).

Merits

At the outset, I note that Defendant is not entitled to summary judgment merely because Plaintiffs failed to abide by the deadline for the filing of responses to dispositive motions as set forth in the Court's Pretrial Scheduling Order dated October 5, 2006. "The trial court has discretion to resolve scheduling issues and to control its own docket." *Coleman v. PricewaterhouseCoopers, LLC*, 902 A.2d 1102, 1107 (Del. 2006) (citation omitted). Although a scheduling order carries the full force and effect of any other order of the Superior Court, a judge retains discretion and may relieve the parties of the dates mandated by the scheduling order. *Sammons v. Doctors for Emergency Servs., P.A.*, 913 A.2d 519, 528 n. 18 (Del. 2006). Because I find that Defendant was not prejudiced by the

delinquent³ filing of the response to her dispositive motion⁴ and the filing of the response after the deadline did not impede the Court's ability to consider the Motion for Partial Summary Judgment in a timely fashion, I find Defendant's objection to lack merit. I will consider Defendant's motion on the merits.

Punitive damages differ from compensatory damages in both form and substance. *Jardel Co. v. Hughes*, 523 A.2d 518, 528 (Del. 1987). "Compensatory damages aim to correct private wrongs, while assessments of punitive damages implicate other societal policies." *Id.* The rationales used to support punitive damages are (1) the interest in punishing wrongdoers and (2) the desire to deter others from engaging in similar conduct. *Id.* at 529. The imposition of punitive damages, therefore, is only appropriate when the defendant's conduct is outrageous because of "evil motive" or recklessly indifferent to the rights of others. *Id.* "It is not enough that [defendant's] decision [to act] be wrong. It must result from a conscious indifference to the decision's foreseeable effect." *Id.* If there is no contention that the defendant's conduct was intentional or malicious, the defendant's actions must be tested under the standard of recklessness. *Id.* at 530. Two elements must be present for recklessness to exist: (1) the act (in the case at bar, the negligent operation of a motor vehicle); and (2) "the perception the actor had or should have had of the risk of harm which his conduct would create." *Id.*

Defendant contends that a layman's knowledge of the effects of alcohol would not permit him to determine whether Defendant had or should have had a perception of the risk of harm her conduct would create. That is, Defendant argues that Plaintiffs' failure to identify an expert toxicologist or

³ The answer to Defendant's motion was filed on July 20, 2007 and the Scheduling Order set the deadline for responses to dispositive motions for July 3, 2007.

⁴ Indeed, Defendant filed a letter response to Plaintiffs' response on July 27, 2007.

chemist who will be able to explain to the jury (a) the effects of alcohol on an individual and (b) the relation between the amount of alcohol consumed and the risk of an automobile accident prohibits Plaintiffs from submitting the issue of punitive damages to the jury. I disagree.

In this case, Defendant had consumed alcohol the day of the accident and upon a breathalyzer test was considered legally intoxicated. Defendant was, in fact, later cited for driving under the influence. Defendant had a BAC of 0.28%, almost three times the legal limit of alcohol concentration, when she operated her vehicle on November 23, 2005.⁵ The investigating officer detailed Defendant's unstable behavior on the day in question immediately following the accident. The question presented is whether the evidence of Defendant's alcohol use on the day in question is sufficient to establish the *minimum* threshold to allow the issue of punitive damages to be submitted to the jury. I am satisfied that it is. A jury can properly make conclusions concerning the effects of alcohol under the circumstances presented here. *Compare Klick v. Shelton*, 1998 WL 733076, at *1 (Del. Super. Aug. 4, 1998).

Conclusion

For the reasons set forth herein, the Defendant's Motion for Partial Summary Judgment as to Plaintiffs' Claim for Punitive Damages is hereby denied.

IT IS SO ORDERED.

Very truly yours,

T. Henley Graves

cc: Prothonotary

⁵ Defendant asks the Court to take judicial notice of the fact that a blood alcohol level will not be static. I decline to do so at this time.