IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

ESTATE OF ALBERTA RAE, DEBORAH J. RAE, Individually and as Co-Executrix, and BONNIE RAE, Individually and as Co-Executrix,	)	
Plaintiffs,	)	
v.	)	C.A. No. 05C-01-087 WCC
WADE S. MURPHY, and the DELAWARE HOSPITAL FOR THE CHRONICALLY ILL and the STATE OF DELAWARE,	)	
Defendants.	)	

Submitted: March 13, 2006
Decided: April 19, 2006

MEMORANDUM OPINION

Upon Defendant Wade Murphy's Motion for Partial Summary Judgment. GRANTED.

Upon Defendant State of Delaware's Motion for Partial Summary Judgment. GRANTED, in Part; DENIED, in Part.

Jeffrey M. Weiner; 1332 King Street; Wilmington, Delaware. Attorney for Plaintiff.

Michael Modica; 715 King Street; Wilmington, Delaware. Attorney for Defendant Wade Murphy.

Marc P. Niedzielski; Delaware Department of Justice; 820 N. French Street; Wilmington, Delaware. Attorney for Defendant State of Delaware.

CARPENTER, J.

Facts

Wade Murphy caused a fatal automobile accident on August 10, 2004 while he was employed by the State of Delaware in the capacity as driver for Delaware Hospital for the Chronically Ill. The accident occurred when Mr. Murphy drove through a red light while operating a state van and struck a car driven by Alberta Rae. The accident resulted in Ms. Rae's death. A complaint was filed on behalf of Ms. Rae's estate as a survival action, and on behalf of Ms. Rae's two daughters, Bonnie and Deborah Rae, for a wrongful death claim. While Mr. Murphy admits his negligence caused the fatal accident, there is a dispute with respect to the level of negligence present. As such, Mr. Murphy filed a motion for summary judgment with respect to the claim of gross or wanton negligence which the Plaintiff contended would support an award of punitive damages. The State joined in Mr. Murphy's motion for summary judgment and additionally requested that the claim of negligent hiring be dismissed. Upon review of the record and pleadings before this Court, Mr. Murphy's summary judgment motion and the State's motion for summary judgment relating to negligent hiring are hereby granted for the reasons set forth below.

Standard of Review

Summary Judgment is appropriate when the moving party has shown there are no genuine issues of material fact, and as a result, it is entitled to judgment as a matter

of law.[1] In considering such a motion, the Court must evaluate the facts in the light most favorable to the non-moving party.[2] Summary judgment will not be granted when the record reasonably indicates that a material fact is in dispute or if it seems desirable to inquire more thoroughly into the facts in order to clarify the application of law to the circumstances.[3]

Discussion

I. Defendant Wade Murphy's Motion

The complaint seeks damages resulting from Mr. Murphy's acts which caused the fatal accident that took Ms. Rae's life. Mr. Murphy acknowledges his actions were negligent and caused this accident, however, he denies the allegations that he acted with gross negligence and/or that he engaged in willful or wanton misconduct. As such, his motion seeks partial summary judgment with respect to the Plaintiffs' claim of gross or wanton negligence. This issue is particularly significant to this litigation since under the State Tort Claims Act, Mr. Murphy, who was acting within the scope of his employment, cannot be held personally liable unless gross negligence is established.

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[1] *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979); *Schueler v. Martin*, 674 A.2d 882, 885 (Del. Super. Ct. 1996).

[2] *Pierce v. Int'l. Ins. Co. of Ill.*, 671 A.2d 1361, 1363 (Del. 1996).

[3] *Ebersole v. Lowengrub*, 180 A.2d 467, 468-469 (Del. 1962).

The determination of whether a defendant acted negligently and with the requisite intent is typically a question for the jury, but only if a reasonable person could conclude, based on the facts at hand, that the conduct rose to the level of recklessness or gross negligence.[4] Thus, the Court acts as a gatekeeper, and if there is not sufficient evidence submitted to the Court to show the conduct meets this high standard, the Court may grant summary judgment and remove from the trial any potential prejudice to the defendant that may occur in the plaintiff's effort to support the allegation.[5] The question before this Court is whether the evidence is sufficient for a reasonable jury to conclude Mr. Murphy acted with either gross negligence and/or wilful or wanton negligence.

First, the Plaintiffs seek punitive damages due to Mr. Murphy's alleged willful or wanton conduct, arguing Mr. Murphy's actions rise to the level of an "I don't care" attitude which warrants such damages. Punitive damages are awarded, not to correct a wrong done to the plaintiff, but instead to either deter or punish the actions taken by a defendant.[6] They are civil penalties which require evidence of "egregious

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[4] *Eustice v. Rupert*, 460 A.2d 507, 510 (Del. 1983).

[5] *Jardel Co., Inc. v. Hughes*, 523 A.2d 518, 530 (Del. 1987). ("There is no contention here that Jardel's conduct was intentional or malicious. Its actions must therefore be tested under the standard of recklessness. . . . it is clear that the evidence did not suffice for submission to the jury of the issue of punitive damages.").

[6] *Id.* at 528.

conduct of an intentional or reckless nature."[7] A negligent act alone is not sufficient; there must be a "conscious indifference to the decision's foreseeable effect" to warrant such damages.[8]

In the case at hand, there is no evidence to suggest that Mr. Murphy's conduct rises to the level of an "I don't care" attitude to allow a jury to decide whether punitive damages should be awarded, even if the Court views all facts in a light most favorable to the Plaintiff. The record is clear that Mr. Murphy entered an intersection despite the traffic light indicating red. Just prior, Mr. Murphy's passenger, Samantha Lewis, telephoned 911 to report a driver falling asleep with children in the car.[9] Pursuant to the conversation with the 911 operator, Ms. Lewis asked Mr. Murphy what type of vehicle the sleeping driver was operating. At this time, Mr. Murphy looked at her to respond, taking his eyes off the road. There are inconsistencies about what happened next, however, for the purpose of this motion the Court will assume the evidence would support that Mr. Murphy was inattentive to the safe operation of his vehicle as he was distracted by the dangerous situation of the sleeping driver; he

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[7] *Id*. at 529.

[8] *Id*. at 530. ("Where the claim of recklessness is based on an error of judgment, a form of passive negligence, the plaintiff's burden is substantial. It must be shown that the precise harm which eventuated must have been reasonably apparent but consciously ignored in the formulation of the judgment.")

[9] Pl. Resp. Def. Murphy Mot. Summ. J., ¶5(e).

was aware of the upcoming traffic light, but nevertheless was inattentive to the color of the light changing;[10] and Mr. Murphy made no attempt to stop his vehicle or to apply his brakes before hitting Ms. Rae's vehicle.[11]

While Mr. Murphy's inattentive actions certainly constitute negligence which caused this horrific accident, all of the evidence suggests this was simply an unfortunate accident cased by the momentary inattentiveness of Mr. Murphy to address a concern relating to the operation of another vehicle and the potential danger to young children in that other vehicle. It would be inconsistent with any reasonable consideration of the evidence to find that Mr. Murphy's actions rose to the level of an "I don't care" attitude as suggested by the Plaintiff.

Because the degree of negligence is typically not determined via summary judgment, and it is highly dependent on the facts of each case, prior case law is helpful in guiding the Court's decision, and is therefore worth reviewing. Specifically, the *Pauley v. Reinoehl*[12] case, relied upon by the Plaintiffs since the Court indicated the jury should determine if punitive damages were appropriate, is similar to the facts at hand, but it can be distinguished. First, a police officer was

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[10]Pl. Resp. Def. State Mot. Summ. J., Ex. F.

[11]Pl. Resp. Def. Murphy Mot. Summ. J., Ex. B.

[12]*Pauley v. Reinoehl,* 848 A.2d 569 (Del. 2004).

responding to a burglar alarm at a local mall while in a police cruiser, and had deactivated her siren, and possibly her overhead lights, while driving "quite fast."[13] She attempted to make a left turn into the outlet store. During this time, vehicles were stopped at the intersection which obstructed the officer's view of oncoming traffic.[14] Nevertheless, she moved across the lanes, shifted her attention toward the mall she was turning into and did not see the victim's car, which she hit. The result was the death of one passenger in the victim's car.[15]

The facts of the *Pauley* case are similar to the facts currently before this Court in that the officer did take her eyes off the road and caused an accident. However, the officer was traveling "quite fast" and knowingly traveled through an intersection against the light with a knowingly obstructed view of oncoming traffic.[16] Whereas, here, there is no evidence to indicate Mr. Murphy knowingly entered an intersection against the light at the time he proceeded through, or that his vision of traffic was obstructed. While it is not an excuse nor acceptable, the only thing it appears Mr.

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[13] *Pauley v. Reinoehl,* 2002 WL 1978931 (Del. Super. Ct.), at *1, *rev'd on other grounds*, 848 A.2d 569 (Del. 2004).

[14] *Id.*

[15] *Id.*

[16] *Pauley,* 2002 WL 1978931, at *1. (The light for oncoming traffic was green, and since the officer was making a left turn, it is presumed she was required to yield to oncoming traffic.)

Murphy did was take his eyes off the road at just the wrong time, whereas the *Pauley* case had many other factors at play.

Contrarily, in *Sikander v. City of Wilmington*,[17] this Court determined an inattentive police officer, who caused an accident while carelessly operating a vehicle by not maintaining proper control or a proper lookout, did not constitute any more than ordinary negligence, and thus dismissed the claim at the summary judgment stage. Based on the facts indicated above, the Court finds this case to be more in line with the *Sikander* case, and there is not sufficient evidence for a reasonable juror to find gross negligence. While the Court agrees that this issue will normally be left to the jury to decide, this is one of those cases where summary judgment is appropriate.

Lastly, the Court must note a disturbing trend is emerging in motor vehicle tort litigation where allegations of punitive damages are becoming the norm. Obviously by doing so, the potential stakes become higher and the negotiating position of the plaintiff becomes stronger. While there are some motor vehicle cases where such allegations are appropriate, it should be a rare event and not the norm. In addition, when it is clear that the evidence would not support a punitive award, the trial court

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[17] *Sikander v. City of Wilmington*, 2005 WL 1953040 (Del. Super. Ct.), at *5, *aff'd,* 2006 WL 686598. (A police officer responding to a call knowingly proceeded through a red light, after looking both ways for traffic and traveling 5-10 miles per hour, causing an accident. In determining gross negligence could not be established, the Court surmised the police officer was "inattentive and/or careless in the operation of his vehicle.").

in fairness to the defendant, should remove the issue from the trial to prevent any spillover prejudice that could potentially occur by the plaintiff's attempt to paint the incident as something more egregious than accidental conduct. Since neither gross negligence nor recklessness can be found by a reasonably jury in this case, and since Mr. Murphy was a state employee acting in that capacity at the time of the accident, Mr. Murphy, individually, cannot be held liable for the accident pursuant to the State Tort Claims Act.[18] Accordingly, his motion for summary judgment is granted.

II. Defendant State of Delaware's Motion

A. Independent Act of Negligence by the State.

Plaintiffs claim the State was negligent or grossly negligent in hiring Mr. Murphy and in allowing Mr. Murphy to operate a state vehicle without a valid driver's license.[19] First, Plaintiffs did not plead negligent hiring within the complaint, and the first mention of this theory is within the Plaintiff's response to the State's motion for summary judgment.[20] While a complaint need only provide a defendant with fair notice of the averment against them,[21] at a minimum there has to be some

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[18] 10 *Del. C.* § 4001.

[19] Compl. ¶7.

[20] Pl. Resp. Def. Murphy Mot. Summ. J., ¶8.

[21] *VLIW Technology, LLC v. Hewlett-Packard Company*, 840 A.2d 606, 611 (Del. 2003).

identifiable assertion of such a claim for it to be presented at trial. Here, the complaint does not include the allegation of the State's negligence in hiring Mr. Murphy due to his driving history, it merely indicates the State was negligent in allowing Mr. Murphy to drive a State owned vehicle while not being properly licensed. The parties have conducted discovery based upon this understanding and this ninth-inning theory is simply too late. As such, the Plaintiff may not present it to the jury as a theory of liability.

Second, the Plaintiff argues the State negligently or recklessly entrusted Mr. Murphy with a state-owned vehicle, since Mr. Murphy did not hold a valid driver's license at the time of the accident, and thus is vicariously liable for Mr. Murphy's actions. Negligent entrustment occurs when the vehicle's owner "entrust[s] his motor vehicle to one who is so reckless or incompetent that in his hands the motor vehicle [becomes] a dangerous instrumentality."[22] The owner would then be liable for any resulting injury, but the plaintiff must first overcome an "unusually high test of foreseeability" for the owner to be found liable.[23] Reckless entrustment further

[22]*Shonts v. McDowell,* 2003 WL 22853659 (Del. Super. Ct.), at *2 (citing *Finkbiner v. Mullins*, 532 A.2d 609, 615 n.3 (Del. Super. Ct. 1987)).

[23]*Shonts*, 2003 WL 22853659, at *2 (citing *Ellis v. Woldoff*, Del. Super. Ct., No. 82C-MR-26, Walsh, J. (June 24, 1983), at 10).

requires an "I don't care" attitude on behalf of the owner of the vehicle in entrusting the vehicle to the driver, and the plaintiff's burden is substantial.[24]

Here, there is no evidence indicating the State negligently or recklessly entrusted a State van to Mr. Murphy since there is no evidence discovered that the State had knowledge, or should have had knowledge, of Mr. Murphy's expired license. The State performed a criminal background check on Mr. Murphy prior to hiring him, and in doing so, ensured he was properly licensed. The Operating Policies and Procedures of the State of Delaware Fleet Services indicates that "Employees must report changes in driver status to their agency's Fleet Vehicle Representative. This includes license expiration, suspension or revocation."[25] It was not the State's policy to continually pull driving histories of employees; and the Plaintiff's cannot point to any obligation of the State to do so. The State has in place reasonable procedures to require its employees to notify the State of significant changes in their driving status and the fact that Mr. Murphy failed to do so does not create an independent claim against the State. The Plaintiffs must show the State had

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[24]*Shonts*, 2003 WL 22853659, at *4 (citing *Jardel,* 523 A.2d 518) ("The plaintiff must demonstrate that 'the precise harm which eventuated must have been reasonably apparent but consciously ignored in the formulation of the [owner's] judgment.'"); *see also*, *O'Brien v. Delaware Olds, Inc.*, 833 F.Supp. 447, 449 (D.Del. 1993).

[25]Pl. Resp. State. Mot. Summ. J., Ex. K. (State of Delaware Fleet Services, Operating Policies and Procedures).

reason to know, and consciously ignored, that the expiration of Mr. Murphy's license coupled with allowing him to continue to drive would likely cause this horrific accident. The Plaintiffs cannot meet their burden, and the State's partial motion for summary judgment with respect to this claim is hereby granted.

B. Damages.

General damages include those which "necessarily and naturally result[] from the wrongful act or omission or which may be legally implied therefrom."[26] Special damages are not implied by law since they are damages that are not a direct result of the action, but are in fact caused by the wrongful or negligent act.[27] Special damages must be indicated with particularity, whereas general damages need not.[28]

The complaint indicates Alberta Rae's injuries includes "pain and suffering, death and medical expenses."[29] This is a general damage claim that does not require a specific amount be stated. The complaint further indicated Bonnie Rae and Deborah Rae's injuries includes "the wrongful death of their mother, including, without

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[26]*Cendant Corp. v. Commonwealth General Corp.*, 2001 WL 1729153 (Del. Super. Ct.), at *1 (citing *Twin Coach Co. v. Chance Vought Aircraft*, 163 A.2d 278, 286 (Del. Super. Ct. 1960)).

[27]*Id.*

[28]Super. Ct. Civ. R. 9(g).

[29]Compl. ¶ 8.

limitation, deprivation of the expected pecuniary benefits that would have resulted from her continued life, loss of contributions for support, loss of parental household services, reasonable funeral expense, mental anguish resulting from the death of their mother." Again, most of these damages are general damages and do not need to be plead with specificity. However, the funeral costs and expected pecuniary benefits averred do require specific proof and liquidated amount. Documentation with respect to Ms. Rae's social security income and pension benefits have been provided, and the Court will allow the Plaintiff to supplement the discovery record by producing to the Defendants a breakdown of the funeral cost.[30] The Court finds the Defendants are not prejudiced by these late developments and will deny this portion of the summary judgment motion.

C. Conscious Pain and Suffering.

Summary judgment is appropriate only when there are no material facts in question, and this is not the case with respect to whether there was any conscious pain or suffering by Ms. Rae at the time of the accident. Simply put, the Plaintiffs aver Ms. Rae remained conscious and suffered, whereas the State contends Ms. Rae was not conscious after the accident and did not suffer. Both will offer experts at trial to support each respective theory. At the moment, the Court has no reason to believe the

[30]Pl. Resp. Def. Mot. Summ. J., Ex. L, M.

experts will not be appropriately qualified nor that their particular area of medical expertise would prevent them from giving opinions in this area. As such, summary judgment is not appropriate as to this issue and the parties may present their opposing experts for the jury to resolve this dispute.

Conclusion

For the foregoing reasons, the State's Partial Summary Judgment Motion is hereby GRANTED, in part, and DENIED, in part, and Mr. Murphy's Partial Summary Judgment Motion is hereby GRANTED.

IT IS SO ORDERED.

/s/ William C. Carpenter, Jr.
Judge William C. Carpenter, Jr.