IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

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CUYAHOGA COUNTY

LINDA K. OZMUN, et al.,	)	**CASE NO. CV 14 824745**
Plaintiffs,	)	**JUDGE PAMELA A. BARKER**
v.	)	**OPINION AND JOURNAL ENTRY ON MOTION FOR SUMMARY JUDGMENT OF DEFENDANTS CUSTOMER ENGINEERING SERVICES, LLC AND GEORGE JENSEN**
CUSTOMER ENGINEERING SERVICES, LLC., et al.,	)	
Defendants.	)	

This matter is before the Court on the Motion For Summary Judgment Of Defendants Customer Engineering Services, LLC and George Jensen filed on June 12, 2015 ("Defendants' Motion"), Plaintiffs' Brief In Opposition To Defendants' Motion For Partial Summary Judgment filed on July 9, 2015 ("Plaintiffs' Brief")[1], Defendants' Reply Brief In Support Of Motion For Summary Judgment Of Defendants Customer Engineering Services, LLC and George Jensen ("Defendants' Reply"), and Plaintiffs' Surreply Brief filed on July 22, 2015 ("Plaintiffs' Surreply").

Plaintiffs are correct in noting at page 1 of their Brief that Defendant Customer Engineering Services, LLC (hereinafter "CES") and Defendant George Jensen (hereinafter "Jensen") actually have filed for **partial** summary judgment. CES and Jensen are asking this Court to declare as a matter of law that the damage cap for non-economic damages set forth under R.C. 2315.18(B)(2) applies. CES is asking this Court to grant summary judgment in its favor and against Plaintiffs on Plaintiffs' claims against it for negligent entrustment, negligent hiring, negligent supervision, and negligent retention since Plaintiffs have not identified an expert or proffered an expert's opinion as to the standard of care applicable thereto. CES is

also asking this Court to grant summary judgment in its favor and against Plaintiffs on Plaintiffs' punitive damages claim, arguing that there is no clear and convincing evidence that CES acted with a conscious disregard for the rights and safety of others.

This lawsuit arises from a motor vehicle accident that occurred on April 3, 2013 involving a vehicle being operated by Plaintiff Linda K. Ozmun ("Plaintiff"), and a vehicle being operated by Jensen and owned by his employer, CES (hereinafter, "the accident"). Plaintiff seeks compensation for physical injuries she sustained as a result of the accident,[2] as well as functional impairments she currently faces in her day-to-day life that are "psychological or psychiatric".[3] Plaintiff concedes that she does not attribute any of her functional problems to any physical injury.[4] Plaintiff admits that she can feed herself, eat without incident, drink water herself, bathe herself, and breathe without the aid of any mechanical implement.[5]

Attached as Exhibit "D" to Plaintiffs' Brief is the Affidavit of Philip J. Fischer, M.D. ("Affidavit"), Plaintiff's psychiatrist, who has opined in relevant part that as a result of the accident and its sequelae: 1.) Plaintiff sustained extensive emotional and psychiatric injuries that are permanent;[6] 2.) her preexisting PTSD, which was under control, is now severe;[7] 3.) Plaintiff is afraid to leave the house on her own, does not drive, has not been able to return to work, is hyper vigilant, startles easily, is constantly on guard and remains in a survival mode of

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[2] Plaintiff testified that her abdomen was sore for a couple of days, but resolved; she had intermittent headaches that resolved; and she had injuries to her mouth and eye that resolved within a month of the accident. Plaintiff's deposition, pp. 23, 24, 29, 37.
[3] *Id.*
[4] *Id.*, pp. 100-101.
[5] Plaintiffs' Responses to Defendants' First Requests for Admission directed to Plaintiff Linda Ozmun, pp. 1-2, attached to Defendants' Motion as Exhibit "C".
[6] Affidavit, at ¶¶15, 18.
[7] Affidavit, at ¶15.

thinking;[8] 4.) Plaintiff often wishes she would die, her appetite is poor, she does not enjoy food, her sleep is broken often by nightmares, and she experiences the accident day and night;[9] 5.) Plaintiff has disassociative episodes that present as trance-like symptoms, she has cognitive deficits, and she has developed intrusive recollections of the event and nightmares.[10]

In his Affidavit, Dr. Fischer also opines to a reasonable psychiatric probability that the injury Plaintiff suffered as a result of the accident constitutes a physical functional injury inasmuch as she suffered an exacerbation of her PTSD symptoms and PTSD causes physical harm to the human body including: brain cell damage; atrophy to the hippocampal gyrus and other areas of the brain; and is associated with the development of a number of other conditions such as premature development of coronary artery disease.[11]

The accident is the first motor vehicle accident that Jensen, whose date of birth is 5-27-55, has ever had.[12] At the time of the accident, Jensen was employed by CES as a field service representative, had been so employed for approximately 6 years, and drove 25,000 to 30,000 miles per year.[13] As part of CES's hiring of Jensen from Fuji Film where he had been employed and had regularly driven a company vehicle, Jensen completed an application requesting information on his driving record, and acknowledged that he had reviewed CES's company vehicle use policy in effect at that time.[14] Although CES did not obtain a third-party report of Jensen's driving record during his application process, CES's decision to hire Jensen was based

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[8] *Id.* Affidavit, ¶16.
[9] *Id.*
[10] Affidavit, ¶15.
[11] *Id.* at ¶¶19, 20.
[12] Jensen Deposition, pp. 2, 56.
[13] Jensen Deposition, pp. 9-11, 54 and Burns Deposition, pp. 24-28, 33, 68, 91.
[14] Jensen Deposition, pp. 9-11 and Burns Deposition, p. 34. Affidavit of Glenn Burns, attached as Exhibit "A" to Defendants' Motion, and documents attached thereto.

on, among other things, CES's familiarity with Fuji Film's driver policies and Jensen's five years of accident-free driving experience in a fleet environment.[15]

Defendants assert that "CES required Jensen to follow a variety of policies related to employee use of company cars during his employment,"[16] and in support thereof, cite to evidence demonstrating that CES performed quarterly random driving records checks on a percentage of its employees who drove company cars,[17] and had a policy in place whereby an employee driving a company car could never have more than three general moving violations within a 36-month period, a policy with which Jensen complied.[18] Jensen also completed a "Gold Cross Driver Training Program" on 4/12/2011.[19] Also, at least two or three times a year, the employee's manager rides along with the employee during the work day, observing the employee's performance and obtaining information from the employee regarding the vehicle and the employee's driving habits.[20]

Plaintiffs point out that Jensen's driving record shows that he has had six speeding tickets between 3/26/1997 and 5/4/2012,[21] two of which occurred during his employment with CES. Plaintiffs also point out that in February of 2011, or before the accident, CES announced its intention to strengthen its safety program by performing motor vehicle record checks on its

[15] Burns Deposition, pp. 21, 24-27, 34, 43.
[16] Defendants' Motion, at page 5, citing Burns Affidavit, Exhibit A and Exhibit B, submitted therewith.
[17] Defendants admit that Jensen was not the subject of one of these random driving record checks.
[18] Burns Deposition, pp. 52-56, 59-60, 65-66; Burns Affidavit, Ex. A at CES000177, Ex. E at CES000067, CES000219.
[19] Burns Affidavit, Exhibit E.
[20] Burns Deposition, pp. 65-66.
[21] Specifically, speeding tickets on 3/26/1997, 1/24/2000, 4/18/2000 (82 in a 65 mph zone), 4/11/2033 (68 in a 55 mph zone), 2/5/2009 , and 5/4/2012. Exhibit F attached to Plaintiffs' Brief.

drivers every 12 months, but CES never followed through to implement annual record checks because "other business issues [] came up" or CES had "other priorities".[22]

Non-economic damages cap

Defendants argue that Plaintiff has not suffered a permanent physical functional injury that permanently prevents her from being able to independently care for herself and perform life-sustaining activities, and therefore, her non-economic damages are capped under R.C. 2315.18(B)(2). Defendant acknowledges that R.C. 2315.18(B)(3)(b) provides an exception when the plaintiff has a "permanent physical functional injury that permanently prevents the injured person from being able to independently care for self and perform life-sustaining activities," but argue that the evidence presented demonstrates as a matter of law that Mrs. Ozmun does not have such an injury. Generally, Defendants argue that Plaintiff's alleged permanent injury is not "physical", but psychological or psychiatric, and that Plaintiff is able to independently care for herself and perform life-sustaining activities.

As to Defendants' argument that Plaintiff's alleged permanent injury is not physical, the Affidavit of Dr. Fischer creates a genuine issue of material fact that precludes this Court from so finding. Indeed, in opposing Defendants' Motion, Plaintiffs correctly cite *Ohle v. DJO, Inc.*, 2012 US Dist. LEXIS 140020 (ND Ohio) for the following proposition: "The statute's explicit statement that summary judgment is available to the parties does not change the standard or purpose of the summary judgment motion. As such, the court's fact-finding role is limited to the threshold determination as to whether there is sufficient evidence to submit the issue of the nature of the injury to the Jury."

[22] Burns Deposition, pp. 115-117.

In *Ohle*, the Court concluded that the plaintiff had submitted sufficient evidence to submit the issue of deformity to the jury, and denied the cross-motions of the parties asking the Court to make a determination as a matter of law as to whether or not the non-economic damages cap applied. In doing so, and as noted in Plaintiffs' Brief In Opposition, the Court cited to that portion of the Ohio Supreme Court's decision in *Arbino v. Johnson & Johnson, et al.*, 116 Ohio St.3d 468, 476, 2007 Ohio 6948, 880 N.E.2d 420 (2007) that "made clear the noneconomic damages is constitutional only '[s]o long as the fact-finding process is not intruded upon and the resulting findings of fact are not ignored or replaced by another body's findings.' *Id.* at 476." The Court in *Ohle* also cited and relied upon the decisions in *Bransteter v. Moore*, 2009 U.S. Dist. LEXIS 6692, 2009 WL 152317 (N.D. Ohio) (issue of whether perforated bowel and surgical scar qualified as deformity submitted to the jury); and *White v. Bannerman*, 2010 Ohio 4846, 2010 WL 3852354 (Ohio Ct. App.) where in a bench trial the court, acting as the trier of fact, concluded that the plaintiff's scarring qualified as a deformity.

Assuming *arguendo* that Plaintiff's exacerbation or serious aggravation of her pre-existing PTSD does constitutes a "physical" injury, as Plaintiff argues and supports with the Affidavit of Dr. Fischer, nonetheless such injury must preclude Plaintiff from independently caring for herself and performing "life-sustaining activities" in order to preclude application of the non-economic damages cap. In support of their argument that Plaintiff is able to independently care for herself and perform "life-sustaining activities", Defendants cite and rely upon the federal district court decisions in *Weldon v. Presley*, N.D.Ohio No. 1:10-cv-1077, 2011 U.S. Dist. LEXIS 95248 (Aug. 9, 2011), report and recommendation adopted 2011 U.S. Dist. LEXIS 95247 (Aug. 25, 2011), and *Williams v. Bausch & Lomb Co.*, S.D. Ohio No. 2:08-cv-910, 2010 U.S.

Dist. LEXIS 62018 (June 22, 2010), also considered by the Court in *Ohle*. However, in *Dillon v. OhioHealth Corporation* (10th Dist. No. 13AP-467, No. 14AP-259), 2015-Ohio-1389, 31 N.E.2d 1232, 2015 Ohio App. LEXIS 1328, the Tenth District Court of Appeals, albeit interpreting the phrase "life-sustaining activities" in the context of R.C. 2323.43(A) which imposes caps on compensatory non-economic damages in civil actions for medical claims, distinguished the facts in *Weldon* and *Williams* from those before it, explaining:

> In *Weldon*, the plaintiff suffered whiplash in an automobile collision and, though no anatomical or structural alteration of her spine was visible, she complained of aching, stiffness, and burning of her neck and back. She had surgery to correct whatever physical problems were causing her symptoms, but the surgery apparently did not improve her condition. Nonetheless, the plaintiff reported that her life had changed little as a result of her injuries and that she did the "same old thing. House cleaning, clothes, grocery shopping, bill paying, just the normal routine." She did, however, claim that she could no longer perform some tasks like "running a sweeper, moving furniture around in her home, and performing yard maintenance including weed whacking and cutting the grass." The court found that these circumstances fell short of showing an inability to accomplish "life-sustaining activities."
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> In *Williams*, due to an eye disease and a corrective procedure that did not improve the condition as expected, the plaintiff lost most vision in one eye and retained only mediocre vision in the other. The plaintiff in *Williams* was, however, able to pass an eye exam to continue to hold a driver's license and was able to dress herself, brush her teeth, wash her hands, comb her hair, and walk without assistance. This too, said the court, fell short of showing an inability to accomplish "life-sustaining activities."
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> In contrast, there was evidence in this case to the effect that Dillon cannot walk any significant distance, cannot dependably make his way into the bathtub without assistance, cannot accomplish even the most basic of homemaking tasks by himself, and cannot even make it to the toilet every time without having accidents. While he can, like the plaintiff in *Williams*, brush his teeth and comb his hair, taking a view of the evidence most favorable to Dillon, reasonable minds could differ about whether Dillon is able to accomplish "life-sustaining activities." The decision of the trial court denying OhioHealth a directed verdict on this issue is affirmed.

Dillon, supra, at ¶¶54-56.

Applying the scant Ohio case law on the interpretation of the phrase "life-sustaining activities", this Court finds that the evidence submitted by Defendants, when considered with the evidence submitted by Plaintiffs, is insufficient to allow this court to determine whether or not Plaintiff is able or unable to independently care for herself and perform "life-sustaining activities". Certainly, the fact that Plaintiff is able to feed herself, eat without incident, drink water, bathe herself and breathe is some evidence that she may be able to perform "life-sustaining activities". But, this limited evidence, along with the evidence submitted by Plaintiffs that Plaintiff does not drive or leave her home, and particularly, that she is hyper vigilant, startles easily, is constantly on guard, experiences the accident day and night, experiences disassociative episodes that present as trance-like symptoms and has cognitive deficits, leads this Court to conclude that it cannot determine as a matter of law that Plaintiff is able to independently care for herself and perform "life-sustaining activities" so as to find that the non-economic damages cap applies. Indeed, is Plaintiff able to perform "life-sustaining activities" when she is experiencing disassociative episodes that present as trance-like symptoms? At the trial of this matter, the evidence adduced may be sufficient to allow this Court to make this determination pursuant to a motion for directed verdict, but again, the evidence presented at this point does not so allow. Therefore, that portion of Defendant's Motion asking this Court to declare as a matter of law that the non-economic damages cap applies is **DENIED**.

Negligent entrustment, hiring, supervision and retention

Defendants argue that because Plaintiffs have not identified an expert or proffered an expert's opinion as to the standard of care applicable to Plaintiffs' negligent entrustment, negligent hiring, negligent supervision and negligent retention claims that they are entitled to

summary judgment on these claims.[23] In support thereof, Defendants argue that the applicable standard of care and the determination of whether CES complied with that standard are outside the common experience of a lay person. This Court is persuaded by the Plaintiffs' argument to the contrary set forth in Plaintiffs' Brief, and finds that it is within the common understanding of a reasonable juror to determine whether CES was negligent in hiring, retaining, and/or supervising Jensen in his capacity as a field service representative requiring use of a company car, and/or entrusting its vehicle to, Jensen, given his six speeding violations. Therefore, that part of Defendants' Motion asking this Court to grant summary judgment in its favor and against Plaintiffs on their negligent entrustment, hiring, retaining, and supervision claims is **DENIED**.

Punitive Damages

Under R.C. 2315.21(C)(1), punitive or exemplary damages are not recoverable from a defendant in question in a tort action unless *** (1) [t]he actions or omissions of that defendant demonstrate malice or aggravated or egregious fraud, or that defendant as principal or master knowingly authorized, participated in, or ratified actions or omissions of an agent or servant that so demonstrate." The burden of proof is upon a plaintiff, by clear and convincing evidence to establish that the plaintiff is entitled to recover punitive or exemplary damages. R.C. 2315.21(D)(4). The Ohio Supreme Court has held that actual malice requires proof either that the defendant's conduct (1) was "characterized by hatred, ill will or a spirit of revenge," or (2) demonstrated "a conscious disregard for the rights and safety of other persons that has a

[23] Despite Defendants' argument to the contrary in Defendants' Reply, Plaintiffs have not abandoned their negligent entrustment, hire and supervision claims. This Court does not read Plaintiffs' Brief as failing to oppose Defendants' arguments on these claims and the assertions and arguments regarding same set forth in Plaintiffs' Surreply are consistent with this Court's reading of Plaintiffs' Brief.

great probability of causing substantial harm." *Preston v. Murty* (1987), 32 Ohio St.3d 334, 336, 512 N.E.2d 1174, 1176. Since there is no assertion that CES's conduct can be characterized as motivated by hatred, ill will, or a spirit of revenge, it is the second form of malice that is at issue herein, i.e., whether CES's actions demonstrated a conscious disregard for the rights and safety of other persons, including Plaintiff, that had a great probability of causing substantial harm. "When proceeding on the 'conscious disregard' definition of malice under Preston, a punitive damages claim requires proof of the defendant's subjective knowledge of the danger posed to another by his conduct." *Schmidt v. Derenia* (10th Dist. Nos. 03AP-335 and 03AP-493), 158 Ohio App.3d 738, 2004-Ohio 5431, 822 N.E.2d 401, ¶11, citing *Malone v. Courtyard by Marriott L.P.* (1996), 74 Ohio St.3d 440, 1996 Ohio 311, 639 N.E.2d 1242, syllabus.

"Since punitive damages are assessed for punishment and not compensation, a positive element of conscious wrongdoing is always required. This element has been termed conscious, deliberate or intentional. It requires the party to possess knowledge of the harm that might be caused by his behavior." *Preston*, at 335. "Actual malice requires consciousness of the near certainty (or otherwise stated 'great probability') that substantial harm will be caused by the tortious behavior. Any less callous mental state is insufficient to incur that level of society outrage necessary to justify an award of punitive damages. Therefore, it is evident that a reckless actor, who only has knowledge of the mere possibility that his or her actions may result in substantial harm, is not behaving maliciously." *Motorists Mut. Ins. Co. v. Said* (1992), 63 Ohio St.3d 690, 698, 1992 Ohio 94, 590 N.E.2d

A trial court may conclude that reasonable minds could not find that a defendant's conduct rose to the level of actual malice and grant summary judgment on the issue of punitive

or exemplary damages. *See Maggard v. Pemberton* (2nd Dist. No. 22595), 178 Ohio App.3d 328, 2008-Ohio-4735, ¶12. "Even where a plaintiff proves a claim of negligent hiring, the plaintiff must establish actual malice before he is entitled to recover punitive damages. *See Stephens v. A-Able Rents Co.* (1995), 101 Ohio App.3d 20, 28, 654 N.E.2d 1315." *Estate of Beavers v. Knapp*, 175 Ohio App.3d 758, 2008-Ohio-2023, 889 N.E.2d 181, ¶59.; *Kuebler v. Gemini Transportation, et al.*, (U.S. Dist. No. 3:12-cv-114), 2013 U.S. Dist. LEXIS 172769, at *18.

The only evidence before this Court of any wrongdoing by CES is its alleged failure to complete a check of Jensen's driving record either before hiring him in 2007 or while he was employed by CES for six years before the accident, which check would have given it knowledge of Jensen's 4 speeding tickets pre-hire or between 1997 and 2003, and 2 speeding tickets between 2009 and 2012 or while employed, and given a company car, by CES. However, CES did have a policy in place whereby an employee with a company car could not have 3 moving violations within a period of 36 months. A review of the evidence submitted by Plaintiffs establishing the dates of Jensen's speeding tickets demonstrates that at no time either before or after CES hired Jensen, or while Jensen was employed or retained, supervised and given a company car, by CES, did he have 3 moving violations in a period of 36-months. Any review by CES of Jensen's driving record would not have shown Jensen to be in violation of this policy. Indeed, the fact that CES had this policy in effect is evidence that it did not have a conscious disregard for the rights and safety of others. Moreover, there are no "aggravating circumstances" in this case that would warrant a finding of "actual malice" or conscious disregard for the rights or safety of others. *See MacNeill v. Wyatt*, 917 F. Supp.2d 726, 730 (S.D.

Ohio 2013). Therefore, that portion of Defendants' Motion seeking summary judgment in favor of CES on Plaintiffs' punitive damages claim is **GRANTED**.

IT IS SO ORDERED.

Pamela A. Barker 7-30-15

JUDGE PAMELA A. BARKER **DATED**