IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

DAVID SHULTZ, Individually and as Administrator of the ESTATE of PATRICIA SHULTZ, Plaintiff	:	CV-18-01308
vs.	:	
ALEC T. BARNES, THOMAS A. BARNES, CHRISTINE M. BARNES, STEVEN H. SHANNON, STEVE SHANNON TIRE COMPANY, INC., Defendants	:	

OPINION AND ORDER

AND NOW, this 2nd day of December, 2022, the Court hereby issues the following OPINION and ORDER regarding Plaintiffs' Motion for Summary Judgment against Defendant Alec T. Barnes; the Motion of the Defendants, Thomas A. Barnes and Christine M. Barnes, for Summary Judgment; and the Motion for Summary Judgment of Defendants Steven Shannon and Steve Shannon Tire Company, Inc.

BACKGROUND

Plaintiff commenced this action by filing a Praecipe to Issue Writ of Summons on August 31, 2018, and filed a Complaint on April 30, 2019. Plaintiff ultimately filed a Second Amended Complaint on September 11, 2019, which is the operative pleading. The Second Amended Complaint alleges that shortly after midnight on the morning of June 22, 2017, Defendant Alec T. Barnes ("Alec") was operating a vehicle while under the influence of alcohol and struck a vehicle operated by Decedent, who died as a result of the collision.[1]

[1] The Amended Complaint avers that on July 9, 2018, Alec entered a guilty plea to multiple charges including Homicide by Vehicle and was sentenced to a period of three-and-a-half to seven years of incarceration in state prison.

The Complaint avers that at the time of the collision, Alec's license was suspended due to a previous DUI conviction and various traffic violations, and that on the night of the collision he was operating the company vehicle used by his father (the "company vehicle"), Defendant Thomas A. Barnes. The Complaint alleges that Defendants Thomas A. Barnes and Christine M. Barnes ("Thomas and Christine"), Alec's parents, allowed him to operate the work vehicle on June 22, 2017 despite knowing Alec's driving history, and were thus negligent in their entrustment of the vehicle to Alec.

The Complaint alleges that the company vehicle was owned by Defendants Steven H. Shannon and Steve Shannon Tire Company, Inc. (the "Shannon Defendants"), who negligently failed to have or enforce an effective policy to prevent employees' children or other persons from operating company vehicles in a negligent manner. Plaintiff contends that to the extent that Alec's use of the company vehicle was not a violation of the Shannon Defendants' policies, Thomas and Alec were agents of the Shannon Defendants and therefore the Shannon Defendants are vicariously liable for their negligence.[2]

The Complaint contains the following counts against remaining parties:

- Count I – Negligence and Recklessness against Alec;
- Count II – Negligence Per Se against Alec;
- Count III – Negligent Entrustment against Christine and Thomas;
- Count IV – Negligence Per Se against Christine and Thomas;

[2] The Complaint also included additional defendants who have since been dismissed by agreement of the remaining parties. Count VII of the Complaint dealt solely with these parties.

- Count V – Negligence against the Shannon Defendants;
- Count VI – Vicarious Liability of Agent against the Shannon Defendants;
- Count VIII – Loss of Consortium against all Defendants;
- Count IX – Wrongful Death against all Defendants; and
- Count X – Survival Action against all Defendants.

Alec filed an Answer to the Second Amended Complaint specifically denying *inter alia*, that he asked Thomas for permission to use the work vehicle. Thomas and Christine filed an Answer to the Second Amended Complaint raising cross-claims against Alec and the Shannon Defendants and pleading a new matter, which averred that Plaintiff's damages were caused solely by the other Defendants over which Thomas and Christine had no control. The Shannon Defendants filed an Answer to the Second Amended Complaint raising a new matter cross-claim against all other Defendants, averring that the other Defendants are solely or jointly liable for Plaintiff's damages, and that all other Defendants are liable to the Shannon Defendants for indemnification of any liability imposed upon them.

MOTIONS FOR SUMMARY JUDGMENT

Discovery in this matter proceeded for over a year. On March 11, 2022, the Shannon Defendants filed a Motion for Summary Judgment on all claims against them for a failure to establish their negligence or vicarious liability. On March 14, 2022, Thomas and Christine filed a Motion for Summary Judgment, averring that Plaintiff has failed to produce sufficient evidence from which a jury could conclude that they negligently entrusted Alec with the work vehicle. Also on March 14, 2022 Plaintiff filed a Motion for Summary Judgment against Alec, averring that the

undisputed facts conclusively establish Alec's liability. This section summarizes each of those Motions and the responses thereto.

A. Shannon Defendants' Motion for Summary Judgment

The Shannon Defendants bring four grounds that they believe entitle them to summary judgment, the first two of which relate to Defendant Steven Shannon ("Steven Shannon") only and the latter two of which relate to both Shannon Defendants.[3]

1. Arguments relating to Steven Shannon Only

The Shannon Defendants first contend that, regardless of the liability of Defendant Steven Shannon Tire Company, Inc. ("Shannon Tire"), Plaintiff has not established that Steven Shannon has any personal liability. The Shannon Defendants argue that because Steven Shannon is a corporate officer of Shannon Tire, Plaintiff may only hold him personally liable if they can "pierce the corporate veil."[4] Because Plaintiff has failed to produce such evidence here, the Shannon Defendants argue, there are no grounds upon which to hold Steven Shannon personally liable for the actions of Shannon Tire.

The Shannon Defendants recognize that there is a limited exception to the need to pierce the corporate veil to impose liability on a corporate officer; this exception applies when the officer participates in the corporation's activities and

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[3] The Shannon Defendants also argue that, because they are entitled to summary judgment on the underlying negligence claims against them, they are entitled to summary judgment on Plaintiff's derivative claims for loss of consortium, wrongful death, and the survival action.

[4] The concept of "piercing the corporate veil… allow[s] a court to disregard the corporate form… whenever justice or public policy demand, such as when the corporate form has been used to defeat convenience, justify wrong, protect fraud, or defend crime." *Mortimer v. McCool*, 255 A.3d 261, 268 (Pa. 2021).

personally commits tortious acts. The Shannon Defendants argue, however, that there is no evidence that Steven Shannon personally participated in the wrongful acts of any other Defendant, and therefore he is not liable under the "participation theory."

2. Arguments Relating to Both Shannon Defendants

The Shannon Defendants contend more broadly that Plaintiff has failed to establish any negligence on their part. Characterizing Plaintiff's theory of negligence as grounded on a contention that the Shannon Defendants breached "a duty to supervise the subject vehicle, institute a written policy regarding the use of the subject vehicle, and issue proper safeguards in the use of the subject vehicle," the Shannon Defendants argue that there is no disputed issue of material fact that would allow a factfinder to conclude they breached those duties. Specifically, the Shannon Defendants contend that it is undisputed that managers like Thomas "were able to take the company vehicle home from work but could only use it thereafter for such things like a fire or security alarm alert being activated at the store in the middle of the night," and that neither Steven Shannon, Thomas, nor any other party ever gave Alec permission to operate the vehicle on the night of the collision.

Furthermore, the Shannon Defendants argue that because Alec did not have permission to operate the vehicle, and Thomas was not otherwise engaged in the scope of employment relating to Alec's use of the vehicle, no acts concerning the collision were committed within the scope of employment of an employee of Shannon Tires. Thus, the Shannon Defendants argue, vicarious liability is unavailable under Pennsylvania law.

3. Plaintiff's Response

At the outset, Plaintiff agrees that the evidence obtained in discovery does not support piercing of the corporate veil, and therefore Plaintiff agrees to the dismissal of all claims against Steven Shannon in his individual capacity. Plaintiff contends, however, that a factfinder could find from the evidence that "an additional employment benefit was that the employees could utilize their company cars as they wished," and could therefore conclude that Shannon Tire's failure to ensure its employees did so safely, supported a finding of negligence. Additionally, Plaintiff highlights a number of pieces of evidence that he contends create issues of material fact as to whether Thomas did in fact approve of Alec's use of the company vehicle. Plaintiff contends that because Shannon Tire provided Thomas with a company vehicle to keep nearby at all times, Thomas's approval of Alec's use of the vehicle fell within the scope of his employment with Shannon Tire.

B. Thomas's and Christine's Motion for Summary Judgment

Thomas and Christine aver that they are entitled to summary judgment because Plaintiff has failed to meet his burden to produce evidence sufficient to allow the negligent entrustment theory, and the related negligence per se theory, to reach the jury.

1. Thomas and Christine's Argument

Thomas and Christine note that under the Restatement (Second) of Torts, Section 308, adopted by the Supreme Court of Pennsylvania, the elements of negligent entrustment are that a person "permits a third person to use a thing or to engage in an activity in such a manner as to create an unreasonable risk of harm to

others." Thomas and Christine aver that, in the context of negligent entrustment of a vehicle, a plaintiff must demonstrate that the vehicle's owner or controller "knew or should have known… at the time the permission [to operate the vehicle] was granted… that the person who was permitted to operate the vehicle habitually drove in a careless or negligent manner."

Thomas and Christine assert that Plaintiff has not produced "any competent or credible facts to support an allegation that" they gave Alec permission to drive the work vehicle, or that they were aware of Alec's loss of license or poor driving record. They further contend that no evidence suggests that Alec was intoxicated or under the influence of drugs at the time Plaintiff alleges Thomas and Christine gave Alec permission to use the vehicle, and thus at that time they were not on notice that granting permission to operate the vehicle would create an unreasonable risk of harm to others. Specifically with regard to Christine, Thomas and Christine argue that there is no evidence that Christine was an owner or an otherwise authorized user of the vehicle.

2. Plaintiff's Reply

In response, Plaintiff contends that multiple genuine issues of material fact exist with regard to the claims of negligent entrustment against Thomas and Christine. In particular, Plaintiff contends that Thomas would have learned of Alec's driving history when Alec previously obtained employment by Shannon Tire in May of 2014, and that both Thomas and Christine admitted actual knowledge of this history of poor driving. Plaintiff further contends that the facts show that Thomas and Christine did grant Alec permission to use the vehicle on the night of the

collision. Specifically, Plaintiff notes that the initial report of the Pennsylvania State Police indicates that Alec stated he received permission to use the vehicle from Thomas; although Alec has since stated he did not receive permission to use the vehicle, Plaintiff contends that he has incentive to lie to protect his parents. Ultimately, Plaintiff argues, the conflicts between Alec's statements at various times create an issue of material fact as to whether he did in fact receive permission to use the vehicle, thus precluding summary judgment.

C. Plaintiff's Motion for Summary Judgment against Alec

Plaintiff also filed a Motion for Summary Judgment as to his claims against Alec. Plaintiff notes that Alec has acknowledged his guilty pleas to multiple criminal offenses arising from this incident, including Homicide by Vehicle, and has admitted that the crash "was solely my fault, my responsibility." Plaintiff asserts that these convictions and admissions clearly establish ordinary negligence, negligence per se, and recklessness in bringing about the harm. In particular, Plaintiff argues that Alec's operation of the vehicle while under the influence, at a high rate of speed, when his license was already suspended for DUI, clearly establishes recklessness.

In response, Alec concedes both ordinarily negligence and negligence per se, but asserts that genuine issues of material fact remain as to whether he was reckless or engaged in "willful, wanton, outrageous, [or] intentional" conduct. Specifically, Alec disputes law enforcement's calculation of the speed at which he was traveling at the time of the accident, and avers that Plaintiffs have produced no evidence to establish that he failed to engage his brakes or take evasive measures to avoid the collision. Alec notes that the question of whether to award punitive

damages is typically an issue for the factfinder, and argues that Plaintiff has not established that he is entitled to a conclusion that Alec was reckless or is otherwise liable for punitive damages as a matter of law.

ANALYSIS

A. Motions for Summary Judgment

Pennsylvania Rules of Civil Procedure 1035.1 through 1035.5 govern the filing of motions for summary judgment.[5] When deciding a motion for summary judgment, the Court must view the record in the light most favorable to the non-moving party, with all doubts as to whether a genuine issue of material fact exists being decided in favor of the non-moving party.[6] The party moving for summary judgment bears the burden of proving both the absence of an issue of material fact and its right to judgment as a matter of law.[7] Once the moving party has met its burden, if the non-moving party fails to produce sufficient evidence on an issue on which that party bears the burden of proof, the moving party is entitled to summary judgment as a matter of law.[8] The Court will only grant summary judgment, however, "where the right to such judgment is clear and free from all doubt."[9] The

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[5] Under Rule 1035.2, "[a]fter the relevant pleadings are closed, but within such time as to not unreasonably delay trial, any party may move for summary judgment in whole or in part as a matter of law (1) whenever there is no genuine issue of any material fact as to a necessary element of the cause of action or defense which could be established by additional discovery or expert report, or (2) if, after the completion of discovery relevant to the motion, including the production of expert reports, an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issues to be submitted to a jury." Pa. R.C.P. 1035.2.

[6] *Keystone Freight Corp. v. Stricker*, 31 A.3d 967, 971 (Pa. Super. 2011).

[7] *Holmes v. Lado*, 602 A.2d 1389, 1391 (Pa. Super. 1992).

[8] *Id.* (citing *Young v. Pa. Dept. of Transp.*, 744 A.2d 1276, 1277 (Pa. 2000)).

[9] *Summers v. Certainteed Corp.*, 997 A.2d 1152, 1159 (Pa. 2010) (quoting *Toy v. Metro. Life Ins. Co.*, 928 A.2d 186, 195 (Pa. 2007)).

Court has explained that a summary judgment cannot "be used to provide for trial by affidavits... or depositions," and therefore the court must thoroughly examine the entire record to determine whether a genuine issue exists as to any material fact.[10]

B. Shannon Tire's Motion for Summary Judgment[11]

Plaintiff contends that Shannon Tire is directly liable for its negligence in providing the company vehicle to Thomas without having or enforcing adequate policies to ensure that it was not used in a harmful manner. Additionally, Plaintiff asserts that Shannon Tire is vicariously liable for the actions of Thomas and Alec. The Court will address these arguments individually.

1. Direct Negligence

The elements of negligence are "(1) a duty or obligation recognized by law; (2) a breach of that duty; (3) a causal connection between the conduct and the resulting injury; and (4) actual damages."[12] Shannon Tire's Motion does not explicitly contest that it owed Plaintiff a duty to supervise the use of company vehicles by enacting and enforcing policies to safeguard against harmful operation, though Shannon Tire raised this issue at argument. Shannon Tire contends that regardless of any duty, when the evidence is viewed in a light most favorable to Plaintiff, it "shows that [Shannon Tire] did have adequate supervision, safeguards, and policies regarding the use of the vehicle."[13] Thus, Shannon Tire asserts that it

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[10] *DeArmitt v. New York Life Ins. Co.*, 73 A.3d 578, 595 (Pa. Super. 2013) (citing *Penn Center House, Inc. v. Hoffman*, 553 A.2d 900, 902-03 (Pa. 1989)). In the summary judgment context, the "record" includes "pleadings, depositions, answers to interrogatories, admissions and affidavits, and reports signed by an expert witness...." Pa. R.C.P. 1035.1.
[11] Because Plaintiff has agreed to withdraw all claims against Steven Shannon, this section addresses the the parties' arguments as they relate to Shannon Tire alone.
[12] *Grossman v. Barke*, 868 A.2d 561, 567 (Pa. Super. 2005).
[13] Shannon Tire brief, p.4.

did not breach any duty it owed to Plaintiff. Additionally, Shannon Tire argues that "it is undisputed that Alec Barnes was not given permission [to operate the work vehicle] by Steven Shannon, Thomas Barnes, or anyone from Steve Shannon Tire Company, Inc. on the night of the incident."[14] This contention relates to both the breach-of-duty element and the causation element of negligence.

Shannon Tire highlights a number of portions of evidence in support of these arguments. In Steven Shannon's deposition, he explained that Shannon Tire provided company vehicles to managers both to address off-the-clock emergencies, such as a burglar alarm in the middle of the night, as well as to pick up and drop off customers if necessary.[15] He explained the company's policy regarding the use of work vehicles as of June 22, 2017 as follows:

> Q: So on June 22nd, 2017, did you have a policy in place as to prohibited and permitted uses of the manager/employee vehicle?
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> A: We didn't have it in writing, but we just – when we told them they could use the vehicle, it was for company use only back and forth to work.
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> Q: So when you say company use only, can you elaborate?
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> A: Company use only. Going back and forth to work. Picking a customer up, picking up parts. But it was never for any time after hours or going on vacation or anything like that.[16]

Shannon Tire next pointed out that Alec, in his deposition, testified that neither Thomas nor anyone else affiliated with Shannon Tire had given him permission to use the work vehicle on June 22, 2017, and that he similarly had not

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[14] *Id.* at p.5.
[15] *Deposition of Steven Shannon*, 26:9-17.
[16] *Id.* at 28:6-17. Steven Shannon further testified that no members of Thomas's family were permitted to use the vehicle and that Thomas verbally acknowledged this prohibition, though there is no writing confirming his acknowledgment.

communicated with anyone Thomas, Christine, or anyone at Shannon Tire about using the vehicle.[17] Thus, Alec stated, he did not have authority to use the vehicle.[18] He added that on at least one occasion prior to that night, Thomas had told him he was not allowed to use the work vehicle, and that Thomas had never permitted him to use it for personal use prior to June 22, 2017.[19]

In response, Plaintiff first highlights the portion of Thomas's deposition in which he explains his understanding of the permitted uses of the vehicle between his hiring in April of 2014 and June 22, 2017. Thomas explained that his family was not permitted to use the work vehicle, but that he was permitted at that time to "take [the work vehicle] to a friend's house" on a weekend when he was not working, and ultimately could "drive [the work] vehicle off company time wherever [he] wanted."[20] Plaintiff noted Thomas's admission that on one occasion in the summer of 2014, he permitted Christine to drive the work vehicle approximately six blocks from a cook-out to Thomas's and Christine's home.[21] Plaintiff also notes that Kelly Shannon, the head of Human Resources for Shannon Tire, indicated that although company vehicles were "for the employee to get back and forth to work and use during work," she was not certain whether employees were permitted to use company vehicles for personal use, and had never spoken to the employees about such a policy.[22] Plaintiff suggests that all of these factors, in light of Steven Shannon's admission that no written policy existed, present a material question of fact regarding whether

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[17] *Deposition of Alec Barnes*, 138:15-139:9; 140:15-22.
[18] *Id.* at 139:9.
[19] *Id.* at 139:25-140:7.
[20] *Deposition of Thomas Barnes*, p.22-23.
[21] *Id.*
[22] *Deposition of Kelly Shannon*, 30:21-31:21.

Shannon Tire enacted and enforced policies sufficient to protect against the harmful use of company vehicles.

In support of his contention that summary judgment is inappropriate, Plaintiff cites *Spencer v. Johnson*,[23] a 2021 case that Plaintiff contends addresses similar issues to those presented here. In *Spencer*, an employer provided its employee with a company vehicle but did not institute a written policy for the use of that vehicle; two years after the employee received the vehicle, the employee's husband operated it while under the influence of alcohol, grievously injuring the plaintiff.[24] All parties agreed that the plaintiff was not at fault and that the employee's husband was negligent in his operation of the vehicle.[25] The employee and employer disagreed, however, over the scope of permissible use of the company vehicle and the extent to which the employer had explained this unwritten policy to the employee.[26]

The plaintiff contended that 1) the employee's husband used the vehicle with the employee's express or implied permission; 2) the employer owed a duty of care to the plaintiff "to ensure that its vehicle was operated in a non-negligent manner"; 3) the employer should have known that the employee was careless in her use of the vehicle and had given permission to family members to operate the vehicle; and 4) that other of employer's employees regularly used company vehicles for personal use and permitted their family members to operate those vehicles.[27] The jury ultimately found each defendant liable to the plaintiff, apportioning 45% liability to the

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[23] *Spencer v. Johnson*, 249 A.3d 529 (Pa. Super. 2021).
[24] *Id.* at 536-37.
[25] *Id.* at 536.
[26] *Id.* at 537-39.
[27] *Id.* at 541.

employer, 19% liability to the employee, and 36% liability to the employee's husband; both the employer and employee appealed from this determination.[28] In rejecting the employer's argument that the jury's apportionment was against the weight of the evidence, the Superior Court noted that "the [trial] court found it was not unreasonable for a jury to decide that if [the employer] would have enforced stricter supervision of the company vehicle, [the employee's husband] would not have been in control of the vehicle on the night in question."[29] The Superior Court reviewed the record, which indicated that employees:

> "were allowed to possess the vehicle at all times, but were not supposed to drive the cars for personal reasons. However, [the employer] administered minimal oversight of vehicle usage by employees… had no employee handbook or manual, and gave little to no vehicular safety training. [The employer] had a two-page vehicle policy document… that was reviewed orally with employees when they received the car and at meetings. [The employer] failed to produce any documentation at trial that [the employee] had signed acknowledging the policy, or even indicated that she had attended any of those meetings when the vehicle policy was discussed."[30]

On these facts, the Superior Court found that "[t]he jury could reasonably find that [the employer's] failure to manage [the employee] led to her allowing [the employee's husband] to regularly drive the company vehicle without their knowledge or authorization," thus subjecting them to liability.[31]

Plaintiff contends that the facts of the instant case are "strikingly similar" to those in *Spencer*, and present a "litany of genuine issues of material facts" concerning Shannon Tires' direct liability to Plaintiff. Shannon Tire responds that the

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[28] *Id.* at 543, 545-46.
[29] *Id.* at 569.
[30] *Id.* at 569-70.
[31] *Id.* at 570.

lengthy *Spencer* opinion overlooks the need to establish a duty in the first place, and contends that it is distinguishable from the instant case.

Although it is true that the Superior Court in *Spencer* did not conduct a full legal analysis regarding whether a company owes a duty to the public to ensure its vehicles are not used in a reckless manner, the analysis the Superior Court did conduct strongly suggests that such a duty exists. It is difficult to isolate the contours of such a duty from *Spencer*, due in part to the fact that the trial court did not ask the jury to specify whether it had found the employer liable on vicarious liability grounds, direct negligence grounds, or both. However, the Superior Court noted approvingly that "the [trial] court concluded the verdict reasonably flowed from the actions and omissions of both [the employer] and [the employee]... [and] found it was not unreasonable for a jury to decide that if [the employer] would have enforced stricter supervision of the company vehicle, [the employee's husband] would not have been in control of the vehicle on the night in question."[32] It is hard to square this language in a controlling appellate case with the position that a company does not have a duty to supervise the use of company vehicles to ensure that they are not used in a dangerous manner. Furthermore, as no party squarely raised the possibility that such a duty does not exist until argument, the issue has not been fully briefed.[33]

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[32] *Id.* at 569.

[33] To the extent that a party seeks to establish a previously unrecognized duty of care, the court must engage in an analysis under Section 323 of the Restatement (Second) of Torts or *Althaus v. Cohen*, 756 A.2d 1166 (Pa. 2000). An *Althaus* analysis requires consideration of "(1) the relationship between the parties; (2) the social utility of the actor's conduct; (3) the nature of the risk imposed and foreseeability of the harm incurred; (4) the consequences of imposing a duty upon the actor; and (5) the overall public interest in the proposed solution."

The Court agrees with Plaintiff that the facts of *Spencer* are similar enough to those alleged by Plaintiff in this case that, if Plaintiff proves his allegations at trial, the factfinder could reach a similar conclusion. In *Spencer*, the employer asserted that it "provided verbal instructions to employees that the only permissible personal use of company cars was for commuting to and from work and job sites," but had not memorialized these instructions in a written policy.[34] The employee, however, "alleged that [the employer] did not inform her of these policies" and "was not told or given anything from [the employer] that family members were not permitted to use [the employer's] vehicles."[35] Even so, the employee stated that she did not let her husband drive the vehicle except once for "an emergency," though another family member testified that the employee's husband had driven the car on numerous occasions.[36] On these facts, both the trial court and the Superior Court found that the jury was permitted to find the employer directly liable to the plaintiff for failing to enact and enforce policies to prevent his harm.

Here, Plaintiff alleges, and Shannon Tire admits, that there was no written policy regarding the use of company vehicles as of June 22, 2017. Plaintiff highlights portions of the deposition testimony of Steven Shannon, Kelly Shannon, and Thomas Barnes that a factfinder could construe as contradictory, creating a question of what exactly Shannon Tire's unwritten policy was and whether it was clearly communicated to employees. As Plaintiff notes, "Kelly Shannon testified that

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Id. at 1169. No party has addressed the *Althaus* factors with regard to an alleged duty of companies to prevent their vehicles from being operated in a dangerous manner.

[34] *Spencer*, 249 A.3d at 552.

[35] *Id.* at 538.

[36] *Id.* at 539.

the company did not check the mileage on the vehicles, they did not monitor the company credit cards provided to employees for gas for the company vehicles, nor did they take any other steps to ensure that the company vehicles were being used only for work purposes as the alleged unwritten policy purported to require."[37] The Superior Court in *Spencer* found that similar factors were relevant and supported the verdict against the employer in that case.

Additionally, Plaintiff notes that shortly after the collision, Alec told a State Trooper that he had asked Thomas for permission to use the company vehicle on that night. Alec has since claimed that he was lying when he made that statement, and every other witness to address the matter has indicated that Alec *did not* ask Thomas for permission to use the company vehicle on June 22, 2017. The question of whether Alec was lying at the time of the collision or lying when he gave an inconsistent statement at his deposition is a quintessential "material issue of fact," however, and is precisely the sort of credibility determination that a jury must make.

Upon a review of the record, the Court cannot conclude as a matter of law that Plaintiff will be incapable of establishing each of the elements of direct negligence against Shannon Tire.

2. <u>Vicarious Liability</u>

Generally, "an employer is held vicariously liable for the negligent acts of his employee which cause injuries to a third party, provided that such acts were

[37] Plaintiff's Brief in Support of Answer to Shannon Tire's Motion for Summary Judgment, p.3.

committed during the course of and within the scope of employment...."[38] As Plaintiff notes:

> "Generally, the conduct of an employee is considered within the scope of employment for purposes of vicarious liability if: (1) it is of a kind and nature that the employee is employed to perform; (2) it occurs substantially within the authorized time and space limits; (3) it is actuated, at least in part, by a purpose to serve the employer; and (4) if force is intentionally used by the employee against another, the use of force is not unexpected by the employer."[39]

Shannon Tire argues that it is not vicariously liable for the collision and resulting harm. Shannon Tire notes that Alec was not employed by Shannon Tire on June 22, 2017, and further contends that "Thomas Barnes was not in the course of his employment when Alec Barnes unilaterally decided to use the subject vehicle."[40]

Plaintiff responds first by clarifying that he is alleging that Shannon Tire is vicariously liable for the actions of both Alec and Thomas, including Thomas's negligent entrustment of the company vehicle to Alec. Plaintiff highlights deposition testimony that suggests the purpose of providing Thomas the company vehicle was to allow him to respond to urgent calls at all hours of the day, and therefore a jury could conclude that any operation or entrustment of the company vehicle was within the scope of Thomas's employment with Shannon Tire.

Again, Plaintiff points to *Spencer*, in which both the employee and the employer emphatically argued that the employee "was not acting within her scope of employment at the time of the accident, and... did not give [the employee's husband]

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[38] *D'Errico v. DeFazio*, 763 A.2d 424, 431 (Pa. Super. 2000).
[39] *Ludwig v. McDonald*, 204 A.3d 935, 943 (Pa. Super. 2019) (internal citations omitted).
[40] Shannon Tire brief, p.6. As noted above, whether Alec Barnes unilaterally decided to use the company vehicle is a disputed issue of material fact.

permission to drive the car."[41] The Superior Court concluded, however, that "there was sufficient evidence to support a finding that [the employee's] acts were committed during the course of and within the scope of her employment," reasoning as follows:

> "It is uncontested that [the employee and her husband] were attending a family gathering at the time of the incident. She testified that the purpose of driving the company car to her mother's house was personal, rather than related to the business of [the employer]. Furthermore, [the employee's] actions were not of the kind and nature that she was employed to perform, she was not acting substantially within the authorized time and space limits of her employer, and her acts were not actuated, in part, by a purpose to serve [the employer].
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> None of these undisputed facts alter another undisputed fact: that [the employee] was on-call '24/7' for her job with [the employer]. Here... [the employer] considered these vehicles 'absolutely essential to the work of [employees]' since 'employees could be required to drive out to job sites at any hour of day or night, twenty-four hours a day.' Further, it is undisputed that [the employee] was continuously on-call and that this was the reason [the employer] supplied her with a company vehicle. Undoubtedly, the vehicle was provided so that while [the employee] was at home, engaged in personal, not union, business, she could respond immediately by driving directly to a worksite to respond to union needs.
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> ...
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> Under these circumstances, we agree with [the plaintiff] that the jury could have reasonably concluded that [the employee] was acting in the course and scope of her employment when she drove the company car to her mother's house on the day of the accident.... Additionally, the evidence at trial did not decisively establish Tina was aware of [her employer's] motor vehicle policy. Accordingly, the jury could have found that [the employer] was vicariously liable for the negligent acts of [the employee]."[42]

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[41] *Spencer*, 249 A.3d at 542.
[42] *Id.* at 551-52.

"Generally, the scope of an employee's employment is a fact question for the jury. Where the facts are not in dispute, however, the question of whether... the employee is within the scope of his employment is for the court."[43]

The Court finds that a material issue of fact exists as to whether Thomas was acting in the scope of his employment when he allegedly gave Alec permission to operate the company vehicle. The parties dispute the scope of Shannon Tire's vehicle use policy and whether it was communicated to Thomas. Thus, a jury could conclude that Shannon Tire's failure to communicate a policy forbidding use of its company vehicles for personal use or by family members, coupled with a failure to ensure that the vehicle was not used in such a manner, amounted to a policy of tacit approval of such uses. Under *Spencer*, when a company acquiesces to personal and family uses of company vehicles provided to employees for around-the-clock use, an employee utilizing the vehicle in that manner by allowing a family member to operate it while intoxicated may support a finding that the use of the vehicle was within the scope of employment. Regardless of the Court's assessment of the likelihood that Thomas was acting within the scope of his employment on June 22, 2017, the presence of disputed issues of fact renders that determination the jury's to make in the first instance.

C. Thomas and Christine's Motion for Summary Judgment

As Thomas and Christine note, Pennsylvania has adopted the formulation of negligent entrustment as stated in Section 308 of The Restatement (Second) of Torts:

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[43] *Ludwig*, 204 A.3d at 943 (quoting *Ferrell v. Martin*, 419 A.2d 152 (Pa. Super. 1980)).

> "It is negligence to permit a third person to use a thing or to engage in an activity which is under the control of the actor, if the actor knows or should know that such person intends or is likely to use the thing or to conduct himself in the activity in such a manner as to create an unreasonable risk of harm to others."

Thus, in order to prevail against Thomas and Christine Barnes on a theory of negligent entrustment, Plaintiff must show that:

- The company vehicle was under Thomas's or Christine's control;
- Thomas or Christine permitted Alec to operate the company vehicle; and
- Thomas or Christine knew or should have known that Alec was likely to operate the vehicle in such a manner as to create an unreasonable risk of harm to others.

Thomas and Christine first contend that Plaintiff has not produced "competent or credible facts" that would allow a jury to conclude that Thomas or Christine gave Alec permission to operate the company vehicle on June 22, 2017. As discussed above, however, a factfinder may conclude that Alec's statement to the police that Thomas gave him such permission is true, and that his repeated contradictory assertions that Thomas did not give him permission are false. Therefore, there is a disputed issue of material fact as to the second of the three prongs listed above.[44]

Regarding the requirement that Thomas and Christine knew or should have known that Alec was likely to operate the vehicle in a manner that created an unreasonable risk of harm, Thomas and Christine assert that Plaintiff has produced no evidence to suggest they knew that Alec's license was suspended as of June 22, 2017 or that he was a habitually unsafe driver. They further assert that Plaintiff has

[44] Thomas and Christine do not dispute that the company vehicle was under Thomas's control, satisfying the first prong.

not alleged facts to show that Thomas's actions placed Decedent under an unreasonable risk of harm. Finally, Thomas and Christine argue that there is no evidence that Alec was under the influence of alcohol or drugs when Thomas allegedly gave him permission to operate the vehicle, and thus there is no basis in the record to conclude that Thomas or Christine knew or should have known that he would operate the vehicle while under the influence.

Plaintiff responds by highlighting a number of pieces of evidence that he contends support a finding that Thomas and Christine knew or should have known that Alec would operate the company vehicle in a manner that created an unreasonable risk of harm. First, Plaintiff notes that although Alec did not work for Shannon Tire as of June 22, 2017, he had previously been employed there after being hired by Thomas on May 9, 2014. Plaintiff notes that both a driving history check performed by Kelly Shannon and Alec's hiring paperwork revealed that he had a history of traffic violations and that his license had been suspended due to a DUI conviction. At her deposition, Kelly Shannon testified that she informed Thomas of this information in May of 2014. Thomas also admitted in his deposition that he knew of Alec's past DUI and license suspension. With regard to Christine, who testified that she could not recall if she knew of Alec's DUI conviction or license suspension, Plaintiff argues that she would or should have known of these facts as a mother living in the same household as her son.[45] Plaintiff ultimately contends that it

[45] Alec stated in his deposition that he moved in with his parents at some point prior to January 1, 2017, meaning he had been living with Thomas and Christine for at least five-and-a-half months prior to the accident.

is for a jury to determine whether Christine's asserted lack of memory regarding Alec's past DUI and license status is credible.

The Court concludes that a genuine issue of material fact exists as to whether Thomas knew or should have known that Alec was likely to operate the company vehicle in a manner that created an unreasonable risk of harm to others. Whether mere awareness of all or part of a driver's history of violations is sufficient to meet the knowledge standard of negligent entrustment is a fact-specific question that depends upon the frequency, severity, and recency of the various violations. Exactly which portions of Alec's driving record Thomas was aware of, and whether that awareness should have given him knowledge that Alec was likely to operate the company vehicle in an unreasonably risky manner, is a question for the jury. Thus, the Court will deny the Motion for Summary Judgment on the negligent entrustment claim as it relates to Thomas.

The Court finds, however, that the record is devoid of facts that would allow a jury to conclude that Christine "entrusted" Alec with the company vehicle. Although Alec initially claimed that Thomas gave him permission to operate the company vehicle, Plaintiff has pointed to no evidence of record suggesting that Alec asked Christine for permission to use the company vehicle or that she granted him permission. Therefore, the Court will grant the Motion for Summary Judgment as to the claim for negligent entrustment against Christine.

Thomas and Christine also move for summary judgment on Count IV, negligence *per se* for a violation of 75 Pa. C.S. § 1574(a), though both parties view this claim as inextricably related to the negligent entrustment claim. That section,

dealing with "permitting unauthorized person[s] to drive," provides that "[n]o person shall authorize or permit a motor vehicle owned by him or under his control to be driven upon any highway by any person who is not authorized under this chapter or who is not licensed for the type or class of vehicle to be driven."[46] As noted above, the parties dispute whether Thomas permitted Alec to operate the vehicle and to what extent he was aware of Alec's driving history. Thus, consistent with the parties' treatment of the issues as intertwined, the Court denies the Motion for Summary Judgment on Count IV as it relates to Thomas and grants the Motion as it relates to Christine.

C. Plaintiff's Motion for Summary Judgment

Plaintiff's Motion for Summary Judgment against Alec avers that the undisputed facts of record are sufficient to establish not just negligence and negligence *per se* – which Alec has conceded – but also that he was reckless or that his conduct was "willful, wanton, outrageous, intentional and indifferent to the rights of" Decedent and Plaintiff. Such a determination would entitle Plaintiff to punitive damages in addition to compensatory damages.

Plaintiff acknowledges that evidence of operation of a vehicle under the influence of alcohol is not by itself sufficient to establish the availability of punitive damages as a matter of legal certainty. Rather, Plaintiff essentially argues for a "DUI plus" standard, contending that DUI in conjunction with either driving with a DUI-suspended license or driving at an excessive rate of speed is sufficient to establish recklessness or outrageous conduct warranting an award of punitive

[46] 75 Pa. C.S. § 1574.

damages. Plaintiff points to the following facts as establishing recklessness as a matter of law when taken in conjunction:

- Alec operated the company vehicle while intoxicated;
- Alec's driver's license was suspended due to a previous DUI;
- Alec operated the company vehicle at a speed between 109 and 118 miles per hour in a 55 mile per hour zone;
- Alec failed to keep reasonable lookout, maintain control of the vehicle, apply brakes, and prevent the collision, and in doing so violated multiple provisions of the Vehicle Code.

In response, Alec notes that he specifically disputes the police's calculation of his speed of travel at the time of the collision, and that he "doesn't remember much of the accident at all...." Alec contends that Plaintiff has not provided evidence that he failed to apply his brakes or take evasive measures. With regard to whether his conduct was willful, wanton, outrageous, intentional, or recklessly indifferent to the rights of others, Alec contends that a jury determination of his mental state is a prerequisite to such a finding. Plaintiff replies that because Alec admits he does not remember what occurred immediately prior to and during the collision, he is thus unable to identify "one or more issues of fact arising from evidence in the record controverting the evidence cited" by Plaintiff, as is required by Rule of Civil Procedure 1035.3(a)(1).

The Superior Court has long recognized that the choice to operate a vehicle under the influence of alcohol may justify an award of punitive damages depending on the specific facts of the case, even without establishing an evil motive or intent:

> "When automobiles are driven by intoxicated drivers, the possibility of death and serious injury increases substantially. Every licensed driver is aware that driving while under the influence of intoxicating liquor

> presents a significant and very real danger to others in the area.... In certain factual circumstances the risk to others by the drunken driver may be so obvious and the probability that harm will follow so great that outrageous misconduct [sufficient to justify punitive damages] may be established without reference to motive or intent. We conclude, therefore, that, under the appropriate circumstances, evidence of driving while under the influence of intoxicating liquors may constitute a sufficient ground for allowing punitive damages."[47]

Plaintiff has not cited a case in which a court has granted a motion for summary judgment finding that a civil defendant's actions in operating an automobile were so egregious as to establish recklessness as a matter of law. Rather, the litany of opinions addressing punitive damages in a DUI context typically address the question of whether the allegations are sufficient to warrant submission of the issue to a jury. It is possible for a defendant's criminal conviction to establish recklessness in a related civil case as a matter of law when recklessness was an element of the offense.[48] Here, however, Alec pled guilty to homicide by vehicle, DUI, and driving under suspension with a blood alcohol content of .02% or greater, none of which require proof of recklessness as an element.[49]

The Court cannot conclude that the record establishes the availability of punitive damages to a legal certainty, such that it would be appropriate to remove

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[47] *Focht v. Rabada*, 268 A.2d 157, 161 (Pa. Super. 1970). In *dicta*, the majority of a divided panel of the Superior Court noted its belief that "an intoxicated driver, proceeding at an excessive speed down a crowded thoroughfare where there are many pedestrians would clearly be liable for punitive damages," though it explained that the question of punitive damages is ultimately for the jury to decide.

[48] *See Straw v. Fair*, 187 A.3d 966, 996 n.17 (Pa. Super. 2018) (defendant's plea to recklessly endangering another person "constitutes 'conclusive evidence' in [related] civil proceeding" that defendant acted recklessly).

[49] Homicide by vehicle, 75 Pa. C.S. § 3732, requires "reckless[ness] or... gross negligence...." Generally, "where a tortfeasor's mental state rises to no more than gross negligence, punitive damages are not justified." *Vance v. 46 and 2, Inc.*, 920 A.2d 202, 207 (Pa. Super. 2007).

the question from the jury's consideration in the first instance. Certainly, if Plaintiff proves his allegations concerning the circumstances of the collision, the award of punitive damages will be justified; it is even possible that a jury's failure to award such damages may be against the weight of the evidence. Alec's admission of negligence and his criminal plea, however, are not sufficient by themselves to require an award of punitive damages as a matter of law. Although Alec has testified that he does not remember the circumstances of the collision and therefore is unable to supply his own specific version of events, it does not follow that a jury is required to accept the findings of law enforcement as conclusively true. Ultimately, the Court may only remove issues of fact from jury consideration in the clearest of cases; in the absence of controlling case law establishing that the circumstances presented here mandate a finding of punitive damages, the Court will allow the jury to consider the issue.

ORDER

For the foregoing reasons, the Court hereby ORDERS as follows:

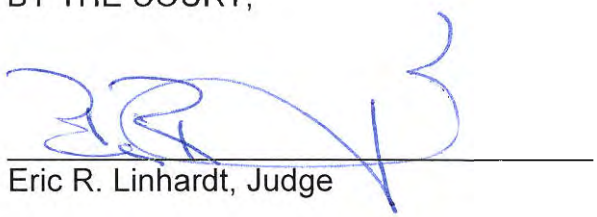
- The Motion for Summary Judgment of Defendants Steven Shannon and Steve Shannon Tire Company, Inc. is GRANTED IN PART as to all claims against Steven Shannon in his individual capacity, as Plaintiff has conceded there is no basis for a finding of individual liability. The Motion is DENIED IN PART as to all claims against Steve Shannon Tire Company, Inc.

- The Motion of the Defendants, Thomas A. Barnes and Christine M. Barnes, for Summary Judgment is DENIED as to Thomas A. Barnes and GRANTED as to Christine M. Barnes.

- Plaintiff's Motion for Summary Judgment is GRANTED IN PART as to claims of negligence and negligence *per se*, as Defendant Alec T. Barnes has conceded his negligence and negligence *per se*. The Motion is DENIED IN PART as to Plaintiff's claims for punitive damages.

IT IS SO ORDERED.

BY THE COURT,



Eric R. Linhardt, Judge

ERL/jcr
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