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**IN THE SECOND JUDICIAL DISTRICT COURT
IN AND FOR DAVIS COUNTY, STATE OF UTAH**

TIMOTHY D. SYMES; and AMY SYMES

Plaintiffs.

vs.

SHANICE C. BURCH, an individual; LUBE
MANAGEMENT CORP., a Utah Corporation;
PARTSCO, L.C., d/b/a MIGHTY AUTO
PARTS; and JOHN DOES 1-10

Defendants.

**PLAINTIFFS' OPPOSITION TO
DEFENDANTS' MOTION FOR PARTIAL
JUDGMENT AS A MATTER OF LAW**

Case No. 180701236
Judge Michael D. DiReda

Plaintiffs, by and through counsel, hereby submit their Opposition to Defendants' Motion
for Partial Judgment as a Matter of Law, as follows:

INTRODUCTION

Defendants seek judgment as a matter of law on the issue of punitive damages. Issues of fact exist and Defendants are not entitled to judgment on this issue as a matter of law. Rather, it should be submitted to the jury for determination. Accordingly, Defendants' Motion should be denied.

LEGAL STANDARD

Rule 50 of the Utah Rules of Civil Procedure governs judgments as a matter of law (formerly known as a directed verdict or judgment notwithstanding the verdict¹), and provides:

(a)(1) If a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue, the court may:

(a)(1)(A) resolve the issue against the party; and

(a)(1)(B) grant a motion for judgment as a matter of law against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue.

(a)(2) A motion for judgment as a matter of law may be made at any time before the case is submitted to the jury. The motion must specify the judgment sought and the law and facts that entitle the moving party to the judgment.

The Utah Supreme Court has further explained:

A trial court may properly grant a directed verdict **only** when reasonable minds would not differ on the facts to be determined from the evidence presented. **The trial court must assess those facts in a light most favorable to the party opposing the motion for directed verdict** and must conclude, as a matter of law, that they do not support the claim presented.

¹ Legal authority addressing the former "directed verdict" are therefore equally applicable to a motion for judgment as a matter of law.

Heslop v. Bank of Utah, 839 P.2d 828, 838 (Utah 1992) (emphasis added). “A directed verdict is in order if a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue.” *Jones v. Mackey Price Thompson & Ostler*, 2020 UT 25, ¶ 30, 469 P.3d 879, 887 (quotations and citation omitted), reh'g denied (July 13, 2020). “Under Utah law, a party who moves for a directed verdict has **the very difficult burden of showing that no evidence exists that raises a question of material fact.**” *Smith v. Fairfax Realty, Inc.*, 2003 UT 41, ¶ 12, 82 P.3d 1064, 1067 (quotations and citation omitted, emphasis added). “When considering a motion for a directed verdict, **the trial court must consider the evidence in the light most favorable to the party moved against, however, the court is not free to weigh the evidence** and thus invade the province of the jury, whose prerogative it is to judge the facts.” *Mahmood v. Ross*, 1999 UT 104, ¶ 18, 990 P.2d 933, 937 (quotations and citations omitted, emphasis added). Trial court rulings on motions for directed verdict are reviewed for correctness. *Jones*, 2020 UT 25.

ARGUMENT

Punitive damages can be awarded in this case in a number of ways. First, punitive damages are appropriate if Plaintiffs can demonstrate that Defendants’ conduct or omissions manifested a knowing and reckless indifference toward, and disregard of the rights of others (the “reckless indifference standard”). *See* Utah Code Ann. § 78B-8-201; MUJI 2d CV2026. Notably, the reckless indifference standard is not measured by legal requirements or burdens. While a law may impose a floor or minimum requirement, it does not establish whether conduct constitutes a knowing and reckless disregard of the rights of others.

Second, Plaintiffs are entitled to punitive damages against Defendant Burch if they can establish she was under the influence of meth to a degree that rendered her incapable of safely operating a vehicle (the “impairment standard”). UCA 78B-8-201(1)(B)(i).² Finally, Plaintiffs are entitled to punitive damages if they succeed on their claim for gross negligence against Ms. Burch, as “[r]ecklessness is subsumed in th[e] court’s definition of gross negligence. Thus, a party seeking punitive damages based on a proven claim of gross negligence, has already satisfied the reckless requirement of the punitive damages statute” (the “gross negligence standard”). *Daniels v. Gamma W. Brachytherapy, LLC*, 2009 UT 66, ¶ 43, 221 P.3d 256, 269. Gross negligence is defined as “the failure to observe even slight care; it is carelessness or recklessness to a degree that shows utter indifference to the consequences that may result.” *Id.* (citations and quotations omitted).

Critically, “[c]ase law **overwhelmingly** concludes that whether punitive damages are awarded **is generally a question of fact within the sound discretion and province of the jury.**” *Biswell v. Duncan*, 742 P.2d 80, 86 (Utah App. 1987) (emphasis added, citations omitted); *see also Holladay v. Storey*, 2013 UT App 158, 307 P.3d 584; *Long v. Stutesman*, 2011 UT App 438, 269 P.3d 178; *Burton Lumber & Hardware Co. v. Graham*, 2008 UT App 207, 186 P.3d 1012. “A determination must be made on the facts of each case whether the negligence complained of is of the sort that will support punitive damages.” *Wachocki v. Luna*, 2014 UT App 139, ¶ 22, 330 P.3d 717, 723. “This state has traditionally permitted recovery of punitive

² Importantly, the “limitations, standards of evidence, and standards of conduct of Subsection (1)(a) do not apply” to this claim. UCA 78B-8-201(1)(B)(i).

damages in personal injury cases” *Behrens v. Raleigh Hills Hosp., Inc.*, 675 P.2d 1179, 1185 (Utah 1983).

Here, genuine issues of fact exist which preclude judgment as a matter of law and mandate sending the question of punitive damages to the jury. This is particularly true given that the evidence must be viewed in a light most favorable to Plaintiffs, and all reasonable inferences must be drawn in their favor. Defendants’ motion must therefore be denied.

1. Defendants are not entitled to judgment as a matter of law with respect to the claim for punitive damages against Defendant Shanice Burch.

The question of punitive damages against Ms. Burch must go to the jury and Defendants are not entitled to judgment as a matter of law. Evidence presented in Plaintiffs’ case-in-chief establishes, at a minimum, that genuine issues of fact exist which the jury must weigh and consider. The question of punitive damages must therefore go to the jury.

The jury received the following relevant testimony:

- Admission from Shanice Burch (“Burch”) that driving a vehicle while under the influence of drugs or alcohol would not be safe.
- Admission from Burch that she habitually used meth on the weekends and at birthday parties.
- Admission from Burch that she used meth just 5 days before the crash, on the preceding weekend.
- Testimony from expert witness Braden Wyatt (“Wyatt”) that meth is highly addictive, and that in his experience someone that admitted to using meth on the weekends was likely unable to refrain from using meth during the week.

- Testimony from expert Wyatt that when someone is under the immediate effects of meth it impairs their driving abilities.
- Testimony from expert Wyatt that even after the very first use of meth, the user will experience withdrawal symptoms. These symptoms can last for 7 to 10 days. The withdrawal symptoms impair driving abilities.
- Testimony from Bruce Hinkle, Defendant Burch's supervisor ("Hinkle"), that he would not be surprised to learn that Burch used drugs and alcohol on the weekends because of her appearance, demeanor and the way she acted.

In addition to all the foregoing evidence, the jury heard from Burch and weighed her overall credibility and believability. Notably, they also were able to consider her appearance. Burch arguably looked like someone that is addicted to meth. Burch's credibility was diminished by her appearance, her refusal to admit she had a drug problem, and her conviction for theft by deception. It is entirely possible that the jury found her totally lacking in credibility and will disregard her testimony denying she was on meth on the day of the crash or the days just before the crash. *See* MUJI 2d CV121.

Burch testified that she knew driving under the influence of meth is dangerous. The Court is required to view all of the foregoing in a light favorable to Plaintiffs and draw all inferences in support of Plaintiffs. In doing so, it is clear that the jury can, and likely will conclude, either: (i) that Burch was lying about whether she was on meth at the time of the crash and find that she was directly under the influence of meth; or (ii) that Burch, at the very least, was experiencing meth withdrawal symptoms for earlier recent drug use that affected her ability to safely operate a motor-vehicle. Accordingly, there is a sufficient legal basis for punitive

damages under the reckless indifference standard, the impairment standard or the gross negligence standard.

In that regard, the fact that the police officer that investigated the crash did not suspect drug use is not dispositive but only one piece of the evidence. Expert Wyatt testified of the difficulties in recognizing impairment due to withdrawal symptoms and that police officers can miss such symptoms. The jury should consider the totality of the evidence to determine whether punitive damages are warranted. Accordingly, Defendants are not entitled to judgment as a matter of law and the motion must be denied.

2. Defendants are not entitled to judgment as a matter of law with respect to the claim for punitive damages against Defendant Lube Management.

Lube Management can be liable for punitive damages under the reckless indifference standard if its conduct or omissions manifested a knowing and reckless indifference toward, and disregard of the rights of others. *See* Utah Code Ann. § 78B-8-201; MUJI 2d CV2026. The question of punitive damages against Defendant Lube Management should go to the jury and Defendants' motion must be denied. Contrary to Defendants' argument in the their motion, there is ample evidence that Lube Management knowingly acted with reckless indifference. Evidence presented in Plaintiffs' case-in-chief establishes, at a minimum, that genuine issues of fact exist which the jury must weigh and consider in relation to Lube Management's conduct.

The jury received the following relevant testimony:

- Lube Management's policies and procedures manual (Stipulated Exhibit 1 - Tab 1 at 6) establishes that Lube Management has an obligation to assure safety in the distribution of its products and services:

Drug and Alcohol Policy

Lube Management Corp has an obligation to its employees and customers to take reasonable steps to assure safety in the workplace, safety and quality in the products and service it provides, and safety in its distribution.

- Lube Management’s policies and procedures manual (Stipulated exhibit 1 – Tab 1 at 6) establishes that Lube Management knew that employee drug use constitutes a safety risk:

Employees under the influence of narcotics, drugs, controlled substances or alcohol, or who possess the same on the job, have the potential for interfering with their own and/or co-workers’ safe and efficient job performance and the safety and security of any customer,

- Lube Management’s policies and procedures manual also establishes that Lube Management knew that off-the-job employee drug use constitutes a potential safety risk:

The use of illegal narcotics, drugs, controlled substances, alcohol or marijuana, in states where recreational use is legal, on personal time which affect an employee’s job performance, employee, customer, vendor or visitor safety is also a dischargeable offense.

- Testimony from Ted Neilson (Lube Management Vice President) (“Neilson”) and Hinkle (Lube Manager warehouse manager and Burch’s direct supervisor) and company documentation that Lube Management had a policy that required Lube

Management to obtain an individual's license, proof of insurance, and motor vehicle record before they were authorized to drive.

- Testimony from Neilson that the purpose of these policies was to ensure safety.
- Testimony from Ted Neilson that he agreed that putting drivers on the road that were not properly vetted or trained would be dangerous.
- Admissions from Neilson, Hinkle and Burch that Lube Management violated its policies and procedures and never obtained Burch's license, proof of insurance and motor vehicle record before allowing her to drive.
- Admission from Neilson that Burch was never authorized to drive for Lube Management.
- Admission from Neilson that he discovered Burch was driving without proper authorization, yet failed to stop her from continued driving for the company.
- Conflicting evidence as to how long Burch was driving for Lube Management prior to the crash.
- In failing to review Burch's MVR, Lube Management failed to discover that within a year before driving for Lube Management, Burch received a speeding ticket, and was cited for driving without a valid license, driving an unsafe vehicle, and causing an accident.
- Testimony from various witnesses and documentation that Lube Management had drug testing policies that required drug testing of employees upon reasonable suspicion, random testing, and on-the-job accidents.

- Testimony from Hinkle, that he would not be surprised to learn that Burch used drugs and alcohol on the weekends because of her appearance, demeanor and the way she acted. Despite this fact, Burch was never drug tested prior to the crash.
- Testimony by expert witness Doug Larsen (“Larsen”) that Lube Management does not have sufficient policies and procedures relative to supervising and training drivers that meets industry standards.
- Admission from Burch that prior to working for Lube Management she had never driven as part of a job and had never driven a panel van that lacked windows in the blind spots.
- Admissions from Burch, Neilson and Hinkle that they did not provide Burch any training on driving the panel van. There was additional disputed testimony whether any other safety training was provided.

The foregoing constitutes genuine issues of material fact that preclude judgment as a matter of law. Lube Management’s actions and omissions are both an extreme departure of care and done with the knowledge of the consequences. Lube Management acted knowingly because it understood the purposes and intent of its policies and procedures – to ensure safety. Lube Management knew that if its policies were not followed, there was a high degree of probability that it would result in harm to another. Lube Management’s failure to have sufficient policies, and its failure to follow the policies and procedures it did have, are therefore reckless and placed the public, including Plaintiff Tim Symes, at risk. This is particularly true given that Neilson discovered that Lube Management had not followed its policies in allowing Burch to drive and yet did nothing to stop her continued driving. Additionally, Bruce Hinkle’s observations about

Ms. Burch's appearance, the way she acted, and her demeanor that made him unsurprised about her usual drug use in combination with Lube Management's total failure to drug test Ms. Burch is reckless, and placed the public, including Plaintiff Tim Symes, at risk. Allowing Burch to drive when she was not authorized is highly unreasonable conduct, or an extreme departure from ordinary care. Under the totality of the circumstances and evidence, the jury could find that Lube Management demonstrated a knowing and reckless indifference toward and disregard of the rights of Utah drivers like Tim Symes. This evidence must be weighed and considered by the jury.

Lube Management argues that punitive damages are inappropriate because they "may be awarded only if they serve society's interest in 'punishing and deterring ... conduct which is not likely to be deterred by other means.'" See the Motion, p. 5 citing *Miskin v. Carter*, 761 P.2d 1378 (Utah 1998). This is precisely the case at hand. There are literally no other means or mechanisms besides this case and punitive damages to hold companies like Lube Management accountable for their failures to appropriately train drivers and adhere to their own safety policies and procedures. Lube Management makes no effort to train its drivers like Burch in either how to drive unfamiliar panel vans lacking windows in their blind-spots, or in driving in general. Lube Management knows that safety is important and supposedly enacted policies and procedures to ensure that safety. However, Lube Management admittedly failed to follow or enforce said policies with respect to Burch, even after learning of the ongoing violation of the policies.

Defendants conflate legal requirements to drive, a minimum threshold, with the standard of care. Punitive damages are routinely awarded for conduct that is not criminal. See, e.g. *Daniels v. Gamma W. Brachytherapy, LLC*, 2009 UT 66, ¶ 43, 221 P.3d 256, 269 (punitive

damages were appropriate against a doctor for administering too high a dose of radiation therapy); *Judge v. Saltz Plastic Surgery, PC*, 2014 UT App 144, 330 P.3d 126. Indeed, most of the punitive damages caselaw stems from cases involving breach of a fiduciary duty or other claims that do not involve any criminal activity. Rather, the standard is whether the conduct manifested a knowing and reckless indifference toward the rights of others. That conduct is not measured by whether or not it is criminal. Lube Management could have complied with minimum standards regarding licensing and still acted with knowing indifference towards the rights of Mr. Symes. Likewise, whether there are requirements mandating specific driver licensing based upon gross vehicle weight promulgated by the government is not the relevant issue.³ What is relevant is that Lube Management knew its policies and procedures and training were necessary to ensure safety. Despite that knowledge, Lube Management did not train Burch to drive, and allowed her to drive without compliance with its policies and procedures.

The Court is not allowed to weigh the evidence in this case. That is the prerogative of the jury. *Mahmood v. Ross*, 1999 UT 104, ¶ 18. There are genuine issues of material fact which preclude judgment as a matter of law. Further, Defendants specifically requested a jury trial. *See* Reliance on Jury Demand in Defendants' Answer to Amended Complaint. They should not now be allowed to circumvent that decision and ask the Court to decide this issue. Rather, these issues must go to the jury who can weigh the evidence and determine whether punitive damages are appropriate.

³ Critically, Doug Larsen clearly testified that Lube Management's existing policies and procedures and enforcement did not meet the standard of care established by industry standards.

CONCLUSION

Defendants cannot meet the “very difficult burden” of showing there are no genuine issues of material fact with respect to the claims for punitive damages. *Smith v. Fairfax Realty, Inc.*, 2003 UT 41, ¶ 12. Accordingly, the Motion must be denied and the jury should decide the issue of punitive damages.

DATED this 27th day of June 2022.

STEELE ADAMS HOSMAN

/s/ Jeff Steele

Jeffrey J. Steele
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on June 27, 2022, the foregoing was served on all counsel of record via the Court’s efilng system.

/s/ Jeff Steele

STEELE ADAMS HOSMAN