

**GARY BRUMLEY and JERRI BRUMLEY, individually and as husband and wife,
APPELLANTS v. TERRY L. KEECH, TROY BLASINGAME, and JAMES
ADAMS, individually and d/b/a J&R TRUCKING COMPANY, APPELLEES**

No. 11-874

SUPREME COURT OF ARKANSAS

2012 Ark. 263; 2012 Ark. LEXIS 282

June 14, 2012, Opinion Delivered

NOTICE:

THE LEXIS PAGINATION OF THIS DOCUMENT IS SUBJECT TO CHANGE PENDING RELEASE OF THE FINAL PUBLISHED VERSION.

PRIOR HISTORY: [**1]

APPEAL FROM THE CRAWFORD COUNTY CIRCUIT COURT, NO. CV2008-434. HONORABLE GARY COTTRELL, JUDGE.

DISPOSITION: AFFIRMED.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellants, husband and wife, challenged the judgment of the Crawford County Circuit Court, Arkansas, granting the motion for directed verdict filed by appellees, trucking company and driver.

COUNSEL: For Appellant: Phillip J. Milligan.

For Appellee: Paul D. Waddell, Matthew Scott Jackson, Joseph Barrett Deacon, Lauren Oswalt Baber.

JUDGES: JIM HANNAH, Chief Justice.

OPINION BY: JIM HANNAH

OPINION

[*1] This case stems from an accident involving an automobile and a tractor-trailer. The driver of the automobile, appellant Gary Brumley and his wife, appellant Jerri Brumley, filed suit against appellees Terry Keech, Troy Blasingame, and James Adams, individually and d/b/a J&R Trucking Company,¹ alleging negligence and requesting punitive damages for alleged violations of the Federal Motor Carrier Safety Regulations ("FMCSR"). Before trial, appellees moved for partial summary judg-

ment as to punitive damages, and if that motion was denied, then to bifurcate the issue of punitive damages pursuant to *Arkansas Code Annotated section 16-55-211* (Repl. 2005). After a hearing, the circuit court entered an order excluding evidence of appellees' failure to conduct post-accident drug-and-alcohol testing and reserving [*2] its ruling on evidence of other alleged violations of the FMCSR. The order did not address the motion to bifurcate.

1 The tractor-trailer, which was leased by Blasingame from appellee Adams d/b/a J&R Trucking Company, was driven by Keech.

At trial, [*2] appellants presented the testimony of Larry Cole, a trucking-industry expert, who claimed that appellees failed to follow certain industry standards by exceeding the allowed drive-time and failing to keep logbooks. At the conclusion of appellants' case, appellees moved for a directed verdict with regard to punitive damages, contending that even if they were required to follow these standards, their failure to do so was not a cause of the accident. Appellants responded that the directed-verdict motion was premature because appellees had asked to bifurcate the proceedings to exclude from the compensatory-damages phase of the trial evidence that was relevant only to punitive damages. In other words, appellants claimed that they had not yet been given the opportunity to present evidence satisfying the punitive-damages standard. The circuit court granted the motion for directed verdict, stating that it had not yet made rulings to exclude certain evidence as appellants had assumed.

On appeal, appellants contend that the circuit court abused its discretion by excluding evidence of appellees' failure to comply with the requirements for post-accident-testing for controlled substances, as set [*3] forth in the FMCSR. They also contend that the circuit court erred in granting appellees' motion for directed verdict because when a trial is bifurcated, it is

improper to enter a directed verdict on a punitive-damages claim at the close of the compensatory-damages phase of the trial. We affirm the circuit court.

Appellants first contend that the circuit court abused its discretion by excluding [*3] evidence of appellees' failure to comply with the FMCSR for post-accident-testing for controlled substances. Appellees respond that the circuit court's decision to exclude evidence related to those regulations was proper because the conduct alleged to constitute FMCSR violations was not causally related to the accident.

[HN1] The decision to admit or exclude evidence is within the sound discretion of the circuit court, and we will not reverse that decision absent a manifest abuse of discretion. *See, e.g., Yeakley v. Doss*, 370 Ark. 122, 257 S.W.3d 895 (2007). The standard for awarding punitive damages is set forth in *Ark. Code Ann. § 16-55-206* (Repl. 2005):

[HN2] In order to recover punitive damages from a defendant, a plaintiff has the burden of proving that the defendant is liable for compensatory damages [**4] and that either or both of the following aggravating factors were present and related to the injury for which compensatory damages were awarded:

(1) The defendant knew or ought to have known, in light of the surrounding circumstances, that his or her conduct would naturally and probably result in injury or damage and that he or she continued the conduct with malice or in reckless disregard of the consequences from which malice may be inferred; or

(2) The defendant intentionally pursued a course of conduct for the purpose of causing injury or damage.

[HN3] Punitive damages may be awarded when a tortfeasor has acted with malice, intent to cause injury, or with conscious indifference such that malice could be inferred. *E.g., S. Cnty., Inc. v. First W. Loan Co.*, 315 Ark. 722, 871 S.W.2d 325 (1994). In law, malice is not necessarily personal hate; it is, rather, an intent and disposition to do a wrongful act greatly injurious to another. *E.g., Fegans v. Norris*, 351 Ark. 200, 89 S.W.3d 919 (2002).

The circuit court excluded evidence of appellees' failure to comply with the post-accident-testing requirements based on its finding that the evidence was "not the type of [*4] conduct in which malice can [be] [**5]

inferred." Appellants assert that evidence of appellees' failure to comply with the FMCSR post-accident-testing requirements, *see 49 C.F.R. § 382.303*, is evidence of conscious indifference such that malice could be inferred and would support a punitive-damages award.

[HN4] The FMCSR apply to "all employers, employees, and commercial motor vehicles, which transport property or passengers in interstate commerce." *49 C.F.R. § 390.3(a)*.² Pursuant to the post-accident controlled-substances testing requirements of the FMCSR,

[HN5] (b) As soon as practicable following an occurrence involving a commercial motor vehicle operating on a public road in commerce, each employer shall test for controlled substances for each of its surviving drivers:

(1) Who was performing safety-sensitive functions with respect to the vehicle, if the accident involved the loss of human life; or

(2) Who receives a citation within thirty-two hours of the occurrence under State or local law for a moving traffic violation arising from the accident, if the accident involved:

(i) Bodily injury to any person who, as a result of the injury, immediately receives medical treatment away from the scene of the accident; or

(ii) One or more motor [**6] vehicles incurring disabling damage as a result of the accident, requiring the motor vehicle to be transported away from the scene by a tow truck or other motor vehicle.

....

[*5] (d)(2) Controlled substance tests. If a test required by this section is not administered within 32 hours following the accident, the employer shall cease attempts to administer a controlled substances test, and prepare and maintain on file a record stating the reasons the test was not promptly administered. Records shall be submitted to the FMCSA upon request.

49 C.F.R. § 382.303.

2 We note appellees' threshold argument is that the post-accident-testing requirements are inap-

plicable because appellees are *intrastate* haulers and not *interstate* haulers. At trial, the parties disputed the applicability of the FMCSR, but the circuit court did not resolve the dispute. Addressing appellees' threshold argument would require this court to engage in factfinding. [HN6] Appellate jurisdiction does not permit this court to make findings of fact. *E.g., Looper v. Madison Guar. Sav. & Loan Ass'n*, 292 Ark. 225, 729 S.W.2d 156 (1987). Accordingly, for the purposes of this appeal, we will assume that the FMCSR apply.

While we have not [**7] previously considered whether a violation of 49 C.F.R. § 382.303 would support an award of punitive damages, we find persuasive the reasoning of the United States District Court for the Southern District of Mississippi in *Abdul v. Logistics Express, Inc., No. 1:07CV1186-LG-RHW*, 2009 U.S. Dist. LEXIS 129981, 2009 WL 6965088 (S.D. Miss. July 8, 2009), cited to this court by appellees. In *Abdul*, a case involving an accident between a tractor-trailer and a vehicle, the plaintiff contended that the defendants' failure to ensure that an alcohol test was administered to the tractor-trailer driver, as required by 49 C.F.R. § 382.303, and their failure to maintain certain documents concerning the accident in violation of 49 C.F.R. § 379.13 would support an award for punitive damages. The United States District Court for the Southern District of Mississippi disagreed, stating that the alleged violations of the regulations occurred after the accident, and there was no indication that the violations contributed to or caused the accident, particularly since there was no evidence the driver had been drinking alcohol prior to the accident. Accordingly, the

federal district court concluded that the alleged violations did not support [**8] a punitive-damages award.

Likewise, in the instant case, the alleged violations of 49 C.F.R. § 382.303 occurred after the accident and there is no indication that the violations contributed to or caused the accident. Moreover, there was no evidence that Keech had been drinking alcohol or using [**6] controlled substances prior to the accident or that he was, or appeared to be, under the influence of alcohol or any controlled substances at the time of the accident. Here, the alleged violations do not support a punitive-damages award. We hold that the circuit court did not abuse its discretion in excluding evidence that appellees failed to comply with the post-accident-testing requirements of the FMCSR.

Appellants next contend that the circuit court erred in granting appellees' motion for directed verdict on punitive damages. Appellants would have this court declare that, when a motion to bifurcate is granted pursuant to *Arkansas Code Annotated section 16-55-211*, it is per se improper for a circuit court to enter a directed verdict on a punitive-damages claim at the close of the compensatory-damages phase of a trial. Appellants' argument is based on the premise that the trial was bifurcated. [**9] The circuit court never ruled on appellees' motion to bifurcate, and a review of the record reveals that the trial was not, in fact, bifurcated. As such, were we to address appellants' point on appeal, which is premised on bifurcation, any opinion we could offer would only be advisory. [HN7] This court does not issue advisory opinions. *E.g., Bakalekos v. Furlow*, 2011 Ark. 505, S.W.3d .

Affirmed.