COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO

WILLIAM A. BROWNE, ET AL.	:	
Plaintiffs	:	**CASE NO. 2016 CVC 01176**
vs.	:	**Judge McBride**
AMANDA M. HUFF, ET AL.	:	**DECISION/ENTRY**
Defendants	:	

Jeffry D. Ferguson, 424 West Plane Street, Bethel, Ohio 45106, and James B. Galbreath, 50 North Fort Thomas Avenue, Fort Thomas, Kentucky 41075, counsel for the plaintiffs William A. Browne and Jerrie Burch Browne,

Keating Muething & Klekamp PLL, Louis F. Gilligan and Michael T. Cappel, counsel for the defendants Amanda M. Huff and Rumpke Transportation Company, LLC, 1 East 4th Street, Suite 1400, Cincinnati, Ohio 45202

This cause is before the court for consideration of the motion for partial summary judgment filed by the defendants Amanda M. Huff and Rumpke Transportation Company, LLC on July 14, 2017.

The plaintiffs filed their memorandum in opposition to the defendants' motion for summary judgment on August 24th. On September 8th, the defendants filed their reply in support of their motion. Oral arguments as to the motion were heard on October 27, 2017. At the conclusion of the oral arguments of counsel, the court took the motion under advisement.

Upon consideration of the motion, the record of the proceedings, the evidence before the court, the written arguments of counsel, and the applicable law, the court now renders this written decision.

FACTS OF THE CASE AND PROCEDURAL BACKGROUND

Initially, the court notes that the parties cite to portions of the defendant Amanda M. Huff's deposition testimony to support their arguments. The plaintiffs noted in their evidentiary filing in opposition to the defendants' motion that they would be filing Huff's deposition when it became available. However, the plaintiffs ultimately did not file Huff's deposition with the court, and it is not of record. Therefore the court cannot rely on Huff's deposition testimony to discern the undisputed facts, nor may either party rely upon Huff's deposition testimony to create a genuine issue of material fact.

This case stems from a vehicular accident that occurred on August 26, 2014 on Bethel-New Richmond Road in Clermont County, Ohio involving vehicles operated by the plaintiff William Browne and the defendant Amanda Huff.[1] Browne was driving a pickup truck and Huff was driving a garbage truck for the defendant Rumpke Transportation Company, LLC (hereinafter referred to as "Rumpke").[2]

Huff was traveling east on Bethel-New Richmond Road as she approached Browne's vehicle, which was being operated in the opposite direction.[3] Huff was driving near the right, outer white line of her lane.[4] When she saw Browne's vehicle approaching,

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[1] W. Cole Aff., ¶ 2.
[2] W. Cole Aff., ¶ 2.
[3] Defs. Ex. A.
[4] Defs. Ex. A.

she drove farther to the right.[5] Huff hit a dip in the road and the truck headed into the direction of Browne's pickup truck.[6] The Rumpke truck then hit Browne's pickup truck.[7]

As a result of the accident, Browne's left front wheel assembly was torn away, and the engine was removed from its mounts.[8] Browne avers that William Cole, a Rumpke Regional Safety Manager, arrived after the accident and said the accident was Rumpke's fault and Rumpke would "make it right."[9] Cole maintains that he did not say this to Browne.[10]

Additionally, Browne indicated to Cole that he was unhurt, except for a minor injury to his left elbow.[11] Browne's glasses were damaged, and he had nicks and cuts on his face and left arm from glass.[12] Browne told the fire department that he did not need to be taken to the hospital.[13] Huff was subsequently tested and found not to be under the influence of alcohol or drugs at the time of the accident.[14]

Four months before the accident, on April 13, 2014, a Rumpke shop ticket notes that the U-joint in the steering shaft "have [has] play."[15] The U-joint was repaired and greased prior to the accident on August 13th.[16] A shop ticket from July 14th also notes that the "steering gear has play."[17] The steering gear was not replaced, and the mechanic who made this notation testified that the steering gear did not need immediate

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[5] Defs. Ex. A; W. Browne Aff., ¶ 3.
[6] Defs. Ex. A; W. Browne Aff., ¶ 4.
[7] Defs. Ex. A; W. Browne Aff., ¶ 7.
[8] W. Browne Aff., ¶ 8.
[9] W. Browne Aff., ¶ 14.
[10] W. Cole Aff., ¶ 4.
[11] W. Cole Aff., ¶ 3.
[12] W. Browne Aff., ¶ 10.
[13] W. Cole Aff., ¶ 3.
[14] W. Cole Aff., ¶ 5.
[15] Pls. Ex. 2.
[16] Pls. Ex. 4.
[17] Pls. Ex. 3.

replacement at that time.[18] Two months after the accident, on October 22nd, a Rumpke shop ticket notes that a steering gear on the Rumpke truck was replaced.[19]

On August 24, 2016, the plaintiffs William Browne, and his wife, Jerrie Burch Browne, filed a complaint against the defendants Huff, Rumpke, and Depositors Insurance Company. The complaint includes a cause of action for negligence against Huff and Rumpke, a claim for uninsured/underinsured motorist coverage and medical payments coverage against Depositors Insurance Company, a claim for loss of consortium, and a request for punitive damages against Huff and Rumpke. Depositors Insurance Company cross-claimed against Huff and Rumpke on a subrogation claim, but later voluntarily dismissed the claim as to Huff.

On July 14, 2017, Huff and Rumpke filed a motion for summary judgment against the plaintiffs on the issue of punitive damages.

LEGAL STANDARD

The court must grant summary judgment, as requested by a moving party when:

> "(1) No genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to the party opposing the motion."[20]

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[18] C. Elliott Aff., ¶ 5.
[19] Pls. Ex. 5.
[20] *Temple v. Wean United, Inc.*, 50 Ohio St.2d 317, 327, 364 N.E.2d 267 (1977). *See Davis v. Loopco Indus., Inc.*, 66 Ohio St.3d 64, 65-66, 609 N.E.2d 144 (1993) (holding same); Civ.R. 56(C).

The court must view the evidence in a light most favorable to the nonmoving party.[21] Even the inferences drawn from the evidence and underlying facts must be construed in favor of the nonmoving party, such as inferences drawn from affidavits, depositions, etc.[22] A fact is material when, under the governing substantive law, the facts "might affect the outcome of the suit."[23]

Whether a genuine issue exists is answered by the following inquiry: Does the evidence present "a sufficient disagreement to require submission to a jury" or is it "so one-sided that the party must prevail as a matter of law"?[24] This threshold inquiry determines whether there are "any genuine factual issues that can properly be resolved only by a finder of fact because they may reasonably be resolved in favor of either party."[25]

The movant bears the burden to show that no genuine issue exists as to any material fact, and it is entitled to judgment as a matter of law.[26] This burden requires the movant to "specifically delineate the basis upon which summary judgment is sought in order to allow the opposing party a meaningful opportunity to respond."[27] If the movant fails to satisfy its initial burden, the motion for summary judgment must be denied.[28]

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[21] *Welco Indus. Inc. v. Applied Cos.*, 67 Ohio St.3d 344, 356, 617 N.E.2d 1129 (1993); *Willis v. Frank Hoover Supply*, 26 Ohio St.3d 186, 188, 497 N.E.2d 1118 (1986); *Williams v. First United Church of Christ*, 37 Ohio St.2d 150, 152, 309 N.E.2d 924 (1974).
[22] *Hannah v. Dayton Power & Light Co.*, 82 Ohio St.3d 482, 485, 696 N.E.2d 1044 (1998), citing *Turner v. Turner*, 67 Ohio St.3d 337, 341, 617 N.E.2d 1123 (1993).
[23] *Anderson v. Liberty-Lobby Inc.* 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202, 211 (1986).
[24] Id. at 251-52.
[25] Id. at 250.
[26] *AAAA Enterprises, Inc. v. River Place Community Urban Redevelopment Corp.*, 50 Ohio St.3d 157, 161, 553 N.E.2d 597 (1990); *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 66, 375 N.E.2d 46 (1978).
[27] *Mitseff v. Wheeler*, 38 Ohio St.3d 112, 526 N.E.2d 798 (1988), syllabus.
[28] Id. *See HSBC Mtge. Serve. v. Williams*, 12th Dist. Butler No. CA2013-09-174, 2014-Ohio-3778, ¶ 8 (holding same).

However, if the movant satisfies this burden, then the nonmoving party has a "reciprocal burden" to set forth specific facts, beyond the allegations and denials in his pleadings, demonstrating that a "triable issue of fact" remains.[29] The duty of the nonmoving party is more than that of resisting the motion's allegations.[30] Instead, this burden requires the nonmoving party to "produce evidence on any issue for which [the nonmoving] party bears the burden of production at trial."[31] The nonmoving party must present documentary evidence of specific facts showing that there is a genuine issue for trial.[32] It may not rely on the pleadings or unsupported allegations.[33]

Under Civ.R. 56(C), the only evidence that may be considered when ruling on a motion for summary judgment is "pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action."[34] The trial court maintains the sound discretion to admit or exclude relevant evidence.[35] When a document falls outside the enumerated categories in Civ.R. 56(C), the correct method to introduce the document is to incorporate it by reference into a properly framed affidavit.[36]

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[29] *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 662 N.E.2d 264 (1996).
[30] *Wells Fargo*, 2013-Ohio-855 at ¶ 25.
[31] (Citation omitted.) *Wing v. Anchor Media Ltd. Of Texas*, 59 Ohio St.3d 108, 570 N.E.2d 1095 (1991), paragraph three of the syllabus; *See Welco Indus., Inc.*, 67 Ohio St.3d at 346 (holding same).
[32] *Williams*, 2014-Ohio-3778 at ¶ 8. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).
[33] Id.
[34] *See Wells Fargo*, 2013-Ohio-855 at ¶ 15, citing *State ex rel. Varnau v. Wenninger*, 12th Dist. Brown No. CA2009-02-2010, 2011-Ohio-3904, ¶ 7 ("Civ.R. 56(C) provides an exclusive list of materials that a trial court may consider when deciding a motion for summary judgment.").
[35] *Green Tree Servicing, L.L.C. v. Roberts*, 12th Dist. Butler No. CA2013-03-039, 2013-Ohio-5362, ¶ 18, quoting *U.S. Bank v. Bryant*, 12th Dist. Butler No. CA2012-12-266, 2013-Ohio-3993, ¶ 10.
[36] *Martin v. Central Ohio Transit Auth.*, 70 Ohio App.3d 83, 89, 590 N.E.2d 411 (10th Dist.1990); *Biskupich v. Westbay Manor Nursing Home*, 33 Ohio App.3d 220, 222, 515 N.E.2d 632 (8th Dist.1986).

Opposing and supporting affidavits must be based on personal knowledge, must set forth facts as would be admissible into evidence, and must affirmatively show that the affiant is competent to testify on the matters in the affidavit.[37] "Personal knowledge" is defined as "[k]nowledge of the truth in regard to a particular fact or allegation, which is original and does not depend on information or hearsay."[38] "Absent evidence to the contrary, an affiant's statement that his affidavit is based on personal knowledge will suffice to meet the requirements of Civ.R. 56(E)."[39] Furthermore, if the affiant does not specifically state that he or she has personal knowledge, "personal knowledge may be inferred from the contents of the affidavit."[40]

By contrast, if certain statements in the affidavit "suggest that it is unlikely that the affiant had personal knowledge" of the facts, then "something more than a conclusory averment that the affiant has personal knowledge would be required."[41] Likewise, affidavits that merely set forth legal conclusions or opinions without stating supporting facts are insufficient to satisfy Civ.R. 56(E).[42]

Civ.R. 56(E) provides that "[s]worn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith." Thus, documents referenced in the affidavit "must be attached to the affidavit."[43] If the affiant "relies" on

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[37] Civ.R. 56(E); *Wells Fargo v. Smith*, Blue Sky L. Rep. P 75.026, 2013-Ohio-855, ¶ 16 (12th Dist.).
[38] *Wells Fargo*, 2013-Ohio-855 at ¶ 16.
[39] Id., citing *Churchill v. G.M.C.*, 12th Dist. No. CA2002-10-263, 2003-Ohio-4001, ¶ 11.
[40] Id.
[41] Id., quoting *Bank One, N.A. v. Swartz*, 9th Dist. No. 03CA008308, 2004-Ohio-1986, ¶ 14.
[42] *Stamper v. Middletown Hosp. Assn.*, 65 Ohio App.3d 65, 69, 582 N.E.2d 1040 (12th Dist.1989).
[43] *Wells Fargo*, 2013-Ohio-855 at ¶ 17, citing Civ.R. 56(E).

documents in the affidavit but fails to attach those documents, "the portions of the affidavit that reference those document[s] must be stricken."[44]

Because summary judgment is a procedural device designed to terminate litigation where there is nothing to try, it must be awarded with caution, and doubts must be resolved in favor of the nonmoving party.[45] Summary judgment is inappropriate when the facts are subject to reasonable dispute when viewed in a light favorable to the nonmoving party.[46]

LEGAL ANALYSIS

Punitive damages are a type of damages that arise incidentally to compensable harm.[47] They can be awarded in civil tort actions involving fraud, malice, or insult.[48]

Punitive damages serve two purposes, punishing the tortfeasor and deterring similar conduct.[49] Because "punitive damages are assessed for punishment and not compensation, a positive element of conscious wrongdoing is always required."[50]

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[44] Id. at ¶ 16, citing *Third Federal S. & L. Assn. of Cleveland v. Farno*, 12th Dist. No. CA2012-04-028, 2012-Ohio-5245, ¶ 10. *See State ex rel. Varnau v. Wenninger*, 12th Dist. Brown No. CA2009-02-010, 2011-Ohio-3904 (striking portions of affidavit where documents were reviewed and relied upon in drafting affidavit but not attached to the affidavit or served with it).
[45] *Loopco Indus., Inc.*, 66 Ohio St.3d at 66, 609 N.E.2d at 145.
[46] *Mers v. Dispatch Printing Co.*, 19 Ohio St.3d 100, 105-06, 483 N.E.2d 150 (1985).
[47] *Whetstone v. Binner*, 146 Ohio St.3d 395, 2016-Ohio-1006, 57 N.E.3d 1111, ¶ 20, citing *Niskanen v. Giant Eagle, Inc.*, 122 Ohio St.3d 486, 2008-Ohio-3626, 912 N.E.2d 595, ¶¶ 12-13.
[48] *Detlin v. Chockley*, 70 Ohio St.2d 134, 136, 436 N.E.2d 208 (1982), citing *Roberts v. Mason*, 10 Ohio St. 277 (1859).
[49] *Whetstone*, 2016-Ohio-1006 at ¶ 15, citing *Moskovitz v. Mt. Sinai Med. Ctr.*, 69 Ohio St.3d 638, 651, 635 N.E.2d 331 (1994).
[50] *Preston v. Murty*, 32 Ohio St.3d 334, 335, 512 N.E.2d 1174 (1987).

As such, punitive damages are always "something more than mere negligence."[51] There must be a finding of "actual malice."[52] Indeed, "it is necessary that defendants' conduct was 'conscious, deliberate or intentional' and that defendants 'posess[ed] knowledge of the harm that might be caused by [their] behavior.'"[53]

Pursuant to R.C. 2315.21(C), in order to recover punitive damages from a defendant in a tort action, the following must apply:

> "(1) The 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.
>
> (2) The trier of fact has returned a verdict or has made a determination pursuant to division (B)(2) or (3) of this section of the total compensatory damages recoverable by the plaintiff from that defendant."[54]

The plaintiff bears the burden of establishing entitlement to punitive damages by clear and convincing evidence.[55] Generally, those who maliciously commit acts are unlikely to admit they did so maliciously.[56] As such, Ohio courts acknowledge that, to prove actual malice, most often the fact finder must examine the surrounding circumstances in order to infer malice form the tortfeasor's conduct.[57]

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[51] Id.
[52] *Whitson v. One Stop Rental Tool and Party*, 2017-Ohio-418, 84 N.E.3d 84, ¶ 26 (12th Dist. 2017), citing *Calmes v. Goodyear Tire & Rubber Co.*, 61 Ohio St.3d 470, 473, 575 N.E.2d 416 (1991).
[53] *MacNeill v. Wyatt*, 917 F.Supp.2d 726, 730, (S.D. Ohio 2013), quoting *Preston*, 512 N.E.2d at 1176.
[54] R.C. 2315.21(C).
[55] R.C. 2315.21(D)(4); *Whetstone*, 2016-Ohio-1006 at ¶ 20, citing R.C. 2315.21(D)(4).
[56] *Edmonson v. Steelman*, 87 Ohio App.3d 455, 458, 622 N.E.2d 661 (12th Dist. 1992), citing *Columbus Finance, Inc. v. Howard*, 42 Ohio St.2d 178, 184, 327 N.E.2d 654 (1975).
[57] *Detling*, 70 Ohio St.2d at 137, citing *Davis v. Tunison*, 168 Ohio St. 471, 475, 155 N.E.2d 904 (1959).

As stated in R.C. 2315.21(C)(1), when punitive damages are not based on fraud, they must be based on malice. The Ohio Supreme Court has defined "actual malice" as meaning "(1) that state of mind under which a person's conduct is characterized by hatred, ill will, or a spirit of revenge, *or* (2) a conscious disregard for the rights and safety of other persons that has a great probability of causing substantial harm."[58] When dealing with a great probability of causing substantial harm, a "great probability" cannot be equated with "mere foreseeability."[59] So too, "[a] possibility or even probability of harm is not enough as that requirement would place the act in the realm of negligence."[60]

"Before submitting the issue of punitive damages to a jury, a trial court must review the evidence to determine if reasonable minds can differ as to whether the party was aware his or her act had a great probability of causing substantial harm."[61] Moreover, "the court must determine that sufficient evidence is presented revealing that the party consciously disregarded the injured party's rights or safety."[62]

As mentioned, more than mere negligence is required before actual malice can be found. This principle applies in automobile accident cases as well. The type of aggravated circumstances sufficient to support an award of punitive damages in a motor

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[58] (Emphasis original.) *Zoppo v. Homestead Ins. Co.*, 71 Ohio St.3d 552, 558, 644 N.E.2d 397 (1994), quoting *Preston*, 32 Ohio St.3d at the syllabus. *See Whetstone*, 2016-Ohio-1006 at ¶ 16, quoting *Rubeck v. Huffman*, 54 Ohio St.2d 20, 23, 274 N.E.2d 411 (1978) (Internal citations omitted.) ("Ohio law is well settled that punitive damages are available for personal injury or property loss caused by malice or intentional, reckless, wanton, willful and gross acts.").
[59] *Calmes*, 61 Ohio St.3d at paragraph two of the syllabus.
[60] *Whitson*, 2017-Ohio-418 at ¶ 26, citing *Preston*, 32 Ohio St.3d at 336.
[61] *Whitson*, 2017-Ohio-418 at ¶ 26, citing *Preston*, 32 Ohio St.3d at 336.
[62] *Whitson*, 2017-Ohio-418 at ¶ 26, citing *Preston*, 32 Ohio St.3d at 336.

vehicle accident may include intoxication and deliberate actions to flee a scene or evade responsibility, among others.[63]

In examining the present case, there is no allegation of fraud or insult. Therefore, the punitive damages award must necessarily rest on the presence of malice. First, the plaintiffs have not argued that Huff, by herself, acted maliciously. The defendants have argued, and by citing to her statement made to Rumpke after the accident, have submitted evidence that Huff overcorrected the Rumpke truck when she went off the right shoulder and swerved into Browne's lane. Under the evidence presented, there are simply no actions by Huff in the record that would allow the court to find that reasonable minds could conclude that Huff may be subject to punitive damages. As such, the remaining issue is whether Rumpke may be liable for punitive damages.

As quoted in R.C. 2314.21(C), to obtain punitive damages under Ohio law against an employer, an employer must knowingly authorize or participate in the malicious actions of its employee. Since there is no evidence that Huff engaged in malicious actions, Rumpke cannot be held liable for maliciously authorizing or participating in those actions. Thus, if Rumpke is to be held liable for punitive damages, it must be because it directly acted maliciously.

The plaintiffs have three bases as to why Rumpke, in and of itself, acted with malice.[64] The first is that Rumpke knew the steering gear had play but failed to replace it

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[63] *MacNeill*, 917 F.Supp.2d at 730, citing Cabe *v. Lunich*, 70 Ohio St.3d 598, 640 N.E.2d 159, 163 (1994), *Cappara v. Schibley*, 85 Ohio St.3d 403, 709 N.E.2d 117, 120 (1999), *Estate of Beavers v. Knapp*, 175 Ohio App.3d 758, 889 N.E.2d 181, 190 (10th Dist. 2008).

[64] The plaintiffs did set forth additional bases in their brief, those being that Rumpke negligently entrusted Huff with the garbage truck and that it negligently hired her. However, those theories cannot be create a genuine issue of material fact because the evidence cited by the plaintiffs in support of this theory was Huff's deposition testimony, which is not part of the record.

before the August 26, 2014 accident. As an initial matter, the defendants have satisfied their burden of showing that there was no malice by pointing to facts in the record that this is a case of, at most, simple negligence by Huff. However, the plaintiffs have failed to produce contrary evidence to show that Rumpke's actions may have demonstrated actual malice.

The question before the court is, based on the undisputed evidence of record, whether reasonable minds could find that Rumpke acted with a conscious disregard for the rights and safety of other persons that has a great probability of causing substantial harm by allowing its garbage truck to be used while its steering gear had play. Something more than mere negligence is always required to support an award of punitive damages, but the Rumpke shop note noting the steering gear has play is insufficient to create a genuine issue of material fact. Although the shop note states that the steering gear has play, there is no context to provide meaning to that finding. For example, there is no indication as to what it means to "have play." The defendants submitted evidence in the form of affidavit testimony from Cody Elliott, the Rumpke mechanic who made the notation. Elliott avers that the note does not mean that the steering gear needed immediate replacement. Further, the defendants note that federal regulations permit commercial motor vehicles steering systems to have some play.[65]

The plaintiffs have not produced any evidence to the contrary to create a genuine issue of material fact as to whether it was dangerous to allow the steering gear to have play. The statement that the steering gear has play is not akin to a notation that the brakes do not work, for example. In other words, the notation that the steering gear has

[65] *See* 49 C.F.R. 393.209; E. Bischoff Aff., ¶ 3.

play is not a notation that allows the court to make a clear inference as to its meaning and whether it is a problem of a major or minor degree, or not a problem at all. It is an automotive term, and its significance is not patently obvious. The only context the court has for the meaning of this note is that provided by the defendants, whose mechanic claims it is not problematic to "have play" in the steering gear, and who states the steering gear did not need to be replaced at that time.

The plaintiffs suggested in oral argument that this issue was not ripe, as they could have experts testify on the matter at trial. However, if expert testimony was necessary to create a genuine issue of material fact in order to discern the meaning of the notation in the Rumpke shop note, then the plaintiffs should have submitted such opinions in opposition to this motion. Furthermore, there is no evidence suggesting that it was the steering gear that caused the accident, as opposed to purely a driver error. Accordingly, when the court views the undisputed facts in a light most favorable to the plaintiffs, reasonable minds can come to but one conclusion, and that conclusion is that Rumpke did not consciously disregard the rights and safety of other persons, such that there was a great probability of causing substantial harm, by allowing its garbage truck to be used while having steering gear with play.

The plaintiffs' second basis for punitive damages is that Rumpke was unable to produce certain maintenance records regarding the Rumpke truck in question.[66] By law, Rumpke was required to maintain the maintenance records for the truck up until 60 days after the accident.[67] Rumpke maintained such records until 90 days after the accident,

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[66] Pls. Ex. 6.
[67] Pls. Ex. 6.

and it produced those reports to the plaintiffs.[68] The plaintiffs also requested driver inspection reports ("DIRs") for the 60 days before the accident.[69] DIRs are made by the drivers of the Rumpke trucks twice per day to report any issues so that they can be fixed.[70] Rumpke was not able to produce them for the truck involved in the accident.[71] Federal law did not require Rumpke to retain the DIRs past 90 days after the accident, and pursuant to Rumpke's retention policies, it had destroyed the DIRs before this law suit was filed.[72]

Rumpke explained that it did not retain the records in this case, beyond the federally prescribed time, based on the fact that it had no notice of Browne's injuries and because of its retention policy. It does not retain the DIRs beyond the 90 day period because it has 1,600 commercial garbage trucks, and the DIRs are completed twice daily for each truck. Further, at the time of the accident Browne refused medical treatment on the scene, and it was not until more than a year later that counsel for the plaintiffs contacted Rumpke's third party adjuster to impart that Browne allegedly sustained serious injuries from the accident. The plaintiffs filed this action on August 24, 2016, two years after the accident, and long after the DIRs had been destroyed pursuant to Rumpke's retention policy.

The conduct the plaintiffs complain of is insufficient to show that Rumple acted maliciously in failing to retain certain maintenance records and DIRs for two years after this accident. The case of *Baker v. Swift Transportation Co. of Arizona, LLC*, S.D. Ohio

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[68] Pls. Ex. 6.
[69] Pls. Ex. 6.
[70] Pls. Ex. 6; Defs. Ex. A. to Reply.
[71] Pls. Ex. 6.
[72] Pls. Ex. 6; E. Bischoff Aff., ¶ 6.

No. 2:17-cv-909, 2018 WL 2088006 (May 4, 2018), although a federal case, provides a recent and relevant example of when alleged destruction of evidence creates a genuine issue of material fact, and it illustrates why Rumpke's actions do not indicate clear and convincing evidence of malice.

Baker involved a vehicle collision, and the plaintiff sought punitive damages against the defendant trucking company that employed the truck driver who caused the accident.[73] As a diversity case, the court applied Ohio law on punitive damages. The trial court held that a portion of the plaintiff's punitive damages claim should survive summary judgment, specifically the claim that the defendant intentionally destroyed documents relevant to the case.[74] The plaintiff alleged that the defendant destroyed extensive evidence, including the truck's owner manual, the truck's maintenance records, the driver's house-of-service records, the driver's historical performance data, video's and images, and the defendant company's communications with the driver.[75] The court found that the plaintiff could proceed with the punitive damages claim, finding: "Given the destruction of evidence allegedly occurred after [the defendant] received preservation letters and learned of [the plaintiff's] potential lawsuit, the Court can infer that [the defendant] maliciously spoliated evidence."[76]

By contrast, in the present case there is no allegation or evidence that Rumpke destroyed evidence after receiving a litigation hold in this case or after Rumpke learned of a potential lawsuit. Unlike the *Baker* case, there are simply no facts that would allow

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[73] *Baker v. Swift Transportation Co. of Arizona, LLC*, S.D. Ohio No. 2:17-cv-909, 2018 WL 2088006, *1 (May 4, 2018).
[74] Id. at *5.
[75] Id.
[76] Id.

the court to infer that Rumpke destroyed the maintenance records out of a hatred, ill will, or a spirit of revenge.

Lastly, the plaintiffs argue in favor of punitive damages on the basis that William Cole, a Rumpke Regional Safety Manager, told Browne that the accident was Rumpke's fault and Rumpke would make it right. Cole denies making such an admission. In any case, even if Cole did make such a statement, such an admission would not be an admission to anything more than an admission to negligence. As such, the plaintiffs' final argument in favor of punitive damages is unavailing.

CONCLUSION

For the foregoing reasons, the defendants Amanda M. Huff and Rumpke's motion for summary judgment on the plaintiffs' claim for punitive damages is well-taken and granted.

IT IS SO ORDERED.

DATED: 6-22-17

Judge Jerry R. McBride

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing were sent on this 22nd day of June 2018 by e-mail to Jeffrey D. Ferguson, at jferguslaw@gmail.com, and James B. Galbreath, at jbglaw@zoomtown.com, counsel for the plaintiffs, to Louis F. Gilligan, at lgilligan@kmklaw.com, and Michael T. Cappel, at mcappel@kmklaw.com, counsel for the defendants Amanda M. Huff and Rumpke Transportation Company LLC, and to Joseph P. Hoerig, at hoerigj@nationwide.com, counsel for the defendant Depositors Insurance Company.

Judicial Assistant to Judge McBride