IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
HARRISONBURG DIVISION

DEBRA LYNN MURI,	)	
Plaintiff,	)	**Civil Action No. 5:03CV00051**
	)	
v.	)	**MEMORANDUM OPINION**
	)	
ALLEN J. KILLEEN, et al.,	)	**By: Samuel G. Wilson**
Defendants.	)	**United States District Judge**
	)	

This is a personal injury action arising out of a motor vehicle accident in Frederick County, Virginia. The plaintiff is a citizen of Pennsylvania, Defendant Killeen is a citizen of Massachusetts, Defendant Shirley is a citizen of Virginia, and Defendant Stowe Woodward, L.L.C. ("Stowe Woodward") is incorporated in Delaware and has its principal place of business in Massachusetts, and the amount in controversy exceeds $75,000. Accordingly, there is diversity jurisdiction pursuant to 28 U.S.C. § 1332. This action is currently before the court on three motions: (1) Stowe Woodward moves from summary judgment, claiming that Killeen was an independent contractor and/or acting outside the scope of employment at the time of the accident; (2) Killeen moves for summary judgment on the claim for punitive damages; and (3) both Killeen and Stowe Woodward move to place under seal allegedly confidential and proprietary information. For the reasons stated, the court (1) grants Stowe Woodward's motion for summary judgment, (2) denies Killeen's motion for summary judgment, and (3) grants the motion for a protective order.

I.

On February 14, 2002, Killeen joined Stowe Woodward employees and independent consultants for dinner. At dinner, Killeen allegedly drank a martini and a beer, and Stowe Woodward

paid for the alcohol and food. Killeen left the dinner around 9:00 p.m., intending to drive his rental car to his hotel room, both of which Stowe Woodward paid for. On the way to the hotel, Killeen turned left onto a divided, four-lane highway and proceeded north in the southbound lanes. Almost immediately Killeen realized he was driving on the wrong side of the road and a "fair amount" of vehicles passed him going the opposite direction, but he continued driving approximately 40-50 miles per hour while he looked for a cross-over in the median in which to turn around.

Muri, who was traveling south in the correct lane, observed Killeen driving toward her. Muri, however, did not apply her brakes, but continued to drive approximately 65 miles per hour, expecting the oncoming car to pass her. At the same time, Shirley, who had been driving behind Muri, attempted to pass her, and as he pulled beside her, he noticed the oncoming car. Shirley cleared Muri's car and pulled in front of her in order to avoid a collision with Killeen. Although none of the cars collided, Muri lost control of her car, flipped in the median, and suffered severe injuries.

Killeen, who claims that he did not see Muri's accident, continued in the wrong direction until a police officer stopped him approximately two miles from where he turned onto the road. The officer administered at least five field sobriety tests at the scene, which Killeen failed, and then arrested Killeen for driving under the influence. At the jail, approximately two hours after Killeen was arrested, the officer gave Killeen a breathalyzer test. Although the test indicated that he had a blood alcohol level of .075%, which is below the presumptive level for driving under the influence of alcohol, Killeen was charged with driving under the influence and later pled guilty.

Muri, who is joined in this action by her husband, Gregory Allan Muri, originally filed this action in the Western District of Pennsylvania. That court transferred the case to this court, and the

defendants moved for summary judgment. All parties stipulate that Virginia law applies, and for the reasons stated, the court (1) grants Stowe Woodward's motion for summary judgment because Killeen was not acting within the scope of employment at the time of the accident, (2) denies Killeen's motion for summary judgment on the claim for punitive damages, and (3) grants the motion for a protective order.

II.

Stowe Woodward moves for summary judgment, claiming that Killeen was an independent contractor at the time of the accident and/or acting outside the scope of employment. Although the question of whether Killeen was a Stowe Woodward employee or an independent contractor is a close question,[1] the court does not need to resolve it because, even if he was an employee, Killeen was acting outside the scope of employment at the time of the accident. Accordingly, the court grants Stowe Woodward's motion.

In Virginia, a plaintiff seeking to recover damages based on respondeat superior must establish that the master-servant relationship "existed at the time and with respect to the specific action out of which the injury arose." Smith v. Landmark Communications, Inc., 431 S.E.2d 306, 307 (Va. 1993). An act is within the scope of employment and gives rise to the master-servant relationship if it is "fairly

[1] In support of the claim that Killeen was an independent contractor, Stowe Woodward asserts that he retired from the company, signed an "Independent Contractor Agreement," relinquished his company credit card, secured his own professional liability insurance, and received an IRS Form 1099 for his independent contractor work. Killeen, however, asserts that he did not retire, but reduced his workload, that his job and supervisor did not change, that the company continued to pay for and make his travel arrangements, that he used the company's letterhead and business cards, that he presented himself as a company representative, and that when examining a customer's equipment, he reported his findings to Stowe Woodward and not the customer.

and naturally incident to the business" and if it is "done while the servant was engaged upon the master's business and ... done ... with a view to further the master's interests, or from some impulse or emotion which naturally grew out of or was incident to .... the master's business." Sayles v. Piccadilly Cafeterias, Inc., 410 S.E.2d 632, 634 (Va. 1991) (distinguishing a worker's compensation case where an employee acted within the scope of employment–"the injury occurred on the employer's premises, the employees were expected to attend the party, and the negligent employee was not intoxicated," id. at 634–and denying recovery under a respondeat superior theory where an employer sponsored a Christmas party after work, employee attendance was strictly voluntary, and those attending were not compensated).[2]

Here, Killeen was not acting within the scope of employment on the evening of the accident because the act of attending the dinner is not "something fairly and naturally incident to [Stowe Woodward's] business." Killeen attended a voluntary, Stowe Woodward-sponsored dinner. From all accounts, his attendance was not compelled, the dinner began after Killeen completed his day's employment responsibilities, and Stowe Woodward did not compensate him for attending. Nor does the mere fact that Killeen was driving a rental car paid for by Stowe Woodward at the time of the accident bring his actions within the scope of employment. See Mobley v. Dyson, 48 Va. Cir. 243, 245 (1999) (holding that an employee who was driving a company-owned car was not acting incident to the business while getting food during an unpaid break). See also Landmark Communications, Inc., 431 S.E.2d at 308 (holding that the mere act of traveling to and from work is not a natural incident of

[2] In deciding the case, the court also noted that worker's compensation cases, unlike respondeat superior liability, are more liberally construed in favor of a claimant.

the master's business when the employer did not pay for the time spent traveling); Smith v. Boland, 36 Va. Cir. 390 (1995) (holding that an employee's travel from home to a work-related seminar is not within the scope of employment). Since Killeen's actions were not incident to the business at the time of the accident and, therefore, not within the scope of employment, Stowe Woodward is not subject to respondeat superior liability for Killeen's negligence. Accordingly, the court grants Stowe Woodward's motion for summary judgment.

III.

Killeen moves for summary judgment on Muri's claim for punitive damages, but the court denies the motion. In Virginia, "[n]egligence which is so willful or wanton ... will support an award of punitive damages in a personal injury case." Booth v. Robertson, 374 S.E.2d 1, 3 (Va. 1988). Willful and wanton is defined as "action undertaken in conscious disregard of another's rights, or with reckless indifference to consequences with the defendant aware, from his knowledge of existing circumstances and conditions, that his conduct probably would cause injury to another." Doe v. Isaacs, 579 S.E.2d 174, 176 (Va. 2003) (quoting Woods v. Mendez, 574 S.E.2d 263, 268 (Va. 2003)). Conscious disregard may be shown by objective facts and not merely the defendant's subjective statements. Booth, 374 S.E.2d at 3 (holding that the objective facts that the defendant had a blood alcohol level of 0.22%, drove the wrong way down an exit ramp at a high rate of speed, passed a truck, and collided head-on with another vehicle, provided sufficient proof of a conscious disregard for others); but see Doe, 579 S.E.2d at 538 (holding that the egregious conduct required for punitive damages was not satisfied where the defendant, who "probably was intoxicated to some extent," did not exceed a reasonable speed, drove on the proper side of the road, and rear-ended the plaintiff).

Here, in the light most favorable to Muri, Killeen evinced a conscious disregard of another's rights or a reckless indifference to probable consequences–that his conduct probably would injure another–by driving in an egregious manner while drunk. Killeen claims he drank only a martini and a beer, but he failed five field sobriety tests and registered a blood alcohol level of .075% approximately two hours after his arrest. From this evidence, a jury could reasonably infer that his blood alcohol level was significantly above the presumptive level for driving under the influence at the time of the accident. See Lemond v. Commonwealth, 454 S.E.2d 31, 35 (Va. App. 1995). A jury could also infer that he drove in an egregious manner. After turning the wrong direction onto a divided highway, Killeen knowingly continued to drive on the wrong side of the road at approximately 40-50 miles per hour, despite being passed by a "fair number" of oncoming vehicles. Accordingly, when viewing the facts in the light most favorable to Muri, one could reasonably infer that he drove in an egregious manner while drunk, thereby evincing a conscious disregard of the rights of others or a reckless disregard for probable consequences. Killeen's motion for summary judgment is therefore denied.

IV.

Stowe Woodward and Killeen also move for a protective order to seal allegedly confidential and proprietary information contained in Defendant's Exhibits 1, 2, and 3 that accompany Killeen's response to Stowe Woodward's motion for summary judgment. Muri does not object to the motion. It appearing to the court that the exhibits contain engineering data, client names, and other potentially confidential and proprietary information, the court grants the motion.

V.

For the reasons stated, the court (1) grants Stowe Woodward's motion for summary judgment,

(2) denies Killeen's motion for summary judgment, and (3) grants the motion for a protective order.

ENTER: This ____ day of May, 2004.

_____
UNITED STATES DISTRICT JUDGE

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DEBRA LYNN MURI,	)	
Plaintiff,	)	**Civil Action No. 5:03CV00051**
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v.	)	**ORDER**
	)	
ALLEN J. KILLEEN, et al.,	)	**By: Samuel G. Wilson**
Defendants.	)	**United States District Judge**
	)	

In accordance with the written Memorandum Opinion entered this day, it is hereby **ORDERED** and **ADJUDGED** that: 1) Stowe Woodward's motion for summary judgment is **GRANTED**, (2) Killeen's motion for summary judgment on the claim for punitive damages is **DENIED**, and (3) defendant's joint motion for a protective order is **GRANTED**.

The Clerk of the Court is directed to send certified copies of this Order and the accompanying Memorandum Opinion to the counsel of record for the plaintiff and the defendants.

ENTER: This ____ day of May, 2004.

_____
UNITED STATES DISTRICT JUDGE