

COPY

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

| | | |
|----------------------------|---|------------------------|
| MARY B. BRUMFIELD, et al., |) | CASE NO. 1:05 CV 847 |
| |) | |
| Plaintiffs, |) | JUDGE DONALD C. NUGENT |
| v. |) | |
| |) | MEMORANDUM OPINION |
| TYSON FOODS, INC., et al., |) | AND ORDER |
| |) | |
| Defendants. |) | |

This matter is before the Court on Defendants' Motion for Judgment as a Matter of Law pursuant to Fed. R. Civ. P. 50(b) on Plaintiff's survivorship claim for Negligent Infliction of Emotional Distress. (ECF #169). For the reasons that follow, Defendants' Motion is denied.¹

FACTUAL AND PROCEDURAL BACKGROUND

This action was precipitated by a car/truck collision that occurred on May 29, 2004. On that date, Daniel Brumfield, driving in the correct lane on State Route 30, was struck head on by a Freightliner tractor-trailer driven by Dale Friesen, an employee of Tyson Foods. Mr. Friesen was driving in the wrong lane at time of the collision. Mr. Brumfield saw the truck coming at him and had stopped his vehicle prior to impact. Mr. Brumfield was killed in the collision. Daniel Brumfield's mother, Mary R. Brumfield, individually, as Administrator of the Estate of Daniel J. Brumfield, and on behalf of the survivors, heirs, and beneficiaries of Daniel J. Brumfield, brought this action against Tyson Foods, Inc. and Dale R. Friesen, alleging, wrongful death in violation of Ohio Rev. Code § 2125.01 *et seq.* and a survival action pursuant to Ohio

Defendants have also filed a Motion for Remittitur and/or New Trial (ECF #170). Plaintiffs have filed a Motion for Pre-Judgment Interest (ECF #174) and a Motion to Tax Costs (ECF #175). These motions will be addressed in separate Memoranda and Opinions.

Rev. Code § 2305.21 alleging negligent infliction of emotional distress.

After a five day trial, the jury found in favor of the Plaintiff on the survivorship claim and awarded One Million dollars for Daniel Brumfield's serious emotional distress plus \$22,000 dollars for property damage on the survivorship claim. Before the Jury was charged, the parties stipulated that Plaintiff was entitled to Judgment in her favor on the wrongful death claim and that the matter would go to the jury for a determination of damages. At that time the Court entered Judgment in favor of Plaintiff on the wrongful death claim. The Jury awarded Six Million dollars in compensatory damages and \$6,687 for funeral and burial expenses on the wrongful death claim. The Court entered Judgment in accordance with the Jury's verdicts.

STANDARD OF REVIEW

Fed.R.Civ.P. 50(b) provides that if a court does not grant a motion for judgment as a matter of law made after the close of all the evidence and the party renews its request after a verdict is returned, the court may (1) allow the judgment to stand; (2) order a new trial, or (3) direct entry of judgment as a matter of law. A Rule 50(b) motion may be granted "only if in viewing the evidence in the light most favorable to the non-moving party, there is no genuine issue of material fact for the jury, and reasonable minds could come to but one conclusion, in favor of the moving party." *Radvansky v. City of Olmsted Falls*, ___ F.3d ___, 2007 WL 2141379, (6th Cir. July 27, 2007) (citing *Gray v. Toshiba Am. Consumer Prods., Inc.*, 263 F.3d 595, 598 (6th Cir.2001) (citations omitted).

The Court is not free to weigh the parties' evidence or to pass upon the credibility of witnesses. *Black v. Zaring Homes*, 104 F.3d 822, 825 (6th Cir.1997); *K & T Enters. v. Zurich Ins. Co.*, 97 F.3d 171, 175 (6th Cir.1996). Nor may the Court substitute its own judgment for that

of the jury. *Zaring Homes*. 104 F.3d at 825; *K & T Enters.*, 97 F.3d at 175-76. Instead, the Court must view the evidence most favorably to the party against whom the motion is made and give that party the benefit of all reasonable inferences from the record. *Zaring Homes*. 104 F.3d at 825; *K & T Enters.*, 104 F.3d at 176. When the evidence would permit reasonable minds to differ on the issues decided by the jury, a motion for judgment as a matter of law must be denied. *American and Foreign Ins. Co. v. Bolt*, 1997 WL 57361 (6th Cir.1997). In short, every effort must be made to uphold the verdict if reasonably possible.

DISCUSSION

Defendants assert that they are entitled to Judgment as a matter of law on Plaintiff's survivorship claim for "pre-impact terror" because Ohio does not recognize a cause of action for "pre-impact terror". As such Defendants contend that the \$1,000,000 jury verdict on the portion of Plaintiff's survivorship claim for damages arising out of the decedent's "pre-impact terror" should be vacated and judgment entered in Defendants' favor on this claim. While Defendants persist in labeling Plaintiff's survivorship claim as one for "pre-impact terror," the Court charged the jury on Plaintiff's survivorship claim of negligent infliction of emotional distress. The claim asserted by Plaintiff on behalf of the decedent is for the conscious mental suffering that the decedent experienced in the seconds before impact when he realized that Defendant's semi-tractor rig was in the wrong lane and was bearing down on him without pause as he brought his truck to a stop. This tort claim for negligent infliction of emotional distress is a claim that decedent could have brought if he had survived the collision and, under Ohio law, is a claim that survives his death.

Defendants argue that under Ohio's survival statute only actions that allege physical

injuries to a person survive a party's death. Ohio Rev. Code § 2305.21 provides:

In addition to the causes of action which survive at common law, causes of action for mesne profits, or injuries to the person or property, or for deceit or fraud, also shall survive; and such actions may be brought notwithstanding the death of the person entitled or liable thereto.

Defendants cite *Witcher v Fairlawn*, 113 Ohio App.3d 214 (1996) in support of their contention that "injury to the person" requires a physical injury. In *Witcher*, the Court, citing *Oakwood v. Makar*, 11 Ohio App.3d 46, 47 (1983), noted that "in order to survive under R.C. 2305.21, the action must be for injuries to the person and 'that term means physical injuries.'" In *Oakwood*, the action at issue was an action for slander or defamation, a cause of action that is specifically abated under R.C. 2311.21 by the death of either party. In *Witcher*, the Court found that the cause of action at issue there, the tort of false imprisonment, does not involve physical injuries, but rather involves injury to the plaintiff's personal rights and thus, does not survive.

That reasoning comports with the Eight District Court of Appeals finding in *Bowman v. Parma Board of Education* that the torts of negligent or intentional infliction of emotional distress involve injuries to the person, albeit psychic injuries, not injuries to personal rights. The Court held:

Ohio has recognized the viability of actions for psychic injury in part because the danger for illusory claims for mental distress is no greater than in cases of physical injury, *Schultz v. Barberton Glass Co.*, (1983), 4 Ohio St.3d 131, 134, 4 OBR 376, 378, 447 N.E.2d 109, 111, and in part due to * * * the modern advances made in medical and psychiatric science. *Pugh v. Hanks* (1983). 6 Ohio St.3d 72, 74, 6 OBR 114, 116, 451 N.E.2d 759, 762. Implicit in the recognition of tort claims for psychic injury of a severe nature is that such claims are claims for injury to the person which would survive death under R.C. 2305.21.

Bowman, 44 Ohio App.3d 169, 177, 542 N.E.2d 663, 671 (1988). See also, *Foster v. McDevitt*, 31 Ohio App.3d 237, 511 N.E.2d 403 (1986) (intentional infliction of emotional distress claim based on assertions that defendant's actions drove decedent to suicide survives the victim's demise.) Based on these Ohio precedents, Plaintiff's negligent infliction of emotional distress claim survives decedent's death.

Moreover, Defendants' contention that Plaintiff's negligent infliction of emotional distress claim is barred because decedent was killed instantly on impact and thus did not suffer consciously is misguided. See *Case v. Norfolk and Western Railway Company*, 59 Ohio App.3d 11, 15, 570 N.E.2d 1132 (1988) (while a cause of action for personal injury survives the demise of the injured party, "recovery is limited to any damages which the deceased might have recovered had he or she lived ... These include damages for any conscious pain and suffering from the time of injury until death and any damage to property occurring concurrent to the bodily injury.") (citations omitted).

Plaintiff's negligent infliction of emotional distress claim is limited to the time period in which Daniel Brumfield suffered his emotional distress—the seconds during which he saw Defendants' tractor trailer in his lane bearing down on him while he was bringing his own truck to a stop. Thus, plaintiff's claim is for conscious suffering that the deceased felt prior to his death. Since Ohio recognizes the tort of negligent infliction of emotional distress and Ohio courts have held that the cause of action survives death under R.C. 2305.21, Plaintiff is entitled to recover the damages for negligent infliction of emotional distress that Daniel Brumfield might have recovered had he lived.

Finally, Defendants argue Plaintiff failed to demonstrate that Daniel suffered severe

emotional distress prior to the collision. Defendant complains that Plaintiff must present some "guaranty of genuineness" in support of her claim. There is no dispute that the Court correctly charged the jury on the elements of a claim for negligent infliction of emotional distress or that the definition of serious emotional distress given to the jury was consistent with Ohio law. The Court instructed the jury that serious emotional distress is:

Serious emotional distress describes injury which is both severe and debilitating. It does not extend to mere insults, indignities, threats, annoyances, petty oppression or mere trivialities. Thus, serious emotional distress may be found where a reasonable person, normally constituted, would be unable to cope adequately with the mental distress caused by the circumstances of the case. It is mental anguish of a nature that no reasonable person could be expected to endure. You may consider any evidence of a resulting physical impairment in judging the degree of emotional distress suffered.

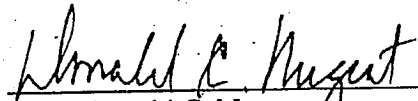
In this case there was testimony and evidence that demonstrated that a 50,000 pound tractor-trailer bore down on Daniel Brumfield, in Daniel's lane of traffic, at over 60 miles per hour, without stopping, or slowing or steering out of the way. According to Plaintiff's expert witness, Daniel was able to process what was happening for at least 4 seconds, was able to bring his own vehicle to at or near a complete stop and watch the tractor trailer bear down on him at full speed without stopping or swerving or braking until after impact. The jury, drawing on their own common sense and experience determined that Daniel suffered serious emotional distress

under these circumstances. Viewing the evidence most favorably to the party against whom the motion is made and giving that party the benefit of all reasonable inferences from the record, the Court finds that the jury's findings were supported by the evidence submitted at trial. The Court will not substitute its own judgment for that of the jury. Defendants have failed to demonstrate that they are entitled to judgment as a matter of law on Plaintiff's survivorship claim for negligent infliction of serious emotional distress.

CONCLUSION

For the reasons set forth above, Defendants' Renewed Motion for Judgment as a Matter of Law (ECF #169) is DENIED.

IT IS SO ORDERED:



Judge Donald C. Nugent
UNITED STATES DISTRICT JUDGE

DATED: October 10, 2007