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COMMONWEALTH OF KENTUCKY
SUPREME COURT
CASE NO. 2012-SC-000462-DG

MV TRANSPORTATION, INC. APPELLANT

v. On Discretionary Review from the Kentucky Court of Appeals
Case Nos: 2010-CA-001907-MR and
2010-CA-001921-MR

RICHARD G. ALLGEIER, EXECUTOR OF THE
ESTATE OF BARBARA ALLGEIER, DECEASED APPELLEE

BRIEF ON BEHALF OF *AMICUS CURIAE* KENTUCKY JUSTICE ASSOCIATION

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CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of July 2013, ten (10) originals of this brief were served via Federal Express upon Susan Stokley Clary, Clerk of the Kentucky, Supreme Court, State Capitol, Room 235, 700 Capitol Ave., Frankfort, KY 40601, with one (1) copy served by regular mail upon each of the following: Samuel Givens, Clerk, Kentucky Court of Appeals, 360 Democrat Dr., Frankfort, KY 40601; Hon. Mary Shaw, Judge, Jefferson Circuit Court; 700 W. Jefferson St., Louisville, KY 40202; B. Todd Thompson, Millicent Tanner, Chad Propst, Thompson Miller & Simpson, PLC, 734 W. Main St., Louisville, KY 40202; Scott Cox, Cox & Mazzoli, PLLC, 600 W. Main St., Louisville, KY 40202; Griffin Sumner, Jason Renzelmann, Frost Brown Todd LLC, 400 W. Main St., Louisville, KY 40202; Gene Zipperle, Ward, Hocker & Thornton, PLLC, Hurstbourne Place, Suite 700, 9300 Shelbyville Rd., Louisville, KY 40222.

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INTRODUCTION

"A defendant may not unilaterally stipulate away from the jury's consideration parts of the case that he does not want the jury to see." *Davis v. City of Winchester*, 206 S.W.3d 917, 919 (Ky. 2006). A remedy exists if evidence supportive of one claim prejudices another—a limiting instruction under KRE 105. *Id.* MV Transportation never asked for one. MV nonetheless complains that relevant and admissible evidence of MV's direct negligence opened the door "to a flood of prejudicial and otherwise inadmissible evidence." MV Transp. Br., p. 30.

Rather than request a limiting instruction—as it could have—MV asks the Court to adopt a rather unusual rule: eliminate distinct and viable direct negligence claims whenever a corporate defendant stipulates to potential liability under *respondeat superior*. If adopted, the rule allows corporate defendants to limit the scope of discovery and proof to the negligence of employees on the date of an injury-producing event. The jury would never learn how corporate hiring, retention, training, or supervision practices contribute to harm innocent accident victims and, in many cases, make injury inevitable.

Should Kentucky adopt a rule as a matter of public policy that requires ***dismissal*** of otherwise viable, direct negligence claims (in this case claims for negligent hiring, retention, supervision, or training) because the defendant stipulates to potential liability under the doctrine of *respondeat superior*?[1]

PURPOSE AND INTEREST OF *AMICUS CURIAE*

Kentucky holds corporate defendants accountable for their independent negligence, not just strict liability for an employee's acts or omissions under the doctrine of *respondeat superior*. *See Ten Broeck Dupont, Inc. v. Brooks,* 283 S.W.3d 705, 732 (Ky. 2009). These claims are not

[1] There appears to be a significant issue as to whether MV preserved this argument. Allgeier's arguments, while substantial, are beyond the scope of this brief.

the same. *Id.* In any event, dismissal of a claim based on *a defendant's* unilateral stipulation makes little sense. Kentucky has already rejected such an approach. "A defendant may not unilaterally stipulate away from the jury's consideration parts of the case that he does not want the jury to see." *Davis v. City of Winchester*, 206 S.W.3d 917, 919 (Ky. 2006). The stipulation approach violates the "substantial right[s]" of civil litigants "to present competent evidence of each element of one's claim." *Id.* It is also incompatible with comparative fault principles in KRS 411.182. The statute requires that the jury consider ***all evidence of fault*** for ***each party***. *See Owens Corning Fiberglas Corp. v. Parrish*, 58 S.W.3d 467, 479-480 (Ky. 2001). A jury cannot adequately perform its task if evidence of fault is missing. Worse, any percentage of fault that would be assigned for missing evidence of negligence must be absorbed by other litigants. The approach prejudices virtually every tort litigant other than the corporate defendant who chooses to utilize it. To mitigate the harshness of the rule other jurisdictions approve of exceptions that nearly swallow it. A better approach is not to adopt it.

Founded in 1954, the Kentucky Justice Association (formerly Kentucky Academy of Trial Attorneys) is a non-profit organization dedicated to protecting the health and safety of Kentuckians, enhancing consumer protection, and preserving every citizen's right to trial by jury. This case is of substantial interest to *Amicus Curiae* because Appellant MV asks this Court to develop a common-law rule that would effectively eliminate viable direct negligence claims, suppress evidence of fault, and undermine the right to trial by jury.

Amicus Curiae agrees with the Court of Appeals: it is a "'rather strange proposition that a stipulation as to one cause of action could somehow 'prohibit' completely the pursuit of another.'" Slip op. at 19 (quoting *James v. Kelly Trucking Co.*, 661 S.E.2d 329, 332 (S.C. 2008)). Indeed, "'the considerations limiting a plaintiff's available causes of action in the typical case

are that the plaintiff must be able to demonstrate a prima facie case for each cause of action and that a plaintiff may ultimately recover only once for an injury." *Id.* These "common-sense tort principles" trump any proposed rule with its origin in an era of contributory negligence. *Id.* Because "common sense must not be a stranger in the house of the law," *Cantrell v. Kentucky Unemployment Ins. Comm'n*, 450 S.W.2d 235, 237 (Ky. 1970), the proposed rule should remain outside our borders.

ARGUMENT

I. FUNDAMENTAL TENETS OF KENTUCKY LAW: DIRECT NEGLIGENCE, STRICT LIABILITY, SUBSTANTIAL RIGHTS, AND ACCURATE ASSESSMENT OF FAULT

A. Direct negligence claims are distinct and separate from strict liability under *respondeat superior*.

The doctrine of *respondeat superior*, a form of vicarious liability, holds an employer responsible for the negligent acts of its employees if those acts were committed within the scope the employee's employment. *Patterson v. Blair*, 172 S.W.3d 361, 364 (Ky. 2005). The doctrine does not require the employer to be negligent in any way. *Id.* The most important reason for holding the employer strictly liable for the acts or omissions of employees "is that employees often cannot pay a tort judgment against them." *Id.*

In contrast, direct negligence claims against the employer, such as the negligent training, negligent supervision, negligent hiring, and negligent retention in this case, are *distinct tort claims*. *E.g.*, *Turner v. Pendennis Club*, 19 S.W.3d 117, 121 (Ky. App. 2000) (recognizing claims for negligent training and supervision); *McDonald's Corp. v. Ogborn*, 309 S.W.3d 274, 291 (Ky. App. 2009)(recognizing negligent supervision); *Oakley v. Flor-Shin, Inc.*, 964 S.W.2d 438, 441-42 (Ky. App. 1998)(recognizing negligent hiring); *Airdrie Stud, Inc. v. Reed*, 2003 WL

22796469, at *1 (Ky. App. Nov. 26, 2003)(recognizing negligent hiring *and* negligent retention and reasoning that "the elements of each are distinctly different").

Unlike other jurisdictions, Kentucky recognizes that direct negligence claims are *independent* from vicarious liability claims arising out of the doctrine of *respondeat superior* because the two categories of claims contain distinct duties and unique prima facie elements. In *Ten Broeck Dupont, Inc. v. Brooks*, this Court reasoned that direct negligence claims "differ" from "liability based upon *respondeat superior*." 283 S.W.3d 705, 732 (Ky. 2009). Under *respondeat superior*, "the employer is strictly liable" for the employee's act committed within the scope of employment. Under direct negligence, however, "the employer's liability may only be predicated upon its own negligence in failing to exercise reasonable care" in hiring, retaining, supervising, or training its employee. *Id.*

Kentucky follows the modern trend and the *Restatement (Second) of Agency* § 213. The *Restatement* provides that a person conducting an activity through agents is subject to liability for harm if negligent or reckless in: "giving improper or ambiguous orders," "the employment of persons," "the supervision of the activity," or "permitting or failing to prevent negligent or other tortious conduct" by employees. *Id.* Kentucky has specifically referenced and adopted the *Restatement* position. *See e.g.*, *Ogborn*, 309 S.W.3d at 291. Comment h to Section 213, titled "*Concurrent* negligence of master and servant," indicates that "[*i*]*n addition* to liability under the rule stated in this Section, a *master may also be subject to liability* if the act occurs within the scope of employment. *In a given case*[,] *the employer may be liable both on the ground that he was personally negligent and on the ground that the conduct was within the scope of employment*." *Id.* cmt. h (emphasis added).

A stipulation that potential *respondeat superior* liability applies does not satisfy the elements of a direct negligence claim under Kentucky law. The claims are separate and distinct. A unilateral stipulation cannot categorically defeat viable negligence claims.

B. A civil litigant has a "substantial right" to present competent evidence of each element of a claim, and a defendant has no right to stipulate away parts of the case the defendant does not want the jury to see.

In *Davis v. City of Winchester*, plaintiff filed suit for unlawful arrest, excessive use of force, and malicious prosecution against the City of Winchester. 206 S.W.3d 917 (Ky. 2006). Before trial, the City sought to eliminate "prejudicial" evidence of criminal charges dismissed in plaintiff's favor. The City stipulated, apparently over plaintiff's objection, that plaintiff satisfied the corresponding element of the malicious prosecution claim. That way, the City would not be prejudiced in its defense of the unlawful arrest claim. The trial court excluded the evidence in light of the City's unilateral stipulation. The case proceeded to trial and the jury returned a verdict in favor of the City. The Court of Appeals affirmed.

On discretionary review, this Court noted that in criminal cases: "the Commonwealth has a right to prove each element of its case by competent evidence of its choosing" and "[a] defendant may not unilaterally stipulate away from the jury's consideration parts of the case that he does not want the jury to see. *Id.* at 919 (citing *Johnson v. Commonwealth,* 105 S.W.3d 430, 438–39 (Ky.2003); *Barnett v. Commonwealth,* 979 S.W.2d 98, 103 (Ky.1998)). This Court then held that civil litigants have the "same right to present competent evidence of each element of one's claim" and "the trial court's denial of that substantial right in this case was reversible error." *Id.* The opinion addresses the City's concerns regarding prejudice this way:

> The trial court reasoned that this evidence could be improperly utilized for the purpose of proving that the police officers lacked probable cause to make an initial arrest. However, a more appropriate remedy would have been to issue a limiting instruction [pursuant to KRE 105] addressing this concern. [footnote

> omitted]. ***A trial court cannot outright preclude a party from introducing evidence to prove an element of his claim on the grounds that such evidence may be prejudicial with regard to another issue.***

Davis, supra at 919 (Emphasis added).

Under Kentucky law, an injury victim has a "substantial right" to present evidence in support of any viable claim. In contrast, a defendant has no right to stipulate away evidence of negligence, even if the evidence is arguably "prejudicial" to a separate claim. The remedy for the defendant is a limiting instruction. See KRE 105(a). MV never requested one, which subjects its appellate argument, even if preserved, to palpable error review. *See Quisenberry v. Commonwealth*, 336 S.W.3d 19, 28 (Ky. 2011).

C. Kentucky's pure comparative fault statute, KRS 411.182, requires the fact-finder to consider all evidence of fault for apportionment purposes.

Kentucky is one of thirteen "pure" comparative fault jurisdictions. Victor E. Schwartz, Comparative Negligence § 2.1(A) (2d. Ed. 1986). By statute, "in all tort actions" the jury must assign percentages of fault to each existing party, including the plaintiff, defendant, third-party defendant, or person previously released unless all the parties otherwise agree. KRS 411.182(1)(b). "In determining the percentages of fault, the trier of fact ***shall*** consider both the nature of the conduct of each party at fault and the extent of the causal relation between the conduct and the damages claimed." KRS 411.182(2)(Emphasis added). Once that happens, KRS 411.182(3) requires the court to "determine the award of damages to each claimant in accordance with the findings…and determine and state in the judgment each party's equitable share of the obligation to each claimant in accordance with the respective percentages of fault."

KRS 411.182 is based on the Uniform Comparative Fault Act. However, unlike other states, Kentucky's statute does not mirror the language of the Model Act. For example, unlike the language in the Model Act, KRS 411.182 omits any provision for joint and several liability.

See David J. Leibson, 13 Ky. Prac. Tort Law § 10:36 (2013). Thus, under the strict terms of KRS 411.182 liability is no longer joint and several but several only. *Degener v. Hall Contracting Corp.*, 27 S.W.3d 775, 779 (Ky. 2000). The definition of "fault" for the purpose of KRS 411.182 broadly includes "acts or omissions that are in *any measure negligent* or reckless toward the person or property of the actor or others, or that subject a person to strict tort liability." *Wemyss v. Coleman*, 729 S.W.2d 174, 177 (Ky. 1987)(Emphasis added). A jury must consider *all evidence of fault* in order to assign fault to each party. If a court suppresses any evidence of fault—whether evidence of independent corporate negligence or otherwise—other parties necessarily absorb the percentage otherwise assigned to "missing negligence" because total fault must equal 100%. Such a result violates a fundamental principle of apportionment: a party "'should have to pay no more than the damage it caused, regardless of the status of other entities at fault.'" *CertainTeed Corp. v. Dexter*, 330 S.W.3d 64, 73 (Ky. 2010)(quoting David J. Leibson, 13 Ky. Prac. Tort Law § 10:60 (2010).

Moreover, Kentucky already allows juries to assess fault for an employer's independent negligence as well as an employee's negligence in the scope of employment. *See Owens Corning Fiberglas Corp. v. Parrish*, 58 S.W.3d 467, 479-480 (Ky. 2001). In *Owens Corning,* Parrish sued Owens Corning for damages suffered during repeated exposure to asbestos in the workplace. Parrish accepted workers' compensation benefits from his employer, Louisville Water Company (LWC), so Parrish could not recover further from LWC. At trial, Owens Corning offered evidence that Parrish, while in the scope of his employment with LWC, did not consistently wear a protective mask. The jury also heard evidence that LWC was ***independently negligent*** for failing to make the protective mask available to Parrish and to train Parrish on proper use. The trial court allowed the jury to apportion fault to both LWC and Parrish. The jury assigned 50% of

fault to Parrish and 10% to LWC for its independent negligence. On appeal, Parrish argued that the jury should not have apportioned fault to LWC. The Court of Appeals reversed. This Court accepted review, reversed the Court of Appeals, and reinstated the verdict and judgment because the evidence supported apportionment of fault for LWC's independent negligence.

If an employer's independent negligence contributes to an injury in any way, as in *Owens Corning, supra*, the jury must consider the evidence and apportion fault accordingly. Indeed, under KRS 411.182, the jury is ***required*** to do so. The jury cannot perform this function if the trial court suppresses evidence of fault and dismisses viable negligence claims as MV advocates in this case.

II. THE STIPULATION APPROACH HAS NO PLACE IN KENTUCKY LAW AND SHOULD NOT BE ADOPTED

A. The stipulation approach has its origin in an era of contributory negligence.

MV offers a tempting invitation: tally up the jurisdictions and follow the majority. The problem is the parties have ably collected the cases from other jurisdictions—and MV's proposed rule no longer appears to be the "majority" rule. However, whether or not MV's label is accurate, it undisputed that the rule was born in an era of contributory negligence. It has no place in Kentucky jurisprudence.

One of the earliest cases to adopt the stipulation approach is a Maryland case, *Houlihan v. McCall*, 78 A.2d 661 (Md. 1951). In *Houlihan*, the Maryland Supreme Court held that, if an employer admits to agency, the evidence of an employee's previous misconduct serves no purpose except to inflame the jury. Maryland is still a contributory negligence jurisdiction. Under the "all or nothing" contributory negligence scheme, the stipulation approach makes sense. If the plaintiff is negligent, there is no recovery. If the defendant-employee is negligent, the employer is responsible for all damages and jointly liable with any other defendant. A jury

would never need to consider ***the extent*** of the employer's negligence—as there is no need to assign relative fault in a contributory negligence jurisdiction.

Other states followed Maryland, including California, Connecticut, and North Carolina. *See Armenta v. Churchill*, 267 P.2d 303 (Cal. 1954); *Prosser v. Richman*, 50 A.2d 85 (Conn. 1946); *Heath v. Kirkman*, 82 S.E.2d 104 (N.C. 1954). California and Connecticut adopted the stipulation approach before their states adopted comparative fault. North Carolina, like Maryland, is one the few remaining contributory negligence jurisdictions. Other state courts that followed, such as Missouri and Idaho, as well as intermediate appellate courts and federal district courts, rely on the early cases for the "majority rule" label. *See, e.g., Wise v. Fiberglass Systems, Inc.*, 718 P.2d 1178 (Idaho 1986); *McHaffie By and Through McHaffie v. Bunch*, 891 S.W.2d 822 (Mo. 1995).

A fifty-state review is often a useful guide. However, any rule that is a holdover from an era of contributory negligence, eliminates valuable rights, contradicts Kentucky common law, and violates our statutes is wrong for Kentucky—no matter what other states are doing.

B. The stipulation approach violates pure comparative fault allocation under KRS 411.182.

The jury has two primary responsibilities under KRS 411.182. First, the jury must evaluate all "acts or omissions that are in ***any measure negligent*** or reckless toward the person or property of the actor or others, or that subject a person to strict tort liability." *Wemyss v. Coleman*, 729 S.W.2d 174, 177 (Ky. 1987)(Emphasis added). Second, the jury must "assign percentages of fault to each existing party, including the plaintiff, defendant, and third-party defendant." KRS 411.182(1)(b). The purpose of apportionment is so no party "'pay[s] more than the damage it caused, regardless of the status of other entities at fault.'" *CertainTeed Corp. v. Dexter*, 330 S.W.3d 64, 73 (Ky. 2010)(citations omitted). The stipulation approach contradicts

these principles. It takes away evidence of negligence from the jury and thwarts an accurate assessment of fault.

MV's argument in support of the rule is the rationale carried forward from the early cases: "once *respondeat superior* is admitted, negligent hiring, retention, and similar claims are per se duplicative." MV Transp. Br., p. 26. However, MV cannot reconcile that point with *Owens Corning Fiberglas Corp. v. Parrish*, 58 S.W.3d 467 (Ky. 2001). In *Owens Corning*, the jury considered the employee's negligence and the employer's direct negligence—and this Court approved of apportionment for each. The employer's negligence cannot be "duplicative" of the employee's negligence because *Owens Corning* approved of separate percentages.

MV also argues that negligent hiring, retention, and similar claims should apply only if the employee commits a tort outside the scope of employment, such as a criminal assault. MV Transp. Br., p. 27. Presumably, MV would argue that fault should be apportioned in this instance. *See, e.g., Roman Catholic Diocese of Covington v. Secter,* 966 S.W.2d 286 (Ky. App. 1998)(apportioning 75% of fault to church for negligent hiring, supervision, and retention and 25% of fault to guidance counselor for sexual assault). However, MV fails to explain why independent negligence ***disappears*** if the employee's conduct is less than intentional. For example, what if the Diocese in *Secter* engages in the same pattern of negligent hiring, supervision, and retention for all its employees—but, this time, the employee is a bus driver who hits a pedestrian? Is the Diocese any less negligent? Would the plaintiff-pedestrian be able to introduce evidence of the Diocese's negligent hiring, supervision, and retention practices like the plaintiff in *Secter*? Under MV's analysis, the claims against the Diocese must be dismissed and any evidence suppressed. Therefore, unlike the jury in *Secter*—armed with evidence of a pattern and practice of negligence—the jury in the bus collision case sees only an unfortunate, isolated

incident. Moreover, in the bus collision hypothetical, the employer's negligence is absent from the apportionment calculus so the jury must magnify the fault of the remaining parties—including the plaintiff-pedestrian—so that fault equals 100%.

C. The stipulation approach violates the substantial rights of injury victims and other tort litigants.

The injustice caused by the stipulation approach is apparent: without complete evidence of negligence, the jury must allocate fault based only on the evidence it has. Other litigants, such as the plaintiff or co-defendants, must absorb any percentage that would otherwise be assigned for the employer's independent negligence. The other litigants are then forced to "'pay more than the damage [they] caused.'" *CertainTeed Corp. v. Dexter*, 330 S.W.3d 64, 73 (Ky. 2010)(citation omitted).

Another less obvious concern is the prejudice to the employee. While Kentucky is a pure comparative fault jurisdiction, it retains a common law cause of action for indemnity. *Degener v. Hall Contracting Corp.*, 27 S.W.3d 775 (Ky. 2000). In *Eichberger v. Reid*, 728 S.W.2d 533 (Ky. 1987), this Court recognized that an employer has a right of indemnity from an employee if the employer is liable under *respondeat superior*. Importantly, any indemnity claim does not accrue until the employer becomes liable. *York v. Petzl America, Inc.*, 353 S.W.3d 349 (Ky. App. 2010).

Therefore, under the stipulation approach, not only can the employer unilaterally *stipulate away* its own negligence by *stipulating to respondeat superior*—the employer creates a complete right of indemnity by stipulation. Any damages the employer becomes liable for based on *respondeat superior* must be fully reimbursed by the employee in a subsequent indemnity proceeding. However, if the jury apportions fault based on ***both*** direct negligence ***and*** the employee's negligence, the scope of the indemnity claim changes. The amount of any indemnity

instead depends on the percentage of fault assigned for the acts or omissions of the employee, separate from the percentage of fault assigned to the employer.

D. The stipulation approach has significant exceptions that swallow the rule.

Given the harshness of the stipulation rule, many jurisdictions have adopted exceptions. The most notable exceptions are for negligent entrustment claims and allegations of gross negligence against the employer. *See e.g., Lee v. J.B. Hunt Transport, Inc.,* 308 F.Supp.2d 310, 313 (S.D.N.Y.2004); *Durben v. American Materials,* Inc., 503 S.E.2d 618, 619 (Ga.App.1998); *Watson v. Strack,* 5 A.D.3d 1067 (N.Y.A.D. 4th Dept.2004). Another exception applies if application of the rule adversely affects insurance coverage. *See Marquis v. State Farm Fire and Casualty Co.*, 961 P.2d 1213, 1223 (Kan.1998); *Parrick v. FedEx Grounds Package System, Inc.*, 2010 WL 1981451, at *3 fn. 3 (D. Mont. 2010). Even the most zealous supporters of the stipulation rule agree that certain exceptions are necessary. *See* Richard A. Mincer, *The Viability of Direct Negligence Claims Against Motor Carriers in the Face of an Admission of Respondeat Superior*, 10 Wyoming Law Rev. 229, 260 (2010)(addressing exceptions and noting "the majority rule is simply inapplicable").

The problem with adopting the proposed rule with these significant exceptions is it assumes the parties—particularly plaintiffs—have perfect knowledge of all facts before filing suit. That is rarely if ever the case. For example, consider a plaintiff who pleads only negligent hiring and *respondeat superior* liability but pleads none of the "exceptions." In response, the defendant-employer files a stipulation and motion to dismiss the negligent hiring claim—likely before filing an answer—and simultaneously moves to limit discovery based on the stipulation/dismissal. After entry of orders granting the motions, the scope of discovery is forever limited to the acts or omission of the employee. The plaintiff never discovers relevant

information concerning the employer's gross negligence, negligent entrustment, or even, perhaps, insurance policies that would provide an exception to the stipulation rule in the first place. However, if the complaint alleges the "exceptions" from the outset, then plaintiff can go forward with broad discovery. The stipulation rule and exceptions force astute plaintiffs to over-plead causes of action, while penalizing those who narrowly plead based on the limited facts pre-suit. In short, artful pleading allows astute litigants to work around the harshness of the rule in virtually any case. Upon close inspection, such practical considerations are not an indictment of the exceptions, but rather the rule itself.

E. MV failed to make an appropriate stipulation in this case.

Throughout its brief, MV asks this Court to adopt a specific version of the stipulation rule recognized by the federal district court in *Oaks v. Wiley Sanders Truck Lines, Inc.*, 2008 WL 5459136 (E.D. Ky. Nov. 10, 2008). In *Oaks*, the plaintiff sued Wiley Sanders, the defendant trucking company, for negligent hiring, training, retention, supervision and entrustment, and sought recovery under *respondeat superior* for the negligence of the truck driver. However, in an opinion issued on September 4, 2008—which MV fails to cite in its brief—the district court in *Oaks* ruled that apportionment was not an issue because the trucking company ***admitted full liability for the wreck***. In other words, Wiley Sanders stipulated not just to *respondeat superior* liability—but 100% fault. *See Oaks v. Wiley Sanders Truck Lines, Inc.*, 2008 U.S. Dist. LEXIS 67378, at *4 (E.D.Ky. Sept. 4, 2008)("In their Reply Brief, Defendants state that they do not intend to introduce evidence of Plaintiff's negligence and accept liability for the accident."). The case then proceeded to trial ***solely on the issue of compensatory damages***.

Unlike the trucking company in *Oaks*, MV never accepted liability and 100% fault in this case. Indeed, MV denied liability and actively blamed Ms. Allgeier throughout this litigation.

The jury instructions plainly reveal that MV did not admit liability. Even after the jury held MV liable, the jury appropriately considered all evidence of fault—including MV's direct negligence—to perform its statutorily assigned task of allocating fault between MV and Allgeier. Ultimately, the jury assigned all fault to MV. This exercise would have been unnecessary had MV adopted the broader *Oaks*-type stipulation it now presses on appeal.

The stipulation approach in *Oaks* requires an employer to admit liability and 100% fault—not just stipulate to a *respondeat superior* relationship with the employee. Therefore, MV never made an appropriate stipulation by its own standard.[2] The opinion of the Court of Appeals should be affirmed for this reason as well.

III. IF THIS COURT ADOPTS SOME VERSION OF THE STIPULATION APPROACH, THIS COURT SHOULD APPLY THE PUNITIVE-DAMAGE CLAIM EXCEPTION

A majority of jurisdictions that follow the stipulation approach allow evidence of an employer's independent negligence if the plaintiff alleges that negligence was "gross." *See e.g., Lee v. J.B. Hunt Transport, Inc.*, 308 F.Supp.2d 310, 313 (S.D.N.Y.2004); *Durben v. American Materials,* Inc., 503 S.E.2d 618, 619 (Ga.App.1998). *Watson v. Strack,* 5 A.D.3d 1067 (N.Y.A.D. 4th Dept.2004); *see also James v. Kelly Trucking Co.,* 661 S.E. 2d 329, 332, 333 (S.C. 2008) (Moore, J., dissenting)(collecting cases and noting that the majority of jurisdictions that follow the stipulation approach make an exception for gross negligence). The exception applies here because Allgeier appropriately requested punitive damages. In cases alleging gross negligence and seeking punitive damages, a plaintiff is entitled to have her theory of the case submitted to the jury if there is "*any evidence* to support an award." *E.g., Thomas v. Greenview*

[2] If in fact MV made an *Oaks*-type stipulation, then MV's evidentiary arguments cannot warrant reversal. The disputed evidence concerns only liability—not compensatory damages. If MV stipulated to liability and 100% fault, consistent with *Oaks*, then any error in the admission of the evidence is necessarily harmless.

Hospital, Inc., 127 S.W.3d 663, 673 (Ky. App. 2004). The briefs in the Court of Appeals, as well as the Court of Appeals opinion itself, exhaustively and accurately detail MV's reckless conduct in this case. Additionally, Allgeier presented evidence that MV authorized, ratified, or should have anticipated its employee's safety-policy violations under KRS 411.184(3). Therefore, the circuit court improperly granted summary judgment on Allgeier's punitive damage claim. The Court of Appeals appropriately reversed for a limited retrial solely on the issue of punitive damages. *See, e.g. Hyman & Armstrong, P.S.C. v. Gunderson*, 279 S.W.3d 93, 122 (Ky. 2008); *Faulkner Drilling Co. v. Gross*, 943 S.W.2d 634, 639 (Ky. App. 1997); *Shortridge v. Rice*, 929 S.W.2d 194, 198 (Ky. App. 1996); CR 59.01. Thus, the punitive damage exception applies even if this Court adopts some version of the stipulation rule.

CONCLUSION

Dismissal of otherwise viable negligence claims based on a defendant's unilateral stipulation abuses the substantial rights of civil litigants and is wholly inconsistent with Kentucky law. Such a rule is wrong for Kentucky. The opinion of the Court of Appeals should be affirmed.

Respectfully submitted,

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