COMMONWEALTH OF KENTUCKY
SUPREME COURT
NO. 2012-SC-000462
ON REVIEW FROM KENTUCKY COURT OF APPEALS
CASE NOS. 2010-CA-001907-MR & 2010-CA-001921-MR

MV TRANSPORTATION, INC. — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
ACTION NO. 07-CI-11559

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

BRIEF FOR APPELLEE ESTATE OF BARBARA ALLGEIER

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CERTIFICATE OF SERVICE

On September 12, 2013, ten (10) copies of this Brief were served via Federal Express upon Susan Stokley Clary, Clerk of the Kentucky Supreme Court, Room 235, Capitol Bldg., 700 Capitol Avenue, Frankfort, Kentucky 40601-3415; and one (1) copy was served via U.S. Mail to the following: Samuel P. Givens, Jr., Clerk of the Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601; as well as counsel for MV, Griffin T. Sumner and Jason P. Renzelmann, Frost Brown Todd LLC, 400 West Market Street, 32nd floor, Louisville, Kentucky 40202; and Gene F. Zipperle, Jr., Ward, Hocker & Thornton, PLC, 9300 Shelbyville Road, Hurstbourne Place, Suite 700, Louisville, Kentucky 40222; Hon. Mary Shaw, Jefferson County Circuit Court, Division Five, 700 West Jefferson Street, Louisville, Kentucky 40202; and Jefferson Circuit Court Clerk, 700 West Jefferson Street, Louisville, Kentucky 40202.

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Counsel for Estate of Barbara Allgeier

INTRODUCTION

The Court should affirm the Kentucky Court of Appeals' unanimous decision, which reversed and remanded this matter for retrial regarding Barbara Allgeier's (Barbara)[1] punitive damage claims against MV Transportation (MV), because the Court of Appeals correctly determined that the trial court erred by granting summary judgment to MV, when substantial fact evidence existed showing that MV and its employees acted grossly negligent and also ratified, authorized, or should have anticipated the grossly negligent employee and employer conduct at issue. In addition, the Court should affirm the Court of Appeals' unanimous decision because the appellate court below correctly dismissed MV's appellate arguments; no error occurred.[2]

[1] Several Allgeiers testified during the case. Therefore, the original Plaintiff, Barbara Allgeier, will be referred to by her first name in this brief to avoid confusion. When substituted party Richard "Rick" Allgeier is intended to be named, he will be identified by his full name.

[2] *Allgeier v. MV Transp.*, Opinion, Nos. 2010-CA-001907-MR & 2010-CA-001921-MR, 2012 WL 1649089 (Ky. App. June 1, 2012), attached at **Appendix 1**; *id.*, Order Denying Pet. for Rehearing (Ky. App. July 5, 2012), attached at **Appendix 2**; R. at 368, *id.*, Order, No. 07-CI-011559 (Jefferson Cir. Ct. Aug. 30, 2010), attached at **Appendix 3**, in accord with Civil Rule 76.12(4)(c)(vii); *see also* R. at 2197-99, *id.*, Judgment (Jefferson Cir. Ct. Sept. 16, 2010); R. at 2362-64, *id.*, Am. Judgment (Jefferson Cir. Ct. Oct. 13, 2010); R. at 2178-89, *id.*, Jury Instructions (Jefferson Cir. Ct. Sept. 15, 2010). The trial court Judgment is attached at **Appendix 4**, and the Amended Judgment is attached at **Appendix 5**. The Jury Instructions are attached at **Appendix 6**.

STATEMENT CONCERNING ORAL ARGUMENT

Richard "Rick" Allgeier respectfully requests that oral argument be held because it will assist the Court in applying the facts of this case, concerning his deceased mother Barbara, to the legal issues presented. In addition, oral argument will provide his counsel with an important opportunity to clarify any remaining questions the Court may have before rendering its opinion.

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

I. COUNTERSTATEMENT OF THE CASE

A. Barbara Allgeier Was Winning.

"She had a life. . . . She never recovered from this. And they blame her. It's taken four years to get here, to get this case to you."
~ Barbara's counsel, closing argument, Sept. 15, 2010.

Barbara Allgeier loved riding the TARC paratransit buses. The buses were her gateway to independence. In December 2006, Barbara was 65 years old. She had battled multiple sclerosis since 1982.[3] And she was winning.

In spite of MS, Barbara enjoyed an active social life and managed her daily routine.[4] She could brush her teeth, apply makeup, open doors, feed herself, drink out of a glass, comb her hair, use a computer, pick up a book and read it, and privately use the bathroom—all on her own. She enjoyed weekly visits to her hairdresser Danny, shopped, socialized with friends during lunch outings, and attended church every Sunday—all on her own.[5]

Barbara relied on MV's paratransit buses and the drivers who operated them to get around Louisville. She rode the buses often—every day from 2001 to December 2006.[6] In 2006, alone, she made 353 round trips.[7] Barbara used an electric wheelchair. She had received a newer model about three weeks before December 8, 2006.[8] Other than a much-welcomed reclining feature, it functioned exactly the same as her old one. She was a careful driver and always wore the chair's lap belt, a type of seatbelt, though she required assistance putting it on.[9]

Barbara wanted to help others like her. During fall and winter 2006, she pursued a pastoral care teaching certificate offered by the Archdiocese of Louisville.[10] She attended

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[3] Video Record (VR): Rick Allgeier, 2:04:44-2:04:58 p.m., Sept. 9, 2010.
[4] *E.g.*, *id.* 2:07:27-2:07:48 p.m..
[5] VR: Georgia Tyson, 10:15:32-10:16:11 a.m. Sept. 15, 2010; VR: Rick Allgeier, 2:04:44-2:04:58 p.m.
[6] *E.g.*, Barbara Allgeier Dep. 14, Sept. 1, 2009 (relied on buses); *id.* 23:15-24 (every day from 2001 to 2006).
[7] Trial Ex. 57, Summ. of 2006 TARC Ridership Records for Barbara Allgeier.
[8] VR: Tyson, 10:21:51-10:22:02 a.m.; Barbara Allgeier Dep. 23:5; Joe Allgeier, Sr., Dep. 43:10, July 15, 2010.
[9] VR: Tyson, 10:22:14-10:23:04 a.m.; VR: Rick Allgeier, 2:07:49-2:10:12 p.m.
[10] VR: Tyson, 10:23:01-10:23:46 a.m.

classes at Baptist East three to four nights a week for eight weeks.[11] Barbara wanted to minister to handicapped and terminally ill patients to give them hope for the future.[12] She graduated from the program on December 7.[13] Barbara was very proud of earning the certificate.[14] Unfortunately, she would never use the skills learned in the program. Her life soon changed.

B. December 8, 2006: The Incident

"One [supervisor] went to the girl, the driver, and he told her, 'Don't say another word.' I heard that distinctly because I was standing right beside her. He said, 'Don't say another word.' Then him and the driver got into the car."
~ Georgia Tyson, Barbara's caregiver[15]

On December 8, 2006, Barbara suffered severe leg injuries while being unloaded from an MV bus by Wilma Caldwell, an MV employee-driver. Her femurs were shattered in nine places.[16] MV maintained and operated the bus under a contract with TARC.[17]

Earlier that day, Barbara was picked up by MV bus No. 7272 at her home, taken to Frazier Rehab for physical therapy, and then to the hair salon for her weekly appointment.[18] One benefit of her new wheelchair was that while at the hairdresser, Danny no longer needed to unbuckle Barbara and put her in a salon chair because the new model could recline. Therefore, when she left the salon, *her lap belt remained buckled.*[19] The bus took her home.[20]

By the time she arrived outside her home that early winter evening, Barbara was the last passenger on the bus.[21] Caldwell was about to end her shift.[22] The time was between 4:55[23] and 5:01.[24] It was a frigid 28 degrees.[25]

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[11] VR: Rick Allgeier, 2:20:08-2:20:18 p.m.; VR: Tyson, 10:23:01-10:23:46 a.m.
[12] VR: Tyson, 10:23:18-10:23:30 a.m.
[13] Trial Ex. 3, Pastoral Care Certificate of Completion, Dec. 7, 2006.
[14] VR: Rick Allgeier, 2:21:08-2:21:26 p.m.
[15] VR: Tyson, 10:30:00-10:30:20 a.m.
[16] Barbara Allgeier Dep. 12:2-5. Barbara sustained five breaks to her right femur and four breaks to her left femur.
[17] R. at 177-78, Def. TARC's Answers to Pl.'s First Set of Interrogs. No. 2, Oct. 8, 2009. TARC was a co-defendant but was later dismissed due to the contractual hold-harmless arrangement between it and MV. R. at 529-40.
[18] Georgia Tyson Dep. 67:24-69:16, July 23, 2010.
[19] VR: Tyson, 10:57:49-10:58:39 a.m. Tyson testified, "So I asked him . . . 'Did you leave her seatbelt off?' He said, 'No . . . I didn't have to.' And that's when he told me that he just reclined her chair." *Id.*
[20] Tyson Dep. 67:24-69:16.
[21] Wilma Caldwell Dep. 70:21-22, Aug. 24, 2009; Barbara Allgeier Dep. 19:8.

First, Caldwell parked the bus and released the four-point "tie-down" securing system that tethered Barbara's chair to the bus floor.[26] Second, Caldwell walked outside, opened the bus's side doors, stepped aside, and walked away from the lift.[27] Third, Caldwell began to deploy the mechanical lift to allow Barbara to board it.[28]

A two-button controller operates the lift.[29] Pressing the right side of the *top* button deploys the lift until it is level with the bus floor. Once level, the lift stops. The driver must then press the right side of the *bottom* button to lower the lift to the ground.[30] Attached photos show the deploying-lowering sequence.[31] Footnote 31 explains the progression.

Fourth, instead of keeping the lift level for boarding, Caldwell actually began to *lower* it,[32] causing a metal flap designed to cover the span from the bus floor to the lift—called a "bridge plate"—to become vertical.[33] Caldwell's actions created a space of at least 16 inches between the bus floor and the lift ramp.[34] Photos taken after the incident show the spacing and

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[22] Caldwell Dep. 10:22-23.
[23] VR: Tyson, 10:26:17-10:26:24 a.m.
[24] VR: Wilma Caldwell, 4:56:57-4:57:01 p.m., Sept. 9, 2010.
[25] *Id.* 4:12:55-4:12:57 p.m.
[26] *Id.* 3:47:09-3:47:59 p.m.; Caldwell Dep. 79:16-18; R. at 603, Trial Ex. 13, MV Incident Report 1, Dec. 8, 2006 (hereinafter Dec. 8 Incident Report). The December 8 Incident Report is attached at **Appendix 7**.
[27] *E.g.*, R. at 603, Dec. 8 Incident Report 1; Caldwell Dep. 80-81; Barbara Allgeier Dep. 9:11-20.
[28] *E.g.*, VR: Caldwell, 3:47:46-3:47:59 p.m.
[29] Ronald Coleman Dep. Ex. 11, June 18, 2010. **A photo of the controller is attached at Appendix 8.**
[30] *Id.* at 147:11-22.
[31] Coleman Dep. Exs. 12-16, 18-20; Caldwell Dep. Ex. 9. **The photos are attached at Appendix 9.** Step 1: Coleman Dep. Ex. 12, the lift in its stowed position. Coleman Dep. Ex. 13, top photo, the bridge plate, with yellow borders. Coleman Dep. Ex. 15, top photo, outside view of the stowed lift. Step 2: Coleman Dep. Ex. 15, bottom photo, the lift begins to deploy. Notice the yellow cane-shaped safety bars on either end, holding the safety belt that suspended Barbara. Coleman Dep. Ex. 14, interior view, same sequence. Step 3: Coleman Dep. Ex. 16, the lift fully deployed and level with the bus floor. Notice in the bottom photo that the bridge plate is level, safely covering the gap between bus floor and lift. Steps 1-3 are achieved by only pressing the *top* button of the two-button controller. Step 4: Coleman Dep. Ex. 18, bottom photo, the lift being lowered to the ground. The driver can only begin to lower the lift to the ground by pressing a *different* button. Notice the bridge plate *only begins to shift to a vertical position once the lift is lowered. This photo represents the approximate position of the lift at the time of Barbara's injury.* Compare it to a remarkably similar photo taken at the scene, Coleman Dep. Ex. 20. Caldwell Dep. Ex. 9, inside view of the now-vertical bridge plate. Coleman Dep. Ex. 19, bottom photo, the lift lowering. Step 5: Coleman Dep. Ex.19, top photo, the lift at ground level.
[32] Caldwell Dep. 101:24-102:4.
[33] Leonard Rowe Dep. 110:11-18, Mar. 3, 2010.
[34] Caldwell Dep. 5, Trial Exs. 16, **photographs attached at Appendix 10.**

the vertical position of the bridge plate.[35] Caldwell did not move the lift after the incident.[36] The photos memorialize the lift's final position.

Next, after Caldwell walked away from the doors outside, Barbara knew it was time to exit because that was the same procedure all the other MV drivers had used in the past.[37] From Barbara's vantage, she was unable to see the bus floor.[38] She relied totally on Caldwell's judgment.[39] Caldwell "did not say a word."[40] She did not signal Barbara in any way.[41]

Finally, Barbara tried to exit the bus onto the lift's ramp, but her chair hit the now-vertical bridge plate and tipped over. She and her chair were suspended in midair by a safety belt attached to the lift. Recall that Barbara was buckled to her chair.[42] Caldwell panicked and asked, "What do I do now?" to which Barbara replied, "If you don't know, I don't know."[43] At that point, Caldwell decided *to release Barbara's lap belt.* Barbara toppled onto the lift's platform, splintering her thighbones.[44] Immediately, she was "squealing in pain." The fall was the "most painful thing" Barbara had ever experienced.[45]

After the incident, Caldwell called MV dispatch, which notified MV supervisors Ronald Coleman and Leonard Rowe *but did not call EMS.*[46] The pair arrived on-scene between 5:15 and 5:20, 15 to 20 minutes later.[47] EMS was not called until 5:23,[48] *after* the supervisors arrived and *after* Coleman made a second call to dispatch—this time, requesting EMS.[49] *No one from*

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[35] *See* photos cited *supra* note 34.
[36] VR: Caldwell, 5:02:26-5:02:34 p.m.; Rowe Dep. 100:19-21.
[37] Barbara Allgeier Dep. 9:11-20; VR: Rick Allgeier, 2:14:27-2:15:48 p.m.
[38] Barbara Allgeier Dep. 35:12-15, 38:8; VR: Caldwell, 3:55:42-3:56:00 p.m.
[39] *See* Barbara Allgeier Dep. 14:17-22 ("You rely on the driver [to] make sure that it's clear.").
[40] *Id.* at 38:8; *see also id.* at 9:11-20; Caldwell Dep. 83:5-8.
[41] VR: Caldwell, 5:08:17-5:08:27 p.m.
[42] Tyson Dep. 74:7; VR: Tyson, 10:57:49-10:58:39 a.m.
[43] Barbara Allgeier Dep. 13:6-12.
[44] *Id.* at 11:17-18; Caldwell Dep. 70.
[45] VR: Caldwell, 4:08:53-4:08:59 p.m. (squealing in pain); Barbara Allgeier Dep. 12:17-18 (most painful).
[46] *E.g.*, R. at 603, Trial Ex. 13, Dec. 8 Incident Report 1 (indicating Caldwell "called dispatch and they notified road supervisor and safety"); Barbara Allgeier Dep. 13:17-22.
[47] VR: Ronald Coleman, 10:39:51-10:39:55 a.m., 10:44:18-10:44:49 a.m., Sept. 10, 2010.
[48] R. at 608, Trial Ex. 31, Com. of Ky. EMS Ambulance Run Report 1, Dec. 8, 2006, attached at **Appendix 11**.
[49] VR: Coleman, 10:44:18-10:44:49 a.m.

MV ever called the police.[50] Before EMS arrived, Coleman documented the scene by taking 36 photos in and around the bus.[51] Rowe ordered Caldwell not to speak, separated her from gathering witnesses, and put her in a car so they could talk.[52] Meanwhile, Barbara laid on the metal lift suffering in excruciating pain for almost an hour[53] in freezing weather with only a thin blanket over her. MV's supervisors *never spoke or attended to her.*[54]

Significantly, Caldwell and Barbara were the *only two eyewitnesses* to the incident. Credibility of those two eyewitnesses was a critical factor at trial, as MV readily played upon. Before trial, MV informed the trial judge, "The *only two witnesses* to what happened on this day are Wilma Caldwell and Ms. Allgeier."[55] At trial, MV informed the jury, "They were the only two people on the bus that day,"[56] earlier telling the jury, "Those are the two people *whose conduct you need to evaluate here.*"[57] MV's counsel informed the jury that a critical issue was "whether or not *you believe* that Caldwell failed to follow the unloading sequence . . . ."[58] Even though no proof was adduced, MV attacked Barbara's credibility, arguing to the jury that "on this day, maybe she's not remembering so clear . . . maybe she's confused . . . ."[59]

C. MV's Safety Policies and Questionable Accident Investigation Procedures

"*Q: So even if you were at fault, you couldn't admit it, could you, under this policy? A: Right.*"
~ Ronald Coleman, MV road supervisor[60]

When MV hired Caldwell in August 2006, the company supplied her with a trainee manual.[61] The manual,[62] along with a 2006 training guide,[63] established a set of safety policies

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[50] *Id.* 1:03:23-1:03:47 p.m.; Coleman Dep. 180:10-18.
[51] VR: Coleman, 12:23:38-12:23:42 p.m.
[52] *E.g.*, VR: Tyson, 10:30:00-10:30:20 a.m.; VR: Rowe, 12:02:45-12:03:18 p.m.
[53] *See* R. at 608, Trial Ex. 31, EMS Run Report 1, Dec. 8, 2006 (indicating EMS arrived at 5:43 p.m.).
[54] *E.g.*, Barbara Allgeier Dep. 13:20-22; Rowe Dep. 60:19-22; Tyson Dep. 95:19. The blanket was provided by Georgia.
[55] VR: Pretrial hearing, 2:30:02-2:30:06 p.m., Sept. 9, 2010.
[56] VR: MV's lead trial counsel, closing argument, 5:18:22-5:18:26 p.m., Sept. 15, 2010.
[57] *Id.* 3:45:11-3:45:15 p.m.
[58] *Id.* 5:07:21-5:07:33 p.m.
[59] *Id.* 4:36:22-4:36:44 p.m.
[60] VR: Coleman, 1:03:44-1:03:47 p.m.
[61] VR: Caldwell, 3:37:21-3:37:25 p.m.; Coleman Dep. 85:1-4; Rowe Dep. 131:11-15.

that MV expected its drivers to follow. The trainee manual was supposed to be taught from "front to back;" no section was to be selectively omitted.[64] In 2006, Ronald Coleman was MV's road supervisor. He was responsible for some of the training.[65] Billy Grice was employed as a trainer.[66] Coleman and Grice trained Caldwell.[67] Leonard Rowe was employed as MV's safety and training director.[68] Grice interviewed Caldwell, and Rowe hired her.[69] Rowe supervised the training and trained *all* of the trainers.[70] The buck stopped with him.

1. MV's Unloading Safety Policies: Deploy the Lift and Level It, Remove the Tie-Downs, Maintain Physical Contact When Lowering, Provide Verbal Cues Along the Way

The trainee manual and training guide establish the following unloading sequence:

1. Step outside and open the side doors of the bus;[71]
2. Unfold—i.e., deploy—the bus's lift until it is level with the floor of the bus;
3. Step back inside the bus;
4. Release the wheelchair passenger's four-point tie-downs;[72]
5. Exit the bus;[73]
6. If unloading a passenger with an electric wheelchair, provide verbal instruction to the passenger until she has safely boarded the lift;[74]
7. Notify the passenger when lowering the lift;[75]
8. Always maintain physical contact with the wheelchair as it lowers;[76]
9. Explain each element of the procedure to the passenger;[77] and
10. If circumstances prevent the driver from following the steps, call dispatch.[78]

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[62] Trial Ex. 9, MV Prof'l Driver Training Program: Trainee's Manual (2001) (hereinafter Trainee Manual).
[63] R. at 673-80, Pl.'s Resp. to Def.'s Mot. for Partial Summ J. Ex. 6, Aug. 5, 2010, MV Paratransit Operator Training Program: Training Guide (Nov. 2006) (hereinafter Training Guide). Although dated November 2006, trainers in MV's Louisville office were using the guide as early as "late 2005." Rowe Dep. 140:12-24.
[64] VR: Coleman, 12:11:37-12:12:12 p.m.
[65] *Id.* 10:16:01-10:16:17 a.m., 10:16:54-10:17:26 a.m.
[66] VR: Billy Grice, 2:42:02-2:42:15 p.m., Sept. 14, 2010.
[67] *Id.*; VR: Caldwell, 3:31:18-3:31:24 p.m.; Coleman Dep. 44:13-19.
[68] Rowe Dep. 15:12.
[69] Caldwell Dep. 44:15-18, 54; *see also* VR: Rowe, 10:09:44-10:13:18 a.m.
[70] VR: Rowe, 2:28:12-2:28:18 p.m.
[71] R. at 677, Training Guide at 156. "Open lift doors from outside the vehicle." *Id.* A portion of the training guide is attached at **Appendix 12.**
[72] R. at 667, Trainee Manual at Module C, 24. A portion of the trainee manual is attached at **Appendix 13.**
[73] R. at 678, Training Guide at 157. "1. The lift must always be operated from the ground. 2. Do not remain in the vehicle while raising and lowering the lift platform." *Id.*
[74] *See* R. at 669, Trainee Manual at Module C, 26 ("If the wheelchair is too large . . . to ride on the lift . . . stand on the ground and to the side . . . while raising and lowering the lift. Maneuver the wheelchair onto and off of the lift . . . while standing on the ground in front of the lift."); R. at 675, Training Guide at 154 (cooperative assistance policy).
[75] R. at 668, Trainee Manual at Module C, 25; R. at 675, Training Guide at 154.
[76] R. at 668, Trainee Manual at Module C, 25; *see also* R. at 678, Training Guide at 157 ("Stand on the ground with one hand on the wheelchair and one hand operating the controls.").
[77] R. at 668, Trainee Manual at Module C, 25; R. at 675, Training Guide at 154.
[78] R. at 669, Trainee Manual at Module C, 26.

Grice, Coleman, Rowe, and Sean Smith—MV's corporate representative at trial—all agreed that the aforementioned procedure was the company's proper unloading sequence.[79]

Removing the tie-downs *before* deploying the bus's lift violates an MV safety policy.[80] Failing to ensure the lift is level *before* a passenger boards the lift is another violation.[81] Failing to maintain physical contact with a passenger while she is lowered from the lift violates a third MV policy. Failing to give a "simple verbal cue," a policy called "cooperative assistance,"[82] at critical stages of loading and unloading is an MV safety violation.[83] Notably, the training guide instructs that verbal cues are "*especially needed*" as the driver starts her "lift up or down."[84]

2. MV's Accident and Investigation Policies

When Caldwell completed wheelchair training, she signed a form that read, "All mobility device accidents must be reported immediately. *Wheelchair accidents are treated the same as vehicle accidents.* Driver error in mobility securement will result in suspension and retraining. Serious driver error may result in termination . . . ."[85] Coleman and Caldwell agreed that when a vehicle accident occurred, in addition to calling EMS, the police must also be notified, who would independently investigate the cause of the accident.[86] Therefore, failing to call the police after a serious wheelchair accident violates another MV safety policy.[87]

MV's trainee manual instructed new drivers, "Under no circumstances should you admit or acknowledge blame" after an accident.[88] Even if a driver was at fault, Caldwell was trained

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[79] VR: Grice, 3:00:49-3:02:10 p.m.; VR: Coleman, 10:21:15-10:22:38 a.m.; VR: Rowe, 11:17:38-11:18:09 a.m.; VR: Sean Smith, 4:36:57-4:37:19 p.m., Sept. 14, 2010.
[80] *E.g.*, Coleman Dep. 91:2-7, 135:11-136:20.
[81] *Id.* at 79:22-80:2.
[82] *Id.* at 78:21-24; Rowe Dep. 149:17-23; *see also* VR: Grice, 3:22:19-3:23:50 p.m.; R. at 678, Training Guide at 157.
[83] Coleman Dep. 28:2-15, 69:25-70:1-4; VR: Rowe, 11:30:41-11:31:00 a.m.
[84] R. at 678, Training Guide at 157.
[85] Trial Ex. 50, MV Wheelchair and Mobility Device Training Acknowledgment Form, Aug, 22, 2006 (emphasis added). The form is attached at **Appendix 14.**
[86] VR: Coleman, 1:02:40-1:03:31 p.m.; VR: Caldwell, 3:32:05-3:33:23 p.m.
[87] *See* VR: Coleman, 1:02:40-1:03:31 p.m.; VR: Caldwell, 3:32:05-3:33:23 p.m.
[88] R. at 687, Trainee Manual at Module D, 8.

never to admit it.[89] Also, employees were trained to protect MV "from fraudulent and excessive liability claims," in part, by promptly taking photos of an accident scene, though they were tested and trained *not* to take photographs of MV's investigators at the scene.[90]

MV policy instructed supervisors to arrive at an accident scene as quickly as possible to take control, typically within ten minutes.[91] However, supervisors agreed that dispatch must always contact EMS first; failure to do so would violate company policy.[92] If dispatch delayed calling EMS for 22 minutes, company policy would again be violated.[93]

Supervisors were trained to interview *only the driver* when collecting information for MV's incident reports. Rowe referred to this investigation policy as "standard procedure."[94] Although the trainee manual indicated it was "important" for drivers to hand out "witness cards" to everyone who "saw the accident,"[95] *every* MV supervisor *and* Caldwell agreed they were barred from interviewing passengers or witnesses, in order to determine driver error.[96]

D. Evidence Shows MV Violated Numerous Safety Policies, While Selectively Adhering to Its Investigation Procedures Designed to Limit Liability

"I don't see why it's vital to go word by word by what we're trained."
~ Billy Grice, MV supervisor who trained Caldwell

1. The Incident Report and MV's Sham Investigation

On November 19, 2007, Barbara filed suit against MV. Contrary to MV's incorrect labeling of all of Barbara's direct negligence claims as "negligent hiring claims," Barbara

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[89] VR: Grice, 3:55:45-3:55:58 p.m.; VR: Coleman, 1:03:42-1:03:46 p.m.
[90] R. at 683, Training Guide at 160. Trainee exam question No. 23 asked, "In a collision, you may be required to conduct the initial collecting of evidence[,] which includes taking pictures . . . . What should you not take a picture of? (A) Other vehicle damage. (B) Area the accident occurred from different angles. *(C) People at the scene investigating the incident.* (D) All the damage on the vehicle, including the inside of the vehicle." The correct answer is (C). Trial Ex. 50, MV Paratransit Written Exam. No. 23 (underlining in original), attached at **Appendix 15.**
[91] VR: Coleman, 10:45:01-10:45:11 a.m.; MV Paratransit Written Exam. No. 20 (supervisors should arrive within 10 minutes), attached at Appendix 15.
[92] VR: Grice, 4:04:01-4:04:13 p.m.; Coleman Dep. 33:6-8; VR: Caldwell, 4:14:59-4:15:17 p.m.
[93] Coleman Dep. 177:11-17.
[94] VR: Rowe, 12:14:22-12:14:32 p.m.
[95] R. at 687, Trainee Manual at Module D, 8.
[96] VR: Rowe, 12:07:43-12:07:51 p.m.; VR: Coleman, 10:53:07-10:54:56 a.m.; VR: Smith, 4:20:01-4:20:03 p.m.

alleged much more than that. She asserted four distinct direct-negligence claims against MV for negligent hiring, negligent training, negligent supervision, and negligent retention. Barbara also asserted a vicarious liability respondeat superior claim against MV arising out of the negligence of its employee-driver, Wilma Caldwell, as well as direct and vicarious gross negligence claims against MV, seeking punitive damages.[97] MV *never admitted liability* until the obviousness of its liability was proven at trial and its employees' credibility was necessarily attacked.

During discovery and at trial, evidence revealed that MV's investigation policies were intended to be one-sided in order to limit its liability.[98] Barbara's incident was no different.[99] MV interviewed Caldwell and no one else, memorializing her false account of Barbara's fall in the company's incident report without ever interviewing Barbara or any of the witnesses who arrived shortly afterward.[100] In the report, *Coleman* wrote, "[P]assenger was too hasty to leave vehicle. Engaged chair before lift was in place. . . . Could not have happened if she had her scooter lap belt fastened, which is her responsibility."[101] Coleman later admitted that Caldwell never told him that Barbara was not wearing her lap belt, he never asked Barbara whether she was wearing it,[102] and "*there may have been some interjections of personal opinion*" in the report.[103] Recall that Barbara was physically unable to remove her own lap belt.

Also, Caldwell falsely wrote, "I was standing on the side of the vehicle deploying the lift when the passenger came flying over the [bridge plate] before I could finish letting down the lift."[104] Recall that the bridge plate *never* becomes vertical until the driver begins to *lower*

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[97] R. at 1-3, Compl. ¶¶ 1-11 Nov. 19, 2007; R. at 2181, Jury Instructions, Instruction No. 3 & Interrog. B, Sept. 15, 2010.
[98] *See* sources cited *supra* notes 88-90, 94, 96.
[99] *E.g.*, R. at 603, Dec. 8 Incident Report 1.
[100] *E.g.*, Coleman Dep. 11-12 (report relied on Caldwell); Rowe Dep. 60:19-22, 68:18-23 (no one else interviewed); VR: Smith, 4:23:45-4:23:51 p.m. (same). Joe Sr., Joe Jr., and Tyson were all on-scene by EMS's arrival.
[101] R. at 603, Dec. 8 Incident Report 1; VR: Coleman, 10:57:35-10:59:57 a.m.
[102] VR: Coleman, 10:58:45-10:59:11 a.m., 12:48:13-12:48:33 p.m.
[103] Coleman Dep. 11:21-22.
[104] R. at 605, Dec. 8 Incident Report 3.

the lift by pressing a *different* lift button.[105] She added, "I had picked this same passenger up on 12-4-06. She had recently gotten the chair two days prior. When I was loading her on the lift, she was trying to go forward and went backwards, not yet knowing how to operate the equipment."[106] Recall that Barbara actually received the chair three weeks earlier.[107] No one had witnessed Barbara having difficulties operating any chair she *ever* owned.[108] Plus, Barbara's new chair operated *exactly the same as her older one*, and other than two recline buttons, the new chair's control panel was *identical* to her older model.[109]

Rowe drafted a section of the report repeating *verbatim* the false findings of Caldwell and Coleman.[110] Regarding his investigation, he testified, "The only person I talked to was my operator."[111] Caldwell was questioned on the day of the incident and never again afterward.[112]

The report also indicated Caldwell called MV dispatch at 5:01, which summoned Rowe and Coleman to the scene *but did not call EMS*.[113] EMS was not called until the supervisors arrived on-scene and had taken 36 photographs, ignoring Barbara.[114] When EMS was finally called at 5:23,[115] the caller reported Barbara was suffering mere "back pain,"[116] further delaying response time because EMS was not fully aware of the severity of the emergency and did not respond as urgently, with lights and sirens, as they normally would have.[117]

Testimony at trial from *every* MV supervisor *and* Caldwell eventually revealed that Caldwell had failed to follow MV's safety procedures for unloading Barbara and that the

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[105] Caldwell Dep. 101:25-102:4; VR: Caldwell, 4:02:43-4:03:20 p.m.; *see also supra* note 31, explaining process.
[106] R. at 605, Dec. 8 Incident Report 3.
[107] VR: Tyson, 10:21:51-10:22:02 a.m., Barbara Allgeier Dep. 23:1-5.
[108] *E.g.*, VR: Rick Allgeier, 2:10:14-2:10:20 p.m.; VR: Tyson, 10:22:14-10:22:51 a.m.
[109] *See* sources cited *supra* note 9; *see also* R. at 1365-72, photos of new and old chair, attached at **Appendix 16**. In the photos, Barbara's old chair is labeled A; her new chair is labeled B. Notice the photos of the *controllers*.
[110] Rowe Dep. 92:1-9; R. at 606, Dec. 8 Incident Report 4.
[111] Rowe Dep. 60:19-22.
[112] VR: Caldwell, 3:46:11-3:46:27 p.m.
[113] R. at 603, Dec. 8 Incident Report 1 ("called dispatch and they notified road supervisor and safety").
[114] *See* sources cited *supra* notes 48-54.
[115] EMS was called at 5:23 p.m. R. at 608, Trial Ex. 31, Com. of Ky. EMS Ambulance Run Report 1.
[116] *Id.*; VR: Sgt. Richard Warren, 2:36:43-2:37:01 p.m., Sept. 10, 2010 (call was for back pain); VR: Johnson, 3:13:38-3:13:51 p.m. (same).
[117] VR: Johnson, 3:14:32-3:15:59 p.m.; VR: Warren, 2:36:43-2:39:20 p.m.

incident *would not have occurred had Caldwell followed the appropriate policies.*[118] Evidence showed that Caldwell was lowering the bus's lift as Barbara attempted to drive onto it, causing Barbara's fall and severe injuries.[119] Caldwell conceded that if, as she claimed, Barbara did not know how to operate the wheelchair, it would have been *even more* important for her to follow MV's tie-down policy.[120] Only *after* being confronted with substantial evidence suggesting that Caldwell was lying and *after* evidence attacking her credibility did Caldwell admit that—absent mechanical defect— the only way Barbara could have hit the vertical bridge plate and fallen from the bus was if Caldwell had begun to lower the lift *before* Barbara tried to board.[121]

Evidence revealed that practically any MV employee could have reviewed photos of the bus's lift taken right after the incident[122] and immediately determined that the lift was descending when Barbara's chair hit the bridge plate. In addition to Caldwell's admission, Coleman agreed the lift must have been descending when Barbara fell.[123] Rowe also agreed that "[t]he only time that flap comes up is when you've got some movement starting to go down."[124] Had anyone at MV's headquarters bothered to examine the incident report, Smith testified that it should have been apparent company safety policies were violated.[125]

Nonetheless, no reasonable investigation occurred because MV instructed its employees to deny fault and not to interview other witnesses,[126] though supervisors conceded that

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[118] *E.g.*, VR: Grice, 3:00:49-3:02:10 p.m. (proper procedure explained), 3:18:47-3:19:05 p.m. (causation); VR: Coleman, 10:26:12-10:26:38 a.m. (same); VR: Caldwell, 3:53:05-3:53:15 p.m. (same); Rowe Dep. 163:8-11 (if Caldwell follows policy, passenger should not be injured).

[119] *See* sources cited *supra* note 31.

[120] VR: Caldwell, 3:51:53-3:52:18 p.m.

[121] *E.g.*, Caldwell Dep. 101:25-102:4; VR: Caldwell, 3:48:30-3:49:35 p.m. (Caldwell lying about incident. p. 91-92), 3:51:14-3:53:15 (Caldwell lying, then admitting liability, p. 93-95), 4:02:43-4:03:20 p.m. (Caldwell admitting liability, p. 102-03), 4:53:48-4:56:00 p.m. (admits lying on job application, then admits liability for incident p. 134-35), excerpts attached at **Appendix 17.**

[122] *See supra* note 31 (photos attached at Appendix 9) and 34 (photos attached at Appendix 10).

[123] VR: Coleman, 11:01:28-11:01:55 a.m., excerpt attached at **Appendix 18.**

[124] VR: Rowe, 3:58:09-3:58:56 p.m., excerpt attached at **Appendix 19**

[125] VR: Smith, 4:28:11-4:28:40 p.m.

[126] *E.g.*, R. at 687, Trainee Manual at Module D, 8 (deny fault); VR: Grice, 3:55:47-3:55:58 p.m. (same); VR: Rowe, 12:14:22-12:14:32 p.m. ("standard procedure" to only interview driver).

interviewing witnesses is an important aspect of any objective investigation.[127] Yet, Coleman testified that if a driver denied blame, MV could wrap up its investigation without the necessity of reporting the incident to the appropriate agencies, otherwise required by the Americans with Disabilities Act.[128] Also, under MV's contract with TARC, the City of Louisville, the Commonwealth, TARC, and various federal agencies had a right to inspect MV's safety records.[129] At trial, Rowe conceded that MV's $45-million contract with TARC could be jeopardized if evidence surfaced suggesting passengers were injured due to MV's failure to enforce its own safety policies.[130]

2. Training, Supervision, and the Benefits-Firing Conundrum at MV Louisville

MV knew many of its drivers did not follow its safety policies, *yet did nothing to correct the problem.* Grice testified that he did not instruct his trainees per MV's written procedures and that other trainers did the same.[131] He could not see why it was "vital to go word for word" by MV's policies.[132] Grice instructed trainees that it was acceptable to cut corners during passenger unloading—for example, during bad weather.[133] *Rowe agreed with Grice's training style.*[134] However, *Coleman* testified that supervisors should make sure drivers followed MV's written policies.[135] Both he and corporate representative Smith agreed the safety policies were drafted in unqualified language and *applied at all times, even during bad weather.*[136] At trial, Rowe eventually—but reluctantly—conceded the same.[137]

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[127] Coleman Dep. 124:14-17; VR: Coleman, 10:51:50-10:51:56 a.m.; VR: Grice, 3:53:54-3:56:38 p.m.
[128] VR: Coleman, 11:32:35-11:32:58 a.m.
[129] VR: Rowe, 12:23:35-12:24:09 p.m.; *see also* VR: Smith, 4:44:35-4:45:25 p.m. (same).
[130] VR: Rowe, 12:35:12-12:35:31 p.m.; R. at 529-40, TARC's Mot. for Summ. J. Ex. 2, TARC-MV contract.
[131] VR: Grice, 3:12:01-3:12:10, 3:15:25-3:15:32 p.m. (Grice didn't instruct); 3:44:14-3:44:41 p.m. (other trainers)
[132] *Id.* 3:12:01-3:12:10 p.m.; *see also id.* 3:15:25-3:15:32 p.m. ("I do not train word for word by the book.").
[133] *E.g.*, *id.* 3:07:25-3:07:42 p.m., 3:12:11-3:12:32 p.m., 3:14:06-3:14:27 p.m.
[134] *See* VR: Rowe, 11:18:11-11:18:55 a.m.; Rowe Dep., 50:17 (unload procedure "depends upon the weather").
[135] Coleman Dep. 106:6-9.
[136] VR: Coleman, 10:27:39-10:28:53 a.m., excerpt attached at **Appendix 20**; VR: Smith, 4:34:21-4:34:41 p.m.
[137] VR: Rowe, 3:30:40-3:30:51 p.m.

Grice referred to MV's policy instructing drivers to deploy the lift before removing a passenger's tie-downs as both "*unimportant*" and "*useless*."[138] To him, it was "*irrelevant* . . . when you take the securements out of the floor." As he recalled, "there wasn't any policy of when to take the securements off or what time to take the securements off."[139] Recall that the trainee manual and training guide instruct otherwise. And *Grice trained Caldwell*.[140]

According to Caldwell, there "*wasn't* a procedure saying that you had to let the lift down and then" remove the tie-downs.[141] She believed it was acceptable to cut corners when unloading a passenger *because that was how Grice trained her*.[142] She claimed she cut corners during the December 8 incident with Barbara "[b]ecause it was cold outside."[143] Significantly, Caldwell also testified that her *supervisors knew her routine* was to remove tie-downs before deploying her bus's lift, and they *never* told her to change the way she was doing it.[144]

Moreover, MV's supervisors *consciously knew* that if one of its drivers failed to follow its established safety policies for unloading a disabled passenger, serious physical injury would result. For example, Rowe testified:

> Q: [L]et's say that the driver gets the platform in the correct position but continues to lower it as the passenger is driving onto it; what's going to happen to the wheelchair?
>
> A: *The wheelchair is going to fall off—off the bus.*[145]

In May 2007, another passenger fell from an MV bus under similar circumstances, due to the driver not following the company's tie-down policy.[146] *It was a sunny, dry day.*[147] In the incident report, Rowe indicated that a button on the lift's controller "stuck" and that MV had

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[138] VR: Grice, 3:26:53-3:26:58 p.m., 3:15:44-3:15:51 p.m. ("unimportant"); 3:15:44-3:15:51 p.m. ("useless")
[139] *Id.* 3:30:43-3:30:52 p.m. ("irrelevant"); 3:08:14-3:08:25 p.m. ("wasn't any policy").
[140] VR: Caldwell, 3:37:19-3:37:21 p.m.
[141] Caldwell Dep. 81:6-8 (emphasis added).
[142] VR: Caldwell, 5:05:52-5:06:14 p.m.
[143] *Id.*; *see also id.* 4:29:09-4:29:26 p.m.
[144] *Id.* 4:28:53-4:29:09 p.m.
[145] Rowe Dep. 67:20-25.
[146] R. at 1265, Trial Ex. 51, MV Incident Report 2, May 14, 2007.
[147] *Id.* at 1264, MV Incident Report 1, May 14, 2007; VR: Smith, 4:34:41-4:36:16 p.m.

"been having some problems" with lifts *exactly* like the one involved in Barbara's incident. To remedy falls, Rowe typed, "[W]e are . . . instructing our operators *to keep their passengers secured* until they are ready to assist in deploying."[148] Yet, Caldwell testified that no supervisor ever talked to her about adhering to MV's tie-down policy *before or after* the May 2007 incident, nor did she receive a memo concerning it.[149] Coleman testified that MV did not even have a system in place to inform its drivers of recent safety-related accidents.[150] Also, he and other trainers knew risks existed with the bridge plates that could cause a passenger's chair to tip over because they would "*experiment*" with the lifts and discover dangerous conditions,[151]all the more reason that MV should have enforced its written safety policies. But no memos went out to drivers warning of these dangers.[152] MV certainly had capabilities to distribute company-wide memos because on October 12, 2006, Rowe sent one to "all employees" because he found it "increasingly disturbing" that they were not *wearing uniforms* per "company policy."[153]

Barbara testified that drivers never followed MV's cooperative assistance policy during loading and unloading. On the day of her fall, Caldwell "did not say a word" as Barbara proceeded to board the unlevelled lift.[154] Rick Allgeier rode on MV buses with his mother five or six times before the incident, and on each occasion, the drivers never provided verbal cues.[155] Additionally, Barbara testified that on numerous occasions, a driver would have to literally *stomp* on the bridge plate to force it to become level for safe boarding.[156]

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[148] R. at 1265, Trial Ex. 51, MV Incident Report 2, May 14, 2007 (emphasis added), attached at **Appendix 21**. The lift involved in Barbara's incident and the May 2007 incident were identical. VR: Rowe, 2:18:05-2:20:06 p.m.
[149] VR: Caldwell, 5:27:39-5:28:25 p.m.
[150] VR: Coleman, 10:30:48-10:30:59 a.m.
[151] Coleman Dep. 161:18-162:19; *see also* VR: Coleman, 11:39:38-11:45:44 a.m.
[152] VR: Coleman, 11:45:31-11:45:44 a.m. Thus, MV *incorrectly* informed the Court in its appellant brief, "[I]t is undisputed that MV had not experienced any life related incidents prior to Ms. Allgeier's incident." Appellant's Br. 8.
[153] Trial Ex. 50. Rowe's memo was found in Caldwell's personnel file. The memo is attached at **Appendix 22**.
[154] Barbara Allgeier Dep. 9:11-20 (policy never followed); *Id.* at 38:8 ("did not say a word").
[155] VR: Rick Allgeier, 2:14:27-2:15:48 p.m.
[156] Barbara Allgeier Dep. 41:23-24, 50:13-19.

Caldwell was an alcoholic, living in a rehab facility when she was hired in August 2006.[157] A psychiatrist was treating her for the addiction.[158] The MV job application she filled out in August—just four months before the incident—required her to certify to the truthfulness of its contents. She lied about her alcoholism and mental health history on her employment application *and admitted such .at trial*, after MV placed Caldwell's credibility and the truthfulness of her eyewitness account of the incident into issue.[159] Citing MV's zero-tolerance policy, Rowe and Grice testified that they *would not have hired Caldwell* had they known she was an alcoholic.[160] However, *Caldwell* testified that Grice and Coleman *knew* she was an alcoholic *before* she was hired.[161]

During trial, when questioned *by MV*, Rowe *offered testimony* to the jury that as the top safety manager at MV-Louisville: "I'm responsible for compliance of the Department of Transportation drug and alcohol program. . . . I'm responsible for accident investigation."[162] *Rowe later again offered testimony* that federal law *required* driver alcohol testing within two hours after a paratransit bus incident like the one here, in order to obtain a reliable result: "We have two hours from the time in which the incident occurred to have the employee tested."[163] Barbara's counsel did not "inaccurately" introduce that evidence to the jury, as MV claimed in its brief; *MV's own manager introduced that testimony to the jury during questioning by MV's counsel.*[164] MV never offered any contrary evidence to the jury. Rowe later *again testified* that "Yes," the two-hour testing limit was required for an incident such as the one at issue because

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[157] Caldwell Dep. 18:13-23. She was still living at the facility in December 2006. *Id.*
[158] *Id.* at 49:14-18; VR: Caldwell, 4:50:57-4:53:07 p.m.
[159] VR: Caldwell, 4:53:47-4:54:22 p.m., transcript attached at **Appendix 23**; Trial Ex. 50, Caldwell employment application, attached at **Appendix 24**.
[160] Rowe Dep. 115:11-21; VR: Grice, 2:54:37-2:55:24 p.m.
[161] VR: Caldwell, 4:49:33-4:50:21 p.m.
[162] VR: Rowe, 2:42:04-2:42:32 p.m. Trial testimony excerpts for notes 162-63 are attached at **Appendix 25**.
[163] *Id.* 3:36:42-3:36:48 p.m.
[164] Sources cited *supra* nn. 162-63.

"*[t]hat's the Department of Transportation policy.*"[165] MV's counsel, *during closing*, argued that Caldwell had been "cleared pursuant to *CFR 39141.*"[166] However, the jury learned that on December 8, 2006, Caldwell was given a breath alcohol test at 7:32 p.m., 32 minutes *past the deadline Rowe discussed with the jury.*[167] The results were negative.[168] At trial, MV offered no explanation for the delay. *Coleman*—who knew Caldwell was an alcoholic—*drove Caldwell to get tested.*[169] The police were never called, so no scientifically reliable alcohol testing occurred.

Also, MV's drivers received low pay and no benefits, resulting in 50% turnover.[170] MV offered its drivers monthly and quarterly safety-related *bonuses.*[171] However, supervisors agreed, and written policy showed, drivers could be *fired* for violating safety policies,[172] which created a double incentive for Caldwell to lie about the cause of Barbara's fall. With a policy mandating that only the driver would be interviewed during an investigation, MV ensured that no paratransit bus incident would ever be attributed to a safety-related violation.

E. Barbara's Injuries Were Severe and Life-Threatening

"Christopher Reeve was Superman, but he only lived 13 years after he got paralyzed . . . and he had the best medical care money could buy, obviously, and when people are immobile, they do not do well."
~ Elizabeth Loy, M.D., Barbara's Internist at Baptist East Hospital[173]

Barbara was immobile for *225 days* due to the incident. She was admitted to Baptist East Hospital, then to Masonic Home of Louisville. Dr. Elizabeth Loy cared for Barbara during her initial 11-day admission at Baptist and during four readmissions causally related to the incident—in late December and also January, February, and March 2007. Dr. Loy called the

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[165] *Id.* 4:06:03-4:06:06 p.m.
[166] VR: MV's closing argument, 3:55:12-3:56:12 p.m., Sept. 15, 2010.
[167] *Id.* 4:05:53-4:06:31 p.m.; Trial Ex. 56, Forensic Alcohol Test Report, Wilma Caldwell, Dec. 8, 2006, attached at **Appendix 26**; Rowe referred to Department of Transportation regulations; MV referred to "CFR" regulations during its closing. Additionally, KRS 189A.010(1) requires testing within the same two-hour window in order for the test to be scientifically reliable.
[168] VR: Rowe, 3:37:08-3:37:11 p.m.
[169] VR: Caldwell, 3:44:43-3:44:53 p.m.
[170] Rowe Dep. 40 (pay/benefits); *id.* at 39 (turnover). The national turnover average was 30%; MV's was 50%. *Id.*
[171] *Id.* at 40:22-41:2; VR: Rowe, 12:17:40-12:18:00 p.m.
[172] Trial Ex. 50, MV Wheelchair and Mobility Training Acknowledgment Form; Grice Dep. 47:3-17; Coleman Dep. 54:18-21; Rowe Dep. 91:1-13; VR: Rowe, 12:18:02-12:18:15 p.m.
[173] VR: Elizabeth Loy, M.D., 10:41:42-10:42:30 a.m., Sept. 14, 2010.

series of hospitalizations "a snowball effect," indicating Barbara "was just wasting away" due to her injuries and prolonged immobilization.[174] After the incident, "[t]he normal things we do every day, she [could not] do."[175] Barbara was totally dependent on others for care. She could do none of the things she once enjoyed. She could not leave her home. She was never able to use her new wheelchair again. As independent as she once was, Barbara's mobility was lost. She later had pneumonia complications and had a feeding tube placed. She could not even go to the bathroom alone, in peace. She had to wear diapers.[176] She passed away on August 26, 2012.

F. Trial and Procedural History

"But, again, ladies and gentlemen, you got to remember that good for Barbara Allgeier is not good for most people. All she needed her legs for was to sit in a wheelchair."
~ MV's attorney, closing argument[177]

Before trial, MV moved for summary judgment on Barbara's punitive damage claims,[178] which the trial court granted. MV also moved to dismiss Barbara's direct-negligence claims on the *sole legal basis* that it had admitted "respondeat superior liability," a misnomer term meaning only that an employer has admitted that its employee was working within the scope of her employment. Other than its single, flawed legal basis, in its motions, MV never offered a factual basis for dismissal of the negligent hiring, negligent training, negligent supervision, or negligent retention claims. The trial court denied the motion.[179]

On September 9, 2010, the Court held a hearing on pretrial motions in limine, MV's motion to reconsider regarding Barbara's direct-negligence claims, and Barbara's motion to reconsider regarding her punitive damage claims. Again, MV claimed that since it had admitted "respondeat superior liability," Barbara's direct negligence claims should be automatically

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[174] *Id.*; *see also* R at 2285-90, Pl.'s Resp. to Defs.' Mot. for New Trial 12-17, Oct. 1, 2010.
[175] VR: Tyson, 10:43:53-10:44:08 a.m.
[176] *Id.* 10:42:16-10:44:13 a.m.
[177] VR: MV's lead trial counsel, closing argument, 5:00:37-5:00:43 p.m., Sept. 15, 2010.
[178] R at 349-69, MV's Mot. for Partial Summ. J. Pursuant to Rule 56, Dec. 9, 2009; *see also* R. at 556-735 Pl.'s Resp. to Def.'s Mot. for Partial Summ. J., Aug. 5, 2010; *see also* R. at 1242-75, Pl.'s Mot. to Reconsider, Sept. 1, 2010.
[179] R. at 368, Order, Aug. 30, 2010, *supra* Appendix 3.

dismissed, citing non-controlling law. Barbara argued that there was substantial punitive-damage evidence against MV. The trial court denied MV's motion but took Barbara's motion under submission. Also the *credibility* of Caldwell and MV was discussed at length. MV conceded that "[t]he only two witnesses to what happened on this day are Wilma Caldwell and Ms. Allgeier."[180] MV sought to exclude evidence of Caldwell's alcoholism and mental health history because it argued "[t]hese issues are not relevant in this case." However, Barbara argued that Caldwell lied about those matters on her employment application and

> [t]hat goes to her credibility because she says the accident happened one way and all the other proof says it didn't. She . . . testified it's all Barbara Allgeier's fault how [Barbara] got hurt, and we think there are a number of untrue statements [Caldwell] made.[181]

Also, just four months before the incident, Caldwell had certified on her application,

> "The above information is completed true." So that goes to her credibility in this case. She is . . . completely at odds with the plaintiff's theory or—of the facts of this case. So her credibility is at issue. This is not a truthful answer. . . . And we think she is not truthful about what happened. [182]

The trial court correctly reasoned, "[I]f it's going to boil down to a credibility issue, [Caldwell] filled out the application. [I]f they can show that she lied on the application, then I think that is an issue for her credibility." The trial court limited the scope of the evidence "only, though, up until the period of the accident."[183] It also excluded prior arrests and citations. MV then requested that Barbara not discuss one of Caldwell's prior suicide attempts, and the parties and the trial court agreed, "We can ask if she's been hospitalized for depression, but we can't get into" the prior suicide attempt.[184] *MV never requested a limiting instruction on the scope of admissibility of the evidence it now complains somehow substantively influenced the jury.*

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[180] VR: Pretrial hearing, 2:30:02-2:30:06 p.m., Sept. 7, 2010.
[181] *Id.* 2:10:52-2:11:19 p.m.
[182] *Id.* 3:39:05-3:39:21 p.m.
[183] *Id.* 3:44:20-3:44:38 p.m.
[184] *Id.* 3:46:51-3:47:24 p.m.

In its brief, MV claims that Barbara "bombard[ed] the jury" with Caldwell's alcoholism and mental health history and the falsification of same on her employment application. During its 35-minute opening statement, MV referenced Caldwell's alcoholism for 15 seconds.[185] During its 1 hour, 42 minute closing, MV referenced the credibility evidence against Caldwell—her alcoholism and mental health history and falsifying same on her employment application—for a total of 7 minutes, 6 seconds.[186] MV claimed Caldwell lied on her employment application "to make a better life" for herself. MV *again* informed the jury that "under federal regulations," the company "had done their duty" in alcohol testing Caldwell but conceded that it "was a little bit late" in testing Caldwell on the day of the incident.[187]

Barbara discussed Caldwell's credibility evidence for 3 minutes, 27 seconds during her 1-hour, 37-minute opening.[188] During her 47-minute closing argument, Barbara discussed Caldwell's credibility issue for 3 minutes, 3 seconds.[189] Barbara informed the jury that it "judge[s] credibility in this case. . . . [W]hen witnesses are testifying, you have to figure out . . . are they telling the truth."[190] During openings and closings, Caldwell's alcoholism; mental health history; lying about same on her application; MV's own offered "federal regulations," "CFR" evidence; MV's knowledge of Caldwell's alcoholism; and its delay to breath-test Caldwell was presented to the jury for 13 minutes, 51 seconds, out of 281 minutes of argument. *Including argument*, over the 5-day trial, the jury heard from 13 witnesses and heard argument from both parties, totaling 1,355 minutes (22 hours, 35 minutes). The jury learned about Caldwell's credibility evidence for 50 minutes, 54 seconds,[191] *only 3.7% of total trial time*.

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[185] VR: MV's opening statement, 12:45:22-12:45:37 p.m., Sept. 9, 2010.
[186] VR: MV's closing, 3:50:47-3:53:18, 3:54:18-3:58:19, 5:06:19-:20, 5:15:20-:25, 5:16:27-:55 p.m., Sept. 15, 2010.
[187] *Id.* 3:49:10-3:49:18 p.m.; 3:51:45-3:52:00 p.m.; 3:54:30-3:56:00 p.m.; 3:57:20-3:57:40 p.m.; 5:16:27-5:16:55 p.m.
[188] VR: Barbara's opening statement, 11:05:27-11:07:44, 11:08:17-11:09:27 a.m., Sept. 9, 2010.
[189] VR: Barbara's closing argument, 6:12:15-6:14:40, 6:17:54-6:18:32 p.m., Sept. 15, 2010.
[190] *Id.* 6:03:56-6:04:06 p.m.
[191] VR: Sept. 9, 2010: 9:08:26-9:15:56, 11:08:17-11:09:25 a.m. (Pl.'s opening); 12:45:22-:37 p.m. (MV's opening); 4:47:58-4:54:25 pm, 5:28:29-5:29:57 (Pl.'s cross, Caldwell); 5:11:23-5:14:02 p.m. (MV's direct, Caldwell). Sept. 10:

Barbara rested her case on September 15, moved for a directed verdict, and moved the trial court to reconsider giving an instruction on punitive damages. The court denied both.[192] The jury found MV directly liable to Barbara for its negligent "hiring, training, supervising, *or* retaining" of Caldwell and vicariously liable for Caldwell's negligence.[193] The jury apportioned no fault to Barbara. On the lone damages form, the jury awarded medical expenses of $74,630.28 and past, present, and future suffering damages of $4.1 million. Barbara filed a direct appeal, seeking reversal of the dismissal of her punitive damage claims and a retrial solely on that issue. MV cross-appealed. The Court of Appeals issued a unanimous 34-page opinion, holding that Barbara's punitive damage claims were improperly dismissed, ordering a retrial on that lone issue, and rejecting MV's cross-appeal. MV filed a petition for rehearing, which was unanimously denied, prompting this appeal.

II. ARGUMENT

A. The Court of Appeals correctly held that introduction of evidence concerning Caldwell's alcoholism and mental health history at trial was appropriate.

1. No abuse of discretion occurred by allowing introduction of evidence concerning Caldwell's alcoholism, mental health history, and lying about same on her employment application because it bore directly on her credibility.

The trial court correctly denied MV's pretrial motion in limine regarding the Caldwell credibility evidence, reasoning that "if it's going to boil down to a credibility issue, [Caldwell] filled out the application. [I]f they can show that she lied on the application, then I think that is an issue for her credibility." No abuse of discretion occurred. Evidence of Caldwell's falsification of her alcoholism and mental health history on her employment application and evidence related to that was admissible to attack her credibility. Ky. R. Evid. 608(b). The

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10:19:17-10:20:57 a.m. (Pl.'s cross, Coleman). Sept. 13: 10:14:36-10:25:37 a.m., 4:04:26-4:06:35 p.m. (Pl.'s cross, Rowe); 2:42:16-:23, 2:57:17-2:59:21, 3:36:08-3:37:13 p.m. (MV's direct, Rowe). Sept. 14: 2:50:07-2:58:35 p.m. (Pl.'s cross, deposition video, Grice; MV filed no objections to depos pretrial). Sept. 15: 3:50:47-3:53:18, 3:54:18-3:58:19, 5:06:19-:20, 5:15:20-:25, 5:16:27-:55 p.m. (MV's closing); 6:12:15-6:14:40, 6:17:54-6:18:32 p.m. (Pl.'s closing).

[192] VR: 11:38:08-11:45:06 a.m., 12:01:32-12:01:38 p.m., 1:37:00-1:37:15 p.m., Sept. 15, 2010.

[193] VR: Hon. Mary Shaw, 9:01:10–9:04:30 p.m., Sept. 15, 2010; *see also* R. at 2178-89, Jury Instructions.

credibility of a witness's testimony "is always at issue" and is never a collateral matter. *Kemper v. Gordon*, 272 S.W.3d 146, 155 (Ky. 2008); *Primm v. Isaac*, 127 S.W.3d 630, 634 (Ky. 2004); *Sanborn v. Com.*, 754 S.W.2d 534, 545 (Ky. 1988).[194] A trial court *cannot* exclude evidence that impeaches a witness's credibility "*even though such testimony would be inadmissible to prove a substantive issue in the case*." *Sanborn*, 754 S.W.2d at 545 (emphasis added). Any proof of a witness's reason to slant testimony is relevant and admissible, and the "range of possibilities" a plaintiff can use to impeach the witness's credibility is "unlimited." *Miller v. Marymount*, 125 S.W.3d 274, 281-82 (Ky. 2004).

Moreover, a character witness—such as a supervisor or employer—may be asked "not only concerning the specific acts of the principal witness probative of truthfulness or untruthfulness, but may be cross-examined concerning familiarity with convictions as well as arrests, rumors, reports, indictments, etc., of the principal witness. Such facts have a natural bearing upon the reputation of the principal witness *and* the character witness' opinion of the principal witness. Lack of familiarity with such facts is relevant to an assessment of the basis for the character witness' testimony." *E.g.*, Graham, *Handbook of Fed. Evid.* § 608:5 (7th ed.).

MV's contention that the Caldwell credibility evidence was "clearly inadmissible" under KRE 404(b) is plainly wrong. This Court recently held that "impeachment testimony *is not proscribed by . . . KRE 404(b)*" and falls within the "other purpose" exception. *Ky. Farm Bureau Mut. Ins. Co. v. Rodgers*, 179 S.W.3d 815, 821 (Ky. 2005) (emphasis added). Federal authority *agrees* that 404(b) evidence can be used for impeachment purposes, when false statements have been made. *E.g.*, *United States v. Strickland*, 999 F.2d 541 (6th Cir. 1993).[195]

Moreover, in a "wide variety of situations, federal courts have allowed cross-examination concerning misstatements of fact" regarding employment, *including falsifications*

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[194] *Sanborn, later overruled on unrelated grounds,* is attached at **Appendix 27.**
[195] *See also U.S. v. Stockton*, 788 F.2d 210, 219 n.15 (4th Cir. 1986); *U.S. v. Altshuler*, 28 F.3d 108 (9th Cir. 1994).

on employment applications. Lawson, *The Ky. Evid. Handbook* § 4.20[5], at 308 & n.50 (4th ed. 2003). "Numerous courts have held that a witness' provision of inaccurate information on a job application is probative of truthfulness under Rule 608(b)." *Watson v. Connelly*, 2008 WL 45259, at *1 (W.D. Penn. Jan. 2, 2008) (collecting cases).[196] Certified statements on "employment applications . . . carry an obligation for truthfulness, so that falsehoods in such situations" are probative of a lack of credibility. *Davidson Pipe Co. v. Laventhol and Horwath*, 120 F.R.D. 455, 462-63 (S.D.N.Y. 1988). "*[L]ying on an employment application* is among those acts that may be inquired into on cross-examination pursuant to Rule 608(b)." *Brossette v. Swift Transp. Co.*, 2008 WL 4809411, at *9 (W.D. La. Oct. 29, 2008) (emphasis added).

In *Lewis v. Baker*, the court affirmed the trial court's admission of "an admittedly untruthful statement regarding [the plaintiff's] psychiatric disorder." 526 F.2d 470, 475 (2nd Cir. 1975). The plaintiff had "certified his negative answers to those questions to be true at the time he completed the form." He "admitted at trial that the negative answers were not truthful in view of his confinement to a psychiatric hospital and treatment less than five years prior . . . ." *Id.* Admission of the evidence was particularly relevant because the plaintiff's "capacity for truth-telling" was a material issue for the jury's consideration. *Id.* In *Zeigler v. Alabama Dept. of Human Res.*, the court allowed cross-examination concerning the plaintiff's "false statements on his employment application . . . which he certified to be true;" moreover, the evidence's probative value did not substantially outweigh any perceived prejudicial effect because the plaintiff's "truthfulness will play a material role in the case." 2010 WL 2490018, at *2 (M.D. Ala. June 16, 2010).[197] In *Andrews v. Seales*, similar cross-examination was allowed

[196] *See also United States v. Howard*, 774 F.2d 838, 845 (7th Cir. 1985); *United States v. Zandi*, 769 F.2d 229, 236-37 (4th Cir. 1985); *United States v. Jones*, 900 F.2d 512, 520-21 (2nd Cir. 1990); *United States v. Reddit*, 381 F.3d 597, 601-02 (7th Cir. 2004); *United States v. Jackson*, 876 F. Supp. 1188, 1197-98 (D. Kan. 1994); *United States v. Burris*, 959 F.2d 242 (9th Cir. 1992); *United States v. Kozlovski*, 2011 WL 4916915, at *2 (E.D.N.Y. Oct. 14, 2011).

[197] *Lewis* is attached at **Appendix 28**; *Zeigler* is attached at **Appendix 29**.

because it was "highly probative" of plaintiff's "truthfulness" and the "resolution of this case will turn largely on Andrews' credibility . . . ." 881 F. Supp. 2d 671, 674 (E.D. Penn. 2012).[198]

This Court will only reverse a trial court's decision to admit evidence "if that decision represents an abuse of discretion." The Court has "to find that the decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Clark v. Com.*, 223 S.W.3d 90, 95 (Ky. 2007). The complaining party must prove that the "decision was against the logic of the circumstances and so arbitrary and unreasonable as to shock one's sense of justice." 5 Am. Jur. 2d *Appellate Review* § 623 (2013).

Here, no abuse of discretion occurred. A material issue of fact existed regarding causation that could not be reconciled unless the jury decided which of two eyewitnesses to the incident was telling the truth—Barbara or Caldwell. Credibility of those two eyewitnesses was a critical factor at trial, as MV readily conceded and played upon. *Just four months before the incident*, Caldwell certified that the contents of her employment application were true. At trial, she admitted that she had lied on her application, which she filled out. Importantly, she also lied about the cause of the incident during her deposition and *again at trial*. Her credibility was a *key* issue. Sources cited *supra* sections I.B-D & F. Evidence of her alcoholism and mental health history was admissible to attack her credibility under KRE 608(b) and would have been admitted regardless of any substantive claims made by Barbara against MV.

2. *MV waived its appellate argument concerning introduction of Caldwell's credibility evidence for substantive purposes because it failed to request a limiting instruction at trial regarding the scope of the evidence's admissibility. No palpable error occurred, even if such evidence was relied upon substantively.*

Under KRE 105(a),

> When evidence which is admissible as to one (1) party for one (1) purpose

[198] The application itself was admissible and did not interfere with Rule 608's extrinsic evidence exception, since Caldwell conceded the facts she was questioned about and admitted filling out the application. *Zandi*, 769 F.2d at 236.

> but not admissible as to another party or for another purpose is admitted, the court, *upon request*, shall restrict the evidence to its proper scope and admonish the jury accordingly. *In the absence of such a request,* the admission of the evidence by the trial judge without limitation *shall not be a ground for complaint on appeal, except under the palpable error rule.*

MV never requested a limiting instruction after the trial court denied MV's motion in limine and allowed introduction of the evidence at issue to attack Caldwell's credibility. *See* sources cited *supra* section I.F. Therefore, to the extent MV complains that such evidence was used substantively, its allegations of error are reviewed by this Court for palpable error. Under this extremely high standard, the Court must find "manifest injustice," in order to reverse a decision below. *Stacy v. Com.*, 396 S.W.3d 787, 791 (Ky. 2013); *Martin v. Com.*, 207 S.W.3d 1, 4 (Ky. 2006). There must be a "'substantial possibility' that the result in the case would have been different without the error." *Brewer v. Com.*, 206 S.W.3d 343, 349 (Ky. 2006). Palpable error "involve[s] prejudice more egregious than that occurring in reversible error[.]" *Ernst v. Com.*, 160 S.W.3d 744, 758 (Ky. 2005). Reversal can occur *only* "if the error so seriously affected the fairness, integrity, or public reputation of the proceeding as to be 'shocking or jurisprudentially intolerable.'" *Martin*, 207 S.W.3d at 4.

Requesting a limiting instruction for mixed admissibility evidence is the *mandatory* requirement at the trial court level because "an admonition is usually sufficient" to cure a perceived erroneous admission of evidence, "and there is a presumption that the jury will heed such an admonition." *Matthews v. Com.*, 163 S.W.3d 11, 17 (Ky. 2005). "The 'upon request' qualification of the rule" codifies the principle that "[t]he admission of mixed admissibility evidence without an accompanying admonition *cannot be questioned on appeal by a party who failed to request an admonition at trial.*'" *Barth v. Com.*, 80 S.W.3d 390, 396 (Ky. 2001).[199] "The opponent of the evidence must ask for that instruction. Otherwise, he may be supposed to

[199] *Barth* is attached at **Appendix 30**. *See* Lawson, *supra* § 1.05[4], at 25-26.

have waived it as unnecessary for his protection." *Id.*; *see also Hyman & Anderson, P.S.C. v. Gunderson*, 279 S.W.3d 93, 120 (Ky. 2008); *St. Clair v. Com.*, 140 S.W.3d 510, 559 (Ky. 2004); *West v. Tyson Foods*, 374 Fed. Appx. 624, 637 (6th Cir. 2010).[200]

Also, for good reason, a trial court has no duty to *sua sponte* provide an unrequested limiting instruction, and "the failure to give an unrequested limiting admonition is not palpable error." *Ernst*, 160 S.W.3d at 759; *see also Drane v. Com.*, 2010 WL 3377756, at *8 (Ky. Aug. 26, 2010).[201] There are "'occasions when, for tactical reasons, defense counsel may wish to forego such a limiting instruction because it might focus the jury's attention on the damaging evidence.'" *Barth*, 80 S.W.3d at 396; *see also Hall v. Com.*, 817 S.W.2d 228, 229 (Ky. 1991). "Thus, Kentucky precedent leaves that important judgment call *squarely within the trial counsel's sound discretion* by recognizing the concept of waiver." *Quisenberry v. Com.*, 336 S.W.3d 19, 29 (Ky. 2011) (emphasis added).[202]

In *Quisenberry*, this Court determined that a criminal co-defendant had waived his Confrontation Clause argument regarding a statement played at trial of a nontestifying witness because he did not request a limiting instruction. This Court reasoned that—*even when a constitutional right was at issue*—"the error was not preserved and [the co-defendant] cannot establish that it was palpable error." *Id.* at 28-29; *see also Fields v. Com.*, 2011 WL 3793149, at *8 (Ky. Aug. 25, 2011) (same).[203] Also, in *May v. Com.*, this Court determined that a defendant had waived his request for a limiting instruction *regarding impeachment evidence* because the defendant's counsel "did not renew his objection" at or near in time to the questioning at issue. "If the defendant fails to request an admonition, the evidence is reviewed on appeal for palpable

[200] *West* is attached at **Appendix 31.**
[201] *Drane* is attached at **Appendix 32,** in accord with CR 76.28(4). *Drane* became final on September 16, 2010.
[202] *Quisenberry* is attached at **Appendix 33.**
[203] *Fields* is attached at **Appendix 34,** in accord with CR 76.28(4). *Fields* became final on September 15, 2011.

error." 2011 WL 5316761, at *8 (Ky. Oct. 27, 2011).[204]

Moreover, MV's pretrial motion in limine was *not sufficient* to preserve the error it complains of because, again, it failed to request a limiting instruction on the scope of admissibility of the Caldwell credibility evidence. *See Lanham v. Com.*, 171 S.W.3d 14, 28-29 (Ky. 2005).[205] In *Lanham*, this Court held that under KRE 103(d), a motion in limine will preserve an alleged error on appeal if it precisely specifies the evidence sought to be excluded and the reason why, "is not a broad, generic objection" concerning a "class of evidence," and is "resolved by order of record." *Id.* at 22-23. Significantly, however, the Court also qualified that *a party's failure to request a KRE 105 limiting instruction waives the alleged error for appeal*, even if the motion in limine met the requirements of KRE 103(d):

> We have previously held that where an admonishment is sufficient to cure an error and the defendant fails to ask for the admonishment, *we will not review the error*. This may appear to contradict our interpretation of KRE 103(d) above, . . . *but it conforms to the limitations on the rule that we have expressed. By failing to ask for an admonition, even after the trial court returned a ruling that Appellant thought was in error, Appellant's "objection" was incomplete.* As such, an admonition was "not strictly within the scope of the objection as made...[and was not] fairly brought to the attention of the trial court...." Basically, even our relaxed reading of KRE 103(d) . . . *requires that a defendant still has to ask for a remedy in order to get the remedy. Id.* at 28-29 (emphasis added).

Furthermore, if MV felt that the Caldwell credibility evidence was being introduced for substantive purposes—i.e., felt that the trial court's pretrial ruling was being violated—then it had a duty to contemporaneously object and bring the issue to the trial court. It never did, which, again, waives MV's alleged error. "[A] party obviously may not obtain a successful pretrial [motion in limine] ruling, acquiesce to the breach of the ruling at trial by failing to object to the violation, and then blithely claim preservation based upon the pretrial ruling. KRE 103(d) does not excuse a party from its duty to contemporaneously bring errors to the trial court's attention

[204] *May* is attached at **Appendix 35**, in accord with CR 76.28(4). *May* became final on January 27, 2012.
[205] *Lanham* is attached at **Appendix 36**.

in the event the pretrial ruling is violated." *Long v. Com.*, 2011 WL 6826377, at *3 n.3 (Ky. Dec. 22, 2011).[206]

Here, the trial court correctly denied MV's pretrial motion in limine regarding the Caldwell credibility evidence and allowed introduction of the evidence to attack Caldwell's credibility. As part of its trial strategy, MV *never requested a limiting instruction* from the trial court on the scope of admissibility of the evidence it now complains about. If MV had requested one, the jury would have been instructed that the evidence at issue was only for consideration regarding Caldwell's credibility and not for substantive consideration; the lion's share of MV's appellate complaint would have been resolved. *See Matthews*, 163 S.W.3d at 17 (presumption is jury will heed admonition). But MV chose not to do that. Moreover, MV never objected during Barbara's opening statement or closing argument. MV never contemporaneously objected to any witness testimony regarding Caldwell's credibility evidence. MV never moved to redact any of the deposition testimony played. On the same day Barbara served her exhibit list, MV's exhibit list identified the employment application Caldwell falsified and "[d]rug/alcohol screen documentation for Wilma Caldwell," indicating MV's intent *to use the evidence for its benefit*. Sources cited *supra* section I.F.[207]

MV *never preserved* the evidentiary issue it is now using as its primary appellate complaint. The "admission of mixed admissibility evidence without an accompanying admonition cannot be questioned on appeal by a party who failed to request an admonition at trial.'" *E.g.*, *Barth*, 80 S.W.3d at 396. MV was required under KRE 105 to "ask for that instruction." By failing to do so, it must be presumed that MV "waived it as unnecessary for [its] protection." *See id.* No palpable error occurred.

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[206] *Long* is attached at **Appendix 37**, in accord with CR 76.28(4). *Long* became final on January 12, 2012.
[207] *See also* R. at 750-52, Defs' Ex. List, Aug. 10, 2010, attached at **Appendix 38.**

*3. Minimal trial time was consumed discussing the evidence MV complains of, and its effect was, at most, harmless error, given the **overwhelming liability** evidence presented against MV at trial.*

A "litigant has a right to a fair trial but not a right to a perfect trial." Lawson, *supra* § 1.10[7][b], at 49. The "harmless error standard requires 'that if upon a consideration of the whole case this court does not believe there is a *substantial possibility* that the result would have been any different, the irregularity will be held nonprejudicial.'" *Brewer*, 206 S.W.3d at 324. Here, the Court of Appeals correctly held that the jury could have inferred a causal connection between Caldwell's alcoholism and Barbara's fall on December 8, 2006. *Allgeier*, 2012 WL 1649089, at **6, 11 (Ky. App. May 11, 2012). Also, MV never moved for summary judgment on factual grounds regarding Barbara's negligent hiring claim; it relied solely on its single, flawed legal argument regarding "respondeat superior liability" and out-of-state law from a minority of jurisdictions, which was appropriately rejected. Notably, the case law MV is presenting to this Court concerning negligent hiring and proximate causation *was never presented to the trial court*. MV never handed the trial court a single case on that, so there was no basis for the trial court to grant summary judgment or to direct a verdict on factual or causation grounds. "An appellate court 'is without authority to review issues not raised in or decided by the trial court.'" *Ten Broeck Dupont, Inc v. Brooks*, 283 S.W.3d 705, 734 (Ky. 2009).

At a minimum, at trial, the jury *heard Rowe testify during MV's own questioning* that on the day of the incident, "federal regulations" required that Caldwell be tested for alcohol within two hours of the incident, yet MV delayed the testing.[208] In addition, MV's own policy *specified* that all wheelchair accidents were to be treated "*the same as vehicle accidents*," which required alcohol testing within that same two-hour window. Moreover, Kentucky statutory law and other

[208] MV cannot credibly argue that Barbara introduced "legally incorrect" evidence to the jury because *MV introduced that testimony during its own questioning of Rowe and never corrected it, inviting its own error*, if any, which is not reviewable on appeal. *See Wright v. Jackson*, 329 S.W.2d 560, 562 (Ky. 1959) ("[A] party is estopped to take advantage of an invited error."); *Louisville Taxicab & Transfer Co. v. Crane*, 262 S.W.2d 188, 189 (Ky. 1953) ("A party may not invite an error and then take advantage of it."); *Miles v. Southeastern Mtr. Truck Lines*, 173 S.W.2d 990, 998 (Ky. 1943).

authority recognize that a brief two-hour limit exists for obtaining a scientifically reliable breath-alcohol test. Ky. Rev. Stat. Ann. § 189A.010 (West 2013); *Ky. Handbook Series: Driving Under the Influence Law* § 5:4 (2012-13 ed.) ("If the test time is beyond two hours, it is generally recognized in the scientific community that the test result would not be an accurate reflection of the alcohol level of the defendant at the time of operation.").[209] On the day of the incident, MV's supervisors at the scene understood *all of the above, yet deliberately delayed testing Caldwell* until well past the deadline for scientific reliability.

At trial, MV offered no explanation for the delay. Rowe separated Caldwell from witnesses at the scene. No one spoke to her but MV's supervisors. Her supervisor, Coleman, was one of the first to arrive at the accident scene but failed to get her alcohol level timely tested, even though *he knew she was an alcoholic.* Further, MV *never called the police*, so no additional alcohol testing was timely performed because the company took exclusive control of the scene. In short, the ability to test Caldwell, a known alcoholic, *was completely within MV's control at all times*, and the absence of a timely alcohol test was the direct and sole result of MV's delay. From the evidence, the jury could have inferred a causal connection between Caldwell's known alcoholism and Barbara's fall from the bus. *E.g.*, *Purcell v. Mich. Fire and Marine Ins. Co. of Detroit*, 173 S.W.2d 134, 140 (Ky. 1943) ("[W]here relevant evidence which would properly be part of a case is within the control of the party whose interest it would naturally be to produce it, and he fails to do so, without satisfactory explanation, the jury may draw an inference that such evidence would be unfavorable to him."); *Hebert v. Aulerich*, 164

[209]*See also State v. Bedah*, 2009 WL 6763583, at *2 (N.M. Ct. App. Feb. 2, 2009) ("In this regard, we note that the jury reasonably could have elected not to rely on the blood test as a reliable indicator of whether Defendant was intoxicated at the time of driving given that it was administered two hours after the initial stop."); *Lund v. Hjelle*, 224 N.W.2d 552, 560 (N.D. 1974) (Erickstad, J., dissenting) ("The effectiveness and reliability of the breathalyzer as well as the blood test diminishes with the passage of time."); *People v. Holbrook*, 864 N.Y.S.2d 726, 730 (N.Y. App. 2008); *State v. Harris*, 2003 WL 21500068, at *3 (Ohio Ct. App. June 24, 2003) (noting that the legislature recognized scientific reliability of breathalyzer if testing occurred within "two hours of the alleged offense"); *Sung Mo Hong v. State*, 2010 WL 2510333, at *3 (Tex. Ct. App. June 23, 2010) ("Here, as in *Mata*, the breath test was administered over two hours after the offense. The *Mata* court observed that such a delay is 'significant' and 'seriously affects the reliability of any extrapolation.'").

Wash. App. 1036 (Wash. Ct. App. 2008), *available at* 2008 WL 3824772, at *3 (negligent hiring claim; "where competing inferences may be drawn from the evidence, the case must be resolved by the trier of fact").[210]

The 5-day trial spanned 13 witnesses and a total of 22 hours and 35 minutes. Minimal trial time was spent on the Caldwell credibility evidence. Significantly, the jury also heard the following overwhelming liability evidence:

- MV employees testified that multiple safety policy violations occurred during Barbara's unloading;
- Wilma Caldwell admitted that she lied on the incident report;
- Ronald Coleman admitted he fabricated his portion of the incident report regarding Barbara wearing her lap belt: "*[T]here may have been some interjections of personal opinion*;"
- Testimony from *every* MV supervisor *and* Caldwell revealed that the incident *would not have occurred had Caldwell followed the appropriate policies*;
- Caldwell conceded that if Barbara did not know how to operate the wheelchair, it would have been *even more* important for Caldwell to follow MV's tie-down policy;
- Caldwell admitted that—absent mechanical defect—the only way Barbara could have hit the vertical bridge plate and fallen off the bus was if Caldwell had begun to lower the lift *before* Barbara tried to board;
- Coleman agreed the lift must have been descending when Barbara fell;
- Leonard Rowe agreed that "[t]he only time that flap comes up is when you've got some movement starting to go down;"
- MV knew many of its drivers did not follow its safety policies, *yet did nothing to correct the problem*;
- Billy Grice testified that he did not instruct his trainees per MV's "irrelevant," "useless," written procedures and that other trainers did the same;
- Rowe—MV's *safety director*—testified that he agreed with Grice's training style;
- Both Coleman and Sean Smith agreed the safety policies were drafted in unqualified language and *applied at all times*, even during bad weather. Rowe conceded the same;
- Caldwell believed it was acceptable to cut corners when unloading a passenger *because Grice trained her that way*. Caldwell also testified that her *supervisors knew her routine* was to remove tie-downs before deploying her bus's lift, and they *never* corrected her;

[210] The *Hebert* court also reasoned, "There is no question that if Bunch had not hired Aulerich, the assault against Hebert would not have occurred. . . . Bunch also admitted that if she knew Aulerich had lied on his application, she would not have hired him." *Id.* at *6.

- Coleman testified that he and other trainers knew risks existed with the bridge plates that could cause a passenger's chair to tip over because they would "experiment" with the lifts and discover dangerous conditions. Yet, drivers were not warned of these dangers. Sources cited *supra* section I.C-D.

The jury unanimously found MV vicariously liable for Caldwell's conduct. In addition, Jury Instruction, Interrogatory B was drafted disjunctively, reading, "Are you satisfied from the evidence that MV Transportation, Inc., failed to exercise reasonable care in hiring, training, supervising, *or* retaining its employee-driver, Wilma Caldwell, and that this failure was a substantial factor in causing Barbara Allgeier's injuries?" The jury's vote was "yes."[211] MV's evidentiary challenge is of no import because *MV overwhelmingly conceded* fault at trial. As such, the jury already had a tremendous independent basis for determining MV's liability. Nothing in the record suggests that the evidence MV seeks to put at issue in any way affected the jury's verdict. And that evidence consumed a minimal amount of trial time. MV was already buried underneath a mountain of evidence on multiple claims, clearly establishing the company's fault on a number of levels. The Court of Appeals correctly understood this, as did the trial court. The Court should affirm the Court of Appeals' decision.

B. For at least 23 years, Kentucky has held that direct negligence claims for negligent hiring, training, supervision, or retention are distinct, separate claims from that of a vicarious liability, respondeat superior claim and not "duplicative."

1. Contrary to what MV calls the "majority rule," today a majority of states consider direct claims for negligent hiring, retention, training, or supervision to be totally independent of a plaintiff's claim for vicarious liability and allow both actions in one suit.

What once may have been considered a "majority rule" is now an incorrect assertion, as even so-called "majority" jurisdictions concede. *See Zibolis-Sekella v. Ruehrwein*, 2013 WL 3208573, at *2 (D.N.H. June 24, 2013) (citing a so-called majority state opinion which quoted,

[211] R. at 2178-89, Jury Instructions.

"Courts from other jurisdictions *are split* on the question," and rejecting the approach).[212] Current 2013 research reveals that 22 states,[213] in addition to the *Restatement (Second) of Agency*[214] and *Prosser and Keeton on the Law of Torts*,[215] consider direct claims for negligent hiring, retention, training, and supervision to be totally independent of a vicarious liability, respondeat superior claim. In contrast, MV has cited 14 states as advocating its so-called "majority rule." MV's approach is in the minority (hereinafter, the "now-minority" approach).

MV cites a line of cases from now-minority jurisdictions holding that when an employer admits "respondeat superior liability," it is entitled to summary judgment on claims for negligent hiring, training, or supervision. However, admission of "respondeat superior

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[212] In fact, a federal court sitting in a so-called "majority" state recently seriously questioned the approach. *See Chamberlain v. Thomas*, 2012 WL 4355908, *1 (W.D. Okla. Sept. 24, 2012) ("Against the backdrop of the general principle, recognized under both federal and Oklahoma law, that a plaintiff can ordinarily pursue alternate or even inconsistent theories of recovery, and that he is not ordinarily required to elect his remedies, *it seems somewhat anomalous to allow the defendant to do the election for him.*").

[213] *See* Combined Brief for Appellant/Cross-Appellee Barbara Allgeier, *Allgeier v. MV Transp.* at 7-9 & nn. 29-35 (Ky. App.) (collecting cases), excerpt attached at **Appendix 39**. The 2011 research presented to the court below remains—in large part—correct. It appears that Hawaii has joined the now-minority of jurisdictions advocating MV's position, dropping it from the now-majority approach advocated by Barbara, *see De-Occupy Honolulu v. City and County of Honolulu*, 2013 WL 2284942 (D. Hawaii May 21, 2013), as has Mississippi. However, upon further review, North Dakota advances the now-majority approach, recognizing that direct negligence claims and a vicarious liability respondeat superior claim are totally independent claims that can be simultaneously asserted against a corporate tortfeasor. *See McLean v. Kirby Co.*, 490 S.W.2d 229, 245 (N.D. 1992) ("Urie's liability to McLean, but for the settlement, would have been based upon *respondeat superior, a vicarious liability, and negligent hiring, a direct liability.*"). No other movement appears to have occurred since briefing occurred at the Court of Appeals.

Keeping the above in mind, 22 states recognize direct negligence claims and respondeat superior claims as independent of one another: (1) **Alabama**, (2) **Arizona**, (3) **Colorado**, (4) **Connecticut** (MV cited a 1946 Connecticut case at page 30, note 92 of its brief that has been superseded by subsequent case law; *e.g.*, *Shore v. Town of Stonington*, 444 A.2d 1379, (Conn. 1982) ("[W]e recognized the existence of an action against a police chief for negligently hiring an unfit police officer, an action independent of the respondeat superior theory of liability.")), (5) **Delaware**, (6) **Iowa**, (7) **Kansas**, (8) **Massachusetts**, (9) **Minnesota**, (10) **New Hampshire** (New Hampshire just expressly weighed in on the issue and adopted the now-majority approach advocated by Barbara, *see Zibolis-Sekella*, 2013 WL 3208573), (11) **North Carolina** (again, MV cited a 1954 case that does not accord with subsequent case law, *e.g.*, *Prior v. Pruett*, 550 S.E.2d 166 (N.C. Ct. App. 2001) (allowing claims for negligent hiring and negligent supervision to proceed simultaneously with respondeat superior claim, and no criminal conduct alleged)), (12) **North Dakota**, (13) **Ohio**, (14) **Oregon** (MV cited a 1955 case that does not accord with subsequent case law, *see Erickson v. Christenson*, 781 P.2d 383 (Or. Ct. App. 1989) (allowing claims for negligent supervision and respondeat superior claim to proceed together, and no criminal conduct alleged)), (15) **Rhode Island**, (16) **South Carolina**, (17) **South Dakota**, (18) **Utah**, (19) **Vermont**, (20) **Virginia**, (21) **West Virginia**, and (22) **Wisconsin**. *See* Combined Brief at 7-8 & n. 29, **Appx. 39** (with the understood exclusion of Hawaii and Miss. and addition of N. Dakota).

Six states have not weighed in (Alaska, Maine, Michigan, Nebraska, Tennessee, and Wyoming). New Mexico has avoided a decision, *e.g.*, *Frederick v. Swift Transp. Co.*, 616 F.3d 1074, 1081 (10th Cir. 2010), and the District of Columbia has conflicting opinions, *see Hackett v. Wash. Metro. Area Transit*, 736 F. Supp. 8 (D.D.C. 1990); *Doe v. Exxon Mobil Corp.*, 573 F. Supp. 2d 16, 29 (D.D.C. 2008) (allowing respondeat superior and negligent supervision).

[214] *Restatement (Second) of Agency* § 213 & cmt. h (1958).

[215] W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 70, at 501–02 (5th ed. 1984).

liability" is a misnomer term meaning *only* that an employer "has admitted the agency relationship" of its employee—course and scope—*and nothing more*. *Scroggins v. Yellow Freight Sys., Inc.*, 98 F. Supp. 2d 928, 931 (E.D. Tenn. 2000) (applying Georgia law). The policy rationales offered for this now-minority position are that allowing direct negligence claims to proceed with a respondeat superior claim would be redundant, would unduly prejudice the employer, or could lead to duplicative damage awards. *See James v. Kelly Trucking Co.*, 661 S.E.2d 329, 331 (S.C. 2008) (dismissing these policy arguments); *Hill v. W. Door*, 2006 WL 1586698, at **2-3 (D. Colo. June 6, 2006) (same).

Regardless, states that have adopted this now-minority position *also recognize an exception* to the rule, whereby a plaintiff can bring both direct and vicarious negligence claims against an employer *once a valid claim for punitive damages is presented. Durben v. Am. Materials, Inc.*, 503 S.E.2d 618, 619 (Ga. Ct. App. 1998); *Marquis v. State Farm Fire and Cas. Co.*, 961 P.2d 1213, 1223 (Kan. 1998). In its brief, MV held out Missouri as one of the jurisdictions that had *not* "recognized a punitive damages exception," Appellant's Br. at 33, when in fact, on March 19, 2013, Missouri *did recognize* the exception, reasoning that evidence of gross negligence *must* be presented to a jury—even in a stipulation-approach jurisdiction—because "this evidence would have a *relevant*, non-prejudicial purpose." *Wilson v. Image Flooring, LLC*, 400 S.W.3d 386, 393 (Mo. Ct. App. 2013). Here, even if the Court adopted MV's unreasonable proposal, Barbara presented overwhelming evidence of punitive-damage conduct, triggering the exception. *See* section II.C, *infra*.

The now-minority rule advocated by MV is more complicated than helpful and is applied inconsistently, which begs the question, why would Kentucky want to adopt it? One of the primary cases MV cited as supporting its position actually *does not* adhere to the now-minority rule, as the Brief on Behalf of *Amicus* Kentucky Justice Association (KJA) correctly

addresses. In *Oaks v. Wiley Sanders Truck Lines, Inc.*, the trial judge from the Eastern District of Kentucky indicated that "[o]nce an employer defendant has *admitted liability* to [a] plaintiff for *its employee's negligence*," a claim for vicarious liability "serves no purpose." 2008 WL 5459136, at *1 (E.D. Ky. Nov. 10, 2008) (emphasis added). MV failed to acknowledge that in a previous opinion issued on September 4, 2008, the same district court ruled that apportionment of fault was not an issue because the trucking company *had admitted actual liability for the truck wreck*, leaving only "the issue of damages" for trial. *Id.* 2008 WL 4149635, at *2 (E.D. Ky. Sept. 4, 2008). Thus, the *Oaks* opinions reason that the employer must admit the employee's *actual liability* before a claim for direct negligence would ever be considered duplicative. *See id.* Unlike the truck company in *Oaks*, MV *never* accepted actual liability in this matter. To the contrary, MV fiercely denied liability, blamed Barbara for causing the incident, and *asked the jury to apportion fault to her. E.g.*, R. at 2178-89, Jury Instructions.

However one applies MV's inconsistent argument, the approach is flawed. In *James*, the South Carolina Supreme Court declined to adopt the now-minority rule, presenting sound arguments against it. 661 S.E.2d at 332.[216] The case, like many of the cases dealing with the issue, dealt with a large transportation corporation, its insurer, and an injured plaintiff. *Id.* at 330. First, the court recognized, as Kentucky also does, that "[j]ust as an employee can act to cause another's injury, so can an employer be *independently* liable in tort." *Id.* (emphasis added).

Second, the court reasoned that the proposed rule "presumes too much" because

> [o]ur court system relies on the trial court to determine when relevant evidence is inadmissible because its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. SCRE 403 . . . . In our view, the argument that the court must entirely preclude a cause of action to protect the jury from considering prejudicial evidence *gives impermissibly short-shrift to the trial court's ability to judge the admission of evidence and to protect the integrity of trial, and to the jury's ability to follow the trial court's instructions. Id.* at 331.

[216] The September 4, 2008, *Oaks* opinion is attached at **Appendix 40.** A copy of *James* is attached at **Appendix 41.**

Third, the court indicated that the rule's punitive damage exception was flawed because it raised troubling procedural problems. *Id.* When judging whether a plaintiff can proceed to trial on a claim, the trial court "concerns itself only with whether the plaintiff's complaint states a factual basis to support a cause of action and whether, at the close of his presentation of the case, the plaintiff has presented a prima facie case supporting the allegations of his complaint." *Id.* However, if a trial court "is asked to make any sort of a qualitative judgment regarding the employer's conduct, the exception would drastically alter our traditional concepts of the court's proper function." *Id.* at 331-32. On the other hand, if a trial court "is simply required to ask whether the plaintiff has requested an award of punitive damages," then "the adoption of a rule of preclusion might prove of little utility." *Id.* at 332. Because requests for punitive damages are commonplace in tort cases involving transportation negligence, "traveling the road the [defendant] proposes would create an exception which swallows the rule." *Id.*

Finally, the court rejected the proposed rule on common-sense tort principles, reasoning,

> *In our view, it is a rather strange proposition that a stipulation as to one cause of action could somehow "prohibit" completely the pursuit of another.* A plaintiff may, in a single lawsuit, assert many causes of action against a defendant. The considerations limiting a plaintiff's available causes of action in the typical case are that the plaintiff must be able to demonstrate a prime facie case for each cause of action and that a plaintiff may ultimately recover only once for an injury. *Id.* (emphasis added).

A present majority of states follow the *James* rationale, recognizing that "[t]here is a significant legal distinction between *vicarious liability* of a principal for the negligence of an agent . . . and *direct liability* of the principal for its own negligence, i.e., its own breach of duty . . ." *McGraw v. Wachovia Secs., L.L.C.*, 756 F. Supp. 2d 1053, 1066 (N.D. Iowa 2010); *see also Fairshter v. Am. Nat'l Red Cross*, 322 F. Supp. 2d 646, 653-54 (E.D. Va. 2004); *Poplin v. Bestway Express*, 286 F. Supp. 2d 1316, 1319-20 (M.D. Ala. 2003); *Marquis*, 961 P.2d at 1225;

Lim v. Interstate Sys. Steel Div., Inc., 435 N.W.2d 830, 833 (Minn. Ct. App. 1989);[217] sources *supra* notes 213-15. Courts in these states correctly recognize that "it is *black letter law* that a principal's liability under a respondeat superior theory of vicarious liability for acts of an agent *has nothing to do* with a principal's direct liability for the principal's own negligence that facilitated misconduct of an agent or employee." *McGraw*, 756 F. Supp. 2d at 1066.

2. The Restatement (Second) of Agency *and Professors Prosser and Keeton reinforce the present-majority rule advocated by Barbara.*

Kentucky "has adopted the *Restatement (Second) of Agency* § 213," *e.g.*, *McDonald's Corp. v. Ogborn*, 309 S.W.3d 274, 291 (Ky. App. 2009) (citing *Smith v. Isaacs*, 777 S.W.2d 912, 914-15 (Ky. 1989));[218] *Oakley v. Flor-Shin, Inc.*, 964 S.W.2d 438, 442 (Ky. App. 1998), which provides that a person conducting an activity through agents is subject to liability for harm resulting from his conduct if he is negligent or reckless:

> (a) in giving improper or ambiguous orders of in failing to make proper regulations [negligent training]; or
> (b) in the employment of improper persons or instrumentalities in work involving risk of harm to others [negligent hiring, negligent retention];
> (c) in the supervision of the activity [negligent supervision]; or
> (d) in permitting, or failing to prevent, negligent or other tortious conduct by persons, whether or not his servants or agents, upon premises or with instrumentalities under his control[.] *Restatement (Second) of Agency* § 213.

Significantly, comment h, 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).

The esteemed *Prosser* treatise also follows the present-majority approach. It provides,

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[217] *McGraw* (**Appx. 42**), *Fairshter* (**Appx. 43**), *Poplin* (**Appx. 44**), *Marquis* (**Appx. 45**), and *Lim* (**Appx. 46**).
[218] *Ogborn* and *Smith* each cite the *Restatement (Second) of Agency* § 213. *Smith* adopts the *entire section* and discusses commentary to the rule. 777 S.W.2d at 914-15.

"Once it is determined that the [person] at work is a servant, the master becomes subject to vicarious liability for his torts. *He may, of course, be liable on the basis of any negligence of his own in selecting or dealing with the servant.*" Keeton, *supra* § 70, at 501-02 (emphasis added).

3. The arguments set forth in the KJA's amicus brief further support affirmation of the Court of Appeals' opinion.

First, as the amicus brief correctly addresses, under Kentucky law, an injured victim has a "substantial right" to present evidence supportive of any viable claim asserted against a defendant. *See Davis v. City of Winchester*, 206 S.W.3d 917, 919 (Ky. 2006).[219] "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.* If a defendant feels that evidence exists supportive of one claim and not of another, Kentucky recognizes a remedy, a limiting instruction under KRE 105, *id.*, "and there is a presumption that the jury will heed such an admonition." *Matthews*, 163 S.W.3d at 17. Adopting MV's proposal would transfer to a defendant the unfettered ability to stipulate away a significant substantial right conferred to a plaintiff.

Second, KRS 411.182 and corresponding case law establish that Kentucky is a pure comparative fault jurisdiction, no longer recognizing joint and several liability. *E.g.*, *Degener v. Hall Contracting Corp.*, 27 S.W.3d 775, 779 (Ky. 2000). Plus, Kentucky already allows juries to assess fault for an employer's independent negligence, as well as an employee's own negligence occurring within the scope of her employment. Thus, if an employer's independent negligence contributes to an injury in any way, the jury must consider all of the evidence and apportion fault accordingly. *See Owens Corning Fiberglass Corp. v. Parrish*, 58 S.W.3d 467, 479-80 (Ky. 2011). "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." Ky. Rev. Stat. Ann. § 411.182(2). The jury could not

[219] *Restatement* section 213 is attached at **Appendix 47**. The KJA's amicus brief is attached at **Appendix 48**.

perform its statutorily conferred function if a trial court were required to suppress significant evidence of fault attributable to an independent cause of action, due to the unreasonable, unilateral stipulation approach MV proposes. *See id.* Additionally troublesome for the *employee* at issue, under MV's approach, once distinct evidence of the employer's fault is stipulated away and the jury attributes a disproportionate amount of fault to the employee, the *employer* could then turn around and *sue that employee for common law indemnity* based, at least in part, on fault not primarily attributable to the employee, such as the company's lax training of the employee. *See Degener*, 27 S.W.3d 775; *Eichenberger v. Reid*, 728 S.W.2d 533 (Ky. 1987); *York v. Petzl Am., Inc.*, 353 S.W.3d 349 (Ky. App. 2010); Brief for Amicus KJA, at 11.

Finally, even if the Court were to adopt MV's unreasonable stipulation proposal, the punitive damages exception to the proposal should also be adopted. Here, Barbara presented significant evidence of MV's gross negligence, which the Court of Appeals correctly recognized, triggering application of the exception in this case. *See Allgeier*, 2012 WL 1649089; section II.C, *infra.*

4. The Court should affirm the opinion below because the present-majority rule adopted by the Court of Appeals is consistent with Kentucky law.

First, supported by the *Restatement*, the present-majority rule recognizes the independent nature of direct negligence claims versus vicarious negligence claims, the distinct duties involved with each, and appropriately allows a plaintiff to assert all applicable claims against a corporate tortfeasor, subject to a trial court's case-by-case evidentiary determinations. As referenced above, Kentucky has adopted Section 213 of the *Restatement*,[220] which clearly provides that direct negligence claims are independent of vicarious negligence claims and can be asserted in the same suit. *Restatement (Second) of Agency* § 213 cmt. h.

[220] *E.g.*, *Ogborn*, 309 S.W.3d at 291; *Smith*, 777 S.W.2d at 914-15; *Oakley*, 964 S.W.2d at 442.

Second, Kentucky already recognizes that claims for negligent training, negligent supervision, negligent hiring, and negligent retention are *four viable, 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); *Ogborn*, 309 S.W.3d at 291 (negligent supervision); *Oakley*, 964 S.W.2d at 441-42 (negligent hiring); *Airdrie Stud, Inc. v. Reed*, 2003 WL 22796469, at *1 (Ky. App. Nov. 26, 2003)[221] (recognizing negligent hiring *and* negligent retention and reasoning that "the elements of each are distinctly different").

Third, Kentucky already recognizes that direct negligence claims against employers 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.*, this Court reasoned that direct negligence claims "differ" from "liability based upon respondeat superior." 283 S.W.3d at 732. Under respondeat superior, "the employer is strictly liable" for the employee's act committed within the scope of employment, while under the direct negligence claims, "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. *See id.* Later, the Court of Appeals recognized the distinct duties involved with the two classes of torts, reasoning that with respondeat superior, the focus is on the *employee's conduct*, but with a direct negligence claim, "the focus is on the *employer's conduct*." *Cooper v. Unthank*, 2009 WL 3320924, at *2 (Ky. App. Oct. 16, 2009).[222]

Fourth, the rule MV advocates renders primary tenets of the Kentucky Rules of Evidence meaningless. "Appeals courts recognize that trial judges are in a better position to make relevancy decisions and for that reason show substantial deference for their determinations." Lawson, *supra* § 2.05[4], at 83. "KRE 403 favors a presumption of

[221] In accord with CR 76.28(4)(c), *Reed* is attached at **Appendix 49**.
[222] A copy of *Cooper* was attached to MV's brief at Appx. J.2.

admissibility . . . by mandating that the negative attribute of the evidence must substantially outweigh its probative value before exclusion is justified." Underwood & Weissenberger, *Ky. Evid. Courtroom Manual* 103 (2013-14 ed.). To adopt a rule automatically excluding admissible, relevant evidence supporting an independent, recognized cause of action makes no sense. The trial court is in the best position to make such determinations on a case-by-case basis.

Finally, Kentucky's open-courts policy supports affirmation of the opinion below. Kentucky has never automatically restricted a plaintiff's right to bring claim X simply because she also asserted claim Y. In fact, Kentucky courts have consistently rejected prior tort reform attempts,[223] and this Court has declined to adopt a stricter summary judgment standard, preferring instead to allow a plaintiff to proceed to trial unless it is impossible for her to produce any evidence to win.[224] When considering 100-plus years of law favoring open courts, Ky. Const. § 14, and a plaintiff's right to proceed to trial once a cognizable claim is alleged, MV's proposed rule *is* "a rather strange proposition," *see James*, 661 S.E.2d at 332. A plaintiff may, in a single lawsuit, assert many causes of action against a defendant. The considerations limiting a plaintiff's available claims are that she must demonstrate a prima facie case for each cause of action and that she may ultimately recover only once for an injury. Here, Barbara did just that. She asserted recognized claims, and the jury filled out the lone damages form, compensating her once for her injury. However, under MV's draconian proposal, a plaintiff does not even get to *choose* between bringing a direct negligence or respondeat superior claim; *the defendant chooses for her*, and naturally, it chooses the claim least likely to fully inform the

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[223] *See Williams v. Wilson*, 972 S.W.2d 260, 260-61, 269 (Ky. 1998). (rejecting heightened "subjective awareness" and "malice" requirements before awarding punitive damages); *McCollum v. Sisters of Charity of Nazareth Health Corp.*, 799 S.W.2d 15 (Ky. 1990) (rejecting medical malpractice statute of repose); *Perkins v. Ne. Log Homes*, 808 S.W.2d 809 (Ky. 1991) (rejecting builder negligence statute of repose); *Saylor v. Hall*, 497 S.W.2d 218 (Ky. 1973) (rejecting builder negligence statute of repose).

[224] *See, e.g., Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476, 482 (Ky. 1991); *Thomas v. Greenview Hospital, Inc.*, 127 S.W.3d 663, 673 (Ky. App. 2004), *overruled on other grounds by Lanham*, 171 S.W.3d at 20 & n.4; *Mobile & Ohio R.R. Co.*, 80 S.W. 471, 473 (Ky. 1904).

jury of the extent of the corporation's negligence. "If we have comparative negligence, we must look at *all* of the proximate causes of [a tortious incident] and its consequent injuries," not just the one the defendant finds least likely to produce an adverse verdict. *Amend v. Bell*, 570 P.2d 138, 142 (Wash. 1977). The Court should affirm the Court of Appeals' opinion.

C. The Court of Appeals correctly reversed the trial court's grant of summary judgment to MV regarding Barbara's punitive damage claims. In doing so, the court below relied on much more than "post-incident investigation practices."

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." *Thomas v. Greenview Hospital*, 127 S.W.3d 663, 673 (Ky. App. 2004). This deferential standard has been recognized for over 100 years. *E.g., Mobile & Ohio R.R. Co.*, 80 S.W. 471, 473 (Ky. 1904). Under our summary judgment standard, the record "must be viewed in a light most favorable" to the plaintiff, and all doubts should be resolved in her favor. *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). Particularly in negligence cases, this Court supports relaxed standards of trial court review for summary judgment and directed verdict because the interpretative function of the jury is critical to the development of case law. *Horton v. Union Light, Heat & Power Co.*, 690 S.W.2d 382, 385 (Ky. 1985).

Under Kentucky *common law*, punitive damages are justified when there is a finding of failure to exercise reasonable care and an additional finding of gross negligence, defined as a reckless disregard for the lives, safety, *or* property of others. *City of Middlesboro v. Brown*, 63 S.W.3d 179, 181 (Ky. 2001). Gross negligence "'must be specifically defined to include the essential element of reckless indifference or disregard for the rights of others.'" *Id.* (quoting 2 *Palmore: Kentucky Instructions to Juries* § 39.15, at 39-12). This Court has rejected alternative terminology when defining gross negligence because "the recklessness standard more certainly communicates to the jury what it must believe prior to awarding punitive damages." *Id.*

Therefore, a plaintiff does not have to prove "malice," "oppression," or "fraud," in order to submit a punitive damages instruction to a jury because requiring that violates her constitutionally protected jural rights. *Williams*, 972 S.W.2d at 264-69.[225] Even the terms "wanton," "outrageous," and "evil motive" are irrelevant because each has "been defined to mean a reckless disregard for the rights of others[] and therefore redundant." *Palmore*, *supra* § 39.15, at 39-13; *see also Phelps v. Louisville Water Co.*, 103 S.W.3d 46, 52 (Ky. 2003) (same).

Recklessness "is conduct lacking intent or actual knowledge of the result." *Williams*, 972 S.W.2d at 264. Therefore, a defendant only has to intend the act or omission that sets in motion the chain of events that cause the result. *Id.*; *see also Restatement (Second) of Torts* § 500 cmt. f (1965). In order for a defendant's conduct to be reckless, "it is not necessary that he himself *recognize* it as being extremely dangerous." *Restatement* § 500 cmt. c. Instead, "it is enough that he knows or has reason to know of circumstances which would bring home to the realization of the ordinary, reasonable man the highly dangerous character of his conduct." *Id.* In other words, if a defendant has knowledge—or should know—of the facts presented "but does not realize or appreciate the high degree of risk involved, although a reasonable man in his position would do so[, a]n objective standard is applied to him, and he is held to the realization of the aggravated risk which a reasonable man in his place would have" known. *Id.* cmt. a.

This Court has held that conscious managerial conduct that causes lower-level employees to disregard a person's life, safety, or property constitutes recklessness, justifying a punitive damages jury instruction against a corporation. *Horton*, 690 S.W.2d at 384-90. Moreover, a company's violation of multiple safety-policies—as well as grossly insufficient employee supervision and training—constitutes recklessness, justifying a punitive damages jury instruction against a corporation. *Phelps*, 103 S.W.3d at 49-54.

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[225] "[A]ccording to *Williams*, 'oppression, fraud, and malice' need not be proven *at all* . . . ." Palmore, *supra* § 39.15, at 39-12.

Here, numerous acts and omissions by MV directly attributed to Barbara's incident and constituted gross negligence. MV's *supervisors* were aware that Caldwell did not follow the company's safety policies before the incident occurred, understood if Caldwell ignored the policies, she could cause injury to a passenger, and made no supervisory attempt to redirect her, causing serious injury to Barbara. Also, MV management was consciously aware its trainers did not *train* drivers according to the company's documented safety policies, understood that if the trainers did not properly instruct drivers regarding its policies that a passenger could get hurt, and did nothing, causing Barbara serious injury. Sources cited *supra* section I.C-D. MV's managers and trainers did not have to intend or have knowledge that by not enforcing MV's safety policies, Barbara would be injured, *Williams*, 972 S.W.2d at 264, nor did they need to recognize that their decision to ignore training or supervising Caldwell per the company's safety policies was "extremely dangerous," *Restatement (Second) of Torts* § 500 cmt. c. They merely needed to intend the conscious act of ignoring their supervision of Caldwell and intend to train Caldwell to ignore the company's written policies, which they clearly did. *See Williams*, 972 S.W.2d at 264. Finally, Caldwell was aware of MV's written safety policies, understood that failing to adhere to the policies could result in serious injury, and ignored them, causing Barbara injury. Sources cited *supra* section I.C-D. Gross negligence was abundantly apparent.

In addition, Barbara presented ample evidence showing that MV's conduct clearly and convincingly satisfied KRS 411.184(3) because the company "authorized or ratified or should have anticipated the conduct in question." Significantly, the statute is drafted with the disjunctive "or," meaning Barbara merely needed to satisfy only one of the standards, which the Court of Appeals correctly understood. *See Allgeier*, 2012 WL 1649089, at *7.

In *Univ. Med. Ctr., Inc. v. Beglin*, this Court defined "authorized" as "to establish" or to "empower. . . . Accordingly, an employer's authorization of an employee to engage in particular

conduct connotes pre-approval of the conduct." 375 S.W.3d 783, 793 (Ky. 2011). Prior case law established a similar authorization standard. In *Ky. Farm Bureau Mut. Ins. Co. v. Troxell*, this Court approved a punitive damages instruction against the insurance company because the company *was aware* that the claims adjuster had previously used unacceptable methods for handling claims *and knew of the unacceptable behavior* practiced by the agent. 959 S.W.2d 82, 85–86 (Ky. 1997). In *Kroger Co. v. Willgruber*, this Court approved the trial court's instructions on punitive damages because it concluded that the evidence "left no doubt" that a Kroger manager *knowingly authorized* unnecessary surveillance on an aging employee, as part of a company effort to deny the employee benefits, even after the company had determined that the employee was entitled to them. 920 S.W.2d 61, 67-68 (Ky. 1996). Similarly, in *McDonald's Corp. v. Ogborn*, the Court of Appeals held that KRS 411.184(3) had been triggered when the franchisor was "fully aware" of the potentially dangerous telephone hoaxes at issue but instead "McDonald's corporate management made a *conscious decision not to train or warn* store employees about the calls. The evidence further supports the finding that *proper training or warning would have prevented* successful repetition of the hoaxes." 309 S.W.3d at 281. The court found that the "evidence justifie[d]" that McDonald's had "authorized or ratified or should have anticipated" the conduct of its employees. *Id.* at 292-93.[226]

The following reckless acts and omissions by MV satisfied the common law gross negligence *and* disjunctive KRS 411.184(3) standards, as recognized by the Court of Appeals:

- Caldwell violated multiple written MV safety policies, including the removal of tie-downs and cooperative assistance policies, which MV authorized and should have anticipated because the company trained Caldwell to cut corners and *had previously observed her routine* and never told her to correct it. *Allgeier*, 2012 WL 1649089, at *5.

[226] MV's insistence that KRS 411.184(3)'s anticipation prong "requires" a "pattern of similar conduct by the employee" is not an accurate statement of Kentucky law and is not included within the plain language of the statute. *E.g.*, Appellant's Br. at 40. MV quoted federal sources incorrectly interpreting—not making—Kentucky law. This Court makes Kentucky law; federal courts merely predict state law in the absence of established precedent. *E.g.*, *In re Yost*, 40 B.R. 962, 962 & n.5 (Bankr. W.D. Ky. 1984). The sources cited by MV inaccurately interpreted state law. No Kentucky state opinion "requires" a "pattern" of conduct by the employee, in order to trigger KRS 411.184(3)'s anticipation prong.

- *At the very same time*, MV's supervisors *knew* that if a driver failed to follow its safety policies, serious physical injury would result. For example, Rowe testified:

  > Q: [L]et's say that the driver gets the platform in the correct position but continues to lower it as the passenger is driving onto it; what's going to happen to the wheelchair?
  >
  > A: *The wheelchair is going to fall off—off the bus. Supra* section I.D., at 13.

- MV did not provide adequate wheelchair accident emergency training. When the incident occurred, Caldwell actually *asked Barbara*, "What do I do now?" Caldwell had no idea what to do, causally contributing to Barbara's injuries. *Id.* at 4.

- MV policy required getting supervisors on-scene as quickly as possible, which meant that company dispatch called Coleman and Rowe *instead of calling EMS*, allowing Barbara to needlessly suffer much longer than necessary. *Id.* at 4-5.

- Dispatch violated MV policy by delaying its EMS call for at least 22 minutes. *Id.* at 4, 8.

- When MV finally called EMS, whoever spoke to the emergency operator stated that Barbara was suffering merely from back pain. Unaware that an elderly woman with MS was lying outside in 28-degree weather with severe leg injuries, EMTs did not use the ambulance's lights and sirens, delaying care for Barbara. *Id.* at 4, 10.

- Supervisors violated MV policy by not calling the police, who may have arrived sooner than EMS to provide emergency medical assistance and who would have conducted an independent investigation. *Id.* at 4, 7.

- Though Coleman and Rowe arrived on-scene within 15 minutes of Barbara's fall, neither one of them *bothered to speak to her or offer care or comfort to her. Id.* at 4-5.

- Because MV policy instructed employees to document the accident scene in order to limit the company's liability "from fraudulent and excessive" claims, before EMS arrived, Coleman—MV's *safety director*—focused his time on meticulously taking 36 photos all around Barbara *but never offered her any aid. Id.*

- Because MV policy instructed employees to always deny fault, Rowe was more concerned with *separating Caldwell from witnesses* than offering aid to Barbara. *Id.*

- MV "standard procedure" instructed its supervisors to only interview the driver when collecting information for its incident report. In effect, company policy *encouraged ignoring Barbara* after the incident. *Id.* at 4-5, 8.

- Grice, one of MV's supervisor-trainers, *knew* Caldwell did not follow the proper unload sequence *because he trained her* to cut corners. Thus, an MV supervisor-agent *authorized and should have anticipated* Caldwell's gross negligence. *Id.* at 12-14.

- Grice called the policy requiring drivers to remove tie downs only after a bus's lift was deployed and level "unimportant" and "useless." Grice should have anticipated that serious physical injury would result from his reckless training of Caldwell. *Id.*

- To Grice, it was "irrelevant . . . when you take the securements out of the floor." As he recalled, "there wasn't any policy of when to take the securements off or what time to take the securements off." However, the trainee manual and training guide instruct

otherwise. Again, *Grice trained Caldwell* and should have anticipated the inherent dangers of his training style; he certainly authorized Caldwell's conduct. *Id.*

- MV supervisors *knew* the company's *trainers* violated company policy by not instructing trainees in accord with its written safety procedures but did nothing to correct the problem. Thus, MV authorized and should have anticipated that reckless conduct would result. Grice openly admitted he did not "train word for word by the book" and indicated that other trainers followed suit. Rowe *agreed with Grice's training style. Rowe supervised the training and trained all of the trainers. Id.*
- MV had no system in place to inform its drivers of recent safety-related accidents, despite capabilities to distribute companywide memos. Supervisors *knew* about bridge plate defects because, as MV-Louisville supervisor-trainer Coleman testified, they would "*experiment*" with the lifts. In spite of being aware of these dangerous conditions, no driver was ever warned. *Id.*; *see Allgeier*, 2012 WL 1649089, at **2-7 (explaining all of the above within the context of KRS 411.184(3)).[227]

In addition, *Beglin* described ratification as "'to approve and sanction formally: confirm . . . . [R]atification is, in effect, the *after the fact approval of conduct* . . . ." 375 S.W.3d at 794. Here, the Court correctly found that MV ratified Caldwell's conduct. As one example, recall that MV's incident report wrongly indicated, "[P]assenger was too hasty to leave vehicle. Engaged chair before lift was in place. . . . Could not have happened if she had her scooter lap belt fastened, which is [Barbara's] responsibility." Both Coleman and Rowe drafted the report, all the time knowing Barbara never would have fallen off the bus had her wheelchair remained strapped down until the bus's lift was safely ready for boarding. However, because MV trained Caldwell to cut corners and because MV management approved of the reckless training regimen, *at the time that incident report was drafted*, MV knew full well that Caldwell's reckless conduct—occasioned by MV's reckless training—caused Barbara's severe injuries *and, still, after the fact, approved of the driver's recklessness*, as documented in the report.

[227] KRS 411.184(3)—requiring *heightened proof* that an employer authorized, ratified, or anticipated the employee's conduct—is unconstitutional because it violates Barbara's common law *jural right* to assert a vicarious liability claim arising out of the *gross negligence* of MV's employees. *See Williams*, 972 S.W.2d 260. Because claims for gross negligence, *id.* at 262-69, *and respondeat superior*, *e.g.*, *L & N R.R. Co. v. Moore*, 7 Ky. L. Rptr. 646 (Ky. 1886), predated the 1891 ratification of the Kentucky Constitution, Barbara merely needed to show that MV's employees were *grossly negligent* in their care of Barbara. Barbara recognizes this issue is not specifically before the Court, but as correctly understood by Justices Scott and Cunnigham in *Beglin*, the issue is overdue to be addressed.

Also, *MV wrote in its brief*, "*Beglin* makes clear that 'Ratification' requires an endorsement of the employee's conduct with full knowledge of the facts . . . ." Appellant's Br. at 39. *That is precisely what happened here.* The facts of *Allgeier* are distinguishable from *Beglin* in that MV *knew* Caldwell acted recklessly regarding unloading Barbara and other passengers *because MV trained her to act that way*, and Caldwell testified that—*before the incident even occurred*—MV *knew* she did not follow the company's written passenger unloading procedure and *condoned her conduct* by never correcting her. Even under *MV's own definition*, the company ratified Caldwell's conduct. *See Allgeier*, 2012 WL 1649089, at *5.

Regarding MV's "post-investigation" argument, unlike *Beglin*, *as the emergent situation occurred*, MV's investigation policies *caused* its employees to recklessly ignore Barbara. MV hurried its managers on scene, did not call the police, took 36 photos, and shielded Caldwell from witnesses, in order to cover up its liability *before EMS arrived and ignored Barbara. MV's investigation took precedence* over Barbara's health and safety at a critical point—*during the incident*. The above facts "presented clear and convincing evidence that MV ratified, authorized, and anticipated" its employees' reckless conduct. *Id.* at *7.

D. The Court of Appeals correctly rejected MV's questions of law regarding retrial on the distinct and severable issue of punitive damages.

Finally, MV incorrectly argues that a "remand solely on punitive damages is improper." MV never preserved this issue because the company, on its prehearing statement, did not identify it as an appellate issue, even though it was aware that Barbara sought reversal and retrial exclusively on her improperly dismissed punitive damage claims. Nor did it raise the issue by motion. *See* CR 76.03(8); *Sallee v. Sallee*, 142 S.W.3d 697, 698 (Ky. App. 2004).

Even if preserved, KRS 411.186(1) is unconstitutional because it violates the separation-of-powers doctrine and infringes upon the proper function of the judiciary. *See, e.g.*, Ky. Const. § 28; *Turner v. Ky. Bar Ass'n*, 980 S.W.2d 560, 562-63 (Ky. 1998); *Com. v. Reneer*,

734 S.W.2d 794, 796 (Ky. 1987). Only this Court "has the authority to prescribe rules of practice and procedure in the courts of the Commonwealth." *Reener*, 734 S.W.2d at 796; Ky. Const. § 116. Comity should not be extended to KRS 411.186(1) because the statute impermissibly interferes with this Court's constitutional role and is not a "statutorily acceptable" substitute. *See Turner*, 980 S.W.2d at 563.

Even if preserved, MV's strained comparison of the Seventh Amendment of the United States Constitution to Section 7 of Kentucky's Constitution is misguided. The Seventh Amendment is not applicable to the states. *Steelvest*, 908 S.W.2d at 106. In addition, "[b]ecause of the profoundly different approaches between the Seventh Amendment to the Constitution of the United States and the provisions of the Kentucky Constitution preserving the right to trial by jury, the federal decisions on this subject are of little utility in Kentucky practice." *Id.* at 107.[228] Moreover, a leading federal practice authority laid the issue to rest by reasoning, "[W]hen a single jury has passed on all issues, but error has tainted its verdict on one of the issues, *it is now quite settled that there may be a new trial before a second jury limited to that single issue*, provided that the error requiring a new trial has not affected the determination of any other issue." 9A Charles Alan Wright et al., *Fed. Prac. & Proc. Civ.* § 2391 (3d ed.).[229]

Substantial precedent establishes that remand and retrial solely on the "distinct and severable issue of punitive damages" is not only allowed *but preferred*, even long after the enactment of KRS 411.186(1). *E.g.*, *Hyman*, 279 S.W.3d 93, 122 (Ky. 2008) (unanimous decision); *Sand Hill Energy, Inc. v. Smith*, 142 S.W.3d 153, 165-68 (Ky. 2004); *Brown*, 63

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[228] MV leaned on *Mason v. Texaco, Inc.*, 741 F. Supp. 1472 (D. Kan. 1990), and its later 10th Circuit opinion (1991) for the proposition that retrial on punitive damages somehow violates the Seventh Amendment. However, just two years later, the 10th Circuit had no problem offering the plaintiff the option of retrial on the sole issue of punitive damages in *Continental Trend Resources, Inc. v. OXY USA Inc.*, 101 F.3d 634 (10th Cir. 1996). The Court offered the plaintiff "the option of either accepting the remittitur of the punitive damages award *or a new trial on that issue*." *Id.* at 642. Therefore, *Mason*'s value as persuasive authority has been seriously undermined.

[229] "Beyond this, the Seventh Amendment does not . . . *require that an issue once correctly determined, in accordance with the constitutional command, be tried a second time, even though justice demands that another distinct issue, because erroneously determined, must again be passed on by a jury*." Wright, *supra* § 2814.

S.W.3d at 182 (unanimous); *Ky. Border Coal Co., Inc. v. Mullins*, 504 S.W.2d 696, 699 (Ky. 1973) (unanimous); *Hensley v. Paul Miller Ford, Inc.*, 508 S.W.2d 759, 764 (Ky. 1974) (unanimous).[230] For at least 118 years, this Court has recognized that whether to award punitive damages is a "distinct" issue. *E.g.*, *Louisville & N.R. Co. v. Brantley's Adm'r*, 28 S.W. 477, 480 (Ky. 1894); *Ky. Cent. R. Co. v. Ackley*, 8 S.W. 691, 693 (Ky. 1888). Punitive damages are awarded for an entirely different purpose than compensatory damages, require a higher standard of proof, introduction of additional evidence, and distinct liability and damage instructions. In this case, Barbara was denied the ability to present such evidence. *E.g.*, R. at 868-70 (signed order by trial court limiting introduction of conduct of other bus drivers).

This Court "has long endorsed the view that damages may be separated from liability and that a case may be properly remanded for retrial of damages only." *Turfway Park Racing Assoc. v. Griffin*, 834 S.W.2d 667, 672 (Ky. 1992). When "'a distinct and severable issue is to be decided, a trial on that issue alone is appropriate unless such a retrial would result in injustice.'" *Id.* Also, Civil Rule 59.01 allows a new trial to be granted on "part of the issues" when "[e]rrors of law occur[red] at the trial" court level. In *Turfway*, this Court remanded on the single issue of "destruction of the decedent's power to earn money," allowing retrial on a *subcategory of compensatory damages.* The Court instructed the trial court to inform the second jury of the previous liability determination and damages award. 834 S.W.2d at 673.

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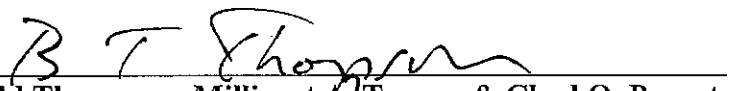
[230] *See also Shortridge v. Rice*, 929 S.W.2d 194, 198 (Ky. App. 1996) (unanimous); *Faulkner Drilling Co. v. Gross*, 943 S.W.2d 634, 639 (Ky. App. 1997); *Motors Ins. Corp. v. Singleton*, 677 S.W.2d 309, 315 (Ky. App. 1984) (unanimous); *Aaron Mortgage Co. v. KDS Properties*, 2012 WL 669953, at *6 (Ky. App. Mar. 2, 2012); *Core Med., LLC v. Schroeder*, 2010 WL 2867820, at **5-7 (Ky. App. July 23, 2010) (unanimous); *Betsy Wilson Realty v. Green*, 2009 WL 3400663, at **8-9 (Ky. App. Oct. 23, 2009) (unanimous); *Ball v. Camp Creek Min. Co.*, 2003 WL 21769873, at *2, *discretionary review denied* (Ky. App. Aug. 1, 2003) (unanimous); *Snyder v. McCarley*, 2003 WL 22025843, at *2, *discretionary review denied* (Ky. App. Sept. 19, 2003) (unanimous); CR 59.01. Kentucky is not alone in this regard. Many jurisdictions allow retrial solely on the issue of punitive damages and gross negligence/recklessness, even California, which has a statute with similar "concurrently" language to that of KRS 411.186(1). *E.g.*, *Torres v. Auto. Club. of S. Cal.*, 15 Cal. 4th 771, 776-82 (Cal. 1997) (statute requiring gross negligence to be presented "to the same trier of fact" did not prevent retrial on punitive damages.) *Rose Care, Inc. v. Ross*, 209 S.W.3d 393, 408 & n.5 (Ark. Ct. App. 2005); *Jannotta v. Subway Sandwich Shops*, 125 F.3d 503, 516 (7th Cir. 1997); *McClure v. Walgreen Co.*, 613 N.W.2d 225, 237 (Iowa 2000); *Gulf Guar. Life Ins. Co. v. Duett*, 671 So. 2d 1305, 1309 (Miss. 1996); *Fabricor, Inc. v. E.I. DuPont De Nemours & Co.*, 24 S.W.3d 82, 101 (Mo. Ct. App. 2000); *White v. Ford Mtr. Co.*, 312 F.3d 998, 1020 (9th Cir. 2002); *Continental Trend Resources, Inc.*, 101 F.3d 634.

Applying MV's strained logic, an entire retrial would be necessary *every time an appellant* received a reversal and remand on a single issue, an unworkable and unfair proposal. The issue of "punitive damages is 'distinct and severable' from the issue of liability." *See Shortridge*, 929 S.W.2d at 198. Retrial on that single issue in *Allgeier* is appropriate. In *Hyman*, the first jury awarded compensatory damages of $7.8 million, and this Court sent the matter back for retrial solely on punitive damages. 279 S.W.3d at 100, 122. In *Sand Hill*, the first jury awarded $3 million in compensatory damages, and this Court remanded for retrial only on punitive damages, with an instruction to be provided to the second jury concerning the first jury's determination of liability and amount of damages it awarded. 142 S.W.3d at 155, 166.

MV's argument that the above cases are distinguishable because evidence on retrial "did not completely overlap" and that the first juries had already awarded an amount of punitive damages is unpersuasive. Barbara was *denied her opportunity to present evidence of gross negligence* to the first jury. She should not be penalized for an error at the trial court level. Otherwise, a grant of summary judgment regarding gross negligence should be, necessarily, immediately appealable because to allow trial to proceed without an appellate determination on that issue would be a complete waste of judicial resources. The idea that because the trial court erred in instructing the jury on punitive damages, Barbara would now need to retry her *entire case over again* is totally unfair and contrary to the Civil Rules. The trial court can instruct the second jury regarding the first jury's liability determination and damages award. The second jury will know *exactly* what the first jury determined.

III. CONCLUSION

The Court should dismiss MV's appeal, and fully affirm the Court of Appeals' opinion.



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APPENDIX

EXHIBIT NO.	DESCRIPTION	RECORD CROSS-REFERENCE
1.....	*Allgeier v. MV Transp., Inc.*, 2012 WL 1649089 (Ky. App. May 11, 2012).	
2.....	Order Denying Petition for Rehearing (Ky. App. July 5, 2012).	
3.....	Order (Jeff. Cir. Ct. Aug. 30, 2010).....	R. at 368.
4.....	Judgment, Sept. 16, 2010.....	R. at 2197-99.
5.....	Am. Judgment, Oct. 13, 2010.....	R. at 2362-64.
6.....	Jury Instructions, Sept. 15, 2010.....	R. at 2178-89.
7.....	MV Incident Report, Dec. 8, 2006.....	R. at 603-06.
8.....	Photo of lift's two-button controller.....	Ronald Coleman Dep. Ex. 11.
9.....	Photos of unload sequence; Barbara on lift after incident.....	Coleman Dep. Exs. 12-16, 18-20; Wilma Caldwell Dep. Ex. 9.
10.....	Photos of Barbara on the lift after incident.....	Coleman Dep. Ex. 20.
11.....	Com. of Ky. EMS Ambulance Run Report, Dec. 8, 2006.....	R. at 608-09; Trial Ex. 31.
12.....	MV Paratransit Operator Training Program: Training Guide (Nov. 2006) (excerpt only).....	R. at 673-80.
13.....	MV Prof'l Driver Training Program: Trainee's Manual (2001) (excerpt only).....	R. at 662-71, 686-87; *see also* Trial Ex. 9 (entire manual).
14.....	MV Wheelchair and Mobility Device Training Acknowledgment Form, Aug, 22, 2006 (signed by Caldwell, Coleman).....	Trial Ex. 50.
15.....	MV Paratransit Written Exam.....	Trial Ex. 50; R. at 1615-23.

EXHIBIT NO.	DESCRIPTION	RECORD CROSS-REFERENCE
16.....	Photos comparing of Barbara's old chair and new chair	R. at 1365-72.
17.....	Trial testimony excerpts: Wilma Caldwell.....	VR: Sept. 9, 2010 (n. 121, *supra*).
18.....	Trial testimony excerpts: Ronald Coleman.....	VR: Sept. 10, 2010. (n. 123, *supra*).
19.....	Trial testimony excerpts: Leonard Rowe.....	VR: Sept. 13, 2010. (n. 124, *supra*).
20.....	Trial testimony excerpts: Ronald Coleman.....	VR: Sept. 10, 2010. (n. 136, *supra*).
21.....	MV Incident Report 2, May 14, 2007.....	R. at 1264-65; Trial Ex. 51.
22.....	Leonard Rowe memo to all employees, Oct. 12, 2006 (signed by Caldwell).....	Trial Ex. 50.
23.....	Trial testimony excerpts: Wilma Caldwell.....	VR: Sept. 9, 2010 (n. 159, *supra*).
24.....	MV Employment Application, Wilma Caldwell.....	Trial Ex. 50.
25.....	Trial testimony excerpts: Leonard Rowe.....	VR: Sept. 13, 2010. (nn. 162-63, *supra*).
26.....	Forensic Alcohol Test Report, Wilma Caldwell, Dec. 8, 2006.....	Trial Ex. 56.
27.....	*Sanborn v. Commonwealth*, 754 S.W.2d 534 (Ky. 1988).	
28.....	*Lewis v. Baker*, 526 F.2d 470 (2nd Cir. 1975).	
29.....	*Zeigler v. Alabama Dept. of Human Res.*, 2010 WL 2490018 (M.D. Ala. June 16, 2010).	
30.....	*Barth v. Commonwealth*, 80 S.W.3d 390 (Ky. 2001).	

EXHIBIT NO.	DESCRIPTION	RECORD CROSS-REFERENCE
31.....	*West v. Tyson Foods, Inc.*, 374 Fed. Appx. 624 (6th Cir. 2010).	
32.....	*Drane v. Commonwealth*, 2010 WL 3377756 (Ky. Aug. 26, 2010).	
33.....	*Quisenberry v. Commonwealth*, 336 S.W.3d 19 (Ky. 2011).	
34.....	*Fields v. Commonwealth*, 2011 WL 3793149 (Ky. Aug. 25, 2011).	
35.....	*May v. Commonwealth*, 2011 WL 5316761 (Ky. Oct. 27, 2011).	
36.....	*Lanham v. Commonwealth*, 171 S.W.3d 14 (Ky. 2005).	
37.....	*Long v. Commonwealth*, 2011 WL 6826377 (Ky. Dec. 22, 2011).	
38.....	Defs' Ex. List, Aug. 10, 2010.....	R. at 750-52.
39.....	Combined Brief for Appellant/Cross-Appellee Barbara Allgeier, *Allgeier v. MV Transp.*, at 7-9 & nn. 29-35 (Ky. App.).	
40.....	*Oaks v. Wiley Sanders Truck Lines, Inc.*, 2008 WL 4149635 (E.D. Ky. Sept. 4, 2008).	
41.....	*James v. Kelly Trucking Co.*, 661 S.E.2d 329 (S.C. 2008).	
42.....	*McGraw v. Wachovia Secs., L.L.C.*, 756 F. Supp. 2d 1053 (N.D. Iowa 2010).	
43.....	*Fairshter v. Am. Nat'l Red Cross*, 322 F. Supp. 2d 646 (E.D. Va. 2004).	
44.....	*Poplin v. Bestway Express*, 286 F. Supp 2d 1316 (M.D. Ala. 2003).	
45.....	*Marquis v. State Farm Fire & Cas. Co.*, 961 P.2d 1213 (Kan. 1998).	

EXHIBIT NO.	DESCRIPTION	RECORD CROSS-REFERENCE
46.....	*Lim v. Interstate Sys. Steel Div., Inc.*, 435 N.W.2d 830 (Minn. Ct. App. 1989).	
47.....	*Restatement (Second) of Agency* § 213 (1958).	
48.....	Brief on Behalf of Amicus Curiae Kentucky Justice Association (Kevin C. Burke).	
49.....	*Airdrie Stud, Inc. v. Reed*, 2003 WL 22796469 (Ky. App. Nov. 26, 2003).	