Supreme Court of Kentucky

2012-SC-000462-DG
COURT OF APPEALS CASE NOS. 2010-CA-001907-MR
AND 2010-CA-001921-MR

MV TRANSPORTATION, INC. — APPELLANT

VS. — ON APPEAL AND CROSS-APPEAL FROM
JEFFERSON CIRCUIT COURT
CIVIL ACTION NO. 07-CI-011559

RICHARD G. ALLGEIER, EXECUTOR
OF THE ESTATE — APPELLEE

BRIEF FOR APPELLANT MV TRANSPORTATION, INC.

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CERTIFICATE OF SERVICE

This is to certify that true copies of Brief for MV Transportation, Inc. was served on the 15th day of July, 2013 by U.S. Mail, First Class postage prepaid, addressed to B. Todd Thompson, Millicent A. Tanner, Chad O. Propst, Thompson Miller & Simpson, PLC, 734 West Main Street, Suite 400, Louisville, KY 40202; Scott C. Cox, Cox & Mazzoli, PLLC, 600 West Main Street, Suite 300, Louisville, KY 40202; Samuel P. Givens, Jr., Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601; Hon. Mary Shaw, Judge, Jefferson Circuit Court, Division 5, 700 West Jefferson Street, Louisville, KY 40202; and to the Jefferson Circuit Court Clerk, 700 West Jefferson Street, Louisville, KY 40202.

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INTRODUCTION

In affirming the jury's more than $4 million award of compensatory damages arising from Plaintiff's accident while de-boarding a TARC 3 paratransit bus in Louisville, the Court of Appeals erroneously held it was permissible for Plaintiff to inundate the jury with evidence of the bus driver's past treatment for alcoholism, depression, and anxiety in support of Plaintiff's negligent hiring claim, despite the absence of any evidence that these conditions played any role in causing the accident, and despite the fact that the employer had already admitted *respondeat superior* liability, rendering the negligent hiring claim duplicative and unnecessary, thus adopting a rule that punishes employers who hire anyone that has ever struggled with addiction, depression, or similar issues, even when those conditions have no affect on job performance, and that places Kentucky at odds with the majority of jurisdictions which hold that an employer's admission of *respondeat superior* liability requires dismissal of duplicative theories of vicarious liability so as to avoid the admission of the very kind of prejudicial "character" evidence that lay at the heart of Plaintiff's trial strategy here. The Court of Appeals compounded its error by reversing the circuit court's grant of summary judgment to the driver's employer on Plaintiff's punitive damages claim, erroneously holding that employer "ratification" under KRS 411.184(3) could be shown by evidence that the driver was trained to not admit fault following an accident or make statements to witnesses, which contradicts this Court's clear precedent that such post-incident investigation practices cannot establish ratification.

STATEMENT OF POINTS AND AUTHORITIES

STATEMENT OF THE CASE

This appeal arises from a jury verdict awarding $4,100,000 in pain and suffering damages, and $74,630.28 in medical expenses to the Plaintiff, Barbara Allgeier,[1] against the Defendant, MV Transportation, Inc. ("MV"), for injuries sustained from an accident that occurred while she was de-boarding the TARC 3 paratransit bus service outside her home. MV operated the TARC 3 paratransit bus service in Louisville pursuant to a contract with the Transportation Authority of River City ("TARC"). Allgeier, age 65, suffered from multiple sclerosis and relied upon a motorized wheelchair for mobility. She had been using the TARC 3 service for transportation on a daily basis for approximately five years at the time of the accident.[2]

The December 8, 2006 Accident

On December 8, 2006, Ms. Allgeier was riding the TARC 3 bus driven by Wilma Caldwell, returning from a hair styling appointment. Upon arrival at Ms. Allgeier's home, the driver, Ms. Caldwell, walked back into the bus and removed the four-point tie-down restraints that secured Ms. Allgeier's wheelchair to the floor of the bus. Ms. Caldwell then exited the bus to deploy the lift used to board and de-board wheelchair-bound passengers. The door opened and Ms. Allgeier drove her chair onto the lift.

When Ms. Allgeier's chair reached the lift, it hit the "bridge plate" – a metal plate that pivots and covers the gap between the edge of the bus and the edge of the lift.[3] The bridge plate was supposed to lie flat over the gap between the bus and the lift, but it had

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[1] On August 29, 2012, counsel for Plaintiff filed a Notice of the Death of Barbara Allgeier on August 26, 2012. A motion was subsequently filed to substitute Richard G. Allgeier, Executor of the Estate of Barbara Allegeier, as a party in the place of Ms. Allgeier. For purposes of this brief, "Plaintiff" will refer to both Ms. Allgeier and Richard Allgeier, individually or collectively as appropriate.

[2] VR No. 151 (Allgeier): 09/10/10; 03:52:12.

[3] VR No. 150 (Caldwell): 09/09/10; 04:06:00.

flipped upright and caught the wheel of Ms. Allgeier's chair. Ms. Allgeier's wheelchair tipped forward onto the lift and Ms. Allgeier was caught by a restraint strap on the lift, leaving Ms. Allgeier suspended above the floor of the lift. Ms. Caldwell testified that at this point, Ms. Allgeier was screaming "my legs, my legs."[4] In order to remove the pressure from Ms. Allgeier's legs, Ms. Caldwell unfastened the wheelchair's safety belt and the lift restraint, and lowered Ms. Allgeier onto the lift.[5] Ms. Caldwell then called her dispatcher to report the accident and to get help for Ms. Allgeier.[6] Both of Ms. Allgeier's femurs were broken as a result of the accident. Ms. Allgeier later testified she did not remember exactly how she fell or how her legs were injured.[7]

Ronald Coleman, Ms. Caldwell's field supervisor, and Leonard Rowe, MV's Director of Safety, arrived on the scene between 5:15 and 5:20 p.m.[8] When they arrived, Mr. Coleman called dispatch to confirm that an ambulance was on its way.[9]

Louisville Metro EMS arrived on the scene at 5:43 p.m. The responding EMS technicians, Sgt. Richard Warren and Thomas Johnson, received the call from EMS dispatch at 5:23, but testified they were delayed in arriving due to dense holiday rush hour traffic surrounding the area.[10] Sgt. Warren did not question Ms. Caldwell's decision to release Ms. Allgeier from her chair, and testified that he did not believe anything Ms.

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[4] VR No. 150 (Caldwell): 09/09/10; 04:08:25; and 03:58:23.
[5] VR No. 150 (Caldwell): 09/09/10; 04:08:48.
[6] VR No. 150 (Caldwell): 09/09/10; 04:09:37.
[7] VR No. 151 (Allgeier): 09/10/10; 04:36:32; 04:38:00.
[8] VR No. 151 (Coleman): 09/10/10; 10:41:03.
[9] VR No. 151 (Coleman): 09/10/10; 10:44:00-18.
[10] Trial Exhibit 48, Ambulance Run Report (Appx. 9 to Appellants Br.); VR No. 151 (Warren): 09/10/10; 02:37:34. Neither Sgt. Warren nor Mr. Johnson knew when E.M.S. received the call or were familiar with current E.M.S. dispatch protocols about how quickly dispatch calls are made after received. VR No. 151 (Johnson): 09/10/10; 03:01:00-04; 03:15:01-10; and VR No. 151 (Warren): 09/10/10; 02:40:45-47. Sgt. Warren testified that Ms. Allgeier's health was not threatened any more than if E.M.S. were to have arrived 10, 15, or 20 minutes earlier. VR No. 151 (Warren): 09/10/10; 03:01:23-36.

Caldwell did after the chair tipped worsened Ms. Allgeier's condition in any way.[11]

Initiation of the litigation and Plaintiff's claims

Ms. Allgeier filed this suit seeking compensatory and punitive damages against MV.[12] She did not name Ms. Caldwell as a defendant. Her Complaint asserted that MV was liable for Ms. Caldwell's negligence based on *respondeat superior* liability.[13] The Complaint also alleged MV was liable for negligent hiring, training, supervision, retention and entrustment of Ms. Caldwell.[14] Ms. Allgeier's negligent hiring claim was premised, in large part, on the fact that Ms. Caldwell was a recovering alcoholic when she was hired and had previously received treatment for anxiety and depression.

MV moved for summary judgment on Plaintiff's negligent hiring and other imputed liability claims. MV's motion cited the majority rule that once *respondeat superior* liability for an employee's actions is admitted, other theories of imputed liability, like negligent hiring, should be dismissed.[15] This rule recognizes that proof of negligent hiring is unnecessary once vicarious liability is established, and can only serve as a conduit for prejudicial evidence about the employee's past conduct and character. MV alternatively filed a motion *in limine* to exclude evidence of alcoholism and treatment for depression and anxiety as irrelevant and prejudicial, since there was no evidence linking these factors to the accident.[16] Both motions were denied.[17]

MV also moved, after discovery, for summary judgment on the punitive damages claim on the grounds that the conduct alleged did not rise to gross negligence and that

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[11] VR No. 151 (Warren): 09/10/10; 02:59:54-03:00:19; 03:00:39-44.
[12] R. 1-4, Complaint.
[13] R. 1-4, Complaint ¶ 6.
[14] R. 1-4, Complaint ¶ 8.
[15] R.A. 349-369, Mot. for Partial Sum. Judgmt., 12/10/09.
[16] R.A. 856-861, MV's Mot. in Lim., 8/19/10.
[17] R.A. 830, Order, 8/30/10 (attached as Appendix G) and R.A. 856-861, MV's Mot. in Lim., 8/19/10.

MV did not ratify Ms. Caldwell's conduct.[18] The circuit court granted the motion.[19] Prior to trial, Plaintiff moved to reconsider that ruling, but the court declined.[20]

Improper focus on Ms. Caldwell's treatment for alcoholism and depression and anxiety

The case was tried to a jury. As MV predicted, throughout the trial, Plaintiff's counsel repeatedly emphasized Ms. Caldwell's status as a recovering alcoholic and her prior treatment for depression and anxiety. During opening argument, counsel detailed Ms. Caldwell's treatment in 2006 for alcohol addiction, and that she was living in the "Healing Place" – an alcohol rehabilitation facility – when she was hired. In the same breath, Plaintiff's counsel admitted that "**there's no evidence that Miss Caldwell was intoxicated when she was operating the bus on December 8**," yet claimed "the evidence will be that these are important issues as to her overall competence."[21]

Plaintiff's opening statement also discussed Ms. Caldwell's prior treatment for depression and anxiety, although no evidence linked these issues to the accident.[22] Counsel speculated that MV was perhaps forced to employ lax hiring standards because of problems with employee turnover caused by poor benefits and wages.[23]

Keeping to the theme, Plaintiff's examination of Ms. Caldwell focused extensively on her prior alcohol use and her treatment for depression and anxiety. Ms. Caldwell acknowledged she was in recovery from alcoholism and living at the Healing Place when she was hired by MV.[24] She also admitted she had previously received

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[18] R.A. 349-369, Mot. for Partial Sum. Judgmt., 12/10/09.
[19] R.A. 830, Order, 8/30/10.
[20] R.A. 1242-75, Motion to Reconsider, 9/01/10; R.A. 2400, Order, 9/16/10.
[21] VR No. 150 (Pl. Opening Stmt.): 09/09/10; 11:09:08 (Transcribed excerpts attached at APX I, EA 4).
[22] VR No. 150 (Pl. Opening Stmt.): 09/09/10; 11:06:41-11:07:09 (Transcribed excerpts at APX I, EA 3).
[23] VR No. 150 (Pl. Opening Stmt.): 09/09/10; 11:10:01 ("A lot of paratransit companies provide health insurance to their employees. They provide retirement benefits. This company provided none.... And I think she was paid about $10 an hour to operate this bus.") (Transcribed excerpts attached at APX I, EA 5).
[24] VR No. 150 (Caldwell): 09/09/10; 05:11:50 (Transcribed excerpts attached at APX I, EA 12).

counseling for depression and anxiety.[25] But she testified – without refutation – that she was not drinking or experiencing depression or anxiety on the day of the incident.[26] Indeed, Ms. Caldwell testified that she had been sober since October 2005, over a year before the accident.[27] She was tested for alcohol and drugs after the accident, and tested negative for both, registering a "**0.000**" blood alcohol level.[28]

Plaintiffs' counsel continued to vigorously pursue the subject of Ms. Caldwell's alcohol history in his examination of numerous other witnesses, including Mr. Coleman,[29] Mr. Rowe,[30] and Billy Grice, MV's Safety Manager.[31] Mr. Coleman admitted he was aware of Ms. Caldwell's past issues with alcohol use, but did not believe that disqualified her from employment.[32] Mr. Coleman testified he had no knowledge of Ms. Caldwell ever drinking, using drugs, or experiencing depression or anxiety while working at MV.[33] Despite the absence of any alcohol-related problems by Ms. Caldwell while employed at MV, Plaintiff's counsel nonetheless asked Mr. Rowe whether MV would be "concerned that someone who's still in rehab might have a relapse...?"[34]

In closing arguments, Plaintiff once more drove home the theme that Ms. Caldwell's past alcoholism and depression made her unfit to be hired:

> Miss Caldwell has an illness. It's not her fault. Alcoholism. Many of us have members in our family that suffer from this. It's not a character flaw. It's an illness. You get an infection, you get treatment. But she had an

[25] VR No. 150 (Caldwell): 09/09/10; 04:50:15-04:53:38 (Transcribed excerpts attached at APX I, EA 8).
[26] VR No. 150 (Caldwell): 09/09/10; 05:12:25-40 and 05:31:34-56 (Transcribed excerpts attached at APX I, EA 13).
[27] VR No. 150 (Caldwell): 09/09/10; 05:11:56-05:12:01 (Transcribed excerpts attached at APX I, EA 12).
[28] Trial Ex. 56, Forensic Alcohol Testing Rep. (Attached as APX H); VR No. 152 (Rowe): 09/13/10; 03:36:00-28.
[29] VR No. 151 (Coleman): 09/10/10; 10:18:58-10:21:01.
[30] VR No. 152 (Rowe): 09/13/10; 10:14:34-10:24:18.
[31] VR No. 153 (Grice): 09/14/10; 02:50:16-02:58:37.
[32] VR No. 151 (Coleman): 09/10/10; 10:20:31-55.
[33] VR No. 151 (Coleman): 09/10/10; 12:04:51-56 - 12:05:02 (Transcribed excerpts attached at APX I, EA 16).
[34] VR No. 152 (Rowe): 09/13/10; 10:28:24-36.

> illness. She was getting treated. Good for her. She had a psychiatric condition. It's an illness. It's not something that she went out and caused to happen. She was getting treatment for it. Good for her. **But people who have those types of conditions should not be taking care of children in a day care. They shouldn't be air traffic controllers. They shouldn't be driving paratransit buses.**[35]

The evidence offered at trial about Ms. Caldwell's actual qualifications and fitness showed that she was qualified and competent to perform her job. Ms. Caldwell was previously trained and employed as a paratransit operator from 1998 to 2000, and then as a technician at Seven Counties for 4 years.[36] After being hired by MV, she received extensive training, including 68 hours of classroom instruction, behind the wheel training, and wheelchair lift instruction.[37] Ms. Caldwell's supervisors testified that she had experienced no prior accidents or problems during her employment at MV before Ms. Allgeier's accident.[38] Although Plaintiff challenged the adequacy of MV's investigation of Ms. Caldwell's driving records and past employers, Plaintiff did not identify any prior incidents in Ms. Caldwell's driving records or employment history.[39]

Improper focus on MV's post-accident investigation

Another significant aspect of Plaintiff's trial strategy involved criticizing MV's post-accident investigation efforts in this case. Plaintiff's counsel challenged Mr. Coleman about the fact that he took 36 pictures after he arrived on the scene, but did not

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[35] VR No. 153 (Pl. Closing Argmt.): 09/15/10; 06:12:37-51 (emphasis added) (Transcribed excerpts attached at APX I, EA 23-24).
[36] VR No. 150 (Caldwell): 09/09/10; 03:25:46-03:26:43. Between her employment at Seven Counties and her hiring at MV, Ms. Caldwell worked for R.H.A. Healthcare in North Carolina. *Id.*
[37] VR No. 150 (Caldwell): 09/09/10; 03:38:57-03:41:38; Trial Exhibit 11.
[38] VR No. 151 (Coleman): 09/10/10; 12:05:03-29; *see also* VR No. 152 (Rowe): 09/13/10; 03:36:00-08.
[39] VR No.152 (Rowe): 09/13/10; 10:11:58-10:14:34. Mr. Grice, MV's Safety Manager, was also asked about the information on Ms. Caldwell's Medical Examination Form concerning alcohol use and history of depression, to which he responded those issues were handled by medical personnel as part of the employee physical, which includes a drug and alcohol screening, and MV relied on the examining physicians' fitness determination. VR No. 153 (Grice): 09/14/10; 02:50:42-02:53:02; 02:57:07-50.

speak with Ms. Allgeier or other witnesses at the scene.[40] Plaintiff also introduced MV training materials and testimony about the fact that employees were trained not to admit fault following an accident or to interview witnesses other than the driver.[41]

Plaintiff made much of the fact that Ms. Caldwell was subjected to drug and alcohol testing two hours and thirty-two minutes after the incident, whereas Plaintiff asserted, inaccurately,[42] that federal regulations required the test to be completed within two hours of an accident.[43] However, Plaintiff did not offer any evidence that the additional 32 minute delay rendered Ms. Caldwell's "0.00" breathalyzer result unreliable. To the contrary, through closing arguments, Plaintiff consistently acknowledged there was no evidence Ms. Caldwell was drinking, but nonetheless argued the delay should be considered as evidence of MV's inadequate investigation of the accident:

> **I told you when this case began that there is no evidence that Miss Caldwell was – had been drinking. And there is no evidence.** But this is – they took her and had her blood drawn, tested for narcotics, but they didn't use the blood to test her alcohol. They did a breathalyzer test, and you have a two hour maximum window to take these under the Department of Transportation rules. Mr. Rowe testified to that. And they took it two and a half hours later. **Another example of investigating this, and I don't know why they waited two and a half hours, but you can draw inferences from that.**[44]

Evidence concerning alleged cause of the accident

Plaintiff argued at trial that the cause of the accident itself was Ms. Caldwell's failure to follow MV policies for unloading wheelchair passengers. Plaintiff asserted that Ms. Caldwell violated safety policies by releasing Ms. Allgeier's wheelchair from the

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[40] VR No. 151 (Coleman): 09/10/10; 10:46:24-10:49:47; 10:54:10-10:57:00.
[41] RA. 687, Trainee Manual-Module D, p. 8; VR No. 153 (Grice): 09/14/10; 03:53:54-03:56:38; VR No. 151 (Rowe): 09/13/10; 12:14:22-12:14:32; VR No. 151 (Coleman): 09/10/10;10:51:50- 10:51:56, 11:32:35-11:32: 58.
[42] *See* pp 17-18, *infra.*
[43] VR No. 151 (Rowe): 09/13/10; 04:05:56-04:06:06; VR No. 153 (Pl. Closing Argmt.): 09/15/10: 06:17:58-06:18:32.
[44] VR No. 153 (Pl. Closing Argmt.): 09/15/10; 06:17:54-06:18:32 (Transcribed excerpt at APX I, EA 27).

four-point safety restraints that kept it tied to the bus floor before the lift was fully deployed. Plaintiff relied on the MV training manual's description of the unloading sequence, which lists deployment of the lift sequentially before unfastening the four-point tie-downs.[45] Plaintiff argued that the fact that drivers sometimes departed from this sequence showed MV's training efforts to be inadequate.[46] However, it is undisputed that MV had not experienced any lift-related incidents prior to Ms. Allgeier's accident.[47]

Plaintiff also contended that pictures of the lift taken after the accident suggested Ms. Caldwell may have begun lowering the lift prematurely, before Ms. Allgeier moved her wheelchair onto it, causing the bridge-plate to flip up. However, Ms. Caldwell denied she had begun to lower the lift prematurely.[48]

At the conclusion of all the evidence, Plaintiff moved the circuit court to reconsider the dismissal of punitive damages, but the circuit court declined.[49] MV moved for directed verdict on Plaintiff's negligent hiring claims, because these claims were irrelevant in light of MV's admission of *respondeat superior* liability and no evidence linked the accident to alcohol use or mental health issues. That motion also was denied.[50]

The jury returned a verdict in favor of Ms. Allgeier for $4,100,000 for pain and

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[45] Trial Exhibit 9, MV Prof'l Driver Trainee's Manual at C-24 (Appx. 11 to Appellants' Br.). Plaintiff relied on the MV Trainee's Manual, which uses the mnemonic acronym "UNLOAD" to detail the process for unloading wheelchair passengers. This acronym lists the steps "Uncover the lift" and "Unfold the lift" – under the "U" in UNLOAD – before "Kneel down to undo the tie-downs, do not bend at the waist," which falls under the "N" in UNLOAD (for "kNeel" to untie the restraints).

[46] VR No. 153: 09/14/10; 03:07:28-03:21:03; 03:25:57-03:27:20.

[47] VR No. 151 (Coleman): 09/10/10; 12:08:06. Plaintiff did introduce evidence concerning an incident that occurred five months **after** Ms. Allgeier's accident, on May 14, 2007. The May 2007 incident resulted when the lift's control button on another paratransit bus stuck, causing the lift to lower and the passenger to drive onto an uneven platform, although the passenger was not injured. The incident report stated MV is "instructing our operators to keep their passengers secured until they are ready to assist in deploying." *See* Trial Exhibit 51, May 14, 2007 Incident Report (Appx. 15 to Appellants' Br.). MV moved to exclude evidence of this incident as a subsequent remedial measure, but that motion was denied. *See* MV Supplemental Mot. in Limine, 9/1/10 (Appendix C to MV Cross-Appellant Br.).

[48] VR No. 150 (Caldwell): 09/09/10; 03:48:00-03:49:11, 04:05:34-04:06:14.

[49] VR No. 153 (DV Arg.): 09/15/10; 11:40:36-11:45:06; 01:37:04-13.

[50] VR No. 153 (DV Arg.): 09/15/10; 11:46:14-11:48:06; 12:01:32-38.

suffering damages, and $74,630.28 in medical expenses.[51] MV moved for a new trial on the grounds that the pain and suffering award, totaling more than 55 times Ms. Allgeier's total claimed medical expenses (many unrelated to the accident), was excessive and a result of passion and prejudice. The Court denied the motion.[52]

Ms. Allgeier appealed the Court's grant of summary judgment on her punitive damages claim. MV filed a cross-appeal arguing, among other things, that the negligent hiring claims should have been dismissed based on its admission of *respondeat superior* liability and that, alternatively, even if Plaintiff could maintain her secondary liability claims after admission of *respondeat superior*, such claims could not be premised on Ms. Caldwell's past alcoholism or mental health treatment in the absence of any evidence that these factors were causally related to the accident.

The Court of Appeals Proceedings

The Court of Appeals affirmed the compensatory verdict in favor of Ms. Allgeier, and also held the circuit court erred in dismissing Plaintiff's punitive damages claim, ordering a limited retrial on punitive damages only. The Court of Appeals held that admission of *respondeat superior* did not preclude a plaintiff from also pursuing a claim for negligent hiring, or other imputed liability theories, because the claims are analytically "distinct" legal theories with different elements. The Court of Appeals also held that the fact that "Caldwell was an alcoholic living in a rehab facility when MV hired her" was relevant to negligent hiring because MV supervisors said they would not

[51] RA 2197-2199 Judgment and RA 2362-2364 Amended Judgment, attached as Appendices D and E; RA 2178-2189 Jury Instructions (verdict form), attached as Appendix F.
[52] R.A. 2235-2244, MV Motion for New Trial, 9/24/10; R.A. 2401, Order, 10/11/10.

have hired Ms. Caldwell if they had known of her alcohol history.[53] On punitive damages, the Court of Appeals found sufficient evidence of ratification by MV, "[i]n particular," based on the fact that "Caldwell was trained not to admit fault" and "not to speak with victims or witnesses."[54] The court also cited testimony of MV supervisors that "they did not instruct on all of the company's safety policies" as evidence MV "authorized or ratified their employee's lax attitude toward passenger safety."[55]

MV filed a Petition for Rehearing arguing that the Court of Appeals' decision on ratification was in conflict with recent opinions of this Court, and that a retrial limited to punitive damages violated Section 7 of the Kentucky Constitution and KRS 411.184(3). The Petition was denied in a one-sentence order.[56]

ARGUMENT

The Court of Appeals Opinion should be reversed. First, the Opinion erroneously holds that a negligent hiring claim may be based on evidence of an employee's past treatment for alcoholism or depression and anxiety, even though the Plainitff admitted that "there's no evidence that [the employee] was intoxicated" or otherwise impaired at the time of the accident.[57] This ruling reads the element of proximate causation out of the tort of negligent hiring, violating well-established Kentucky law. It also opens the floodgates to prejudicial evidence about an employee's history of alcoholism, depression,

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[53] Opinion at 24 (attached hereto as APX A). The Opinion went on to mention the alleged 2 hour and 32 minute delay in administering the breathalyzer test and said this rendered the test not "scientifically reliable," even though no expert evidence was offered by Plaintiff to prove that. *Id.* at 25. The Court of Appeals did not appear to suggest the evidence would permit an inference that Ms. Caldwell ***was*** drinking, as there is no evidence to that effect. In any event, as discussed below, see pp. 17-19, *supra*, the Court of Appeals' legal premise that the test was required to be administered within two hours and its premise that a test administered outside two hours is "scientifically unreliable" are both incorrect.

[54] Opinion at 16.

[55] Opinion at 17.

[56] July 5, 2012 Order Denying Pet. for Rehearing.

[57] VR No. 150 (Pls. Opening Stmt.): 09/09/10; 11:09:08 (Transcribed excerpts attached at APX I, EA 4).

or similar issues whenever negligent hiring has been pled, whether or not those factors played any role in the tort. The practical effect of the Court of Appeals' Opinion is to punish employers that hire individuals who have battled and overcome such issues, and to make it more difficult for such individuals to find employment. The Court of Appeals' determination that employers may be deemed negligent for hiring persons with a history of treatment for alcoholism, depression or similar issues – even where there is no evidence of impaired job performance – also creates conflicts with employers' duties under employment laws like the Americans with Disability Act ("ADA").

Second, the Court of Appeals Opinion, deciding a question of first impression, incorrectly rejected "[t]he majority rule ... that once an employer has admitted *respondeat superior* liability for a driver's negligence, it is improper to allow a plaintiff to proceed against an employer on any other theory of imputed negligence."[58] This rule recognizes that once an employer admits vicarious liability for its employee's conduct, pursuit of a redundant alternative theory of secondary liability, like negligent hiring or retention, serves no valid purpose. In such cases, allowing the plaintiff to go forward on a theory of negligent hiring or entrustment merely facilitates admission of prejudicial evidence about the employee's past misconduct or "bad character" – which would otherwise be clearly inadmissible propensity or character evidence under KRE 404(b) – to show that the employer was negligent in hiring or retaining the employee. The Court of Appeals' Opinion erroneously holds that Kentucky law permits such abusive trial tactics, ensuring they will become standard operating procedure in Kentucky courts.

Third, the Court of Appeals erroneously held that MV's "ratification" and

[58] *Oaks v. Wiley Sanders Truck Lines, Inc.*, 2008 WL 5459136, at *1 (E.D. Ky. Nov. 10, 2008) (applying Kentucky law) (copy attached).

"authorization" of Ms. Caldwell's conduct could be shown by evidence that "Caldwell was trained not to admit fault for an accident," and that "Caldwell was trained and instructed not to speak with victims and witnesses."[59] In *University Medical Center v. Beglin*, this Court squarely held that "ratification" can ***not*** be predicated on an employer's allegedly inadequate post-incident investigation practices, including even evidence that an employer "actively obstruct[ed] the investigation by concealing evidence of the negligence."[60] Indeed, it is common practice for employers to instruct their drivers not to admit fault following an accident. If the Court of Appeals Opinion is left undisturbed, this common practice could give rise to near-automatic punitive damages liability for employers in vehicle accident cases, largely eviscerating Kentucky's well-established policy against holding employers vicariously liable for punitive damages.

Finally, the Court of Appeals' decision to order a retrial solely on punitive damages violates MV's jury trial right under Section 7 of the Kentucky Constitution. In a retrial on punitive damages, the jury will necessarily consider the same factual issues addressed by the first jury at the liability phase. This is inconsistent with "right of a litigant to have only one jury pass on a common issue of fact." *Alabama v. Blue Bird Body Co.*, 573 F.2d 309, 318 (5th Cir. 1978). It is also contrary to KRS 411.186(1)'s mandate that punitive damages be tried "concurrently with all other issues presented."

I. The Court of Appeals erred in holding Ms. Caldwell's past treatment for alcoholism or depression and anxiety could form the basis of a negligent hiring claim, where those conditions played no role in causing the accident.

The circuit court and Court of Appeals both erred as a matter of law in holding that the Plaintiff could sustain a claim for negligent hiring or retention based on evidence

[59] Opinion at 15.
[60] *University Medical Center v. Beglin*, 375 S.W.3d 783 (Ky. 2011).

of Ms. Caldwell's past treatment for alcoholism or depression and anxiety, despite the absence of any evidence that alcohol use, depression, or anxiety played a causal role in this accident. This error allowed the Plaintiff to bombard the jury with highly prejudicial evidence about Ms. Caldwell's status as a recovering alcoholic and her prior depression counseling, and to openly invite the jury to make inferences about Ms. Caldwel's "overall competence" from such facts. This error requires the jury verdict to be vacated.[61] The issue was properly preserved for review.[62] This Court should therefore reverse the Court of Appeals and remand for a new trial.

A. A negligent hiring claim may only be based on an employer's hiring of an employee with known "dangerous propensities" that actually *caused or contributed* to the plaintiff's injuries.

An employer's failure to exercise due care in hiring can only give rise to liability if "such failure...was a **substantial factor in causing injury**...." *Ten Broeck Dupont, Inc. v. Brooks*, 283 S.W.3d 705, 731 (Ky. 2009) (emphasis added). Thus, when an employer is claimed to be negligent in hiring an employee who possesses an allegedly dangerous trait or condition, like alcoholism or depression and anxiety, there must be a causal connection between that specific condition and the resulting injury:

> The employer is subject to liability only for such harm as is within the risk. If, therefore, the risk exists because of the quality of the employee, there is liability **only to the extent that the harm is caused by the quality of the employee which the employer had reason to suppose would be likely to cause harm.**

RESTATEMENT (SECOND) OF AGENCY, § 213, cmt. d (emphasis added). *See also* 29 AM.

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[61] While evidentiary rules are reviewed for abuse of discretion, a ruling premised on an error of law is *per se* an abuse of discretion. *Terry v. Commonwealth*, 332 S.W.3d 56, 60 (Ky. 2010); *Koon v. United States*, 518 U.S. 81, 100 (1996) ("Little turns ... on whether we label review of this particular question abuse-of-discretion or *de novo*.... A district court by definition abuses its discretion when it makes an error of law.").

[62] This issue was properly preserved for appeal by MV's *motion in limine* to exclude evidence of Ms. Caldwell's past alcoholism and mental health treatment, R.A. 856-861, MV's Mot. in Lim., 8/19/10, as well as its Motions for Directed Verdict on the negligent hiring claims. VR No. 153: 09/15/10; 11:46:14-11:48:06; 12:01:32-38 (Motion for Directed Verdict).

JUR. TRIALS 267, § 10 & illus. 2 (hiring employee with embezzlement history not causally related to employee assault).

Unpublished Kentucky decisions have properly applied this rule, and held that an employer's knowledge of an employee's allegedly dangerous trait or propensity cannot give rise to a negligent hiring claim, unless that specific trait or propensity was the cause of the plaintiff's injury. *Cooper v. Unthank*, 2009 WL 3320924, at *4 (Ky. App. Oct. 16, 2009) (unpublished, copy attached); *Jenkins v. Atlas Siding & Window Co.*, 2004 WL 2756230, at *2 (Ky. App. Dec. 3, 2004) (unpublished, copy attached). In *Cooper*, for example, the court held that the employer's knowledge of an athletic coach's prior drug use did not make the employer liable, under a negligent hiring theory, for the coach's acts of sexual abuse. The court explained that "[w]hile arguably Unthank's drug history and drug-related convictions did not render him a desirable athletic coach, there was nothing in his criminal history to suggest that he had a propensity to sexually abuse children." *Cooper*, 2009 WL 3320924, at *4.

Similarly, in *Jenkins*, an employee of a window installation company broke into a customer's home several weeks after the installation job was complete, burglarizing and assaulting the owners. 2004 WL 2756230. Plaintiffs sued the employer for negligent hiring, alleging that the employer had knowledge of the employee's "dangerous propensities" based on his past incarceration for domestic violence, altercation with a co-worker, and unspecified juvenile offenses. The court concluded such facts could not form the basis for a negligent hiring claim because they were "not of the same type as the crimes he committed against [the plaintiff]," and therefore any negligence in hiring "was not the proximate cause of [plaintiff's] injuries." *Id.* at *2.

Other jurisdictions also follow this rule, and have held that past alcohol or drug use cannot support a negligent hiring claim if the underlying tort was not caused by the employee's intoxication. In *Long v. Brookside Manor*, 885 S.W.2d 70, 74 (Tenn. App. 1994) (copy attached), the court held, as a matter of law, that a nursing home's alleged negligence in retaining an employee after she was caught drinking alcohol at work could not be the "proximate or legal cause" of the employee's assault on a resident because "[t]here has been no showing in this record that [the employee] was intoxicated at the time of her assault upon the plaintiff." *Id.* In *Mulhern v. City of Scottsdale*, 799 P.2d 15, 18 (Ariz. App. 1990) (copy attached), the court held that a police officer's history of alcohol and narcotics use was properly excluded in a negligent assignment suit against the city relating to the officer's shooting of a civilian because "Plaintiffs offered no evidence that [the officer] was acting under the influence of drugs or alcohol at the time of the incident." *Id.*

The Court of Appeals Opinion disregards this well established law. The Opinion states that Ms. Caldwell's past treatment for alcoholism and for depression and anxiety could be offered to show she was negligently hired, even though there was no evidence that Ms. Allgeier's accident was related to alcohol use or depression and anxiety in any way. The Opinion concludes these traits were sufficiently causally related to the accident merely because two supervisors testified they would not have hired her if they had known about Ms. Caldwell's alcohol treatment.[63] This decision eliminates the requirement that an employee's "dangerous propensities" be causally related to the accident. The Court of Appeals, in essence, holds that any past misconduct or character flaws of an employee-tortfeasor can be introduced to establish a negligent hiring claim merely on the theory

[63] Opinion at 24.

that if the employee had not been hired, they would not have been in a position to commit the tort, even if the past misconduct or character flaws had nothing to do with the tort. Courts have explicitly rejected that reasoning:

> [A]bsent a **causal connection** between the employee's **particular incompetency** for the job and the injury sustained by the plaintiff, the defendant employer is not liable.... [W]e **reject Munroe's 'but for' argument** that Universal is liable ... solely because his employment by Universal provided Love with the access or opportunity to injure her.

Munroe v. Univ. Health Servs., 596 S.E.2d 604, 606 (Ga. 2004) (emphasis added) (copy attached). The Court of Appeals Opinion, in essence, holds that anytime a negligent hiring claim has been pled, the plaintiff may introduce evidence of any past conduct or negative character traits that allegedly made the employee-tortfeasor a "bad hire," whether or not related to the accident. That is not the law.

B. Ms. Caldwell's past treatment for alcoholism and depression and anxiety was not a proximate cause of Plaintiff's injuries.

Applying the correct legal standards, evidence concerning Ms. Caldwell's history of alcoholism and treatment for depression and anxiety had no relevance to Plaintiff's negligent hiring claims because these factors were not causally related to the accident in any way. The **only** evidence in the record is that Ms. Caldwell was **not** drinking on the day of the accident, and in fact had not had a drink since October 2005. Indeed, in opening argument, Plaintiff's counsel admitted "**there's no evidence that Miss Caldwell was intoxicated when she was operating the bus on December 8.**"[64] Nonetheless, Plaintiff claimed Ms. Caldwell's past alcohol and depression and anxiety treatment raised "important issues as to her overall competence."[65]

Ms. Caldwell testified without refutation that she was not drinking on the day of

[64] VR No. 150 (Pl. Opening Stmt.): 09/09/10; 11:09:08 (Transcribed excerpts attached at APX I, EA 4).
[65] *Id.*

the incident,[66] and that she had been sober for **more than a year** before the accident.[67] Ms. Caldwell's supervisors confirmed she had never consumed alcohol or used drugs to their knowledge while working at MV.[68] **She was tested for alcohol and drugs after the accident, and tested negative for both, registering a "0.000" blood alcohol level.**[69]

The Court of Appeals' Opinion gratuitously questions whether the "0.000" blood alcohol reading was scientifically reliable because it was administered thirty-two minutes after an alleged two-hour window for such tests to be conducted. But there was no expert testimony – or testimony of any kind – that a breathalyzer test administered two hours and thirty two minutes after an accident is unreliable. To the contrary, as other courts have recognized, "**there is nothing to suggest that [a] Breathalyzer test itself is unreliable merely because a two-hour time frame has elapsed.**" *People v. Quezada*, 876 N.Y.S.2d 600, 602 (N.Y. Sup. Ct. 2009) (emphasis added).

Moreover, the Court of Appeals' assertion that an alcohol test was required to be administered within two hours of the accident is legally incorrect. The only statute cited in Plaintiff's Court of Appeals brief for this point was KRS 189A.010(1), which is the provision of the criminal DUI statute creating a presumption of intoxication when a driver registers .08 blood alcohol content within two hours of arrest. However, this statute has no application outside the criminal context. Moreover, the statute does not state that a test outside the two hour window is *per se* unreliable, only that such a test does not create a legal presumption of guilt. *E.g., Quezada*, 876 N.Y.S.2d at 602.

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[66] VR No. 150 (Caldwell): 09/09/10; 05:12:25-40; 05:31:34-56 (Transcribed excerpts at APX I, EA 13).
[67] VR No. 150 (Caldwell): 09/09/10; 05:11:56-05:12:01(Transcribed excerpts attached at APX I, EA 12).
[68] VR No. 151 (Coleman): 09/10/10; 12:04:51-56 - 12:05:02 (Transcribed excerpts attached at APX I, EA 16).
[69] Trial Ex. 56, Forensic Alcohol Testing Rep. (attached as APX H); VR No. 152 (Rowe): 09/13/10; 03:36:00-28.

Nor is this claim supported by the federal Department of Transportation regulations referenced in Plaintiff's closing argument and cross-examination of Mr. Rowe. Those regulations expressly state that ***no*** test is required for "[a]n **occurrence involving only boarding or alighting from a stationary motor vehicle**." 49 CFR § 382.303(h)(1) (emphasis added). Even where a test is required, the regulations do not state that a test is scientifically unreliable if administered more than two hours after an accident. To the contrary, under the regulations, an employer should only abandon efforts to administer an alcohol test if it cannot be completed within "**eight hours** following the accident." *Id.* at § 382.303(d)(1) (emphasis added).

Regardless, whether or not the breathalyzer test was reliable to prove that Ms. Caldwell was **not** drinking, the fact remains that Plaintiff produced no evidence whatsoever that suggested she **was** drinking the day of the accident. There is no evidence that Ms. Caldwell appeared or acted intoxicated, for example. While Plaintiff's counsel questioned the timing of the breathalyzer test in closing argument, counsel still acknowledged **"there is no evidence that Miss Caldwell was – had been drinking."** [70] Counsel cited the delay to show that MV was shoddy in its investigation, not that Ms. Caldwell was actually drinking that day.[71] Thus, whether or not the "0.000" breathalyzer results were reliable or admissible, there was still no evidence that could affirmatively establish a causal connection between the accident and alcohol use.

Moreover, whatever bearing the delay may have had on the alcohol test, the court still offered no justification for the admission of evidence concerning Ms. Caldwell's past treatment for depression and anxiety. Ms. Caldwell testified that while she had received

[70] VR No. 153 (Pl. Closing Argmt.): 09/15/10; 06:17:54-06:18:32 (Transcribed excerpt at APX I, EA 27).
[71] *Id.*

some counseling for these issues in the past, she was not experiencing any difficulties when the accident occurred.[72] Her supervisors confirmed they did not observe any evidence of depression or anxiety impairing Ms. Caldwell's job performance.[73] Plaintiff did not even purport to offer any evidence causally linking this accident to depression, anxiety, or any similar issues. Yet, Plaintiff was nonetheless allowed to cite Ms. Caldwell's past counseling for depression as a reason she should not have been hired:

> She had a psychiatric condition. It's an illness. It's not something that she went out and caused to happen. She was getting treatment for it. Good for her. **But people who have those types of conditions should not be taking care of children in a day care. They shouldn't be air traffic controllers. They shouldn't be driving paratransit buses.**[74]

Thus, even assuming *arguendo* Plaintiff could justify the introduction of evidence concerning Ms. Caldwell's past alcoholism, the admission of evidence concerning Ms. Caldwell's past treatment for depression and anxiety would still warrant reversal.

In reality, the Plaintiff offered no evidence **at all** that could support a claim for negligent hiring or entrustment against MV. Negligent hiring and retention both require proof that the employer knew or should have known that the employee possessed dangerous propensities that posed a foreseeable threat to others. *Airdrie Stud, Inc. v. Reed*, 2003 WL 22796469, at *1 (Ky. App. Nov. 26, 2003) (unpublished, copy attached). Aside from the irrelevant and inadmissible evidence of Ms. Caldwell's past treatment for alcoholism and for depression and anxiety, there was no evidence that Ms. Caldwell had ever exhibited any "dangerous propensities." There was no evidence that Ms. Caldwell had been involved in any prior incidents or misconduct prior to this accident. Her

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[72] VR No. 150 (Caldwell): 09/09/10; 04:50:15-04:53:38, 05:12:31-52, and 05:31:34-56 (Transcribed excerpts attached at APX I, EA 8 and 13).
[73] VR No. 151 (Coleman): 09/10/10; 12:04:55-12:05:08-13 (Transcribed excerpts at APX I, EA 17).
[74] VR No. 153 (Pl. Closing Argmt.): 09/15/10; 06:12:37-51 (emphasis added) (Transcribed excerpts attached at APX I, EA 23).

supervisors confirmed she had been in no prior accidents at MV.[75] Thus, not only should the evidence of alcoholism and depression have been excluded as irrelevant and prejudicial, Plaintiff's negligent hiring and retention claims should have been dismissed in their entirety either at summary judgment or directed verdict, as MV requested.[76]

Nor was evidence of Ms. Caldwell's past treatment for alcoholism or depression and anxiety admissible to attack Ms. Caldwell's credibility, as Plaintiff has previously argued.[77] *See Phipps v. Winkler*, 715 S.W.2d 893, 895 (Ky. App. 1986) (where "alcohol use was not an issue" on the merits, inquiry into allegedly false prior testimony about alcohol use related "to a collateral matter and not subject to attack by cross-examination").[78] Even if Ms. Caldwell's failure to check certain boxes on her medical examination questionnaire were permissible grounds for impeachment, Plaintiff did not merely inquire about these specific alleged misstatements to impeach Ms. Caldwell's credibility on cross-examination. Plaintiff engaged in a wide-ranging effort through multiple witnesses to paint Ms. Caldwell as an alcoholic, and expressly asked the jury to draw the inferences from this evidence about Ms. Caldwell's "overall competence," not merely her credibility.[79] This was done with the express permission of the circuit court, who overruled all objections concerning the irrelevance of this evidence to Plaintiff's

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[75] VR No. 151 (Coleman): 09/10/10; 12:05:21-30; *see also* VR No. 152 (Rowe): 09/13/10; 03:36:00-10 (Transcribed excerpts attached at APX I, EA 17 and 18).

[76] *See* n.86, *infra.*

[77] Moreover, the fact that "regular, frequent alcohol use" was not checked on Ms. Caldwell's medical examination report is not the kind of unambiguously false prior statement that is admissible to challenge credibility, since she had been sober for nearly a year at the time she applied. *Tigges v. Cataldo*, 611 F.2d 936 (1st Cir. 1979) (ambiguous or arguable prior statements not relevant to credibility).

[78] *Accord Tamme v. Commonwealth*, 973 S.W.2d 13, 29 (Ky. 1998) (collateral matters not admissible to attack credibility); *United States v. Infelise*, 1992 WL 7837 (N.D. Ill. Jan. 10, 1992) ("[T]he court will not allow cross examination questions about Mr. Jahoda's pattern and practice of drinking to impeach him.").

[79] VR No. 150 (Pl. Opening Stment.): 09/09/10; 11:09:08 (Transcribed excerpts attached at APX I, EA 4).

negligent hiring claim.[80] This evidence was not admissible for any purpose.

C. The Court of Appeals Opinion opens the door to abusive trial tactics, raises serious policy concerns about punishing employers for employing those recovering from addiction or mental health issues, and conflicts with federal employment laws.

The Court of Appeals Opinion holds that a plaintiff may introduce, virtually without limitation, evidence of an employee's history of alcoholism or counseling for depression or anxiety, even where, as here, there is not a scintilla of evidence that the employee was using alcohol or was otherwise impaired at the time of an accident. This Opinion sets a precedent that will allow plaintiffs to bombard juries with evidence of an employee's prior alcohol use, substance abuse, depression, or any other alleged physical or psychological condition to show the employee was a "bad person" that the employer should not have hired, whether or not those past conditions contributed in any way to the accident. That is exactly what Plaintiff did here, arguing in closing that "people with those types of conditions should not be taking care of children in day care. They shouldn't be air traffic controllers. They shouldn't be driving paratransit buses."[81]

While the elements of a negligent hiring or retention claim may require some evidence concerning an employee's past misconduct or dangerous propensities to show the employer's negligence,[82] the mere fact that a plaintiff pleads a negligent hiring claim should not give the plaintiff *carte blanche* to conduct a character assassination of an employee defendant. This is particularly true when dealing with issues of past alcoholism, addiction, or depression, which may have the potential to arouse strong

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[80] *E.g.*, R.A. 830, Order, 8/30/10 and R.A. 856-861, MV's Mot. in Lim., 8/19/10.

[81] VR No. 153 (Pl. Closing Argmt.): 09/15/10; 06:12:37-51 (emphasis added) (Transcribed excerpts attached at APX I, EA 23).

[82] *E.g.*, *Moore v. Bothe*, 479 S.W.2d 634, 636 (Ky. 1972) (prior conviction for drunk driving not admissible to prove negligence or intoxication at time of accident in question).

feelings and prejudices in some jurors. *E.g.*, *Phipps v. Winkler*, 715 S.W.2d 893, 895 (Ky. App. 1986) ("[E]vidence in the instant case of the appellant's past alcoholism unduly influenced and prejudicially swayed the jury.").

As a result of this Opinion, many employers will simply choose not to hire employees with any history of alcohol use, addiction, depression, anxiety or similar issues, **even if the employer is convinced beyond doubt that the applicant has overcome those issues,** lest they risk negligent hiring liability and introduction of highly prejudicial evidence against them in the event the employee is involved in an accident. The Opinion effectively ensconces in Kentucky law the prejudice urged by Plaintiff that employees who have ever experienced such difficulties are forever suspect as to their "overall competence," even after they have overcome those issues, as the evidence showed Ms. Caldwell had done. That is legal error and bad policy.

Indeed, the Opinion creates serious conflicts with employers' legal duties under employment laws, particularly the ADA. "Alcoholism, like drug addiction, is an 'impairment' under the definitions of a disability set forth in the FHA, the ADA, and the Rehabilitation Act." *Regional Econ. Cmty. Action Program, Inc. v. City of Middletown*, 294 F.3d 35, 46 (2d Cir. 2002). *See also Moorer v. Baptist Memorial Health Care System*, 398 F.3d 469, 479 n.4 (6th Cir. 2005) ("There is no question that alcoholism is an impairment ... under the ADA.") (quotation omitted). Thus, the EEOC has advised that while an employer may make certain inquiries about whether an applicant is currently abusing alcohol or illegal drugs, "an employer may not ask whether an applicant is a drug addict or alcoholic, nor inquire whether s/he has ever been in a drug or alcohol rehabilitation program." EEOC Technical Assistance Manual on the Employment

Provisions (Title I) of the Americans With Disabilities Act § 8.8 (1992).[83] Likewise, a blanket policy of refusing to hire any applicant with a history of alcoholism, regardless of an their current ability to safely perform job functions, plainly violates the ADA. *E.E.O.C. v. Old Dominion Freight Lines, Inc.*, 2013 U.S. Dist. LEXIS 88352, at *13 (W.D. Ark. June 24, 2013) (copy attached). The Court of Appeals would nonetheless impose common-law tort duties on employers to do precisely what the ADA prohibits, and would sanction lawyers' entreaties for jurors to make the very kind of stereotypical assumptions that the ADA seeks to eradicate.

This Court should reverse the Court of Appeals, and reaffirm that a negligent hiring, retention or entrustment claim may only be premised on an employee's known propensities that actually contribute to the Plaintiff's injuries. The jury verdict should be vacated and the case remanded for a new trial of all issues.

II. The Court of Appeals Opinion puts Kentucky law at odds with the majority rule that admission of vicarious liability precludes a negligent hiring claim.

The circuit court and Court of Appeals both erred as a matter of law by refusing to follow the majority rule that an employer's admission of *respondeat superior* liability requires dismissal of other secondary liability theories, like negligent hiring, which also seek to impose liability on the employer for the employee's negligence. As this case amply demonstrates, allowing negligent hiring claims to go forward after vicarious liability been admitted serves no purpose other than to allow admission of highly prejudicial evidence of an employee's alleged bad character or prior misconduct – evidence that otherwise would be clearly inadmissible under KRE 404(b) – which

[83] http://adaportal.mtc-inc.com/Employment/Browse_TAM_I/Chapter_VIII_8-8.html (last visited July 2, 2013).

prejudices the entire proceeding and requires a new trial.[84] This is a pure question of law, which the Court reviews *de novo*.[85] MV preserved this issue for appeal.[86] Thus, the Court of Appeals Opinion should be reversed and the verdict vacated.

A. Kentucky law is properly aligned with the majority rule that an employer's admission of *respondeat superior* liability requires dismissal of other redundant imputed liability theories.

"The majority rule is that once an employer has admitted *respondeat superior* liability for a driver's negligence, it is improper to allow a plaintiff to proceed against an employer on any other theory of imputed negligence." *Oaks v. Wiley Sanders Truck Lines, Inc.*, 2008 WL 5459136, at *1 (E.D. Ky. Nov. 10, 2008) (predicting Kentucky would adopt majority rule).[87] This rule is "mandated by the applicable rule of state

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[84] *See, e.g., Diaz v. Carcamo*, 253 P.3d 535, 540 (Cal. 2011) (copy attached).

[85] A denial of summary judgment based solely on an issue of law, as opposed to disputed facts, is reviewable after final judgment and is subject to *de novo*. *Hazard Coal Corp. v. Knight*, 325 S.W.3d 290, 298 (Ky. 2010). The Court of Appeals correctly recognized that this rule applied here. Opinion at 18.

[86] R.A. 349-369, Mot. for Partial Sum. Judgmt., 12/10/09. Since the denial of summary judgment before trial is the order on appeal, MV's summary judgment motion is sufficient to preserve the issue by itself. Nonetheless, MV also moved for directed verdict at the close of Plaintiff's case, VR No. 154:09/15/10; 11:46:14-11:49:01, and renewed its objection after the close of all the evidence. VR No. 154:09/15/10; 01:46:43-01:52:06.

[87] *Accord, e.g., Akhalia v. Guardia*, 2013 WL 2395974, at *6 (E.D.N.Y. May 31, 2013) ("Where an employer has been found to be vicariously liable, these additional claims are barred by law."); *Adele v. Dunn*, 2013 WL 1314944, at *2 (D. Nev. Mar. 27, 2013) (predicting "Nevada would adopt the majority rule."); *Westbrook v. Good Neighbor Care Centers LLC*, 2013 WL 425077, at *5 (W.D. Okla. Feb. 4, 2013) (an employer may be liable for negligent hiring, supervision, or retention of an employee only "if vicarious liability is not established."); *Perry v. Stevens Transp. Inc.*, 2012 WL 2805026, at *6 (E.D. Ark. July 9, 2012) ("[W]hen an employer admits vicarious liability, the plaintiffs are allowed to maintain a claim on only one theory of recovery."); *Ellis v. Old Bridge Transp. LLC*, 2012 WL 6569274, at *3 (M.D. Ga. Dec. 17, 2012) ("[A]dmission of respondeat superior liability requires that summary judgment be granted" on negligent hiring, entrustment, training, and supervision); *Roberts v. Ecuanic Exp., Inc.*, 2012 WL 3052838, at *2 (S.D. Miss. July 25, 2012); *Weber v. Carmona*, 2011 WL 1807783, at *1 (E.D. Mo. May 11, 2011) ("[I]t is improper in a motor vehicle accident to allow a plaintiff to proceed against an employer on any theory of imputed liability once *respondeat superior* liability has been admitted."); *Mann v. Redman Van & Storage Co., Inc.*, 2011 WL 5553044, at *2 (D. Mont. Oct. 17, 2011) ("[T]he Montana Supreme Court would follow the majority rule on this issue, which is "that once an employer has admitted respondeat superior liability for a driver's negligence, it is improper to allow a plaintiff to proceed against the employer on any other theory of imputed liability.") (quotation omitted); *LaPlant v. Snohomish Cnty.*, 271 P.3d 254, 256-57 (Wash. App. 2011) ("Under Washington law, therefore, a claim for negligent hiring, training, and supervision is generally improper when the employer concedes the employee's actions occurred within the course and scope of employment."); *Diaz v. Carcamo*, 253 P.3d 535, 540 (Cal. 2011); *Gant v. L.U. Transport, Inc.*, 770 N.E.2d 1155, 1158 (Ill. App. Ct. 2010); *Bd. of School Comm'rs v. Pettigrew*, 851 N.E.2d 326, 332 (Ind. App. 2006) (reversing trial court's denial of summary judgment);

substantive law, as well as procedural [evidentiary] concerns about potential prejudice to the Defendant employer." *Scroggins v. Yellow Freight Systems, Inc.*, 98 F. Supp. 2d 928, 932 (E.D. Tenn. 2000) (copy attached). When the employer stipulates to vicarious liability, as MV did here, "a separate cause of action for negligent hiring ... has no value," since the "employer is already responsible for the actions of employees ...." *Id.*

Allowing a plaintiff to proceed on a negligent hiring or similar claim under such circumstances serves only one purpose: to facilitate an end-run around KRE 404(b)'s prohibition on prior misconduct and character evidence. Negligent hiring and entrustment claims require proof that an employee had "dangerous propensities" about which the employer knew or should have known. *Reed*, 2003 WL 22796469, at *1. Proof of such "dangerous propensities" typically consists of evidence concerning the employee's prior accidents or misconduct, which would otherwise be inadmissible as improper character or propensity evidence. *Diaz v. Carcamo*, 253 P.3d 535, 540 (Cal. 2011). Thus, when a plaintiff is allowed to go forward with negligent hiring claims after vicarious liability is conceded, "inflammatory evidence comes into the record which is irrelevant to any contested issue in the case." *Oaks*, 2008 WL 5459136, at *1.

In *Diaz*, for example, the California Supreme Court vacated a $22.5 million jury verdict because the trial court failed to dismiss the negligent hiring claim after the employer admitted vicarious liability, resulting in the admission of prejudicial evidence that the employee had two prior accidents, had lied on his employment application, and was fired from prior driving jobs. The court explained that this result is mandated by the

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superior, it is entitled to summary judgment on claims for negligent entrustment, hiring and retaliation."); *Elrod v. G&R Const. Co.*, 628 S.W.2d 17 (Ark. 1982); *Clooney v. Geeting*, 352 So. 2d 1216, 1219-20 (Fla. App. 1977); *Houlihan v. McCall*, 78 A.2d 661 (Md. 1951) (ordering new trial where court failed to dismiss negligent hiring claims, allowing introduction of prejudicial evidence of past misconduct).

"majority rule that a defendant-employer's admission of vicarious liability bars claims for negligent entrustment, hiring, or retention." *Id.* at 454. The proper remedy is a new trial because the evidence admitted on the negligent hiring claim "creates a prejudicial risk that the jury will find the employee drove negligently based not on evidence about the accident at issue, but instead based on an inference, drawn from the employee's past accidents, that negligence is a trait of his character." *Id.* at 455.

While this is an issue of first impression for this Court, U.S. District Court for the Eastern District of Kentucky concluded that Kentucky law would follow the "majority rule." *Oaks*, 2008 WL 5459136, at * 1. In *Oaks*, the court *sua sponte* dismissed negligent hiring, training, retention and supervision claims against a trucking company, where the company had admitted vicarious liability for its driver's conduct, explaining:

> Once an employer has admitted liability to plaintiff for its employee's negligence, the evidence laboriously submitted to establish the other theory of liability serves no purpose. The energy and time of courts and litigants is unnecessarily expended. In addition, potentially inflammatory evidence comes into the record which is irrelevant to any contested issue in the case.

Id. at *1.

The *Oaks* court was correct: the "majority rule" is consistent with established Kentucky jurisdiprudence. First, the majority rule recognizes that once *respondeat superior* is admitted, negligent hiring, retention, and similar claims are *per se* duplicative and unnecessary. "The doctrine of *respondeat superior* and the doctrine of negligent entrustment are simply alternative theories by which to impute an employee's negligence to an employer," and "[u]nder either theory, the liability of the principal is dependent on the negligence of the agent." *Thompson v. N.E. Ill. Reg. Commuter R.R.*, 854 N.E.2d 744, 747 (Ill. App. 2006). If the plaintiff proves the employee's negligence and

respondeat superior liability is admitted, there is no need to inquire further into negligent hiring to impose liability on the employer. *Id.*

Kentucky law is in accord. This Court has squarely held that "[i]n order for [an] employer to be held liable for negligent hiring [or] retention... the employee must have committed a tort." *Ten Broeck DuPont, Inc. v. Brooks*, 283 S.W.3d 705, 727 (Ky. 2009). If *respondeat superior* liability has been admitted, then proof of the employee's negligence automatically triggers the employer's liability, and there is no need to further prove negligence in the hiring process.

Second, the majority rule recognizes that the historical rationale for recognizing the tort of negligent hiring "appears to rest upon ... the need to assess liability for the vicious acts of employees, *in the absence of respondeat superior liability*...," like a criminal assault that is outside the scope of employment. *Lee v. J.B. Hunt Transp.*, 308 F. Supp. 2d 310, 313-14 (S.D.N.Y. 2004) (italics in original). That is, the tort of negligent hiring arose to address cases where *respondeat superior* is **not** available. *Id.*

That is also true of Kentucky. The tort of negligent hiring was first recognized in Kentucky in *Oakley v. Flor-Shin, Inc.*, 964 S.W.2d 438 (Ky. App. 1998), which involved a criminal sexual assault by an employee that was indisputably outside the scope of employment. Indeed, the plaintiff in *Oakley* "conceded" that the employer "was **not** vicariously liable for [the employee's] behavior." *Id.* at 439 n.1 (emphasis added).

Third, the majority rule is premised on judicial recognition of the highly prejudicial nature of evidence concerning an employee's past misconduct or dangerous propensities, and a desire to limit the use of such evidence to cases where it is truly necessary to resolve a **contested** issue of secondary liability. *E.g., Oaks*, 2008 WL

5459136, at * 1; *Diaz*, 253 P.3d at 545. Kentucky law shares this concern about the uniquely prejudicial effect of "past misconduct" evidence, and recognizes the need to "strictly limit[]" use of such evidence. *Kentucky Farm Bureau Mut. Ins. Co. v. Rodgers*, 179 S.W.3d 815, 819 (Ky. 2005).[88]

Despite the clear alignment between Kentucky law and the majority rule, the Court of Appeals decided – as a matter of first impression – that Kentucky simply would not follow this rule. Instead, the Court of Appeals placed Kentucky squarely in the minority of jurisdictions that allow plaintiffs to maintain duplicative theories of secondary liability even when secondary liability is not disputed. The Court of Appeals focused on the different elements of proof for *respondeat superior* and negligent hiring, but ignored the practical reality that once *respondeat superior* is admitted, prevailing on negligent hiring imposes no additional liability on the employer. Allowing the negligent hiring claim to be tried is a purely academic exercise, yet it has a very real prejudicial effect of allowing evidence of an employee's prior misconduct or "bad character" to be admitted. The prejudicial effect of this evidence *per se* outweighs its probative value, since the probative value is absolutely *nil* once the employer admits vicarious liability.

The Court of Appeals' view exalts form at the expense of substance. It also ignores the historical development of negligent hiring and similar torts, which were recognized to fill the gap for torts committed by employees outside the scope of their employment but for which the employer should be held accountable. There is no need to struggle to find a role for these liability theories when the employer acknowledges accountability for the acts of its employees. The only purpose for asserting such claims is

[88] *See also Kelley v. Poore*, 328 S.W.3d 683, 687 (Ky. App. 2009) "[E]vidence of one's character for carefulness or carelessness ... is plainly inadmissible ....").

to escape KRE 404(b)'s limitations on use of prejudicial character evidence. That is a misuse of the tort, which serves no valid purpose. This Court should so hold.

B. The Court of Appeals is incorrect that a majority of jurisdictions now reject the "majority rule."

The Court of Appeals is also incorrect that the majority of jurisdictions have shifted and now support Plaintiff's view. Even the cases the Court of Appeals cites in support of its holding acknowledge they are adopting a "minority" view. *See Marquis v. State Farm Fire & Cas. Co.*, 961 P.2d 1213, 1224 (Kan. 1998) ("The rule ... that once an employer admits liability under *respondeat superior* the plaintiff may not proceed .... on a negligent entrustment or negligent hiring or supervision theory[] is the majority rule."); *James v. Kelly Trucking Co.*, 661 S.E.2d 329, 332 (S.C. 2008) (Moore, J. dissenting) ("[m]ost jurisdictions" do not permit duplicative secondary liability theories). Indeed, opinions addressing this issue consistently acknowledge MV's position represents the majority view. *E.g.*, *Adele v. Dunn*, 2013 WL 1314944, at *2 (D. Nev. Mar. 27, 2013); *Oaks*, 2008 WL 5459136, at * 1; *Scroggins*, 98 F. Supp. 2d at 932; *Diaz*, 253 P.3d at 544.

The Court of Appeals erroneously accepted Plaintiff's claims concerning the number of jurisdictions that support her view.[89] While Plaintiff claims that twenty-three states have adopted her position, many of the cases Plaintiff cites as doing so merely observe that *respondeat superior* and other secondary liability theories are legally distinct claims, but do not address whether admission of *respondeat superior* liability requires dismissal of other secondary liability theories, like negligent hiring.[90] But merely

[89] Combined Brief for Appellant/Cross-Appellee Barbara Allgeier at 7-8 n.29.
[90] *E.g.*, *McGraw v. Wachovia Secs., LLC*, 756 F. Supp. 2d 1053 (N.D. Iowa 2010); *Shiga v. Hawaiian Mission Academy*, 165 P.3d 1049 (Hi. App. 2007); *Or v. Edwards*, 818 N.E.2d 163 (Mass. App. Ct. 2004) (intentional murder, clearly outside scope of employment); *L.L.N. v. Clauder*, 563 N.W.2d 434 (Wis.

recognizing that the two types of claims are distinct does not mean a court has rejected the majority rule. Even the jurisdictions that follow the majority rule acknowledge that *respondeat superior* and negligent hiring are "separate and distinct ... bases for recovery." *Gant v. L.U. Transport, Inc.*, 770 N.E.2d 1155, 1158 (Ill. App. Ct. 2002). In several of the cases cited by Plaintiff, the employer actively contested *respondeat superior* liability, rendering the majority rule inapplicable.[91] **And at least four of the states that Plaintiff claims to support her view have actually expressly adopted MV's position.**[92] Thus, Plaintiff's claims about the number of jurisdictions adhering to her view are incorrect, and the Court of Appeals erred in accepting them.

Regardless, the force of the majority rule advocated by MV stems from its firm grounding in sound legal principles and its practical sense, not the number of jurisdictions that have adopted it. It is manifestly unfair to allow plaintiffs to "wish away" KRE 404(b)'s restrictions on character evidence, opening the door to a flood of prejudicial and otherwise inadmissible evidence of an employee's prior "bad acts," merely by incanting the words "negligent hiring" in the complaint. The Court of Appeals' decision to place Kentucky in the minority on this question should be reversed.

C. The majority rule requires that the verdict be vacated.

Applying the majority rule in this case, Plaintiff's negligent hiring and related secondary liability claims should have been dismissed before trial. MV expressly

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1997); *Rehm v. Lenz*, 547 N.W.2d 560 (S.D. 1996); *Mainella v. Staff Builders Indus. Servs., Inc.*, 608 A.2d 1141 (R.I. 1992).

[91] *Trahan-Laroche v. Lockheed Sanders, Inc.*, 657 A.2d 417 (N.H. 1995) (defendant disputed employee's conduct was within scope of employment); *Erickson v. Christenson*, 781 P.2d 383 (Or. App. 1989) (defendant moved to dismiss *respondeat superior* claim).

[92] *Roberts v. Ecuanic Exp., Inc.*, 2012 WL 3052838, at *2 (S.D. Miss. July 25, 2012) ("The Courts of this state have consistently dismissed independent negligence claims against an employer who admits vicarious liability for an employee's actions."); *Tuite v. Union Pac. Stages*, 284 P.2d 333 (Or. 1955); *Heath v. Kirkman*, 82 S.E.2d 104 (N.C. 1954); *Prosser v. Richman*, 50 A.2d 85 (Conn. 1946).

admitted vicarious liability for Ms. Caldwell's actions.[93] Thus, proof of MV's negligence in hiring her was unnecessary to establish MV's liability for any tort she may have committed, and this evidence should not have been submitted to the jury.

The prejudicial effect of this evidence is undeniable. Plaintiff bombarded the jury with testimony about Ms. Caldwell's past alcohol use, treatment for alcoholism, and treatment for depression and anxiety, which was offered to prove that MV should have refused to hire her. *See* pp. 4-7, *supra.* This created a risk that the jury would infer from Ms. Caldwell's past experience with alcoholism that she was careless or unreliable when evaluating whether Ms. Caldwell was negligent on December 8, 2006 – even though Caldwell tested negative for both drugs and alcohol after the accident.[94] Indeed, Plaintiff's counsel explicitly **invited** the jury to make this inference, stating in opening argument that even though there was "no evidence that Miss Caldwell was intoxicated when she was operating the bus on December 8,... the evidence will be **that these are important issues as to her overall competence**...."[95]

Kentucky courts have held that it is prejudicial and reversible error to admit evidence of a party's prior alcohol or substance abuse that is unrelated to the incident at issue. *E.g.*, *Phipps v. Winkler*, 715 S.W.2d 893, 895 (Ky. App. 1986) (new trial required because admission of "evidence in the instant case of the appellant's past alcoholism unduly influenced and prejudicially swayed the jury"). *Accord Bloxam v. Berg*, 230 S.W.3d 592, 595-96 (Ky. App. 2007) (prior marijuana use excluded where nothing

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[93] *See* R.A. 762-63, Amended Answer, 8/13/10; RA 764-783, MV Reply in Supp. of Motion for Partial Summary Judgment at 781, 8/13/10.

[94] Trial Ex. 56, Forensic Alcohol Testing Rep. (Attached as APX H); VR No. 152 (Rowe): 09/13/10; 03:36:00-28 (Transcribed excerpts attached at APX I, EA 20).

[95] VR No. 150 (Pl. Opening Stmt.): 09/09/10; 11:09:08-23 (emphasis added) (Transcribed excerpt attached at APX I, EA 4).

beyond "pure surmise" suggested that physician used marijuana at time of alleged malpractice); *Moore v. Bothe*, 479 S.W.2d 634, 636 (Ky. 1972) (prior conviction for drunk driving not admissible to prove negligence or intoxication at time of accident).

Nor was the prejudicial and irrelevant evidence admitted in support of Plaintiff's negligent hiring theory limited to Ms. Caldwell's past treatment for alcoholism and depression. Plaintiff also elicited testimony about the low wages and benefits paid by MV to its drivers, which Plaintiff claimed was relevant to show that MV was forced to accept substandard applicants.[96] This evidence was irrelevant to show Ms. Caldwell's negligence on the day of the accident and only served to inflame the jury against MV, and further demonstrates how the minority rule opens the door to prejudicial evidence on collateral issues that do not bear on any contested question of liability.

D. Plaintiff's assertion of a claim for punitive damages does not justify allowing her negligent hiring claim to go forward.

Although some courts have recognized an exception to the majority rule in cases where punitive damages are at issue, these decisions are of no assistance to the Plaintiff in this appeal. *Scroggins*, 98 F. Supp. 2d at 932. The jurisdictions that recognize such an exception hold that admission of *respondeat superior* liability may not necessarily bar introduction of evidence on negligent hiring if such evidence is necessary and relevant to prove "gross" negligence as required for punitive damages. *Id.* But here, the circuit court granted summary judgment on punitive damages before trial, so the exception offers no support for the circuit court's decision. And while the Court of Appeals reversed the grant of summary judgment, it did so in reliance on facts that this Court has held cannot establish an employer's punitive damages liability. *See* pp. 36-46, *infra*. Thus, punitive

[96]VR No. 152 (Rowe): 09/13/10; 02:17:28-59; VR No. 153 (Grice): 09/14/10; 02:49:43-54; VR No. 153 (Smith): 09/14/10; 04:37:59-04:38:27.

damages were not properly at issue in this case, and this Court need not even reach the issue of whether to recognize a punitive damages exception.

Moreover, not all courts have recognized a punitive damages exception to the majority rule. *See Connelly v. H.O. Wolding, Inc.*, 2007 WL 679885 (W.D. Mo. March 1, 2007) (copy attached) ("Missouri has yet to recognize such an exception. Thus, the general rule in Missouri remains – Plaintiff cannot assert additional theories of imputed liability when defendant has admitted *respondeat superior* liability."); *Hood v. Dealers Transp. Co.*, 459 F. Supp. 684, 686 (N.D. Miss. 1978) ("Should the evidence warrant the imposition of punitive damages against defendant on account of the gross or willful negligence of defendant's servant, the negligent entrustment act of defendant, if any, would add nothing to the case."). For good reason: allowing an exception when punitive damages are pled creates that possibility that the exception will "subsume the rule" through "artful pleading." Richard A. Mincer, *The Viability of Direct Negligence Claims Against Motor Carriers in the Face of an Admission of Respondeat Superior*, 10 WYO. L. REV. 229, 261 (2010). "Plaintiffs should not be able to inject prejudicial evidence into a proceeding simply by adding a paragraph to a Complaint." *Id.* at 263.

Furthermore, in those cases where negligent hiring claims are permitted to establish punitive damages liability, courts commonly recognize that "direct liability claims should be bifurcated to avoid completely any possible prejudice to the employer on the vicarious liability claim." *Scroggins*, 98 F. Supp. 2d at 932. Since Kentucky does not permit bifurcation of punitive damages claims, *see* KRS 411.186(3), a key rationale for recognizing a punitive damages exception is absent here.

Finally, even assuming *arguendo* that, in the abstract, negligent hiring claims may

be pursued to prove punitive damages liability in some cases, such an exception to the majority rule still would not justify admission of Ms. Caldwell's prior treatment for alcoholism, depression, or anxiety. Those factors were not causally related to the accident, so they were not relevant to prove negligent hiring even if such a claim were properly submitted to the jury. *See* Part I, *supra*. *See also, e.g.*, *Hardaway Mgmt. Co. v. Southerland*, 977 S.W.2d 910, 917 (Ky. 1998) (punitive damages may only be awarded for conduct that caused or contributed to the plaintiff's injuries). Thus, admission of evidence concerning Ms. Caldwell's prior alcoholism, depression and anxiety requires reversal regardless of whether a punitive damages exception applied in this case.

In sum, this case perfectly illustrates the prejudice and confusion that results when plaintiffs are permitted to introduce prejudicial evidence of collateral issues concerning an employee's past difficulties or "dangerous propensities" to prove a negligent hiring claim when the employer's secondary liability for the employee's torts is not even in dispute. This trial was as much or more about attacking Ms. Caldwell's character as it was about proving the facts surrounding Ms. Allgeier's accident and damages. That is precisely the kind of mischief KRE 404(b) seeks to avoid. The circuit court should have granted summary judgment on Plaintiff's alternative secondary liability claims under the majority rule. Its failure to do so facilitated a flood of highly prejudicial evidence, which requires reversal of the verdict and a new trial.

III. The Court of Appeals' punitive damages ruling is in direct conflict with this Court's precedents and should be reversed.

The circuit court was asked **three times** – at summary judgment, before trial, and

at the close of the evidence[97] – to consider whether punitive damages should be submitted to the jury. **Three times**, the circuit court properly ruled that the plaintiff had not presented a viable claim for punitive damages. Indeed, a reasonable trier of fact could not find by clear and convincing evidence **either** (1) that MV ratified, authorized or should have anticipated Ms. Caldwell's conduct, **or** (2) that the conduct that led to this accident amounted to gross negligence. Both must be shown to maintain a claim for punitive damages under Kentucky law. *See* KRS 411.184.

The Court of Appeals Opinion focused on the issue of employer ratification and concluded a "MV did in fact ratify and authorize" Ms. Caldwell's conduct based primarily on MV's policies concerning post-accident investigation practices – "[i]n particular, [that] Ms. Caldwell was trained not to admit fault for an accident" and that "Caldwell was trained and instructed not to speak with victims and witnesses...."[98] However, in *University Medical Center v. Beglin*, 375 S.W.3d 783 (Ky. 2011), this Court expressly instructed that an employer's insufficient or even obstructionist post-incident investigation practices cannot be relied upon to establish "ratification." The Court of Appeals Opinion is in direct conflict with this precedent. Moreover, the practices condemned by the Court of Appeals – instructing employees not to admit fault or make statements after an accident – are extremely common practices among employers that many would regard as reflecting legitimate legal advice, not a nefarious "ratification" of employee wrongdoing. To hold that such policies give rise to vicarious liability for punitive damages would have massive repercussions on Kentucky employers.

Nor was there any other basis for submitting punitive damages to the jury.

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[97] R.A. 830, Order, 8/30/10; R.A. 2398, Motion to Reconsider, 9/1/10; VR No. 153: 09/15/10; 01:37:04-01:43:33.

[98] Opinion at 16.

Employer liability for authorizing or anticipating an employee's gross negligence requires evidence of a pattern of similar incidents or gross misconduct by the employee in the course of his or her employment. *E.g. Patterson v. Tammy Blair, Inc.*, 265 S.W.3d 241 (Ky. App. 2007). Plaintiff did not identify any prior instances of unloading accidents similar to the one here by Ms. Caldwell or any other MV driver.

Plaintiff similarly did not show "outrageous" conduct as required to establish gross negligence under Kentucky law. Plaintiff's negligence case was based on the theory that the accident would not have occurred if Ms. Caldwell had waited to remove the restraints on Ms. Allgeier's wheelchair until the lift was fully deployed. Those facts show no more than simple negligence, not a "wanton or reckless disregard for the safety" of Ms. Allgeier. *Kinney v. Butcher*, 131 S.W.3d 357, 359 (Ky. App. 2004) (quotation omitted). Kentucky law instructs trial courts to exercise care when deciding whether to submit punitive damages to the jury, to not "eliminate the distinction between ordinary and gross negligence." *Id.* The circuit court here correctly concluded these facts fall into the former category, which required summary judgment on Plaintiff's punitive damages claim, whether or not she could establish ratification or authorization by MV.

A grant of summary judgment is reviewed by this Court *de novo*, viewing the evidence in the light most favorable to the non-moving party. "[T]he standard of review on appeal of summary judgment is whether the trial court correctly found there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law." *Inter-Tel Techs., Inc. v. Linn Station Prop., LLC*, 360 S.W.3d 152, 165 (Ky. 2012). Moreover, under KRS 411.184, liability for punitive damages must be established by "clear and convincing" evidence. This heightened burden of proof must be considered in

determining whether Plaintiff can withstand summary judgment. *Spaulding v. Tate*, 2012 WL 3845411, at *5 (E.D. Ky. Sept. 5, 2012) (granting summary judgment on punitive damages under Kentucky law). "Where a party bears a higher burden of proof, that party must meet the same burden in resisting the summary judgment motion." *Id.* Here, summary judgment was warranted regardless of the burden of proof applied.[99]

A. The Court of Appeals' reliance on MV's post-incident investigation practices conflicts with this Court's precedents concerning the legal standard for employer ratification under KRS 411.184(3).

KRS 411.184(3) provides "[i]n no case shall punitive damages be assessed against a principal or employer for the act of an agent or employee unless such principal or employer authorized, ratified or should have anticipated the conduct in question." Thus, a court must determine "whether it can be fairly found that [the employer] authorized, ratified, or reasonably could have anticipated" the employee's conduct before instructing the jury on punitive damages. *Beglin*, 375 S.W.3d at 793 (vacating jury's punitive damages award). "Kentucky is the only state with a statute that so broadly limits vicarious liability for punitive damages." *Berrier v. Bizer*, 57 S.W.3d 271, 283 (Ky. 2001). Parties asserting punitive damages against employers face a heavy burden. "Under Kentucky law, it is **very difficult** to obtain punitive damages against an employer for the negligent acts of its employees." *Jones v. Blankenship*, 2007 WL 3400115, at *3 (E.D. Ky. Nov. 13, 2007) (emphasis added) (copy attached). "Very few cases on record have recognized vicarious liability for punitive damages" under KRS 411.184(3). *McGonigle v. Whitehawk*, 481 F. Supp. 2d 835, 842 (W.D. Ky. 2007).

In *Beglin*, this Court specifically held that an employer's inadequate post-accident

[99] Since MV prevailed on the issue in the circuit court, the burden of preserving the issue for appeal rests with Ms. Allgeier, not MV. Nonetheless, MV preserved the issue with its motion for summary judgment on punitive damages. R.A. 349-69.

investigation, including even efforts "to ***actively obstruct the investigation by concealing evidence*** of the negligence[,] ... does not constitute 'ratification' of that negligence" for purposes of KRS 411.184(3). *Beglin*, 375 S.W.3d at 794. In that case, a nurse delayed transmitting an order for blood to the hospital blood bank by nearly a half hour, resulting in the death of a patient. Evidence was presented that the hospital actively obstructed the investigation of the incident, including destroying a confidential incident report. This Court instructed that "ratification" connotes "after the fact approval of the conduct," and is "quite distinct" from an employer's failure to investigate, or even conceal, the employee's fault. *Id.* As the Court explained, "[t]he alleged cover up implies, not confirmation or approval of the negligence, but disapproval and a misguided attempt to distance itself from the tortious conduct, which is the opposite of ratification." *Id.*

The Court of Appeals Opinion cannot be reconciled with *Beglin*. The Court of Appeals correctly recognized that the threshold question was "whether Barbara [Ms. Allgeier] presented clear and convincing evidence that MV ratified, authorized or anticipated the conduct ..."[100] However, in direct contravention of *Beglin*, which was not cited, the Opinion held that Plaintiff satisfied this burden with, "in particular," evidence that "Caldwell was trained not to admit fault for an accident, but to instead immediately call dispatch and report the accident," and that "Caldwell was trained and instructed not to speak with victims and witnesses, and, in fact, her supervisors placed her in a car so she could not speak with Barbara or surrounding witnesses during the initial investigation."[101] The Court stressed it was significant that "Caldwell was *trained* to respond to accidents in this manner" – *i.e.*, "not to admit fault" and "not to speak with

[100] Opinion at 15
[101] Opinion at 15.

victims and witnesses."[102]

These are precisely the kind of post-accident investigation factors that *Beglin* holds may ***not*** be used to prove ratification. *Beglin* makes clear that "Ratification" requires an endorsement of the employee's conduct with full knowledge of the facts, not merely efforts to avoid an adverse determination of liability. *Accord* RESTATEMENT (THIRD) AGENCY § 4.06 (2006); *Papa John's Intern., Inc. v. McCoy*, 244 S.W.3d 44 (Ky. 2008). Otherwise, any employer that disputes its employee's negligence in litigation could potentially face punitive damages for "ratifying" the employee's acts. The fact that Ms. Allgeier was trained before the fact to respond to accidents in this way does not make these facts any more relevant to ratification. To the contrary, ratification is an **after the fact** endorsement. A pre-existing investigatory policy cannot show ratification.

What is more, these practices – instructing employees not to admit fault or give statements following an accident – are common practice for employers.[103] Indeed, a simple internet search reveals a number of informational web sites that provide essentially the same advice to all drivers as the appropriate way to respond to a vehicle accident.[104] Many attorney-maintained websites offer the same advice.[105] Given the commonplace nature of this advice, holding that such practices may constitute "ratifying" or "authorizing" employee negligence effectively makes vicarious punitive damages liability nearly automatic, in clear contravention of KRS 411.184(3).

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[102] Opinion at 16-17 (italics in original).

[103] *See, e.g.*, Work Truck Magazine Online, "10 Things Drivers Should Do in Case of an Accident" http://www.worktruckonline.com/Channel/Safety-Accident-Management/Article/Story/2007/10/10-Things-Drivers-Should-Do-in-Case-of-an-Accident.aspx?interstitial=1 (last visited May 24, 2012).

[104] "First Steps Following a Personal Injury Auto Accident," http://www.dmv.org/insurance/first-steps-following-a-personal-injury-auto-accident.php (last visited May 24, 2012).

[105] *E.g.*, ExpertLaw, Automobile Accident Law, http://www.expertlaw.com/library/personal_injury/automobile.html (last visited July 3, 2013); Ledger & Assocs., Auto Accident Do's and Don'ts, http://www.ledgerlaw.com/auto-accident-do-and-dont/ (last visited July 3, 2013).

B. MV did not anticipate or authorize tortious conduct.

Plaintiff similarly cannot maintain a punitive damages claim against MV on the theory that it "authorized" or "should have anticipated" Ms. Caldwell's conduct for purposes of KRS 411.184(3). Courts applying KRS 411.184(3) have consistently held that to show anticipation or authorization, "Kentucky law requires evidence of a **pattern of similar conduct by the employee**, such that the employer should have reasonably expected the conduct to recur." *In re Air Crash at Lexington, Ky.*, 2011 WL 350469 at *5 (E.D. Ky. Feb. 2, 2011) (emphasis added) (copy attached). *See also Beglin*, 375 S.W.3d at 794 (emphasizing "[a]n incident of this type had never before occurred at the hospital"); *Ky. Farm Bureau Mut. Ins. Co. v. Troxell*, 959 S.W.2d 82, 85-86 (Ky. 1997); *Patterson*, 265 S.W.3d 241; *Jones v. Blankenship*, 2007 WL 3400115, at *4 (E.D. Ky. Nov. 13, 2007) ("[F]or Walker to prove that Willis Shaw 'authorized' or 'should have anticipated' Blankenship's acts, he must present evidence that ... Blankenship exhibited a pattern of conduct similar to the alleged gross negligence....").

In *Patterson*, 265 S.W.3d 241, the court granted an employer summary judgment, dismissing punitive damages claims for an employee's use of a handgun to repossess a vehicle. Even though the employee was known to regularly carry a handgun, the plaintiff could not show "anticipation" because "there is no evidence that [the employee] previously repossessed any vehicles in an impermissible manner." *Id.* at 245.

In *McGonigle*, the court granted summary judgment to the employer in a truck accident case because, even though the employee-driver had two prior DUI convictions, neither conviction occurred while he was employed for the employer-defendant and therefore "these two (2) instances do not qualify as a pattern for purposes of providing a

punitive damages instruction to the finder of fact." 481 F. Supp. 2d at 842.

Here, there is absolutely no evidence that Ms. Caldwell, or any other MV driver, had been involved in any similar incidents in the course of her employment for MV prior to Ms. Allgeier's accident, much less that Ms. Caldwell exhibited a "pattern" of grossly negligent conduct.[106] Absent such evidence, Plaintiff cannot establish authorization or anticipation under KRS 411.184(3).

Contrary to the Court of Appeals Opinion, the mere testimony of MV supervisors that "they did not instruct on all of the company's safety policies" does not support a finding of authorization or ratification, without such a pattern of misconduct.[107] KRS 411.184(3) requires evidence that the employer was aware of a pattern of misconduct presenting a danger to the public and, in the face of this knowledge, still made a conscious decision not to implement safeguards – like additional training. *Jones*, 2007 WL 3400115, at *4 (prior incidents could not show knowledge of pattern of misconduct where "the circumstances ... are so dissimilar, even trivial, when compared to the complained-of accident that they cannot reasonably be viewed as a pattern of conduct such that Willis Shaw should have anticipated gross negligence leading to a serious auto collision"). A mere alleged lack of adequate training practices does not automatically equate to authorization or anticipation of grossly negligent misconduct for purposes of KRS 411.184(3). As Judge Heyburn observed in *Estate of Presley v. CCS of Conway*:

> Conway Courier Service and CCS of Conway apparently did not have policies in place regarding safety and driver training or disciplinary procedures for drivers who violated traffic laws. While lack of company policies might show negligence on the part of companies to educate their drivers about road safety and fulfill their regulatory obligations, **it does not show that the companies authorized unsafe driving or ratified any**

[106] VR No. 151 (Coleman): 09/10/10; 12:08:06 (no prior accidents similar to this one).
[107] Opinion at 17.

violations of traffic laws by their drivers.

2004 WL 1179448, at *4 (W.D. Ky. May 18, 2004) (emphasis added). Were the law otherwise, every negligent training case would automatically go to the jury on punitive damages against the employer, which would contradict the purpose of KRS 411.183(3).

The Court of Appeals employed an incorrect legal standard for determining employer authorization, ratification, or anticipation under KRS 411.184(3). When the correct interpretation of KRS 411.184(3) is applied, the facts relied upon by the Court of Appeals do not warrant reversal of the circuit court's grant of summary judgment.

C. The facts do not show outrageous conduct required for a punitive damages claim based on gross negligence.

The circuit court's summary judgment should be affirmed for the additional reason that Plaintiff did not identify any outrageous conduct rising to the level of "gross negligence." Absent such a showing, there can be no claim for punitive damages, regardless of whether MV ratified Ms. Caldwell's actions. *See Timmons v. Wal-Mart Stores, Inc.*, 33 F. Supp. 2d 577, 581 (W.D. Ky. 1999) (granting employer directed verdict on punitive damages where employee did not act wantonly or recklessly); *Hamby v. Univ. of Ky. Med Ctr.*, 844 S.W.2d 431, 435 (Ky. App. 1992).

It is black letter law that mere negligence is not sufficient to award punitive damages. "[P]unitive damages should be reserved for truly gross negligence ... a wanton or reckless disregard for the safety of other persons." *Kinney*, 131 S.W.3d at 359. Kentucky law requires trial courts to exercise care when deciding whether to submit punitive damages to the jury, so as to not "eliminate the distinction between ordinary and gross negligence." *Id. See also Turner v. Werner Enter., Inc.*, 442 F. Supp. 2d 384, 386 (E.D. Ky. 2006). "[C]ausing an accident is simply not enough to warrant punitive

damages; otherwise, the punitive damages standard would be no different than the standard for ordinary negligence." *Zachery v. Shaw*, 2013 WL 1636385, at *3 (W.D. Ky. April 16, 2013). "Such a result would run contrary to the specific yet limited purposes that punitive damages are meant to serve." *Embry v. GEO Transp. of Ind., Inc.*, 478 F. Supp. 2d 914, 921 (E.D. Ky. 2007) (citing *State Farm v. Campbell*, 538 U.S. 408 (2003)).

Thus, where the totality of the circumstances does not permit an inference of outrageous conduct beyond mere ordinary negligence, punitive damages claims should not be submitted to the jury. In *Kinney,* 131 S.W.3d at 359, for example, the court affirmed the circuit court's refusal to instruct the jury on punitive damages, concluding that driving 10 mph over the speed limit and entering the plaintiff's lane while passing in a no-passing zone could not constitute gross negligence. *Id.*

In *Turner*, the court granted summary judgment on punitive damages, concluding that a truck driver's conduct falling asleep at the wheel was ordinary, not gross, negligence. 442 F. Supp. 2d at 386. The court emphasized that allowing punitive damages in such a case would contravene *Kinney's* instruction to maintain the "distinction between ordinary and gross negligence." *Id.*

In *Spaulding*, 2012 WL 3845411, the court granted summary judgment on punitive damages, finding eight alleged violations of state and federal traffic and motor carrier laws – including rules concerning changing lanes, obstructing view of mirrors, and care and maintenance of freight vehicles – did not rise above ordinary negligence. The court emphasized that, by itself, "violation of a statute establishing rules of the road does not constitute gross negligence or willful or wanton conduct," nor even constitute "evidence" of the kind of "aggravated misconduct" required for punitive damages. *Id.* at

*6. The court also held punitive damages could not be awarded based on the company's failure to administer a post-accident alcohol test required by federal motor carrier regulation or the fact that the driver blamed the plaintiff following the accident. *Id.* at *7.

Applying these standards, Plaintiff has not alleged any conduct that rises to the level of gross negligence. Both the Plaintiff and the Court of Appeals made much about Ms. Caldwell violating MV safety policies. But the mere fact that a safety policy was violated, without more, does not show "aggravated misconduct," any more than the mere fact of a traffic law violation does. *Id.* at *6.

The sum and substance of Ms. Caldwell's alleged negligence was that she untied Ms. Allgeier's wheelchair before the lift was fully deployed, and did not sufficiently communicate with Ms. Allgeier about whether the lift was ready before Ms. Allgeier drove onto it. Such facts, at most, demonstrate no more than ordinary negligence. Plaintiff cites no aggravating factors suggesting that Ms. Caldwell acted with reckless disregard for Ms. Allgeier's safety. There is no evidence that Ms. Caldwell disregarded any obvious warnings that Ms. Allgeier might attempt to drive onto the lift too early, or that Ms. Caldwell was engaged in some obviously distracting conduct that she knew would impair her ability to focus and safely perform her duties. Ms. Allgeier herself testified that Ms. Caldwell performed the unloading process just as every other driver had done in her five years of regularly riding the TARC 3 bus – a period that extends well before MV's contract to operate TARC 3 or Ms. Caldwell's employment – and that she had never before experienced any problems.[108]

Nor does any of the other conduct alleged in this case rise to the level of gross negligence or wanton or reckless disregard for Ms. Allgeier's safety. The Court of

[108] VR No. 151 (Allgeier): 09/10/10; 03:56:23-28; 04:12:41-04:13:16; 04:30:45-04:31:15.

Appeals vaguely referenced "Caldwell and MV's treatment of Barbara immediately after the accident" as evidence of "reckless disregard for Barbara's life and safety,"[109] seemingly referring to the same post-accident investigation practices that it erroneously cited in support of ratification. But such post-accident conduct cannot, as a matter of law, establish punitive damages liability. *Spaulding*, 2012 WL 3845411, at *7. Only conduct that somehow caused or contributed to the plaintiff's injuries are relevant to punitive damages. *E.g.*, *Hardaway Mgmt. Co. v. Southerland*, 977 S.W.2d 910, 917 (Ky. 1998); *Estep v. Werner*, 780 S.W.2d 604, 607 (Ky. 1989); *Saucedo v. Salvation Army*, 24 P.3d 1274, 1280 (Ariz. App. 2001) ("[A] survey of other states' jurisprudence indicates that punitive damages are proper when the conduct giving rise to punitive damages contributes to, or is a cause of, the injury"). Thus, post-accident efforts to deny responsibility are irrelevant to punitive damages liability.

Plaintiff's allegations about the delay in EMS arriving at the scene also do not establish gross negligence. Plaintiff offered no evidence at all about MV's responsibility for this delay. Ms. Caldwell testified that she called dispatch immediately after the accident to request help for Ms. Allgeier, as well as to report the accident.[110] Mr. Coleman called again to confirm that an ambulance was on its way immediately after he arrived on the scene.[111] Plaintiff alleges there was a delay in contacting EMS because the responding local EMS vehicle was contacted by EMS dispatch at 5:23, whereas Ms. Caldwell's report (which was not filled out until well after the incident) stated the accident occurred at 5:01.[112] But Plaintiff presented no evidence whatsoever about the

[109] Opinion at 17.
[110] VR No. 150 (Caldwell): 09/09/10; 04:09:37.
[111] VR No. 151 (Coleman): 09/10/10; 10:44:00-18.
[112] Trial Exhibit 48, Ambulance Run Report; VR 150 (Caldwell): 09/09/10: 04:09:01-10.

reason for any delay, or when EMS dispatch was first contacted by MV dispatch. Richard Warren of Louisville Metro EMS testified that he does not know when EMS dispatch received notification, nor from whom the call was received.[113] Even assuming *arguendo* that this evidence permits an inference that MV's dispatcher somehow delayed the call to EMS, in the absence of any evidence about the reasons for or circumstances surrounding this delay, the mere time discrepancy between the MV accident report and the EMS run report cannot demonstrate gross negligence.

Likewise, Plaintiff's negligent hiring claims cannot establish gross negligence by MV. As explained above, Ms. Allgeier's past treatment for alcoholism and depression is not relevant to establish negligent hiring at all, much less gross negligence in hiring.

In sum, the circuit court properly concluded that the Plaintiff could not establish gross negligence or wanton and reckless disregard by either Ms. Caldwell or MV. Thus, its dismissal of punitive damages should be affirmed.

IV. A remand for trial solely on punitive damages is improper.

It was also error to remand for a trial solely on the issue of punitive damages, while leaving the underlying liability and compensatory damages verdict undisturbed. A trial solely on punitive damages violates KRS 411.186(1)'s command that punitive damages liability shall be tried "concurrently with all other issues presented." It also violates MV's jury trial rights under Section 7 of the Kentucky Constitution.[114]

A. Limited retrial solely on punitive damages violates KY. CONST., § 7.

Ky. Const., § 7 guarantees that "[t]he ancient mode of trial by jury shall be held sacred, and the right thereof remain inviolate, subject to such modifications as may be

[113] VR No. 15 (Warren): 09/10/10; 03:01:00-04 and 02:39:53-02:40:00.
[114] This issue was properly preserved by MV's Petition for Rehearing to the Court of Appeals, which was Mv's first opportunity to address the Court of Appeals' limited remand remedy.

authorized by this Constitution." Section 7, like the Seventh Amendment to the federal constitution, preserves the right to trial by jury as it existed at common law in 1791. *Kentucky Comm'n on Human Rights v. Fraser*, 625 S.W.2d 852, 858 (Ky. 1981).[115] "The constitutional term 'inviolate' means that the right to trial by jury is unassailable. ... [L]egislation and civil rules of practice shall be construed strictly ... in favor of the right." *Steelvest, Inc. v. Scansteel Serv. Ctr.*, 908 S.W.2d 104, 108 (Ky. 1995).

"[I]nherent in the Seventh Amendment guarantee of a trial by jury is the general right of a litigant to have **only one** jury pass on a common issue of fact." *Alabama v. Blue Bird Body Co.*, 573 F.2d 309, 318 (5th Cir. 1978) (emphasis added) (citing *Gasoline Prods. Co. v. Champlin Refin. Co.*, 283 U.S. 494 (1931)). "[I]f separate juries are allowed to pass on issues involving overlapping legal and factual questions, the verdicts rendered by each jury could be inconsistent," undermining the sanctity of each verdict. *Id.*[116]

In *Gasoline Products*, 283 U.S. 494, the U.S. Supreme Court held that the Seventh Amendment permitted "a partial new trial" on some, but not all issues, only where it "clearly appears that the issue to be retried is so **distinct and separable** from the others that a trial of it alone may be had without injustice." *Id.* at 500 (emphasis added).

Applying this principle, many courts have held that where retrial of punitive damages claims requires consideration of the same facts underlying the original jury's liability and compensatory damages determinations, punitive damages may not be tried

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[115] The Seventh Amendment has not been incorporated onto the states. While this Court has noted it is not obligated to follow federal precedent in the context of the Seventh Amendment, it has only done so in the context of observing that "[s]tate constitutions may offer greater protections for their citizens than the federal constitution...." *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.*, 908 S.W.2d 104, 107 (Ky. 1995).

[116] *See also Castano v. Am. Tobacco Co.*, 84 F.3d 734, 750 (5th Cir. 1996) ("The Seventh Amendment entitles parties to have fact issues decided by one jury, and **prohibits a second jury from reexamining those facts and issues.**") (emphasis added); *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1303 (7th Cir. 1995) (Posner, J.) (constitution guarantees "a right to have juriable issues determined by the first jury impaneled to hear them..., and **not reexamined by another finder of fact.**") (emphasis added).

separately on remand without also concurrently retrying the underlying liability and compensatory damages verdicts.[117] In such cases, the plaintiff "should have an opportunity to choose between preserving its actual damages award by filing a remittitur for all punitive damages or having the case remanded to the district court for a **new trial on all issues.**" *Western Fireproofing Co. v. W.R. Grace & Co.*, 896 F.2d 286, 294 (8th Cir. 1990) (emphasis added). As one court explained:

> [A] new trial may be properly limited to the question of damages where the damage and liability issues are distinct and separate.... However, these principles have developed within the context of compensatory damages, and it is **doubtful whether it would ever be appropriate for a court to grant a new trial limited to relitigating the issue of punitive damages.** Because punitive damages issues are inextricably interwoven with the issue of liability, the **courts have recognized that it would be impossible to order a retrial limited solely to the issue of punitive damages.**

Mason v. Texaco, Inc., 741 F. Supp. 1472, 1493 (D. Kan. 1990) (emphasis added).

"Since punitive damages must be reasonably related to the reprehensibility of the defendant's conduct and to the compensatory damages awarded to the plaintiffs, it would not be feasible to permit one jury to pass on the issue of punitive damages while allowing a subsequent jury or juries to decide ... compensatory damages **without violating the Seventh Amendment.**" *Bacon v. Honda of Am. Mfg., Inc.*, 205 F.R.D. 466, 489 (S.D. Ohio 2001) (emphasis added).

In this case, a new trial limited to the issue of punitive damages would require the jury to reconsider facts and issues addressed in the original verdict. Indeed, a retrial on

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[117] *E.g., McDonald v. Johnson & Johnson*, 722 F.2d 1370, 1388-89 (8th Cir. 1983) ("[W]e have previously refused to grant a new trial solely on punitive damages....We therefore vacate the entire judgment for fraud and remand for a new trial on liability and damages, both actual and punitive."); *Malandris v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 703 F.2d 1152, 1178 (10th Cir. 1981) ("If the plaintiff declines to accept a reduced judgment, there should be a new trial on all issues since we feel that a new trial on less than all the issues could not be had without confusion and uncertainty...."). *Accord United Air Lines, Inc. v. Wiener*, 286 F.2d 302, 306 (9th Cir. 1961) (holding separate trial for punitive damages would entail separate juries hearing overlapping issues in violation of Seventh Amendment).

punitive damages will almost certainly be a near-identical replay of the original trial. Determining culpability for, and the amount of, punitive damages will require making the same negligence assessments and evaluating the same facts about the severity of the plaintiff's injuries. Thus, the second jury would necessarily reexamine **all** of the same facts determined by the first jury, and may reach inconsistent conclusions. It may determine a greater or lesser degree of culpability by MV or harm to Ms. Allgeier as its foundation for determining punitive damages. Moreover, the first jury, had it considered punitive and compensatory damages concurrently, may have felt the $4.1 million pain and suffering verdict was sufficiently punitive that a modest additional punitive award would be sufficient. A second jury deciding only punitive damages will not have the benefit of the first jury's thinking on such questions, and could reach a verdict inconsistent with the first jury's intentions.

B. Trying punitive damages alone violates KRS 411.186(1).

KRS 411.186(1) states "[i]n any civil action where claims for punitive damages are included, the jury ... shall determine **concurrently with all other issues presented,** whether punitive damages may be assessed." (emphasis added). This language expressly prohibits determining liability for punitive damages in isolation from determination of liability and compensatory damages, recognizing the inherent interconnection between these decisions. The Court of Appeals' mandate for a limited trial on remand devoted solely to punitive damages violates the plain language of the statute.

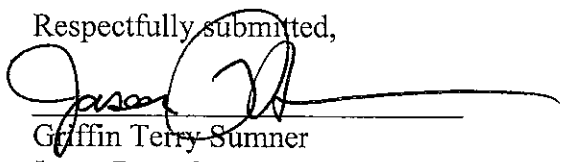
While this Court has previously held that partial retrials limited to punitive damages may be permissible under CR 59.01 in some circumstances, none of those decisions addressed whether such a procedure violates KRS 411.186(1) or the jury trial

right under Section 7 of the Kentucky Constitution. *See Hyman & Armstrong, P.S.C. v. Gunderson*, 279 S.W.3d 93, 122 (Ky. 2008); *Sand Hill Energy, Inc. v. Smith*, 142 S.W.3d 153, 166 n.26 (Ky. 2004).[118] Thus, the statutory and constitutional issues presented here have not been squarely addressed by this Court. The Court should do so now, and make clear that a limited retrial of punitive damages alone is not permitted, particularly where, as here, the facts supporting punitive damages are identical to those considered by the jury that awarded compensatory damages.

CONCLUSION

For the foregoing reasons, the Court of Appeals decision should be **REVERSED**. The jury verdict and judgment below should be **VACATED** and remanded for a new trial. And the circuit court's grant of summary judgment to MV on Plaintiff's punitive damages claims should be **AFFIRMED.**

Respectfully submitted,



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[118] Moreover, *Hyman & Armstrong* and *Sand Hill* are factually distinguishable because in those cases, punitive damages were premised largely on evidence of extra-territorial conduct, which did not completely overlap with the compensatory claims of the individual plaintiff. Also, in both of those cases, the first jury *did* award punitive damages. So unlike here, the compensatory awards in those cases were made by juries with the knowledge that additional punitive damages would also be awarded. The Court of Appeals similarly approved a limited retrial of punitive damages in *Shortridge v. Rice*, 929 S.W.2d 194, 198 (Ky. App. 1996). However, in *Shortridge*, the compensatory damages were extremely low, so there was little concern about the second jury awarding duplicative damages. Also, it does not appear that either party in *Shortridge* contested the fairness of limiting the retrial to punitive damages.

APPENDIX

Index

Index
Video References Cross-indexed to Appendix I Pages

Witnesses and Video References Cross-indexed to Appendix I Pages

09/09/10	Wilma Caldwell Cross-Examination by Mr. Zipperle 09/09/10; 05:11:27-05:13:53	EA12-15
09/10/10	Ronald Coleman Cross-Examination by Mr. Zipperle 09/10/10; 12:04:09-12:05:04	EA16-17
09/13/10	Leonard Rowe Cross-Examination by Mr. Zipperle 09/13/10; 03:35:18-03:37:00	EA18-20
09/13/10	Leonard Rowe Redirect by Mr. Thompson 09/13/10; 04:05:29-04:05:05	EA21-22
09/15/10	Closing Argument by Mr. Thompson 09/15/10; 06:12:18-06:17:22	EA23-27

J Cases Attached

1. *Oaks v. Wiley Sanders Truck Lines, Inc.*, 2008 WL 5459136 (E.D. Ky. Nov. 10, 2008)
2. *Cooper v. Unthank*, 2009 WL 3320924 (Ky. App. Oct. 16, 2009)
3. *Jenkins v. Atlas Siding & Window Co.*, 2004 WL 2756230 (Ky. App. Dec. 3, 2004)
4. *Airdrie Stud, Inc. v. Reed*, 2003 WL 22796469 (Ky. App. Nov. 26, 2003)
5. *Spaulding v. Tate*, 2012 WL 3845411 (E.D. Ky. Sept. 5, 2012)
6. *Jones v. Blankenship*, 2007 WL 3400115 (E.D. Ky. Nov. 13, 2007)
7. *In re Air Crash at Lexington, Ky.*, 2011 WL 350469 (E.D. Ky. Feb. 2, 2011)
8. *Zachery v. Shaw*, 2013 WL 1636385 (W.D. Ky. April 16, 2013)
9. *Long v. Brookside Manor*, 885 S.W.2d 70 (Tenn. App. 1994)
10. *Mulhern v. City of Scottsdale*, 799 P.2d 15 (Ariz. App. 1990)
11. *Munroe v. Univ. Health Servs.*, 596 S.E.2d 604 (Ga. 2004)
12. *E.E.O.C. v. Old Dominion Freight Lines, Inc.*, 2013 U.S. Dist. LEXIS 88352 (W.D. Ark. June 24, 2013)
13. *Scroggins v. Yellow Freight Systems, Inc.*, 98 F. Supp. 2d 928 (E.D. Tenn. 2000)
14. *Diaz v. Carcamo*, 253 P.3d 535 (Cal. 2011)
15. *Estate of Presley v. CCS of Conway*, 2004 WL 1179448 (W.D. Ky. May 18, 2004)