COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
CASE NOS. 2010-SC-000072 and 2010-SC-000682

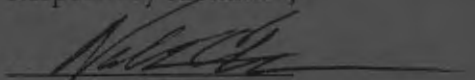
GARNETT GIBSON, AS EXECUTOR AND
PERSONAL REPRESENTATIVE OF THE
ESTATE OF TOPSIE GIBSON, APPELLANT

ON DISCRETIONARY REVIEW FROM KNOTT CIRCUIT COURT
V. CIVIL ACTION NO. 05-CI-00103
HON. KIMBERLY CORNETT-CHILDERS, JUDGE

FUEL TRANSPORT, INC., APPELLEE

BRIEF FOR APPELLANT

Respectfully submitted,



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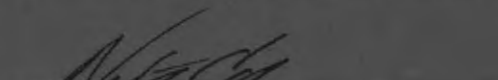
CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Brief has been served by mail delivery to Hon. Kimberley Cornett-Childers, Judge, Knott Circuit Court, Knott County Justice Center, Third Floor, 53 W. Main Street, Post Office Box 867, Hindman, Kentucky 41822-0867; Ronald L. Green, Esq. and Carl W. Walter, Esq., Boehl, Stopher & Graves, LLP, 444 W. 2nd Street, Lexington, Kentucky 40507; and Virginia Hamilton Snell, Esq., and Sara Christine Veeneman, Esq., Wyatt, Tarrant & Combs, LLP, 2800 PNC Plaza, 500 W. Jefferson Street, Louisville, Kentucky 40202, Counsel for Fuel Transport, Inc., and that the original and ten copies were sent via Registered U.S. Mail to the Clerk, Kentucky Supreme Court, State Capitol. Room 235, 700 Capitol Avenue, Frankfort, Kentucky 40601, on this the Seventh day of February, 2011.



NATHAN COLLINS

INTRODUCTION

This is a wrongful death case wherein 78-year-old Topsie Gibson was fatally injured when the vehicle in which she was riding collided with Appellee's coal trailer which had overturned and spilled its cargo across the public highway. At trial, the Jury found that Appellee Fuel Transport, Inc., acted recklessly by disregarding a specific verbal warning and physical demonstration that the fifth-wheel mechanism of the truck was severely defective; on appeal, while summarily (and correctly) rejecting Appellee's many challenges to the award of compensatory damages, the Court of Appeals incorrectly ruled that the Trial Court erred in failing to sustain a directed verdict as to the punitive damages claim.

STATEMENT CONCERNING ORAL ARGUMENT

Appellant's counsel believes that firmly established precedent as well as the record below clearly requires reinstatement of the Jury's entire Verdict and the Trial Court's entire Judgment in this case (and a wholesale rejection of the arguments that will be advanced in Appellee's cross-appeal). As such, he does not believe that oral argument is necessary in this case, but would gladly participate if the Court deems it helpful.

STATEMENT OF POINTS AND AUTHORITIES

STATEMENT OF THE CASE:

On November 2, 2004, Topsie Gibson was mortally wounded when the automobile in which she was riding collided with an overturned coal trailer in a darkened curve of Kentucky Highway 80 along the Knott-Floyd County border. At trial, the evidence decisively showed that the trailer overturned, in the first instance, because Appellee Fuel Transport, Inc.'s dilapidated coal truck was equipped with a defective "fifth-wheel" coupling mechanism.[1] The evidence also decisively showed that, seven days before the fatal impact, Appellee Fuel Transport, Inc. ("Fuel Transport"), was specifically warned and physically shown that the fifth-wheel was defective and had approximately 1 to 1½ inches of slack in the mechanism where there should have been none.[2] Nevertheless, Appellee consciously disregarded the known deadly risk and placed the truck back into service without further inspection or repairs.[3] This was done despite Appellee's special affirmative legal duty, under state and federal motor carrier regulations, to keep its vehicles in safe operating condition at all times.[4] Thus, as will be more clearly explained, the Jury rightly found that Appellee Fuel Transport acted with a reckless disregard for the life and safety of Topsie Gibson, which led to her death.

The 1990 Model Tractor-Trailer and the Defective Fifth-Wheel In Question

Witness Linville Isaac ("Isaac"), who owned and operated the truck from July 20, 2004, until October 26, 2004, seven days before the accident, testified that the tractor was an older

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[1] [VR No. 1A, 12/3/07, 1:52:25-1:59:50; 2:00:25; 2:15:00; 2:18:57; 3:26:58; 3:29:57; VR No.2, 12/4/07, 10:49:20-10:57:53; 1:05:35; 2:43:56; 2:50:22.] **A tractor's fifth-wheel couples to the trailer "kingpin" and steers the trailer.** [VR No. 2; 12/4/07; 9:40:47].

[2] [**Id.**; 1:57:07—1:59:50, 2:15:00—2:16:55].

[3] [VR No. 1A, 12/3/07, 1:57:07; 2:15:00; VR No. 2, 12/4/07, 2:25:01].

[4] KRS 281.600 and 601 KAR 050 1:005, have adopted the Federal Motor Vehicle Safety Regulations as the minimum permissible requirements for commercial motor carriers. 49 CFR 396.7 holds that *"A motor vehicle shall not be operated in such a condition as likely to cause an accident or a breakdown of the vehicle."* See also 49 CFR §§ 393.7, 396.11. The Court's Instruction defined Appellants duty as the duty to use ordinary care to *"maintain its vehicles in a safe operating condition at all times."* [ROA Vol. V, 636].

1990 model Mack that had been physically turned over "*a bunch of times.*" [VR No. 1A; Jury Trial, Day 1 of 3; Tape 1 of the Day, 12/3/07; 2:18:57—2:19:20; VR No. 2; Jury Trial, Day 2 of 3, 12:4:07; 2:29:48—2:30:02]. He testified that the truck "*pulled to the right*" but did not know whether this was due to the defective fifth-wheel or warpage to the frame—each of which he identified as problems. [Id.; 2:00:25—2:01:19]. Past load records for the truck indicated (and two former drivers testified) that it was regularly loaded at or in excess of the maximum 126,000 lb. legal weight limit that any extended-weight coal truck may haul in Kentucky. [VR No. 1A; 12/3/07; 2:07:25—2:08:04, 3:26:11—3:26:34, VR No. 2; 12/4/07; 10:49:20—10:08:52, 1:09:50—1:10:40. See also exhibits to Richardson Deposition, regarding truck "FT14"]. Though the load in question was presumably within the statutory limits, all loads were at or near the 126,000 lb. statutory limit and, therefore, greatly exceeded the 100,000-pound gross combination weight rating of the tractor-trailer combination in question. [VR No. 1A, 12/3/07; 2:07:25—2:08:04, 3:26:11—3:26:34, VR No. 2, 12/4/07; 10:42:56—10:49:20, 1:09:50—1:10:40; Richardson Deposition and exhibits, regarding truck "FT14"]. This was even though Fuel Transport's driver at the time of the accident, Troy Vanderpool ("Vanderpool") testified from his CDL training that the weight rating was put on trucks "*to know the load limit they can haul safely*" [VR No. 1A; 12/3/07; 3:26:58—3:29:17], and Fuel Transport's designated representative, David Clifton, ("Clifton") testified that wear and tear on the fifth-wheel is caused by the weight of the load and, if the trucks were run empty, they would probably never wear out. [Id.; 4:00:10—4:01:48]. Likewise, accident reconstructionist, Joseph Stidham ("Stidham"), testified that the more weight being hauled would cause the fifth-wheel to wear out quicker and to need inspection and repairs more often. [VR No. 2; 12/4/07; 10:42:56—10:49:20].

Isaac testified that he initially acquired the truck from Fuel Transport for $2,500[5] under an installment contract whereby Appellee retained title ownership and Isaac operated under Appellee's transportation permits during the time that he "owned" it. [Id.; 1:46:26—1:48:49, 2:20:28—2:21:95; VR No. 2; 12/4/07; 2:25:01—2:28:18; 2:29:48—2:30:20.] On October 26, 2004, Isaac sold the tractor-trailer combination back to Fuel Transport for $5000 after he, himself, was injured in a similar accident involving the same truck. [VR No. 1A; 12/3/07; 1:52:25—1:59:50; 2:15:00—2:16:55]. Isaac was injured a couple of weeks before the re-sale transaction when another loaded trailer came free from the same defective fifth wheel mechanism while crossing a set of railroad tracks, causing him to lose control and strike the Lackey Bridge. [Id.]. Isaac testified that he attempted to repair the fifth-wheel after the earlier accident by replacing the fifth-wheel bushings, but could not fix the problem. [Id.].

On October 26, 2004,[6] one week before the instant collision, Isaac testified that, Fuel Transport's agent David Clifton and driver Troy Vanderpool approached him at Fuel Transport's garage and asked to buy him out. [Id.; 1:53:25—1:59:50]. At that time, according to Isaac, Clifton asked if there was anything wrong with the truck, prompting Isaac to tell them that the fifth-wheel was "*wore out.*" [Id.; 1:57:07—1:59:50, 2:15:00—2:16:55]. Isaac then placed a pry-bar and demonstrated the defect by revealing 1-1½ inches of free slack. [Id.]. The Court of Appeals acknowledged this fact when it stated: *"[Isaac] informed both David Clifton, the owner of Fuel Transport, and Vanderpool that there was a dangerous degree of slack in the fifth wheel."* [Opinion by Kentucky Court of Appeals, attached hereto at Appendix A, p. 12]. Notwithstanding these warnings, Appellee re-purchased the dilapidated tractor-trailer (for a

[5] Isaac testified he purchased the entire tractor-trailer combination for a mere $2,500.00 and re-sold it to Appellee for $5,000.00. [VR No. 1A; 12/3/07; 2:00:05—2:00:24]. These *de minimus* values reflect the dilapidated condition of the fourteen-year-old vehicle.

[6] After first denying ownership of the vehicle at the time of the accident, upon cross-examination, Appellee admitted that Fuel Transport re-purchased the truck on October 26, 2004. [VR No. 1A;12/3/07; 4:05:15].

mere $5,000.00) and placed it back into service the following day without performing any further inspection or repairs. [Id.; 1:57:07—1:59:50; 2:15:00—2:16:55; 3:57:05; 4:07:02; VR No. 2; 12/4/07; 2:25:01—2:28:18; 2:28:18—2:30:20].

Although Clifton and Vanderpool each acknowledged that they were present at the time of re-purchase [VR No. 1A; 12/3/07; 3:14:19; 3:55:25], Clifton claimed that he did not ask Isaac whether there were any problems with the truck. [Id.; 3:58:04]. However, he did admit that he knew that a trailer broke free when Isaac was operating the truck, several weeks beforehand; that he had seen invoices where Isaac purchased fifth-wheel bushings; and that he knew that Isaac had recently attempted repairs. [Id.; 3:57:05; 4:07:02; VR No. 2, 12/4/07, 2:25:01; 2:29:48; 4:04:45]. He stated that he simply "*assumed*" Isaac's repairs were successful and admitted that no inspections or repairs were made to the vehicle after Isaac returned it. [Id.]. Thus, despite a very specific warning and demonstration of the defect and knowledge that the same condition had caused another trailer to break free upon the highway only weeks beforehand, Appellee placed the truck back upon the public highway without further inspection or repairs leading directly to the instant tragedy exactly one week later.

As noted in the Trial Court's uncontested Jury Instructions, Appellee had a special affirmative legal duty, as a commercial motor carrier, to protect the public by *"maintain[ing] its vehicles in a safe operating condition at all times"*—regardless of whether specifically warned about a defect or not.[7] [ROA Vol. V, 636]. Indeed, Appellee's counsel openly admitted the well-known danger of such a defective condition from the outset of trial:

> Mr. Greene: And the two things to keep in mind when you're listening to Mr. Isaac is: Five Thousand Dollar check—at the, at that point in time Mr. Isaac had only paid Twenty Five Hundred Dollars for the truck. **And the other piece, little fact to keep in the back of your mind, and we'll talk about in closing, is that whoever's driving this truck, if it's a dangerous truck is putting his life at risk. Okay. When he has an accident due to a defective truck he's at risk of being injured,**

[7] See KRS 281.600; 601 KAR 050 1:005; 49 CFR 396.7; 49 CFR 393.7; 49 CFR 396.11.

> **he's at risk of dying.** Keep those two things in your mind while Mr. Isaac tells whatever yarn[8] he's going to and then we'll talk about it at the end on which is most likely to have actually occurred.

[VR No. 1A; 12/3/07; 1:46:26—1:50:20]. The same danger that threatened the driver threatened the public, as well. Based on this and other evidence, the Jury found that Fuel Transport violated its legal duties with a *"reckless indifference or disregard for the rights, lives and safety of other persons, including Topsie Gibson"* when it placed the defective truck into service without further inspection or repairs.[9] [ROA Vol. V, pp. 639-640].

As to Ownership of the Vehicle

Both before and during trial, Appellee attempted to escape liability by falsely stating to the Court and the Jury that Isaac, himself, both owned the truck and employed Vanderpool on the date in question and was fabricating his testimony to, himself, escape liability. That is, Linville Isaac was telling a "yarn" insofar as he stated that he sold the truck to Fuel Transport before the accident. Indeed, on November 21, 2007, twelve days before trial, Fuel Transport filed a motion for summary judgment based on the false assertions that Linville Isaac owned the truck and employed Vanderpool until after the time of the accident. [ROA, Vol. IV, 540-584]. Attached to this memorandum was a sworn Affidavit by Fuel Transport's president that Linville Isaac both owned the truck and employed Vanderpool on the date in question. This affidavit was tendered despite the fact that Appellee's agents had previously admitted in their depositions that Fuel Transport owned the truck and employed Vanderpool at the time of the collision. [ROA, Vol. III, 448-449; Vol. IV, 523-526; Clifton Deposition 15, 37-38; Vanderpool Deposition 5, 7-9, 31-32].

Appellant responded to the affidavit by citing Appellee's prior sworn testimony and by

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[8] As the Court of Appeals noted, Fuel Transport, rather than Isaac was caught in the *"yarn"* in that Appellee filed a falsely sworn affidavit that Isaac owned the truck at the time of the accident. [Exhibit C at pp. 16-20].

[9] [VR No. 1A; 12/3/07; 1:57:07; 2:15:00; VR No. 2; 12/4/07; 2:25:01; 2:29:48].

tendering the counter-affidavit of Linville Isaac, which averred that Sections 4, 5, 8, 9, and 10 of the Appellee's Affidavit were false. [ROA, Vol. IV, 523-525]. Thereafter, on Sunday, December 2, 2007, the day before trial, Appellee's counsel mailed a letter to the Court which stated *"after review of the affidavit Fuel Transport is no longer sure of the timing,"* when ownership changed hands. [ROA Vol. IV, 609]. On the morning of trial (the following day), Appellee attempted to "*pass*" (rather than withdraw) its motion for summary judgment, but was overruled due the issue of material fact presented by the Isaac counter-affidavit. [VR No. 1A; 12/3/07; 9:19:36—9:20:05]. Appellee continued to challenge ownership by vigorously requesting permission from the Trial Court to use late-disclosed witnesses to prove that it did not own the truck when the accident happened. [Id.; 9:19:36—9:33:43]. Appellee's counsel claimed that these witnesses were needed for the *"ownership issue,"* which it described as *"very, very important"* because the Plaintiffs had *"to prove control"* of the vehicle by Fuel Transport. [Id.]. The Trial Court permitted Appellee to call these witnesses in rebuttal to Mr. Isaac, though none ever materialized. [Id.].

During opening statements to the jury, Appellee's counsel openly stated to the Jury ***"Fact is that Mr. Isaac owned this truck. Okay."*** and later suggested that Isaac may or may not have owned the truck at the time of the accident. [Id., 1:46:44—1:49:49]. Appellee's counsel proceeded to define the *"crux of this case"* as a swearing contest between Isaac and the Appellee's agents as to whether he had shown them the defect before it caused the accident:

> Mr. Greene: Now, let's talk about Mr. Linville Isaac, uh, Mr. Collins was correct when he said that Mr. Isaac had been operating this truck, but he's a little bit wrong about the circumstances. And there'll be plenty of proof that you'll hear to this effect: **Fact is that Mr. Isaac owned this truck. Okay**. He bought the truck from Fuel Transport a number of months earlier. Okay. He bought it on, uh, on a thing they call a conditioned, conditional sales agreement and you know, you're not going to have to know what that is, but that basically is a deal where you can't really get credit or anything so what you do is the owner keeps the title and you make payments and when you finish, uh, paying it off then you get the title, but in the meantime it's your truck. Okay.***

> ... **So it may or may not be true that Mr. Isaac didn't own this on November 2nd but he'd operated and owned it right up to then.** Okay. Now, the crux of this case is exactly this: apparently Mr. Isaac is gonna claim that, when he had whatever mishap he had, that that somehow did damage to the fifth-wheel. Don't know if that's true, don't know if it's not. But he's gonna claim that he told both Mr. Clifton and Mr. Vanderpool. And the fact is he didn't. You're gonna hear two people testify to that effect and that may be the big factual issue that you've got to resolve. And I think there's gonna be some proof that you can look to, to help you resolve that when you, when you look at it. Why, why would this happen, why would that happen? You try to, tend to look at what would reasonable people do under those circumstances. And the two things to keep in mind when you're listening to Mr. Isaac is: Five Thousand Dollar check—at the, at that point in time Mr. Isaac had only paid Twenty Five Hundred Dollars for the truck[10]—and the other piece, little fact to keep in the back of your mind, and we'll talk about in closing, is that whoever's driving this truck if it's a dangerous truck is putting his life at risk. Okay. When he has an accident due to a defective truck he's at risk of being injured, he's at risk of dying. Keep those two things in your mind while Mr. Isaac tells whatever yarn he's going to and then we'll talk about it at the end on which is most likely to have actually occurred.

[Id.: 1:46:26—1:50:20]. During Appellee's cross-examination of Isaac, Appellee's counsel not only attacked Isaac, but also Appellant's accident reconstructionist and counsel, as procuring his counter-affidavit by fear that he would be sued—as if he actually owned the truck in the first place and was trying to escape liability. [Id.; 2:20:20—2:23:30]. Thereafter, Appellants' counsel called Appellee's designated representative immediately to the stand and thoroughly cross-examined him, forcing him to admit that Fuel Transport's Affidavit to the Trial Court was not only *"false"* in all material respects, but also that it knew it was false at the time it was made and at the same time its counsel was openly suggesting to the Jury that Isaac had a motive to fabricate his testimony so as to conceal his alleged ownership. [Id.; 3:51:43—3:54:25, 4:10:03—4:12:42]. Having contested and been forced to admit ownership at trial, Appellee again falsely suggested to the Court of Appeals that Isaac was fabricating his testimony to escape liability:

> The Estate argued that Fuel Transport was aware of a problem with the fifth-wheel coupling based solely on Mr. Isaac's testimony that he told Mr. Clifton it was "wore

[10] Appellee's suggestion that purchasing an entire tractor-trailer for a mere $5,000.00 rather than $2,500.00 indicates that it was in good condition was completely bewildering.

> out" and raised it with a bar to demonstrate the alleged problem. Mr. Clifton and Mr. Vanderpool swear this never happened. And, Mr. Isaac had a motive to allege this conversation because he wanted to avoid liability based on the time he owned and maintained the tractor-trailer.

[Appellants Brief in 2008-CA-969, p. 10]. Of course, as the Jury in this case was very much aware by the completion of Appellee's representative's testimony that Fuel Transport clearly owned the truck and employed Vanderpool at the time of the collision. Thus, it was Appellee who had the motive that has been repeatedly ascribed to Isaac.

The Wreck that Killed Topsie Gibson

On appeal, Appellee has repeatedly stated that the truck was "functioning properly" before the accident and that *"[w]hile the truck was not out of control before he over-corrected, when he cut right, the trailer leaned and then turned on its side, spilling coal and coming to rest."* [Appellants' Brief in 2008-CA-969, p. 1-2; Response to Motion for Discretionary Review, p. 2]. In this manner, Appellee misleadingly suggests that the trailer overturned merely because driver Vanderpool *"overcorrected,"* which is flatly contradicted by Vanderpool's own sworn trial testimony and contemporaneous statements to the police officer that he *"overcorrected"* while trying to re-establish control of the vehicle after it had *"darted"* out of control. Specifically, Vanderpool described the accident as follows:

> I started around from the curve at the Knott-Floyd County line and I felt it lean. I felt the trailer itself lean and it's like the further I went around the curve then I realized I was in trouble and so I was going to cut the curve short and come from the slow lane into the fast lane because I realized that I was in trouble. And it as I cut the wheel to go into the left lane it's like, I, I mean I can't describe how it did but it leaned up and when I, when the, it's like it darted, the front end darted on the truck and, when I corrected it, I overcorrected it really bad and by then I was out of control of the truck *** I realized that I was in trouble probably half way through the curve.

[VR No. 1A; 12/3/07; 3:29:57—3:31:30].

> Okay. I started out, this would be the right lane here. Okay. I was started in this lane and as I started rounding the curve I felt the truck leaning. A truck leans every time you go into a curve—up to some point, you know? Then I realized, it, it, it had started leaning to the point that I was getting scared, you know, that I felt like something

could be wrong, so I was just going to try to what I call "cut the curve short." Uh, when I felt the truck leaning and after it felt it was leaning to the point that it scared me, then by the time that I'd started here I was out of control. I was out of control of the truck. I couldn't get it to do what I wanted it to do and I realized that I was in trouble and I was trying to straighten the truck back and whenever I did straighten it, it darted. I mean, when I turned the wheel, it cut hard to the right. And after that, I mean, I don't know. I can't, I don't know what, I don't know what point during this that I actually did that.
Mr. Green: As you were coming down through there across those lanes, was the trailer still following you?
Mr. Vanderpool: To the best of my knowledge, yes.
Mr. Green: Okay. And you heard Officer Hutchinson talking about steering and that, tell the jury what, what were you talking about there, from where and when did that happen?
Mr. Vanderpool: When I realized that it was leaning up, putting a scare in me, you know, to the point that I was feeling like there was something wasn't right. I was going to just try to straighten the curve out.
Mr. Green: Okay
Mr. Vanderpool: To do that, I would've had to drifted over into this lane. And it was when I did that, the truck wouldn't, the truck was doing what it wanted to do. Not, you know, I couldn't do nothing with it.
Mr. Green: Okay
Mr. Vanderpool: When it started on this path, I was out of control of the truck.
Mr. Green: Okay.
Mr. Vanderpool: But I was still ahold of the wheel trying to drive it on out of the curve under the load but when I turned it back to the right I overcorrected—I was turning it hard enough to whenever I did catch it, that I overcorrected, bad.

[VR No. 2; 12/4/07; 2:43:56—2:46:24]. Furthermore, Vanderpool testified that the defective fifth wheel *"absolutely"* could have caused the wreck:

Mr. Collins: You told us that the truck, the load began to lean, correct?
Mr. Vanderpool: Correct.
Mr. Collins: Okay. And then you felt that not only was it just leaning like they normally lean when they go into a curve, but that this was leaning out of control. You was scared it was gonna turn over at that point.
Mr. Vanderpool: Yes.
Mr. Collins: And you was trying to get back under the load as you described it.
Mr. Vanderpool: Yes.
Mr. Collins: What caused that to lean out so bad that it was gonna turn over, that you believed it was gonna turn over, Troy?
Mr. Vanderpool: I don't know.
Mr. Collins: Was is something that had to do with your speed or was it something that had to do with the mechanicals of the truck?
Mr. Vanderpool: I don't know.
Mr. Collins: And you would agree with that [inaudible] gonna turn over and you before, when you made the decision to get back under the load and cut to the left or

when you cut to the right?
Mr. Vanderpool: **I don't know why it leaned like it did. I do not know why.**
Mr. Collins: Did it have anything to do with speed?
Mr. Vanderpool: It could have just as well as it could not have. I don't feel like it did.
Mr. Collins: **What about mechanical? Could it have had something to do with the mechanical features of the truck?**
Mr. Vanderpool: **Possibility. Absolutely.**
Mr. Collins: **And so if it had something to do with mechanicals it could have something to do with the fifth-wheel couldn't it?**
Mr. Vanderpool: **Yes, sir, it could.**
Mr. Collins: You would agree with me that uh that the trailer ended up on it's side and that the truck was on its wheels.
Mr. Vanderpool: Yes, sir.

[Id.; 2:50:22—2:51:48]. As to his speed, Vanderpool testified at trial that he was traveling at *"60 maybe"* but there was *"no way"* he was going above 65 mph. [VR No. 1A; 12/3/07; 3:42:50—3:43:44]. Likewise, Kentucky Department of Transportation Officer Dennis Hutchinson confirmed that Vanderpool had also told him that he was traveling between 60 and 65 mph on the night in question [VR No. 2; 12/4/07; 1:04:03—1:04:35], and that the steering wheel locked before he began to jerk the wheel:

Mr. Collins: Did you make the determination as to what the causative factors were in this motor vehicle collision?
Officer Hutchinson: I'm not sure why it turned over. He, he, just what I've got here in the report, that he stated that the steering wheel had stuck on him and he started to jerk and that's when it turned over.

[Id.; 1:05:35—1:06:02]. Despite the foregoing evidence, Appellee claimed in its post-trial motions before the Trial Court that there was no proof of steering problems before the accident, which argument also completely overlooked Isaac's testimony that the truck constantly *"pulled to the right."* [Id.; ROA, Vol. V, 655; VR No. 1A; 12/3/07; 2:00:25—2:01:19]. On appeal to the Kentucky Court of Appeals, Appellee mischaracterized both Vanderpool's and Officer's Hutchinson's testimony as follows: *"Mr. Vanderpool attributed the cause of the accident to his overcorrection of the tractor-trailer and Officer Hutchinson confirmed the cause in his testimony."* [Appellants Brief at in 2008-CA-969, p. 11]. As shown above, however,

Vanderpool stated that the wreck *"absolutely"* could have been caused by mechanical failure of the fifth-wheel [Id.; 2:50:22—2:51:48], and Officer Hutchinson did not state a cause, but only that Vanderpool told him on the night in question that the steering wheel stuck and that he started to jerk the wheel before it turned over. [VR No. 2; 12/4/07; 1:05:35—1:06:02].

In keeping with its suggestion that the truck was *"functioning properly"* at the time of the accident Appellee repeatedly and falsely suggested to the Court of Appeals that, in the aftermath of the wreck, the tractor and trailer remained connected and the fifth-wheel remained *"intact."* [Appellants Brief in 2008-CA-969, pp. 1, 2, 3, 4, 9, 11, 12]. Thus, Appellee implicitly suggested, if there was no damage after the accident, there could have been no defect before. However, as Driver Vanderpool himself observed, after the accident the tractor remained upright and the trailer was lying on its side, making it physically impossible for them to have remained coupled. [VR No. 1A; 12/3/07; 3:43:44—3:43:57]. More importantly, Vanderpool testified that the fifth-wheel plate was not intact but *"hooved up"* approximately six inches in the middle and the retaining flange completely broken from the *"king pin"* of the trailer when it had pulled free:

> Mr. Collins: ... Can you describe for the jury what the fifth-wheel plate looked like after the motor vehicle collision, Troy?
> Mr. Vanderpool: It, uh, the middle part it, where the king pin linches into the hole it was hoo.. it was, I don't know how you'd describe it. It was hooved up, picked up in the middle part of it. You could see where the pin had pulled up out of it.
> Mr. Collins: When you say hooved up what do you mean hooved up, and I think I know, but can you describe that for us better?
> Mr. Vanderpool: It was just high in that spot, I mean, I'm not a mechanic, I don't, I don't know that there was anything wrong with it but just what I saw that's, you know, it looked like the pin had come up out of it, straight up.
> Mr. Collins: What about the, um, did you ever look at the trailer?
> Mr. Vanderpool: Um, not, just the night that I had the accident?
> Mr. Collins: Okay. What about that? Can you tell me anything about the connecting mechanism of the trailer at all?
> Mr. Vanderpool: The bottom part of king pin, I don't know what they call it, it's like a, like a, the bottom part of the pin, like the pin will come down and then it'll have a bottom flange that's wider than the actual pin that holds it in the jaws. And it was gone from the king pin.

[Id.; 3:40:04—3:41:54]. Thus, in order to circumvent Vanderpool's own devastating testimony, Appellee found it necessary to repeatedly mischaracterize Officer Hutchinson's testimony to suggest that he found the fifth-wheel to be *"intact"* after the accident and that he determined there was *"nothing wrong," "nothing unusual," and "nothing amiss"* with it. [Appellants Brief in 2008-CA-969, pp. 3, 4, 9, 11, 11, and 12]. However, Officer Hutchinson actually testified as follows:

> Mr. Walters: Did you see anything wrong with the fifth-wheel on this vehicle?
> Officer Hutchinson: Only thing that I saw was wrong was that the fifth-wheel was dry…
> Mr. Walters: That's all you saw?
> Officer Hutchinson: That I remember. I don't have my inspection with me, the inspection that I did on the truck, but I do recall the fifth-wheel being dry.

[VR No. 2; 12/4/07; 1:10:40—1:11:32]. In fact, Hutchinson could not recall the condition of the fifth-wheel after the accident, at all, except that it was *"dry,"* meaning *"not greased or any type of lubricant."* [Id.]. He testified that he could not even recall whether the tractor rolled over with the trailer or remained upright on its wheels. [Id.; 1:04:44—1:05:30]. He most certainly did not testify that the coupling was *"still intact, continuing to join the trailer to the tractor"* as Appellee repeatedly suggested despite Vanderpool's own sworn testimony. [Appellant's Brief in 2008-CA-969, p. 3].

The only other witnesses regarding the circumstances of this first phase of the accident scenario were the instant Appellant's accident reconstructionist, Joseph Stidham, and the Appellee's accident reconstructionist, Billy Cox, Jr. As will be discussed, one of these experts conducted and photographed a comprehensive investigation and performed a detailed mathematical analysis and extensive reconstruction of the accident. The other had worked *"less than three hours"* on the case as of the Friday before trial.

First, Accident Reconstructionist Stidham confirmed Vanderpool's present sense

impression that speed, alone, did not cause the trailer to overturn. [VR No. 2; 12/4/07; 10:49:20—10:57:53]. Shortly after the accident, Stidham had performed an extensive investigation and spent approximately 2 hours and 40 minutes explaining the details of his reconstruction to the Jury such that they could easily understand the evidence and evaluate the merits of his opinion that the accident would not have happened but for the failure of the fifth wheel mechanism. [VR No. 2; 10:49:20—10:57:53; 11:33:35—11:38:20]. Using accident vehicle photographs, scene photographs, scale maps and diagrams, and aerial photographs, he testified, at length, as to the details of his investigation and the various aspects of his reconstruction [Id.]. Stidham explained the relevant evidence including tire marks, scrape marks, drag factor, super-elevation, lighting at the scene, radius of the curve, center of mass, etc. [Id.; 9:42:00—10:03:20]. Noting his own contemporaneous interview with Isaac who told him that there was approximately 1 to 1 ½" slack in the mechanism at the time it was returned to the Appellee [VR No. 2; 9:33:28—9:35:20], Stidham used various manufacturers specifications and parts diagrams, to explain the various parts and functions of the fifth wheel apparatus as well as the need for lubricant on the fifth-wheel and the need for regular inspections of the coupling device. He noted that slack in the fifth-wheel *"can cause bad problems in a curve"* and described the consequences of slack as follows:

> Mr. Collins: Now, the slack in the fifth-wheel, or this up and down play, why is… what does that mean and how does that affect how vehicles operate or are able to operate?
> Mr. Stidham: [Using a demonstrative model] Where the trailer couples to the tractor is the fifth-wheel. The king pin snaps together—if I can step down—and again this truck is a scale model from Peterbuilt that's the reason I have it. The kingpin is the, uh, we all pull trailers with our trucks, it's the ball and the hitch [demonstrating]. They couple together and then a locking mechanism comes in behind that. If you're going around a curve and there's movement, this is—that king pin and fifth-wheel is actually the steering mechanism for the trailer. The steering tires steer the tractor, but it's pulled by the trailer. If you get in a situation in a curve and there's movement there—a sudden inch/inch-and-a-half jerk—just like your car, if you're in a curve and you're going a little bit too fast and you jerk the front wheels, what happens? You start sliding out. The same situation here with the trailer and tractor.

[Id.; 9:40:47—9:42:00]. Stidham also explained the significance of the gross vehicle weight ratings of the tractor and the trailer, as well as the gross combination weight rating of the coupled vehicles and the consequences of repetitively overloading a truck in excess of the mechanical design limits with regard to increasing wear and tear on the fifth-wheel and the need for increased inspection. [Id.; 10:42:56—10:49:20]. He also explained a broken trailer spring which was broken during the accident but determined to be non-causative. [Id.].

Mr. Stidham also discussed the various aspects of the crash relating to Roger Russell's vehicle: the consistency between Craig's Method of measuring crush damage to calculate impact speed and the data downloaded from the vehicle's black box (58 mph 5 seconds before impact, 29 mph at impact). [Id.; 10:12:25—10:13:52, 10:33:40—10:42:20]. He explained how the black-box data related to Russell's hitting the coal and slamming into the tailgate of the overturned trailer. He testified regarding Topsie Gibson's seat belt use. [Id.; 10:13:52—10:14:48]. He talked about conspicuity factors and perception/response time as it related to Mr. Russell in the darkened curve. [Id.; 10:30:20—10:33:40]. As to causation for the accident, Mr. Stidham stated, in summary, that *"In my opinion he was going too fast and there was a mechanical failure in the truck, based on [Isaac's and Vanderpool's] testimony."* [Id.; 10:49:20—10:57:53]. On cross-examination, Stidham further testified as follows:

> Mr. Green: Let me ask you that again, do you know what Mr. Isaac described for the Jury yesterday as to how he said a problem came up with this fifth-wheel?
> Mr. Stidham: I do not.
> Mr. Green: Okay. Uh, now, did, are you familiar with any testimony that Mr. Isaac gave at trial yesterday, uh, to the effect of an incident that he had with this tractor and a different trailer, are you familiar with that at all?
> Mr. Stidham: The answer is I know he testified about dropping the trailer but I don't know what he said other than the statement that he gave me back in December [2004].
> Mr. Green: Okay, so you know enough to know that he told the jury that at, at, at, I guess at Lackey, I don't know exactly where it was at, that he had hooked up a different trailer and that he took off with it and the trailer just didn't follow, is that about what you heard?
> Mr. Stidham: He told me, told me that he had dropped it on the railroad tracks.

Mr. Green: Okay. It came uncoupled?
Mr. Stidham: Correct.
Mr. Green: And, uh, after that happened, you are aware are you not that after a week of being out—and I think he said he replaced some bushings, are you aware of that testimony?
Mr. Stidham: Not the testimony, but that's what he told me in the statement that gave me in December, yes sir.
Mr. Green: Okay and the bushings are, when the bushings give that causes slack, right?
Mr. Stidham: Yes, sir.
Mr. Green: Okay. So he put in new bushings and went back to work, correct?
Mr. Stidham: Yes, sir. Again, well, I don't know what he testified to. When I say yes, that's what I'm—what he said in December was the same thing only he said it still had an inch and a half of slack in it after he replaced the bushings.
Mr. Green: Without regard to what Mr. Isaac said, you've seen documents that show he went back to work after, as he was driving this truck for a period of time, correct?
Mr. Stidham: I think so. I don't know when he dropped the trailer. I don't know when this stuff occurred in time. There are documents that he was working up to a short period of time before this collision.
Mr. Green: Okay. Now, I think we've now established that in late October, uh, Fuel Transport and Mr. Isaac cut a deal where Fuel Transport bought the tractor-trailer back from him. Are you familiar with that, you've testified about it?
Mr. Stidham: After a lot of debate, yes sir.
Mr. Green: Okay. Well, we've now established what the deal is on that. And you are aware are you not that Troy Vanderpool proceeded to drive this tractor and this trailer, uh, after that occurred, correct?
Mr. Stidham: For four or five days that would be correct. Until he wrecked.
Mr. Green: Okay. And are you aware of anybody testifying that there was any problem with this truck showing any kind of shimmy or the stuff that you've described in those two or three weeks where it was hauling coal prior to this accident?
Mr. Stidham: Two or three weeks—late October and the Second day of November is not two or three weeks.
Mr. Green: I'm including where Mr. Isaac was driving it.
Mr. Stidham: Uh, yes. In Mr. Vanderpool's, uh, when he talked to the police in the police report he actually said the steering locked is what caused him to wreck. And then he testified here that there was a problem with the truck that it shimmied before he flipped. So yeah, he's saying there's something wrong. My opinion is the shimmy that he felt was the trailer rolling over. But he has testified I think both to the jury and told the police and in deposition that there was something wrong with the truck. That's why he wrecked.

[Id.; 11:33:35—11:38:20].

The only remaining witness in this case with regard to the nature and circumstances of the accident was Appellee's accident reconstructionist, Billy Cox, Jr., ("Cox") who—in comparison to Stidham's voluminous body of work—admitted that he had only worked

three hours on the case as of the Friday before trial. [Id.; 3:29:02—3:29:34]. Having been retained in August, 2007, on Friday, November 30, 2007, three days before trial, Cox requested Appellee's counsel to provide him with Stidham's file materials which Appellee had declined to attach at the time of Stidham's deposition. These documents were subpoenaed on the afternoon of Sunday, December 2, 2007, and delivered at trial the following morning, which Cox reviewed the night before his testimony. [Id.; 3:46:24—3:48:50]. Though he, himself, never saw the vehicles or visited the accident-scene, Cox also commissioned a survey crew to diagram the alleged accident scene over the weekend and insisted that the radius of the curve was 1100 feet, rather than Stidham's measured radius of 760.4 feet. [Id.; 3:21:06—3:21:53, 3:25:19—3:25:30, 3:29:43—3:30:02, 10:08:52—10:12:25]. Of course, as had been previously explained by Stidham, such a larger radius would have increased the speed needed to cause an operational trailer to overturn, which implicated the defective fifth-wheel to an even greater degree. [Id.; 10:09:52—10:12:30].

Despite the aforementioned testimony by Isaac, Vanderpool, Hutchinson, and Stidham and his absence from the courtroom at the time of their testimony, Cox testified, incredibly, that there was no testimony to indicate that the fifth-wheel had anything to do with the accident. [Id.; 3:19:41—3:20:00]. He destroyed any remaining vestiges of his own credibility when he claimed that he *"considered"* the statements of Linville Isaac within five minutes after he had just admitted that he did not know who Isaac was or what he had said. [Id.; 3:50:00—3:52:18, 3:53:53—3:54:40]. Appellee did not mention Mr. Cox at all in their appellate brief to the Court of Appeals for good reason. Having initially denied liability altogether and having settled with Roger Russell during trial [VR No. 2; 9:02:23—9:02:41], Appellee's counsel stipulated liability for the collision in its closing argument. [VR No. 3; 12/5/07; 10:13:16—10:14:48]

"Six Days" of Undisputed Pain and Suffering

After the collision on November 2, 2004, Mrs. Gibson was extracted and rushed to nearby Our Lady of the Way Hospital with extensive bruising, several broken bones, and complaining of shortness of breath. [VR No. 2; 12/4/07; 1:20:04—1:20:28]. She was stabilized and transported to St. Mary's Hospital. [Id.]. The undisputed evidence was that she continued to complain of breathing problems and was electively intubated on the morning of November 4, 2004, two days after the accident. [Id.; 1:26:12—1:26:36]. Thereafter, she had to be forcibly restrained from killing herself by ripping the tubes from her throat as she slowly and painfully smothered to death over the course of the next several days. [VR No. 1B, Jury Trial, Day 1 of 3; Tape 2 of the Day, 12/3/07; 4:41:14—4:45:16; Plaintiff's Trial Exhibits 1, 2, and 3]. She did not did not die of a heart attack as Appellee hyper-technically suggested on appeal [Appellant's Brief in 2008-CA-969, p. 3-4], except that her heart stopped when she was removed from life support, pursuant to a living will, after she reached the point of no return. [VR No. 2; 12/4/07; 1:34:26—1:35:13].

Appellee called no experts or witnesses to rebut the testimony of Appellant's treating physician, David Denning, M.D., or the certified medical records and other evidence entered into the record at trial. In its brief the Court of Appeals, however, Appellee suggested that Dr. Denning was its own witness and misleadingly stated as follows:

> First, the only medical expert who testified, Dr. David Denning, opined that Ms. Gibson was in pain upon admission to the hospital but immediately received morphine and other pain medication, which after intubation, rendered her at least heavily sedated the last days of her life. Second, the only evidence even arguably to the contrary comes from Ms. Gibson's daughter-in-law, who is not qualified to assess her condition.

[Appellant's Brief in 2008-CA-969, p. 17]. The misrepresentations by Appellee regarding Mrs. Gibson's pain and suffering were too replete to mention herein, except to say that they culminated in Appellee's blatantly false statement, in bold underlined print, that "***The***

Treating Physician Swears No Pain After Day 1." [Appellant's Brief in 2008-CA-969, p. 17]. However, Appellee was not so brazen when standing before the Jury that actually heard the evidence in its entirety. In its closing arguments, Appellee's counsel conceded as follows:

> The only real issue here is **pain and suffering for the six days or so that Mrs. Gibson was in the hospital**, and again, **we're not gonna try to minimize that a whole lot either**. Uh, you've heard two witnesses basically, you've heard a doctor who really didn't have any personal knowledge, but looked at the records and talked about, you know, she was in and out of consciousness, that sort of thing. And you've heard the uh, her uh, her ex, uh, uh, daughter in law plus she made a nice presentation here and explained to you all real nicely what all happened in the hospital and stuff. I thought she did a good job. Uh, but how do you put a dollar amount on that? That's tough to do. I know I know that that Mr. Collins is gonna get up here and say that it's worth gobs of money, millions or whatever. Uh, I what I'm gonna ask you to do is when you when you start thinking about that don't think about that you read in the paper that somebody in New York got sixty-four million dollars for some kind of crazy case because those kind of cases happen. But this is Kentucky and we're realistic here, uh, I think what you got to think about is how do you figure out what money's worth? Okay, and when you talk about a million dollars, that's a lot of money. To anybody except for maybe Paris Hilton and those kinds of people. To any of us, you know, most of us ain't gonna see a million dollars and if we do we want to save most of it so we won't never actually have it, uh, people work a whole year, not everybody, people work a whole year for twenty, thirty, forty thousand dollars. A years worth of work. **And we're talking six days of time**. And we're talking about being medicated, I mean doctors don't just let you lay in the hospital in pain, they give you pain medication, doesn't make it right. It's not an apology for it, it's just that's what the proof is. **So what we're gonna suggest is for six days, a hundred and fifty thousand dollars.** We think that would be fair. Its not that other numbers wouldn't be. But I think anything in the millions like that, that's just that's out of touch with the reality of what actually her, that's not compensation. You look at this instruction, fairly and reasonably compensates is the test that the law has and it's not anything more than that. And if you think something more than that is appropriate, then you award it. Okay, we're not saying we know everything but we think that's a fair number or at least representative of one.

[VR No. 3; 12/5/07; 10:41:40—10:44:16]. In its Response to Appellant's Motion for Discretionary Review, Appellee claimed that *"Dr. Denning opined that from [the morning of November 4, 2004] until her death from cardiac arrest on November 9, she was "heavily sedated."* [Response to Motion for Discretionary Review, p. 3]. In fact, Dr. Denning did not, could not, and would not say that Mrs. Gibson was ever completely unconscious or pain free at any time. Dr. Denning's entire testimony on the point of sedation and unconsciousness is as

follows:

Mr. Walters: In reviewing the medical records, could you relate to the jury what type of pain medications Ms. Gibson was on?
Dr. Denning: You know, I could look through here and find what was administered, but on this, I don't know.
Mr. Walters: Well, if you could—I assume we're going to attach your chart as a exhibit.
Dr. Denning: Do you want me to look and find if she received anything?
Mr. Walters: Yes, please.
Dr. Denning: That might be difficult.
THE VIDEOGRAPHER: We are now off the record. The time is 2:21 p.m.
Dr. Denning: According to this record, at any rate, at St. Mary's she received morphine, two milligrams on the two occasions, four milligrams once, three milligrams on two occasions and Haldol, which is a sedative, on one occasion. I don't have the records from the other hospital, but she may have received pain medicine there.
Mr. Walters: And morphine is a pain medication?
Dr. Denning: Yes, it is.
Mr. Walters: Is it an effective pain medication?
Dr. Denning: Yes, it is.
Mr. Walters: And in one of the records that you reviewed that you identified as a hospital-type printout for billing purposes, it indicates that Ms. Gibson was intubated and that I think it was for longer than 96 hours. In reviewing the chart, was Ms. Gibson conscious during that period?
Dr. Denning: Again I did not look specifically at that. Do you want me to look at that again?
Mr. Walters: Yes, please.
Dr. Denning: There's a notation on November the 3rd. Patient was confused. This is a notation made on November the 4th. Patient incoherent, possibly more so today than the 3rd. And later on that morning, the patient was intubated. So she was admitted early morning hours of November the 3rd and was put on a ventilator on mid morning of November the 4th. Both notations on November 3rd and November the 4th say that she was confused, but I mean, I suppose she was talking and things.
Mr. Walters: From November 4th to November 9th, being intubated, would Ms. Gibson be heavily sedated?
Dr. Denning: Yes.
Mr. Walters: Would she be unconscious?
Dr. Denning: Depends. Sometimes we can render the patient unconscious with medicine.
Mr. Walters: Was she rendered unconscious?
Dr. Denning: Again, I don't know, The notation, again, on November the 6th says she's on Diprivan. Dipirivan is a medicine that we use as a short-acting anesthetic, and it can render somebody unconscious. On November the 5th, there's a notation that she's sedated with morphine, which is pain medicine, and Versed, which is a sedative. At that time, she moved her legs when she was stimulated. I would state that sometimes the patient had some response to stimulation, so she wasn't completely paralyzed or unconscious. Other times, she may have been. It depends on how much

medicine you give the patient.

[VR No. 2; 12/4/07; 1:38:27—1:45:40]. Further, Dr. Denning referenced the following comments and notations to the medical records which clearly indicate that Topsie Gibson was conscious and/or partially conscious and enduring pain for most of her ordeal:

1) "Upon arrival, the patient was stable but moaning in pain and was difficult to understand. The patient was a poor historian." [Id.; 1:25:35—1:25:44].
2) "Dr. Lovejoy saw the patient; was planning to do surgery on the patient when she became stable." [Id.; 1:26:12—1:26:36].
3) "The patient continued to have respiratory problems and was electively intubated in the ICU." [Id.].
4) "The patient continued to decrease in respiratory status ... which required medicine." [Id.].
5) "Q. Can you also relate to the members of the jury whether that is a painful condition to have, a femur fracture? A. Any broken bone is painful. The femur is the large bone in the thigh. Q. Would your answer be the same for the hip fracture and the radial and ulnar fractures and the left scaphoid fracture in the wrist? A. Yes." [Id., 1:31:52—1:32:22].
6) "Incoherent at times, combative and in obvious pain." [Id.; 1:36:24—1:37:07].
7) "Now, the only thing that's obviously abnormal is that she was incoherent at times, and, on room air, which means breathing air in the room without any administered oxygen, was low" [Id.].
8) "Examination of the head, basically nothing particularly was noted to be abnormal." [Id., 1:37:07—1:37:18].
9) "She had a wrist fracture and a forearm fracture on the left. She did move all of her extremities. The sensation was normal." [Id.; 1:37:48—1:37:59].
10) "A neurologic exam appeared to be, at least what you could test, appeared normal." [Id.; 1:38:12—1:38:21].
11) She received morphine [on at least five occasions] and Haldol which is a sedative on one occasion. [Id.; 1:39:22—1:39:47].
12) "There's a notation on November the 3rd, Patient was confused" [Id.; 1:41:06—1:41:29].
13) This is a notation made on November the 4th, Patient incoherent, more so today than the third. And later on that morning, the patient was intubated." [Id.].
14) "Both notations on November 3rd and November the 4th say that she was confused, but I mean, I suppose she was talking and things." [Id., 1:41:52—1:42:00].
15) "Q. From November 4th to November 9th, being intubated, would Ms. Gibson be heavily sedated? A. Yes. Q. Would she be unconscious? A. Depends. Sometimes we can render the patient unconscious with medicine. Q. Was she rendered unconscious? A. Again, I don't know." [Id. 1:42:00—1:43:21].
16) "On November the 5th, there's a notation that she's sedated with morphine, which is pain medicine, and Versed, which is a sedative. At that time, she moved her legs when she was stimulated." [Id.].
17) "The notation, again, on November the 6th says she's on Diprivan. Diprivan is a

medicine that we use as a short-acting anesthetic, and it can render somebody unconscious." [Id.].

18) "I would state that sometimes the patient had some response to stimulation, so she wasn't completely paralyzed or unconscious. Other times, she may have been. It depends on how much medicine you give to the patient." [Id.].

In addition, Mrs. Gibson's medical records (which were attached as Plaintiffs Trial Exhibits 1, 2, and 3) contain the following indications:

1) "Upon arrival, the patient was hemodynamically stable, but was moaning in pain and was difficult to understand."
2) This is a 78-year-old female who was the passenger, reportedly unrestrained, in a motor vehicle accident. She had gone around a corner and there was a coal truck that had turned over and the car collided with. Inside the car, she was thrown forward. She had pain, questionable femur fracture, and rib fractures. She was transported to a nearby facility near where she lives in Kentucky. She was taken from that small emergency department in Kentucky after evaluation and transported to St. Mary's to be seen by the trauma service. She had an obvious femur fracture, a wrist fracture, and she did complain of some mild shortness of breath.
3) "Resp—Positive for shortness of breath."
4) "CV—Positive chest pain."
5) "GI—Positive for mid epigastric pain."
6) "Musculoskeletal—Positive for left leg pain, wrist pain."
7) "She cooperates with the exam."
8) "Blunt chest trauma"
9) "Left open femur fracture"
10) "Range of motion of her hip does cause her pain. She is arousable to pain"
11) "She was moaning in pain and difficult to understand."
12) "She was complaining of vague epigastric abdominal pain."
13) "The patient was very combative at times."
14) "The patient states that she has some abdominal pain, some left leg pain and left arm pain."
15) "Combative, incoherent at times, obvious pain."
16) "The patient continued to have respiratory problems, and was electively intubated in the intensive care unit."
17) "Uncooperative."
18) "Pt confused, pulled out IV lines and NG tube"
19) "Morphine … prn (as needed) severe pain." "Haldol … prn combativeness"
20) "Versed … prn."
21) "Moves all extremities when needed"
22) "Pt still somewhat confused this a.m."
23) "Pt still incoherent. ? more incoherent"
24) "Pain Type: Burning"
25) "Level/Consciousness: Awake."
26) "Dr. Blom notified of nausea and vomiting."
27) "Restraint: Applied: Yes"
28) "Stimulus: Per pain."

[ROA, Plaintiff's Trial Exhibits 1, 2, and 3]. Further, lay witness Carolyn Wogomon testified without objection as to what she observed during the times that she saw Mrs. Gibson in the hospital after she was intubated on November 4, 2004:

> Q: And when you arrived at the hospital, what did you learn?
> A: Um, that she was in an accident and that they was getting ready to ship her out to Huntington, to the trauma center.
> Q: Huntington, West Virginia?
> A: Yeah.
> Q: Okay. And then what happened, or do you know what happened next? Where'd you go and where'd Topsie go and then did you eventually end up in Huntington yourself?
> A: Uh, yeah, I went down there to Huntington, and Garnett went down there and my daughter went down there.
> Q: Now, can you describe for us, um, Topsie's condition when you, when you first got down there when you first arrived what her, what her physical condition was.
> A: Well, she was in a lot of pain, but she moaned a lot, you know, and, um, I seen her back there in the trauma center and I, I believe that she could tell that we was there because she would squeeze our hands. . . .
> Q: Okay. Now, during the time when she was in there, did they, did they have to do anything to sort of keep her from pulling at the cords ...
> A: Yes.
> Q: ... or pulling at the tubes and things like that and if so can you tell the members of the jury what they had to do
> A: Uh, she was trying to pull the tubes out of her throat and arms and they had to restrain her.
> Q: Okay. And when you say restrain her, what did they do to her hands or what particularly
> A: They just tied em' over to the side so she couldn't reach the tubes
> Q: Okay. And that's the restraining straps that that that go with the
> A: Yeah.
> Q: ... bedrails.
> A: Yeah.
> Q: Did she require, was she required to be, uh, the restraining straps, were they basically required the entire time that she was there up until her passing.
> A: Uh, pretty well, yeah.
> Q: At the time when, after she'd been took back to her room, from the emergency room back to her room could you describe any any moaning or anything that would indicate her being in discomfort or or not being at ease
> A: Uh, yeah, she moaned some and moved, moved just a little bit.
> Q: Was she still squeezing your all's hands at that point or during that time period?
> A: Well, she was, she'd, maybe the first few days, you know, and then she started going downhill.

[VR No. 1B; 12/3/07; 4:41:14—4:45:16]. The foregoing clear and unrebutted evidence was

the reason Appellee admitted that Topsie Gibson endured "six days" of pain and suffering at trial, whatever "yarn" it may have tried to spin to the Court of Appeals. [VR No. 3; 12/5/07; 10:38:24—10:44:20].

The Proceedings Below

On March 22, 2005, Appellant, Garnett Gibson, as executor and personal representative of the Estate of Topsie Gibson, filed a complaint in Knott Circuit Court for compensatory and punitive damages against Appellee and Vanderpool for the pain, suffering, and wrongful death of his mother. Trial commenced on December 3, 2007. Following a three day trial, the Jury returned with a verdict in favor of Appellant, awarding $2,121,371.31 in compensatory damages and another $2,000,000.00 in punitive damages against Appellee Fuel Transport. On January 8, 2008, the Trial Court entered its Judgment in accordance with the Jury's Verdict. [Judgment, attached hereto at Appendix C; ROA Vol. V, 641-646]. On January 18, 2008, Appellee filed a "Motion for Judgment NOV or in the Alternative, a New Trial," wherein, among various other objections, Appellee made a shocking, yet baseless, charge of juror misconduct against Juror Lisa Short. [ROA Vol. V, 648].

As it happened, during *voir dire*, Appellee's counsel asked the following ambiguous rhetorical question:

> I like to look at it as Lady Justice. I don't know if anybody has seen the scales. Lady Justice holds the scales. But, a lot of times, people don't realize that she's blindfolded. And what we're trying to do here is trying to get jurors who will take all outside influences and put the evidence on the scales of what they hear in the courtroom. Is there anyone who can't take their outside influences—I know everybody has their own prejudices and own experiences in life—that's not what I'm asking. I'm asking can anyone not take those prejudices and experiences and set them aside for the three days we're here? Anybody [unintelligible[11]] do that? Great.

[VR No. 1A; 12/3/07; 11:17:14—11:18:03]. Throughout the post-trial proceedings and even

[11] It is has never yet been made clear as to whether Appellee's counsel said *"Anybody can do that?"* or *"Anybody can't do that?"*

on appeal, Appellee has never bothered to clarify whether this question was asking whether the Jury *"can"* or *"can't"* do whatever they were asking. Nevertheless, after trial, Appellee retained a private investigator to track down each of the jurors and asked a series of written questions. According to Appellee's investigator, Juror Short allegedly answered a question as to why she awarded pain and suffering damages by stating *"My father was killed in an accident and they deserved everything they got."* Thus, Appellee claimed they it was *"misled"* by *"false information given on voir dire"* when Short failed to exclaim that her father was killed in an automobile accident when she was called to the panel 20 minutes after the foregoing ambiguous rhetorical question was asked. [ROA, Vol. V, 648]. As a matter of fact, when Juror Short was called to the panel 20 minutes later, Appellee's counsel was given ample opportunity to ask or re-ask individualized questions to Short, but specifically declined to do so. [Id.; 11:36:00—11:36:45].

As proof of her alleged bias, Appellee's Motion attached a copy of the *ex parte*, unsworn, and unattested *"questionnaire,"* (which double-hearsay was filled out by the investigator) and stated as follows:

> In a questionnaire that centered around the motivation and facts surrounding the verdict and damages awarded to the Plaintiff Ms. Short admitted her deeply ingrained bias and disdain. Specifically, Ms. Short responded to a question regarding the punitive damages instruction by stating "My father was killed in an automobile accident and they deserved everything they got." Ms. Short signed the questionnaire.

[ROA, Vol. V, 649]. Having attempted to mislead the Trial Court about the actual non-question asked in *voir dire*, Appellee attempted to mislead the Trial Court by pairing the alleged answer regarding pain and suffering damages with a separate question about punitive damages. This was done because Ms. Short did not even participate in the award of pain and suffering damages in the first instance. [Jury Instructions and Verdict, attached hereto at Appendix B, attached hereto at Appendix B, Instructions No. 5 and 8, ROA, Vol. V, 637,

640]. In fact, only ten jurors signed the instruction awarding pain and suffering, which Juror Short clearly did not. [Id.].

Appellee never sought to depose Juror Short or establish any credible proof of her alleged bias. Instead, Appellee's investigator revisited Ms. Short, again *ex parte*, and secured a tape recorded re-enactment of the interview wherein Short simply read what the investigator had written and signed a so-called *"affidavit,"* which did not aver the truth of the answers to the questions asked, but only that she had *"signed the questionnaire."* [ROA, Vol. V, 753-758]. Following the rule set out in *Com., Transp. Cabinet, Dept. of Highways v. Wilson Furniture, Inc.*, 205 S.W.3d 267 (Ky.App., 2006), the Trial Court specifically found as follows:

> Defendants' argument with respect to allegations of juror misconduct is hereby OVERRULED. The Court finds that the Defendants have failed to meet their heavy burden to show that the juror gave a false answer to (or failed to answer) a material question on voir dire, that such falsehood was intentional and dishonest rather than inadvertent, or that the truthful answer to such question would have required the juror to be stricken for cause. Moreover, the Court finds that the supporting documents tendered by the Defendants are patently incredible but, even then, do not meet the Defendants' burden. The Court also finds that the Defendants were not prejudiced.

[Trial Court's Order Overruling Appellant's Motion for New Trial ("Trial Court's Order") Appendix D, pp. 1-2, ROA, Vol. VII, 966-967]. On appeal, Appellee again raised its unfounded juror misconduct claim so as to cast aspersions on the Jury and so as to misleadingly suggest that the Verdict was the result of passion and prejudice. Once again, Appellee utterly failed to mention the actual question asked or to address the elemental requirements of the law regarding claims of juror mendacity. Indeed, the Court of Appeals, here, citing *Moss v. Com.*, 949 S.W.2d 579, 580-582 (Ky. 1997), noted correctly as follows:

> Similarly, in reviewing the record, this Court finds that appellants [herein appellee] failed to ask a proper question which may have elicited the response that they now claim is prejudicially omitted. *** During voir dire, appellants asked, in essence, whether any potential juror would be unable to set aside his or her own life experiences in order to render a verdict on the facts presented. Neither Short nor any of the other jurors responded. Furthermore, while appellants asked the jurors if they had ever been involved in a motor vehicle accident, they failed to ask the jurors if any

family member had been in such an accident. The appellants failed to ask the proper question which could have elicited a more complete response.

[Opinion by the Court of Appeals, Appendix A, p. 3-8].

Additionally, Appellee raised numerous other frivolous and unpreserved arguments during the post-trial and appellate proceedings. The Trial Court entered a detailed Order on May 1, 2008, specifically overruling each of Appellee's arguments. On appeal, Appellee (as the appellant, there) raised various arguments including several which were never raised to the Trial Court in the first instance. On September 25, 2009, the Court of Appeals rendered its Opinion properly affirming the Verdict and Judgment with regard to the Appellant's compensatory damages, but unfairly setting aside the award of punitive damages.

ARGUMENT

I. THE COURT OF APPEALS HAS FAILED TO APPLY THE CORRECT STANDARD OF REVIEW FOR THE TRIAL COURT'S DENIAL OF APPELLEE'S REQUEST FOR A DIRECTED VERDICT.

Preservation: The Appellant correctly argued to the Court of Appeals that it was required to review the Trial Court's denial of Appellee's motion for directed verdict and new trial as to punitive damages under the highly deferential "clearly erroneous" standard of Appellate review [Appellee's Brief in 2008-CA-969, p. 11-13 and generally].

As an initial matter, at the close of evidence, Appellee requested the Trial Court to direct a verdict as to punitive damage based on its contention that there was not sufficient evidence to support a finding under the given instructions, which the Trial Court denied the motion based on the evidence at trial which it found *"clearly sufficient."* [Trial Court's Order, Appendix D, p. 3; ROA 968]. Before invoking the heightened standard of KRS 411.184(2) and substituting its own opinion about the weight and credibility of the evidence for that of the Jury, which will be discussed herein, the Court of Appeals initially embarked upon the correct standard of appellate review for a trial court's denial of a motion for directed verdict. [Opinion by the Court of Appeals, Appendix A, p. 8-9]. The proper role of the Trial Court

was more completely set out in *Gibbs v. Wickersham*, 133 S.W.3d 494 (Ky.App. 2004), as follows:

> **The standard of review for an appeal of a directed verdict is firmly entrenched in our law. A trial judge cannot enter a directed verdict unless there is a complete absence of proof on a material issue or there are no disputed issues of fact upon which reasonable minds could differ**. *Bierman v. Klapheke*, Ky., 967 S.W.2d 16, 18 (1998). Where there is conflicting evidence, it is the responsibility of the jury to determine and resolve such conflicts. *Id.* at 19. A motion for directed verdict admits the truth of all evidence favorable to the party against whom the motion is made. *National Collegiate Athletic Association v. Hornung*, Ky., 754 S.W.2d 855, 860 (1988) citing *Kentucky Indiana Terminal R. Co. v. Cantrell*, 298 Ky. 743, 184 S.W.2d 111 (1944). Upon such motion, the court may not consider the credibility of evidence or the weight it should be given, this being a function reserved for the trier of fact. *National Collegiate Athletic Association v. Hornung*, Ky., 754 S.W.2d 855, 860 (1988) citing *Cochran v. Downing*, Ky., 247 S.W.2d 228 (1952). The trial court must favor the party against whom the motion is made, complete with all inferences reasonably drawn from the evidence. The trial court then must determine whether the evidence favorable to the party against whom the motion is made is of such substance that a verdict rendered thereon would be "palpably or flagrantly" against the evidence so as "to indicate that it was reached as a result of passion or prejudice." In such a case, a directed verdict should be given. Otherwise, the motion should be denied. *National Collegiate Athletic Association v. Hornung*, Ky., 754 S.W.2d 855, 860 (1988) citing *Nugent v. Nugent's Ex'r.*, 281 Ky. 263, 135 S.W.2d 877 (1940).

Id. at 495-96.

Owing to the fact that a trial judge clearly has a superior opportunity to observe and determine the credibility and demeanor of the witnesses, and is also able to study and consider all of the evidence in its entirety firsthand, Kentucky has long ago set a high threshold for an appellate court to reverse a trial court's denial of a motion for directed verdict. As the Court explained in *Bierman v. Klapheke*, Ky., 967 S.W.2d 16 (1998):

> When engaging in appellate review of a ruling on a motion for directed verdict, the reviewing court must ascribe to the evidence all reasonable inferences and deductions which support the claim of the prevailing party. **Once the issue is squarely presented to the trial judge, who heard and considered the evidence, a reviewing court cannot substitute its judgment for that of the trial judge unless the trial judge is clearly erroneous.**
>
> In reviewing the sufficiency of evidence, the appellate court must respect the opinion of the trial judge who heard the evidence. A reviewing court is rarely in as good a position as the trial judge who presided over the initial trial to decide whether a jury can properly consider the evidence presented. Generally, a trial judge cannot enter

a directed verdict unless there is a complete absence of proof on a material issue or if no disputed issues of fact exist upon which reasonable minds could differ. Where there is conflicting evidence, it is the responsibility of the jury to determine and resolve such conflicts, as well as matters affecting the credibility of witnesses. **The reviewing court, upon completion of a consideration of the evidence, must determine whether the jury verdict was flagrantly against the evidence so as to indicate that it was reached as a result of passion or prejudice. If it was not, the jury verdict should be upheld.**

Id. at 18-19 (emphasis added); *accord Auto-Owners Ins. Co. v. Goode*, 294 S.W.3d 32, 39 (Ky.App. 2009)("*Once the issue is squarely presented to the trial judge, who heard and considered the evidence, a reviewing court cannot substitute its judgment for that of the trial judge unless the trial judge is clearly erroneous.*"); *see also Miller v. Swift*, 42 S.W.3d 599, 600-601 (Ky. 2001):

Miller alleges that the trial court erred when it denied her motion for a new trial. Our review, therefore, is limited to whether the trial court's denial of her motion was clearly erroneous:

Our recent decision in *Cooper v. Fultz*, Ky., 812 S.W.2d 497 (1991), laid to rest any confusion which previously existed with respect to such appellate review. We began by declining any review until the trial court had first considered the substance of the claim and quoted with approval from *Davis v. Graviss*, Ky., 672 S.W.2d 928 (1984), which described a CR 59.01 ruling as "a discretionary function assigned to the trial judge who has heard the witnesses firsthand and observed and viewed their demeanor and who has observed the jury throughout the trial." Id. at 932. We followed *Prater v. Arnett*, Ky.App., 648 S.W.2d 82 (1983), in which the appellate court was held to be precluded from stepping "into the shoes" of the trial court, and precluded from disturbing its ruling unless it was found to be clearly erroneous.

Our decision in *Cooper* amounts to a recognition that a proper ruling on a motion for new trial depends to a great extent upon factors which may not readily appear in an appellate record. Only if the appellate court concludes that the trial court's order was clearly erroneous may it reverse.

In regard to Appellee's motion for directed verdict regarding punitive damages, the Trial Court ruled as follows:

Defendant Fuel Transport's argument with respect to the denial of its motion for directed verdict on the issue of punitive damages is hereby OVERRULED. The Court finds that the evidence in this case was clearly sufficient to support the jury's finding that Fuel Transport violated its duties with a reckless disregard for the lives and safety of others, including Topsie Gibson. For these and other reasons, the motion is overruled in this respect.

[Appendix D, p.3; ROA, Vol. VII, 968]. In fact, the Court of Appeals did not find that the

Trial Court's ruling was clearly erroneous, as required for a reversal, but rather seemed to agree with the language of the Trial Court's punitive damages instructions and decision to deny Appellee's directed verdict motion.

> Appellants complain that the jury instructions provided the wrong standard for assessing punitive damages. They argue that a new trial is warranted because of the flawed instructions. **We disagree**. **** **We note that we agree with the trial court's instruction on punitive damages as well as the decision to deny the postrial motions regarding the punitive damages instruction**.

[Opinion by the Court of Appeals, Appendix A, p. 22]. In fact, Appellee failed to attach the Trial Court's Order and did not even address the Trial Court's actual rulings in its appellate brief. Thus, it failed to advise the Court of Appeals as to how the Trial Court allegedly committed clear error in the first instance.

As a *"motor carrier"* under state and federal regulations, Fuel Transport was charged with an affirmative legal duty to keep its vehicles in safe operating condition at all times on the public highways. [Jury Instructions and Verdict, Appendix B, Instruction 4; ROA Vol. V, 636; *see also, e.g.,* KRS 281.600, 601 KAR 050 1:005, 49 CFR 393.7, 49 CFR 396.7, 49 CFR 396.11]. The evidence in this case clearly established that Appellee was specifically warned and shown that there was dangerous slack in the fifth-wheel mechanism which Appellee knew had caused another accident and injured another driver several weeks before Topsie Gibson was killed. Nevertheless, Appellee consciously disregarded those warnings before placing the defective tractor back upon the public highway without further inspection or repair, which led directly to the tragic and foreseeable death of Topsie Gibson one week later. In fact the Court of Appeals, itself, observed the following facts:

> Following the accident, the Estate conducted an interview of Linville Isaac (Isaac), who had re-sold the truck to Fuel Transport one week before the accident. Isaac told the Estate's expert, accident reconstructionist Joseph Stidham (Stidham), that he had informed both David Clifton (Clifton), the owner of Fuel Transport, and Vanderpool that there was a dangerous degree of slack in the fifth wheel and that he had demonstrated that slack to both Clifton and Vanderpool. Isaac also informed Stidham,

> and testified at trial, that he had been injured in an accident only weeks prior to November 2, 2005, (sic) when a different trailer had come loose from the fifth wheel while he was driving the truck. Isaac testified that he made some repairs to the fifth wheel but that it still had dangerous slack in it when he re-sold it to Fuel Transport one week before the accident.

[Opinion by the Court of Appeals, Appendix A, p. 11]. Viewing the evidence in the light most favorable to the Appellant, there is abundant and overwhelming evidence to support the Trial Court's finding that the evidence was *"clearly sufficient"* to support the jury's finding. As such, it would have been clearly erroneous for the Trial Court to refuse the instruction. See *Northeast Health Management, Inc. v. Cotton*, Ky. App., 56 S.W.3d 440 (2001)(*A party is entitled to have the jury instructed on the issue of punitive damages "if there was any evidence to support an award of punitive damages."*); *Thomas v. Greenview Hosp., Inc..*, Ky. App., 127 S.W.3d 663 (2004)(*"An instruction on punitive damages is warranted if there is evidence that the defendant ... was grossly negligent by acting with wanton or reckless disregard for the lives, safety or property of others."*); *Phelps v. Louisville Water Co.*, Ky., 103 S.W.3d 46, 51-52 (2003). Indeed, the Court of Appeals apparently recognized this law when it stated: *"If there was any evidence to support the Estate's Theory that Fuel Transport had acted with gross negligence, the Estate had a right to an instruction on punitive damages."* [Opinion by the Court of Appeals, Appendix A, p. 9].

Having found that the evidence was *"clearly sufficient"* to support the jury's finding, the Trial Court could not remotely begin to say that the evidence was of such substance that a verdict rendered thereon would be *"palpably or flagrantly against the evidence so as to indicate that it was reached as a result of passion or prejudice."* Thus, it was required by the foregoing law to give the instruction. *Gersh v. Bowman*, Ky. App., 239 S.W.3d 567 (2007)(*"If there was any evidence to support an award of punitive damages, a plaintiff has a right to have the jury instructed on the option to award punitive damages."*).

On appeal, despite its higher obligation to show that the Trial Court was *"clearly erroneous,"*

Appellee completely failed to attach or properly address the Trial Court's Order in its Brief at all. Ignoring its own standard of review, the Court of Appeals did not attempt to show that the Trial Court was *"clearly erroneous"* or that the verdict was *"so flagrantly against the weight of the evidence as to indicate passion or prejudice,"* but rather, merely implied that the Trial Court was somehow *"clearly erroneous"* by failing to accept an argument that was never made to the Trial Court in the first instance (i.e., that the Trial Court was required to impose the *"clear and convincing"* standard of KRS 411.184(2) and/or that Appellee's conduct was akin to ordinary driver negligence). [Opinion by the Court of Appeals, Appendix A, p. 8-15].

It is also notable that the Court of Appeals' decision failed to acknowledge the settled rule that a trial court's decision to deny a directed verdict is not clearly erroneous where, as here, the underlying verdict is supported by substantial evidence. See, e.g., *Black Motor Co. v. Greene,* 385 S.W.2d 954, 956 (Ky. 1965); *Moore v. Asente,* 110 S.W.3d 336, 353-354, (Ky. 2003). Because the Court of Appeals failed to meet the foregoing standards of appellate review, it should not be permitted to disturb the Trial Court's proper denial of Appellee's motion for directed verdict. Neither the Appellee nor the Court of Appeals has ever shown that there was a *"complete absence of proof"* as to Appellee's utter disregard for its obligation to maintain its vehicles in safe condition at all times or that the Trial Court was *"clearly erroneous"* in its denial of the motion for directed verdict actually made. Appellee having failed to meet the foregoing standard in its motion for directed verdict and motion for a new trial, the Court of Appeals was not authorized to disturb the Trial Court's rulings.

II. THE COURT OF APPEALS IMPROPERLY SUBSTITUTED ITS OWN OPINION ABOUT THE WEIGHT OF THE EVIDENCE FOR THE FACTUAL FINDINGS OF THE JURY.

Preservation: The Appellant correctly advised the Court of Appeals as to powers respectively reserved to the jury, the trial court, and the reviewing court. [Appellee's Brief in 2008-CA-969, p.11-13]. Indeed, the Court of Appeals recognized this standard when it stated that *"we will not substitute our opinion for that of the jury"* [Opinion of the Court of Appeals,

Appendix A, p. 9].

Based upon the entirety of the evidence in this case, the Jury unanimously found that the Appellee *"breached its duties with 'gross negligence,"* meaning *"a reckless indifference or disregard for the rights, lives, and safety of other persons, including Topsie Gibson."* [Jury Instructions and Verdict, Appendix B, ROA Vol. V, pp. 639-640]. In fact, every single juror unanimously agreed upon the issue of punitive damages whereas only ten jurors agreed upon the amount of compensatory damages. [Id.; 637-640]. Yet rather than finding that *"the verdict of the jury was so flagrantly against the weight of the evidence as to indicate passion or prejudice,"* as required by the foregoing law, the Court of Appeals simply substituted its own relatively uninformed estimation about the weight and credibility of the evidence for the unanimous factual findings of the jury. Whereas the Jury was familiar with all of the evidence and had an opportunity to observe the demeanor of all of the witnesses and found that Appellee breached its duties with *"a reckless indifference or disregard for the rights, lives, and safety of other persons, including Topsie Gibson,"* the Court of Appeals opined that *'In our opinion, although Fuel Transport failed to exercise reasonable care, the failure did not rise to the level of wanton or reckless disregard for others."* [Id., ROA Vol. V, pp. 639-640; Opinion by the Court of Appeals, Appendix A, p. 13]. Indeed, the Court of Appeals and the Jury could not have been more diametrically opposed on this key point.

Thus, the Court of Appeals found it necessary to violate its own self-admonition that *"we will not substitute our opinion for that of the jury"* and, in fact, substituted the Jury's Verdict with its own peculiar opinion. [Opinion of the Court of Appeals, Appendix A, p. 9, citing *Lewis v. Bledsoe Surface Min. Co.*, 798 S.W.2d 459, 461-462 (Ky. 1990) and *Commonwealth Life ins. Co. v. Auxier*, 470 S.W.2d 335, 337 (Ky. 1968)]. Hence, the Jury's Verdict was reversed without the required finding that the verdict was *"so flagrantly against the weight of the evidence as to indicate*

passion or prejudice." See Denzik v. Denzik, 197 S.W.3d 108 (Ky. 2006):

> When reviewing a jury verdict, the appellate court is restricted to determining whether the trial judge erred in failing to grant a motion for directed verdict. The reviewing court must consider all evidence favoring the prevailing party as true and is not at liberty to determine the credibility or weight which should be given to the evidence. *Lewis v. Bledsoe Surface Mining Co.*, 798 S.W.2d 459 (Ky.1990). The reviewing court must draw all reasonable inferences in favor of the claimant, refrain from questioning the credibility of the claimant, and from assessing the weight which should be given to any particular item of evidence. *United Parcel Service Co. v. Rickert*, 996 S.W.2d 464 (Ky.1999). **The reviewing court may reverse the verdict of the jury only when it is so flagrantly against the weight of the evidence as to indicate passion or prejudice**. *Bierman v. Klapheke*, 967 S.W.2d 16 (Ky.1998).

Id. at 110; see also Sufix, U.S.A., Inc. v. Cooke, 128 S.W.3d 838, 841 (Ky. App. 2004). Therefore, even though the Court of Appeals could not and did not say that the trial Court was *"clearly erroneous"* or that the verdict of the Jury was so *"flagrantly against the weight of the evidence as to indicate passion or prejudice,"* it nevertheless impermissibly reversed both the Trial Court and the Jury.

III. APPELLEE'S CONDUCT WAS CLEARLY "REPREHENSIBLE" AND CLEARLY MET THE "GROSS NEGLIGENCE" STANDARD.

Preservation: The Appellant correctly advised the Court of Appeals that the record contained ample and sufficient evidence of reckless conduct; that the Appellee's conduct was clearly reprehensible and clearly met the gross negligence standard [Appellee's Brief in 2008-CA-969, p. 1-13, 16-17, 25].

In contrast to its own specific prior finding that *"[Isaac] had informed both David Clifton, the owner of Fuel Transport, and Vanderpool that there was a dangerous degree of slack in the fifth wheel"* [Opinion by the Court of Appeals, appendix A, p. 11], unfairly drew the following inference in favor of Appellee:

> An apparent conversation between the seller of the truck and Fuel Transport's management['s] suggestion that the fifth wheel may need attention does not establish reprehensible or malicious behavior necessary for an award of punitive damages.

[*Id.*, p. 14]. However, there was nothing in the evidence that Isaac's warning and physical demonstration of the defect was a mere *"suggestion"* that the fifth wheel *"may need attention."*

Rather the proper (and more reasonable) inference to be drawn, in Appellant's favor, was that Isaac informed and showed Appellee's agents *"that there was a dangerous degree of slack in the fifth wheel,"* precisely to warn them that it needed repairs. [*Id.*, p. 9, 12]. Once Appellee learned of the defect, it knew by virtue of the law imposed upon it as a commercial motor carrier, that it was required to repair the defect before placing it back upon the highway. Appellee also knew that another trailer had broken free from the same fifth wheel mechanism recently beforehand causing an accident upon the highway.

As to the Court of Appeals' opinion that Fuel Transport did not engage in sufficiently *"reprehensible"* conduct to merit punitive damages, in *Steel Technologies, Inc. v. Congleton*, Ky. 234 S.W.3d 920 (2007), this Court addressed the reprehensibility underlying a punitive damages award in a nearly identical case involving a wrongful death caused by a violation of the motor carrier regulations where a woman was killed when her vehicle struck a steel coil that fell from a truck because the defendant driver had secured the coil with three steel chains when the motor carrier regulations required at least five chains in that particular situation. [Id.] In the instant case, not only the load, but Appellee's entire loaded trailer came loose (for the second time in three weeks) and caused a similar obstruction in the highway which killed Mrs. Gibson in the same type of collision. In *Congleton*, the Kentucky Supreme Court described *"reprehensibility,"* as the *"most important indicium of the reasonableness of a punitive damages award,"* and noted the various factors demonstrating reprehensibility:

> [Whether] the harm caused was physical as opposed to economic; [whether] the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident.

The Supreme Court analyzed the reprehensibility factors presented in the *Congleton* case as follows:

> Unlike the harm involved in *Campbell* and *Gore*, the harm in this case was not economic. Rather, it consisted of the violent death of a young mother. The jury also found that the conduct in question involved reckless disregard for the lives or safety of others. While the other factors were not present … there is no doubt that some reprehensibility is present.

Congleton at 931.

In the instant case, Appellee openly admits that *"Certainly, Ms. Gibson suffered the worst harm: death"* [Appellants' Brief in 2008-CA-969, p. 16]. Indeed, the harm suffered in this case was greater than the instantaneous violent death suffered by Mrs. Congleton in that Mrs. Gibson consciously smothered to death over the course of seven days while she was forcibly restrained to her mattress. Likewise, the juries in both cases found that the conduct in question involved *a reckless disregard for the lives and safety of others.* Therefore, Mrs. Gibson's death is clearly no less reprehensible than that in *Congleton,* and the Court of Appeals' statement that the evidence in this case does not *"establish reprehensible or malicious behavior necessary for an award of punitive damages"* is not correct if *Congleton* is good and superior law.

Moreover, unlike Appellee herein, there was no evidence that the driver who chained the load in *Congleton* disregarded his own knowledge of a prior accident or ignored a specific verbal warning and demonstration about the danger. Yet, under the logic provided by the Court of Appeals in the instant case, the punitive damages awarded in *Congleton* should have been stricken since no one specifically warned the driver that, by using only three chains, *"an accident was likely to occur."* [[Opinion by the Court of Appeals, Appendix A, p. 14]. The fact that Appellee ignored a specific warning of the defective condition (which the Court of Appeals rightly described as *"a dangerous degree of slack in the fifth wheel"*) clearly makes this case more reprehensible than that in *Congleton*, where no special advance warning was given to the truck driver at all. [*Id.*, p. 11-12].

Still further, although Appellee argued to the Trial Court, in its motion for new trial, that

the Jury's punitive damages award was excessive, it did not so, not by addressing the reprehensibility factors or the other *"guideposts"* of constitutional analysis as set out in *Congleton* as well as *BMW of N. America v. Gore,* 517 U.S. 559 (1996), and *State Farm Mutual Automobile Insurance Co. v. Campbell,* 538 U.S. 408 (2003). Instead, Appellee cited the dissenting opinion of Justice Cooper in *Williams v. Wilson*, Ky., 972 S.W.2d 260 (1998), where the majority held that the elevated *"malice"* standard of KRS 411.184(1)(c) is unconstitutional and by recycling the arguments made by the losing parties in *Phelps v. Louisville Water Co.*, Ky., 103 S.W.3d 46 (2003). [ROA Vol. V, 662-664]. In its written response to Appellee's motion for new trial, Appellant responded by citing the majority opinion in each of Appellee's cases and specifically address the three guideposts of constitutional analysis for punitive damages, including the factors demonstrating reprehensibility (which forms the first guidepost in the proper constitutional analysis). [ROA Vol. VI, 897-907].

As noted, under the second guidepost (*"the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award"*), the ratio of punitive damages to compensatory damages in this case was less than 1 to 1, which is clearly within the 9 to 1 Constitutional parameters set by *Gore* and *Campbell.* And finally, as to the third guidepost (*"the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases"*), Appellant noted that *Congleton* gave Appellee specific notice that substantial punitive damages had been awarded in a nearly identical but less reprehensible case where the motor carrier regulations were ignored. [*Id.*]. See *Phelps v. Louisville Water Co.*, Ky., 103 S.W.3d 46, 55 (2003) citing *Gore*, *Campbell*, and *TXO Production Corp.*, 509 U.S. 443 (1993): *"Notice is satisfied for due process purposes if prior law fairly indicated that a punitive damages award might be imposed in response to egregiously tortious conduct."* In fact, as Appellant noted, Kentucky case law gives very clear notice that greater civil penalties have been awarded for much lesser harmful and lesser

reprehensible conduct. *See, e.g., Kentucky Kingdom Amusement Co. v. Belo Kentucky, Inc.*, Ky., 179 S.W.3d 785 (2005)($2.5 million punitive damages for defamation); *Sufix, USA, Inc. v. Cook*, Ky.App., 128 S.W.3d 838 (2004)($3 million punitives for injury to leg by defective weed-eater); *Farmland Mutual Insurance v. Johnson*, Ky., 36 S.W.3d 368 (2000)($2 million punitive damages for purely economic losses). In fact, the very language of the Trial Court's punitive damages instruction which stated that the verdict was *"not to exceed $2,000,000"* gave Appellee specific notice of the amount. And because Appellee failed to make any contemporaneous objections at trial with regard that amount, the alleged error with regard to excessiveness was also not preserved. *Cf. Gersh v. Bowman*, Ky.App., 239 S.W.3d 567 (2007). Thus, it is readily apparent that the Jury's award was clearly within the relevant constitutional parameters and the Trial Court stated so as follows in its May 1, 2008, Order. [Trial Court's Order, Appendix D, p. 4-6; ROA 969-971].

In summary, there was clearly sufficient evidence at trial to establish that the Appellee knew that this particular truck was affected by a dangerous defect. In fact, there was unequivocal evidence on this point in the form of the testimony of witness Linville Isaac, who testified that, one week before the deadly collision, he specifically told two (2) of Appellee's agents that the fifth-wheel was worn out and even went so far as to show each of them that the fifth-wheel was defective by placing a pry-bar and raising the mechanism up and down to demonstrate a "dangerous degree of slack in the fifth wheel." [Opinion by the Court of Appeals, Appendix A, p. 12; VR No. 1A; 12/3/07; 1:57:07—1:59:50, 2:15:00—2:16:55.]. This testimony, especially when coupled with Appellee's admitted knowledge of the danger posed by such a defect and knowledge of the previous un-coupling accident and attempted repairs, clearly supports the Jury's finding that the Appellee in this case, as commercial motor carrier, knew, or was reckless in not knowing, that continued use of the

defective truck without further repair presented a grave risk of death and injury to others who happened to share the roadway.

Having invaded the province of the Trial Court by reversing its decision without a showing that it acted clearly erroneously, the Court of Appeals substituted its opinion about the weight of the evidence for that of the Jury without showing that it was so *"flagrantly against the weight of the evidence as to indicate passion or prejudice."* The Court of Appeals finding that the evidence *"does not establish reprehensible ... behavior necessary for an award of punitive damages"* is clearly mistaken. *Congleton*, *Gore*, and *Campbell*, *supra.*

IV. THE APPELLEE NEVER ARGUED TO THE TRIAL COURT THAT IT WAS REQUIRED TO APPLY A "TRULY GROSS NEGLIGENCE" STANDARD OR THAT IT CANNOT CONSTITUTE GROSS NEGLIGENCE FOR A COMMERCIAL MOTOR CARRIER TO KNOWINGLY PLACE A DANGEROUSLY DEFECTIVE TRACTOR-TRAILER UPON THE PUBLIC ROADWAYS.

Preservation: The Appellant correctly advised the Court of Appeals that the Appellee's had waived any objection to the Trial Court's definition of the standard of care regarding punitive damages; that Appellee had failed to request the "truly gross negligence" standard which it *actually* argued for, on appeal, in its argument entitled "The Standard for Punitive Damages is "Truly Gross Negligence" [Appellant's Brief in 2008-CA-969, p. 6-9]; that the record contained ample and sufficient evidence of reckless conduct for the jury to award punitive damages; and that the Trial Court did not err with regard to the given standard of the instructions or in its refusal to direct a verdict as to punitive damages.[Appellee's Brief in 2008-CA-969, p.10-17, 25]. Moreover, neither the *"truly gross negligence"* nor the *"clear and convincing"* standard were properly raised or preserved by Appellee in the first instance as Appellee failed to object to the given instructions and failed to tender instructions of its own containing the alleged standards. Matters of Appellee's initial failure to raise or preserve the issue will be discussed further below. [*Id.*].

For the first time in the case, on appeal, Appellee made an unsupported and somewhat incoherent argument that the standard for punitive damages is *"truly gross negligence,"* by which it meant to equate ordinary driver negligence, such as that discussed in *Kinney v. Butcher*, Ky.App., 131 S.W.3d 357 (2004), with its own conduct as a commercial motor vehicle carrier by recklessly disregarding the known dangers posed by a defective fifth wheel. [Appellant's Brief in 2008-CA-906, p. 6-12]. At trial, however, Appellee failed to tender its own punitive

damage instructions or make any contemporaneous objection to the *"gross negligence"* standard used by the Trial Court or its definition as *"a reckless indifference or disregard for the rights, lives, and safety of other persons, including Topsie Gibson."*

Having failed to contemporaneously ask for the alleged *"truly gross negligence"* language that it claimed, on appeal, should have been given with regard to its own conduct, Appellee also failed to mention the matter in its post-trial motions except obliquely in a single conclusory statement couched within in a now-abandoned argument that the testimony somehow did not causally link the defective fifth wheel to the accident. [ROA Vol. V, 653-656]. In one single solitary statement, Appellee claimed but did not argue that *"[t]his conduct is mere negligence, it does not rise to the level of gross negligence."* [*Id.*]. Notably, however, Appellee never once mentioned the *Kinney* case or anything like it as a basis for prohibiting punitive damages against a motor carrier for reckless disregard of an unsafe vehicle. [*Id.*].

On appeal, Appellee argued for the first time (without ever explaining) that automobile driver negligence cases such as *Kinney v. Butcher*, Ky.App., 131 S.W.3d 357 (2004); *Estate of Embry v. GEO Transp. of Indiana, Inc.*, 478 F.Supp.2d 914 (E.D.Ky. 2001); and *Turner v. Werner Enterprises, Inc.*, 442 F.Supp.2d 384 (E.D. Ky. 2006), which generally do not involve gross negligence except for exceptional circumstances (such as alcohol intoxication, etc.) somehow place a bar to finding that Fuel Transport acted with *"truly gross negligence"* for failure to maintain the vehicle in safe operating condition before placing it on the public highway. [Appellant's Brief in 2008-CA-906, p. 6-12]. However, no punitive damages were had for any driving negligence in this case. Thus, the *Kinney* line of cases clearly did not apply. Indeed, the Trial Court had previously refused to give a punitive damages instruction against driver Vanderpool for his negligent operation of the vehicle, which shows that the Trial Court was aware of the distinction between ordinary and gross negligence. [VR No. 3; 12/5/07;

9:22:40—9:24:20].

Besides the fact that Appellee's appellate argument was not properly preserved, punitive damages were awarded in this case, not for driver negligence, but for Fuel Transport's conscious decision to place the truck back upon the public highway despite its actual notice of the defective fifth-wheel and its affirmative obligation to maintain its fleet in safe operating condition at all times. As previously noted, just one week before the accident Linville Isaac specifically told Appellee's agents that the fifth wheel was *"wore out"* and demonstrated the defect by using a pry bar to show them what the Court of Appeals acknowledged was a *"dangerous degree of slack in the fifth wheel."* Appellee acknowledged the known danger of such a defect in opening statements when attacking Isaac:

> [W]hoever's driving this truck if it's a dangerous truck is putting his life at risk. Okay. When he has an accident due to a defective truck he's at risk of being injured, he's at risk of dying.

[VR No. 1A; 12/3/07; 1:50:01—1:50:12]. Moreover, Appellee's agent admitted that he knew that another trailer had broken free, several weeks beforehand; that he had seen invoices where Isaac purchased fifth-wheel bushings; and that he knew that Isaac had recently attempted repairs. [*Id.*; 3:57:05; 4:07:02; VR No. 2, 12/4/07, 2:25:01; 2:29:48; 4:04:45]. Yet the vehicle was placed back upon the highway the following day without further inspections or repairs. [*Id.*]. In other words, the Jury in this case could easily and rationally conclude that Fuel Transport acted with reckless disregard when it consciously disregarded Linville Isaac's warning and physical demonstration of the defect (and other notice), which it clearly knew to be a dangerous condition.

The evidence in this case, viewed in a light most favorable to Appellant, presents a far cry from the typical or ordinary driving negligence case with which *Kinney* was concerned. Rather, as pointed out by Appellant repeatedly in the Court below, the evidence of reckless

conduct presented at trial and the reasonable inferences to be drawn therefrom, showed this case to be far more similar to the decision in *Congleton* which affirmed a punitive damages award under nearly identical circumstances where a motor carrier violated regulations requiring that a load be secured with five steel chains instead of three. The key difference in this case and *Congleton* is that the motor carrier, herein, was specifically warned and shown the dangerous condition whereas the truck driver in *Congleton* was not.

Never once in its analysis did the Court of Appeals acknowledge the special uniquely-heightened duties imposed upon *"motor carriers"* under the state and federal regulations, even though Appellee openly acknowledged their duties at trial and did not contest the Trial Court's instruction which defined Appellee's duty as the duty to use ordinary care to *"maintain its vehicles in a safe operating condition at all times."* [Jury Instructions and Verdict, Appendix B, ROA Vol. V, 636]. While the Court of Appeals seemed to acknowledge that Appellant was entitled to an instruction of punitive damages if *"there is any evidence"* of gross negligence by Appellee [Opinion by the Court of Appeals, Appendix A, p. 9, quoting *Shortridge v. Rice*, Ky. App., 929 S.W.2d 194, 197 (1996)], it ultimately abandoned this principle in preference for its mere *"opinion"* that the evidence of reprehensibility was not *"clear and convincing"* enough to suit it. [*Id.*, pp. 14-15). Neither the Court of Appeals nor Appellee ever bothered to explain how the Trial Court acted erroneously or abused its discretion with regard to this previously un-raised argument, let alone committed palpable error.

VI. THE "CLEAR AND CONVINCING" STANDARD OF KRS 411.184(2) WAS NOT PRESERVED FOR APPELLATE REVIEW AND, EVEN IF IT HAD BEEN, SUCH A STANDARD VIOLATES SECTIONS 14, 54, AND 241 OF THE KENTUCKY CONSTITUTION.

Preservation: The Appellant correctly advised the Court of Appeals that the Appellee's had waived any objection to the Trial Court's definition of the standard of care regarding punitive damages; that Appellee had failed to request the "truly gross negligence" standard

which it *actually* argued for, on appeal [Appellant's Brief in 2008-CA-969, p. 6-9]; that the record contained ample and sufficient evidence of reckless conduct for the jury to award punitive damages; and that the Trial Court did not err with regard to the given standard of the instructions or in its refusal to direct a verdict as to punitive damages.[Appellee's Brief in 2008-CA-969, p.10-17, 25]. Moreover, Appellee made no developed argument that a clear and convincing standard or KRS 411.182 should be imposed but rather mentioned the standard only once in passing within the context of its argument entitled "The Standard for Punitive Damages is "Truly Gross Negligence," which goes to show that the Appellee was not arguing to impose KRS 411.184(2) as the matter was never once raised or preserved in the Trial Court. Nevertheless, Appellant plainly advised the Court of appeals that Appellee "Waived any Objection to the Court's Definition of the Standard of Care." [Id., 10-11].

Appellee never once argued to the Trial Court that the instructions should hold the jury to a *"clear and convincing"* standard, let alone to the statutory standard of KRS 411.184(2). Moreover, the statutory provision was not even raised in Appellee's Brief to the Court of Appeals except for a cryptic and conclusory statement that *"under KRS 411.184(2), a plaintiff must prove outrageous conduct by "clear and convincing evidence."* [Appellee's Brief in 2008-CA-969, p. 7]. In fact, nothing was else was mentioned on appeal at all about the alleged standard except for Appellee's equally conclusory statement in a separate sub-argument that *"[n]othing in the record comes close to proving 'truly gross negligence,' much less by clear and convincing evidence."* [*Id.*, p. 9]. Beyond these mere naked statements on appeal, Appellee did not argue to the Court of Appeals that the Trial Court violated KRS 411.184(2) or that it ever requested the Trial Court to impose a clear and convincing standard, let alone to show where the in the record the argument was preserved. *See Phelps v. Louisville Water Co.*, 103 S.W.3d 46 (Ky. 2003):

> Rule of Civil Procedure (CR) 76.12(4)(c)(iv) mandates that a party indicate how an issue is properly preserved for review by an appellate court. LWC's briefs do not cite to where in the record this issue is preserved and we will not search the vast record on appeal to make that determination. See *Robbins v. Robbins*, Ky.App., 849 S.W.2d 571 (1993); *Ventors v. Watts*, Ky.App., 686 S.W.2d 833 (1985). Accordingly, we hold that the trial court instructed the jury on the correct common law standard of gross negligence, as found in Horton, supra, governing claims for punitive damages.

Id. at 52. By failing to raise a timely objection to the Jury instructions with regard to the elevated *"truly gross negligence"* standard or the *"clear and convincing"* standard of KRS 411.184(2),

Appellee deprived the Jury of any opportunity to comment upon the weight and credibility of the evidence beyond the traditional and long-established common law preponderance of the evidence standard in the given instructions.

Notwithstanding Appellee's failure to raise or properly preserve the issue and the Jury's unanimous finding that Appellee violated its special affirmative legal duty to keep its vehicles in safe operating condition at all times with *"a reckless indifference or disregard for the rights, lives, and safety of other persons, including Topsie Gibson,"* the Court of Appeals set aside the award of punitive damages because it determined that *"[i]n our opinion, although Fuel Transport failed to exercise reasonable care, the failure did not rise to the level of wanton or reckless disregard for others."* [Opinion by Court of Appeals, Appendix A, p. 13 (emphasis added)]. In deciding that Appellee's willful and knowing violation of law did not meet the standard for punitive damages, the Court of Appeals imposed the elevated *"malice"* or *"clear and convincing"* standard for punitive damages found in KRS 411.184(2), which was never fairly raised or preserved by the Appellee in the first instance. Even if the matter had been properly raised, the statutory provision is also unconstitutional for the same reasons that KRS 411.184(1)(c) was declared unconstitutional in *Williams v. Wilson*, 972 S.W.2d 260 (Ky.1998). As was most eloquently explained in Justice Palmore's learned treatise on jury instructions, from which the Trial Court's common law *"gross negligence"* punitive damages instructions were drafted:

> In *Williams v. Wilson*, 972 S.W.2d 260, 269 (Ky. 1998), the Kentucky Supreme Court in-validated (at least for purposes of actions that come within the purview of Const. § 54) KRS 411.184(1)(c), which defines "malice" as including "subjective awareness," on the ground that it introduces a "vastly elevated standard for the recovery of punitive damages and a clear departure from the common law" and thus violates §§ 14, 54, and 241 of the Kentucky Constitution. Though for technical reasons the Court found it inappropriate to pass on the constitutionality of KRS 411. 184(2) which requires "clear and convincing" proof of oppression, fraud or malice, it **necessarily follows** from the invalidation of KRS 411.184(1)(c) that the "malice" aspect of KRS 411.184(2) also is invalid. Logically, it would seem that the requirement of "clear and convincing" evidence *vis-à-vis* a "preponderance" of the evidence, which obviously elevates the standard of proof to be met by the plaintiff, is equally violative of Const.

§§ 14, 54, and 241. *Cf. Bowling Green Mun. v. Atmos Energy Corp.* 989 S.W.2d 577, 580 (Ky. 1999).

John S. Palmore, Kentucky Instructions to Juries, 5th Edition; (Matthew Bender: 2006), Comment to § 39.15. Kentucky Constitution §§ 14, 54, and 241. See also *Williams v. Wilson*, 972 S.W.2d 260, 269 (Ky. 1998). Thus, to the extent that the Court of Appeals held the Appellant to the un-raised and unpreserved KRS 411.184(2) standard (or any standard except the given common law standard), it has violated the Kentucky Constitution for the same reasons better set forth in *Williams v. Wilson, supra*, and mentioned most eloquently by Justice Palmore.

Ironically, although the Court of Appeals ultimately applied the clear and convincing standard for punitive damages in holding that the Trial Court committed error, it inconsistently stated as follows on page 22 of its Opinion:

> Appellants complain that the jury instructions provided the wrong standard for assessing punitive damages. They argue that a new trial is warranted because of the flawed instructions. We disagree. **** We note that we agree with the trial court's instruction on punitive damages as well as the decision to deny the postrial motions regarding the punitive damages instruction.

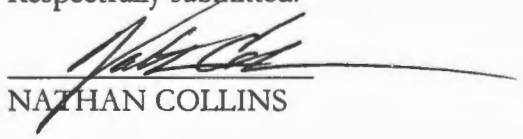
[Opinion by the Court of Appeals, Appendix A, p., p. 22]. The post-briefing adoption of KRS 411.184(2) was even more prejudicial to the Appellant in that he was only permitted a mere 25 pages to respond to the nine disparate, misleading, frivolous and unsuccessful sub-arguments that were actually raised by the Appellee in its appeal. As such, Appellant had no adequate notice or opportunity to respond to the un-briefed statute, which effectively deprived the Appellant's Estate of her rights in the verdict without due process of law. To the extent that the Court of Appeals has held the Appellant to the elevated standard of KRS 411.184(2), it has done so based on an unpreserved argument regarding an unconstitutional statutory provisoion which was never properly raised on appeal but which has abrogated the Appellant's right to punitive damages as guaranteed by the Kentucky Constitution and as

fully permitted by the United States Constitution. *Williams v. Wilson*, 972 S.W.2d 260 (Ky., 1998); *BMW of N. America v. Gore*, 517 U.S. 559 (1996); *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003).

CONCLUSION

For the reasons set forth above, Appellant respectfully requests that the Court reverse the Court of Appeals' opinion vacating the award of punitive damages and reinstate the Jury's Verdict and the Trial Court's Judgment below in full so as to preserve the proper balance of powers between the Jury, the Trial Court, and the Appellate Courts and so as to preserve the Appellant's state and federal Constitutional due process rights to her just and lawful award.

Respectfully submitted:



NATHAN COLLINS