COMMONWEALTH OF KENTUCKY
SUPREME COURT
2010-SC-000072-D & 2010-SC-0000682-D

GARNETT GIBSON, AS EXECUTOR
AND PERSONAL REPRESENTATIVE
OF THE ESTATE OF TOPSIE GIBSON — APPELLANT/CROSS-APPELLEE

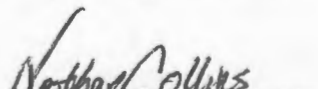
v.

APPEAL FROM KENTUCKY COURT OF APPEALS
NO. 2008-CA-000969-MR

FUEL TRANSPORT, INC. — APPELLEE/CROSS-APPELLANT

# COMBINED RESPONSE/REPLY BRIEF FOR APPELLANT/CROSS-APPELLEE

Respectfully Submitted,



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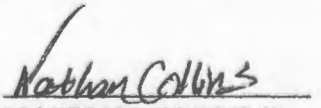
## CERTIFICATE OF SERVICE

This certified that a true and correct copy of the foregoing document has been served by U.S. regular mail delivery to Sam Givens, Jr., Clerk of Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601; Honorable Kimberly Cornett-Childers, Judge, Knott Circuit Court, 76 West Main Street, Hindman, Kentucky 41822; Virginia H. Snell, Esq., Deborah H. Patterson, Esq., and Sara Veeneman, Esq., Wyatt, Tarrant & Combs, LLP, 2800 PNC Plaza, 500 W. Jefferson Street, Louisville, Kentucky 40202; and the original and ten copies to Susan Stokely Clary, Clerk, Kentucky Supreme Court, 700 Capital Avenue, Room 235, Frankfort, Kentucky 40601-3415, via U.S. registered mail, on this the 7th day of July, 2011.



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STATEMENT OF POINTS AND AUTHORITIES

## ARGUMENT

In its combined brief, the Appellee/Cross-Appellant, Fuel Transport, Inc. ("Appellee" or "Fuel Transport") has numerous distractor arguments so as to confuse the material legal error that occurred when the Court of Appeals set aside the Jury's unanimous verdict regarding punitive damages and overturned the Trial Court's decision upholding that verdict. Indeed, Fuel Transport essentially conceded that the issues now raised in its cross-appeal lack merit when it argued against this Court's grant of discretionary review as follows:

> [T]his case presents **no issue of consequence** beyond the particular facts and parties before the Court, **no constitutional question**, **no matters of policy** affecting the Commonwealth and **no other intriguing points of any kind**.

Appellee's Response to Motion for Discretionary Review, p. 1 (emphases added). Hence, the only real issue in this appeal is whether the Court of Appeals erred when it reversed the jury's unanimous verdict and the Trial Court's judgment regarding punitive damages. For the reasons stated in Appellant/Cross-Appellee's opening Brief (and in the original Motion for Discretionary Review), the record resoundingly answers this question in the affirmative.

### I. THE COURT OF APPEALS ERRED IN REVERSING THE DENIAL OF DIRECTED VERDICT, AND THE JURY'S UNANIMOUS VERDICT, REGARDING PUNITIVE DAMAGES

Among the most notable features of Appellee's opening Brief is its determination to construe the facts in a light most favorable to its own interests despite the rules of review clearly requiring otherwise. For example, at the very beginning of the counterstatement, Appellee writes as follows:

> Allowing punitive damages on **the undisputed facts** here would, as in *Kinney v. Butcher*, 131 S.W.3d 357, 359 (Ky. App. 2004), "effectively eliminate the distinction between ordinary and gross negligence . . .". The Court of Appeals therefore correctly set aside the $2 million punitive award that the jury awarded – on top of $2 million in pain and suffering – but disagreed that **other errors** infected the remainder of the verdict.

Fuel Transport's Combined Brief ("Combined Brief"), p. 1. Of course, it does not take long

to realize that Appellee's version of the allegedly "undisputed facts" is very different than the evidence that was presented at trial. Indeed, Appellee's combined brief does little more than argue against the facts and evidence presented at trial while claiming that "the key facts are **undisputed** and establish **no** evidence of Fuel Transport misconduct" (Combined Brief, pp. 1, 17, 18)(emphases added) and that "Fuel Transport did **nothing** to hurt [Topsie Gibson]." (Combined Brief, p. 38) (emphasis added). Obviously, Appellee does not truly believe that the "undisputed" facts show "**no evidence** of Fuel Transport's misconduct," or that it "did **nothing** to hurt" the decedent in this case. Otherwise, Appellee would not have stipulated to liability for the collision that caused Mrs. Gibson's death at trial. (VR No. 3; 12/5/07; 10:13:16—10:14:48). Appellee's combined brief even suggests that the Court of Appeals found that "other errors" were committed by the Jury and/or the Trial Court, but also incorrectly found that those "other errors" did not "infect the remainder of the verdict," when, in fact, the Court of Appeals found only one (1) alleged "error" below (*i.e.*, the Trial Court's denial of Appellees Transport's directed verdict motion regarding punitive damages).

Of comparable nature are other broad misstatements and/or baseless appeals to sympathy contained in Appellee's combined brief, such as the assertions that (1) "Officer Hutchinson ... did not find that the tractor-trailer load exceeded legal limits,"[1] (2) that "small companies like Fuel Transport and truck drivers like Mr. Vanderpool rely on the appellate court to curb prejudice and speculation and to correct when a jury is so wrong

[1] That "Officer Hutchinson . . . did not find that the tractor-trailer load exceeded legal limits" is inconsequential in that the trailer broke free from a known defective fifth wheel and caused the accident. Appellee clearly knows this, as it has admitted to the Court of Appeals that "the trailer leaned and then turned on its side, spilling coal and coming to rest." (Fuel Transport's Court of Appeals' Brief, pp. 1-2). The significance of past load records for the truck were to show that the truck was constantly and repeatedly loaded greatly in excess of the manufacturer's design limits which contributed to its dilapidated condition and increased the need inspections and repairs (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)(Combined Brief, p. 6).

[and] [t]he trial court erred in allowing the jury to consider punitive damages,"[2] (3) that "[b]y the time of trial, there was no dispute about ownership,"[3] and (4) that "[a] reasonable person would be 'involved' in an accident if a parent had died in one"[4] (Combined Brief, pp. 7, 11, 39, and 52, respectively).

While the foregoing and other misstatements of facts are troubling, as are other aspects of this appeal (*e.g.*, Appellee's tendency to raise arguments that were long ago waived), perhaps the most significant problem with Appellee's opening brief is its attempt to generate confusion by raising a plethora of unpreserved, waived, and settled arguments to draw the attention away from well settled rules of appellate review for the Trial Court's denial of a directed verdict motion. This dilution tactic no doubt contributed to the error in the Court of Appeals opinion reversing the punitive damages award. That is, while the Court of Appeals at first *recited* the correct standards for reviewing a Trial Court's denial of a motion for directed verdict, it clearly failed to *apply* those standards properly and, instead, retroactively imposed the "clear and convincing" standard of KRS 411.184(2) and

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[2] Obviously, Fuel Transport claims that it is a "small" company so as to suggest that it cannot afford to pay the verdict. If there had been any such evidence at trial, which there was not, such evidence would have opened the door for evidence of Appellee's liability insurance and other means of paying the judgment which do not affect Appellee's bottom line. Moreover, it is well established that "[t]here is no law applicable to the poor that is not likewise applicable to the rich, nor is any law applicable to the rich that is not likewise applicable to the poor, and an endeavor on the part of an attorney or litigant to inflame . . . by referring to the financial status of either of the parties is improper." *Walden v. Jones*, 158 S.W.2d 609 (Ky. App. 1942). Appellee's inclusion of "truck drivers like Mr. Vanderpool" is a similar ploy to elicit undeserved sympathy; as Mr. Vanderpool has satisfied his portion of the judgment and is not a party to this appeal.

[3] As the Court of Appeals correctly found, Fuel Transport's claim that "[b]y the time of trial, there was no dispute about ownership" is clearly refuted by the record below. *See* Court of Appeals' Opinion, p. 16 ("However, contrary to appellants' assertions, it appears from the record that *was* still at issue in this case as appellants maintained their position during the trial that they neither owned the truck nor employed Vanderpool on the date of the accident.")(emphasis in original).

[4] Appellee's assertion that "[a] reasonable person [who was not physically involved in an accident] would be [metaphysically] 'involved' in an accident if a parent had died in one" also underscores the lack of merit to the arguments raised in its cross appeal.

substituted its own opinion about the weight of the evidence for that of the Jury. The Court of Appeals reversed the Trial Court's Judgment upholding the Jury's unanimous punitive damages verdict as follows:

> [U]nder KRS 411.184(2), the **plaintiff must prove outrageous conduct by "clear and convincing evidence." 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.
>
> Similar to *Kinney*, an award of punitive damages in this case would "eliminate the distinction between ordinary and gross negligence." *See Kinney*, 131 S.W.3d at 359. As the Court stated:
>
> > Nearly all auto accidents are the result of negligent conduct, though few are sufficiently reckless as to amount to gross negligence, authorizing punitive damages. We are of the opinion that punitive damages should be reserved for truly gross negligence[.]
>
> *Id.* In the case at hand, the record is devoid of **clear and convincing evidence** proving that the action of Fuel Transport comprised gross negligence.. Here, the jury was presented with the facts that the driver of a coal truck got in the wrong lane and then overcorrected causing the load to overturn. Tragically, a few moments later the vehicle in which the decedent was a passenger crashed into the coal debris. Furthermore, it is suggested that Fuel Transport should have checked the fifth wheel after repurchase of the truck. **But nowhere did Isaac warn or even imply to Fuel Transport that without checking the fifth wheel, an accident was likely to occur. An apparent conversation between the seller of the truck and Fuel Transport's management suggestion (*sic*) that the fifth wheel may need attention does not establish reprehensible or malicious behavior for an award of punitive damages.** The Estate did not provide **clear and convincing evidence** showing Fuel Transport's actions to be "outrageous" conduct which was willful and malicious.
>
> Here, the trial court overruled Fuel Transport's motion. But even viewing the evidence in the strongest possible light for **the appellant** (*sic*), **we cannot concur** with the trial court's decision to overrule Fuel Transport's directed verdict motion. Therefore, we reverse the trial court's denial of the directed verdict and vacate the award of punitive damages.

Court of Appeals' Opinion, pp. 13-15 (emphases added). First, the Court of Appeals' opinion ignores the well-known rule that "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 Hospital, Inc.*, 127 S.W.3d 663, 673 (Ky. App. 2004) (overruled on other grounds) (internal quotation omitted), even though the Court of Appeals plainly twice recited a similar rule on pages 8 and 20-21 of its opinion. Instead, the Court of

Appeals displaced the "any evidence" standard with a "clear and convincing" standard.

Second, the Court of Appeals' punitive damages analysis did not construe the evidence in a light most favorable to the proper party (*i.e.*, the Estate of Topsie Gibson), who was the *appellee* in the lower appellate court, rather than the *appellant*. Indeed, the literal text of the opinion shows that the Court of Appeals did just the opposite, by construing the evidence in "the strongest possible light for the **appellant**" (Court of Appeals' Opinion, p. 14)(emphasis added), which was Fuel Transport, rather than the Estate. The failure to construe the evidence in a light most favorable to the proper party is perhaps best illustrated by Page 14 of the Court of Appeals' opinion which describes the evidence of Fuel Transport's prior knowledge of the defective nature of the fifth-wheel mechanism in the following language:

> [N]owhere did Isaac *warn or even imply* to Fuel Transport that without checking the fifth wheel, an accident was likely to occur. An *apparent* conversation between the seller of the truck and Fuel Transport's management suggestion (*sic*) that the fifth wheel *may need attention* does not establish reprehensible or malicious behavior for an award of punitive damages.

Court of Appeals' Opinion, p. 14 (emphases added). However, witness Linville Isaac specifically testified that he told and showed Appellee's management, David Clifton, and driver, Troy Vanderpool, that the fifth wheel was "wore out" by placing a pry-bar and raising the mechanism up and down to reveal approximately 1-1 ½ inches of free slack (VR No. 1A; 12/3/07; 1:53:25-1:59:50). From this testimony, properly construed, the Jury could easily and reasonably infer that Isaac informed and showed Clifton and Vanderpool "that there was a dangerous degree of slack in the fifth wheel" (Court of Appeals' Opinion, p. 12), and that such notice was a clear warning of the obvious danger, rather than a mere suggestion that the "fifth wheel *may* need attention" as the Court of Appeals inaccurately characterized. Once Appellee learned of the condition of the fifth wheel, the Jury could reasonably infer that it also knew, as a commercial motor carrier, that it was required to further inspect and

repair the defect before placing the truck back into heavy service upon the public roadways, especially given its duty to keep its fleet in safe operating condition at all times. Therefore, the Jury could also reasonably infer (either by clear and convincing evidence or otherwise) that Appellee's subsequent decision to haul coal without even first inspecting the fifth wheel showed a reckless disregard for the lives, safety and property of others. In other words, viewing the evidence in a light most favorably to the Estate, the Jury could reasonably infer that Mr. Isaac's disclosures about the "worn out" condition of the fifth-wheel, coupled with his physical demonstration of the slack in the mechanism, constituted a clear warning to any reasonable commercial motor carrier that it would be dangerous, indeed reckless, to haul coal with this truck until the fifth-wheel mechanism was inspected and, if necessary, repaired. The Court of Appeals initially acknowledged this fact when it correctly characterized the evidence as showing that: "[Isaac] informed both David Clifton, the owner of Fuel Transport, and Vanderpool that there was a dangerous degree of slack in the fifth wheel." (Court of Appeals' Opinion, p. 12)(emphasis added).

Moreover, although the Court of Appeals apparently thought that Appellee needed a specific warning that "an accident was likely to occur," it apparently failed to appreciate that, viewing the evidence in a light most favorable to the Estate, Appellee was aware of the likely (indeed, inevitable) consequences of hauling coal without further repairs to the fifth wheel, as Clifton testified that he knew that Isaac had been involved in a highly similar uncoupling accident with the same truck when another trailer broke free from the same fifth-wheel shortly before Fuel Transport re-purchased it (VR No. 1A; 12/3/07; 1:57:07; 3:57:05-3:57:20, 4:07:02-4:09:59; VR No. 2; 12/4/07; 2:25:01-2:28:18). Further, the Jury could have reasonably inferred from Isaac's verbal warning and demonstration of the defect, along with Clifton's contemporaneous knowledge that Isaac had been in an accident attempted repairs

to the fifth wheel (VR No. 1A; 12/3/07; 3:58:04-3:59:26; VR No. 2; 12/4/07; 4:04:45-4:05:52), that Fuel Transport recklessly disregarded an unreasonable risk to the lives and safety of others by placing the truck into heavy service the very day following its re-purchase without performing any inspection or repairs after being shown the "dangerous degree of slack in the fifth wheel." (VR No. 1A; 12/3/07; 1:57:07; 3:57:05-3:57:20, 4:07:02-4:09:59; VR No. 2; 12/4/07; 2:25:01-2:28:18). This was particularly so since the Jury here was instructed, without objection, that Appellee was a charged with a special affirmative legal duty to protect the public by keeping its vehicles "in a safe operating condition at all times"—regardless of whether it had received a specific warning or not.[5]

The Court of Appeals' "opinion" also did not adhere to other basic rules of appellate review of a denial of a motion for directed verdict. As stated in *Bierman v. Klapheke*, 967 S.W.2d 16 (Ky. 1998), these rules required the Court of Appeals to affirm the punitive award unless it was shown "that the verdict was palpably or flagrantly against the evidence so as to indicate that it was reached as a result of passion or prejudice." *Id.* at 18. Furthermore, "[o]nce 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." *Id.* at 18 (citation omitted). 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., Moore v. Asente*, 110 S.W.3d 336, 353-354, (Ky. 2003). "[A] motion for a directed verdict raises only questions of law as to whether there is **any evidence** to support a verdict," and "the court will direct a verdict [only] where there is

[5] KRS 281.600 and 601 KAR 050 1:005, have adopted the Federal Motor Vehicle Safety Regulations as the minimum requirements for commercial motor carriers. Therein, 49 CFR 396.7 commands 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." (T.R. Vol. V, p. 636).

**no evidence** of probative value to support the opposite result and the jury may not be permitted to reach a verdict based on mere speculation or conjecture." *Gibbs v. Wickersham*, 133 S.W.3d 494 (Ky. App. 2004)(emphasis added)(citations omitted). "In reviewing the sufficiency of evidence, the appellate court must respect the opinion of the trial judge who heard the evidence" because **"[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."** *Bierman*, 967 S.W.2d at 18 (emphasis added). Accordingly, "[w]here 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." *Id.* at 19 (citation omitted).

Here, neither the Trial Court nor the Court of Appeals determined that the punitive damages verdict was so flagrantly against the evidence as to indicate that it was reached as a result of passion or prejudice. Nor did the Court of Appeals find that the Trial Court was "clearly erroneous" in denying Appellee's directed verdict motion, which is a greater standard. Instead, the only bases for the Court of Appeals' reversal of the Jury's unanimous punitive damages verdict and the Trial Court's denial of Appellee's directed verdict motion is the Court of Appeals' declaration 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"[6] and its conclusion that "we cannot concur with the trial court's decision to overrule Fuel Transport's directed verdict motion."[7] (Court of Appeals' Opinion, pp. 13, 16).

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[6] Thus, the Court of Appeals found it necessary to violate its own admonition that "we will not substitute our opinion for that of the jury" and, in fact, substituted the Jury's Verdict with its own relatively uninformed opinion. See Court of Appeals' Opinion, p. 9, citations omitted).

[7] Thus, the Court of Appeals violated the prohibition in *Bierman* that "Once the issue is squarely presented to the trial judge, who heard and considered the evidence, a reviewing

In fact, the Court of Appeals could not have found that the Trial Court was "clearly erroneous" in denying Appellee's motion for a directed verdict or that there was "no evidence" to support a factual finding of recklessness, given Isaac's testimony that he told Clifton and Vanderpool that the fifth wheel was worn out and showed them the nature and extent of the dangerous degree of slack, and Clifton admitted that he was aware of Isaac's prior accident involving this same truck and this same fifth wheel and that Isaac had recently attempted repairs to the fifth wheel. This testimony, as was found by the Jury, coupled with Appellee's status as a motor carrier, provided significantly more than substantial evidence upon which the Jury and the Trial Court could reasonably infer that Appellee was subjectively aware of the dangerous degree of slack in the fifth wheel, but nevertheless consciously disregarded that risk by immediately placing the truck into service without inspection or repair of the fifth wheel. And although Appellee claims that Isaac's testimony about his warnings was not credible, the Jury was free to find otherwise, particularly in light of the fact that Isaac, unlike Appellee's witnesses, had not previously submitted a false affidavit regarding other disputed issues in the case (*i.e.*, ownership of the truck and employment of Vanderpool). *See Bierman*, 967 S.W.2d at 19 (citation omitted).

Another legal error apparent from the Court of Appeals' decision is its determination that Fuel Transport's misconduct "did not rise to the level of wanton or reckless disregard for others." (Court of Appeals Opinion, p. 13). However, in *Steel Technologies, Inc. v. Congleton*, 234 S.W.3d 920, 931 (Ky. 2007), this Court determined that punitive damages were properly awarded in a highly similar case where a wrongful death was caused when a steel coil that fell from a truck because the driver there had secured the coil with three (3) steel chains instead of five (5) as required by the motor carrier regulations. *Id.* Like *Congleton*, the failure here to

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keep the vehicle in safe operating conditions at all times caused an obstruction in the highway which caused an innocent person's foreseeable death. In this case, though, not only the load, but the entire trailer came loose, and for the second time within approximately a month after a verbal warning and demonstration of the defect. In *Congelton*, this Court stated 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.

*Id.* (emphases added). In this action, Fuel Transport has repeatedly admitted that "Certainly, Ms. Gibson suffered the worst harm: death" (Combined Brief, p. 38; Court of Appeals' Brief, p. 16). Indeed, the harm in this case was even greater than the violent death in *Congleton* in that Mrs. Gibson also consciously smothered to death over the course of seven days while she was forcibly restrained to a hospital mattress. Likewise, the Juries in both cases found, as a matter of fact, that the conduct in question involved a reckless disregard for the lives and safety of others. Moreover, there was no evidence that the driver in *Congleton* disregarded his own knowledge of a prior accident or ignored a specific verbal warning and demonstration about the danger. Therefore, Mrs. Gibson's death was clearly no less reprehensible than the death in *Congleton*, and the Court of Appeals' statement that the evidence here does not "establish reprehensible or malicious behavior necessary for an award of punitive damages" is clearly erroneous. Indeed, under the logic of the Court of Appeals here, the punitive damages awarded in *Congleton* should have been reversed simply because no one specifically warned the driver there that, by using only three (3) chains instead of five (5), "an accident was likely to occur." On the other hand, 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.*, 179 S.W.3d 785 (Ky. 2005)($2.5 million for defamation); *Sufix, USA, Inc. v. Cook*, 128 S.W.3d 838 (Ky. App. 2004)($3 million for injury to leg by defective weed-eater); *Farmland Mutual Insurance v. Johnson*, 36 S.W.3d 368 (Ky. 2000)($2 million for economic losses).

The same principle approved in *Congleton* and *Sufix*—confirming the propriety of punitive damage awards in cases where a person "cavalierly subjects the public to an unreasonable risk of catastrophic injury" (128 S.W. 2d at 842) – was even recently extended to cases of purely financial harm in *Peoples Bank of Northern Kentucky, Inc. v. Crowe Chizek and Co.*, LLC, 277 S.W.3d 255, 268 (Ky. App. 2008), where the Court found that a jury must be the final arbiter in such cases because:

> **Where the potential for harm is great and directly evident, Kentucky has found that a reckless disregard for the rights of others may be inferred from the negligent act.** *See Horton v. Union Light, supra* at 387 (a gas company could be found grossly negligent for its failure to adopt procedures to detect and contain gas leaks); *Phelps v. Louisville Water Co., supra* at 52 (employer's failure to adopt procedures to protect the lives and safety of its employees and concealment of hazardous conditions may be considered grossly negligent); and *Gersh v. Bowman*, 239 S.W.3d 567, 572 (Ky. App. 2007) (driver who drives well in excess of speed limit on a curvy road may be considered to be grossly negligent).

The final, and most significant, error committed by the Court of Appeals concerns its *sua sponte* decision to retroactively subject the Estate's punitive damages award to the "clear and convincing" burden of proof set forth at KRS 411.184(2), and then to determine this disputed factual issue as a matter of law. On this point, it should first be observed that Fuel Transport never argued to the Trial Court that it was entitled to a jury instruction or a directed verdict based upon the statutory "clear and convincing standard."[8] Indeed, at trial,

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[8] Fuel Transport does not identify where it preserved its alleged entitlement to the "clear and convincing" language, claiming only that "[b]y objecting to punitive damages under any standard [in its motions for directed verdict], Fuel Transport necessarily objected to punitive under a clear and convincing standard." (Combined Brief, p. 47). In fact, Appellee did not mention or contest the Trial Court's use of the common law preponderance standard. That

Fuel Transport failed to propose any punitive damage instructions of its own, and also did not make any contemporaneous objection to the "gross negligence" standard ultimately used in the instructions or its definition as "a reckless indifference or disregard for the rights, lives, and safety of other persons, including Topsie Gibson." (T.R. Vol. VII, 969-971). Likewise, although Appellee moved for a directed verdict on the punitive claim, its arguments advanced in support of such motion did not remotely mention the "clear and convincing" standard set forth at KRS 411.184(2). Having failed to invoke the "clear and convincing" language it now claims was prejudicially omitted before to the Jury's verdict, Appellee also failed to mention the matter in its post-trial motions. Rather, after trial, Appellee merely objected to the punitive instructions based on the statutory definition of "malice" contained in KRS 411.184(1)(c), relying upon the dissenting opinion of Justice Cooper in *Williams v. Wilson*, 972 S.W.2d 260 (Ky. 1998), and by tracing the losing arguments in *Phelps v. Louisville Water Co.*, 103 S.W.3d 46 (Ky. 2003). (T.R., Vol. V, pp. 662-664).

Even on appeal, Fuel Transport did not make any developed argument regarding the "clear and convincing" language, preferring instead to argue, for the first time on appeal, that the standard for punitive damages should have been "truly gross negligence" under the alleged holding in *Kinney v. Butcher*, 131 S.W.3d 357, 359 (Ky. App. 2004)(Court of Appeals' Opinion, p. 10). This *Kinney* argument, however, was rejected by the Court of Appeals, which correctly "disagree[d] with [Fuel Transport's] attempts to characterize *Kinney* as setting forth a new standard for gross negligence." (Id.) Moreover, as was at least initially discerned by the Court of Appeals, the holding of *Kinney* is inapposite to the punitive damages award

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said, "a general motion for directed verdict cannot be used to preserve an issue on appeal with respect to a jury instruction." *Pryor v. Commonwealth*, 2011 WL 2416744, at *3 (Ky. App. 2011)(citations omitted). Further, "a general objection without specification is insufficient to preserve the [alleged] error." *See Gersh v. Bowman*, 239 S.W.3d 567, 574 (Ky. App. 2007)(internal quotation omitted). Accordingly, Fuel Transport clearly waived any "clear and convincing" argument. *See Phelps v. Louisville Water Co.*, 103 S.W.3d 46, 52 (Ky. 2003).

here, as "the trial court did not allow an instruction on punitive damages against Vanderpool for his [driving] negligence ... punitive damages were considered solely against Fuel Transport based on the Estate's argument that Fuel Transport, in failing to inspect, repair or maintain its vehicle, evidenced a wanton or reckless disregard for the safety of others...." (Id. at pp. 10-11). Notably, Fuel Transport has not cross-appealed these appellate findings.

Nevertheless, the Court of Appeals improperly invoked KRS 411.184(2) and decided the weight and credibility of the evidence as follows: "Moreover, under KRS 411.184(2), the plaintiff must prove outrageous conduct by 'clear and convincing evidence.' **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. at p. 13)(emphasis added). However, because Appellee never raised the "clear and convincing" burden under KRS 411.184(2) with the Trial Court in the first instance, and never requested any jury instructions incorporating such language, the Court of Appeals' was wholly without authority to raise such an argument on Fuel Transport's behalf. *See, e.g., Ten Broeck Dupont, Inc. v. Brooks*, 283 S.W.3d 705, 734 (Ky. 2009). "Furthermore, a general motion for directed verdict cannot be used to preserve an issue on appeal with respect to a jury instruction." *Pryor v. Commonwealth*, 2011 WL 2416744, at *3 (Ky. App. 2011)(citations omitted).

Moreover, even if the elevated statutory standard had been properly raised and preserved, the Court of Appeals was still not authorized to apply the "clear and convincing" standard to the Trial Court's denial of Fuel Transport's directed verdict motion for directed verdict. Instead, the Court of Appeals should have deferentially determined whether the Trial Court had been "clearly erroneous" in denying Fuel Transport's directed verdict motion. This error would have been prevented in the first place if the Court of Appeals had adhered to its own prior recitation of a correct rule of law that "a party is entitled to have [her] theory of

the case submitted to the jury if there is *any evidence to sustain it.*" (See Court of Appeals' Opinion, p. 9)(citations omitted)(emphasis in original)). The Court of Appeals' polar inconsistency on this point of law manifested clearly when, later in its opinion, it "disagree[d]" with Appellee's argument that the "the jury instructions... incorrectly stated the standard for punitive damages," and "**agree[d] with the trial court's instruction on punitive damages as well as the decision to deny the posttrial motion regarding the punitive damages instruction**," (Court of Appeals' Opinion, pp. 20, 22)(emphasis added), even though the instructions did not contain "clear and convincing" language.

It is well established that an appellate court may not reverse a trial court's denial of a motion for directed verdict merely because it "cannot concur" as to whether the evidence was sufficiently "clear and convincing." It has also been well recognized that the burden of proof applicable to motions for directed verdict requires only a "scintilla of evidence," or "substantial evidence," rather than anything "clear and convincing." *Wheeler v. Andrew Jergens Co.*, 696 S.W.2d 626, 627 (Ky. App. 1985); *see also Grant v. Wrona*, 662 S.W.2d 227, 229 (Ky. App. 1983); *James v. England*, 349 S.W.2d 359, 361 (Ky. App. 1961)(quoting *Wadkins' Adm'x v. Chesapeake & Ohio Railway Co.*, 298 S.W.2d 7 (Ky. App. 1956)). The Court of Appeals acknowledged this more than a quarter century ago in the decision in *Hibbs v. Chandler*, 684 S.W.2d 310, 312 (Ky. App. 1985) when it stated that the "'clear and convincing' evidence is a standard of persuasion to be applied by the trier of the fact in a trial setting." Nearly four decades before *Hibbs*, the Court of Appeals expressed the idea more fully as follows:

> **The expression 'clear and convincing proof' has been used in numerous opinions, but in none of them has it been used under such circumstances as to justify this court in disregarding the finding of the jury or the court below where there is substantial evidence to support it. It is the fact-finding body which must be convinced**. It hears the evidence and is charged with the duty of passing upon the credibility of the witnesses. . . .**[T]he rule that the evidence must be clear and convincing is satisfied although contradicting evidence is introduced by the opposing party. . . .where the evidence . . . is sufficiently**

> **clear and convincing, we cannot reverse the judgment on the ground that such evidence is contradicted by other evidence, because the right to pass upon the credibility of witnesses is not vested in this Court**. The only question which we have to decide in respect to the sufficiency of the evidence, is whether that which tends to prove the alleged fraud or mistake [or, in this case, gross negligence], if standing alone, without contradiction, would make out a prima facie case.

*Glass v. Bryant*, 194 S.W.2d 390, 393-394 (Ky. App. 1946)(emphases added). This rule regarding the inapplicability of the ultimate burden of persuasion to directed verdict motions make perfect sense, as any judicial effort to determine whether the burden of persuasion has been satisfied appears inherently incompatible with the prohibition on weighing the evidence in the directed verdict context. *See, e.g., Ellison v. R & B Contracting, Inc.*, 32 S.W.3d 66, 75-76 (Ky. 2000). The Court of Appeals, however, apparently overlooked these important precepts when it raised *sua sponte* a "clear and convincing" argument on Appellee's behalf.

Furthermore, the Court of Appeals' analysis fails to reflect that gross negligence is a finding of fact that must be made, if at all, by a trier of fact, and, once made, usually cannot be resolved or overturned as a matter of law by an appellate court, even if the latter would have decided the case differently (or, in this case, "cannot concur" with the Trial Court). *See Hardin v. Savageau*, 906 S.W.2d 356, 358-359 (Ky. 1995)[9]; *Garlock Sealing Technologies, LLC. v. Robertson*, 2011 WL 1811683, at *9 (Ky. App. 2011)(unpublished). "[A] finding a fact is

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[9] In *Hardin*, this Court observed as follows regarding the clear and convincing evidence standard:

> The required instruction, embracing the applicable legal standard, requires the jury to make a **factual** determination whether it has been convinced of a defendant's guilt to a high degree of certainty. **Requiring such a degree of certainty, however, does not change the nature of the inquiry from factual to legal. It merely attempts to insure that the jury will be possessed of a proper attitude of reluctance** . . . . In each instance, the jury is called upon to make a **factual** determination based on the legal standard stated in the instructions. In each, **the required phrase is capable of being understood and applied by jurors of ordinary intelligence**."(emphases added).

906 S.W.2d at 358-359 (emphases added).

erroneous as a matter of law and may be disturbed on appeal only if it is so unreasonable under the evidence that a contrary finding is compelled." *Purchase Transp. Services v. Estate of Wilson*, 39 S.W.3d 816, 817-818 (Ky. 2001) (citations omitted). The Court of Appeals' Opinion here did not, and could not, conclude that a "contrary finding" of no recklessness was "compelled" on the current record. Indeed, the Court of Appeals plainly acknowledged that, depending on whether the evidence was viewed in favor of the "appellant" (*i.e.*, Fuel Transport"), or "appellee" (*i.e.*, the Estate), it could either view Isaac's warning and demonstration of the "worn out" and defective fifth wheel as actual notice "that there was a dangerous degree of slack in the fifth wheel," as it originally did (Court of Appeals' Opinion, p. 12), or as merely "[a]n apparent...suggestion that the fifth wheel may need attention" as it ultimately did (Id., p. 14). Thus, the Court of Appeals' decision to import the "clear and convincing" standard of KRS 411.184(2) into its review of the Trial Court's denial of Fuel Transport's directed verdict motion was clearly erroneous on multiple grounds.

The Court of Appeals' decision to raise the "clear and convincing" argument on Fuel Transport's behalf also means that the propriety of its opinion now rests upon the constitutionality of KRS 411.184(2), a highly dubitable proposition in light of this Court's rationale and holding in *Williams v. Wilson*, 972 S.W2d 260 (Ky. 1998). In *Williams* a near-unanimous Court declared KRS 411.184(1)(c)'s definition of "malice," which "requires proof of a subjective awareness that harm will result," to be unconstitutional under the jural rights doctrine. In the words of the *Williams* majority, the definition of "malice" contained in KRS 411.184(1)(c) was unconstitutional because "it amounts to a vastly elevated standard for the recovery of punitive damages and a clear departure from the common law." *Id.* at 264. Although *Williams* did not decide the constitutionality of KRS 411.184(2), *id.* at 269, the Court's decision in *Hardin* indicates that if it had been forced to decide the issue in *Williams*,

the Court would have also found that the statutory "clear and convincing" standard to be an unconstitutionally "vastly elevated standard for the recovery of punitive damages." That is, *Hardin* unanimously expressed the opinion that "[t]he nature of the inquiry is **substantially different** when the jury must say whether it 'is satisfied from the evidence' or whether it 'believes by clear and convincing evidence.'" 906 S.W.2d at 358 (emphasis added); As was eloquently stated by Justice Palmore: "Logically, it would seem that the requirement of "clear and convincing" evidence [as stated in KRS 411.184(2)] 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 [as KRS 411.184(1)(c)]." John S. Palmore, Kentucky Instructions to Juries, 5th Edition; (Matthew Bender: 2006), Comment to § 39.15).

While Appellee's combined brief to this Court invites the Court to reverse the rationale of *Williams*, it has given no sound legal reason for doing so. That is, Fuel Transport's many criticisms of the jural rights doctrine *vis-à-vis* the clear and convincing standard of KRS 411.184(2) are the very same ones that were cogently disposed of by the *Williams* majority regarding the statutory definition of malice found in KRS 411.184(1)(c). Additionally, it is significant that Fuel Transport's cross-motion for discretionary review did not indicate that Fuel Transport had preserved, or would be making, an argument that *Williams* (or any other related precedent) was unconstitutional or wrongly decided.

Moreover, even if the clear and convincing standard had been properly preserved and could be constitutionally applied, the standard was plainly satisfied in this case, and a directed verdict would have been improper in light of conflicting nature of the sworn proof presented at trial. *See, e.g., Glass*, 194 S.W.2d at 393[10]; *Bierman*, 967 S.W.2d at 19 ("[w]here

[10] In *Glass*, the Court also stated as follows:

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."); *Cf. McCollum v. Garrett*, 880 S.W.2d 530, 531 (Ky. 1994)(where testimony "of the parties [is] in conflict, for the purpose of ruling on the motion [for judgment as a matter of law], the testimony of the party against whom the motion is made must be accepted."). Here, there was direct evidence that Appellee had acted recklessly, since Isaac unequivocally testified that he not only told but also showed Clifton and Vanderpool the defect in question, and Clifton admitted that Fuel Transport did not make any further inspections or repairs to the fifth wheel before the truck was returned to service even though he was aware that Isaac had recently had an accident and attempted repairs to the fifth wheel. In fact, not only was the evidence in this case, fairly construed, sufficient to satisfy the "vastly elevated" statutory clear and convincing standard, *see Glass*, 194 S.W.2d at 393, it was also substantially more powerful and direct than the evidence presented in *Congleton* where there was no evidence of a specific demonstration of the nature of the danger as there was in this case.

## II. THE ARGUMENTS RAISED IN FUEL TRANSPORT'S CROSS-APPEAL ARE WITHOUT MERIT AND MOOT

Appellee's first argument regarding its cross-appeal (see Fuel Transport's Cross-Motion for Discretionary Review, p. 5; Question of Law Presented No. 1), is the argument that the Court "should order a new trial because the punitive award is excessive" under *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), as (allegedly) applied in *Congelton* (Combined Brief, pp. 37-38). Again,

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> The expression 'clear and convincing' ... means that the evidence in support ... is not vague, ambiguous or contradictory, and comes from a credible source. Proof that is clear and convincing . . .does not lose its character merely because it is disputed or contradicted by evidence introduced by the opposing party. . . .It is sufficient if there is proof of a probative and substantial nature carrying the weight of evidence sufficient to convince ordinarily prudent minded people.

*Id.* at 393 (internal quotations and citations omitted)(emphases added).

however, this argument was plainly waived as it was not raised before the Trial Court. Though Appellee now claims that it presented an argument to the Trial Court under the three "guideposts" in *Gore* and *Campbell* (citing T.R. 664-666; Combined Brief, p. 37, n. 6), this is simply not the case.[11] Accordingly, this Court should not review Appellee's current "excessiveness" argument regarding the punitive damages award. *See, e.g., Lovett v. Com.*, 103 S.W.3d 72, 84 (Ky. 2003); *Abuzant v. Shelter Ins. Co.*, 977 S.W.2d 259, 262 (Ky. App. 1998)(quoting *Crain v. Dean*, 741 S.W.2d 655, 658 (Ky. 1987)). Moreover, notwithstanding waiver, a *de novo* review of the punitive award here under the three *Gore* and *Campbell* "guideposts" would not change the result. This is primarily because, as to the first (and "most important") of the "guideposts," the misconduct and consequences at issue here were clearly more reprehensible than that at issue in *Congleton*, where the Court affirmed an identical punitive damages award even though the defendant there had not received a specific warning and demonstration that an accident was likely to occur and the decedent there died instantly and did not smother to death over the course of seven days, as herein. 234 S.W.3d at 931. As to the second "guidepost," the less than 1:1 ratio between the punitive award ($2 million, identical to the award in *Congleton*) and the compensatory award ($2.1 million) here strongly suggests, as in *Congleton*, no "outrageous[] dispar[ity]." *Id.* at 931-

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[11] First, Fuel Transport failed to make any objections at trial with regard to the language of the punitive damages instruction, which stated that the verdict was "not to exceed $2,000,000.00." (Trial Court Instruction No. 8). Because the award did not exceed that amount, the alleged error is not preserved. *See Gersh v. Bowman*, 239 S.W.3d 567, 574 (Ky. App. 2007). Secondly, Fuel Transport failed to raise an "excessiveness" argument in its post-trial motions, allegeding instead only that the instructions did not meet the statutory "malice" standard and the same flawed arguments rejected in *Phelps v. Louisville Water Co.*, Ky. 103 S.W.3d 46 (2003). (T.R. Vol. V, pp. 662-664.). As a result, the Trial Court specifically found that "the argument is not raised that the award violates the guidelines set out in...*Gore* [and] *Campbell*...and related cases." (T.R. Vol. VII, 970-971). Fuel Transport has neither alleged nor proven that the Trial Court erred in finding waiver here.

932. 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"), *Congleton* was a comparable case that gave Appellee specific notice that substantial (identical) punitive damages had been awarded in a nearly identical but less reprehensible case where the motor carrier regulations were ignored. *Id.* at 931 (quoting *Campbell*); *see also Sufix*, 128 S.W. 3d at 843("Nor was the three million dollar punitive damage award excessive. It doubled Cook's compensatory damages, which is a penalty both comparable cases and Supreme Court precedent indicate a manufacturer who cavalierly subjects the public to an unreasonable risk of catastrophic injury should expect."). Accordingly, for the reasons expressed in *Congleton* (and *Sufix*), the punitive damages award at issue should be found within permissible limits.

Secondly, Fuel Transport's cross appeal seeks to convince the Court that it "should order a new trial because the Jury was inflamed by passion and prejudice." (Combined Brief, p. 39). The crux of this contention is Fuel Transport's bare assertion that "the Estate's counsel's repeated exploitation of a affidavit that Fuel Transport filed earlier in the case to support a summary judgment motion" unfairly inflamed the jury and/or resulted in a violation of KRE 403 (Combined Brief, pp. 39-41). However, as Fuel Transport ultimately acknowledges, both the Trial Court and the Court of Appeals determined that the affidavit was used for proper and probative impeachment purposes (Court of Appeals' Opinion, pp 16-18). Furthermore, the falsity of the affidavit was not remotely used for purposes of assessing punitive damages and did not "unduly prejudice[]" Fuel Transport or "inflame the passions and prejudice of the jury." (Id., pp. 18-19). Additionally, any argument regarding the affidavit was waived because Fuel Transport never "made any specific objections to the use of the Fuel Transport's affidavit during the testimony of Clifton nor did they timely request the court to limit the jury's consideration of that affidavit." (Id. at 18). Accordingly,

for several reasons, the Court of Appeals rightly concluded that the Trial Court did not abuse its discretion in admitting Fuel Transport's affidavit into evidence and in permitting cross-examination thereon. While Fuel Transport argues that the Court of Appeals somehow erred in upholding the Trial Court's evidentiary decisions in this regard, it has not even come close to showing an actual error was committed below with respect to the affidavit.

Fuel Transport's third cross-appellate argument implores the Court to "reverse to $2 million award for pain and suffering and remand for a new trial" because the compensatory damages award is "unsupported by the evidence and necessarily based on passion and prejudice." (Combined Brief, p. 42). First, as was correctly noted by the Court of Appeals, this argument was clearly waived because Fuel Transport did not object to the $2 million limitation for pain and suffering contained in the jury instructions, and the jury did not award an amount in excess of such limitation. *See Gersh v. Bowman*, 239 S.W.3d 567, 574 (Ky. App. 2007). Additionally, "there was [adequate] evidence presented [in the form of Mrs. Gibson's medical records, the testimony of Dr. David Denning and the testimony of Carolyn Wogomon] that Topsie was responsive to stimuli, that she was repeatedly given pain medication (which would indicate a continuation of pain), and that she had intervals of at least partial consciousness from the time she suffered the injuries until her death." (Court of Appeals' Opinion, p. 20). Fuel Transport has not shown that the foregoing conclusion was contrary to the weight of the evidence or was otherwise erroneous. Finally, while Appellee's *appellate* counsel claims that '[i]n all likelihood, except for the night of the accident [], Ms. Gibson was neither in pain nor suffering for last week of her life," (Combined Brief, pp. 43-44), there was never any affirmative evidence presented to support this contention, which is why Appellee's *trial* counsel was left to ignore the fact that Mrs. Gibson had to be forcibly restrained to her mattress and argue before the Jury 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. *** **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 [of pain and suffering], a hundred and fifty thousand dollars. We think that would be fair. Its not that other numbers wouldn't be. . . . And if you think something more than that is appropriate, then you award it.**

VR No. 3, 12/5/07; 10:41:40-10:44:16 (emphases added).

Appellee's fourth cross-appeal argument is that the jury instructions regarding punitive damages should have included "clear and convincing" and "willful" language [previously addressed] and that the instructions as to the compensatory damages award should have included language limiting the award to the decedent's "conscious" pain and suffering. Again, however, these arguments were not preserved, as Fuel Transport failed to tender jury instructions regarding punitive damages and did not verbally request or provide the Trial Court with an instruction, or cite any authority mandating,[12] any "conscious pain and suffering" language to begin with. (Court of Appeals' Opinion, pp. 21-22).

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[12] The case cited by Fuel Transport for the "consciousness" argument is *Vitale v. Henchey*, 24 S.W.3d 651 (Ky. 2000), where the Court stated that an award for pain and suffering may be made "if the injured person was 'partly conscious,' had intervals of consciousness, or was conscious for a short time before death." *Id.* at 659 (citation omitted). Having been seriously injured on the evening of November 2nd, there was no evidence presented at trial that Mrs. Gibson was ever rendered completely unconscious at any subsequent time until her death—only that at times she may have been rendered unconscious by her pain medication. On the other hand, there is ample of evidence that she was conscious and in obvious pain for much of the time before her death (VR No. 2; 12/4/07; 1:20:04-1:24:49; Plaintiff's Trial Exhibits 1, 2, and 3; VR No. 1B; 12/3/07; 4:41:14-4:45:16; VR No. 2; 12/4/07; 1:42:48-1:43:21). Thus, the Jury could reasonably find that Mrs. Gibson was, much of the time, "capable of experiencing pain and distress, and that [her] injuries pained and distressed [her]." *Alliant Hospitals, Inc. v. Benham*, 105 S.W.3d 473 (Ky. App. 2003).

Fifth, Appellee's claim of juror misconduct is unpersuasive, as the video record below plainly reveals that Appellee's trial counsel failed to ask the juror in question any clear or specific question to begin with. During *voir dire*, Appellee's counsel asked the following ambiguous rhetorical question:

> 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[13]] do that? Great.

(VR No. 1A; 12/3/07; 11:17:14-11:18:03). Thus, Appellee claimed in the post-trial proceedings that it was "*misled*" by "*false information given on voir dire*" when Juror Short failed to state that her father was killed in an automobile accident when she was called to the panel 20 minutes after ambiguous question was asked. (T.R. Vol. V, p. 648). For the first time on appeal, Appellee has claimed that its counsel also later asked if anyone had been "involved in a car accident" and that, coupled with the first ambiguous question, "should be adequate to prompt someone to disclose that a family member as close as a father 'killed in an accident' constitutes a prejudicial life experience as well as 'involvement' in an accident." This is patently ridiculous in that it is entirely possible for one family member to be physically involved in an accident without another family being physically involved in the same. Perhaps if Appellee actually meant to ask whether anyone was "emotionally involved" in an accident it should have used better words than being "involved in an accident," which is commonly understood to mean actual physical involvement rather than metaphysical emotional "involvement." Thus, the juror could not have been guilty of misconduct for not answering a question that was never asked. Furthermore, that a potential juror has had a family member who was once involved in personal injury litigation has never alone been

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[13] Despite being challenged in the post-trial proceedings, Fuel Transport has never advised whether its counsel asked "*Anybody can do that?*" or "*Anybody can't do that?*"

sufficient to establish categorical juror bias.

Sixth, Fuel Transport's venue objections fail to reconcile with the fact that the Trial Court correctly determined that Appellee's failed to raise any objection to venue until it moved for leave to file an Amended Answer so as "*to assert the defense of venue*," on April 27, 2006, over a year after the action was filed (T.R. Vol. II, p. 265) and subsequent to the entry of the parties' initial appearances and the conduct of discovery. Appellee fails to show that the Trial Court's decision was error, or that the Court of Appeals made a mistake in its review on this point. An abundance of authorities support (indeed, compelled) the Trial Court's and the Court of Appeals' findings of waiver of improper venue under these facts. *See, e.g., Hibbs*, 684 S.W.2d at 314 (erroneous to find lack of venue where there has been a waiver).[14]

Finally, to the extent the Appellee's cross appeal seeks a new trial regarding the award of compensatory damages, it is moot, as Fuel Transport voluntarily and unconditionally paid that award. That is, on December 4, 2009, Fuel Transport moved the Trial Court to deposit the compensatory damages award into court pursuant to CR 67.01. See Appendix hereto, Supplemental Record from Knott Circuit Court, Civil Action No. 05-CI-103.[15] During the

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[14] *See also Miller v. Watts*, 436 S.W.2d 515 (Ky. App. 1969)("unwarranted delay in making the motion amounts to a waiver of the right to seek a change of venue"); *Marsh v. Kentucky Farmers Bank*, 714 S.W.2d 502 (Ky. App. 1986)("Further, we note that appellant did not timely object to lack of venue and thereby waived it."); *Jaggers v. Martin*, 490 S.W.2d 762 (Ky. 1973)("We are of the opinion that lack of venue is not a defense that can be raised at any time and was waived by [the] failure to timely raise it"); *Shepherd v. Mann*, 490 S.W.2d 760 (Ky. 1973)("[W]e are of the opinion that the question was waived by petitioner's failure to raise it within proper time after valid service of the summons."); *McKinney v. Com.*, 445 S.W.2d 874 (Ky. 1969)("[T]he accused waives objections to venue by failure to make them in due season.")(ellipses and parenthesis omitted); *James v. Holt*, 244 S.W.2d 159 (Ky. 1951)("If the defendant does not properly raise the question . . . any objection as to venue is waived").

[15] In its motion to the Trial Court, the Appellee explained that it was seeking to "pay the full and complete amount owed to [the Estate] under the Judgment as modified by the Court of Appeals in a manner that would provide Plaintiff [] with unrestricted ability to withdraw the readily available and complete funds ... [and also] an Order stopping the accrual of post-judgment interest" on the compensatory damages award that had been affirmed by the Court of Appeals. See Appendix 1 hereto, Motion for Deposit of Money into Court and for

hearing on the motion, Fuel Transport's counsel represented as follows:

> And it's a **no strings attached deal**, but we need to get it done and to, to just say, well, we're gonna' negotiate something that doesn't work .... [And] **they're basically foregoing their appellate arguments on the compensatory**. So I mean it's not like we're just paying wanting to pay the money. **We're actually giving up rights that we otherwise would have**.

See Appendix hereto, Video Record from 12/16/09 (emphases added). In reliance on these representations, the Trial Court noted that "tender will be made to [the Estate] without conditions or stipulations" (see Appendix hereto, Docket Report dated 12/16/09), the compensatory damages award (with all accrued interest) was in fact paid, and, with the knowledge and consent of Appellee, those monies were distributed to the Estate's heirs (see Motions to Distribute Funds to Heirs) and Appellee obtained a release of the *supersedeas* bond that it had posted while appealing the compensatory award. Under these circumstances, further review of the compensatory damages award would be moot.

## CONCLUSION

For the foregoing reasons, and for the reasons stated in the Estate's opening brief as well as the Estate's briefs in the Court of Appeals, the Court should reverse the opinion of the Court of Appeals insofar as it reversed the Trial Court's denial of Fuel Transport's directed verdict motion and vacated the jury's unanimous punitive damages verdict, and should reinstate the Trial Court's final judgment in full.

Respectfully submitted,

Nathan Collins

NATHAN COLLINS

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Order Stopping Accrual of Post-Judgment Interest, p. 2. Additionally, in its motion, Appellee informed the Trial Court and the Estate that the "**Defendants are prepared to forego any further appeal on these issues**" and, thus, "[i]t can hardly be argued that the Plaintiffs will suffer prejudice by having immediate access to the funds represented by this portion of the judgment." Id. (emphasis added).