COMMONWEALTH OF KENTUCKY
SUPREME COURT
2010-SC-000072-D & 2010-SC-0682-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 BRIEF FOR APPELLEE/CROSS-APPELLANT FUEL TRANSPORT, INC.

Virginia H. Snell
Deborah H. Patterson
Sara Veeneman
Wyatt, Tarrant & Combs, LLP
2800 PNC Plaza
500 W. Jefferson St.
Louisville, Kentucky 40202
502.589.5235

Counsel for Appellee/Cross-Appellant

CERTIFICATE OF SERVICE

The undersigned hereby certifies that true and correct copies of this Brief for Appellee/Cross-Appellant have been served upon the following, by U.S. mail, postage prepaid, on this the 25th day of April, 2011: Samuel Givens, Jr., Kentucky Court of Appeals, 360 Democrat Dr., Frankfort, Kentucky 40601; Honorable Kimberly Childers, Judge, Knott Circuit Court, 3rd Floor Justice Center, 53 W. Main St., P.O. Box 867, Hindman, Kentucky 41822; Adam Collins and Nathan Collins, Campbell Collins, PSC, P.O. Box 727, Hindman, Kentucky 41822.

Virginia Hamilton Snell

INTRODUCTION

The Court of Appeals set aside a $2 million punitive damage award against a transport company in a case arising from a tractor-trailer accident, but affirmed the remainder of the verdict, including $2 million for pain and suffering. This appeal involves the need for a meaningful check on punitive damages, juror misconduct, inflammatory evidence, and excessive verdicts.

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

COUNTERSTATEMENT OF THE CASE

Summary. This case arises from a tractor-trailer accident in which an oncoming car passenger was seriously injured and died, while sedated, days later in a hospital. 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.

After deliberating for less than two hours (including lunch) the jury verdict flowed, not from the evidence, but from inflammatory innuendo, juror bias, and improper instructions. This Court granted the Estate's motion for discretionary review and Fuel Transport Inc.'s cross motion, accepting review of all issues. In this Combined Brief, Fuel Transport asks this Court to affirm the reversal of punitive damages and to remand for a new trial.

The Condition of the Tractor-Trailer. While Appellant's Brief ("Brief") appears to be replete with video record references, appearances can be deceiving.

The Estate's theory against Fuel Transport, the owner of the tractor-trailer, turns on the testimony of one witness, Linville Isaacs, who allegedly told Fuel Transport a week before the accident on November 2, 2004, that there was "slack" in the fifth wheel, a coupling that links the trailer to the truck.

As the Evidentiary Appendix ("EA") attached to this Combined Brief at Appendix 4 reveals, the key facts are undisputed and establish no evidence of Fuel Transport misconduct. Mr. Isaacs purchased the tractor-trailer from Fuel Transport in July 2004. From that time until October 26, 2004, he hauled coal for Fuel Transport and

other companies, about 5 to 7 loads daily. During this time, he admits responsibility for all necessary repairs and doing all repairs himself (Tape No. 1, 12/3/07, 2:19:28-2:19:53). The Estate states that Mr. Isaacs had a "similar accident involving the same truck" during the month that he was responsible for its maintenance (Brief, p. 3). That is **not** Mr. Isaacs' testimony.

He describes an accident that occurred in mid-October when he was crossing railroad tracks (Tape No. 1, 12/3/07, 1:54:45). He said a trailer came loose but explained "the right trailer wasn't on the truck to start with" (Tape No. 1, 12/3/07, 1:55:09-1:55:20). He said some drivers had a problem on Highway 80 and asked him to haul their trailer of coal to the tipple (Tape No. 1, 12/3/07, 2:15:13). So, the trailer that came loose on the railroad tracks was not the trailer Isaacs owned – it was not the "right trailer."

After the incident, Mr. Isaacs installed new bushings on the fifth wheel (Tape No. 1, 12/3/07, 2:16:46; EA-2), hooked up the "right trailer," and continued to haul 5 to 7 loads of coal daily without any problems. He "never had no problems" after that railroad track accident (Tape No. 1, 12/3/07, 2:15:43-2:18:58; EA-3). The Estate quotes Isaacs as saying the truck turned over a "bunch of times," but Isaacs only describes the one incident involving someone else's trailer. Moreover, the statement was made in talking about the age of the truck and Mr. Isaacs most likely meant that the truck had exchanged hands about a hundred times, not that it physically turned over a hundred times. This is only reasonable given Mr. Isaacs' subsequent observation that "It's a pretty good truck. It runs good." (Tape No. 1, 12/3/07, 2:19:18-48; *See also*, Tape No. 1, 12/3/07, 2:16:00-2:19:48; EA-3).

The undisputed fact that Mr. Isaacs continued to haul coal in the tractor-trailer 5 to 7 times daily for two weeks with no problem is significant. It is undisputed that slack

in the fifth wheel is readily detectable to a driver. The Estate's own expert, Joseph Stidham, testified that when a fifth wheel is loose, a driver constantly feels it. In his words, a driver would feel its "give and shimmy" all the time (EA-10). Mr. Isaacs felt no "give and shimmy" in the weeks prior to the accident.

In late October, Fuel Transport bought back the tractor-trailer for more money than Mr. Isaacs had paid. At Fuel Transport's garage, according to Mr. Isaacs, he met with David Clifton, Fuel Transport's owner, and Defendant Troy Vanderpool, another independent contractor who hauled coal for Fuel Transport and other companies. Mr. Isaacs did not volunteer that the truck had any problems. To the contrary, Mr. Isaacs testified that **Mr. Clifton asked him** if "anything was wrong" with it (Tape No. 1, 12/3/07, 1:59:39). Mr. Isaacs says that, in response to Fuel Transport's inquiry, he told Mr. Clifton and Mr. Vanderpool that the fifth wheel was "wore out" (Tape No. 1, 12/3/07, 1:58:07-1:58:46).

But after he put in new bushings and hooked up "the right trailer," Mr. Isaacs hauled coal 5 to 7 times daily with "no problem" before he decided to sell it back to Fuel Transport. And, he testified that Fuel Transport asked him if "anything was wrong" with the tractor-trailer. He admits that Fuel Transport had always made every repair he requested (EA-1).

He never said an accident was likely – he had, after all, been driving it with "no problem." And, after Mr. Isaacs sold the tractor-trailer back to Fuel Transport, Troy Vanderpool started driving it to haul coal. Like Mr. Isaacs, Mr. Vanderpool experienced no problems – no "give or shimmy" (EA-18). And, as Plaintiffs' expert stated, if slack had been present, he would have felt it "all the time" (EA-10). Mr. Vanderpool never would have driven the truck if the fifth wheel was defective (EA-18). Plaintiff repeatedly

attaches words like "dilapidated" to the truck, but both Mr. Isaacs (EA–3) and Mr. Vanderpool testified that it "runs good." As Mr. Vanderpool explained, it did not drive like a new truck "but if there was something dangerous about it I wouldn't have been hauling coal in it" (Tape No. 3, 12/4/07, 2:47:49-2:48:08).

The Estate points to Mr. Isaacs as saying the truck "pulled to the right" and the frame was "warped," but there is no evidence whatsoever that Fuel Transport was aware of these conditions. Mr. Isaacs admits that he never told Fuel Transport about a "pull" to the right or the left or a problem with the frame (Tape No. 1, 12/4/07, 2:01:38). And, The Estate has never even claimed that these alleged problems caused Ms. Gibson's accident.

The Estate relies on Mr. Clifton's inability to testify one way or the other about whether Fuel Transport made repairs to the truck after it repurchased it from Mr. Isaacs. But Mr. Clifton would not know. It is undisputed that Trey McGaffey is the "truck boss" for Fuel Transport, the person to whom problems were reported – the man "to talk to" if a driver needed something done to a truck (Tape No. 1, 12/3/07, 3:36:00-3:36:48). Mr. Vanderpool in fact testified that the tractor-trailer was serviced before he started hauling coal in late October, including brake replacement. When Plaintiff's counsel asked Mr. Vanderpool if any repairs had been made before he started driving it, Mr. Vanderpool responded: "[S]ome brakes were replaced on the trailer and to my knowledge that's about it other than service work, greasing" (Tape No. 1, 12/3/07, 3:24:09-3:24-45; EA–6).

The Accident. On November 2, 2004, after he had been hauling coal 5 to 6 times daily for a week with no problem, Mr. Vanderpool was driving toward a curve bearing left on Highway 80 in Floyd County. As he explained at trial, drawing on paper before the jury, every time a tractor-trailer goes into a curve, the trailer normally "will lean," and

the driver needs to "get back under the load" (Tape No. 3, 12/4/07, 2:49:00–2:49:37). That is what happened when he began bearing left in the far right lane on November 2. It was normal (Tape No. 3, 12/4/07, 2:45:57). Mr. Vanderpool then decided to try and straighten out to get back under the load. To this point, roughly halfway into the curve, the trailer was still following the truck as it should (Tape No. 3, 12/4/07, 2:45:15–2:45:23). But during the course of trying to straighten up his path, Mr. Vanderpool cut "too hard" to the right, and in doing so, he "over-corrected it really bad" (Tape No. 1, 12/3/07, 3:31:05; (EA-7). While the truck was not out of control before he over-corrected, when he cut too sharp to the right, the trailer leaned further and then turned on its side, spilling coal and coming to rest (Tape No. 1, 12/3/07, 3:31:05-3:31:55; EA-19).

Mr. Vanderpool did not say the fifth wheel "absolutely" could have caused the accident. In the lengthy quotation on pages 9-10 of the Estate's brief, he repeatedly says "I don't know" – "I do not know why it leaned like it did" (Tape No. 3, 12/4/07, 2:50:22-2:51:48). "Absolutely" was used with "possibly," obviously after Mr. Vanderpool said three times that he did not know and also that he was not a "mechanic" (Tape No. 1, 12/3/07, 3:40:50). Answering a hypothetical "isn't-it-possible" type of question is pure speculation. He testified that trailers always lean when going into a curve; and he does not know why the trailer turned over here except for the fact that it went out of control when he overcorrected "really bad" (Tape No. 1, 12/3/07, 3:30:00-3:31:12; Tape No. 3, 12/4/07, 2:46:30; EA-7).

Mr. Vanderpool was not significantly injured, but "shook and beat up." He got out of the truck and a nearby resident, Steve Bowling, walked from his home 300 feet away, to check on Mr. Vanderpool (Tape No. 1, 12/3/07, 3:32:46-3:34:55). At the same time, Roger Russell and Ms. Gibson were coming around the curve from the opposite

direction in a pickup truck. Mr. Russell was driving and Ms. Gibson was on the passenger side. Coal was scattered on the road. Roger hit the brakes but the coal made it impossible to stop. His truck hit the tractor (Tape No. 1, 12/3/07, 2:59:16-3:00:00). Mr. Russell was not seriously injured (Tape No. 1, 12/3/07, 3:10:07-3:12:12). Ms. Gibson was taken to the hospital.

The Police Report. Officer Dennis Hutchison reported to the scene. Because the neighbor, Mr. Bowling, did not testify, Officer Hutchison is the **only** neutral witness at trial with personal knowledge of the tractor-trailer's condition at the time of the accident. At the time, he had seven years' experience in vehicle enforcement and training (Tape No. 3, 12/4/07, 1:02:49; 1:09:43; EA-11). He interviewed Mr. Vanderpool and determined that he had been speeding – driving 65 mph on the curve, though the speed limit on Highway 80 is 55 mph (Tape No. 3, 12/4/07, 1:04:10–1:04:34; EA - 11). He issued no citations (Tape No. 3, 12/4/07, 1:12:16-32; EA - 15).

Officer Hutchison called this curve on Highway 80 a "bad spot" (Tape No. 3 12/4/07, 1:06:56). He observed that the tractor was undamaged, except for a dented door and fuel tank (EA - 12). Officer Hutchison observed nothing wrong with the fifth wheel:

Q: Did you see anything wrong with the fifth wheel on the vehicle?

A: Only thing I saw wrong was that the fifth wheel was dry

(EA – 14). There is no evidence that "dryness" had anything at all to do with the accident. "Dryness" is not slack. Moreover, Fuel Transport's owner, David Clifton, explained that dry was normal for this kind of fifth wheel because its particular design did not require grease (Tape No. 3, 12/4/07, 2:21:39). Plaintiff offered no evidence to the contrary. While it argues that the fifth wheel was "hooved up" after the accident, this

obviously was the result of the accident **not** its cause. Otherwise Officer Hutchison would have observed something "wrong," and he did not.

The Estate suggests the truck was overloaded with coal. But there is no evidence of that on November 2. And, while evidence suggests the trailer was sometimes overloaded and sometimes underloaded, there was no constant "give and shimmy" suggesting slack in the fifth wheel. And, Officer Hutchison observed the size of the load, noting that the tractor-trailer had extended weight decals, which meant, with a gross weight manufacture rating of 80,000 pounds, it can haul up to 120,000 pounds under state law (Tape No. 3, 12/4/07, 1:10:02-1:10:37; 1:12:00; EA–13; EA-14). He did not find that the tractor-trailer load exceeded legal limits (EA–15).

The Estate quotes at length Mr. Vanderpool's "description of the fifth wheel after the motor vehicle collision" (Brief, pgs. 11-12). But all of this testimony relates to what Mr. Vanderpool observed when he went to "get my personal effects" out of the truck **after** Fuel Transport moved it from the scene of the accident to Fuel Transport's garage (Tape 1, 12/3/07, 3:38:50). The only evidence of how the fifth wheel appeared at the scene of the accident – right after it happened – comes from Officer Hutchison. He observed nothing wrong with the fifth wheel, only that it was dry (EA-14), and it was dry because Fuel Transport uses matt, rather than grease, on this design. Plus, no evidence suggests that "dry" caused the accident. The fifth wheel could have "hooved up," after the accident or with transport – it was not something the Officer noticed. And, Mr. Vanderpool admits "I'm not a mechanic. I don't, I don't know that there was anything wrong with it . . . ." (Tape No. 1, 12/3/07, 3:45:54). Even if it was hooved up with the king pin "out of it," this is the result of the accident, **not** a cause.

Ms. Gibson's Injuries. Dr. David Denning treated Ms. Gibson upon admission to the hospital that night on November 2. He testified that, on arrival, she was incoherent and in pain (Tape No. 3, 12/4/07, 1:36:08-1:36:39). She was 78 years old and in bad health: diabetes, lung disease, heart murmurs, clotting and malnourished (Tape No. 3, 12/4/07, 1:51-1:53). The nurses immediately put her on an IV and administered morphine and other pain medications (Tape No. 3, 12/4/07, 1:39:23-1:39:40; EA-16). On the morning of November 4, she was intubated (Tape No. 3, 12/4/07, 1:41:41; EA-16). Dr. Denning opined that from that time on November 4 to her death on November 9, she was "heavily sedated" (Tape No. 3, 12/4/07, 1:42:10). She received Diprovan, which can render someone "unconscious" (EA-16). The nurses give pain medications "up and down" to keep patients out of pain. For this reason, perceptions of pain by anyone else "may not be valid" (Tape No. 3, 12/4/07, 1:45:24; EA-17). The cause of death was "cardiac arrest" resulting from the accident and her existing health problems (Tape No. 3, 12/4/07, 1:28:18-1:29:00; 1:34:36-1:35:20).

Nearly all of Ms. Gibson's medical records that the Estate cites refer to her first two days in the hospital and therefore do not, and cannot, establish even her consciousness during the rest of the time. The later dates (November 8) are actually **from another patient's records** that were presumably included in Ms. Gibson's file by mistake. (*See* Brief, p. 21, dates 11/7/04 and 11/08/04, Nos. 24, 25, and 26, Robert Wilminks records – BATES M0173, M0175, and M0191).

Describing her pain medication, Dr. Denning testified:

> [T]he notation 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. On November the 5th, there is 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

Tape No. 3, 12/4/07, 1:42:00-1:43:21).

The Court of Appeals suggests Ms. Gibson was in pain because she was receiving pain medication. But the evidence suggests otherwise. Dr. Denning explained the flow sheet regarding pain:

> These scales are used by the nursing staff, not by – used by physician staff. Most of the time when patients are in the intensive care unit, they're on constant infusion of narcotics and sedatives, which the nurses use to increase or decrease as they see fit in order to maintain the patient on the ventilator. So some of the perception of pain may or may not necessarily be valid . . . **the reason that they're receiving these medicines, it may not be for pain. It may be for keeping them such that they can be oxygenated properly.**

(Tape No. 3, 12/4/07, 1:45:00-1:45:40).

Proceedings Below. The Estate sued Mr. Vanderpool and Fuel Transport in Knott Circuit Court alleging negligence, gross negligence and recklessness (T.R. 001-006). Venue was improper because the accident occurred in Floyd County (EA-11). Over Fuel Transport's objection, the case proceeded to trial in December 2007 for a short two-and-a-half days.

At the conclusion of the evidence, Mr. Vanderpool did not challenge the amounts that the Estate claimed for Ms. Gibson's past medical expenses, lost earnings, and funeral expenses. But both he and Fuel Transport vigorously opposed the $2 million amount that the Estate demanded for pain and suffering given overwhelming proof that she was not in pain from early November 4 to November 9 when she died. Fuel Transport objected to an instruction on punitive damages because there was no proof, much less clear and convincing proof, of gross negligence. (Tape No. 4, 12/5/07, 9:29:43-9:30:22).

After two days of testimony and closing argument, the jury deliberated for less than two hours (12:02 p.m. – 1:55 p.m., including the lunch break) and rendered a jaw-dropping verdict. It gave the Estate every cent demanded for pain and suffering. The jury then apportioned fault: 85% against Fuel Transport and 15% against Mr. Vanderpool, despite undisputed evidence that Mr. Vanderpool's conduct caused the accident on this "bad spot" of Highway 80. On top of this $1,803,165 award against Fuel Transport, the jury added another $2 million in punitive damages.

After trial, Fuel Transport learned for the first time, through post-trial interviews, that one juror, Lisa Short, had a deeply ingrained prejudicial bias. When asked in a questionnaire about the damages awarded, she stated "my father was killed in an automobile accident and they deserved everything they got" (T. R. 9-10, App. 3). Ms. Short never disclosed this prejudice when asked before trial, and her participation in deliberations undoubtedly inflamed every juror on the panel.

Fuel Transport and Mr. Vanderpool filed motions for judgment notwithstanding the verdict and, alternatively, for a new trial based in part on excessiveness and juror misconduct (T.R. 647-699). The trial court denied all motions (T.R. 966-972). It also ordered 12% post-judgment interest, even though KRS 360.040 authorizes lower courts to reduce the rate consistent with current economic conditions, and Fuel Transport demonstrated that the rate used in federal court is 2.9% and the prime interest rate is 2.25%. The Court of Appeals reversed the $2 million punitive damage award and affirmed the compensatory damages (App. 1). This Court granted Plaintiff's motion for discretionary review and then Fuel Transport's cross-motion.

ARGUMENT

The Court of Appeals correctly set aside punitive damages. No evidence suggests outrageous conduct. Small companies like Fuel Transport and truck drivers like Mr. Vanderpool rely on the appellate courts to curb prejudice and speculation and to correct a verdict when a jury is so wrong. The trial court erred in allowing the jury to consider punitive damages and in permitting argumentative "evidence," juror bias, and improper instructions. As a result, inflamed and prejudiced, the jury returned a grossly excessive verdict. We urge this Court to affirm the reversal of punitive damages as a matter of law and to remand for new trial on the remaining issues.

I. THE COURT OF APPEALS PROPERLY SET ASIDE THE PUNITIVE DAMAGE AWARD.[1]

A. The Standard For Punitive Damages Is Gross Negligence and "Outrageous" Conduct.

Punitive damages are reserved for the egregious case, over and above full compensation for a plaintiff's injuries, "for the purpose of punishing the defendant, teaching him not to do it again, and deterring others from following example." *Hensley v. Paul Miller Ford, Inc.*, 508 S.W.2d 759, 762 (Ky. 1974). To recover punitive damages under Kentucky law, the defendant's conduct must constitute **gross** negligence, defined as a "wanton or reckless disregard for the safety of other persons' such that the offending conduct is **so outrageous** that malice could be implied from the facts of the situation. *Phelps v. Louisville Water Co.*, 103 S.W.3d 46, 52 (Ky. 2003)(emphasis added).

---

[1] Fuel Transport preserved this issue for appeal by moving for directed verdict at the end of Plaintiff's proof (Tape No. 3 12/4/07 1:59:42-2:03:04) and at the end of all proof (Tape No. 3 12/4/07 4:01:48-4:03:01), by objecting to the Court's jury instructions (Tape No. 4 12/05/07 9:25:07 – 9:25:12; 9:29:43 – 9:30:22) and by its post-trial motions (T.R. 653-657; 662-664).

At the heart of a punitive damages claim, then, is whether the misconduct is "outrageous," not whether it was negligently or intentionally inflicted. *Horton v. Union Light, Heat & Power Co.*, 690 S.W.2d 382, 389 (Ky. 1985). "Outrageous" conduct is that which is "willful, malicious, and without justification." *Id.* And, under KRS 411.184(2), a plaintiff must prove outrageous conduct by "clear and convincing evidence."

Distinctions are imperative when identifying a proper punitive damage case. Punitive damages are not compensatory damages. Gross negligence is not ordinary negligence. Outrageous conduct is not negligent conduct. The Court of Appeals properly reversed a judgment here that blurs, if not abolishes, the difference between compensating and punishing in this Commonwealth.

To permit punitive damages in accident cases such as this will "eliminate the distinction between ordinary and gross negligence," as now Chief Justice Minton explained in *Kinney v. Butcher*, 131 S.W.3d 357, 359 (Ky. App. 2004). *Kinney* arose from a car accident that occurred when Mr. Butcher was trying to pass a moving van and collided with Ms. Kinney's vehicle. The trial court refused to instruct the jury on punitive damages, which was Ms. Kinney's lead contention of error on appeal. But the Court of Appeals agreed with the trial court and unanimously affirmed. "[T]raveling at a possible speed of ten miles per hour in excess of the posted speed limit and failing to complete a pass before entering a no-passing zone constitute nothing more than ordinary negligence." *Id.* at 359.

Chief Justice Minton went on to observe: "Were we to accept Kinney's argument that it amounts to wanton or reckless disregard for the safety of others, it would effectively eliminate the distinction between ordinary and gross negligence in the context

of automobile accidents." *Id.* at 359. The Court realized that "[n]early all auto accidents are the result of negligent conduct, **though few are sufficiently reckless** as to amount to gross negligence, authorizing punitive damages." *Id.* (emphasis added). The Court's message is clear: "We are of the opinion that **punitive damages should be reserved for truly gross negligence** . . ." *Id.* (emphasis added).

To render the message unmistakable, the Court in *Kinney* describes circumstances of "truly gross negligence." It cites *Shortridge v. Rice*, 929 S.W.2d 194 (Ky. App. 1996), *Stewart v. Estate of Cooper*, 102 S.W.3d 913 (Ky. 2003), and *Phelps v. Louisville Water Company*, 103 S.W.3d 46, 52 (Ky. 2003), as examples.

In *Shortridge* and *Stewart*, the defendant tortfeasors were driving while intoxicated; and, in *Phelps*, the jury was presented with eighteen instances where the Louisville Water Company misrepresented the dangerous nature of a highway condition, violated its own safety policies, and disregarded the Manual on Uniform Traffic Control Devices, all of which evidenced a conscious disregard for public safety. *Id. See also Fowler v. Mantooth,* 683 S.W.2d 250, 252 (Ky. 1984) ("The mere fact that the act is intentional and a tort does not justify punitive damages absent this additional element of implied malice, meaning conscious wrongdoing."); *Keller v. Morehead*, 247 S.W.2d 218, 219-20 (Ky. 1952) (punitive damages not appropriate where accident caused by overwidth of trailer on slight curve to the right).

In *Estate of Embry v. GEO Transp. of Indiana, Inc.*, 478 F. Supp. 2d 914 (E.D. Ky. 2007), the court applied the reasoning of *Kinney* to bar punitive damages in a tractor-trailer accident context. After ruling that the driver "was negligent *per se* in failing to control his vehicle and in crossing into oncoming traffic and striking the minivan driven by Heather NcNay," the court held nevertheless that "as a matter of law . . . his conduct

does not rise to the level of **gross** negligence so as to support an award of punitive damages under Kentucky law." *Id.* at 921.

Allowing punitive damages, the Court explained, would "make almost any negligent act committed while driving a basis for the imposition of punitive damages." *Id.* This consequence would contravene "the specific yet limited purposes that punitive damages are meant to serve." *Id. See State Farm Mut. Auto Ins. Co. v. Campbell,* 538 U.S. 408, 419, 123 S.Ct. 1513 (2003) (noting that punitive damages should only be awarded if the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence) (*citing BMW of North America, Inc. v. Gore*, 517 U.S. 559, 575 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996)).

For the same reason, *Turner v. Werner Enterprises, Inc.*, 442 F. Supp. 2d 384 (E.D. Ky. 2006), holds punitive damages in an accident case inappropriate. There, a tractor-trailer driver admitted to being tired and falling asleep, when he rear-ended the plaintiffs' pickup truck. Though the driver was obviously negligent, the court held that his "alleged misconduct . . . does not match the level of culpability of the defendant in *Kinney,* in which no punitive damages were available." *Id.* at 386.

In concluding that "although Fuel Transport failed to exercise reasonable care, the failure did not rise to the level of wanton or reckless disregard for others" (Opinion, p. 14, App. 1), the Court of Appeals in this case properly reversed a erroneous trial court and inflamed jury that failed to appreciate that punitive damages are not compensatory damages, that gross negligence is not ordinary negligence, and that outrageous conduct is not negligent conduct. It also heeded the concerns of the late Justice McAnulty of this Court and refrained from "setting a new culpability standard for an award of punitive

damages...". *Steel Technologies, Inc. v. Congleton*, 234 S.W.3d 920, 923 (Ky. 2007). "[G]ross negligence is stilled required by both our statutory and common laws." *Id.*

B. The Record Contains No Evidence Of Outrageous Conduct.

Nothing in the record comes close to proving the outrageous conduct required for truly gross negligence – by any standard, much less by clear and convincing evidence. The Estate's claim for punitive damages hinged solely on the theory that there was slack in the fifth wheel coupling (EA-14), thereby causing the trailer to overturn.

As previously explained, the sole basis for the Estate's fifth-wheel contention lies in the testimony of one witness, Mr. Isaacs. For many undisputed reasons, Mr. Isaacs' alleged statement to Mr. Clifton and Mr. Vanderpool – that the fifth wheel was "wore out" – cannot be the basis for punitive damages.

- It cannot be said too often that slack in a fifth wheel causes a "give and shimmy" that happens all the time (EA-10). It was not happening in the weeks prior to the accident.
- Mr. Isaacs admits all responsibility for repairs until he sold the tractor-trailer back to Fuel Transport on October 26 (Tape No. 1, 12/3/07, 2:19:48).
- He had a trailer come loose on railroad tracks in mid-October but it "was not the right trailer on the truck to start with" (Tape No. 1, 12/3/07, 1:55:11).
- He then installed new bushings and continued to haul coal 5 to 7 loads daily with the "right trailer" and "never had no problems" (Tape No. 1, 12/3/07, 2:18:35).
- He experienced no give and shimmy during the weeks immediately preceding his conversation with Mr. Clifton and Mr. Vanderpool.
- Mr. Clifton **asked** him whether anything was wrong with the truck (Tape No. 1, 12/3/07, 1:59:43), which itself is contrary to any reckless intent.
- Mr. Isaacs admits that Fuel Transport made every repair he requested (EA-1).

- Mr. Isaacs and Mr. Vanderpool admitted the truck "runs good" (Tape No. 1, 12/3/07 2:19:28).

- Mr. Vanderpool stated that Fuel Transport serviced the truck before he started driving it, including brake replacement (Tape No. 1, 12/3/07, 3:24:10-47). Providing "service work" is contrary to any inference of reckless conduct. "To my knowledge, it seems like maybe some brakes were replaced on the trailer and to my knowledge that's about it other than service work, greasing" (Tape No. 1, 12/03/07, 3:24:09-45; EA-6).

- Mr. Vanderpool hauled coal 5 to 7 times daily after October 26 and experienced no problems – no give or shimmy (EA-18).

- Mr. Vanderpool never would have driven the truck if there was something wrong with it – "if there was something dangerous about it I wouldn't have been hauling coal in it" (Tape No. 3, 12/4/07, 2:47:49-2:48:08).

- Mr. Vanderpool admitted that the trailer was following the truck halfway around the curve as it should but then he cut too hard to the right and "over-corrected it really bad" (Tape No. 1, 12/3/07, 3:31:05, EA-7). The trailer then leaned, turned on its side, spilling coal.

- Officer Hutchison – the only witness at the scene who testified about the condition of the fifth wheel immediately after the accident – stated that he observed nothing wrong with it, except that it was "dry" (EA-14). "Dry" has nothing to do with the accident and it is undisputed that "dry" is normal for this kind of fifth wheel (Tape No. 2, 12/4/07, 2:21:39).

- Officer Hutchison stated that Mr. Vanderpool was speeding on this "bad spot" of road, driving 65 mph, though the speed limit on Hwy. 80 is 55 mph (EA-11–12).

The Estate's expert, Mr. Stidham, relied exclusively on the statement and testimony of Mr. Isaacs (Tape No. 3, 12/4/07, 9:11:56, 9:36:00; EA-8, EA-9). His testimony therefore stands as questionable and irrelevant as Mr. Isaacs'. *See Kentucky Trust Co. v. Gore*, 192 S.W.2d 749, 752 (Ky. 1946) (Opinion of expert witness "will not control when not supported by the proven facts."). Perhaps most important, both ignore Officer Hutchison, the responding law enforcement officer at the scene. Again, he testified that he saw nothing wrong with the fifth wheel coupling (Tape No. 3, 12/4/07,

1:10:54-1:11:02). He observed that it appeared "dry" but that is normal; Mr. Clifton testified that this particular coupling design did not require grease, and his testimony is undisputed (Tape No. 3, 12/4/07, 2:21:39). Mr. Vanderpool attributed the cause of the accident to his over-correction of the tractor-trailer (Tape No. 1, 12/3/07, 3:31:07), and Officer Hutchison confirmed the cause in his testimony. (Tape No. 3, 12/4/07, 1:05:40-1:06:00). Mr. Isaacs' testimony about the fifth wheel when he sold it back has no bearing on the condition of the fifth wheel coupling on the night of November 2, when Officer Hutchison observed it.

On these undisputed facts, no reasonable fact finder could possibly conclude that Fuel Transport's actions were ever negligent, much less "outrageous." At worst, even assuming Mr. Isaacs told Fuel Transport there was a problem with the fifth wheel when he returned it, there was no "problem" thereafter. Even Mr. Isaacs admitted that Fuel Transport consistently made every repair a driver requested. (EA-1) Mr. Vanderpool agreed and stated that Fuel Transport serviced the tractor-trailer before he started hauling coal with it. And, when he drove the tractor-trailer days before the accident, it functioned properly.

At best, Mr. Isaacs' "conversation" never happened, and no one thought there was a problem with the fifth wheel because no problem existed. Either way, no basis exists for punitive damages. One conversation alleged by one witness given all the other facts cannot possibly support a finding of outrageous conduct. Maybe Mr. Isaacs was wrong in his alleged opinion about the fifth wheel or maybe subsequent actions corrected the problem assuming one existed. Mr. Clifton **asked** Mr. Isaacs if anything was wrong with the truck, according to Mr. Isaacs' own testimony. Bottom line: There is no evidence whatsoever of motive to refuse an inexpensive repair.

There is no evidence, like that in *Phelps*, of a pattern of misrepresentation. The undisputed evidence stands to the contrary: Fuel Transport provided all parts and repairs that its drivers wanted. Even if Fuel Transport forgot the alleged conversation with Mr. Isaacs or disagreed with his belief that the fifth wheel was "wore out," this conduct alone is at worst negligent, **not** outrageous action or inaction in light of all the testimony. It does not even approach the negligent conduct of speeding or falling asleep in *Kinney* and *Turner.*

The Estate raises the facts and result of this Court's decision in *Steel Technologies, Inc. v. Congleton* to salvage its punitive award. It is misguided both as to the case's factual and legal relevance here. First, the accident in *Congleton* was caused by defendant's violation of specific Federal motor carrier regulations that required five steel chains to secure the steel coil cargo, as opposed to the three chains used by defendant. 234 S.W.3d 920, 923 (Ky. 2007). While the Estate attempts to minimize the *Congleton* defendant's blatant disregard for government-mandated safety measures on the day of the accident, that illegal conduct is a far cry from Fuel Transport's alleged failure to act immediately on Mr. Issacs' questionable assessment of the fifth wheel a week before the accident at the time of sale, in light of the fact that he had been driving the truck for weeks prior to his "warning" and Mr. Vanderpool drove it for the week after the "warning," neither experiencing any problems.

Factual distinctions aside, *Congleton* never ruled on the sufficiency of evidence question that is squarely at issue in this case because defendant Steel Technologies waived that claim. Addressing Steel Technologies' claim that "[punitive damages] cannot be imposed for ordinary negligence," this Court stated:

> The second claim is basically that the proof at most showed that Steel Technologies was negligent, which alone is insufficient to impose punitive

> damages. These two claims are essentially that the evidence was insufficient to allow the punitive damages. As such, they were not preserved and will not be addressed by this Court.

Id. at 927.

Ironically, though, the Estate both failed to mention and decidedly failed to heed the only guidance in *Congleton* pertinent to this case. It is found in the late Justice McAlnulty's Concurring Opinion, which he wrote specifically "out of concern that future plaintiffs will analogize their cases to the facts of this one and feel likewise entitled to punitive damages."

> This is a regrettable and tragic case, resulting in the death of a young mother, but it is also a case of ordinary negligence. The Majority opinion should not be construed as setting a new culpability standard for an award of punitive damages; gross negligence is still required by both our statutory and common laws. "If the act was willful or the negligence gross, punitive damages may be recovered." KRS 411.130. Gross negligence requires "a finding of failure to exercise reasonable case, and then an additional finding that this negligence was accompanied by 'wanton or reckless disregard for the lives, safety or property of others.'" *Horton v. Union Light, Heat & Power Co.,* 690 S.W.2d 382, 389-390 (1985). **In my opinion, although Steel Technologies failed to exercise reasonable care, the failure did not evince a wanton or reckless disregard for others.**

Id. at 933 (emphasis added). Justice McAlnulty's closing admonition are the final words in Congleton: **"This case should not serve as notice that ordinary negligence cases warrant punitive damages."** *Id.* (emphasis added).

The Estate's claimed entitlement to punitive damages in this case confirms that Justice McAlnulty's concerns in *Congleton* were well-founded, as were now-Justice Minton's in *Kinney*. While Ms. Gibson's death also was tragic and highly regrettable, this too is a case of ordinary negligence at worst. The Estate attempts to blur the lines between ordinary and gross negligence beyond distinction. But there is a distinction - a

legal one - that the Court of Appeals properly upheld in reversing the $2 million punitive damage award.

II. THE COURT OF APPEALS APPLIED THE CORRECT STANDARD OF REVIEW.

The Estate finds no refuge in the law, which requires "outrageous" conduct to submit a punitive damage claim to the jury, nor in its evidence, which falls far short of presenting even an issue as to gross negligence by Fuel Transport. Because the Court of Appeals reached the correct result in vacating the $2 million punitive damage award, the Estate resorts to a challenge on the Court's methodology. But the Court of Appeals plainly applied the correct standard of review in its 26-page unanimous Opinion. Certainly the Estate admits this to be true in the context of its $2 million award for pain and suffering, which the Court affirmed.

Far from substituting its opinion for that of the trial court or the jury, the Court of Appeals did exactly as is required of a court of review – it reviewed. Under the Estate's rationale, "review" means blind acceptance in the context of a trial court's denial of a directed verdict and an appellate court would "substitute" its opinion any time it reverses a jury verdict. The Court of Appeals proceeded as it should and as other courts have in reviewing the sufficiency of the evidence in this case. *See, e.g., E.W. Scripps Co. v. Cholmondelay*, 569 S.W.2d 700 (Ky. App. 1978) (holding the trial court erred in refusing to grant a directed verdict to the defendant on the issue of punitive damages in a defamation case because the plaintiff did not present sufficient evidence of actual malice); *Ashland Dry Goods Co. v. Wages*, 302 Ky. 577, 195 S.W.2d 312 (1946) (a false arrest case in which the court of appeals held the trial court improperly submitted the question of punitive damages to the jury because there was no evidence of malice or reckless disregard to justify the instruction).

Contrary to the Estate's contention, the Court of Appeals both knew and applied the correct standard of review in concluding that "even viewing the evidence in the strongest possible light for the appellant, we cannot concur with the trial court's decision [i.e. the trial court erred] 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" (Opinion at 16).

But to fully understand whether the Court viewed the issues under the correct standard, this Court need only read what the Court of Appeals said. Importantly, it began its punitive damage analysis as it ended, recognizing that "the trial court was under a duty to consider the evidence **in the strongest possible light** in favor of the party opposing the motion" (Opinion, p. 9, App. 1 (emphasis added)).

Furthermore, it is required to give the opposing party the advantage of every fair and reasonable inference which can be drawn from the evidence. And, it is precluded from entering . . . a directed verdict . . . unless there is a complete absence of proof on a material issue in the action, or if no disputed issue of fact exists upon which reasonable men could differ. *See Sutton v. Combs*, 419 S.W.2d 775 (Ky. 1967). *Taylor v. Kennedy*, 700 S.W.2d 415, 416 (Ky. App. 1985). "On appeal the appellate court considers the evidence in the same light." *Sutton*, 419 S.W.2d at 777. Further, we examine whether the evidence supported the jury's verdict or whether the verdict is so 'palpably or flagrantly' against the evidence" that it appears to have been made as a result of passion or prejudice. *Childers Oil Co., Inc. v. Adkins*, 256 S.W.3d 19, 25 (Ky. 2008); *Bierman v. Klapheke*, 967 S.W.2d 16, 18-19 (Ky. 1998); *Lewis v. Bledsoe Surface Min. Co.*, 798 S.W.2d 459, 461-62 (Ky. 1990).

The Court of Appeals expressly acknowledged: "All evidence and inferences will be viewed in the light most favorable to the prevailing party, and we will not substitute our opinion for that of the jury. *Lewis*, 798 S.W.2d at 461-62; *Commonwealth Life Ins. Co. v. Auxier*, 470 S.W.2d 335, 337 (Ky. 1971)." And, it made clear that "we will affirm the judgment unless the evidence had no probative value and was so speculative or conjectural that a directed verdict should have been granted as a matter of law. *Lewis*, 798 S.W.2d at 461-62; *Harris v. Cozatt, Inc.*, 427 S.W.2d 574, 575 (Ky. 1968)." The Court of Appeals' description of the standard stands entirely consistent with the Estate's view, as well as its lengthy quote from *Gibbs*.

The Court further acknowledged that in punitive damage cases alleging gross negligence and requesting punitive damages, "[a] party plaintiff is entitled have [her] theory of the case submitted to the jury if there is *any evidence to sustain it. Shortridge v. Rice*, 929 S.W.2d 194, 197 (Ky. App. 1996). If there was evidence to support the Estate's theory that Fuel Transport had acted with gross negligence, the Estate had the right to an instruction on punitive damages. *Shortridge*, 929 S.W.2d at 197" (Opinion, pgs. 9-10, App. 1).

The Estate disagrees with the Court of Appeals' conclusion on the insufficiency of evidence, saying that the Court abandoned the "any evidence" standard. Importantly though, this "any" evidence that would defeat a motion for directed verdict in this case must be probative evidence of truly *gross* negligence, of reprehensibility, of the kind of conduct "so outrageous" that the KRS 411.184 – required malice can be implied. *Kinney v. Butcher*, 131 S.W.3d 357 (Ky. App. 2004). The Court reviewed the sufficiency of the

evidence, in the light most favorable to the Estate,[2] and properly concluded that while it might support a finding of ordinary negligence, it failed as a matter of law to reach the level of "reprehensible or malicious behavior necessary for an award of punitive damages" (Opinion, p. 15, App. 1). *See Estate of Embry v. GEO Transportation of Indiana, Inc.*, 478 F. Supp. 2d 914, 921 (E.D. Ky. 2007)(while finding presence of "ordinary negligence," "the court concludes **as a matter of law** that [defendant's] conduct does not rise to the level of *gross* negligence so as to support an award of punitive damages under Kentucky law)(bold emphasis added, italic emphasis in original).

The Court's review was neither "impermissible" nor extraordinary.[3] On the contrary, it likens precisely to the analysis routinely employed by our appellate courts in gauging the legal sufficiency of intentional infliction of emotional distress [IIED] claims. As with punitive damages, recovery for IIED is reserved for truly outrageous conduct. *Humana of Kentucky, Inc. v. Seitz*, 796 S.W.2d 1 (Ky. 1990). Mere insults, indignities, threats, annoyances, and petty oppressions do not give rise to a cause of action for IIED.

---

[2] The argument that the Court of Appeals failed to view the evidence in the most favorable light to the Estate is astounding, given the Court's overly generous summary of Mr. Issacs' testimony. While Mr. Issacs only testified that he told Fuel Transport representatives the fifth wheel was "wore out" (Tape No. 1, 12/3/07, 1:58:08), the Court summarizes that he warned "there was a dangerous slack in the fifth wheel" (Opinion, p. 12, App. 1). The Estate is careful in touting the "dangerous" language to cite to the Court of Appeals Opinion and not to Mr. Issacs, because he never used the word dangerous. The Estate received more favorable inferences than its evidence warranted. It cannot be heard to complain about the Court's standard of review.

[3] Contrary to the Estate's complaint, it is neither impermissible nor extraordinary for the Court of Appeals to say: "In our opinion," Fuel Transport's failure to exercise reasonable care did not rise to the level of wanton and reckless disregard for others. Appellate Courts are in the business of issuing "opinions." CR 76.28. Using the word "Opinion" in the body of an Opinion does not render the decision anything more than what Courts of Appeal do in the ordinary course. It is empty rhetoric to say an opinion substitutes a jury verdict. Otherwise, appellate courts could never reverse.

Kroger Company v. Willgruber, 920 S.W.2d 61 (Ky. 1996). Accordingly, appellate courts, this Court included, are often called upon to review the sufficiency of evidence with respect to an IIED claim, to determine whether it reaches the legal threshold for recovery – just as the Court of Appeals in this case reviewed whether the evidence presents such outrageous, reprehensive conduct so as to cross the legal threshold from merely ordinary to the truly gross negligence necessary to support a punitive damages award.

The Court of Appeals' method and conclusions here comport entirely with those in *Stringer v. Wal-mart Stores, Inc.*, 151 S.W.3d 781 (Ky. 2004), where this Court, after expressly "review[ing] the sufficiency of the evidence with respect to each of the Appellant's three claims " under the directed verdict standard (*Id.* at 787), concluded the following with respect to the intentional infliction of emotional distress :

> After examining the evidence in a light most favorable to Appellants, we agree with the Court of Appeals that the trial court erred when it denied Appellees' motion for a directed verdict.

Id. at 791. *See also Whittington v. Whittington*, 766 S.W.2d 73, 74 (Ky. App. 1989) ("While we cannot condone or excuse Mr. Whittington's reprehensible action . . . we do not see them as rising to the level of outrageousness necessary for tortuous liability."); *Kentucky Farm Bureau Mutual Ins. Co. v. Burton*, 922 S.W.2d 385 (Ky. App. 1996)("[W]e do not believe that [plaintiff] has shown that Farm Bureau's actions constituted outrageous conduct . . . While the manner in which the proceedings were handled – from beginning to end – undoubtedly reflects ineptitude and indifference, we simply cannot agree that it rose to the level of intentional infliction of severe emotional distress according to the directives set forth under governing case law." *Wilhoite v. Cobb*, 761 S.W.2d 625, 627 (Ky. App. 1988) ("[T]here is no evidence in the record that

the appellee's conduct was extreme and outrageous, although the result was certainly horrendous.").

Because the evidence of Fuel Transport's conduct in light of all the other undisputed evidence plainly fails to reach the legal threshold of outrageousness to warrant punitive damages, the Court of Appeals hardly substituted its opinion for the jury's decision, any more than this Court substituted its opinion in *Stringer*. Rather, the Court of Appeals fulfilled its "highest duty" in vacating the punitive damage award after giving the Estate all favorable inferences and finding at best only evidence of ordinary negligence but **no** evidence of gross negligence. *See Hensley v. Paul Miller Ford, Inc.*, 508 S.W.2d 759, 763 (Ky. 1974). In short, the Estate understandably prefers a different result on appeal than the one reversing a hefty punitive award, but it has no basis whatsoever to challenge either the Court of Appeals' decision on punitive damages or the Court's standard of review.

III. THE CLEAR AND CONVINCING EVIDENCE STANDARD IS NO JURAL RIGHTS VIOLATION.

In a cursory manner, the Estate argues that the "clear and convincing" evidence requirement in KRS 411.184(2) violates the jural rights doctrine "for the same reasons that KRS 411.184(1)(c) was declared unconstitutional in *Williams v. Wilson*, 972 S.W.2d 260 (Ky. 1998)" (Brief, p. 43). The Court need not reach this issue because no evidence justifies punitive damages under any standard. In addition, the Estate raised its "jural rights" challenge belatedly – for the first time in its petition for rehearing – and therefore waived this argument.

But if this Court addresses the jural rights issue, it should find the clear and convincing evidence standard to be constitutional. The Court has assessed evidence for punitives under the clear and convincing standard since *Wilson*. *See Kentucky Kingdom*

Amusement Co. v. Belo Kentucky, Inc., 179 S.W.3d 785, 792 (Ky. 2005). And, the "clear and convincing evidence standard" does not violate the jural rights doctrine.

Any analysis under the jural rights doctrine is inherently complicated, and the Estate does not even come close to addressing the parameters of its application. The jural rights doctrine rests on three Kentucky constitutional provisions, sections 14, 54 and 241. *Wilson* and earlier decisions read the provisions together to fashion the jural rights doctrine. An inquiry into each provision demonstrates that the clear and convincing evidentiary burden does not implicate jural rights.

As this Court explained in *Wilson*, *Ludwig v. Johnson*, 243 Ky. 533, 49 S.W.2d 347 (1932), is the first case to articulate the jural rights doctrine. In *Ludwig*, the Court construed Sections 14, 54 and 241 together to conclude that it is "inescapable that the intention of the framers of the Constitution was to inhibit the Legislature from abolishing rights of action for damages for death or injuries caused by negligence." *Id.* at 350. The majority opinion in *Wilson* notes that *Ludwig* "has been followed many times" (972 S.W.2d at 266), but also observes that "constitutional doctrine is not immune from reconsideration . . . and indeed this Court has declared that we will refrain from 'sanctification of ancient fallacy.'" *Id.* at 267 (*citing Hilen v. Hays*, 673 S.W.2d 713, 717 (Ky. 1984)). Chief Justice Stephens "reluctantly" concurred in the majority *Wilson* opinion, stating "for some time, I have begun to doubt the validity of the doctrine of the jural rights which 'popped' into our law in 1932." *Id.* at 269. Pointing to Justice Cooper's dissenting opinion and Professor Thomas Lewis' law review article, Jural Rights Under Kentucky's Constitution: Realities Grounded in Myth, 80 K.L.J. 953 (1991-92), Chief Justice Stephens opines: "There is little if any basis for this now

routinely accepted doctrine in the Kentucky Constitution or in the constitutional debates." *Id.* Chief Justice Stephens is correct.

A. The Constitutional Provisions Underlying The Jural Rights Doctrine.

Sections 14, 54, and 241 "must be interpreted as nearly as possible in consonance with the objects and purposes in contemplation at the time of their adoption." *State Journal Co. v. Commonwealth*, 289 Ky. 808, 160 S.W.2d 145, 147 (1942) (internal quotations omitted). In addition, "words used in the Constitution must be given their plain and ordinary meaning." *City of Louisville Mun. Hous. Comm'n v. Public Hous. Admin.*, 261 S.W.2d 286, 287 (Ky. 1953). Courts should be "sensitive to the rule that an Act should be held valid unless it clearly offends the limitations and prohibitions of the constitution...." *Johnson v. Commonwealth ex rel Meredith*, 291 Ky. 829, 165 S.W.2d 820, 823 (1942). The Estate fails even to quote, much less to analyze the three constitutional sections from which the jural rights doctrine flows.

1. Section 14

Section 14 provides:

> All courts shall be open, and every person for an injury done him in his lands, goods, person or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial or delay.

The substance of Section 14 appeared in Kentucky's first Constitution, enacted in 1792. It does not address what "remedy" will be available. It says only that a person will have "a remedy by due course of law...." History shows that the framers intended Section 14 simply to be an open courts provision:

> a guarantee of process in the application of the law of the land -- due course of law. It is not, nor could it sensibly be a delegation of final

> authority to the courts to declare substantive law through the law of remedies.

Lewis, Jural Rights Under Kentucky's Constitution: Realities Grounded In Myth, 80 Ky.L.J. 953, 966 (1991-92) (hereinafter "Jural Rights").

Kentucky's highest court acknowledged the purpose of Section 14 in considering its predecessor, Section 15 of the 1850 Constitution. In *Johnson v. Higgins*, 60 Ky. (3 Met) 566 (1861), the Court considered an Act "suspend[ing] the circuit and other courts in this Commonwealth" for a certain period of time. The question on appeal was whether the Act violated the Constitution, including Section 15, which was identical to Section 14.

The Court found no violation of Section 14's predecessor: "The terms and import of this provision show that it relates altogether to the judicial department of the government, which is to administer justice 'by due process of law,' and not to the legislative department, by which such 'due course' may be prescribed. Any other construction would make it inconsistent with other clauses of the Constitution, and, in fact, render it practically absurd." *Id.* at 571-572.

The Court in *Ludwig* criticized *Johnson* forty years after the Constitution was enacted (*Ludwig*, 49 S.W.2d at 351), but *Johnson* undoubtedly was the law when the 1890 Convention opened. After reciting the language of Section 14 at the Convention, one delegate stated it "is unobjected to, and is the equivalent of section fifteen of the present Constitution."[4] This statement was made after *Johnson* and therefore at a time when the framers were deemed to know that *Johnson*'s construction of Section 15 was the

[4] 1 Official Report of the Proceedings and Debates in the Convention Assembled at Frankfort, on the Eighth Day of September, 1890, to Adopt, Amend, or Change the Constitution of the State of Kentucky, p. 439 (hereinafter Debates).

law of the land. The history underlying Section 14 has nothing to offer toward a theory that would give constitutional status to the common law decisions of the courts.

Kentucky's framers adopted the Bill of Rights in Pennsylvania's 1790 Constitution "almost verbatim," including Sections 14, 54 and 241. Jural Rights, p. 977. A delegate observed during the 1890 constitutional debates: "We will not only have the Constitution in conformity with what was approved of by the Pennsylvania Constitution-al Convention, but we **will have the benefit of a construction put upon it by that Court**." 4 Debates, p. 4727 (emphasis added).

In *Singer v. Sheppard*, 346 A.2d 897 (Pa. 1975), the Pennsylvania court specifically construed the effect of Pennsylvania's counter-part to Section 14. It concluded: "Nothing in Article I, Section 11 [Counterpart to Kentucky's Section 14], therefore, prevents the legislature from extinguishing a cause of action." *Id.* at 400.

Subsequently, the Pennsylvania Supreme Court articulated the practical, sound reason for not reading the open courts provision as giving citizens vested rights in an immutable body of common law.

> The practical result of a contrary conclusion would be the stagnation of the law in the face of changing societal conditions . . . . Indeed we have long explicitly recognized that societal conditions occasionally require the law to change in a way that denies a plaintiff a cause of action available in an earlier day.

Freezer Storage, Inc. v. Armstrong Cork Co., 382 A.2d 715, 720 (Pa. 1978) (internal citations omitted).

This Court made a similar observation in *City of Louisville v. Chapman*, 413 S.W.2d 74 (Ky. 1967), when considering the evolution of the common law and likening it to a "mighty rising river" that spills over into "new fields and new territory in order to make its way to the sea." *Id.* at 77.

> [i]f we are to be restricted to the common law, as it was enacted at fourth James, rejecting all modifications and improvements which have since been made, by practice and statutes, except our own statutes, we will find that system entirely inapplicable to our present condition, for the simple reason that it is more than two hundred years behind the age.

Id. at 77 (*quoting, Penny v. Little*, 3 Scam. 301 (Il. 1841)).

2. Section 54

Section 54 provides:

> The General Assembly shall have no power to limit the amount to be recovered for injuries resulting in death, or for injuries to person or property.

This Court has recognized that Section 54 was enacted in 1891 "to limit the power of the General Assembly, which was then widely perceived as abusing its power with the grant of privileges and immunities to railroads and other powerful corporate interests." *Perkins v. Northeastern Log Homes*, 808 S.W.2d 809, 811-12 (Ky. 1991). The Debates reveal that the framers' concern focused on legislative favoritism shown the railroads in capping amounts of recovery in suits against the railroads. The Debates refer to limitations on amounts, not to the need to preserve any cause of action existing then or now. 3 Debates, p. 3793 (emphasis added). If the framers had intended Section 54 to preserve all causes of action for all time, they could have easily expressed that prohibition in plain language. Instead, they referred to limitations on amounts to be recovered for injuries and referred to no cause of action "resulting" in injury or death.

In addition, like Section 14, Section 54 was based on a provision in Pennsylvania's Constitution. In *Singer v. Sheppard*, 346 A.2d at 900 n.6 (Pa. 1975), the Pennsylvania Supreme Court construed the counterpart to Section 54 in Pennsylvania's Constitution and concluded that this provision did not inhibit the legislature's power to abolish causes of action existing at common law. *Id.* at 901.

3. Section 241

Section 241 provides:

> Whenever the death of a person shall result from an injury inflicted by negligence or wrongful act, then, in every such case, damages may be recovered for such death, from corporations and persons so causing the same. Until otherwise provided by law, the action to recover such damages shall in all cases be prosecuted by the personal representative of the deceased person. The General Assembly may provide how the recovery shall go and to whom belong; and until such provision is made, the same shall form part of the personal estate of the deceased person.

Without a doubt Section 241 had a narrow focus in the mind of the framers. "Neither its language or its history can justify giving it any broader effect than to preserve a wrongful death action in circumstances where, in the absence of death, a cause of action for injuries would have been available." Jural Rights, p. 972. During the Debates, one delegate noted that other states had similar constitutional provisions: "There are like provisions in other Constitutions, notably in the Constitution of Texas. In that [the Texas] Constitution punitive damages are expressly authorized to be given. The [Revisory] Committee did not draw this section [section 241] as stringently as that." 4 Debates, p. 4687 (emphasis added). Section 241 was general by design, leaving its application to legislative discretion.

Significantly, six years after the Constitution was adopted, this Court recognized that Section 241 did not restrict the General Assembly's ability to determine the circumstances under which punitive damages would be allowed. In *Clark's Administratrix v. Louisville & N. R. Co.*, 18 Ky. L. Rep. 1082, 39 S.W. 840 (1897), the Court considered an amendment to the wrongful death statute. When the Constitution was adopted, the wrongful death statute allowed punitive damages when the negligence was "gross." The prior statute, enacted under the identical predecessor to Section 14,

required "willful neglect." *Id.* at 841. After considering whether Section 241 limited the General Assembly's ability to choose the desirable language governing punitive damages, the Court held:

> If section 241 of the constitution did not repeal Section 3, c.57, Gen. St. (the wrongful death statute) as adjudged in *Wright v. Woods Adm'r,* thus recognizing the validity of an act of the general assembly fixing a "degree" of negligence for punitive damages may be recovered, **it follows that the general assembly can change or designate the 'degree' for which it may authorize a recovery of punitive damages.**

Id. at 841 (emphasis added). In KRS 411.184(2), the General Assembly simply designated the "degree" of proof required for punitive damages.

B. Sections Governing Separation of Powers.

Sections 14, 564 and 241 should be read within the whole fabric of the Kentucky Constitution. Section 233 gives the legislature the power to repeal or abolish the common law unless the Constitution plainly provides otherwise.

> §233. General Laws of Virginia in force in this State until repealed. -- All laws which, on the first day of June, one thousand seven hundred and ninety-two, were in force in the State of Virginia, and which are of a general nature and not local to that State, and not repugnant to this Constitution, nor to the laws which have been enacted by the General Assembly of this Commonwealth **shall be in force within this State until they shall be altered or repealed by the General Assembly**.

(Emphasis added). The majority opinion in *Wilson* concludes under the jural rights doctrine itself that Section 233 does not allow the General Assembly to define malice, but does not discuss the history of Section 233, which suggests that it is the province of the General Assembly, as policymaker, to alter, modify or repeal the common law.

The words of Section 233 "explicitly recognize that the common law is subject to repeal or alteration." *Fireman's Fund Insurance Co. v. Gov't Employees Ins. Co.*, 635 S.W.2d 475, 476 (Ky. 1982) *overruled on other grounds*; *Perkins v. Northeastern Loghomes*, 808 S.W.2d 809, 817 (Ky. 1991). Section 233 grants the General Assembly

the "plenary power to abrogate or modify the common law." *Johnson v. Commonwealth ex rel Meredith*, 165 S.W.2d 820, 828 (Ky. 1942). *See also Benjamin v. Goff*, 236 S.W.2d 905, 906 (Ky. 1951) (Section 233 "provides that the common law shall be in effect in this state until repealed or altered by the Legislature."); *Ruby Lumber Co. v. K.V. Johnson Co.*, 299 Ky. 811, 187 S.W.2d 449, 453 (1945) (same).

If the framers had intended Sections 14, 54 and 241 to narrow substantially the legislature's right to alter or repeal the common law under Section 233, they would have said so in plain language. "Interpretation of the Constitution by rule of implication is hazardous; to be employed only in instances where the subject matter and language leave no doubt that the intended meaning may be thus reached with approximate certainty." *Commonwealth v. Howard*, 180 S.W.2d 415, 418 (Ky. 1944).

Similarly, *Wilson* does not discuss the separation of powers doctrine in Sections 27 and 28 of our Constitution. Section 27 of the Kentucky Constitution divides all the powers of government into the legislative, executive and judicial departments. Section 28 prohibits one department from exercising any power properly belonging to either of the other two departments of government.

Legislative Research Commission v. Brown, 664 S.W.2d 907 (Ky. 1984), provides the definitive interpretation of Kentucky's separation of powers doctrine. The grant of legislative power encompasses "all powers which are solely and exclusively legislative in nature." *Id.* at 913. Included in the grant of legislative power is the power to make public policy decisions for the Commonwealth through legislative action. *Commonwealth ex rel Cowan v. Wilkinson*, 828 S.W.2d 610, 614 (Ky. 1992) (*overruled on other grounds*). *See also Commonwealth v. Hillhaven Corporation*, 687 S.W.2d 545 (Ky. App. 1985). The ability to make public policy by amending, modifying or repealing

provisions of the common law is an inherently legislative function. *See, e.g., Pryor v. Thomas*, 361 S.W.2d 279, 280 (Ky. 1962).

The Estate necessarily argues that the General Assembly may modify or repeal only the common law of Kentucky as it existed on June 1, 1792, but not the common law as it developed after that date. This leads to a somewhat inexplicable disparity. Under its view, the post-1792 amendments to the old Virginia common law would have an exalted constitutional position and would not be subject to legislative modifications, while the original body of common law carried to Kentucky could be amended, modified or repealed by the legislature.

For example, the General Assembly would be prohibited from altering standards of liability in tort actions that existed in 1891, but could, as a proper exercise of legislative power, alter proof standards in contract cases, thus giving tort causes of action a constitutionally protected status, leaving contract cases without such protection. *See Kentucky Hotel v. Cinotti*, 182 S.W.2d 27 (Ky. 1944); *Zurich Fire Ins. Co. of N.Y. v. Weil*, 259 S.W.2d 54, 57 (Ky. 1953) (overruling *Cinotti* to the extent it could be read to apply to tort claims). Moreover, it will require the Court and litigants to engage in historical hair splitting about which actions were well-established in 1891 and how "established" an action must have been in 1891 to receive constitutional protection. Finally, it can lead courts to use the expansive notion of "jural rights" to provide constitutional protection for causes of action that developed **after** the adoption of our 1891 constitution, as the majority in *Wilson* acknowledged to be controversial: "Perhaps the most controversial of our jural rights decisions has been the 'constitutionalization' of newly discovered rights." *Wilson*, 972 S.W.2d at 269.

Allowing the General Assembly freedom to establish remedy standards has beneficial effects. It will respect the role of the legislature as the policymaking department of government and enable the General Assembly to provide certainty regarding the standards of proof in tort cases. Moreover, the General Assembly can allocate risk in transactions and apportion liability for transgressions according to the norms of our time.

C. KRS 411.184(2) DOES NOT VIOLATE THE JURAL RIGHTS DOCTRINE.

Since *Ludwig*, this Court has invalidated statutes under the jural rights doctrine when the General Assembly has completely abolished a right of action. *See University of Louisville v. O'Bannon*, 770 S.W.2d 215, 217 (Ky. 1989) (immunity statute). *Saylor v. Hall*, 497 S.W.2d 218 (Ky. 1973) (statute of limitations applicable to builders); *Perkins*, 808 S.W.2d at 813 (1991) (statute of repose for product liability actions); *McCollum v. Sisters of Charity of Nazareth Health Corp.*, 799 S.W.2d 15 (Ky. 1990) (statute of repose for actions against physicians and hospitals). KRS 411.184(2) does not violate a well-established right. It is a burden of proof, not the elimination of a cause of action. "A plaintiff shall recover punitive damages only upon proving by clear and convincing evidence, that the defendant . . . acted toward the plaintiff with oppression, fraud or malice."

In his dissent Justice Cooper saw no need to address jural rights in *Wilson* because KRS 411.184 does not abolish a common law right to punitive damages. He noted that the Court so held in *Wittner v. Jones*, 864 S.W.2d 885, 890 (Ky. 1993), where it observed "we shall not so interpret" KRS 411.184 as destroying a cause of action. This reasoning is consistent with the rule that a statute is presumed valid unless it "clearly offends" " the Constitution. *See Johnson v. Kentucky ex rel Meredith*, 291 Ky. 829, 165 S.W.2d 820,

823 (1942). KRS 411.184(2) cannot clearly offend the Constitution because there is no well established right to a particular burden of proof.[5]

As Justice Cooper explains in his dissenting opinion, the "clear and convincing evidence" standard does not implicate jural rights because "the establishment of a heightened standard of proof would not 'abolish' the right to collect punitive damages, but only establish the standard of proof to be applied by the jury in determining whether to award them." *Wilson*, 972 S.W.2d at 271.

Justice Cooper noted that similar areas in the law support a clear and convincing requirement for punitive damages:

> "In fact, both malice and fraud have always required proof by clear and convincing evidence. *E.g., Hardin v. Savageau*, Ky., 906 S.W.2d 356 (1995); *Warford v. Lexington Herald-Leader Co.*, Ky., 789 S.W.2d 758 (1990), *cert. denied*, 498 U.S. 1047, 111 S.Ct. 754, 112 L.Ed.2d 774 (1991). The standard recognizes the quasi-criminal nature of punitive damages by taking the middle ground between the standard ordinarily used in civil cases of proof by a "preponderance of the evidence," and the criminal law standard of proof "beyond a reasonable doubt." While holding that Due Process does not require a standard higher than the "preponderance of the evidence," if buttressed by other procedural and substantive protections, the United States Supreme Court has stated that "There is much to be said in favor of a State's requiring, as many do, . . . a standard of clear and convincing evidence" or, even "beyond a reasonable doubt." *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1, 23 n. 11, 111 S.Ct. 1032, 1046, 113 L.Ed.2d 1 (1991).

Citing numerous statutes, cases and academic analysis, Justice Cooper justified the clear and convincing evidence standard:

---

[5] Courts use the jural rights doctrine to save from abolishment those jural rights that had become "**well established** prior to the enactment of our Constitution." *Ludwig*, 49 S.W.2d at 350, *quoting, Stewart v. Houk*, 127 Or. 589, 271 P. 998 (Or. 1928) (emphasis added). Similarly, the Court in *Kirschner v. Louisville Gas & Electric Co.*, 743 S.W.2d 840 (Ky. 1988), looked for a "definitive statement" in the common law and, finding none, upheld the statute.

> The "clear and convincing evidence" standard for punitive damages has been adopted by legislative enactment or judicial decision in twenty-nine other states and the District of Columbia, and has been recommended by each of the principal academic groups to analyze the law of punitive damages since 1979, *i.e.*, the American Bar Association, the American College of Trial Lawyers, the American Law Institute, and the National Conference of Commissioners on Uniform State Laws.

Wilson, 972 S.W.2d at 271 (footnotes omitted).

There is no independent cause of action for punitive damages. And, punitive damages do not serve to compensate a plaintiff – to be recovered as a matter of right. "Punitive damages are damages other than compensatory or nominal damages, awarded against a person to punish him for his outrageous conduct." *Ashland Dry Goods v. Wages*, 195 S.W.2d 312, 315 (Ky. 1946). *See also Louisville & N.R. Co. v. Roth*, 114 S.W.2d 264, 266 (Ky. 1908) ("punitive damages are awarded as civil punishment inflicted upon the wrongdoer, rather than as indemnity to the injured party"). The clear and convincing evidence standard does not implicate jural rights.

IV. THIS COURT SHOULD ORDER A NEW TRIAL BECAUSE THE PUNITIVE AWARD IS UNCONSTITUTIONALLY EXCESSIVE.[6]

Because the trial court never should have allowed the jury to consider punitive damages, the amount is plainly excessive; it should have been zero. But if this Court sees a jury question, it should find $2 million to be well over the top. Applying a *de novo* standard of review, this Court explained:

> *Gore* and *Campbell* require that punitive damages awards be reviewed under three "guideposts": (1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.

[6] Fuel Transport preserved this issue for appeal by its post-trial motions (T.R. 664-666).

Steel Technologies, Inc. v. Congleton, 234 S.W.3d 920, 931 (Ky. 2007) (internal quotation omitted).

The first guidepost is the "most important *indicium* of the reasonableness of a punitive damages award." *Id.* For the same reasons that Fuel Transport's conduct can in no way be deemed "outrageous" under Kentucky law, it also cannot be "reprehensible" under a due process analysis. Even assuming incorrectly that Fuel Transport was aware of a fifth wheel coupling problem and forgot to fix it, that mistake does not rise to a reprehensible level as a matter of law under *Kinney* and other accident cases. There is no evidence that Fuel Transport had a pattern of other accidents or poor vehicle maintenance. Even Mr. Isaacs acknowledged that Fuel Transport consistently made every repair he requested (EA-1). Mr. Vanderpool stated that Fuel Transport serviced the tractor-trailer before he drove it. Both drivers drove it during the weeks preceding the accident with no problems. And, the fifth wheel did not cause the accident.

The second guidepost, disparity between actual harm and the punitive award, also undermines the award here. Certainly, Ms. Gibson suffered the worst harm: death. But Fuel Transport did nothing to hurt her. While the punitive award equals the pain and suffering award, that is not the proper comparison. For reasons explained below, the pain and suffering award is greatly excessive and therefore irrelevant to assessing the punitive award under the three guideposts.

The third guidepost, civil penalties, likewise cannot justify the award because there is no penalty facing or applicable to Fuel Transport as a result of the accident. Under all three criteria, the $2 million award in this case fails constitutional scrutiny.

V. THE COURT SHOULD ORDER A NEW TRIAL BECAUSE THE JURY WAS INFLAMED BY PASSION AND PREJUDICE.[7]

The record allows the Court to assess the reasons that inflamed the jury. Through questions of counsel, rather than answers from witnesses, the jury must have been confused by all the irrelevant fifth wheel speculation. A more likely cause of bias, however, lies in the Estate's counsel's repeated exploitation of an affidavit that Fuel Transport filed earlier in the case to support a summary judgment motion (T.R. 440-477), in which it denied ownership of the tractor-trailer at the relevant time. Mrs. Clifton had determined from Fuel Transport records that the tractor-trailer involved in the accident had been sold to Mr. Isaacs. Fuel Transport then discovered before trial that it, not Mr. Isaacs, owned the tractor-trailer, and promptly advised the trial court of that fact. By the time of trial, there was no dispute about ownership.

But over Fuel Transport's objection, the trial court allowed counsel for the Estate to hammer the affidavit when examining Mr. Isaacs and cross-examining Mr. Clifton. He continually argued that the filing of the affidavit was a dishonest attempt to avoid liability. (Tape No. 1, 12/3/07, 1:58:28, 4:10:11; Tape No. 3, 12/4/07, 2:22:14; Tape No. 4, 12/5/07, 11:00:11-40, 11:04:15, 11:13:48, 12:05:07). But there was no evidence whatsoever of deliberate concealment. Mr. Clifton never denied ownership. This was only pretrial confusion, but with inflammatory words like "fraud on the Court," it became the Estate's counsel's brush, used over and over to paint Fuel Transport as a lying, corporate miscreant.

[7] Fuel Transport preserved this issue for appeal by its post-trial motions. (T.R. 648-650).

This affidavit and confusion over ownership should never have played a part in the Estate's presentation at trial and cannot be considered as evidence to justify punitive damages. *Gersh v. Bowman*, 239 S.W.3d 567 (Ky. App. 2007), involved a one car accident in which the driver went too fast around a curve and lost control, despite warnings from his passengers to slow down. The crash seriously injured Bowman. She contended during the trial that Gersh " 'concealed' his misconduct" (exceeding the speed limit which caused the accident) "through statements, deposition testimony, and discovery responses." *Id.* at 572. This Court adhered to the long-standing rule that "[A]cts of concealment can give rise to punitive damages '**only** if the concealment itself caused damages **independently** of those flowing from the wrongful act attempted to be concealed.' " (*Id.* at 573) (*quoting Hardaway Mgmt. Co. v. Southerland*, 977 S.W.2d 910, 916-17 (Ky. 1998)) (emphasis added). "Bowman did not sustain any separate and distinct damages as a result of Gersh's alleged concealment regarding discovery issues. Accordingly, it was error for the trial court to allow any testimony regarding it." *Id.*

Similarly, in *Estate of Embry v. GEO. Transp. of Indiana, Inc.*, 478 F. Supp. 2d 914, 923 (E.D. Ky. 2007) (applying Kentucky law), the court considered an Estate's argument that punitive damages should be based on evidence that a negligent truck driver had concealed his various physical ailments when applying for a commercial driving license. As in *Gersh*, the Court held that the concealment had no causal connection to the injuries and therefore could not support a punitive award. The same is even more true of the affidavit here, which was not "concealment" and had no relevance at all to the accident. But its use at trial by the Estate's counsel angered and prejudiced the jury and, combined with ownership and fifth-wheel confusion, led to a wholly unsupportable punitive award.

In a similarly inflammatory manner, the Estate argued that Fuel Transport's method of paying its drivers encouraged negligence. (Tape No. 4, 12/5/07, 11:14:32). There was no proof to support any such connection and there is nothing improper about paying a driver according to how hard he works, as in how many loads he hauls. Employee compensation had no relationship to the accident or its cause.

Aggravating this immaterial hysteria, a deeply prejudiced juror, Ms. Short, participated in deliberations without having disclosed the highly relevant fact that her father was killed in a car accident. (App. 2) The jury's punitive damage award, rests not on relevant proof, but necessarily flows from improper motives and Plaintiff counsel's effective manipulation of immaterial, inflammatory allegations.

The Court of Appeals noted that the Estate could use the affidavit "to question Clifton's credibility." This reasoning would open the door to any "alleged concealment' rendering the rule in *Gersh* meaningless. Presumably, the "concealment' in *Gersh* and any other case would relate somehow to "credibility." And, in this case, it should not be a credibility issue because Clifton did not deny Fuel Transport's ownership when he testified. Plus, the manner in which counsel used the affidavit made any probative value substantially outweighed by the danger of undue prejudice and confusion of the issues. KRE 403 serves to exclude such occurrences at trial.

VI. THE $2 MILLION AWARD FOR PAIN AND SUFFERING IS UNSUPPORTED BY THE EVIDENCE AND NECESSARILY BASED ON PASSION AND PREJUDICE.[8]

This Court should reverse the $2 million award for pain and suffering and remand for a new trial. Under the applicable standard, this Court should find a verdict excessive when the trial court was "clearly erroneous" in failing to realize that the jury's award "appears to have been given under the influence of passion or prejudice or in disregard of the evidence or the instructions of the court." *Burgess v. Taylor*, 44 S.W.3d 806, 813 (Ky. App. 2001) (citing CR 59.01(d)). "[T]here is no legal yardstick for measuring . . . pain and suffering. . . . There is only the broad and general rule of reasonableness, free from sentiment or fanciful standard, and, as well, free from the imposition of punishment for an aggravated act where the circumstances are not of a character to authorize submission to the jury of the question of allowing punitive damages." *Noel v. Creary*, 385 S.W.2d 951, 953 (Ky. 1965). An appellate court will reverse a compensatory award when "the jury may probably have been actuated by sympathy or by bias, prejudice or like unjudicial and improper motive," such as when the award "at first blush" strikes "the judicial conscience as being grossly excessive." *Field Packing Company v. Denham*, 342 S.W.2d 524, 527 (Ky. 1961).

The $2 million pain and suffering award here should "strike the judicial conscience." 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 tubation, rendered her at least heavily

[8] Fuel Transport preserved this issue for appeal by objecting to the Court's jury instructions (Tape No. 4, 12/05/07, 9:24:40 – 9:24:58) and by its post-trial motions (T.R. 651-653).

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.

In this short two-and-a-half-day trial, only one medical witness, Dr. David Denning, testified about Ms. Gibson's medical condition when she was brought to the emergency room after the accident. The Estate called no nurses or other professionals with personal knowledge to testify based on their daily contact presumably because their observations are no different. When Ms. Gibson was admitted at the emergency room on the late night of November 2 or early morning of November 3, she was incoherent and in pain (Tape No. 3, 12/4/07, 1:36:26-1:36:36). She had fractures from the accident, but also long existing health problems, such as diabetes, heart murmurs, and lung disease (Tape No. 3, 12/4/07, 1:52:55-1:53:52).[9] The nurses immediately put her on an IV and gave her morphine and other strong pain medication (Tape No. 3, 12/4/07, 1:39:22-1:39:41; EA-16).

The next day, November 3, she continued to be heavily medicated. On the morning of November 4, Dr. Denning had her intubated to provide oxygen for breathing. According to his sworn testimony, from that time on until she died on November 9, she was "heavily sedated" and continued to be on Morphine and other pain medications that can render a patient unconscious (Tape No. 3, 12/4/07, 1:42:02-1:43:22; EA-16, EA-17). Dr. Denning opined that the accident, combined with her bad health, caused her death (Tape No. 3, 12/4/07, 1:28:18-1:29:00; 1:52:55-1:53:52). In all likelihood, except for the

[9] The award may also be excessive and reflective of inappropriate sympathy based on Ms. Gibson's preexisting condition. A jury is not supposed to consider injuries from preexisting conditions. *Langnehs v. Parmelee*, 427 S.W.2d 223, 224 (Ky. 1968).

night of the accident on November 2, Ms. Gibson was neither in pain nor suffering for the last week of her life.

Because Ms. Gibson was heavily sedated and at least unconscious much of her days at the hospital, the Estate cannot recover pain and suffering damages for those days. The law remains settled that no recovery for pain and suffering is appropriate for the period in which "the overwhelming evidence" proves that Ms. Gibson was unconscious. *See, Vitale v. Henchey*, 24 S.W.3d 651, 659 (Ky. 2000). Kentucky adheres to the general rule that "[a]n award for pain and suffering is appropriate only for pain and suffering that is conscious . . . ." 22A Am. Jur. 2d *Death* §210. While the Estate may be entitled to some amount for pain and suffering, an award of $2 million on these facts is surely shocking under any standard.

The Estate relies on Ms. Gibson's former daughter-in-law, but her knowledge is inadequate to assess Ms. Gibson's condition. The Estate surely had the opportunity to bring a nurse to the stand who had constant contact with Ms. Gibson. No such witness appeared, however, presumably because he or she would add nothing contrary to Dr. Denning's opinion. Instead, the Estate brought forward only one witness, Carolina Wogomon, the mother of Ms. Gibson's grandchildren but divorced from her son. Ms. Wogomon testified for less than fifteen minutes. In that short period of time, after testifying about her former mother-in-law's pre-accident activities, she said Ms. Gibson seemed to be in pain when she saw her on the night of the accident (Tape No. 2, 12/3/07, 4:42:30-4:42:49). That is consistent with Dr. Denning's professional opinion before Ms. Gibson received morphine.

Ms. Gibson's former daughter-in-law then proceeded to offer completely vague assertions about Ms. Gibson "moaning' when she saw her. Her testimony is vague but it

seems she is continuing to refer to Ms. Gibson's state upon admission to the hospital (Tape No. 2, 12/3/07, 4:44:50-4:45:17). The record fails to disclose how many times Ms. Wogomon visited her former mother-in-law or how many minutes she stayed in the room. Dr. Denning testified that Ms. Gibson was "heavily sedated" and being administered drugs that could render her unconscious – from November 4 through November 9 when she died. He explained that nurses administer pain medication "up and down" to keep patients constantly out of pain, and for this reason, a perception of pain, like Ms. Wogonan's, may not be valid (EA-17). The testimony of a biased relative cannot trump Dr. Denning's professional opinion to conjure a fact issue. She is not qualified.

In *Steel Technologies, Inc. v. Congleton,* 234 S.W.3d 920 (Ky. 2007), the trial court refused to give an instruction on pain and suffering because Ms. Congleton died at the scene. But the trial court allowed an instruction on "pre-impact fear damages" for which the jury awarded $100,000. This Court evaluated the pre-impact fear claim against the long-existing element of an intentional infliction of emotional distress claim requiring "impact." Remarkably, like Ms. Wogonan's lay testimony, the "fear" evidence in *Steel Technologies* consisted "primarily of the opinion of an emergency services worker about what the grimace on the victim's face meant. There was no scientific or medical proof of mental injury. . . ." *Id.* at 930. "Mental injury" like fear is qualitatively similar to pain and suffering. Both can be subjective. This Court concluded that distress from an injury must be shown from "demonstrable evidence of mental distress manifesting in a medical injury proven **through expert testimony**." *Id.* (emphasis added). *See also Tallon v. Lloyd & McDaniel*, 497 F. Supp. 2d 847, 851 (W.D. Ky. 2007) ("Plaintiff must produce actual evidence of distress and injury, not merely conclusory statements about it."). Ms.

Wogonan's brief and biased testimony about "pain" cannot support a $2 million pain and suffering award.

The Court of Appeals states that Fuel Transport waived the right to challenge the $2 million award for pain and suffering because "they failed to object to the $2 million limit on the possible recovery" (Opinion, p. 21, App. 1). The Court should not find waiver when a party's position is clear to all at trial: Counsel for Fuel Transport argued in closing, in the context of Instruction No. 5 on damages, that $150,000 for pain and suffering was fair and reasonable (Tape No. 4, 12/5/07, 10:43:35-50). Fuel Transport made clear an objection to the excessive demand for $2 million.

VII. ERRORS IN INSTRUCTIONS WARRANT A NEW TRIAL.[10]

The trial court failed to impose the standard for punitive damages in wrongful death cases in KRS 411.184(2), which requires conduct that is willful or the negligence gross to be established by "clear and convincing" evidence." The lower court's instruction violates substantive and procedural due process requirements for reasons that Justice Cooper explains when dissenting in *Williams v. Wilson*, 972 S.W.2d 260, 276 (Ky. 1998). Punitive instructions must "enlighten the jury as to the punitive damages' nature and purpose, identify the damages as punishment for civil wrongdoing of the kind involved and explain that their imposition is not compulsory." *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U. S. 1, 20, 111 S. Ct. 1032 (1991). To confine the jury's discretion within constitutional bounds, the trial court should have used the "willful" and "clear and convincing" evidence requirement in KRS 411.184. Because the trial court allowed the Estate counsel to use the affidavit and confusion over truck ownership to smear Fuel

[10] Fuel Transport preserved these issues for appeal by objecting to the Court's jury instructions (Tape No. 4, 12/05/07, 9:24:39-9:30:22).

Transport, it also should have instructed the jury that causation is required between the so-called misconduct and the injury.

A. Punitive Damages.

Appellant strongly faults the Court of Appeals for applying the "clear and convincing" standard of proof in KRS 411.184. Appellant errs in suggesting that Fuel Transport failed to argue the "clear and convincing" burden. By objecting to punitive damages under any standard, Fuel Transport necessarily objected to punitives under a clear and convincing standard.

Moreover, Kentucky law requires courts to employ the express language of an applicable statute in instruction to a jury. When the legislature defines a standard, its words are meaningless if not given in instructions to the jury. This Court has observed this principle of law specifically in the context of the punitive damage statute. In *Hanson v. American Nat. Bank & Trust Co.*, 865 S.W.2d 302 (Ky. 1993), (*overruled on other grounds by Sand Hill Energy, Inc. v. Ford Motor Co.*, 83 S.W.3d 483, 495 (Ky. 2002) this Court considered a case that reached the Court "on the issue of the instructions by the trial court to the jury on punitive damages...." *Id.* at 310. While the Court did not decide the constitutionality of KRS 411.184, the Court noted that in *Pacific Mutual Life Insurance Co. v. Haslip,* 499 U.S. 1, 111 S.Ct. 1032 (1991), the United States Supreme Court "did **not** identify the parameters the trial court and appellate court should apply in insuring that an award of punitive damages meets the test of due process." *Id.* at 310.

This Court held in *Hanson* that the statute-based instructions were adequate under the due process test in *Haslip*. The instructions in *Hanson* fully encompassed and complied with KRS 411.184 and 411.186 and represented the "only guidance that could be given the jury." *Id.* at 310 (emphasis added). *See also Kroger Co. v. Willgruber*, 920

S.W.2d 61, 68 (Ky. 1996) ("The instructions on punitive damages were proper and in full accord with KRS 411.184 and KRS 411.186.").

Hanson and *Kroger* are consistent with the general, well-settled rule that trial courts should follow the language of governing statutes in jury instructions. *See City of Louisville v. Maresz*, 835 S.W.2d 889, 894 (Ky. App. 1992) ("[W]hen a statute or ordinance prescribes or proscribes certain actions, '[t]he duties of the parties defined by the ordinance [or statute] should be covered by the instructions.'"); *Louisville Taxicab & Transfer Co. v. Holsclaw Transfer Co.*, 344 S.W.2d 828, 830 (Ky. 1961) (instruction following language of ordinance was proper); *Fayette County v. Veach*, 294 S.W.2d 541, 546 (Ky. 1956) (instruction covering all statutory requirements was proper). The trial court erred by refusing to follow the language of KRS 411.184. "Clear and convincing" is the statutory standard in the statute governing punitive damages.

B. Compensatory Damage.[11]

The Court should have instructed the jury on "conscious" pain, suffering, and mental anguish. As previously explained, Kentucky law requires that awards for pain and suffering compensate for "conscious" pain and suffering. *Vitale v. Henchey,* 24 S.W.3d 651 (Ky. 2000).

VIII. PREJUDICIAL JUROR MISCONDUCT.[12]

Juror misconduct is grounds for new trial. Near the end of *voir dire*, the trial court was prepared to grant a mistrial, on Fuel Transport's Motion, because so many

---

[11] Fuel Transport preserved this issue in objecting to instructions (Tape No. 4, 12/5/07, 9:24:30).

[12] Fuel Transport preserved this issue for appeal by its post-trial motions (T.R. 648-650, 921-929).

jurors had been excused for cause and the remaining number was inadequate. At the last minute, however, a juror, Lisa Short, appeared, who had not been present during roll call or sworn. In response to questioning, Ms. Short stated that she had been present throughout the *voir dire* and had no responses to the questions asked (Tape No. 1, 12/3/07, 11:36:17). One of those questions was squarely directed toward exposing bias, inquiring if any member of the panel had any outside influences or prejudices that would affect decision making in this kind of case (Tape 1, 12/3/07 11:17:56). No one responded, and neither did Ms. Short. Though, she should have.

Also, the Court of Appeals observed that "appellants asked the jurors if they had ever been involved in an accident," but unfairly deemed this question insufficient because "they failed to ask if any family member had been in such an accident" (Opinion, p. 8, App. 1). Counsel in fact inquired if anyone had been involved in a car accident "at all" (Tape No. 1, 12/3/07, 11:36:38-11:37:57). The two questions, whether separately or combined, 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.

After the verdict, defense counsel interviewed jurors and discovered that Ms. Short should have disclosed a significant bias. In her written answer to a questionnaire concerning damages, Ms. Short admitted, "My father was killed in an automobile accident and they deserved everything they got" (T.R. 910, App. 3). It is counterintuitive to think Ms. Short forgot this tragic event during voir dire in a wrongful death accident case.

In a case like this one, the worst kind of juror a defendant could have is one whose beloved family member was killed in a car accident. For this reason, courts grant

new trials when jurors hide information that comes to light after trial. In *Stein v. Chesapeake & O. Ry. Co.*, 116 S.W. 733, 738 (Ky. 1909), the Court held:

> A juror on his *voir dire* qualified, declaring that he had not formed nor expressed an opinion concerning the merits of the case. But he had. The fact was not learned by appellant till after the juror had signed and returned the verdict, and the jury discharged. This was urged as a ground for a new trial. Being established, it should have prevailed.

See also Olympic Realty Co. v Kamer, 141 S.W.2d 293, 297 (Ky. 1940) ("the right to challenge a given number of jurors without showing cause is one of the most important rights to a litigant, any system for the empaneling of a jury that prevents or embarrasses the full, unrestricted exercise of the right of challenge must be condemned.").

The Court of Appeals cites *Sizemore v. Com.*, 306 S.W.2d 832, 834 (Ky. 1957), but it justifies recusal here. There, as the Court explains, "two jurors failed during *voir dire* to disclose that they were related to a victim of a crime similar to that charged against the accused. During *voir dire* in a murder trial, the jurors were asked whether any of them 'had ever been interested in the prosecution of a case in which a person had been killed'" (Opinion, p. 5, App. 1). Later, defense counsel discovered that two jurors had been related to a victim killed by her husband; one as an uncle and the other by marriage *Id.* The Court recognized that "interested" has different interpretations, but reversed the verdict nonetheless because "the jurors were under a duty to disclose their relationship to a murder victim where under the circumstances described it would be 'difficult to conceive of a situation where complete indifference existed'" (Opinion, p. 6, App. 1 (*quoting Sizemore*, 306 S.W.2d at 834)). Disclosure could have been of "great value to the attorney for the defense in determining whether bias, actual or implied, existed." *Id.*

Ms. Short's nondisclosure is not different. Like "interested," the word "involved" may be interpreted in different ways. And, having a duty in a murder case to disclose

that a relative was murdered has no logical difference from having to disclose, in a fatal accident case, that a father was killed in a car wreck. In both instances, the juror was asked a general question – whether he or she was involved or interested – and in both the answer during *voir dire* should have been "yes." In both situations, disclosure is of "great value" to counsel in evaluating whether bias is present.

The Court of Appeals appears to have relied, not on *Sizemore*, but on *Moss v. Commonwealth of Kentucky.*, 949 S.W.2d 579, 580-82 (Ky. 1997) (Opinion, p. 6, App. 1). But *Sizemore* is much more analogous to our case. In *Moss*, counsel asked the jurors during *voir dire*, whether they "had any relationship or knowledge of these officers . . . **that would affect your ability to be fair to both sides in this case**?" *Id.* at 580 (emphasis added). No juror responded at the time, but later one juror approached the judge, outside the parties' presence and said he knew the officers but his knowledge would not affect his ability to be impartial. *Id.* at 581. The judge did not tell the parties about this disclosure. The Court did not reverse, however, because the juror was unlikely to be stricken for cause and the juror had truthfully answered the question asked. The defendant failed to ask a question to elicit a more complete response.

In *Moss*, counsel's question was qualified. It only sought an answer if knowledge "would affect your ability to be fair to both sides in this case." Here, the question sought an affirmative answer if a juror had outside influence that would affect decision making or involvement in an accident. Ms. Short's post-verdict responses to a questionnaire, unlike the juror's statement to the judge in *Moss*, shows that she could not have been impartial. The Court of Appeals "cannot see how Short's presence tainted the verdict, particularly in light of her failure to agree to the compensatory damages awarded" (Opinion, p. 8, App. 1). But for all anyone knows, Ms. Short wanted to award more than

the other jurors did simply because she is biased. She states, after all, that defendants "deserved everything they got," a plain statement that proves she never would have awarded less than the other jurors. Fuel Transport did not receive a fair trial before an impartial jury.

Had knowledge of Ms. Short's bias been known before trial began, the trial court surely would have struck the juror for cause, and if not, counsel for Fuel Transport and Mr. Vanderpool would have most definitely used a preemptory strike. Without such knowledge, both were severely prejudiced. Someone cannot be expected to have no bias in Ms. Short's circumstance. But her prejudice is inescapable and alone justifies a new trial.

The Court of Appeals could not "see how Short's presence on the jury tainted the verdict" (Opinion, p. 8, App. 1). But, she states that "they deserved everything they got" in the same sentence that begins "my father was killed in an automobile accident" (Ms. Short's Interview Form, App. 2). Her father's death was obviously her reason for awarding damages that she felt Fuel Transport "deserved." The Court of Appeals states that not signing the compensatory award suggests Ms. Short's impartiality, but this reasoning omits the fact that she joined the other jurors in awarding $2 million in punitive damages. Surely, the death of a father is a life experience uppermost in someone's mind. And, any reasonable person would disclose a father's death in an accident when asked if "they" had ever been involved "at all" in an accident. A reasonable person would be "involved" in an accident if a parent had died in one. The law should not require more specificity during the heat of trial in circumstances where the inquiry was made generally, the disclosure is huge, and the prejudice is glaring.

IX. THE TRIAL COURT ERRED IN REFUSING TO TRANSFER VENUE.[13]

Floyd County is the only proper venue where this case could be tried. KRS 452.460(1) states: "Every other action for an injury to the person or property of the plaintiff, and every action for an injury to the character of the plaintiff, against a defendant residing in this state, must be brought in the county in which the defendant resides, or in which the injury is done." Mr. Vanderpool is a resident of Floyd County, Fuel Transport's principal place of business lies in Floyd County, and the accident occurred in Floyd County. The only connection between this case and Knott County is that Ms. Gibson lived in Knott County. That connection is inadequate under KRS 452.460(1) as a matter of law.

In its Complaint, the Estate nevertheless alleged that the accident occurred in Knott County (T.R. 001-006). Fuel Transport and Mr. Vanderpool filed an Answer (T.R. 009-012) denying the venue allegation because they did not know where the accident occurred. It happened at night and the first police report did not identify which County.

Fuel Transport had no evidence that the accident occurred in Floyd County until it received a supplemental police report before the discovery deposition of Officer Hutchison. Fuel Transport then moved to amend its Answer specifically to challenge venue (T.R. 265-272). And, KRS 452.105 requires a trial court to transfer when it lacks venue.

> In civil actions, when the judge of the court in which the case was filed determines that the court lacks venue to try the case due to an improper

[13] Fuel Transport preserved this issue for appeal by moving for directed verdict at the end of Plaintiff's proof (Tape No. 3, 12/4/07, 1:59:42-2:03:04) by its post-trial motions (T.R. 657-662).

> venue, the judge, upon motion of a party, shall transfer the case to the court with the proper venue.

The trial court acknowledged that the accident occurred in Floyd County, but erroneously found that Fuel Transport and Mr. Vanderpool waived venue (T.R. 301-302). Finding waiver here is erroneous and unfair. The Answer denied the Estate's venue allegation. The Estate knew that Knott County was the wrong venue. After learning that the accident occurred in Floyd County, Fuel Transport moved promptly to amend its Answer and contest venue.

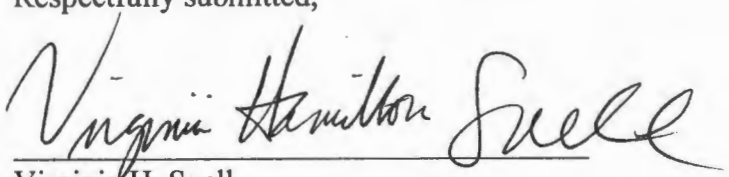
Moreover, a transfer to Floyd County would not have prejudiced the Estate. The parties had taken minimal discovery and no scheduling order was in place. Kentucky courts consistently look for evidence that the party opposing the motion to amend would have been in some way prejudiced by its filing. In *Ashland Oil & Refining Co. v. Phillips*, 404 S.W.2d 449 (Ky. 1966), the court found an abuse of discretion in the strict court's denial of a motion to amend because the opposing party could point to no prejudice and the moving party, as here, presented grounds for delay in seeking to amend. *See Continental Cas. Co. v. L.G. Wasson Coal Mining Corp.,* 407 S.W.2d 426, 431 (Ky. 1966). Likewise, the Estate demonstrated no prejudice from transfer to Floyd County. If this Court grants a new trial, it should transfer the case to Floyd County.

CONCLUSION

In less than two hours, including a lunch break, the jury reached a verdict that was nearly $4 million. The brevity of time spent alone suggests that prejudice and passion drove the jury, not reason and proof. As the Court in *Kinney* held, punitive damages are the exception, not the rule in accident cases. Fuel Transport did not deserve a finding of negligence and surely nothing "outrageous' for a finding of truly gross negligence. We

respectfully urge the Court to affirm the reversal of the punitive damages and to set aside the compensatory award and remand for a new trial in the proper venue, Floyd County.

Respectfully submitted,



Virginia H. Snell
Deborah H. Patterson
Sara Veeneman
Wyatt, Tarrant & Combs, LLP
2800 PNC Plaza
500 W. Jefferson St.
Louisville, Kentucky 40202
502.589.5235

Counsel for Fuel Transport

20338437.3