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

REPLY BRIEF FOR APPELLEE/CROSS-APPELLANT FUEL TRANSPORT, INC.

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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 8th day of August, 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.

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COUNTERSTATEMENT OF POINTS AND AUTHORITIES

May It Please The Court:

After less than 2 hours of deliberations (including lunch), the jury here awarded $2.2 million in compensatory damages for pain and suffering and $2 million in punitive damages, every cent the Estate demanded. Fuel Transport made the business decision to pay the compensatory portion of the judgment, but the excessiveness of the compensatory award remains pertinent because it compels close scrutiny of the $2 million in punitives. Punitives are reserved for egregious conduct, over and above compensation for a plaintiff's injuries. "[T]he offending conduct must be so outrageous that malice can be implied from the facts of the situation." *Phelps v. Louisville Water Co.*, 103 S.W.3d 46, 52 (Ky. 2003). No reasonable trier of fact could conclude that Fuel Transport's conduct was so outrageous as to imply malice.

No Basis for Punitive Damages. As an example of the unreliability of the Estate's Combined Brief ("Combined Brief"), the Estate asserts that Fuel Transport failed to preserve its challenge to punitive damages. Like so many other contentions, this statement is wrong. Fuel Transport moved for directed verdict (Tape No. 2, 2:01:00), objected to giving the jury a punitive damage instruction (Tape No. 3, 9:29:57), and moved for J.N.O.V. to vacate the award (T.R. 653-57, 662-664). Similarly, on page 2, the Estate asserts that Fuel Transport "stipulated liability," despite its motions for directed verdict and closing argument in which it denied liability (Combined Brief, p. 2). The Estate offers the same inflammatory language exploited at trial, like "smothered to death," as if someone murdered Ms. Gibson (*Id.* at p. 10).

As this foretells, the Estate's presentation of the evidence tends toward the hyperbolic and fails to confront key undisputed facts that eliminate any legitimate inference of recklessness. 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. We are not "debating" the evidence – we rely on undisputed facts.

- 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).
- Mr. Isaacs had a trailer "come loose" on railroad tracks in mid-October but he admitted it "was not the right trailer on the truck to start with" (Tape No. 1, 12/3/07, 1:55:11).
- Mr. Isaacs thereafter 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).
- It cannot be said too often – though the Estate ignores this undisputed fact – slack in a fifth wheel causes a "give and shimmy" that happens all the time (EA-10). No driver experienced "give and shimmy" during the weeks prior to the accident.
- Mr. Isaacs experienced no give and shimmy during the weeks immediately preceding his conversation with Mr. Clifton and Mr. Vanderpool.
- Mr. Clifton **asked** Mr. Isaacs 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. Vanderpool testified that Fuel Transport serviced the truck before he started driving it, including brake replacement (Tape No. 1, 12/3/07, 3:24:10-47). "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). Providing "service work" is contrary to any inference of reckless conduct.

- 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 – "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).
- 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*, 302 Ky. 1, 192 S.W.2d 749, 752 (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. 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).

On these undisputed facts, no reasonable fact finder could possibly conclude that Fuel Transport's actions were "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 evidence of a "problem" thereafter. Mr. Isaacs admitted that Fuel Transport consistently made every repair a driver requested (EA-1). And, Mr. Vanderpool testified that the tractor trailer was serviced before he started driving it (EA-6), an undisputed fact that the Estate ignores. Significantly, Mr. Clifton **asked** Mr. Isaacs if anything was wrong with the truck, according to Mr. Isaacs' own testimony. There is no evidence whatsoever of motive to refuse an inexpensive repair. One conversation alleged by one witness given all the other facts cannot possibly support a finding of outrageous conduct.

The Estate again relies most heavily on *Steel Technologies, Inc. v. Congleton* to salvage its punitive award (Combined Brief, pgs. 9-10, 20). The reliance is misguided. 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 the defendant. 234 S.W.3d 920, 923 (Ky. 2007). That illegal conduct is a far, far cry from a defendant asking if there is a problem with a vehicle, thereafter servicing it, and hearing no evidence from the driver that a problem exists. The driver experienced **no** "give and shimmy," which is a constant occurrence when a fifth wheel is slack.

Factual distinctions aside, *Congleton* never ruled on the sufficiency of evidence issue before this Court because defendant Steel Technologies waived that argument. 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.

The Estate ignores Justice McAlnulty's Concurring Opinion in *Congleton*, in 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 . . . . **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). The Estate also forgets his closing admonition: **"This case should not serve as notice that ordinary negligence cases warrant punitive damages."** *Id.* (emphasis added).

The Standard of Review. Attacking the Court of Appeals' review of the evidence, the Estate posits, in essence, that a reviewing court should not **review** the record – contending, for example, that the court "fails to reflect that gross negligence is a finding of fact that must be made, if at all, by a trier of fact . . ." (Combined Brief, p. 15). Appellant cannot deny that the Court of Appeals set forth the standard of review that the

Estate demands (Opinion, pgs. 8-9). The Estate simply dislikes the outcome of applying the correct standard to the evidence presented.

The Estate attempts to skirt around *Kinney v. Butcher*, 131 S.W.3d 357, 359 (Ky. App. 2004), pointing to the Court of Appeals' refusal to characterize *Kinney* as establishing "a new standard for gross negligence." But that appears to miss the thrust of the rationale in *Kinney*, which eliminates any basis for awarding punitive damages against Fuel Transport, just as it denies punitives in other accident cases.

Kinney finds steady support in other decisions (Fuel Transport's Combined Brief, pgs. 11-13), all of which respect the necessity of drawing a line between compensating and punishing. Gross negligence is not ordinary negligence, and courts should not "effectively eliminate the distinction." "We are of the opinion that punitive damages should be reserved for truly gross negligence." *Kinney*, 131 S.W.3d at 359.

The Estate suggests that *Kinney's* reasoning applies only to car accidents, but such limited construction defies logic and fairness. Putting aside the fact of an accident here, *Kinney* itself provides examples of what constitutes "truly gross negligence." It cites cases where tortfeasors were driving while intoxicated[1] and *Phelps v. Louisville Water Company*, 103 S.W.3d 46, 52 (Ky. 2003), where evidence showed 18 instances of the Water Company misrepresenting a dangerous highway condition, violating its own safety policies, and disregarding a traffic control manual. These examples of reprehensible conduct involve a degree of intent or pattern of wrongful conduct.

By contrast, Fuel Transport did every repair asked of it and **asked** Mr. Isaacs if "anything was wrong" with the truck (Tape No. 1, 12/3/07, 1:59:39 EA-1). Someone

[1] *Shortbridge v. Rice*, 929 S.W.2d 194 (Ky. App. 1996); *Stewart v. Estate of Cooper*, 102 S.W.3d 913 (Ky. 2003).

does not intend to ignore a problem when asking whether a problem exists. The Estate also ignores Mr. Vanderpool's testimony that Fuel Transport performed maintenance on the truck before he drove it (EA-6), and that he would never have driven the truck if it was defective (EA-18). The Estate also disregards the undisputed testimony of its own expert that a driver would experience "give and shimmy" from a slack fifth wheel "all the time" (EA-10, EA-18), and neither Mr. Isaacs nor Mr. Vanderpool felt give and shimmy in the weeks prior to the accident. Logic suggests no reason for a legal distinction between negligently driving – which does not warrant punitive damages under *Congleton* – and negligently maintaining, the worst action alleged against Fuel Transport and from a lone witness who admitted Fuel Transport did all the repairs he requested.

The Estate again states that Mr. Isaacs was involved in a "highly similar uncoupling" (Combined Brief, p. 6), but omits that this uncoupling – while crossing railroad tracks – occurred when "the right trailer wasn't on the truck to start with" – it was not Mr. Isaacs' trailer (Tape No. 1, 12/3/07, 1:55:09-1:55:20). The evidence is undisputed that after this dissimilar incident, Mr. Isaacs installed new bushings on the fifth wheel, hooked up the "right trailer," and continued to haul 5 to 7 loads of coal daily without any problems" (EA-2, 3). He admitted: "It's a pretty good truck. It runs good" (Tape No. 1, 12/3/07, 2:19:18-48).

Having abandoned any serious jural rights challenge to the statutory "clear and convincing evidence" standard, the Estate nevertheless complains mightily about the Court of Appeals' reference to the standard. But the record contains **no** evidence of "truly gross negligence," clear and convincing or otherwise. Moreover, KRS 411.184(2) requires "clear and convincing" proof as a prerequisite to imposing punitive damages.

The Estate asserts that clear and convincing proof is always for the trier of fact to decide (Combined Brief, p. 14). But it relies on cases that suggest otherwise. In *Hardin v. Savageau*, 906 S.W.2d 356, 358 (Ky. 1995), this Court observed: "When the law requires a particular evidentiary standard, both the judge and the jury must consider the evidence in that light." The Estate cites cases like a paternity action, *e.g., Hibbs v. Chandler*, 684 S.W.2d 310 (Ky. App. 1985), which do not even address the evidentiary threshold for punitive damages.

In short, the Court of Appeals' review of the evidence was **not** "clearly erroneous on multiple grounds" (Combined Brief, p. 16). It reflects the proper and needed exercise of appellate responsibility. Appellate courts should provide meaningful review, especially in the context of extraordinary remedies. For example, as Fuel Transport explains – and the Estate ignores – courts routinely assess evidence and reverse jury awards when testing the legal sufficiency of outrage claims. They enforce the legal distinction between insults, threats, ineptitude, and indifference on the one hand, and "the level of outrageousness necessary for tortious liability" on the other. Reviewing courts reverse a jury verdict when the level of reprehensibility is absent. *See Stringer v. Wal-Mart Stores, Inc.*, 151 S.W.3d 781 (Ky. 2004), and other cases in Fuel Transport's Combined Brief, pgs 23-25. Likewise, courts should be vigilant in respecting the distinction between ordinary negligence and the truly gross negligence that may warrant exemplary punishment. Consistent with this important distinction, the Court of Appeals properly reversed.

Passion And Prejudice. In awarding $2 million in punitive damages, the jury was driven improperly by passion and prejudice, primarily for two reasons. First, juror Lisa Short failed to disclose during *voir dire* that her father was killed in a car accident

when asked if anyone on the panel had been involved in an accident "at all" (Tape No. 1; 12/3/07, 11:36:38-11:37:57). Citing no authority, the Estate says it is "patently ridiculous" (Combined Brief, p. 23) to suggest misconduct because "involved" means "actual physical involvement." But involved "at all" includes any involvement and any reasonable person would consider themselves involved if a parent had been killed. That Ms. Short declined to join in the compensatory award does not eliminate her prejudice. Likely, she wanted to award more for pain and suffering than the Estate demanded, as her response to the questionnaire reveals. There, post-verdict, she directly connects her father's death to her belief "they deserved everything they got."

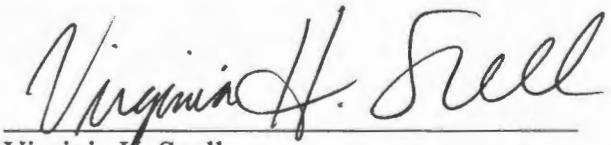
Second, as only a review of the trial testimony can confirm, trial counsel's use of Mr. Clifton's affidavit during cross-examination no doubt inflamed the jury because it charged Fuel Transport with dishonesty and concealment. The Court of Appeals suggests that the affidavit relates to "credibility." This reasoning eviscerates the rule of *Gersh v. Bowman*, 239 S.W.3d 567 (Ky. App. 2007), which excludes acts of concealment as a basis for punitives when, as here, the so-called concealment caused no separate or distinct harm. Allowing it into evidence for "credibility" would allow it every time because alleged concealment will always relate to credibility, leaving no teeth in *Gersh*.

Pain And Suffering. Fuel Transport made the business decision to satisfy the award for pain and suffering to avoid the costs of bond and 12% post-judgment interest. Though entitled, it will not seek reimbursement if it prevails on appeal. The Estate contends that Fuel Transport has waived any ability to challenge the pain and suffering award by satisfying that portion of the judgment. This position discourages a defendant from paying a judgment to avoid the 12% post-judgment interest.

And, the $2 million award remains relevant because it also suggests, in its excessiveness, a jury driven by passion and prejudice. The Estate likens its case to *Gersh*, but the plaintiff there underwent seven surgeries over a two-year period and would continue to have back pain in the future. As Fuel Transport's Combined Brief explains, $2 million for pain and suffering is inexplicable, without the motive of passion and prejudice, given the undisputed facts.

For this reason, the excessiveness of the $2 million pain and suffering award highlights the excessiveness of punitive damages. The second guidepost for assessing punitive damage awards under *Congleton* is the disparity between actual harm and the punitive award. Because the evidence here fails to justify $2 million for pain and suffering, the evidence of "actual harm" caused by Fuel Transport's actions cannot support another $2 million in punitive damages. The evidence undermining the compensatory award also demonstrates that the punitive award is excessive. Punitives are not justifiable here under any circumstances, which alone proves the award to be excessive. We urge this Court to affirm the Court of Appeals on punitive damages, or alternatively, to grant a new trial.

Respectfully submitted,



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