Supreme Court of Kentucky

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

MV TRANSPORTATION, INC. — **APPELLANT**

VS.

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

RICHARD G. ALLGEIER, EXECUTOR
OF THE ESTATE OF BARBARA ALLGEIER — **APPELLEE**

REPLY BRIEF FOR APPELLANT MV TRANSPORTATION, INC.

Griffin Terry Sumner
Jason Renzelmann
Frost Brown Todd LLC
400 West Market Street, 32nd Floor
Louisville, KY 40202
Telephone: (502) 589-4200

~and~

Gene F. Zipperle, Jr.
Ward, Hocker & Thornton, PLLC
Hurstbourne Place, Suite 700
9300 Shelbyville Road
Louisville, KY 40222
Counsel for Appellant

CERTIFICATE OF SERVICE

This is to certify that true copies of Brief for MV Transportation, Inc. was served on the 27th day of September, 2013 by U.S. Mail, First Class postage prepaid, addressed to B. Todd Thompson, Millicent A. Tanner, Chad O. Propst, Thompson Miller & Simpson, PLC, 734 West Main Street, Suite 400, Louisville, KY 40202; Scott C. Cox, Cox & Mazzoli, PLLC, 600 West Main Street, Suite 300, Louisville, KY 40202; Samuel P. Givens, Jr., Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601; Hon. Mary Shaw, Judge, Jefferson Circuit Court, Division 5, 700 West Jefferson Street, Louisville, KY 40202; and to the Jefferson Circuit Court Clerk, 700 West Jefferson Street, Louisville, KY 40202.

Counsel for Appellant

STATEMENT OF POINTS AND AUTHORITIES

I. Admission of past alcoholism and depression evidence was prejudicial error 1

A. Plaintiff's attacks on Ms. Caldwell's "overall competence" based on past alcoholism and depression were not permissible under KRE 608 1

KRE 608(b) 1, 2

28 CHARLES ALAN WRIGHT, ET. AL., FED. PRAC. & PROC. EVID. § 6118 (2d ed.) 1, 2

Bennett v. Longacre, 774 F.2d 1024 (10th Cir. 1985) 1, 3

KRE 403 1

U.S. v. Alston, 626 F.3d 397 (8th Cir. 2010) 1

Firemen's Fund Ins. Co. v. Thien, 63 F.3d 754 (8th Cir. 1995) 2

Andrews v. Seales, 881 F.Supp.2d 671 (E.D. Pa. 2012) 2, 3

Lewis v. Barker, 526 F.2d 470 (2d Cir. 1975) 2

Zeigler v. Ala. Dept. of Human Res., 2010 WL 2490018 (M.D. Ala. June 16, 2010) 2

Johnson v. Baker, 2009 WL 3486000 (W.D. Ky. Oct. 23, 2009) 3

Phipps v. Winkler, 715 S.W.2d 893 (Ky. App. 1986) 3

B. The error was properly preserved 3

KRE 105 3

George v. Commonwealth, 2003 WL 21241938 (Ky. App. May 30, 2003) 3

United States v. Rogers, 918 F.2d 207 (D.C. Cir. 1990) 3

1 CHRISTOPHER B. MUELLER, ET AL., FED. EVID. § 1:6 (3d ed.) 3

21A CHARLES ALAN WRIGHT, ET. AL, 21A FED. PRAC. & PROC. EVID. § 5065 (2d ed.) 3

KRE 103(d) 4

Kentucky Farm Bureau Mut. Ins. Co. v. Rodgers, 179 S.W.3d 815 (Ky. 2005) 4

C. The error was not harmless 5

Crane v. Commonwealth, 726 S.W.2d 302 (Ky. 1987) 5

Winstead v. Commonwealth, 283 S.W.3d 678 (Ky. 2009) 5

Polk v. Greer, 222 S.W.3d 263 (Ky. App. 2007) 5

KRE 609 5

Phipps v. Winkler, 715 S.W.2d 893 (Ky. App. 1986) 5

II. MV's admission of *respondeat superior* precludes a negligent hiring claim 6

Diaz v. Carcamo, 253 P.3d 535 (Cal. 2011) 6, 7, 8

Airdrie Stud., Inc. v. Reed, 2003 WL 22796469 (Ky. App. Nov. 26, 2003) 7

KRE 404(b) 7

Oaks v. Wiley Sanders Truck Lines, Inc., 2008 WL 5459136 (E.D. Ky. Nov. 10, 2008) 7

Scroggins v. Yellow Freight Systems, Inc., 98 F. Supp. 2d 928 (E.D. Tenn. 2000) 7

Thompson v. N.E. Ill. Reg. Commuter R.R., 854 N.E.2d 744 (Ill. App. 2006) 7

KRS 411.186(1) 7

KRS 411.184(3) 7

Gant v. L.U. Transp., Inc., 770 N.E.2d 1155 (Ill. App. 2002) 7

Williams v. McCollister, 671 F. Supp. 2d 884 (S.D. Tex. 2009) 7

Owens Corning Fiberglas v. Parrish, 58 S.W.3d 467 (Ky. 2011) 8

Anderson v. Commonwealth, 281 S.W.3d 761 (Ky. 2009) 8

Hillard v. Commonwealth, 158 S.W.3d 758 (Ky. 2005) 8

III. The circuit court properly granted summary judgment on punitive damages 9

KRS 411.184(3) 9

University Medical Center v. Beglin, 375 S.W.3d 783 (Ky. 2011) 9

Jones v. Blankenship, 2007 WL 3400115 (E.D. Ky. Nov. 13, 2007) 9

Ky. Farm Bureau v. Troxell, 959 S.W.2d 82 (Ky. 1997) 9

IV. A remand for trial solely on punitive damages is improper 10

KRS 411.186(1) 10

KRS 418.075(2) 10

Foster v. Overstreet, 905 S.W.2d 504 (Ky. 1995) 10

I. Admission of past alcoholism and depression evidence was prejudicial error.

A. Plaintiff's attacks on Ms. Caldwell's "overall competence" based on past alcoholism and depression were not permissible under KRE 608.

Throughout trial, and through multiple witnesses, Plaintiff/Appellee attacked Ms. Caldwell's character based on her prior alcoholism and depression. Plaintiff's questions were not limited to specific alleged misstatements on Ms. Caldwell's pre-employment physical exam questionnaire, but also explicitly posited that Ms. Caldwell's prior conditions demonstrated a lack of "overall competence."[1] This evidence was a corner-stone of Plaintiff's negligent hiring claim. Now, in this Court, Plaintiff pivots and suggests it was admitted merely to test credibility under KRE 608(b). Plaintiff mischaracterizes both the record below and the scope of KRE 608(b).

KRE 608(b) states that "[s]pecific instances of the conduct of a witness, for the purpose of attacking ... credibility, ... may not be proved by extrinsic evidence," but may be "inquired into **on cross-examination of the witness**."[2] The scope of the rule is limited: it permits only questions (not extrinsic evidence) concerning specific instances probative of truthfulness, and those questions may only be asked during "examination of ... the principal witness" whose credibility is being challenged, not other witnesses.[3]

Even inquiries that meet the narrow criteria of KRE 608(b) must still pass the probative value vs. prejudice balancing test of KRE 403.[4] The danger of unfair prejudice is particularly acute where "the jury may use misconduct evidence to draw an inference about the likelihood the defendant committed the acts with which he is charged in the

---

[1] VR No. 150 (Pl. Opening Stmt.): 09/09/10; 11:09:18.
[2] KRE 608(b) (emphasis added).
[3] 28 CHARLES ALAN WRIGHT, ET. AL., FED. PRAC. & PROC. Evid. § 6118 (2d ed.). *See also Bennett v. Longacre*, 774 F.2d 1024, 1027 (10th Cir. 1985) (FRE 608(b) inquiries allowed "only on cross-examination of a witness in challenging the truthfulness of his testimony").
[4] *Bennett*, 774 F.2d at 1027 ("Even if it is determined to be relevant [under FRE 608], the trial court... may exclude otherwise admissible evidence if its probative value is substantially outweighed...."); *U.S. v. Alston*, 626 F.3d 397, 404 (8th Cir. 2010) ("Rule 403 balancing ... is an integral step" in applying 608(b).).

case at bar," in which case "unfair prejudice could result from admission even if the evidence is admissible to prove character for truthfulness under Rule 608(b)."[5]

Andrews v. Seales, on which Plaintiff relies, demonstrates the limited scope of Rule 608(b).[6] There, the court permitted a party to be examined about false statements concerning his criminal history, but held the questioning "may not disclose the specific crimes," including a DUI, because "testimony regarding his DUI conviction would be highly prejudicial, as it would suggest to the jury that [Andrews] has poor judgment when he consumes alcohol, something Seales is likely to suggest Andrews was doing ...."[7]

The evidence was not admissible under KRE 608. First, most of it was elicited during examination of witnesses **other than Ms. Caldwell,** including Mr. Coleman, Mr. Grice, and Mr. Rowe, and therefore is clearly outside the scope of KRE 608(b).[8]

Second, Plaintiff's inquiries extended far beyond Ms. Caldwell's alleged false statements. For example, Mr. Rowe was asked the following questions:

- "One of the reasons you, as the safety director, Mr. Rowe, would want to be aware of [past alcoholism] is because you would be concerned that someone who's still in rehab might have a relapse, right?"
- "[Y]ou wouldn't want a driver transporting disabled persons in this community if they were suffering from anxiety attacks or had severe depression, or would you?"
- "Do you think, Mr. Rowe, that a driver of disabled persons in this community, and when you hire them in rehab for alcohol abuse and a history of psychiatric disorders,

---

[5] 28 CHARLES ALAN WRIGHT, ET. AL., FED. PRAC. & PROC. EVID. § 6118 (2d ed.) (emphasis added) ("[T]he jury might ignore the real issues, including those relating to credibility, and improperly base its verdict on this evaluation of his character."). *See also, e.g., Firemen's Fund Ins. Co. v. Thien*, 63 F.3d 754, 760 (8th Cir. 1995) (excluding prior falsification of pilot logbook because while "probative of Thien's untruthfulness, it is far more pertinent to the question of Thien's possible fault in the crash").

[6] 881 F. Supp. 2d 671 (E.D. Pa. 2012) (cited in Appellee's Br. at pp. 22-23). In *Lewis v. Barker*, 526 F.2d 470 (2d Cir. 1975), the plaintiff had already put the fact of his mental health problems at issue because his theory of damages was that the injury complicated this prior condition. In *Zeigler v. Ala. Dept. of Human Res.*, 2010 WL 2490018 (M.D. Ala. June 16, 2010), facts about plaintiff's prior conduct had relevance to another issue in the case, namely defendant's "after-acquired evidence" defense to wrongful termination.

[7] *Id.* at 674-75 (quotations omitted, brackets in original).

[8] *E.g.,* VR No. 152 (Rowe): 9/13/10; 10:14:34-10:25:36, 04:04:30-04:05:52; VR No. 153 (Grice): 9/14/10; 2:50:14-2:58:11; VR No. 151 (Coleman): 09/10/10; 10:18:58-10:21:01.

you think that is the best MV Transportation can do?"[9]

These inquiries did not pertain to Ms. Caldwell's credibility. They were intended to elicit the inference that "people who have those types of conditions ... shouldn't be driving paratransit buses."[10] Even if Ms. Caldwell could be questioned about past misstatements, these questions were not directed to Ms. Caldwell nor to any misstatement by her.

Third, even questions to Ms. Caldwell about past misstatements should not have disclosed the substance of her past alcoholism or depression.[11] "[I]ndulging in alcohol and illegal drugs, without more, would not have any probative value on [one's] 'character for untruthfulness....'"[12] Conversely, such subjects present a very high risk of prejudice.[13]

B. The error was properly preserved.

MV was not required to request a limiting instruction to preserve this error. KRE 105 concerns evidence of "limited" admissibility– *i.e.*, admissible for one purpose but not another. Failure to request a limiting instruction for such evidence "precludes review on appeal of the alleged error in **failing to give such an instruction.**"[14] However, "a lawyer **does not thereby waive his objection to admission of the evidence in the first instance.**"[15] "[F]ailing to ask for a limiting instruction ... does not waive a basic and properly raised objection seeking **complete exclusion of the evidence.**"[16] Where evidence is not admissible for any purpose, a limiting instruction need not be requested.

---

[9] VR No. 152 (Rowe): 9/13/10; 10:18:24-:33, 10:23:03-:13, 04:05:34-:53.
[10] VR No. 154 (Pl. Closing Argmt.): 09/15/10; 06:12:57-6:13:10.
[11] *Andrews*, 881 F. Supp. 2d at 674-75; *Johnson v. Baker*, 2009 WL 3486000, at *9 (W.D. Ky. Oct. 23, 2009) (permitting questions about prior instance of lying to supervisors, but holding "Plaintiff may not inquire as to the content of the alleged 'lie,'" which concerned sexual misconduct).
[12] *Bennett*, 774 F.2d at 1027.
[13] *E.g.*, *Phipps v. Winkler*, 715 S.W.2d 893, 895 (Ky. App. 1986).
[14] *George v. Commonwealth*, 2003 WL 21241938, at * 3 (Ky. App. May 30, 2003) (emphasis added) (copy attached).
[15] *United States v. Rogers*, 918 F.2d 207, 212 (D.C. Cir. 1990) (Thomas, J.).
[16] 1 CHRISTOPHER B. MUELLER, ET AL., FED. EVID. § 1:6 (3d ed.)). *See also* 21A CHARLES ALAN WRIGHT, ET. AL, FED. PRAC. & PROC. EVID. § 5065 (2d ed.) ("[F]ailure to request limitation does not 'waive' a proper objection to ... admissibility ....").

Plaintiff's claim that MV should have asked for a limiting instruction also overlooks the fact that the evidence was specifically admitted for the very purpose to which MV objected – *i.e.*, to show Ms. Caldwell had "dangerous propensities." Plaintiff mischaracterizes the circuit court's ruling as limited to credibility. While the court referenced potential relevance to credibility, its ruling was not limited to credibility or to questioning Ms. Caldwell about false statements. MV moved *in limine* to exclude all evidence of alcoholism and depression due to the lack of a causal connection to the accident.[17] At the hearing on the motion, Plaintiff made clear the evidence was being offered **both** for purposes of credibility **and** to establish MV's negligence in hiring and retaining Ms. Caldwell, and specifically discussed Plaintiff's intention to offer testimony from supervisors to prove MV was negligent to hire someone with a history of alcoholism and depression.[18] MV argued this was "character evidence" not "credibility evidence."[19] The court denied MV's motion, except to exclude evidence of alcohol or depression issues occurring after the date of the accident.[20]

"[A] *motion in limine* resolved by order of the court is sufficient to preserve error for appellate review" without further objection at trial.[21] Plaintiff says MV did not file a "factual" motion for summary judgment, but a motion for summary judgment is not necessary to preserve an evidence objection. Also, MV did cite the lack of causal connection as a reason to dismiss negligent hiring at the September 7, 2010 hearing,[22] and

[17] R.A. 856-861, MV's Mot. in Lim., 8/19/10.
[18] VR Sept. 7, 2010 Hrg. at 03:41:22-03:43:22, 03:38:10-03:39:12.
[19] VR Sept. 7, 2010 Hrg. at 03:43:53-03:44:00.
[20] *Id.* at 03:44:10-03:44:55. The "date of accident" limitation obviously relates to the timeframe potentially relevant to Plaintiff's negligent retention claim, not to any time period uniquely relevant to Ms. Caldwell's credibility. The court also excluded details about a past suicide attempt, but allowed the parties to discuss the event if they described it as being "hospitalized for depression." *Id.* at 03:47:04-:12.
[21] KRE 103(d). *See also Ky. Farm Bureau Mut. Ins. Co. v. Rodgers*, 179 S.W.3d 815, 817 (Ky. 2005).
[22] VR Sept. 7, 2010 Hrg. at 02:06:35-02:10:10.

MV moved for directed verdict on those grounds.[23] The error was properly preserved.

C. The error was not harmless.

"The test for harmless error .... is not whether the jury reached the right result regardless of the error, but whether there is a reasonable possibility that the error might have affected the jury's decision."[24] It is not enough to ask "whether there was enough [evidence] to support the result, apart from the phase affected by the error."[25] Thus, Plaintiff's recitation of other evidence that could have supported the verdict is irrelevant. Plaintiff contends that the verdict turned on "which of two eyewitnesses to the incident was telling the truth" about how the accident occurred.[26] Inflammatory evidence that Ms. Caldwell had a dangerous propensity for recklessness due to past alcoholism and depression presents a substantial possibility of affecting that decision. Even if other evidence could have supported finding *some* liability by MV, there is a substantial possibility the jury may have apportioned MV less than 100% fault in its absence.

Polk v. Greer is exactly on point.[27] In *Polk*, although the plaintiff's prior felony conviction was admissible to test credibility under KRE 609, the defendant exceeded the limits of the rule by describing the plaintiff as a "two time convicted persistent felon." The court held this "'smearing' of Polk [was] unduly prejudicial," and "[b]ecause the outcome of the jury's verdict turned on a negative assessment of Polk's credibility, we cannot say that Greer's objectionable characterization of Polk was harmless."[28]

In *Phipps v. Winkler*, admission of prior alcoholism evidence was held to be not harmless error given the "highly prejudicial" nature of the evidence coupled with the

---

[23] VR No. 154: 09/15/10; 11:46:14-11:48:06,12:01:32-38.
[24] *Crane v. Commonwealth*, 726 S.W.2d 302, 307 (Ky. 1987).
[25] *Winstead v. Commonwealth*, 283 S.W.3d 678, 689 (Ky. 2009) (quotation omitted).
[26] Appellee's Br. at 23.
[27] 222 S.W.3d 263, 266 (Ky. App. 2007).
[28] *Id.*

amount of the damages award, which suggested the jury was prejudiced.[29] Here too, the prejudicial nature of the evidence is undeniable, particularly when coupled with a pain and suffering award over 55 times plaintiff's medical costs.

There is also no merit to Plaintiff's current assertion that the jury could have inferred Ms. Caldwell was drinking the day of the accident. Plaintiff admitted in both opening and closing arguments that there was no evidence she was drinking.[30] Even if the timing of the test made the "0.00" breathalyzer reading less reliable to prove **absence** of intoxication than if the test had been administered 32 minutes earlier, there still was **no affirmative evidence** of alcohol use. Plaintiff's insinuation that the jury could have drawn an adverse inference from the delay presumes a "missing evidence" instruction, which Plaintiff never requested and which the evidence did not support. Also, none of Plaintiff's arguments about the alcohol test supplies any excuse for the use of inflammatory and prejudicial evidence of Ms. Caldwell's past treatment for depression.

II. MV's admission of *respondeat superior* precludes a negligent hiring claim.

The "majority rule [is] that a defendant-employer's admission of vicarious liability bars claims for negligent entrustment, hiring, or retention."[31] Plaintiff's insistence that the majority has "shifted" is simply wrong. Plaintiff inflates his count by including any case that suggests *respondeat superior* has different substantive elements than a claim for negligent hiring, retention, or supervision.[32] But that is not in dispute. Indeed, it is the very reason for the rule. One of the "distinct elements" of a negligent hiring claim is proof that the employee had pre-existing "dangerous propensities," which

---

[29] 715 S.W.2d 893, 895 (Ky. App. 1986).
[30] VR No. 150: 09/09/10; 11:09:08; VR No. 154: 09/15/10; 06:17:54-06:18:32.
[31] *Diaz v. Carcamo*, 253 P.3d 535, 544 (Cal. 2011).
[32] *See* Appellant's Br. at 29-30, nn. 90-92 (cataloging plaintiff's mischaracterization of cases).

should have caused the employer to refrain from hiring him.[33] This element creates a back-door conduit for introduction of evidence about the employee's "prior bad acts" that otherwise would be inadmissible under KRE 404 (b).[34]

That evidence serves no valid purpose. The consequence of proving a negligent hiring claim is to make the employer liable for the tort of the employee. If the employer concedes agency, the employer is **automatically** liable for the tort of the employee, without further proof of the employer's negligence. Thus, a jury verdict on negligent hiring after the employer admits agency has no affect on the Plaintiff's right to recover.[35]

Plaintiff's advocacy of an exception for punitive damages claims is misplaced. Punitive damages were properly dismissed in this case, so they were not at issue. Also, Plaintiff ignores the fact that states which recognize such an exception require punitive damages to be bifurcated to avoid the resulting prejudice,[36] whereas KRS 411.186(1) precludes such bifurcation. Also, KRS 411.184(3) enumerates the showing needed to impose punitive damages on an employer for an employee's tort. Imposing punitive damages based on "grossly negligent hiring" would conflict with those statutory limits.

The majority rule, moreover, is most consistent with principles of comparative fault.[37] Negligent hiring, retention, and entrustment are all theories of *derivative liability*. They provide a means to hold the employer responsible for the employee's tortious

---

[33] *Airdrie Stud., Inc. v. Reed*, 2003 WL 22796469, at *1 (Ky. App. Nov. 26, 2003).

[34] *E.g., Oaks v. Wiley Sanders Truck Lines, Inc.*, 2008 WL 5459136, at *1 (E.D. Ky. Nov. 10, 2008); *Scroggins v. Yellow Freight Systems, Inc.*, 98 F. Supp. 2d 928, 932 (E.D. Tenn. 2000). *Oaks* does not require the employer to concede both agency and the employee's negligence. *Oaks* applied the "majority rule" that negligent hiring claims must be dismissed "once an employer has admitted *respondeat superior* liability," not complete liability. 2008 WL 5459136, at *1. The *Oaks* decision specifically relied on *Scroggins*, where the employer did not concede its employee's liability.

[35] *E.g., Thompson v. N.E. Ill. Reg. Commuter R.R.*, 854 N.E.2d 744, 747 (Ill. App. 2006).

[36] *Scroggins*, 98 F. Supp. 2d at 932.

[37] *E.g., Diaz v. Carcamo*, 253 P.3d 535, 543-44 (Cal. 2011) (citing jurisdictions that have both adopted and reaffirmed the rule after adopting comparative negligence); *Gant v. L.U. Transp., Inc.*, 770 N.E.2d 1155, 1160 (Ill. App. 2002); *Williams v. McCollister*, 671 F. Supp. 2d 884, 890-92 (S.D. Tex. 2009).

conduct. The employer's share of fault is determined by the employee's relative contribution to the accident, for which the employer is deemed to be responsible. To allow negligent hiring claims to be submitted as a separate basis for apportioning fault to the employer would lead to inequitable results:

> No matter how negligent an employer was in entrusting a vehicle to an employee, ... it is only if the employee then drove negligently that the employer can be liable for negligent entrustment, hiring, or retention. .... To assign to the employer a share of fault greater than that assigned to the employee whose negligent driving was a cause of the accident would be an inequitable apportionment of loss.[38]

Owens Corning is not to the contrary.[39] That case addressed apportionment in a suit *by an employee against his own employer*, not secondary claims against an employer for torts of its employee. Nor would the majority rule prejudice employees in indemnity actions by their employers. An employer's admission of agency would not preclude the employee from asserting the employer's negligence as a defense to the indemnity suit.

The majority rule does not implicate "open courts" or Plaintiff's right to present evidence in support of a claim. No legal authority recognizes a right to present evidence or submit a theory that has no impact on plaintiff's right of recovery, but opens the door to highly prejudicial evidence.[40] An employer's admission of *respondeat superior* liability confers the same recovery against the employer that the plaintiff obtains by proving negligent hiring, so the majority rule does not implicate jural rights in any way.

---

[38] *Diaz*, 253 P.3d at 543-44. *See also Gant*, 770 N.E.2d at 1160 ("[A]llowing the simultaneous submission of these two separate theories would create the possibility that an employer's negligent entrustment of a vehicle to an employee would result in a greater percentage of fault to the employer than is attributable to the employee. That ... is plainly illogical."). *See also* MV Resp. to KJA Mot. for Leave to File as Amicus.

[39] *Owens Corning Fiberglas v. Parrish*, 58 S.W.3d 467, 479-80 (Ky. 2011).

[40] *See Anderson v. Commonwealth*, 281 S.W.3d 761 (Ky. 2009) (abuse of discretion to admit facts of prior felony where defendant stipulated to it); *Hillard v. Commonwealth*, 158 S.W.3d 758 (Ky. 2005) (victim's sexual history excluded when victim already acknowledged sexual orientation in cross-examination).

III. The circuit court properly granted summary judgment on punitive damages.

Plaintiff still has not offered any evidence that MV ratified, authorized, or anticipated the alleged gross negligence by Ms. Caldwell, as is required to impose punitive damages on an employer under KRS 411.184(3). The post-incident report on which Plaintiff relies does not "ratify" or "approve" conduct amounting to gross negligence by Ms. Caldwell. Rather, the report denied that Ms. Caldwell was guilty of the conduct Plaintiff claims to be grossly negligent, or that Ms. Caldwell was otherwise responsible for the accident, which cannot establish ratification under *Beglin*.[41]

Nor can Plaintiff show authorization or anticipation by MV. "[T]o prove that [an employer] 'authorized' or 'should have anticipated' [the employee's] acts, [Plaintiff] must present evidence that ... [the employee] exhibited a pattern of conduct similar to the alleged gross negligence...."[42] It is undisputed that there was never an incident like this one involving Ms. Caldwell, or any other MV employee, prior to Ms. Allgeier's accident. Plaintiff relies on *Troxell* to argue MV "authorized" Ms. Caldwell's conduct because it was aware of a pattern of similar conduct. But in *Troxell*, the "pattern" was repeated conduct by the same agent that was clearly tortious and "unacceptable under Kentucky law," and which, in fact, had resulted in prior litigation.[43] Here, the testimony merely indicated drivers had sometimes removed the tie-downs before deploying the lift where appropriate under the circumstances, such as to minimize the time passengers were exposed to the elements.[44] There is no evidence any prior driver, including Ms. Caldwell, had ever endangered – much less tortiously injured – a passenger by doing so, or that MV

---

[41] *University Medical Center v. Beglin*, 375 S.W.3d 783, 794 (Ky. 2011) ("The alleged cover-up implies, not confirmation or approval of the negligence, but disapproval and a misguided attempt by the hospital to distance itself from the tortious conduct, which is the opposite of ratification.").
[42] *Jones v. Blankenship*, 2007 WL 3400115, at *4 (E.D. Ky. Nov. 13, 2007).
[43] *Ky. Farm Bureau v. Troxell*, 959 S.W.2d 82, 86 (Ky. 1997).
[44] *See* Testimony cited in Appellee's Br. at 12 & nn. 133-34.

had any reason to believe that drivers were engaging in grossly negligent conduct.

Equally without support is Plaintiff's argument that MV's investigation policies caused its employees to delay calling EMS. No evidence indicated that any *MV policy* caused the delay. Indeed, Plaintiff admits that "company policy" required "that dispatch must always contact EMS first."[45] In fact, there was no evidence to explain the reason for the EMS delay at all, other than the EMS drivers' testimony about being significantly delayed by holiday traffic. Ms. Caldwell testified she immediately called dispatch to request emergency assistance, and Mr. Coleman called to confirm EMS was en route immediately upon arriving at the scene.[46] Any claims relating to the delay in EMS' arrival cannot support punitive damages against MV.

No evidence permitted imposing punitive damages against MV. The trial court reached this conclusion on three separate occasions, each time after being exhaustively presented with Plaintiff's evidence on the issue. The trial court should be affirmed.

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

Plaintiff does not dispute that a retrial limited to punitive damages would violate KRS 411.186(1)'s directive that punitive damages be tried "concurrently with all other issues." Plaintiff argues the statute is unconstitutional, but Plaintiff waived constitutional challenge by failing to notify the Attorney General as required by KRS 418.075(2). The Court should also extend comity to KRE 411.186(1) because this now-longstanding rule is clearly a "statutorily acceptable" substitute for judicial procedure.[47]

Counsel for Appellant, MV Transportation, Inc.

[45] Appellee's Br. at 8 & nn. 92-93.
[46] VR No. 150 (Caldwell): 09/09/10; 04:09:37; VR No. 151 (Coleman): 09/10/10; 10:44:00-18.
[47] *Foster v. Overstreet*, 905 S.W.2d 504, 507 (Ky. 1995).

APPENDIX INDEX

A *George v. Commonwealth,* 2003 WL 21241938 (Ky. App. May 30, 2003)