Nos. 2022-CA-1431, 2022-CA-1477

In the Kentucky Court of Appeals

CSX TRANSPORTATION, INC., Appellant,

v.

DANIEL J. CAREY II, D.C., ET AL., Appellees.

CRAIG HELIGMAN, M.D., Appellant,

v.

DANIEL J. CAREY II, D.C., ET AL., Appellees.

APPEALS FROM GREENUP CIRCUIT COURT
CASE NO. 18-CI-00348 (JUDGE JOHN F. VINCENT)

BRIEF OF WASHINGTON LEGAL FOUNDATION AS AMICUS CURIAE SUPPORTING APPELLANTS AND REVERSAL

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CERTIFICATE OF SERVICE

In accordance with RAP 30(B), on September 15, 2023, the undersigned filed this brief with the Court's electronic filing system which caused a copy to be served on all counsel of record. The undersigned also served copies of the brief via hand-delivery and/or US Mail on Rodney D. Payne, 400 W. Market St., Suite 2300, Louisville, KY 40202; and Judge John F. Vincent, 2805 Louisa St., Catlettsburg, KY 41129. Undersigned further certifies that neither amicus curiae nor its counsel retrieved the appellate record from the Greenup Circuit Clerk.

/s/ Byron N. Miller
Counsel for Amicus Curiae

000001 of 000024

STATEMENT OF POINTS AND AUTHORITIES

Page(s)

STATEMENT OF POINTS AND AUTHORITIES
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STATEMENT OF POINTS AND AUTHORITIES
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STATEMENT OF POINTS AND AUTHORITIES
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Page(s)

INTRODUCTION

Washington Legal Foundation is a nonprofit, public-interest law firm and policy center with supporters nationwide, including many in Kentucky. WLF promotes free enterprise, individual rights, limited government, and the rule of law. It regularly appears as amicus curiae to emphasize the limits due process imposes on arbitrary deprivations of property. *See, e.g., State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003); *Coates v. R.J. Reynolds Tobacco Co.*, 2023 WL 106899 (Fla. Jan. 5, 2023). WLF's publishing arm, its Legal Studies Division, has produced many works by outside experts on punitive damages. *See, e.g.,* Victor E. Schwartz, *Punitive Damages Awards: The Rest of the Story*, WLF LEGAL BACKGROUNDER (Nov. 4, 2011); Curt Cutting, *An Emerging Trend?: Federal Appeals Court Limited Punitive Damages to 1:1 Ratio*, WLF LEGAL OPINION LETTER (Feb. 27, 2009). Here, the Circuit Court awarded Plaintiffs punitive damages despite this being a humdrum tort case. Even if the award of punitive damages were appropriate under this Commonwealth's laws, that does not mean that the award's magnitude complies with the United States Constitution.

The Fourteenth Amendment's Due Process Clause limits punitive-damages awards to ensure that defendants are not arbitrarily deprived of their property. Here, the punitive-damages award is excessive and violates the Due Process Clause. WLF therefore submits this brief to explain why this Court should, at a minimum, eliminate or reduce the punitive-damages award.

ARGUMENT

As described in CSX Transportation's and Dr. Craig Heligman's briefs, this Court should reverse the Circuit Court's judgment because Plaintiffs' claims for defamation and tortious interference fail as a matter of law. Even if this Court disagrees and holds that the Circuit Court did not err by entering judgment for Plaintiffs, the Court should reverse the punitive-damages award or reduce it to a constitutional level.

I. PLAINTIFFS DID NOT CLEARLY AND CONVINCINGLY PROVE THAT CSX'S OR HELIGMAN'S ACTIONS WERE OPPRESSIVE, FRAUDULENT, MALICIOUS OR GROSSLY NEGLIGENT.

The General Assembly and our Supreme Court have severely restricted the types of cases in which a court may award punitive damages. To award punitive damages, a court must find that the

defendant acted with "oppression, fraud or malice." KRS § 411.184(2). Rightly concerned that courts may interpret these terms too broadly, the General Assembly supplied narrower meanings. "'Oppression' means conduct which is specifically intended by the defendant to subject the plaintiff to cruel and unjust hardship." KRS § 411.184(1)(a). "'Fraud' means an intentional misrepresentation, deceit, or concealment of material fact known to the defendant and made with the intention of causing injury to the plaintiff." KRS § 411.184(1)(b). As relevant here, "'[m]alice' means [] conduct which is specifically intended by the defendant to cause tangible or intangible injury to the plaintiff." KRS § 411.184(1)(c).

The Commonwealth's democratically elected General Assembly reasonably decided that "oppression, fraud or malice" are the only circumstances in which courts may award punitive damages. But our Supreme Court has held that those limitations violate the Kentucky Constitution. *Williams v. Wilson*, 972 S.W.2d 260, 264, 269 (Ky. 1998). Besides those three categories of cases that the General Assembly has said warrant punitive damages, our

Supreme Court has held that punitive damages are also allowed when the defendant acts with gross negligence. *Id.*

That is just the first hurdle that plaintiffs must clear to be entitled to punitive damages. "[I]t has been often written that not every case of gross negligence authorizes the assessment of punitive damages." *Louisville & N.R. Co. v. George*, 129 S.W.2d 986, 988 (Ky. 1939) (citing *Cadle v. McHargue*, 60 S.W.2d 973, 975 (Ky. 1933); *Chesapeake & O. Ry. Co. v. Johns' Adm'x*, 159 S.W. 822, 825 (Ky. 1913)); *see also* 25A C.J.S. *Damages* § 234 (2023 Supp.) (discussing the limits on awarding punitive damages for gross negligence).

This Court has distilled these rules to mean that "punitive damages are not justified just because the injury was intentional. Punitive damages may be awarded for conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others." *Carter v. Coalfield Lumber Co.*, 331 S.W.3d 271, 277 (Ky. App. 2010) (cleaned up).

In all cases, punitive damages may be awarded only if the plaintiff proves that the defendant's conduct was oppressive, fraudulent, malicious or grossly negligent by "clear and convincing

evidence." KRS § 411.184(2); *Louisville SW Hotel, LLC v. Lindsey*, 636 S.W.3d 508, 514 (Ky. 2021) (citation omitted); *Yung v. Grant Thornton, LLP*, 563 S.W.3d 22, 65 (Ky. 2018) (citation omitted). Clear and convincing evidence must be "substantially more persuasive than a preponderance of the evidence." *Vision Mining, Inc. v. Gardner*, 364 S.W.3d 455, 480 (Ky. 2011) (quotation omitted).

The Circuit Court failed to apply these well-settled rules for punitive damages. Neither CSX nor Heligman acted oppressively. To establish oppression, Plaintiffs had to show by clear and convincing evidence that CSX's and Heligman's actions were "unjust." KRS §§ 411.184(1)(a); 411.184(2). They failed to meet that burden.

The evidence shows that CSX's and Heligman's actions were fully justified. "Heligman pursued the investigation of the [employees] because of the clear pattern he discerned with the deluge of [certificates of ongoing illness or injury] forms in the context of the furlough notices." *Adkins v. CSX Transp., Inc.*, 70 F.4th 785, 793 (4th Cir. 2023). This "pattern of similar leave

requests in the context of the furlough notices" provided "ample evidence to raise legitimate suspicions of benefits abuse." *Id.* at 794.

The Fourth Circuit's decision affirming the grant of summary judgment to Heligman and CSX shows just how wrong the Circuit Court was in awarding Plaintiffs punitive damages. The Fourth Circuit made clear that both CSX and Heligman acted reasonably, and lawfully, by investigating the abuse of the leave system and ultimately terminating the employees.

It makes no difference that this case does not involve the propriety of CSX's firing the employees and instead involves the doctors who provided COIIs for the employees. Both Heligman and CSX had good reason to suspect that the CSX employees and Plaintiffs were engaged in wrongdoing worthy of investigation.

When determining the extent of CSX's and Heligman's wrongdoing, it matters not whether the suspicions were "wise" or "correct." *Hawkins v. PepsiCo, Inc.*, 203 F.3d 274, 279 (4th Cir. 2000) (quoting *DeJarnette v. Corning Inc.*, 133 F.3d 293, 299 (4th Cir. 1998)). What matters is the defendant's subjective belief. *See Adkins*, 70 F.4th at 794.

Even Plaintiffs admitted that Heligman and CSX reasonably believed the "unusual" and "surprising" spike in COIIs from their offices warranted investigation. VR 9/20/2022, 9:40:00–9:41:00. As part of his and CSX's investigation, Heligman sought help from six other organizations. Having apprised them of his suspicions, he encouraged them to use their substantial, and broader, investigative authority to see whether Plaintiffs were engaged in wrongdoing. Plaintiffs, however, were not the only ones who warranted scrutiny. CSX also fired dozens of its own employees after investigating their behavior and determining that they had engaged in conspiracy or fraud. In short, both Heligman and CSX were focused on protecting CSX's interests if fraud were occurring.

True, Heligman and CSX may have been overzealous when pursuing what they perceived as fraud by their employees and third parties. But overzealousness is not grounds for awarding punitive damages. *See* KRS § 411.184(2); *cf. Yost v. Wabash Coll.*, 3 N.E.3d 509, 524 (Ind. 2014) (same (citation omitted)). As the Supreme Court of Indiana has said, the overzealous pursuit of fraudsters is a "noniniquitous human failing." *Bud Wolf Chevrolet, Inc. v.*

Robertson, 519 N.E.2d 135, 137 (Ind. 1988) (quotation omitted). Of course, Indiana is not alone in holding that overzealousness cannot serve as grounds for awarding punitive damages. *See, e.g.*, *Tomaselli v. Transamerica Ins.,* 31 Cal. Rptr. 2d 433, 445 (Cal. App. 1994); *Raley v. Fraser*, 747 F.2d 287, 290 (5th Cir. 1984).

The reason that courts are nearly unanimous that behavior like Heligman's and CSX's does not warrant punitive damages is because allowing exemplary damages here would contravene public policy. As our Supreme Court has explained, "obviously it is good public policy to disfavor fraud." *Louisville Peterbilt, Inc. v. Cox*, 132 S.W.3d 850, 855 (Ky. 2004); *see Local Indus. Fin. Co. v. McDougale*, 404 S.W.2d 789, 791 (Ky. 1966) (explaining that "fraud" is "repugnan[t]" to "public policy").

Allowing punitive damages just because a defendant was overzealous in pursuing potential fraudsters would give fraud a safe harbor in this Commonwealth. Because prosecutors have limited resources and cannot investigate and charge every instance of fraud, the biggest deterrent to fraud is being caught by a private party. For the employees involved here, being caught in fraudulent

activity led to job loss. For Plaintiffs, engaging in a fraudulent conspiracy could lead to the loss of their licenses, fewer insurance companies covering their services, or companies' employees being barred from seeing them for work-related excuses. In short, they risk much by engaging in fraud.

But if parties like CSX and Heligman can face punitive damages for investigating potential fraud, they will stop pursuing fraudsters. They will be afraid that any benefit from catching fraudsters would be vastly outweighed by a single case in which they were found to be overzealous in pursuing fraud. This case proves the point. What rational company will pursue fraudsters if the risk of being deemed to have been overzealous in challenging suspicions conduct is over $20 million in punitive damages? The answer is obvious—none. That means that fraudsters will be free to engage in conduct that is repugnant to the public policy of this Commonwealth because private parties will no longer serve as a deterrent. The fraudsters will quickly realize that the risk of being prosecuted is so low that the expected value of fraud is positive—

and not just marginally so. Thus, it will economically incentivize them to engage in fraud.

In short, "[t]he public interest requires" that companies and individuals be able to report wrongdoing so "that offenders may be detected." *Grimes v. Coyle*, 45 Ky. 301, 305 (1845). This entails ensuring that citizens are not "deterred" from reporting potential fraud "by a fear of legal responsibility." *Id.* Plaintiffs also failed to show that CSX or Heligman acted fraudulently, maliciously, or grossly negligently. Thus, this Court should not contravene this Commonwealth's public policy by affirming the award of punitive damages here.

II. THE PUNITIVE-DAMAGES AWARD VIOLATES THE FOURTEENTH AMENDMENT'S DUE PROCESS CLAUSE.

As detailed above, if this Court rejects CSX's and Heligman's arguments about why the Court should reverse the liability findings, it should still hold that Plaintiffs failed to clearly and convincingly show that they were entitled to punitive damages. But even if this Court rejects that argument too, the punitive-damages award is excessive. It is so excessive, in fact, that it violates the Fourteenth Amendment's Due Process Clause.

"The point of due process—of the law in general—is to allow citizens to order their behavior." *State Farm*, 538 U.S. at 418 (quoting *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 59 (1991) (O'Connor, J., dissenting)). Thus, "a person [should] receive fair notice" of both "the conduct that will subject him to punishment" and "the severity of the penalty that a State may impose." *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574 (1996). Arbitrary—and thus unpredictable—awards of punitive damages violate due process. *State Farm*, 538 U.S. at 416.

While states enjoy broad discretion to impose punitive damages in egregious cases, that discretion is limited. The U.S. Supreme Court has repeatedly struck down excessive punitive-damages awards by state courts as "arbitrary deprivation[s] of property without due process of law." *BMW*, 517 U.S. at 586 (Breyer, J., concurring); *Philip Morris USA v. Williams*, 549 U.S. 346, 352 (2007); *State Farm*, 538 U.S. at 429. "[T]he most commonly cited indicium of an unreasonable or excessive punitive damages award is its ratio to the actual harm inflicted on the plaintiff." *BMW*, 517 U.S. at 580.

If this Court affirms both the liability finding and the decision that punitive damages were appropriate, it must then decide what ratio between compensatory and punitive damages is so large that it violates the Fourteenth Amendment's Due Process Clause. The Supreme Court's punitive-damages precedent answers this question. In *State Farm*, the Supreme Court explained that "[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only *equal to compensatory damages*, can reach the outermost limit of the due process guarantee." 538 U.S. at 425 (emphasis added). In other words, the maximum ratio of punitive damages to compensatory damages is 1:1 when compensatory damages are substantial.

True, some courts have disregarded this guidance as nonbinding "*dicta*." *E.g.*, *Cote v. Philip Morris USA, Inc.*, 985 F.3d 840, 849 (11th Cir. 2021) (citation omitted). But this Court should follow the Supreme Court's guidance and hold that the 1:1 ratio is the outermost limit of the Due Process Clause. Our Supreme Court recently explained just how important *dicta* from the Supreme Court of the United States is when deciding important questions.

See Cameron v. EMW Women's Surgical Ctr., P.S.C., 664 S.W.3d 633, 654-57 (Ky. 2023). This Court should follow our Supreme Court's lead and take the U.S. Supreme Court at its word.

The case for following the Supreme Court's *dicta* here is stronger than it was in *EMW Women's Surgical Center*. There, our Supreme Court was addressing whether some plaintiffs could assert third-party standing. In holding that they could not, it relied on recent Supreme Court *dicta* about third-party standing, even though standing in state court is strictly a question of state law. Here, the question is one of pure federal law. Kentucky, of course, cannot fall below the federal due-process floor. This makes it even more important that state courts follow the Supreme Court's *dicta* when it discusses due-process questions.

And the Supreme Court has reinforced its statements in *State Farm*. Soon after *State Farm* said that the 1:1 ratio may be the outermost limit of the Due Process Clause, the Supreme Court was presented with a maritime case in which the jury awarded $500 million in compensatory damages. Because it was a maritime case, federal common law, not state law, applied. The Supreme Court

held that a 1:1 ratio was the maximum permissible punitive-damages award after a substantial compensatory-damages award. *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 514-15 (2008) (citing *State Farm*, 538 U.S. at 425).

In limiting the punitive-damages award, the Supreme Court was concerned about predictability and fairness. *See* Jill Wieber Lens, *Procedural Due Process and Predictable Punitive Damage Awards*, 2012 B.Y.U. L. Rev. 1, 25 (citing *Exxon*, 538 U.S. at 499). *Exxon*'s concerns about predictability and fairness apply equally in non-maritime cases. *See id.* In fact, some concerns are magnified in the non-maritime context.

Juries are unpredictable and likely to be swayed by emotion, rather than facts. That happened here. Most judges would not award $21,400,000 in punitive damages against basic tortfeasors who caused only $1,415,000 in damages. Yet that is what the jury did here.

Again, "[t]he real problem" is "the stark unpredictability of punitive damage awards," which "leads to inconsistency because two cases involving very similar facts can produce dramatically

different punitive awards." Lens, 2012 B.Y.U. L. Rev. at 4, 7 (cleaned up). The verdict here highlights these concerns. There was no way for CSX and Heligman to know that they would face punitive damages over fifteen times the substantial compensatory damages.

A 1:1 ratio lessens the problem of unpredictable punitive damages. *Exxon*, 554 U.S. at 514-15. After all, the 1:1 ratio used in *Exxon* was not based on unique aspects of maritime law. Rather, it was based on the median ratio of state-court awards. *See id.* at 512-13. This shows that the 1:1 ratio the Supreme Court adopted for maritime cases in *Exxon* is also appropriate in other cases.

Exxon's reliance on state law is why many federal courts of appeals have taken the Supreme Court at its word and limited punitive-damages awards to the amount of a substantial compensatory-damages award. *E.g.*, *Saccameno v. U.S. Bank Nat'l Ass'n*, 943 F.3d 1071, 1090 (7th Cir. 2019); *Jones v. United Parcel Serv., Inc.*, 674 F.3d 1187, 1208 (10th Cir. 2012); *Méndez-Matos v. Mun. of Guaynabo*, 557 F.3d 36, 55-56 (1st Cir. 2009); *Jurinko v. Med. Protective Co.*, 305 F. App'x 13, 27 n.15 (3d Cir. 2008); *Boerner*

v. Brown & Williamson Tobacco Co., 394 F.3d 594, 602-03 (8th Cir. 2005) (collecting cases).

Besides circuits outside of Kentucky, the Sixth Circuit has also held that *State Farm* strongly suggests that a 1:1 ratio is the maximum permitted by the Fourteenth Amendment. *See Bach v. First Union Nat. Bank*, 486 F.3d 150, 156 (6th Cir. 2007). This Court may reject the Sixth Circuit's interpretation of federal law. *See Kentucky Farm Bureau Mut. Ins. Co. v. Blevins*, 268 S.W.3d 368, 371 (Ky. App. 2008). But doing so causes serious problems for litigants in the Commonwealth.

The same substantive law should apply in both federal and state courts. But if the Court does not adopt the 1:1 limit, the amount of punitive damages available to plaintiffs will vary based on whether a case is decided in federal or state court. This will encourage both plaintiffs and defendants to forum shop and use procedural gamesmanship. Because the Sixth Circuit's decision tracks Supreme Court precedent and that of many of its sister circuits, this Court should not make it so the substantive law depends on whether the plaintiff sues in state or federal court.

Unsurprisingly, state courts of last resort have also joined the federal courts of appeal and limited punitive-damages awards to the amount of substantial compensatory-damages awards. *See, e.g.*, *Roby v. McKesson Corp.*, 219 P.3d 749, 770 (Cal. 2009); *Roth v. Farner-Bocken Co.*, 667 N.W.2d 651, 671 (S.D. 2003). These courts were persuaded by the Supreme Court's *dicta* in *State Farm*.

Here, the $1,415,000 compensatory damages award is more than 'substantial' enough to warrant imposing a 1:1 ratio. *See, e.g.*, *Méndez-Matos*, 557 F.3d at 56 (affirming reduction of a $350,000 punitive award to $35,000, the amount of compensatory damages). Anything greater than a 1:1 ratio would exceed the amount necessary to accomplish Kentucky's interest in punishing and deterring defamation and tortious interference.

The Circuit Court's decision is out of step with the Supreme Court's due-process guideposts. As this case highlights, Kentucky courts continue to gloss over the Due Process Clause's limits on punitive-damage awards—limits already "well established" twenty years ago. *State Farm*, 538 U.S. at 416. Defendants in Kentucky are thus at risk of punishment without "fair notice . . . of the severity of

the penalty that" they face. *BMW*, 517 U.S. at 574. Although the Supreme Court has not explicitly imposed a bright-line ratio in all cases, its precedent suggests that the 1:1 ratio is the maximum permitted by the Due Process Clause. This Court should adopt it in this case.

CONCLUSION

This Court should reverse the trial court's judgment or reduce the punitive-damages award to a constitutional amount.

Respectfully Submitted,

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/s/ Byron N. Miller