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**COMMONWEALTH OF KENTUCKY
SUPREME COURT
CASE NO. 2024-SC-0317-D**

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

APPELLANTS

v.

On Discretionary Review
Court of Appeals Case No. 2022-CA-1431
Appeal from Greenup Circuit Court
Civil Action No. 18-CI-00348

CSX TRANSPORTATION, INC.

APPELLEE

**BRIEF OF *AMICUS CURIAE*, KENTUCKY JUSTICE ASSOCIATION, IN
SUPPORT OF DRS. DANIEL J. CAREY AND SHANNON JOHNSON**

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CERTIFICATE OF SERVICE

In accordance with RAP 30(B), on August 26, 2025, the undersigned filed this Response with the Court’s electronic filing system. The undersigned also served copies of the brief via email on the following attorneys, who have elected electronic service: Hon. Evan M. Tager (etager@mayerbrown.com) and Hon. Carl J. Summers (csummers@mayerbrown.com); Hon. Michael P. Abate (mabate@kaplanjohnsonlaw.com) and Hon. Burt A. (Chuck) Stinson (cstinson@kaplanjohnsonlaw.com); Hon. Katherine K. Yunker (kyunker@mcbayerfirm.com), Hon. David J. Guarnieri (dguarnieri@mcbayerfirm.com), and Hon. Stephen G. Amato (samato@mcbayerfirm.com); Hon. Kenneth Reed (kenreedatty@gmail.com); Hon. Brian D. Schmalzbach (bschmalzbach@mcguirewoods.com) and Hon. Davis Walsh (dwalsh@mcguirewoods.com); Hon. Earl L. Martin, III, (earl.martin@steptoe-johnson.com) and Hon. Rodney D. Payne (rod.payne@steptoe-johnson.com). I further served copies by First Class Mail on Circuit Court Judge John F. Vincent, Special Judge, Greenup Circuit Court, 2805 Louisa Street, Catlettsburg, KY 41129; and Court of Appeals Clerk Kate Morgan, 669 Chamberlin Ave., Suite B, Frankfort, KY 40601.

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1. Whether the jury’s finding that CSX Transportation, Inc. (CSX) and Dr. Craig Heligman (Dr. Heligman) acted with actual malice in defaming Drs. Carey and Johnson supports the imposition of punitive damages under Kentucky common law and KRS § 411.186.
2. Whether the punitive damages award – approximately ten times the compensatory damages – complies with constitutional guidelines.
3. Whether, consistent with KRS § 411.186(2)(c) and due process principles, the trier of fact may consider evidence of CSX’s financial condition and the profitability of its misconduct when determining the amount of punitive damages.

INTRODUCTION

Kentucky law has long recognized the legitimacy of punitive damages to punish intentional torts and deter similar future conduct. It is the general rule of this Commonwealth that “the award of such damages rests within the discretion of the jury.” Moore v. Bothe, 479 S.W.2d 634, 635 (Ky. 1972). “Punitive damages ... serve to punish or deter a person, and others, from committing such acts in the future. Accordingly, punitive damages have no relation to compensating a plaintiff for injury, but instead exist as a punishment for the wrongdoer.” Mo-Jack Distrib., LLC v. Tamarak Snacks, LLC, 476 S.W.3d 900, 910–11 (Ky. App. 2015).

Where, as here, the evidence establishes a concerted effort to destroy a person’s professional standing through defamatory accusations made in bad faith, punitive damages are not only appropriate but necessary to serve the objectives of KRS § 411.184 and the

jury’s role under Williams v. Wilson, 972 S.W.2d 260 (Ky. 1998). Kentucky courts have consistently emphasized that the degree of reprehensibility of the defendant's conduct is the most important factor in determining the reasonableness of a punitive damages award. Indeed, this Court and the United States Supreme Court have found “wrongful conduct which is ‘the result of intentional malice, trickery, or deceit’” to be ‘particularly reprehensible conduct.’” Yung v. Grant Thornton, LLP, 563 S.W.3d 22, 72 (Ky. 2018).

Moreover, the punitive damage awards in this case comply with constitutional due process principles established by the U.S. Supreme Court in BMW of North America, Inc. v. Gore, 517 U.S. 559 (1996) and State Farm Mutual Automobile Insurance Co. v. Campbell, 538 U.S. 408 (2003). CSX’s conduct was reprehensible, the ratio between punitive and compensatory damages is well within established limits given the seriousness of the harm, and the few comparable civil penalties that exist further support the reasonableness of the jury’s award, either in the fact few exist as an alternative remedy or in their similarity.

Finally, CSX’s arguments regarding the trial court’s evidentiary rulings on the admission of CSX’s operating income do not undermine the soundness of the verdict.

The jury’s \$10.7 million dollar punitive damage awards to Drs. Carey and Johnson were not only constitutionally sound and undisturbed by the trial court’s evidentiary rulings, but they are also essential to deter future malicious retaliation by powerful corporate actors against community-based healthcare providers.

The Kentucky Supreme Court should affirm the judgment in full.

STANDARDS OF REVIEW

Whether a punitive damages award is constitutionally excessive is reviewed de novo. Cooper Indus., Inc. v. Leatherman Tool Grp., Inc., 532 U.S. 424, 436 (2001). Questions of Kentucky punitive damages law (including the continued vitality of Williams v. Wilson) are reviewed de novo. See Williams v. Wilson, 972 S.W.2d 260, 269–71 (Ky. 1998). Evidentiary rulings (including KRE 401/403/404 determinations) are reviewed for abuse of discretion. Harmless-error principles apply; non-prejudicial error must be disregarded. CR 61.01.

ARGUMENT

I. EVIDENCE OF ACTUAL MALICE SUPPORTS PUNITIVE LIABILITY UNDER KENTUCKY LAW.

A. The Jury Was Entitled to Find Actual Malice Based on CSX's Calculated Conduct.

Punitive damages in Kentucky rest on common law principles codified in KRS § 411.184, which authorize such awards when a defendant’s conduct involves “oppression, fraud, or malice” and when the plaintiff proves that misconduct by clear and convincing evidence. This standard survived legislative amendments in Williams v. Wilson, 972 S.W.2d 260 (Ky. 1988). Here, the evidence shows that CSX and Dr. Heligman acted with actual malice. The July 2017 letters accused Drs. Carey and Johnson of conspiring with patients to commit insurance fraud and of intentionally keeping employees off work through excessive treatment, yet Dr. Heligman conceded he had no facts to support these statements. Dr. Heligman admitted at trial that he conducted no direct interviews and did not verify the patterns before sending the letter. He could not identify a single false

certificate or any patient who had been kept off work unnecessarily. These baseless accusations were sent to multiple entities, including the Railroad Retirement Board, insurers, and state licensing boards, and its language went far beyond neutral concern. CSX also announced it would no longer accept certificates of ongoing illness or injury (COII) forms from Drs. Carey and Heligman.

A reasonable jury could infer from this conduct that CSX intended to damage the chiropractors' reputations and economic livelihoods, satisfying the requirements of KRS § 411.184(2) and this Court's precedent in Williams v. Wilson, 972 S.W.2d 260 (Ky. 1998). The trial court, having heard all testimony and reviewed the evidence, upheld this finding. The jury's verdict therefore reflects a determination that CSX acted with "malevolence or ill will" and with a flagrant disregard for the doctors' reputational and economic interests. This Court should not disturb that determination.

B. Kentucky Law Does Not Immunize False Accusations Cloaked as "Opinion" or "Privilege".

CSX's assertion that Dr. Heligman's letter was a protected expression of opinion or fell within the bounds of qualified privilege is unavailing. Kentucky courts have consistently rejected attempts to shield defamatory statements behind the veneer of opinion or privilege when those statements imply false, undisclosed facts or are disseminated with malice.

As this Court recognized in Yancey v. Hamilton, 786 S.W.2d 854 (Ky. 1989), the First Amendment does not protect defamatory communications that imply a factual basis that is either knowingly false or made in reckless disregard of the truth. The relevant inquiry is whether the speaker's statements are capable of being proven true or false and whether

they imply the existence of defamatory facts not disclosed to the reader. In this case, Dr. Heligman’s statements went far beyond mere opinion:

- He asserted that Drs. Carey and Johnson engaged in conduct that was "highly suspicious" and removed workers “without justification,” implying fraudulent intent.
- The letter cited no verifiable data or investigation to support these conclusions.
- The accusations were disseminated to regulatory and quasi-regulatory bodies, where such statements can have—and did have—devastating consequences.

The qualified privilege defense likewise fails. While Kentucky law recognizes that some communications may be privileged if made in good faith on a matter in which the speaker has an interest, that privilege is defeated where the communication is made with actual malice or to parties with no corresponding duty or interest. See Toler v. Süd-Chemie, Inc., 458 S.W.3d 276, 281–82 (Ky. 2014). The jury was entitled to conclude that CSX’s communications to third-party insurers, state licensing boards, and a federal agency were not made to protect a business interest but to punish and ostracize Drs. Carey and Johnson.

Dr. Heligman’s testimony further undermined any claim of privilege or objectivity: he acknowledged that he sent the letter without having contacted the Drs. Carey and Johnson or given them a chance to respond, and he stated under oath that he would “do it again” despite conceding some information had not been confirmed. These admissions alone supported a jury finding that the letter was not a good-faith communication entitled to legal protection.

To hold otherwise would invite powerful corporate actors to circumvent defamation

law by labeling their most damaging accusations as opinion or internal concern. Kentucky law, however, has never countenanced such a result, and this Court should not do so now.

C. CSX's Disregard for Dr. Carey's and Dr. Johnson's Rights Supports Punitive Liability.

The jury's punitive damages award also finds firm support in CSX's total disregard for the fundamental rights of Drs. Carey and Johnson – particularly their rights to protect their professional reputations and to respond to defamatory accusations before they are broadcast to the world. Kentucky law has long recognized that punitive damages are appropriate where a defendant acts with such indifference to the consequences of its conduct as to warrant deterrence and punishment. See Horton v. Union Light, Heat & Power Co., 690 S.W.2d 382, 389 (Ky. 1985).

CSX acted unilaterally, and without procedural fairness, when it distributed defamatory accusations about Drs. Carey and Johnson. It failed to conduct a meaningful investigation. It failed to notify or provide them any opportunity to respond. It failed to confine the communication to internal channels. Instead, CSX used its large corporate platform to send a message to regulators and insurers that these two professionals were not just poor providers, but unethical or criminal actors. That message inflicted serious economic and reputational harm.

The pattern of conduct revealed a corporate strategy designed not to remedy fraud but to eliminate perceived outliers whose treatment decisions may have conflicted with the company's cost-saving preferences. Such conduct is the very type of intentional abuse that punitive damages are meant to deter. Indeed, the trial court observed that this was not a case of isolated miscommunication or administrative error, but one involving concerted

and malicious dissemination of unverified accusations.

Drs. Carey and Johnson were small-town chiropractors serving injured workers in their community. The disparity in power and resources between CSX and Drs. Carey and Johnson makes the need for punitive deterrence all the more imperative. When a corporation of CSX's size chooses to exercise its influence recklessly to ruin the reputation of health care professionals without due process, the civil justice system must be equipped to respond with meaningful penalties.

By awarding punitive damages, the jury fulfilled its constitutionally sanctioned role in guarding against abuse of private power. See Saint Joseph Healthcare, Inc. v. Thomas, 487 S.W.3d 864 (Ky. 2016). The verdict reflects the jury's moral judgment that CSX's conduct exceeded all bounds of propriety and cannot be tolerated. This Court should uphold that judgment.

II. THE PUNITIVE DAMAGES AWARD IS CONSTITUTIONALLY SOUND UNDER BMW V. GORE AND CAMPBELL.

The U.S. Supreme Court has articulated a framework for evaluating punitive damages under the Due Process Clause, focusing on three guideposts: (1) the degree of reprehensibility of the defendant's conduct; (2) the ratio between punitive and compensatory damages; and (3) the comparison between the punitive damages and civil penalties authorized or imposed in comparable cases. See BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 574–85 (1996); State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 409 (2003). Each of these guideposts supports the constitutionality of the punitive awards in this case.

A. CSX's Conduct Was Highly Reprehensible.

Intentional reputation-destroying conduct by a powerful institutional actor warrants substantial punishment. Reprehensibility is the most important guidepost. Campbell, 538 U.S. at 419. The reprehensibility of CSX's conduct lies at the core of the jury's decision and the court's affirmance. The record demonstrates that CSX engaged in a coordinated effort to destroy the professional reputations of two health care providers through false and defamatory statements sent to regulatory and third-party entities.

CSX's campaign was not the result of a mistaken impression or a hasty complaint. It was a deliberate action undertaken by a corporate executive – Dr. Heligman – who knew the likely impact of his words. His letter included assertions of unethical conduct and fraud. It was sent not only within CSX but to state licensing boards, a federal agency, and private insurers. Dr. Heligman failed to interview Drs. Carey and Johnson, failed to verify the accusations, and testified at trial that he would make the same accusations again, even knowing the harm they caused.

The Supreme Court has emphasized that intentional and repeated conduct with disregard for the health and safety of others weighs in favor of a substantial punitive damages award. See Gore, 517 U.S. at 576–77. While this case involves professional rather than physical harm, reputational destruction can be equally devastating. Accusing licensed professionals of fraud and conspiracy without evidentiary basis, broadcasting those charges to regulators and third-party payors, and imposing a corporate ban that predictably destroys reputation and revenue is highly reprehensible. The conduct targeted economic interests central to livelihood; it was repeated and disseminated to multiple audiences; it involved a

disparity in power and an institutional actor; it yielded corporate profit; and, because reputational injuries are hard to quantify and to remedy fully, meaningful punishment is essential to deterrence.

As this Court observed in Yung, 563 S.W.3d at 72, “wrongful conduct which is ‘the result of intentional malice, trickery, or deceit’ is ‘particularly reprehensible conduct.’”

This case fits squarely within that principle. The jury’s finding of malice under KRS § 411.184(2) satisfies the constitutional standard, and nothing in the record suggests the jury’s verdict was the product of bias or excess.

This Court should therefore find that the degree of reprehensibility fully justifies a significant punitive award.

B. The Ratio Between Punitive and Compensatory Damages Is Justified.

Here, the compensatory damages awarded to Dr. Carey and Dr. Johnson included \$350,000 each in noneconomic damages for emotional distress, along with economic losses of \$260,000 for Carey and \$450,000 for Johnson. The punitive damage awards of \$10.7 million each, *on their face*, make it appear that the punitives exceed the compensatory damage award for defamation and interference by ten (10) times. However, at closer look, an entirely acceptable ratio presents itself in this case. There was testimony that the efforts made in distributing Dr. Heligman’s letter were to save CSX approximately two million dollars. The damages were acutally five (5) times the profitability sought to be saved.

Even if the Court insists on seeing a double-digit ratio in this case, the United States Supreme Court has recognized that higher ratios may be warranted where the injury is difficult to value or the conduct is particularly egregious. Campbell, 538 U.S. at 425; Gore,

517 U.S. at 580–81. Reputational injuries produce long term effects not captured fully by compensatory damages.

Further, this Court and others have recognized that higher ratios may be warranted when the compensatory award is relatively modest and the reprehensibility of the conduct is high. See, e.g., BMW, 517 U.S. at 582 (noting a higher ratio may be justified where the injury is hard to detect or the harm is primarily economic). “An award of punitive damages need not bear reasonable relation to actual damages sustained, which indeed may warrant only “nominal” damages, if the claimant's evidence regarding the character of the act, meaning the extent of conscious wrongdoing, is sufficient to sustain the award.” Fowler v. Mantooth, 683 S.W.2d 250, 253 (Ky. 1984). See Campbell, 538 U.S. at 425; Burgess v. Taylor, 44 S.W.3d 806 (Ky. App. 2001).

The reputational damage inflicted here – loss of credibility, referrals, and career opportunities – was egregious, long-lasting, and difficult to quantify in monetary terms. The punitive awards reflect the jury’s reasoned response to the evidence, not a runaway verdict. Moreover, CSX is a multibillion-dollar corporation. A smaller award may be seen as a mere cost of doing business rather than a meaningful deterrent. For all of the above reasons, the ratios here are justified. This Court should therefore reject CSX’s claim that the ratio renders the award excessive or unconstitutional.

C. Comparable Civil Penalties Underscore the Reasonableness of the Award.

The third guidepost under the BMW v. Gore framework directs courts to compare the punitive damages awarded with civil penalties authorized or imposed in comparable cases. See Gore, 517 U.S. at 583. While no direct statutory penalty exists for a corporate

executive's defamatory campaign against healthcare providers, analogous regulatory and statutory frameworks reflect the seriousness of this type of misconduct and support the jury's punitive damages award. For example, the Federal Trade Commission may impose civil penalties of over \$50,000 per violation for unfair or deceptive acts in commerce, and such penalties increase substantially when conduct affects vulnerable populations or involves reckless disregard. See 15 U.S.C. § 45(m). Similarly, under Kentucky law, intentional violations of consumer protection statutes or professional licensure laws may trigger substantial fines, license suspension, or even criminal penalties in extreme cases. See, e.g., KRS § 367.990; KRS § 312.991.

While comparable, these civil penalties still do not match the deterrent effect required in a case like this one. There is no civil fine that equivalently addresses the corporate incentives at play. This lack of meaningful comparison supports the necessity of punitive damages, as they fill a gap the law otherwise leaves open.

Given these comparable civil enforcement tools and the difficulty in quantifying reputational harm, the jury's punitive award is well-aligned with the magnitude of harm and the need for deterrence in this case. Courts are not limited to matching precise dollar amounts but must instead assess whether the punitive award is grossly out of proportion to the sanctions that could be imposed for similar conduct. See Gore, 517 U.S. at 583.

Accordingly, the third constitutional guidepost is also satisfied. It is consistent with Kentucky practice and federal constitutional review to defer to the jury's reprehensibility findings and to the trial court's superior vantage point in determining amounts to award for punitive damages.

III. EVIDENCE OF PROFITABILITY AND FINANCIAL CONDITION IS RELEVANT TO THE AMOUNT OF PUNITIVE DAMAGES.

KRS § 411.186 instructs juries to consider several factors when fixing punitive damages, including “the profitability of the misconduct to the defendant.” KRS 411.186(2)(c); see also United Parcel Serv. Co. v. Rickert, 996 S.W.2d 464, 471–72 (Ky. 1999) (“The evidence at trial indicated that UPS in 1987 had earned \$750 million on \$9.6 billion in revenue”). It was particularly proper for the jury to consider such evidence in this case. There was testimony that the efforts made in sending Dr. Heligman’s letter were to save the CSX approximately two million dollars, which as mentioned above likely provided a reasonable anchor for the punitive damage awards.

However, in Hardaway Management Co. v. Southerland, 977 S.W.2d 910 (Ky. 1998), and Sand Hill Energy, Inc. v. Smith, 142 S.W.3d 153 (Ky. 2004), the Supreme Court cautioned against admitting evidence of wealth *unrelated to the wrongful conduct*; juries should not be allowed to punish a defendant solely because it is wealthy. While CSX’s operating income was admitted in this case, there are circumstances surrounding its admission that make it proper and, even if not, harmless error. In pre-trial discovery, Drs. Carey and Johnson noticed the deposition of CSX’s chief financial officer to obtain financial information pertinent to their punitive damage claims but voluntarily cancelled the deposition in reliance on discussions with CSX to stipulate to financial information to be conveyed to the jury.

At trial, it is understood CSX attempted to renege on the stipulation. When discussing the proposed stipulation at trial, the trial court stated “there might have been a miscommunication between the parties as to what we were talking about . . . they did cancel

the deposition. Which, you know, they could have asked the deponent 10 or 12 or 200 more questions” that would have established admissible financial data. The trial court found that it was too late (at trial) to reopen discovery on relevant evidence of profitability. Given these circumstances, CSX cannot credibly complain that it was prejudiced by the jury being advised of the stipulated amount of CSX’s operating income when it caused or contributed to preventing Drs. Carey and Johnson from discovering other admissible evidence regarding CSX’s profitability.

Further, the jury was provided plenty of evidence to determine the punitive damage award without resorting to CSX’s operating income. CSX and Dr. Heligman themselves put on evidence that denying the employees’ claims for injury-related time off would save CSX approximately \$2 million. There were more than sufficient grounds without the stipulation for the jury to reach their punitive damage figures and any error regarding the stipulation is harmless.

This is one of many other trial court evidentiary rulings that CSX and Dr. Heligman claim denied them a sufficient trial defense to the punitive damage claims. “The Due Process Clause prohibits a State from punishing an individual without first providing that individual with an opportunity to present every available defense.” Philip Morris USA v. Williams, 549 U.S. 346, 353 (2007). However, the Constitution polices punitive damages through fair notice, an opportunity to be heard subject to ordinary evidentiary rules, and meaningful judicial review as set out in Campbell and Gore – not by conferring a right to introduce otherwise inadmissible “defense” evidence or to deny entry of admissible evidence. Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 23 (1991) (the Constitution does

not prescribe a specific formula of trial procedures or evidentiary rules but upholds punitive awards where the state provides “the full panoply of Alabama's procedural protections[,]” including fair trial procedures, adequate jury instructions, post-verdict review, etc.).

Kentucky juries should be permitted to consider the defendant’s financial condition and the profitability of the misconduct when assessing punitive damages. Evidence such as operating income and cost savings informs whether a punitive award will actually deter and whether the misconduct was a calculated, profitable choice. Excluding such evidence impedes the jury tasked with determining punitive damage awards and rewards the wealthy defendant by increasing the likelihood they will be assessed punitives that merely slap the wrist.

IV. POLICY CONSIDERATIONS FAVOR PRESERVING ROBUST PUNITIVE REMEDIES FOR MALICIOUS CORPORATE SMEAR CAMPAIGNS THAT CHILL ACCESS TO CARE AND CORRODE PROFESSIONAL REPUTATIONS.

Punitive damages serve their classic function here: they deter a large and powerful corporate actor from weaponizing fraud allegations as a cost-control tactic, especially where the targets are individual professionals embedded in small communities. Absent meaningful punishment, similar campaigns will proliferate. Accusations are cheap to make, difficult to disprove, and devastating to livelihoods. Maintaining punitive liability – meaningful amounts – is essential to counteract those incentives and to protect Kentucky’s workers and patients who rely on independent providers without fear of corporate blacklisting by innuendo.

Affirming the judgment sends an important message: that professionals, particularly in rural Kentucky, must not be scapegoated by corporate actors seeking to

deflect financial scrutiny or retaliate against independent treatment providers. Retaliatory defamation by corporate actors chills the willingness of providers to treat injured workers or testify in litigation. Upholding this verdict protects the community access to care, encourages professional independence, and reinforces the jury's role as the conscience of the community.

CONCLUSION

For the foregoing reasons, the Kentucky Justice Association respectfully urges this Court to affirm the jury's punitive damages verdict. The record demonstrates that CSX's conduct was malicious, unjustified, and profoundly harmful to the reputations and livelihoods of two independent healthcare providers. The jury's punitive award serves the vital civil justice function of deterring powerful actors from weaponizing influence and misinformation to retaliate against disfavored professionals.

Affirmance will reinforce the longstanding role of punitive damages in punishing intentional wrongdoing and vindicating the rights of individuals against bad-faith corporate conduct. The verdict in this case was supported by ample evidence, consistent with Kentucky and federal law, and reflects the considered judgment of the jury.

Respectfully submitted,
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WORD COUNT CERTIFICATE

This document complies with the word limit of RAP 34(B)(4) because, excluding the parts of the document exempted by RAP 15(D), this document contains 4,360 words.

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