RENDERED: MAY 11, 2012; 10:00 A.M.
TO BE PUBLISHED

MODIFIED: JUNE 1, 2012; 10:00 A.M.

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001907-MR
AND
NO. 2010-CA-001921-MR

BARBARA ALLGEIER APPELLANT/CROSS-APPELLEE

v.

APPEAL AND CROSS-APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE MARY M. SHAW, JUDGE
ACTION NO. 07-CI-011559

MV TRANSPORTATION, INC. APPELLEE/CROSS-APPELLANT

OPINION
AFFIRMING IN PART,
REVERSING IN PART, AND REMANDING

** ** ** ** **

BEFORE: CLAYTON, DIXON, AND LAMBERT, JUDGES.

LAMBERT, JUDGE: This case arises from Barbara Allgeier's fall from a paratransit bus maintained and operated by MV Transportation, Inc. (MV). Prior to trial, the trial court granted MV's motion for summary judgment regarding Barbara's claim for punitive damages. Barbara now appeals the trial court's order

denying her punitive damages and asks this Court to remand the case solely for a trial on that issue. MV cross-appeals on various grounds, arguing that the trial court improperly allowed Barbara to introduce evidence pertaining to its negligent hiring, supervision, and retention claims despite MV's admission of vicarious liability. MV's primary argument is that the introduction of such evidence in light of its admission of *respondeat superior* liability rendered the other claims irrelevant and superfluous. For the reasons stated herein, we reverse the trial court's entry of summary judgment pertaining to Barbara's claim for punitive damages and remand for a trial solely on that issue. In all other regards, we affirm the rulings of the trial court.

MV operates the Transportation Authority of River City (TARC) 3 paratransit bus service in Louisville, Kentucky pursuant to a contract with TARC. Barbara is sixty-five years old and has suffered from multiple sclerosis since 1982, which requires her to use a wheelchair. Despite her MS, prior to the accident Barbara was able to enjoy an active social life and manage her own daily routine. She could brush her teeth, apply makeup, open doors, feed herself, use a computer, read a book, and privately use the restroom. She made weekly visits to her hairdresser, shopped, socialized with friends, and attended church every Sunday. Barbara used the TARC 3 service on a daily basis for years prior to the accident at issue in this case. Three weeks prior to the accident, Barbara received a newer model wheelchair, but the only difference between her old wheelchair and the newer model was that the new wheelchair reclined.

On December 8, 2006, the day of the accident, MV bus no. 7272 picked Barbara up at her home, took her to Frazier Rehab for physical therapy, and then took her to her hair salon for her weekly appointment. Because her new wheelchair reclined, her hairdresser did not have to unbuckle Barbara from her wheelchair and move her, and therefore her lap belt remained buckled throughout the day. After Barbara's appointment, bus driver Wilma Caldwell picked her up to take her home. By the time Barbara arrived outside her home that evening, she was the only passenger left on the bus, and Caldwell's shift was about to end. The estimated time of arrival at Barbara's residence was between 4:55 and 5:01 p.m. It was twenty-eight degrees outside.

Upon arriving at Barbara's stop, Caldwell parked the bus and released the four-point "tie-down" securing system that tethered Barbara's wheelchair to the bus floor. Next, Caldwell walked outside, opened the side doors of the bus, stepped aside, and walked away from the lift. Caldwell began to deploy the mechanical lift to allow Barbara to board the lift. A two-button controller operates the lift. Pressing the right side of the top button deploys the lift until it is level with the bus floor. Once level, the lift stops, and the driver must then press the right side of the bottom button to lower the lift to the ground.

Instead of keeping the lift level for Barbara to board, Caldwell actually began to lower the lift, causing a metal flap (called a "bridge plate") designed to cover the span from the bus floor to the lift to become vertical. Caldwell's actions created a space of at least sixteen inches between the bus floor

and the lift ramp. Photos taken after the incident show the spacing and vertical position of the bridge plate. Caldwell did not move the lift after the incident, and the photos memorialize the lift's final position.

After Caldwell walked away from the doors outside, Barbara knew it was time to exit because that was the same procedure all the other MV drivers had used in the past. From her viewpoint, Barbara was unable to see the bus floor, and thus she was relying solely on Caldwell's judgment and cues. Caldwell did not "say a word" to Barbara, nor did she signal Barbara in any way.

Barbara tried to exit the bus on the lift's ramp, but her chair hit the vertical bridge plate and tipped over. Both Barbara and her chair were suspended in midair by a safety belt attached to the lift, and she was still buckled into her wheelchair. Caldwell panicked and asked Barbara what she should do, to which Barbara replied, "If you don't know, I don't know." At that point, Caldwell decided to release Barbara's lap belt. Barbara toppled onto the lift's platform, splintering her thighbones. She recalls that she was "squealing in pain," and that the fall was "the most painful thing" she had ever experienced.

Caldwell called MV dispatch, which notified supervisors Ronald Coleman and Leonard Rowe. Neither Caldwell nor dispatch called an ambulance or the police at this time. Coleman and Rowe arrived at the scene of the accident between 5:15 and 5:20 p.m., fifteen to twenty minutes later. Emergency Medical Services (EMS) was not called until 5:23, after the supervisors arrived and after Coleman made a second call to dispatch—this time requesting EMS. No one from

MV ever called the police. Before EMS arrived, Coleman documented the scene by taking thirty-six photographs inside and outside the bus. Rowe ordered Caldwell not to speak and separated her from gathering witnesses. Eventually, Caldwell was placed into a car so she could talk with Rowe about what happened. Barbara laid on the metal lift in pain for almost an hour in freezing temperatures with only a thin blanket someone from her apartment complex had brought her. Barbara testified that the supervisors never spoke to her. She suffered two broken femurs as a result of the accident.

When MV hired Caldwell in August 2006, they supplied her with a trainee manual. The manual, along with a 2006 training guide, established a set of safety policies that MV drivers were expected to follow. The trainee manual was supposed to be taught in its entirety, and no section was to be selectively omitted. In 2006, Coleman was one of MV's road supervisors in Louisville. As a road supervisor, he was responsible for some employee training. Billy Grice was employed as a supervisor-trainer. Coleman and Grice trained Caldwell when she was hired. Rowe was employed as MV's safety and training director. Grice interviewed Caldwell, and Rowe hired her. Rowe supervised the training and trained all of the trainers. He described his position as that of a "leadership role."

The trainee manual and training guide establish the following unloading sequence:

1. Step outside and open the side doors of the bus.

2. Unfold–i.e., deploy–the bus's lift until it is level with the floor of the bus.

3. Step back inside the bus.

4. Release the wheelchair passenger's four-point tie-downs.

5. Exit the bus.

6. If unloading a passenger with an electric wheelchair, provide verbal instruction to the passenger until she has safely boarded the lift.

7. Notify the passenger when lowering the lift.

8. Always maintain physical contact with the wheelchair as it lowers.

9. Explain each element of the procedure to the passenger.

10. If the circumstances prevent the driver from following the steps, call dispatch.

Grice, Coleman, Rowe, and Sean Smith—MV's corporate representative during trial—all agreed that the aforementioned procedure was the company's proper unloading sequence.

Removing the tie-downs before deploying the bus's lift violates an MV safety policy. Failing to ensure the lift is level before a passenger boards is another safety-policy violation. Failing to maintain physical contact with a passenger while the passenger is lowered from the lift violates a third MV policy. Failing to give "simple verbal cue[s]"—a policy called "cooperative assistance"—at critical stages of loading and unloading is an MV safety violation. Significantly, the training guide provides that verbal cues are "especially needed" as the driver starts her "lift up or down."

When Caldwell completed wheelchair training, she signed a form that stated, "All mobility device accidents must be reported immediately. Wheelchair accidents are treated the same as vehicle accidents. Driver error in mobility securement will result in suspension and retraining. Serious driver error may result in termination. . . ." Coleman and Caldwell agreed that when a vehicle accident occurred, in addition to calling EMS, the police must also be notified, who would independently investigate the cause of the accident. Therefore, failing to call the police after a serious wheelchair accident also violated MV policy.

MV's training manual instructed new drivers, "Under no circumstances should you admit or acknowledge blame" after an accident. Even if a driver was at fault, she was trained never to admit it. Also, employees were trained to protect MV from "fraudulent and excessive liability claims," in part, by promptly taking photos of an accident scene. MV policy also directed supervisors to respond immediately to an accident scene and to take control as quickly as possible. However, at trial, the supervisors agreed that dispatch must always contact EMS first; failure to do so would violate company policy. Thus, in the instant case, when dispatch delayed in calling EMS for twenty-two minutes, company policy was again violated.

Supervisors were also trained to only interview the driver when collecting information for MV's incident reports. Although they were instructed to hand out "witness cards" to everyone who witnessed the accident, Caldwell and the

supervisors agreed they were barred from interviewing passengers or witnesses in order to determine driver error.

On November 19, 2007, Barbara filed suit against MV, asserting claims for ordinary and gross negligence under the doctrine of *respondeat superior*, as well as claims of ordinary and gross negligence for negligent hiring, training, and supervision of Caldwell.

During discovery and at trial, evidence revealed that MV interviewed Caldwell but did not interview anyone else. In the report, Coleman wrote, "[P]assenger was too hasty to leave vehicle. Engaged chair before lift was in place. . . .Could not have happened if she had her scooter lap belt fastened, which is her responsibility." He later admitted that Caldwell had never told him that Barbara was not wearing her lap belt, and he never asked Barbara whether she was wearing it. He conceded that "there may have been some interjections of personal opinion" in the report.

Additionally, Caldwell wrote, "I was standing on the side of the vehicle deploying the lift when the passenger came flying over the flap [i.e., bridge plate] before I could finish letting down the lift." However, as described earlier, the flap never becomes vertical until the lift actually begins to lower. Caldwell also noted in her report that she had picked Barbara up two days prior to this incident, and she remembered that Barbara had recently received the new wheelchair. She stated, "When I was loading her on the lift, she was trying to go forward and went backwards, not yet knowing how to operate the equipment."

However, Barbara had actually received the wheelchair three weeks prior to the incident, and the only difference from her old wheelchair was that the new one reclined. Otherwise, the control panel on her new chair was identical to her previous model.

Rowe drafted a section of the incident report repeating Caldwell and Coleman's findings verbatim. Regarding his own investigation, he testified that the only person he interviewed was his operator, Caldwell. The evidence also indicated that Caldwell was questioned the day of the incident and was never questioned again by her supervisors following the accident.

Finally, the report indicated that Caldwell called MV dispatch at 5:01 p.m., which summoned Rowe and Coleman to the scene. Dispatch did not call EMS until 5:23, and EMS received notice that Barbara was experiencing "back pain," which further delayed EMS response time because the paramedics were not fully aware of the severity of the emergency and did not respond with lights and sirens, as they normally would have in an urgent situation.

Testimony from the MV supervisors and Caldwell indicated that she failed to follow the company safety procedures for unloading Barbara, and the incident would not have occurred had she followed the appropriate policies. Caldwell conceded at trial that if, as she claimed, Barbara did not know how to properly operate the wheelchair yet, it would have been even more important for her to follow MV's tie-down policy. Caldwell eventually admitted in her deposition and later during trial that, absent mechanical defect, the only way

Barbara could have hit the vertical bridge plate and fallen from the bus was if she had begun to lower the lift *before* Barbara began to board. Safety policies were in place instructing her to only lower the lift *after* the passenger had boarded the lift. Coleman agreed that the lift must have been descending when Barbara fell, and Rowe agreed that the only time the flap comes up is when the lift is going down.

The evidence indicated that no reasonable investigation occurred because MV instructed its employees to deny fault and not interview witnesses, and to only interview its own employees. Coleman stated that if a driver denied blame, MV could wrap up its investigation without the necessity of reporting the incident to the appropriate agencies, in accord with the Americans with Disabilities Act. Also, under MV's contract with TARC, the City of Louisville, the Commonwealth, TARC, and various federal agencies had a right to inspect MV's safety records. Rowe conceded that their contract with TARC could have been jeopardized if evidence surfaced suggesting passengers were injured due to MV's failure to enforce its own safety policies.

The evidence also indicated that MV knew many of its drivers did not follow its safety policies, but it did nothing to correct the problem. Grice testified that he did not instruct his trainees per MV's written procedures and that other trainers failed to instruct on the procedures also. He testified that he did not see why it was "vital to go word for word" by MV's policies. Grice instructed his trainees that it was acceptable to cut corners during passenger unloading—for example during bad weather, such as on the day of Barbara's accident. Rowe's

testimony indicated that he agreed with Grice's training style. However, Coleman testified that supervisors should make sure that employees followed MV's written safety policies. Both he and corporate representative Sean Smith agreed that the safety policies were drafted in unqualified language and applied at all times, even during bad weather. At trial, Rowe eventually conceded this issue.

Grice referred to MV's policy instructing drivers to deploy the lift before removing a passenger's tie-downs as both "unimportant" and "useless." To him, it was "irrelevant. . . . when you take the securements out of the floor." He denied that there was any policy directing when to take the securements off, however the trainee manual indicated otherwise. Grice trained Caldwell, and she testified that she was unaware of any such policy. Caldwell also testified that her supervisors knew her routine was to remove tie-downs before deploying her bus's lift, and they never told her to change her process.

In May 2007, another passenger fell from an MV bus under similar circumstances, due to the driver not following the company's tie-down policy. In the incident report following that accident, Rowe indicated that a button on the lift's controller "stuck" and that MV had been "having some problems" with lifts exactly like the one involved in Barbara's incident. Rowe apparently indicated that MV was instructing its operators "to keep their passengers secured until they are ready to assist in deploying." However, Caldwell testified that no supervisor ever talked to her about adhering to MV's tie-down policy following the May 2007 incident, nor did she ever receive a memo about it.

Coleman testified that MV did not have a system in place to inform its drivers of recent safety-related accidents. He and other trainers knew the safety risks existed with the bridge plates that could cause a passenger's wheelchair to tip over because they would "experiment" with the lifts to discover dangerous conditions. Yet, the supervisors never sent out any type of memorandum warning drivers of the possible safety risks. In another instance, MV sent out a memo regarding employees not wearing uniforms per company policy, so it follows that they could have sent a safety memo out to drivers if they felt it necessary.

Further, Barbara testified at trial that the drivers never followed MV's cooperative assistance policy during the loading and unloading process. She stated that the drivers never provided verbal cues telling her when to board the lift, and she indicated that on numerous occasions, the driver actually had to literally stomp on the bridge plate to force it to become level for safe boarding.

The evidence also indicated that Caldwell was an alcoholic and was living in a rehab facility when she was hired by MV in August 2006. She lied about her alcoholism on her employment application and listed the facility's address as her home. Citing MV's zero-tolerance policy, Rowe and Grice said they would not have hired Caldwell had they known she was an alcoholic before she was hired. Federal and state laws require driver alcohol testing within two hours after a bus accident, but Caldwell was not given a breath alcohol test until 7:32 p.m., thirty two minutes past the two hour deadline. MV offered no

explanation for the delay. However, the breath alcohol test was negative. The police were never called, so no additional alcohol testing was done at the scene.

After the accident, Barbara was immobile for 225 days. She was admitted to Baptist East Hospital, then to Masonic Home of Louisville. Since the accident, Barbara has been totally dependent on others for care and cannot do any of the things she once enjoyed. She cannot leave her home or use the restroom, and she wears diapers.

On December 9, 2009, MV moved for summary judgment regarding Barbara's punitive damages claims, which the court granted. After a six-day trial, a jury found MV directly liable to Barbara for its negligent hiring, retention, training, or supervision of Caldwell and vicariously liable to her for Caldwell's negligence. The jury apportioned no fault to Barbara and awarded her medical expenses in the amount of $74,630.28. For past, present, and future pain and suffering, the jury awarded her damages of 4.1 million dollars.

On appeal, Barbara argues that the trial court improperly awarded summary judgment prior to trial on her gross negligence claims and asks this Court to remand the case for retrial solely on that issue.

As this issue was decided by summary judgment, the following standard of review applies:

> The standard of review on appeal of a summary judgment is whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law. Kentucky Rules of Civil Procedure (CR)

> 56.03. There is no requirement that the appellate court defer to the trial court since factual findings are not at issue. *Goldsmith v. Allied Building Components, Inc.*, Ky., 833 S.W.2d 378, 381 (1992). "The record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor." *Steelvest, Inc. v. Scansteel Service Center, Inc.*, Ky., 807 S.W.2d 476, 480 (1991). Summary "judgment is only proper where the movant shows that the adverse party could not prevail under any circumstances." *Steelvest*, 807 S.W.2d at 480, *citing Paintsville Hospital Co. v. Rose*, Ky., 683 S.W.2d 255 (1985). Consequently, summary judgment must be granted "[o]nly when it appears impossible for the nonmoving party to produce evidence at trial warranting a judgment in his favor . . . ." *Huddleston v. Hughes*, Ky.App., 843 S.W.2d 901, 903 (1992), *citing Steelvest, supra* (citations omitted).

Scifres v. Kraft, 916 S.W.2d 779, 781 (Ky. App. 1996). "Because summary judgment involves only legal questions and the existence of any disputed material issues of fact, an appellate court need not defer to the trial court's decision and will review the issue *de novo*." *Lewis v. B & R Corp.*, 56 S.W.3d 432, 436 (Ky. App. 2001).

In support of her argument that this Court should reverse and remand this case back to the trial court for a jury trial on punitive damages, Barbara argues that in cases alleging gross negligence and seeking punitive damages, a plaintiff is entitled to have her theory of the case submitted to the jury if there is "*any evidence* to support an award." *Thomas v. Greenview Hospital, Inc.*, 127 S.W.3d 663, 673 (Ky. App. 2004) (overruled on other grounds by *Lanham v. Commonwealth*, 171 S.W.3d 14 (Ky. 2005)). However, *Thomas* also cites to

Kentucky Revised Statutes (KRS) 411.184,[1] Kentucky's punitive damages statute. KRS 411.184(3) prohibits assessing punitive damages against a principal or employer for the act of an agent or employee unless such principal or employer authorized or ratified or should have anticipated the conduct in question.

Thus, the question becomes whether Barbara presented clear and convincing evidence that MV ratified, authorized, or anticipated the conduct in question. A careful review of the record indicates that MV did in fact ratify and authorize the conduct of their employee, Caldwell. In particular, Caldwell was trained to not admit fault for an accident, but instead to immediately call dispatch and report the accident. Further, Caldwell was trained and instructed not to speak with victims and witnesses, and in fact, her supervisors placed her into a car so she could not speak with Barbara or surrounding witnesses during the initial investigation. MV was also consciously aware that Caldwell did not follow the company's safety policies, as shown by the testimony of the supervisors who trained Caldwell on these safety policies. They acknowledged themselves that they did not instruct on all of the company's safety policies, thereby acknowledging that they authorized or ratified their employee's lax attitude toward passenger safety. Finally, although dispatch was called, neither Caldwell nor dispatch called EMS or police, which was a violation of MV policy. It is abundantly apparent to this Court that Caldwell and MV's treatment of Barbara immediately after the accident could rise to the level of gross negligence or

[1] We note that KRS 411.184(1)(c) was found unconstitutional by *Williams v. Wilson*, 972 S.W.2d 260 (Ky. 1998), but that holding did not affect KRS 411.184(3).

reckless disregard for Barbara's life and safety. Further, there is proof that MV authorized and ratified Caldwell's conduct—in fact Caldwell was *trained* to respond to accidents in this manner. Accordingly, we agree with Barbara that a trial for punitive damages was warranted. We therefore reverse the trial court's entry of summary judgment in this regard and remand for a trial on the issue of whether punitive damages were warranted.

MV's first argument on cross-appeal is that Barbara's negligent hiring claims were improperly submitted to the jury. In support of this, MV urges this Court to adopt what it calls the "majority rule" that once an employer has admitted *respondeat superior* liability for a driver's negligence, it is improper to allow a plaintiff to proceed against an employer on any other theory of imputed negligence, such as negligent hiring or negligent supervision. *See Oaks v. Wiley Sanders Truck Lines, Inc.*, 2008 WL 5459136 (E.D. Ky. 2008). *See also Scroggins v. Yellow Freight Systems, Inc.,* 98 F. Supp. 2d 928, 932 (E.D. Tenn 2000).

In response, Barbara first argues that MV failed to preserve this issue by failing to move for a directed verdict at the close of the evidence at trial. Barbara urges us to ignore MV's argument and dismiss the cross-appeal. In response, MV argues that it attempted to dismiss the negligent hiring claim before trial, before evidence reached the jury. MV contends that it preserved the issue with its motion in limine to exclude the evidence and with its motion for summary judgment prior to trial.

We agree with MV that this issue is preserved for our review. A denial of summary judgment based on purely legal issues, as opposed to sufficiency of the evidence, is reviewable *de novo* on appeal. *See Hazard Coal Corp. v. Knight*, 325 S.W.3d 290, 298 (Ky. 2010). *See also Sprint Coms. Co. v. Leggett*, 307 S.W.3d 109, 113 (Ky. 2010). MV also contends that it renewed its objection after the close of the testimony by moving for directed verdict. Because MV filed the motion for summary judgment based on a legal issue and there were not any contested issues of material fact, that motion was sufficient for review by this Court. However, a review of the trial tapes indicates that MV also preserved the argument by moving for directed verdict at the close of its evidence.

Turning to the merits of this argument, Barbara contends that contrary to what MV calls the "majority rule," today a majority of states consider direct claims for negligent hiring, training, and supervision to be totally independent of a plaintiff's claim for vicarious liability and allow both actions in one suit. Barbara argues that twenty-three states, in addition to the *Restatement (Second) of Agency* and *Prosser and Keeton on the Law of Torts*, consider direct claims for negligent hiring, retention, training, and supervision to be totally independent of a vicarious liability, *respondeat superior* claim. In contrast, Barbara argues, only eighteen states consider the aforementioned direct negligence claims to be duplicative or redundant to a *respondeat superior* claim. Seven states have not decided the issue, and Kentucky appellate courts have not yet ruled.

MV's position is essentially that when an employer admits *respondeat superior* liability, it is entitled to summary judgment on claims for negligent hiring, retention, training, or supervision. The policy rationale for this rule is that allowing direct negligence claims to proceed along with a *respondeat superior* claim would be redundant, would unduly prejudice the employer, or could lead to duplicative damage awards. *See James v. Kelly Trucking Co.*, 661 S.E.2d 329, 331 (S.C. 2008) (dismissing the policy arguments). States that have adopted this position also recognize an exception to the rule whereby a plaintiff can bring both direct and vicarious negligence claims against an employer if a valid claim for punitive damages is presented. *Durben v. American Materials, Inc.*, 503 S.E.2d 618, 619 (Ga. Ct. App. 1998).

Instead, Barbara urges this Court to adopt the reasoning of the South Carolina Supreme Court in *James*, *supra*, at 332. That case dealt with a large transportation corporation, its insurer, and an injured plaintiff. The Court provided several arguments in support of its decision to reject the now-minority rule. First, the court recognized that "[j]ust as an employee can act to cause another's injury . . . so can an employer be independently liable in tort." *Id.* Second, the Court reasoned that the proposed rule "presumes too much" because

> Our court system relies on the trial court to determine when relevant evidence is inadmissible because its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. Rule 403, SCRE. . . . In our view, the argument that the court must entirely preclude a cause of action to protect the jury from considering prejudicial evidence

> gives impermissibly short-shrift to the trial court's ability to judge the admission of evidence and to protect the integrity of trial, and to the jury's ability to follow the trial court's instructions.

Id. at 331.

Third, the court indicated that the rule's exception was flawed because it raised troubling procedural problems. *Id*. When judging whether a plaintiff can proceed to trial on a cause of action, "the trial court typically concerns itself only with whether the plaintiff's complaint states a factual basis to support a cause of action and whether, at the close of his presentation of the case, the plaintiff has presented a prima facie case supporting the allegations of his complaint." *Id*. However, if a trial court is asked to make a judgment regarding the employer's conduct, the exception would alter our traditional notion of the court's proper function. *Id*. at 331-32.

Finally, the court rejected the proposed rule based on common-sense tort principles, reasoning:

> In our view, it is a rather strange proposition that a stipulation as to one cause of action could somehow "prohibit" completely the pursuit of another. A plaintiff may, in a single lawsuit, assert many causes of action against a defendant. The considerations limiting a plaintiff's available causes of action in the typical case are that the plaintiff must be able to demonstrate a prima facie case for each cause of action and that a plaintiff may ultimately recover only once for an injury.

Id. at 332.

We agree with Barbara that there is a distinction between vicarious liability of a principal for the negligence of an agent and direct liability of the principal for its own negligence. *See McGraw v. Wachovia Sec., L.L.C.*, 756 F. Supp. 2d 1053, 1066 (N.D. Iowa 2010). Further, a majority of states follow the *James* rationale, as detailed above. *See Fairshter v. American Nat'l Red Cross*, 322 F. Supp. 2d 646 (E.D. Va. 2004); *Poplin v. Bestway Express*, 286 F. Supp. 2d 1316 (M.D. Ala. 2003); *Lim v. Interstate Sys. Steel Div., Inc.*, 435 N.W.2d 830, 833 (Minn. Ct. App. 1989).

Kentucky law recognizes that an employer can be held liable for the negligent supervision of its employees. *See Smith v. Isaacs*, 777 S.W.2d 912, 914-15 (Ky. 1989). In recognizing the tort of negligent supervision, Kentucky has also adopted the *Restatement (Second) of Agency* § 213 (1958), which provides that a person conducting an activity through agents is subject to liability for harm resulting from his conduct if he is negligent or reckless:

> (a) in giving improper or ambiguous orders or in failing to make proper regulations; or
>
> (b) in the employment of improper persons or instrumentalities in work involving risk of harm to others; or
>
> (c) in the supervision of the activity; or
>
> (d) in permitting, or failing to prevent, negligent or other tortious conduct by persons, whether or not his servants or agents, upon premises or with instrumentalities under his control.

Comment h, entitled "Concurrent negligence of master and servant," is particularly insightful and indicates that "[i]n addition to liability under the rule stated in this Section, a master may also be subject to liability if the act occurs within the scope of employment. In a given case[,] the employer may be liable both on the ground that he was personally negligent and on the ground that the conduct was within the scope of employment." *See* §§ 219-267.

Kentucky recognizes that claims for negligent hiring, negligent training, negligent supervision, and negligent retention are four viable and distinct tort claims. *See, e.g.*, *Turner v. Pendennis Club*, 19 S.W.3d 117, 121 (Ky. App. 2000) ("Kentucky has indeed recognized and acknowledged the existence of claims of negligent training and supervision."); *McDonald's Corp. v. Ogborn*, 309 S.W.3d 274, 291 (Ky. App. 2009) (recognizing negligent supervision); *Oakley v. Flor-Shin, Inc.*, 964 S.W.2d 438, 441-42 (Ky. App. 1998) (recognizing negligent hiring and retention); *Airdrie Stud, Inc. v. Reed*, 2003 WL 22796469 at *1 (Ky. App. Nov. 26, 2003) (recognizing negligent hiring and negligent retention).

Thus, because Kentucky law has recognized that a distinction exists between the vicarious liability of an employer and the actual liability of that employer, we disagree with MV's claim that once an employer admits vicarious liability, a plaintiff cannot pursue claims for negligent hiring, retention, supervision, or training.

MV next argues that in the instant case, evidence of Caldwell's prior history of alcoholism was prejudicial and served only to inflame the jury. MV argues that

Barbara "bombarded the jury with testimony about Caldwell's past alcohol use and treatment for alcoholism, which was offered to prove that MV should have refused to hire her." MV argues that as with all character or "prior act" evidence, this created a risk that the jury would infer from Caldwell's past experience with alcoholism that she was careless or unreliable when evaluating whether Caldwell was negligent on December 8, 2006, even though she tested negative for both drugs and alcohol after the incident.[2]

We are cognizant that "evidence of one's character for carefulness or carelessness for the purpose of showing action in conformity therewith is plainly inadmissible . . . ." *Kelley v. Poore*, 328 S.W.3d 683, 687 (Ky. App. 2009) (internal citation omitted). However, Caldwell was an alcoholic living in a rehab facility when MV hired her. A psychiatrist was treating her for her addiction. The MV job application she filled out required her to certify the truthfulness of its contents. She lied about her alcoholism and mental health history on her employment application *and admitted such at trial*. Citing MV's zero-tolerance policy, supervisors Rowe and Grice said they would not have hired Caldwell had they known she was an alcoholic. Caldwell testified that Grice and Coleman knew she was an alcoholic before they hired her. Based upon this evidence, it was not impossible for the jury to conclude that Caldwell was negligently hired, as two of her supervisors admitted at trial that they would not have hired her had they known of her history of alcoholism and the fact that she lied on her application. If one is

[2] We note that the alcohol test was performed outside the accepted period and thus the results are not entirely reliable.

to believe Caldwell's testimony that they knew she was an alcoholic and hired her anyway, then at the very least, Grice and Coleman openly violated their own stated policies by hiring her. This evidence was relevant to Barbara's negligent hiring claims.

Additionally, federal and state law requires driver alcohol testing within two hours after a bus accident, in order to obtain an accurate result. Caldwell was given a breath alcohol test at 7:32 p.m., thirty-two minutes past the deadline for accurate testing. Although the results were negative, MV never offered an explanation for the delay. The police were never called to the scene, even though MV's safety policies required that they be called. Instead, Coleman drove Caldwell to have her tested. Thus, no scientifically reliable evidence was ever obtained. The evidence was simply inconclusive as to whether Caldwell was drinking on the day in question, although the eventual tests indicated she was not intoxicated. Evidence of Caldwell's prior alcohol abuse, while somewhat prejudicial, was relevant to Barbara's claims that Caldwell was negligently hired.

MV next argues that the trial court erred by admitting evidence of a subsequent accident. In May 2007, another passenger fell from an MV bus under similar circumstances, due to the driver not following the company's tie-down policy. That accident occurred on May 14, 2007, which was a sunny, dry day, as opposed to a cold, wintery day like the day on which Barbara was injured.

In support of its argument that the trial court improperly admitted evidence of the subsequent accident, MV cites *Davis v. Fischer Single Family Homes, Ltd.*,

231 S.W.3d 767, 777 (Ky. App. 2007), for the proposition that "[i]t has long been held that evidence of prior negligent acts or customary practices, offered solely in an attempt to prove negligence on a different occasion, is inadmissible as it offers very little probative value and presents a potential for confusion of the issues." MV also argues that Kentucky Rule of Evidence (KRE) 404(b) embodies this rule and provides that "evidence of other crimes, wrongs, or acts is not admissible" to prove that a party acted "in conformity therewith" during the events in question.

We initially note that the May 2007 accident happened subsequently to Barbara's December 2006 accident, and thus Barbara was not offering proof of prior negligence, but instead was offering proof of a subsequent event. Nonetheless, under Kentucky law, evidence of the occurrence of other accidents or injuries under substantially similar circumstances is admissible when relevant to the existence or causative role of a dangerous condition. *Harris v. Thompson*, 497 S.W.2d 422, 429 (Ky. 1973). The other occurrence seeking to be admitted "need not be identical to the occurrence at issue." 32A C.J.S. *Evidence* §1034 (2012). "Incidents which 'occurred under similar circumstances or share the same cause' can properly be deemed substantially similar." *Surles ex rel. Johnson v. Greyhound Lines, Inc.*, 474 F.3d 288, 297 (6th Cir. 2007) (quoting *Rye v. Black & Decker Mfg. Co.*, 889 F.2d 100, 102 (6th Cir. 1989)).

Barbara argues on appeal that Caldwell testified that there "wasn't a procedure saying that you had to let the lift down and then" remove the tie-downs. Caldwell believed that it was acceptable to cut corners when unloading a passenger

because that was how Grice trained her. She claimed she cut corners during the December 8 incident with Barbara "because it was cold outside." The occurrence of a similar incident when it was not cold outside indicates that other drivers believed it was acceptable to cut corners even when the circumstances were different. Thus, the evidence was relevant to support Barbara's claims of negligent training and supervision claims. In the May report, Rowe indicated that MV was *only then* beginning to follow its written policy of instructing drivers to wait to remove the four-point tie-downs until the bus lift was level for boarding. Evidence that supervisors had instructed drivers that they could cut corners and was only beginning, almost six months after a serious accident, to instruct according to its policy manual is most definitely relevant to Barbara's claims for negligent supervision and training. Accordingly, we do not agree with MV that the evidence of the May 14, 2007, accident offered little probative value and presented a potential for confusion of the issues. The trial court properly admitted evidence of the subsequent accident.

MV next argues that the trial court committed reversible error in admitting evidence of MV's financial condition. In support of this argument, MV argues that the trial court allowed Barbara's counsel to introduce evidence of MV's 45 million dollar contract with TARC and to discuss that value in closing argument. Barbara argues that MV has waived this argument on appeal by failing to raise the objection at the time the evidence was first offered. *See* KRE 103(a). *See also* *Copar, Inc. v. Rogers*, 127 S.W.3d 554, 560 (Ky. 2003). Barbara argues that MV

failed to object when her counsel first mentioned the TARC contract. MV contends that it preserved this issue for appellate review by objecting when the contract was first actually introduced.

After a review of the record, we agree with MV that the issue was preserved for review by its objection when the TARC contract was introduced into evidence. MV's failure to object when Plaintiff's counsel surreptitiously mentioned the amount of the contract in passing does not amount to waiver. However, we agree with Barbara that the brief mention of the 45 million dollar contract was at most, harmless error. Although Barbara's counsel mentioned the contract, the actual dollar amount of the contract was only mentioned twice during the entire trial. Even if deemed improper, isolated references to a party's financial condition constitute, at most, harmless error. *See Baston v. County of Kenton ex rel. Kenton County Airport Bd.*, 319 S.W.3d 401, 411-12 (Ky. 2010) ("[T]he airport's wealth was hardly a secret, and counsel's references to it were not gratuitous, inflammatory statements likely to distract the jury from the relevant evidence."). *See also Hardaway Mgmt. Co. v. Southerland*, 977 S.W.2d 910, 916 (Ky. 1998) (evidence that company owned 8,000 apartments, although marginally relevant did not affect the company's substantial rights, in part, because the jury already knew the company was large and wealthy; any error was harmless); *Rockwell Int'l Corp. v. Wilhite*, 143 S.W.3d 604, 631 (Ky. App. 2003) ("An isolated instance of improper argument . . . is seldom deemed prejudicial.") (footnote citation omitted).

The test for harmless error is whether, on the whole, there was a substantial possibility that the case would have turned out differently absent the complained of issue. *Burchett v. Commonwealth*, 314 S.W.3d 756, 759 (Ky. App. 2010). We simply cannot say that this case would have turned out any differently, absent Plaintiff's two mentions of the TARC contract's amount. Thus, at most, the inclusion of such evidence was harmless error.

Additionally, under MV's contract, the City of Louisville, Commonwealth, TARC, and various federal agencies had a right to inspect MV's safety records. Thus, MV had an incentive not to conduct thorough investigations and to not report safety violations, such as it not following its own safety procedures. If it was found to have safety violations, it would have been at a huge risk to lose the 45 million dollar contract. Evidence of the contract was directly related to MV's credibility regarding whether it conducted a thorough investigation of the accident.

Finally, MV argues that the trial court's jury instructions were improper. MV contends that the trial court improperly instructed the jury on the governing law both with respect to the duty of care and the scope of MV's liability for negligent hiring.

First, MV argues that the jury instruction concerning MV's duty of care as a "common carrier" was erroneous. "A common carrier of passengers on a bus owes those passengers the highest degree of care in transporting them to protect them from dangers that foresight can anticipate and to exercise the utmost skill, diligence and foresight for [their] safety, consistent with the practical operation of

his bus." *Montgomery v. Midkiff*, 770 S.W.2d 689, 690 (Ky. App. 1989) (internal citation omitted). As this language makes clear, this heightened duty applies only to the conduct of the carrier while actually "transporting" the passengers and "operat[ing]" the bus. *Id.*

Thus, while a heightened duty of care may have applied to Caldwell's conduct relating to assisting a passenger in de-boarding the bus, the standard applicable to MV's conduct in reviewing Caldwell's employment application is the same standard of ordinary care under the circumstances that applies to most ordinary negligence claims. *E.g.*, *Boland-Maloney Lumber Co., Inc. v. Burnett*, 302 S.W.3d 680, 686 (Ky. App. 2009).

"The question to be considered on an appeal of an allegedly erroneous instruction is whether the instruction misstated the law." *Olfice, Inc. v. Wilkey,* 173 S.W.3d 226, 229 (Ky. 2005) (internal citation omitted). "In instructing juries, Kentucky uses the 'bare bones' method." *Id.* Upon review of the jury instructions submitted in the instant case, we agree with Barbara that the jury instructions were in accord with Kentucky's bare-bones instruction doctrine and did not misstate the law. Instruction 2 stated:

> Defendant MV Transportation, Inc. is considered a "common carrier," responsible for publicly transporting passengers, including disabled passengers.
>
> As a common carrier, MV Transportation, Inc. is subject to the "highest degree of care." As used in these instructions, the highest degree of care means the utmost care, skill, diligence, and foresight the jury would expect

> to be exercised by prudent and skillful persons engaged in the management and operation of paratransit buses.

After this instruction, the jury was directed to proceed to interrogatory A, which states:

> Are you satisfied from the evidence that MV Transportation, Inc. failed to exercise its duty of care, commensurate with Barbara Allegier's disability, and that this failure was a substantial factor in causing harm?

The jury answered interrogatory A by marking "yes." Instruction 3 stated:

> It was the duty of Defendant MV Transportation, Inc., as an employer, to exercise reasonable degree of care in hiring, training, supervising, or retaining its employee-driver, Wilma Caldwell. "Reasonable care" means such care as the jury would expect an ordinarily prudent corporation to exercise under similar circumstances.
>
> Regardless of your finding on Instruction No. 2, you will nonetheless find for Plaintiff Barbara Allgeier if you are satisfied from the evidence that MV Transportation, Inc. failed to exercise reasonable care and that such failure was a substantial factor in causing Barbara Allgeier's injuries.

After this instruction, the jury was instructed to proceed to Interrogatory B, which stated:

> Are you satisfied from the evidence that MV Transportation, Inc. failed to exercise reasonable care in hiring, training, supervising, or retaining its employee driver, Wilma Caldwell, and that this failure was a substantial factor in causing Barbara Allegier's injuries?

Again, the jury answered this question by marking "yes."

MV argues that Instruction 2 was not limited to consideration of MV's or its employees' negligence in connection with the actual operation of the bus or the

lift. We disagree with this argument because Instruction 2 very clearly states that the heightened duty of care applies in the management and operation of the paratransit buses. The instruction clearly and briefly sets forth the details of the heightened duty of care, per Kentucky's bare-bones instruction doctrine.

Instruction 3 clearly sets forth MV's regular standard of care in the hiring, training, supervising, and retaining of employees. While we agree with MV that the statement "regardless of your finding on Instruction 2, you will nonetheless find for Plaintiff Barbara Allegier if you are satisfied from the evidence that MV Transportation, Inc. failed to exercise reasonable care and that such failure was a substantial factor in causing Barbara Allegier's injuries" was in error, because the jury answered Interrogatory 2 in the affirmative, they were free to answer Interrogatory 3 similarly, and thus the error was harmless in the instant case. *See Ten Broeck DuPont, Inc. v. Brooks*, 283 S.W.3d 705, 727 (Ky. 2009) ("In order for [an] employer to be held liable for negligent hiring [or] retention . . . the employee must have committed a tort.") (citation omitted).

We find no errors with the jury instructions as utilized by the court. Kentucky "is not a jurisdiction which favors instructing the jury at length regarding every subtle nuance of the law which may be relevant to a particular case." *King v. Grecco*, 111 S.W.3d 877, 882 (Ky. App. 2002) (superseded by statute as stated in *Meece v. Feldman Lumber Co.,* 290 S.W.3d 631 (Ky. 2009)). Instead, the Commonwealth's appellate courts mandate bare-bones instructions that "can be fleshed out by counsel in their closing arguments if they so desire." *Olfice, Inc. v.*

Wilkey, 173 S.W.3d 226, 228 (Ky. 2005) (citing *Cox v. Cooper*, 510 S.W.2d 530, 535 (Ky. 1974)). A review of the record indicates that to be the case here. Accordingly, we affirm the trial court's use of the above jury instructions.

Based on the foregoing, we hereby reverse the trial court's entry of summary judgment regarding Barbara's claim for punitive damages and remand for a trial in accordance therewith. In all other aspects, we affirm the trial court's rulings.

ALL CONCUR.

BRIEF FOR APPELLANT:

B. Todd Thompson
Millicent A. Tanner
Brian S. Brownfield
Scott C. Cox
Chad Owens Propst
Louisville, Kentucky

BRIEF FOR APPELLEE:

Griffin Terry Sumner
Jason Renzelmann
Gene F. Zipperle, Jr.
Louisville, Kentucky