No. 86-1849

In The

Supreme Court of the United States

October Term, 1986

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Frances Lola Womack, Individually, and as Surviving Spouse of William Sydney Womack, Deceased,

and

James A. Chandler and wife, Iva I. Chandler,

Petitioners,

v.

Donald J. Gettelfinger & wife, Doris Y. Gettelfinger, d/b/a Gettelfinger Farms

and

Charles S. Ritter,

Respondents.

—o—

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

—o—

RESPONDENTS' BRIEF IN OPPOSITION

—o—

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QUESTION PRESENTED FOR REVIEW

Tennessee diversity highway accident case: Whether there was any substantial and material evidence of gross negligence presented at trial such that it was appropriate to submit the question of punitive damages to the jury.

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OPINION BELOW

The Opinion of the Court of Appeals for the Sixth Circuit was correctly cited in the Petition as being reported at 808 F.2d 446; however, two pages of the opinion were omitted in the Petitioners' "Appendix A" (pages 12 & 13). Consequently, the entire Opinion is included in this Brief in Opposition as "Appendix A".

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STATEMENT OF THE CASE

The following addition to the statement of facts given in the Opinion below and by the Petitioners is submitted:

The Petitioner Mr. Chandler and the decedent, Mr. Womack, were iron workers working in Oak Ridge, Tennessee, and they customarily rode to work with another iron worker in his automobile. On the morning of the accident, the Petitioner Mr. Chandler woke up and heard a report on the radio that there was a driver's alert due to foggy weather. For that reason he left home early. He met the others and they started for work. The fog was equivalent to the heaviest the driver had ever driven in and it got foggier as they approached the scene of the accident, which is a half mile from the Clinch River. It was completely dark. The driver of the car did not feel that it was safe to drive that morning, but since they all had to go to work, they drove anyway. Appendix, Court of Appeals, at 279, 280, 295, 303, 306, 308, 316. [References to "Appendix, Court of Appeals" are to the Joint Appendix filed below.]

The Respondent Charles Ritter, after spending the night in his cab, awoke the morning of the accident and conducted a safety check of his lights, tires, brakes, etc., noting that the fuel in his diesel reefer unit was low—an eighth of a tank. A cardinal rule among truckers is that a diesel must not run out of fuel. That is a significant problem because when a diesel runs out of fuel, it may take four to six hours or longer and the services of a diesel mechanic to restart it. By that time, the load may have spoiled. Mr. Ritter decided that his course of action would be to obtain fuel and head for his destination. Appendix, Court of Appeals, at 158-162, 191, 225, 227, 410.

Among truckers, whether to operate a truck in fog or other bad weather is left up to the driver, and generally, they will drive if other traffic is moving. Other traffic was moving that morning and Mr. Ritter pulled onto the interstate looking for fuel. Appendix, Court of Appeals, at 162, 179, 192-193, 248, 414.

Just before the accident, as Mr. Ritter was pulling onto the highway making a right turn, he noticed a ditch on his right at the edge of the driveway. The ditch was 31-32 inches deep. He was concerned that his rear wheels not get in the ditch, because with a heavily loaded trailer the whole rig might have turned over, or the load might have shifted causing the front of the trailer to go down against the drive wheels. The rig would then be stuck in that position, blocking the road until a wrecker arrived. Appendix, Court of Appeals, at 169-170, 245-247, 432-433, 462-463, 484. The rear wheels on Mr. Ritter's trailer were some 40 feet behind the tractor. In making the turn called for in this situation, truckers have to swing out and make

a much wider turn, preferably keeping the rear wheels in view through their rearview mirrors. The safe practice is to keep the rear wheels out of the ditch and this is so even if the trucker must swing out to the other side of the road. Appendix, Court of Appeals, at 245, 247-248.

Swinging out as Mr. Ritter did is how you "would have to make the turn" according to one of two truckers testifying for the Petitioners and was "proper driving", although he felt it could be done with only a two foot encroachment on the other lane. In his driving experience there had been times when he, too, had to block highways in pulling out of a lot to keep his rear wheels from dropping into a ditch. Appendix, Court of Appeals, at 234, 244, 273-274. The other trucker who testified for the Petitioners re-enacted the turn, but in broad daylight and with an empty truck. His rear wheels went into the ditch the first time. Since his truck was not loaded there were no serious consequences. When he tried again, his rear wheels were right at the edge of the ditch and he blocked about half of the other lane. Appendix, Court of Appeals, at 399-400, 425.

On September 28, 1983, about two weeks before the accident, the Respondent Ritter and one Larry Goode had filled out employment applications at Gettelfinger Farms. Mr. Goode was an experienced, qualified truck driver, driving since 1971. Mr. Ritter, 33 years old, had worked in service stations for 15 years or so, and Mr. Goode had taught him to drive a tractor trailer and was trying to help him get started. Mr. Ritter had ridden with Mr. Goode for three to five years, sometimes driving for him, for instance, while Mr. Goode was sleeping. Appendix,

Court of Appeals, at 66, 74, 82, 144-147, 154-155, 198-200, 204, 223, 474.

Federal regulations require that before putting a driver on the road, an employer must either give a driver a specified road test or receive a certificate that he had passed such a road test and is qualified. Mr. Ritter held such a certificate which had been given to him and signed by Mr. Goode. The certificate certified that Mr. Ritter was regularly driving a vehicle and was fully qualified under the regulations. Mr. Ritter presented this certificate to Gettelfinger Farms before he was hired. Appendix, Court of Appeals, at 57, 204-206, 238-239, 468, 472-474, 478, 520-521.

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SUMMARY OF REASONS FOR DENYING THE WRIT

Although the Petitioners couch their argument in terms of the *Erie* doctrine and the 7th Amendment, the issue they argue is whether the evidence warranted submitting the case to the jury on the issue of punitive damages. They raise various side issues, such as whether the diversity court should apply the Federal or the Tennessee standard for reviewing a motion for directed verdict or a judgment N.O.V., whether the Court of Appeals used an erroneous standard of review, and whether the Court of Appeals was familiar with the Tennessee definition of punitive damages. However, through all the side issues they are complaining of only one thing: the Court of Appeals reversed the Trial Court's rulings on the Respondent's motions for directed verdict and judgment N.O.V. on punitive damages.

The Court below painstakingly reviewed the evidence (eight days of trial, Appendix of more than 800 pages), and determined that the particular facts and circumstances of this case did not rise to the level of gross negligence under Tennessee law. Accordingly, the Court below held that the Trial Court had been in error in allowing the punitive damages question to go to the jury. The Petitioners ask this court to second guess the Court of Appeals on that ruling. Such an endeavor would require this court to follow the path of the Court of Appeals in reviewing the evidence and would be of no possible benefit to anyone other than the parties. All are familiar with the Seventh Amendment and its requirement that a jury decision is to be upheld if it is supported by material evidence. Another statement by this court to that effect would be of no use in developing the law.

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REASONS FOR DENYING THE WRIT

I.

No Substantial Erie Question is Presented Since There is No Practical Difference in the Federal and Tennessee Standards For Reviewing Motions For Directed Verdict and Judgment N.O.V.

The Petitioners argue, based on the *Erie* doctrine and the case of *Toth v. Yoder Co.*, 749 F.2d 1190 (6th Cir. 1984), that the Federal Courts sitting in diversity cases should apply the state standard for determining whether

motions for directed verdict or judgment N.O.V. should have been granted. They argue that the Court of Appeals for the Sixth Circuit applied the Federal standard and that such application constitutes error. Although the Respondents have no preference as to whether the Federal or State standard is used, we note that the question may be subject to debate. *Donovan v. Penn Shipping Co.,* 429 U.S. 648, 649-650, 97 S.Ct. 835, 836-837, 51 L.Ed.2d 112, 114 (1977); *Gold v. National Savings Bank of the City of Albany,* 641 F.2d 430, 434 n.3 (6th Cir. 1981).

A. No practical difference in the standards.

These standards have been stated in many cases and on many occasions. We do not set out the citations below as being the only acceptable language but merely as fair representative specimens. The Court should:

Federal	*Tennessee*
view the evidence in the light most favorable to Mrs. Gillham, who secured the jury verdict, & a judgment N.O.V. may not be granted unless reasonable minds could not differ as to the conclusions to be drawn from the evidence. *Gillham v. Admiral Corp.,* 523 F.2d 102, 109 (6th Cir. 1975).	take the strongest legitimate view of the evidence in favor of the opponent of the motion, allow all reasonable inferences in his or her favor, discard all countervailing evidence, and deny the motion where there is any doubt as to the conclusions to be drawn from the whole evidence. *Holmes v. Wilson,* 551 S.W.2d 682, 685 (Tenn. 1977).

B. Not outcome determinative.

If there is any difference in the standards as listed, it is so minute as to be of no practical significance. Under either standard, the question is whether there was any substantial and material evidence to support the point in question. Obviously, the result in the case at bar would be the same regardless of which standard was used.

II.

No Substantial Seventh Amendment Question is Presented, Since the Question is Merely Whether, on the Unique Facts of this Case, the Petitioners Have Made Out a Jury Question on a Particular Issue.

The Petitioners claim that they presented evidence of gross negligence such that the case was properly submitted to the jury on the issue of punitive damages. The Court of Appeals disagreed, finding that they did not present such proof. Consequently, the Petitioners claim that their Seventh Amendment right to a trial by jury has been violated. The remarks of Justice Frankfurter in the case of *Dick v. New York Life Ins. Co.*, 359 U.S. 437, 455-456, 3 L.Ed.2d 935, 947, 79 S.Ct. 921, 932 (1959), although made some years ago and in dissent, seem very pertinent on the question raised by the Petitioners:

> *If this case raises a question under the Seventh Amendment, so does every granted motion for dismissal of a complaint calling for trial by jury, every direction of verdict, every judgment notwithstanding the verdict.* Fabulous inflation cannot turn these conventional motions turning on appreciation of evidence into constitutional issues, nor can the many diversity cases sought to be brought here on contested questions of evidentiary weight be similarly transformed by insisting before this court that the Constitution has been violated. This verbal smokescreen cannot ob-

scure the truth that all that is involved is an appraisal of the fair inferences to be drawn from the evidence. (Emphasis added).

A. Additional ruling on this point would add nothing to American jurisprudence.

The applicable rule of law is long and well settled. We quote one of the many statements of the rule from the case of *Mortensen v. United States,* 332 U.S. 369, 374, 645 S.Ct. 1037, 1040, 88 L.Ed. 1331, 1335 (1944), which states that the question is: "[W]hether there was *any competent and substantial evidence* fairly tending to support the verdict." (Emphasis added). The focal point of judicial review is "the *reasonableness* of the particular inference or conclusion drawn by the jury." *Sentilles v. Inter-Caribbean Shipping Corp.,* 361 U.S. 107, 110, 80 S.Ct. 173, 4 L.Ed.2d 142, 145 (1959). (Emphasis added).

The rule is familiar. The only question the Petitioners raise is whether the Court of Appeals properly applied the rule. On occasion in the past, this court has taken up such questions, particularly in the FELA and Jones Act cases cited in the Petitioners' brief, but the prevailing view and the better practice is that certiorari is improvidently granted when the only question is the propriety of submitting certain questions to the jury. *Houston Oil Co. v. Goodrich,* 245 U.S. 440, 441, 38 S.Ct. 140, 141, 62 L.Ed. 385 (1918).

B. The Court of Appeals did not create a "new standard" with which to review the motions for directed verdict and judgment N.O.V. in this case.

The Petitioners complain that the Court of Appeals "established a new Federal standard" for reviewing mo-

tions for directed verdict and judgment N.O.V. The new standard, says the Petitioners, requires Federal judges to reweigh evidence, assess the credibility of witnesses, and utilize a preponderance of the evidence test in deciding these motions. We aren't certain where the Petitioners got the idea that the Court of Appeals used those methods because the only place their "buzzwords" are found is in their petition. The concepts the Petitioners refer to certainly are not found in the opinion of the Court of Appeals. There is no indication that the Court of Appeals did any of the things that the Petitioners complain of. The bulwark of the Petitioners' argument seems to be the statement of the Court of Appeals that the case was a "close one", referring to the propriety of allowing punitive damages under the facts presented. Only the Petitioners can tell us how they concluded from that statement that the Court of Appeals applied a preponderance of the evidence test. Accepting the Petitioners' argument would mean that every case in which the Court of Appeals indicated that their decision was any more than a rubber stamp matter would be subject to reversal on Seventh Amendment grounds.

In point of fact, there is every indication that the Court of Appeals applied the customary "any substantial and material evidence" test, and gave the Petitioners the benefit of all favorable inferences. In the opinion, the court is careful to point out evidence "from which the jury could reasonably have inferred" various matters, such as that Mr. Ritter's four-way flashers were not on and that Mr. Ritter had not passed certain tests. Appendix A, this brief, at 6 & 18.

C. Accepting this case would require the Supreme Court to review the facts and pass on the sufficiency of the evidence.

It should go without saying that any time an appellate court reviews the action of a court below on motions for directed verdict or judgment N.O.V. it will be called upon to carefully review all of the facts of the case. The Court's position on this function is indicated by Justice Holmes in *United States v. Johnston,* 268 U.S. 220, 227, 45 S.Ct. 496, 497, 69 L.Ed. 925, 926 (1925): "We do not grant a certiorari to review evidence and discuss specific facts."

Further, as Justice Frankfurter pointed out in *Dick v. New York Life Ins. Co.,* 359 U.S. 437, 461-462, 79 S.Ct. 921, 935, 3 L.Ed.2d 935, 950 (1959):

> It is the *staple business of courts of appeal to examine records* for the sufficiency of evidence. To undertake an independent review of the review by the Court of Appeals of evidence is neither our function nor within our special aptitude through constant practice. Such disregard of sound judicial administration is emphasized by the fact that the judges of the Court of Appeals are, by the very nature of the business with which they deal, far more experienced than we in dealing with evidence, ascertaining the facts, and determining the sufficiency of evidence to go to a jury. (Emphasis added).

D. Based on the facts presented, the Court of Appeals was correct in its judgment in reversing the Trial Court's actions on the motions for directed verdict and judgment N.O.V.

The Petitioners claim to have presented evidence of gross negligence by the Respondents. In doing so, they

have placed a premium on their own characterizations at the expense of reviewing the actual undisputed facts. For example they make charges relating to Mr. Ritter's "intentionally blocking a two-lane highway" and Gettelfinger Farms "intentionally violat[ing] Federal standards". Although all of the factual issues were briefed to the Court of Appeals, we will only touch on a few of the more important points here. The Trial Court gave a very good summary of the case in regard to Mr. Ritter's negligence in operating the tractor trailer:

> . . . in undertaking to pull out onto the highway in the fog, risking injury to himself and damage to the truck, Mr. Ritter evidently expected to make a safe turn. His negligence was not so gross or wanton as to evince conscious indifference to the consequences of his action. On the facts of this case, we do not believe the Tennessee Supreme Court would sustain an award of punitive damages against Mr. Ritter. Appendix A, this brief, at 17.

The Petitioners, with their argument that Mr. Ritter "intentionally blocked" the highway seem to imply that Mr. Ritter's ultimate objective was the blocking of the highway to the detriment of other drivers. Actually, Mr. Ritter's "intention to block the road" was merely his agreement on cross-examination that when he pulled out, he knew the road would be blocked. Appendix, Court of Appeals, at 119-120.

The better statement would be that Mr. Ritter was "intentionally turning around" and that an unfortunate side effect of his turning around was the blocking of the highway. In that connection we point to the testimony of one of the Petitioners' own expert witnesses, as set out

in the supplemental facts of this brief, that swinging out as Mr. Ritter did is how you "would have to make the turn" and was "proper driving", although he felt it could be done with only a two foot encroachment. Of particular interest is the re-enactment of the turn by the Petitioners' other expert trucker. He made the same turn in broad daylight with an empty truck and his rear wheels went into the ditch on his first try. Since his truck was not loaded there were no serious consequences. When he tried again, he was able to avoid the ditch but he blocked about half of the other lane. It is interesting to speculate how he might have fared with a fully loaded truck in pitch darkness and fog.

Turning now to the negligent entrustment cause of action, the Petitioners charge that Gettelfinger Farms "intentionally violated" Federal standards on the hiring, training and testing of drivers. However, the facts they list do not support their charges. Let us review the facts they list (from pp. 4-5 of the Petition):

1. "Hired only by a secretary." Mr. Ritter filled out an employment application and was called by a secretary and advised to return for work. Appendix A, this brief, at 9.

2. "Had never driven a truck alone." It is true that Mr. Ritter had never operated a tractor trailer on his own before. However, he had driven with Mr. Goode for an extended period of time and even "ran together" with Mr. Goode for an extended period after beginning to work for Gettelfinger Farms. As the Trial Court pointed out, he drove several thousand miles for Gettelfinger Farms

without incident before the accident. Appendix A, this brief, at 8, 9 and 18.

3. "Failed the only driver's test he had ever attempted at another company." Mr. Ritter did fail a test at another company. As is pointed in the Court of Appeals opinion, Mr. Ritter testified that he failed because he made a mistake in shifting gears and the person who administered the test could not remember the reason for his failure. However, the person giving the test did testify that finding a truck driver had not passed a road test at another truck line would not be a factor in the decision to hire him. Appendix, Court of Appeals, at 445-446, 452, 413.

4. He was "not tested" at Gettelfinger Farms. Federal regulations require *either* a certain road test or a certificate that a prospective driver has already taken and passed the road test. 49 C.F.R. 391.11(10)(1983). It is not necessary to give a road test if the prospective driver has an appropriate certificate. Mr. Ritter's certificate stated that he was "regularly driving a vehicle" and was "fully qualified under Part 391, Federal Motor Carrier Safety Regulations". Further, according to the practice in the transportation industry, a driver may be hired on the basis of the certificate if the certifying driver is qualified. It is uncontroverted that Mr. Ritter presented a proper certificate to Gettelfinger Farms. The certificate was signed by Larry Goode, an experienced, qualified truck driver who had been driving since 1971. Thus, according to the regulations and the practice in the trucking industry, it was appropriate for Gettelfinger Farms to hire Mr. Ritter without giving him a road test. Appendix, Court of

Appeals, at 57, 204-206, 238-239, 468, 472-474, 478, 520-521, Appendix A, this brief, at 18.

Federal regulations also call for a certain written test. Although the Court of Appeals noted that the jury "reasonably could have found" that Mr. Ritter did not pass the written test, the test is an "instructional tool only" and a person's qualifications to drive are not affected by his performance on the test. 49 C.F.R. 391.35(6) (1983); Appendix A, this brief, at 18.

5. "The only person familiar with the driver's qualifications stated he was incompetent." In the first place, the witness to whom the Petitioners refer (Larry Goode), did not really testify that Mr. Ritter was "incompetent". The Court will recall that Larry Goode is the driver who taught Mr. Ritter to drive, who slept while Mr. Ritter was driving, and who issued the certification card to Mr. Ritter. Mr. Goode's actual testimony is as follows:

> (examination by Petitioners' counsel)
>
> Q. Mr. Goode, having seen and observed Mr. Ritter, in your judgment, is he a competent, safe driver?
>
> A. Well, if I had it to do over with, I wouldn't sign the card for him.
>
> Q. Would you please answer my question?
>
> A. I don't feel that he is qualified.
>
> Appendix, Court of Appeals, at 261-262.

At any rate, whether we say "not qualified" or "incompetent" Mr. Goode's testimony is not evidence of a violation of any Federal safety standards. To the contrary, the testimony points up the fact that Mr. Ritter did

have the certificate required by Federal safety standards. After the fact, Mr. Goode says he wished he hadn't given Mr. Ritter the certificate, but he admits that he issued the certificate and that he did not tell Gettelfinger Farms at any time before the accident that he felt Mr. Ritter was not qualified.

It is thus seen that the Petitioners are unable to back up their characterization that Gettelfinger Farms "intentionally violated" Federal standards. To the contrary, the standards were followed and as the Trial Court pointed out, the evidence shows that Mr. Ritter "did, in fact, know how to drive". Accordingly, the court will realize that the learned Court of Appeals was eminently correct in reversing the award of punitive damages.

III.

The Petitioners Merely Question the Court of Appeals' Interpretation of State Law.

A. The review of state law questions is better left to the Courts of Appeal.

The Petitioners claim that the Court of Appeals misapplied the Tennessee standard for punitive damages. The Court of Appeals, say the Petitioners, "has seen fit to apply his own standard for punitive damages awards rather than the state law standard" (in using the word "his", the Petitioners are referring to the learned judge who authored the opinion). In making this argument the Petitioners suggest that this Court review Tennessee law and determine if it was properly followed. Similar petitions for certiorari have been filed many times before. The Court's general feeling on these types of petitions

is stated in *Huddleston v. Dwyer,* 322 U.S. 232, 237, 64 S.Ct. 1015, 1018, 88 L.Ed. 1246, 1249 (1944):

> Ordinarily we accept and therefore do not review, save in exceptional cases, the considered determination of questions of state law by the intermediate Federal appellate courts.

As Justice Frankfurter stated in his dissent in *Dick v. New York Life Ins. Co.,* 359 U.S. 437, 458, 79 S.Ct. 921, 933, 3 L.Ed.2d 935, 948 (1959):

> To bring a case here when there is no 'special and important' reason for doing so, when there is no reason other than the interest of a particular litigant, especially when the decision turns solely on a view of conflicting evidence or the application of a particular local doctrine decided one way rather than another by a Court of Appeals better versed in the field of such local law than we can possibly be, works inroads on the time available for due study and reflection of those classes of cases for the adjudication of which this court exists.

In another instance, Justice Frankfurter, joined by Justice Harlan, again dissented from the Court's grant of certiorari. In *Gibson v. Phillips Petroleum Co.,* 352 U.S. 874, 77 S.Ct. 16, 1 L.Ed. 77 (1956), the Justices first noted that the case was an ordinary suit for damages for injuries claimed to have been caused by Defendant's fault and that "hundreds upon hundreds" of such suits are constantly brought in the state courts. Then noting that similar diversity suits were becoming an increasing burden upon the Federal courts, the Justices made this observation:

> This court cannot determine whether the Court of Appeals was right or wrong in its judgment without de-

> termining whether on this record the case should or should not have been left to the jury. That can only be decided on the basis of an investigation of Texas law. This court is not a court to determine the local law of the 48 states.

Instead of attempting to determine local law the Supreme Court, as is noted in *Bishop v. Wood,* 426 U.S. 341, 346, 48 L.Ed.2d 684, 690-691, 96 S.Ct. 2074, 2078 (1976), will accept a reasonable construction of state law by a United States Court of Appeals "even if an examination of the state-law issue without such guidance might have justified a different conclusion".

B. The opinion of the Court of Appeals does not conflict with Tennessee law since Tennessee law was correctly applied.

The Petitioners generally claim that the court below applied a standard for determining punitive damages which was somewhat stiffer than the Tennessee standard. Their complaint centers around the Court of Appeals' use of the term *"mens rea"* in its opinion. From the viewpoint of the Petitioners this term has an almost talismanic significance. Actually, the term *"means rea"* merely refers to the state of mind of a party at the time of a particular event, generally meaning "bad mind". As the Court will note from the Tennessee authorities, there is a state of mind requirement for awarding punitive damages in Tennessee, variously described as follows:

> Where the wrongdoer behaved so wantonly or grossly as to show a willingness to inflict the injury. *Earley v. Roadway Express,* 106 F.Supp. 958, 959 (E.D. Tenn. 1952).

> Where there is an entire want of care as to raise a presumption of conscious indifference to consequences.

Honaker v. Leonard, 325 F.Supp. 212 (E.D. Tenn. 1971).

Where there are circumstances of aggravation and usually there must be some 'wrong motive accompanying the wrongful act'. *Walgreen Co. v. Walton,* 64 S.W.2d 44, 52 (Tenn. App. 1933).

The 'turpitude of Defendant's conduct is considered, and there must be a 'wrong intent' on his part. *Stepp v. Black,* 14 Tenn.App. 153, 166 (1931).

The cases, all using somewhat different language, clearly evince the fact that the Tennessee courts require a finding of a particular wrongful state of mind before allowing punitive damages. The Court of Appeals properly characterizes that state of mind as "the kind of *mens rea* that makes it reasonable for the government not only to require payment of full compensation, but to exact retribution as well". Appendix A, this brief, at 12.

Incidentally, the case of *McParland v. Pruitt,* 284 S.W. 2d 299, 303 (Tenn. App. 1955), holds that an "inadvertent violation of a traffic regulation does not constitute gross and wanton negligence". In that regard we note that Mr. Ritter was charged with failure to yield the right of way and fined $10.00 instead of being charged with vehicular homicide. This fact is a good indication of Mr. Ritter's state of mind.

The Petitioners also misunderstand the Court of Appeals' citation to *Williams v. Union Carbide Corp.,* 790 F.2d 552 (6th Cir. 1986), a case arising in Arkansas. The Petitioners seem to suggest erroneously that the Court below went by the Arkansas standard for gross negligence. The Court of Appeals did not cite the case on that point. Actually, the case was cited only as authority for the prin-

ciple that the Federal courts in diversity must award punitive damages according to the state-created standards, rather than for the particulars of the Arkansas standard. Appendix A, this brief, at 12.

The Court of Appeals carefully reviewed the relevant Tennessee cases dealing with punitive damages, including cases dealing with tractor trailer rigs as well as other cases, and carefully compared the conduct of the Respondents in the case at bar to that of the defendants in the Tennessee cases. After doing so, the Court of Appeals indicated that:

> the conduct of the truck driver, Mr. Ritter, while it had tragic consequences, does not seem to bespeak the 'conscious indifference to consequences' manifested in the actions of the truck drivers in *Daniels* and *Garner*. [Two Tennessee cases where gross negligence was found.] Appendix A, this brief, at 14.

The court then indicated that Mr. Ritter's driving represented:

> poor judgment and lack of ordinary care, but that is not the stuff of which million dollar—plus punitive damages awards are made—at least not in Tennessee. Appendix A, this brief, at 14.

(The page of the Opinion below on which these passages appear was omitted from the copy of the Opinion included in the Petition for Writ of Certiorari. Consequently, we have included the entire Opinion of the Court below as Appendix A to this Brief).

The Court of Appeals' language just above may be contrasted with the claims of the Petitioners that the Court of Appeals has "mandated" that a defendant must

possess "intense culpability and bad motive" in order to justify an award of punitive damages in Tennessee. As can be seen, the standard applied by the Court of Appeals was the very standard the Petitioners called for in their Petition:

Petition for Writ of Certiorari	*Court of Appeals Opinion*
That is, in Tennessee, an award of punitive damages is proper, as an example, upon a finding of *mere conscious indifference to the consequences of one's actions.* (Emphasis added). Petition, at 28-29.	. . . in undertaking to pull out onto the highway in the fog, risking injury to himself and damage to the truck, Mr. Ritter evidently expected to make a safe turn. His negligence was not so gross or wanton as to evince *conscious indifference to the consequences of his action.* (Emphasis added). Appendix A, this brief, at 17.

By the same token, in regard to the negligent entrustment issues, the court indicated that the conduct of Gettelfinger Farms "does not bespeak the kind of wanton misconduct necessary to support a punitive damage award". Appendix A, this brief, at 18.

IV.

The Case Has No Significance Beyond the Immediate Facts and Parties.

This Court generally seems to extend certiorari jurisdiction only to adjudicating Constitutional issues, questions of national importance, settlement of conflict among the circuits, etc. As the Court has said, certiorari jurisdiction "is a jurisdiction to be exercised sparingly and

only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision". *Hamilton-Brown Shoe Co. v. Wolfe Bros. & Co.*, 240 U.S. 251, 257-258, 36 S.Ct. 269, 271, 60 L.Ed. 629, 633 (1913). None of these extraordinary matters seem to be present in the case at bar.

Thus, even if the case were wrongly decided below, in granting certiorari, this Court would be performing a mere error-correcting function that would be of no importance except to the litigants themselves. In such a case, the Court considers the granting of a writ to be inappropriate. *Rudolph v. United States,* 370 U.S. 269, 271, 82 S.Ct. 1277, 1278, 8 L.Ed.2d 484, 486 (1962).

CONCLUSION

For the reasons set out herein, the Respondents respectfully urge the Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

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Nos. 84-5613, 84-5614, & 84-5651

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

FRANCES LOLA WOMACK,
Plaintiff-Appellee (84-5613),

and

JAMES A. CHANDLER, et al.,
Plaintiffs-Appellees (84-5614),

v.

DONALD J. GETTELFINGER, et al.,
Defendants/Third-Party Plaintiffs-Appellants,

v.

RONALD D. KENNEDY, et al.,
Third-Party Defendants-Appellees (84-5651).

ON APPEAL from the United States District Court for the Eastern District of Tennessee.

Decided and Filed December 29, 1986

Before: JONES and NELSON, Circuit Judges; and PECK, Senior Circuit Judge.

DAVID A. NELSON, Circuit Judge. At 6:30 in the morning of October 14, 1983, defendant Charles S. Ritter, a relatively inexperienced truck driver operating a trac-

tor-trailer owned by defendant Gettelfinger Farms, entered a two lane state highway from the driveway of a restaurant in rural Tennessee. The highway ran north-south, and Mr. Ritter approached it from the west side. Keeping the rear wheels of his trailer in sight in his rear view mirror, and taking care that they did not go into a ditch that was present at the side of the driveway, Mr. Ritter made a wide right turn, swinging onto the shoulder at the far side of the road. He intended to pull into the southbound lane at the completion of his turn.

Third-party defendant Ronald D. Kennedy, driving his automobile north on the highway, saw the headlights of the truck pointing toward him from the shoulder. It was still dark, and there was a very heavy fog. Confused by the position of the oncoming truck headlights, and failing to see the trailer angled across the road, Mr. Kennedy drove into the side of the trailer. One of his passengers, William Sidney Womack, was killed, and another passenger, plaintiff James A. Chandler, was injured.

Mr. and Mrs. Chandler and Mr. Womack's widow brought federal court diversity actions against Mr. Ritter and Gettelfinger Farms, seeking compensatory and punitive damages. The defendants filed third-party complaints against Mr. Kennedy and against Joe R. and Linda Woods, the operator and owner, respectively, of an automobile that hit the Kennedy car some minutes after the initial accident.

The two original actions were tried to a jury, and after defense motions for a directed verdict as to punitive damages had been denied, Mrs. Womack and Mr. and Mrs. Chandler recovered judgments against Mr. Ritter and Get-

telfinger Farms for compensatory damages totaling $610,963.02 and punitive damages totaling $1,250,000. The magistrate before whom the case was tried then entered summary judgment against Gettelfinger Farms and the truck driver on their third-party claims for contribution or indemnity and for damage to the tractor-trailer. The magistrate held that these claims were barred by the jury's finding that the defendants had been guilty of conduct warranting the award of punitive damages. While the case was on appeal, Mr. and Mrs. Woods entered into a $2,500 settlement with Mrs. Womack and obtained a release of liability from her. On the strength of this release, the Woods have moved for dismissal of the appeal of the summary judgment as to them on mootness grounds, the third-party complaint in the Chandler case having been dismissed by agreement prior to trial.

The central issue presented on appeal is whether the magistrate erred in submitting the claim for punitive damages to the jury and in overruling a motion for judgment notwithstanding the verdict on the punitive damage issue. The question is a close one, but we have concluded that the Tennessee courts probably would not permit an award of punitive damages under the circumstances of this case. We shall therefore reverse both the judgment for the plaintiffs, insofar as it awards punitive damages, and the summary judgment for the third-party defendants.

I

The rig that Mr. Ritter was driving consisted of a 1979 Mack cab-over tractor, with manual transmission and five forward gears, and a refrigerated trailer 42 feet in length. Gettelfinger Farms, a trucking concern, turned the

rig over to Mr. Ritter on September 29, 1983, when he started work for Gettelfinger Farms as a probationary employee. Mr. Ritter had driven the tractor-trailer for several thousand miles by the time of his accident, picking up and discharging loads of perishable food products at various points in Mississippi, Texas, Michigan, Tennessee, Ohio and Kentucky.

On the evening before the accident Mr. Ritter was driving east on Interstate Route 40 in Tennessee, hauling a full load of food products that he was supposed to deliver in New Jersey the following afternoon. He testified that he pulled off the road at about 9 p.m., having encountered thick fog, and spent the night sleeping in his cab. As is customary, the diesel engine of his truck and the diesel-powered refrigerator unit on his trailer were left running. Mr. Ritter got up a few minutes before 6 a.m., made a safety check, and noted that the fuel gauge on the refrigeration unit's diesel fuel tank registered only one-eighth full. Although it was still foggy, Mr. Ritter resumed his journey, keeping an eye out for a place to refuel. Having noticed a billboard advertisement for a truck stop that he assumed would be at the next exit, as he testified, Mr. Ritter took that exit and drove north for a short distance on Tennessee State Route 95.

Seeing a lighted restaurant at the right hand side of the road, Mr. Ritter parked his truck on the shoulder of the road, still pointing north, and went into the restaurant to ask where he could buy fuel. He was told that he would have to turn around and go back in the direction from which he had come.

Mr. Ritter testified that he then went back to his truck, turned off his "four-way flashers" (both turn sig-

nals on the tractor and on the trailer), signaled for a left turn, and pulled onto the road. Because he was going very slowly, looking for a place to turn around, he testified that he put his flashers back on.

About two-tenths of a mile farther on Mr. Ritter saw another restaurant, this one on the left side of the road. The restaurant had a paved driveway and parking area. Mr. Ritter made a left turn into that driveway, looped around in the parking lot, and stopped his truck before reentering the highway. He testified that he looked both ways, saw nothing coming, and pulled out onto the road to begin his turn to the right. He was operating in low gear at half throttle.

Looking down to his right, Mr. Ritter saw a ditch at the side of the driveway. He wanted to make sure that his rear wheels did not slip into the ditch, which might have caused his loaded trailer to flip over on its side, so he made a wide turn, pulling onto the shoulder at the far side of the road. He kept the right rear wheels of his trailer in sight in his mirror, to make sure he was keeping the wheels away from the ditch. The fact that the tractor did not have power steering may have led him to make his turn even wider than it would have been otherwise.

As Mr. Ritter was maneuvering onto the road, Mr. Ronald Kennedy, an iron worker at a local construction project, was driving north in a Ford Escort automobile. Two fellow iron workers, Mr. Womack and Mr. Chandler, were passengers in the car; Mr. Chandler was in the front seat, and Mr. Womack was dozing in the back. Mr. Kennedy's car was equipped with halogen fog lights, and it was going about 35 miles an hour.

Rounding a slight curve to the south of the restaurant, Mr. Kennedy saw the headlights of the truck about 400 or 500 feet away. Surprised at the position of the headlights, Mr. Kennedy made a comment about them to Mr. Chandler. Mr. Chandler responded "It looks like he is on our side [of the road]" and then said "No, he is over to our right." Mr. Kennedy agreed, saying "Yeah, he is sitting on the shoulder of the road." Neither man saw the trailer angled across the road until it was too late to stop. Mr. Kennedy had taken his foot off the accelerator, slowing down to about 25 miles per hour, but did not see the trailer until he was past the headlights of the tractor. Mr. Kennedy swerved to the left just before the impact, but could not avoid hitting the trailer. The driver of the truck, Mr. Ritter, (concentrating, perhaps, on his rear wheels and the ditch) did not see the oncoming automobile in time to flash his lights, sound his horn, or otherwise signal Mr. Kennedy to stop. There was evidence from which the jury could reasonably have inferred that the truck's four-way flashers were not on. The truck was equipped with a reflectorized triangle, but Mr. Ritter had not set it out before starting his turn. There was testimony from a state official, Ronald Stanley, the triangle would have done no good in the fog. Flares would have been visible, but Gettelfinger Farms did not equip its trucks with flares and was not required to do so by government regulations.

Mr. Stanley, the state official, happened on the scene just after the accident. Driving south on State Route 95 at a speed of 30 to 40 miles per hour, and seeing the back of the trailer sitting on the road, Mr. Stanley eased his patrol car around it. (He had no trouble stopping in time.) When he saw there had been a collision, Mr. Stanley parked

on the shoulder of the southbound lane and turned on his flashing blue lights. Mr. Ritter, who had stopped his truck after the impact and jumped out of his cab, asked Mr. Stanley if he should move the truck out of the road. Mr. Stanley told him to do so. Mr. Ritter then backed up a foot or two, disengaging the trailer from the Kennedy car, and pulled the entire rig onto the shoulder of the northbound lane. He left his lights on, as Mr. Stanley told him to.

Some ten or fifteen minutes after the accident, Mr. Joe R. Woods, driving his car north on State Route 95 at around 30 or 35 miles per hour, saw the headlights of the truck on the shoulder to his right and the blue lights of the patrol car on the opposite shoulder. He did not see the Kennedy vehicle in the middle of the road until he had gone past the headlights of the truck. He slammed on his brakes when he saw the Kennedy car, but could not avoid hitting it. Mr. Womack was still in the car.

Mr. Ritter subsequently admitted that he had caused the accident because he had been blocking the road. Mr. Ritter said he "was going to jail," but in fact he was only fined $10 plus court costs for failure to yield the right-of-way.

An experienced truck driver who testified as an expert witness on behalf of the plaintiffs told the jury that although he did not believe Mr. Ritter should have been put in prison, it was very dangerous for him to have pulled out onto the far side of the road in the fog without using flares. There was some suggestion that it would have been possible to make the turn without going much over the center line, in which event flashing lights would have pro-

vided all the warning necessary, but the main thrust of the testimony was that Mr. Ritter ought to have remained in the restaurant parking lot until the fog had lifted.

Extensive evidence was also presented on Mr. Ritter's lack of experience as a truck driver and on the failure of Gettelfinger Farms to investigate his qualifications before hiring him. Mr. Ritter, a married man in his early thirties, had a 9th grade education and had spent fifteen years working in service stations and at odd jobs. He had a long-time friend named Larry Goode, a truck driver by trade, who had allowed Mr. Ritter to ride with him, off and on, for several years, and who had worked with Mr. Ritter to teach him to drive a truck. Federal regulations require that anyone in the cab of a truck "be certified and capable of driving," according to Mr. Goode's testimony, and in 1981 Mr. Goode had signed a certificate of qualification attesting to Mr. Ritter's ability to drive. Mr. Goode subsequently gave Mr. Ritter a second certificate, with an expiration date subsequent to the date of the accident. Mr. Goode let Mr. Ritter drive a total of between 700 and 1000 miles over a period of about three months prior to the accident in 1983. Mr. Goode sometimes slept while Mr. Ritter was driving. Both men had log books, and when Mr. Goode drove more than the legal limit, the excess time would apparently be logged to Mr. Ritter. Mr. Ritter would take over the driving when the men approached weigh stations where log books might be checked.

In 1982 Mr. Goode got Mr. Ritter a job spotting trailers at a General Electric facility, but other drivers had to help Mr. Ritter do the work and he was soon released from the job.

In August of 1983 Mr. Ritter applied for a job at Victory Freightways and was given a road test, which he failed. The person who administered the test could not remember the reason Mr. Ritter did not pass the test, but Mr. Ritter testified that it was because he missed a gear in shifting gears on a tractor that had a number of forward speeds.

Two months later both Mr. Goode and Mr. Ritter went to Gettelfinger Farms and filled out job applications. Mr. Gettelfinger testified that Mr. Goode told him Mr. Ritter, although short on experience, could safely handle a tractor-trailer, but Mr. Goode testified that no such conversation occurred, that he did not feel Mr. Ritter was qualified, and that he had lied when he certified Mr. Ritter as qualified. There is also a conflict in the evidence as to whether the men were given written open-book examinations before being hired.

Both men were called to work at the same time, and each man was given a truck to drive. No road tests were administered as far as they knew, but Mr. Gettelfinger testified that he followed Mr. Ritter in a pickup truck for 10 to 15 miles to check on Mr. Ritter's driving. Mr. Goode disputed this. It is clear, in any event, that Mr. Ritter drove the Gettelfinger truck for several thousand miles prior to the accident; that he and Mr. Goode "ran together" during the first week or ten days of their employment, staying no more than twenty miles apart from one another, and that Mr. Ritter had no mishap during that time. He did have a minor accident the day before the collision with which we are concerned here; it was occasioned, he testified, by someone cutting too sharply in front of him and then shopping at a red light.

Some weeks after the major accident Mr. Ritter had an accident in Texas. He told Gettelfinger and the state troopers that a deer had run in front of him, but Mr. Goode testified that Mr. Ritter said he had really fallen asleep at the wheel.

The punitive damage claims against Gettelfinger Farms were submitted to the jury under the theory of respondeat superior (as is permissible, under Tennessee law, where the agent's conduct would justify a punitive damage award against the agent) and under the theory that the accident had been caused by gross negligence in the entrustment of the truck to an incompetent driver. The jury's verdict was a general one, making it impossible to tell which theory (or theories) the jury accepted in assessing punitive damages against Gettelfinger Farms as well as against the truck driver.

II

Summarizing Tennessee case law going back to the last century, the Tennessee Supreme Court has said that punitive damages

> "are awarded in cases involving fraud, malice, gross negligence or oppression, *Knoxville Traction Co. v. Lane,* 103 Tenn. 376, 53 S.W. 557 (1899); or where a wrongful act is done with a bad motive or so recklessly as to imply a disregard of social obligations, *Stepp v. Black,* 14 Tenn. App. 153 (1931); or where there is such willful misconduct or entire want of care as to raise a presumption of conscious indifference to consequences. *Honaker v. Leonard,* 325 F.Supp. 212 (E.D. Tenn. 1971)." *Inland Container Corp. v. March,* 529 S.W.2d 43, 45 (Tenn. 1975).

It is only in cases involving this kind of egregious misconduct that punitive damages may be awarded. *Johnson v. Husky Industries, Inc.,* 536 F.2d 645, 650 (6th Cir. 1976); *Cathey v. Johns-Manville Sales Corp.,* 776 F.2d 1565, 1570 (6th Cir. 1985), *cert. denied* — U.S. —, 92 L.Ed. 2d 740 (1986). Intended to inflict punishment on the wrongdoer rather than to make the injured party whole (which is what compensatory damages are supposed to do, insofar as possible), punitive damages are based "upon the oppression of the party who does the injury." *Cathey,* 776 F.2d at 1570, citing *Lazenby v. Universal Underwriters Insurance Co.,* 214 Tenn. 639, 642, 383 S.W.2d 1, 4 (1964). Tennessee views punitive damages as "private fines," *Dykes v. Raymark Industries, Inc.,* 801 F.2d 810, 814 (6th Cir. 1986), citing *Huckeby v. Spangler,* 563 S.W.2d 555 (Tenn. 1978), and this quasi-criminal punishment is not to be imposed for mere negligence or want of care. To do so—particularly when the dollar amount of the "fine" is measured in the millions—could raise "important issues" under the United States Constitution. See *Aetna Life Insurance Co. v. Lavoie,* 475 U.S. —, —, 89 L.Ed.2d 823, 837 (1986).

The standards for determining whether the wrongdoer's conduct is sufficiently oppressive to justify an award of punitive damages have been characterized as "confusing and devoid of any effective definition." Sales & Cole, "Punitive Damages: A Relic That Has Outlived Its Origins," 37 Vand.L.Rev. 1117, 1137 (1984). Unless the federal courts are prepared to hold punitive damages unconstitutional, however, or hold that they cannot be imposed without according the defendant some or all of the safeguards peculiar to criminal proceedings—neither of

which courses is urged on us here—federal courts must apply the state-created standards as best they can, limiting any recovery to compensatory damages where liability is based on garden-variety negligence (see, e.g., *Williams v. Union Carbide Corp.*, 790 F.2d 552 (6th Cir. 1986), applying Arkansas law), and permitting the jury to consider awarding both punitive and compensatory damages where the defendant's misconduct manifests the kind of *mens rea* that makes it reasonable for the government not only to require payment of full compensation, but to exact retribution as well.

The two Tennessee decisions that come closest to suggesting Mr. Ritter could properly be found guilty of gross negligence or reckless misconduct in the case at bar are *Inter-City Trucking Co. v. Daniels,* 181 Tenn. 126, 178 S.W.2d 756 (1944) and *Garner v. Maxwell,* 360 S.W.2d 64 (Tenn. Ct. App. 1961). Both cases involved trucks that were left parked on the highway at night, without adequate warning devices, while the drivers took their ease elsewhere. In each instance the truck driver was guilty of more than a momentary lapse of judgment, and in neither case did punitive damages, as such, play a significant role in the decision.

Daniels was a wrongful death case in which the decedent's widow recovered judgment, after a $2500 remittitur, for $6000. There was no award of punitive damages; only because of the defendant trucking company's attempt to rely on a contributory negligence defense did the question of "gross negligence" on the part of the truck driver arise. Under Tennessee law, contributory negligence on the part of the plaintiff's decedent would have meant that the widow and her three minor children could have re-

covered nothing—not even the modest compensatory damages awarded in the trial court—unless the truck driver (who, incidently, had no driver's license) could be said to have been guilty of gross negligence. Perhaps it is not too surprising that the Tennessee Supreme Court was able to discern gross negligence. In the first place, the truck driver had been guilty of negligence per se in failing to comply with a Tennessee statute requiring three lighted flares or pot torches to be placed around a vehicle parked on the highway at night. The truck driver did claim to have set out the required pot flares, but instead of standing by to keep them burning, he went into town to seek comfort and protection from the cold and remained away for at least an hour and a half. The flares (if they had been placed at all) went out, and the plaintiff's decedent was killed as a result. Likening the truck driver's attitude to that of a person who is guilty of criminal negligence, the court allowed the $6000 compensatory damage award to stand.

In *Garner v. Maxwell,* 360 S.W.2d 64, *supra,* a truck driver had left his disabled tractor-trailer outfit parked on the highway, at night, for about four hours. The truck driver had turned off the lights of the truck to save the battery and had gone home to bed, leaving the rig unattended and without the statutorily required three flares or three reflectors. The truck driver made no effort to employ a wrecker to get the tractor-trailer off the highway. A member of the Tennessee Highway Patrol ran his automobile into the tractor-trailer at about 12:30 a.m. A jury returned a verdict awarding the patrolman $21,000 for compensatory damages and $400 for punitive damages. The Tennessee Supreme Court affirmed a judgment en-

tered on this verdict, expressing the view that the truck driver had been guilty of such gross negligence as to deprive him and his partners of the right to rely on the defense of contributory negligence. The court was not impressed by the defendants' contention that the facts did not justify a charge on the subject of gross negligence, but could not decide that issue on appeal, under Tennessee procedure, because the question had not been presented in the defendants' motion for new trial.

In the case at bar, as was not true in *Daniels* and *Garner,* the jury's award of substantial compensatory damages will be allowed to stand whether or not the defendants are deemed to have been guilty of gross negligence. And passing, for the moment, the negligence of the employer, Gettelfinger Farms, we may say that the conduct of the truck driver, Mr. Ritter, while it had tragic consequences, does not seem to bespeak the "conscious indifference to consequences" manifested in the actions of the truck drivers in *Daniels* and *Garner.* Unlike the truck drivers in those cases, Mr. Ritter did not turn off the lights of his truck and did not abandon his truck on the highway to seek personal comfort indoors. What he did, essentially, was pull his truck slowly onto a rural highway where, despite the fog, his lights could unquestionably be seen by the drivers of other vehicles from far enough away for them to stop without running into him. Mr. Ritter's failure to realize that other drivers might be confused by the position of his headlights doubtless represented poor judgment and lack of ordinary care, but that is not the stuff of which million-dollar-plus punitive damages awards are made—at least not in Tennessee.

A good example of the kind of reckless misconduct that can justify substantial punitive damages under Tennessee law may be found in *Sakamoto v. N.A.B. Trucking Co., Inc.,* 717 F.2d 1000 (6th Cir. 1983), a diversity wrongful death action where this court affirmed an award of punitive damages against a truck driver and his employer on account of an accident that occurred on Interstate Highway 75. The truck driver, an habitual user of amphetamines, had been without sleep for more than 40 hours. A new tractor had been brought to him following a breakdown, and after hitching up his trailer he decided to have breakfast at a restaurant located behind him on the interstate highway. Instead of going on to the next exit, the truck driver attempted to turn his rig around on the interstate itself, with a view to driving back the wrong way to an interchange he had passed before his breakdown. The tractor-trailer got stuck midway through the turn, and shortly thereafter the plaintiff's decedent slammed into it. Citing *Richardson v. Gibalski,* 625 S.W.2d 715 (Tenn. Ct. App. 1979), for the proposition that under Tennessee law "it takes something far greater than lack of ordinary care to sustain an award for punitive damages," this court concluded that there was sufficient evidence of gross negligence to justify submission of the punitive damages issue to the jury.

We think that the degree of Mr. Ritter's negligence is more like that of the defendant in *Southeastern Aviation, Inc. v. Hurd,* 209 Tenn. 639, 355 S.W.2d 436 (1962), a wrongful death action arising from an airplane crash. The pilot of a DC-3 on a scheduled flight from Memphis to Nashville noticed that the Automatic Direction Finder with which the plane was equipped was malfunctioning. The

ADF (a radio compass) enables a pilot to make an approach and landing when weather conditions prevent visual contact with the ground. When the pilot landed the plane at the Nashville Airport, he alerted the successor pilot who was to fly the plane on to the Tri-City Airport that the ADF was malfunctioning. The second pilot elected to try to reach his ultimate destination notwithstanding this fact, and notwithstanding that the plane had only one ADF and not two, as most up-to-date aircraft did. As the plane approached the Tri-City Airport, visual contact with the ground was impossible due to clouds, light snow, and fog—conditions not unsual for that time of year. When the pilot attempted to make his approach, he radioed to the tower operator that he was "having trouble" with the ADF and that he "didn't pick up the outer marker," a ground radio facility which would indicate his location. The plane then flew approximately 20 miles beyond the airport and crashed into the side of Holston Mountain, killing the plaintiff's decedent.

The Tennessee Supreme Court held there was sufficient evidence to support the jury's verdict that the defendant airline was "guilty of negligence in respect of the condition of its plane and the manner of its operation," *id.* at 662, 355 S.W.2d at 446, but also held that there was "no evidence that [the defendant] was guilty of such gross and wanton negligence as to justify any award for punitive damages." *Id.* at 664, 355 S.W.2d at 446-47. In setting aside an award of punitive damages in the relatively modest amount of $5,000, the court said that

> "While petitioner's (defendant's) pilot and First Officer were negligent in undertaking to fly a plane not airworthy, and in their manner of operation of the

> plane, there is nothing to show such gross and wanton negligence on their part as to evince conscious indifference to consequences. It must be remembered that their own lives were at stake, and they evidently expected to make a safe landing."

Id. at 665, 355 S.W.2d at 447.

So it was in the present case; in undertaking to pull out onto the highway in the fog, risking injury to himself and damage to the truck, Mr. Ritter evidently expected to make a safe turn. His negligence was not so gross or wanton as to evince conscious indifference to the consequences of his action. On the facts of this case, we do not believe the Tennessee Supreme Court would sustain an award of punitive damages against Mr. Ritter.

III

Insofar as the award of punitive damages against Gettelfinger Farms is concerned, our conclusion that Mr. Ritter was not guilty of gross or wanton negligence means that his employer cannot be held liable for punitive damages on a respondeat superior theory. Conceptually, however, gross negligence in the entrustment of the tractor-trailer to a known incompetent could justify an award of punitive damages even without gross negligence on the part of the driver himself. See Tenn. Code Ann. § 20-9-502 (1980); *Tracy v. Finn Equipment Co.*, 290 F.2d 498 (6th Cir.), *cert. denied,* 368 U.S. 826 (1961). On the record of this case, we do not believe that the negligence of Gettelfinger Farms in entrusting its truck to Mr. Ritter can support an award of punitive damages.

Evidence presented at trial indicated that Mr. Ritter was not properly certified to drive the truck. The jury

reasonably could have found that Mr. Ritter did not pass either the required road test or a written test prior to his employment by the Gettelfingers. Mr. Ritter did, however, present a competency certificate signed by Mr. Goode, an experienced driver, and the fact that Mr. Ritter drove the Gettelfinger truck for several thousand miles without significant incident shows that Mr. Ritter did, in fact, know how to drive. The accident in this case did not result from inability to shift gears or maneuver the truck; it resulted from a lapse of judgment that no pre-employment test would have been likely to predict. Negligent though Gettelfinger Farms may have been in hiring Mr. Ritter, the entrustment of a $200,000 tractor-trailer to an apparently responsible driver does not bespeak the kind of wanton misconduct necessary to support a punitive damage award.

IV

Rejecting two subsidiary claims advanced by the defendants, we do not find the compensatory damage awards excessive, nor do we believe that the district court abused its discretion in failing to grant the defendants a continuance. We shall therefore affirm the judgment of the district court insofar as it awards compensatory damages against Mr. Ritter and Gettelfinger Farms.

V

The magistrate granted the third-party defendants' motions for summary judgment in the third-party action against Mr. Kennedy and Mr. and Mrs. Woods because, under Tennessee law, "[t]here is no right of contribution in favor of any tort-feasor who has intentionally caused or contributed to the injury or wrongful death." Tenn. Code

Ann. § 29-11-102(c) (1980). Equating gross negligence with intentional infliction of injury or death, the magistrate held that this statutory provision precludes grossly negligent tortfeasors from obtaining contribution or indemnity. We need not address that issue, having determined that as a matter of law the third-party plaintiffs were not guilty of gross negligence. Simple negligence does not bar contribution or indemnity among joint tortfeasors.

As the magistrate has held, the third-party plaintiffs may not recover for damage to the truck. Although it is unclear whether federal or state collateral estoppel rules should be applied in determining the preclusive effect, in the third-party action, of the negligence finding in the trial of the wrongful death and personal injury actions, Tennessee and federal law would dictate the same result here. In cases governed by federal law, collateral estoppel may clearly be invoked in situations such as that presented here. *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation,* 402 U.S. 313 (1971). Although the Tennessee Supreme Court has not precisely so ruled, it has indicated in dicta that it would follow the rationale of the Supreme Court (and the courts of other states) in holding that collateral estoppel may be used defensively by one who was not a party to the prior suit. See *Cotton v. Underwood,* 223 Tenn. 122, 131-32, 442 S.W.2d 632, 637 (1969); see also *Fourakre v. Perry,* 667 S.W.2d 483 (Tenn. App. 1983). Whether federal law or Tennessee law is applied, therefore, the third-party plaintiffs in this case are collaterally estopped from relitigating the issue of their own negligence. "Under Tennessee law contributory negligence is ordinarily a complete bar to a plaintiff's recovery." *McElroy v. Boise Cascade Corp.,* 632 S.W.2d 127, 136 (Tenn. App.

1982). Therefore, because the accident was found to have been caused by the third-party plaintiffs' negligence, Gettelfinger Farms is precluded from recovering from Mr. Kennedy for damage to its tractor-trailer.

VI

Finally, Mr. and Mrs. Woods have moved to dismiss the appeal as to them on the basis of their settlement agreement with Mrs. Womack. Tennessee Code Annotated § 29-11-105 (1980) provides,

> "(a) When a release or covenant not to sue or not to enforce judgment is given in good faith to one (1) of two (2) or more persons liable in tort for the same injury or the same wrongful death:
>
> (1) It does not discharge any of the other tort-feasors from liability for the injury or wrongful death unless its terms so provide; but it reduces the claim against the others to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is the greater; and
>
> (2) It discharges the tort-feasor to whom it is given from all liability for contribution to any other tort-feasor."

In order for the Woods to be protected, under this statute, against a claim for contribution, the release must have been "given in good faith." The third-party plaintiffs contend that the release in this case was not given in good faith. As evidence of that fact, they point out that although Mrs. Womack was awarded $175,963.02 in compensatory damages and $500,000 in punitive damages, the settlement with the Woods was in the amount of only $2,500. More-

over, that settlement was entered into after entry of judgment, when the damage amounts were already determined.

Whether a release was given in good faith is a question of fact to be determined first by the trier of fact. *Florow v. Louisville & Nashville Railroad Co.*, 502 F.Supp. 1 (M.D. Tenn. 1979). The magistrate will have an opportunity to consider this question on remand.

Because Tenn. Code Ann. § 29-11-105 does not govern indemnity, we must look elsewhere to determine whether the third-party plaintiffs may still assert a cause of action against the Woods for indemnity. In *Southern Railway Co. v. Foote Mineral Co.*, 384 F.2d 224, 226-27 (6th Cir. 1967), this court approved the following jury instruction:

> "Under the Tennessee law a person who is held liable for negligence to one party may be indemnified or may recover indemnity in the amount of his liability from a third-party, if he establishes that the third-party is also guilty of negligence proximately causing or contributing to the cause of the accident, and that the negligence of the third-party was active negligence while his own negligence was only passive."

The instruction went on to explain that if one joint tortfeasor was guilty of active negligence, he could not recover indemnity from the other tortfeasor. *Id.* at 226. If both were guilty of active negligence, however, one could recover *contribution* from the other. *Id.* at 226-27. (Contribution is not available, as noted above, where there has been a good faith release.)

Because the magistrate granted summary judgment in favor of the Woods on the basis that one found guilty of gross negligence is not entitled to indemnity or contribution, and thus did not consider the active/passive negli-

gence issue, that issue, too, should be addressed by the magistrate on remand.

We AFFIRM the award of compensatory damages, REVERSE the award of punitive damages, and REMAND the third-party action for further proceedings in accordance with this opinion.