

**COMMONWEALTH OF KENTUCKY
GREENUP CIRCUIT COURT**

DANIEL J. CAREY II, D.C., et al.,

Plaintiffs,

v.

CSX TRANSPORTATION, INC., et al.,

Defendants.

**Case No.: 18-CI-00348
Hon. Judge John F. Vincent**

DEFENDANTS' PRETRIAL MEMORANDUM

Without waiving any defenses, Defendants¹ submit the following Pretrial Memorandum pursuant to the Court's Trial Order entered on December 17, 2021.

A. Succinct Statement of the Facts of the Case

Plaintiffs Daniel J. Carey II, D.C., Carey Chiropractic and Rehabilitation, Inc., Shannon M. Johnson, D.C. d/b/a Johnson Chiropractic ("Plaintiffs") are chiropractors² who issued more than sixty nearly identical Certification of Ongoing Illness or Injury ("COII") forms during a three-month period when a furlough announcement and workforce reorganization was ongoing at CSX Transportation, Inc. ("CSXT"). COIIs operate to take an employee out of service for medical reasons. Specifically, during the summer of 2017, CSXT began receiving a drastic and unprecedented increase in COII forms from the Plaintiffs and their practices for numerous CSXT employees claiming that they could not work because of medical conditions.

¹ On August 19, 2022, Defendants Gus Thoele, Tom DeAngelo, Shawn Lusk, and Elizabeth Creedon (collectively, the "Unserved Individual Defendants") renewed their request that this Court dismiss Plaintiffs' complaint for failure to perfect service pursuant to C.R. 12.02(e) and C.R. 4.04. The Court will not hear Unserved Individual Defendants' motion until September 2, 2022. The deadline to submit this pretrial memorandum is August 26, 2022. As such, the Unserved Individual Defendants join in the submission of instant memorandum out of an abundance of caution and without waiving their previous arguments that Plaintiffs' complaint should be dismissed for failing to perfect service.

² Chiropractor Carey sued individually and on behalf of his business. Chiropractor Johnson sued only on behalf of his business entity, Johnson Chiropractic.

Given the unusual volume of COIIs received in a short timeframe, the inordinate number of employees taken out of work for precisely two months, and the similarity of the conditions, Dr. Craig Heligman, who was then CSXT's Chief Medical Officer, initiated an investigation into the circumstances of the mass submission of the COII forms. Upon review of the COIIs submitted by Plaintiffs on behalf of the CSXT employees during those months, Dr. Heligman determined that the COIIs all described medical conditions that were minor musculoskeletal complaints, which generally improve on their own or with limited treatment within a few days to a few weeks. Despite this, the COIIs submitted by Plaintiffs all uniformly stated that the employee was required to be off work for two months. Based on these circumstances, Dr. Heligman questioned if the employees may have sought COII forms from chiropractors Johnson and Carey to obtain extended benefits because they were either due to be furloughed, have their jobs abolished, or be involved in other job changes, or it was rumored that they were due to be furloughed or have their jobs abolished.

For context, during this exact same period, CSXT had announced furloughs and job abolishment from the Huntington Locomotive Shops where most of the employees worked, as well as many other business changes that would have reduced the workforce in the tri-state area. If an employee's job is abolished or the employee is furloughed, many benefits continue for four months pursuant to the Collective Bargaining Agreements; however, if an employee is out of work because of a medical condition when the furlough/abolishment occurs, the employee's benefits continue for two years. These benefits included Railroad Retirement Board ("RRB") short and long term leave and medical insurance.

Due to the apparent patterns among the COIIs, Dr. Heligman wrote a letter to the RRB on July 14, 2017, notifying the RRB that it was his belief that certain CSXT employees potentially were engaging in fraudulent activity to improperly gain additional benefits and requested a formal

investigation (the “Heligman Letter”). In this letter, Dr. Heligman opines that the circumstances suggested fraudulent practices on the part of the employees and the Plaintiffs. Copies of this letter also were sent to certain insurers, the Ohio State Chiropractic Board, and the Kentucky Board of Chiropractic Examiners.

In late summer of 2017, Dr. Heligman sent a letter to certain employees who submitted COIIs from Plaintiffs informing them that medical documentation would no longer be accepted from the chiropractor Plaintiffs. The letter advised these employees that, should they need to remain off work for a medical reason or otherwise return to work, the employees needed to “provide updated medical documentation from [their] primary care or treating physician” other than Plaintiffs. The employees were not prohibited from treating with Plaintiffs, and the treatment would still be covered by insurance without changes. On August 23, 2017, Dr. Heligman sent letters to Plaintiffs memorializing this policy and informing them CSXT would no longer accept documentation completed by Plaintiffs’ offices on behalf of any CSXT employee.

The sixty-eight CSXT employees who submitted the COIIs from Plaintiffs were charged with violations of the CSXT Rules regarding ethical conduct. The investigative and disciplinary processes for these employees’ crafts were outlined in the Collective Bargaining Agreements for each craft. As part of the process, an investigative hearing was held on the facts surrounding the charges, and each employee was permitted to testify, call witnesses, and submit exhibits. CSXT employees or former employees, August (“Gus”) Thoele; Curt Shogren; Milton Storm; Dillon Doug [Delando] Jones; Tom DeAngelo; Shawn Lusk; Elizabeth Creedon; and Kenneth Ray Emerson were either the hearing officers or the presenting officers at those hearings.

Plaintiffs initiated this civil action on July 12, 2018, alleging two causes of action: (1) defamation *per se* against all Defendants; and (2) tortious interference with contracts and prospective economic advantage against CSXT and Dr. Heligman.³

B. Questions of Fact

1. If the statements contained in the Heligman Letter are not expressions of pure opinion and are not privileged as a matter of law, which Defendants strenuously deny, whether Plaintiffs have shown that Defendants acted with actual malice by clear and convincing evidence. *See Warford v. Lexington Herald-Leader Co.*, 789 S.W.2d 758, 771 (Ky. 1990).
2. If the statements contained in the Heligman Letter are not expressions of pure opinion and are not privileged as a matter of law, which Defendants strenuously deny, whether Plaintiffs have shown that the statements contained in the Heligman Letter are false. *See Warford v. Lexington Herald-Leader Co.*, 789 S.W.2d 758, 771 (Ky. 1990).
3. If the statements contained in the Heligman Letter are not expressions of pure opinion and are not privileged as a matter of law, which Defendants strenuously deny, whether Plaintiffs have shown that that the hearing and charging officer Defendants published the Heligman Letter during the disciplinary process in bad faith. *See Tucker v. Kilgore*, 388 S.W.2d 112, 114 (Ky. Ct. App. 1964).
4. If the statements contained in the Heligman Letter are not expressions of pure opinion and are not privileged as a matter of law, which Defendants strenuously deny, whether Plaintiffs have shown that the statements contained in the Heligman Letter caused patients to no longer treat with them. *See Toler v. Sud-Chemie, Inc.*, 458 S.W.3d 276, 281–82 (Ky. 2014).
5. If CSXT unjustly interfered with Plaintiffs' business expectancies as a matter of law, which CSXT strenuously denies, whether Plaintiffs have shown that such unjust interference caused special damages. *See Snow Pallet, Inc. v. Monticello Banking Co.*, 367 S.W.3d 1, 6 (Ky. Ct. App. 2012).
6. Whether Plaintiffs have shown that Defendants acted with oppression, fraud or malice by clear and convincing evidence. *See K.R.S. § 411.184.*
7. Whether Plaintiffs have shown that Defendants' conduct amounted to gross negligence by clear and convincing evidence. *See Profit v. Highlands Hosp. Corp.*, No. 7:19-15-KKC, 2022 WL 1275632, at *9 (E.D. Ky. Apr. 28, 2022); *W.T. Sistrunk & Co. v. Meisenheimer*, 265 S.W.467, 468 (Ky. 1924).

³ As noted above, Dr. Heligman, Gus Thoele, Tom DeAngelo, Shawn Lusk, and Elizabeth Creedon have not been properly served with the complaint.

8. Whether Plaintiffs have shown that slight care was not exercised in sending the Heligman Letter. *See Severe v. Middle Tenn. Truss Co.*, No. 1:16-CV-00040, 2019 WL 4061680, at *6 (W.D. Ky. Aug. 28, 2019).

C. Issues of Applicable Law

1. Whether the statements contained in the Heligman Letter are expressions of pure opinion, which are “absolutely privileged.” *See Yancey v. Hamilton*, 786 S.W.2d 854, 857 (Ky. 1989); *Williams v. Blackwell*, 487 S.W.3d 451 (Ky. Ct. App. 2016); *Cromity v. Meiners*, 494 S.W.3d 499, 502–04 (Ky. Ct. App. 2015); *Biber v. Duplicator Sales & Serv., Inc.*, 155 S.W.3d 732, 737 (Ky. Ct. App. 2004); *Compuware Corp. v. Moody’s Inv’rs Servs.*, 499 F.3d 520, 529 (6th Cir. 2007); *Croce v. Sanders*, 843 F. App’x 710 (6th Cir. 2021).
2. If the statements contained in the Heligman Letter are not expressions of pure opinion, whether the statements are protected by the absolute privilege extended to judicial and legislative proceedings. *See Compton v. Romans*, 869 S.W.2d 24, 25–26 (Ky. 1993); *Hayes v. Rodgers*, 447 S.W.2d 597, 599 (Ky. 1969); *McAlister & Co. v. Jenkins*, 284 S.W. 88 (Ky. 1926); *Tanner v. Stevenson*, 138 Ky. 578, 128 S.W. 878, 881 (Ky. 1910); *Ranson v. West*, 125 Ky. 457, 101 S.W. 885, 886 (Ky. 1907); *Lanier v. Higgins*, 623 S.W.2d 914, 915 (Ky. Ct. App. 1981); *White v. Ashland Park Neighborhood Ass’n, Inc.*, No. 2008-CA-001303-MR, 2009 WL 1974750, at *8 (Ky. Ct. App. July 10, 2009); *Smith v. Hodges*, 199 S.W.3d 185, 193 (Ky. Ct. App. 2005), *Morgan & Pottinger, Att’ys, P.S.C. v. Botts*, 348 S.W.3d 599, 602 (Ky. 2011).
3. If the statements contained in the Heligman Letter are not protected by an absolute privilege, whether the statements are protected by the qualified privilege, which requires Plaintiffs to prove actual malice and falsity to rebut. *See Tucker v. Kilgore*, 388 S.W.2d 112, 114 (Ky. Ct. App. 1964); *Weinstein v. Rhorer*, 42 S.W.2d 892, 894 (Ky. 1931); *Scheel v. Harris*, No. 3:11-17-DCR, 2012 WL 3731263, at *10 (E.D. Ky. Aug. 28, 2012); *Fortney v. Guzman*, 482 S.W.3d 784, 790 (Ky. Ct. App. 2015); *Warford v. Lexington Herald-Leader Co.*, 789 S.W.2d 758, 771 (Ky. 1990).
4. If the statements contained in the Heligman Letter are not protected by any privilege, whether the statements are true. *See Toler v. Sud-Chemie, Inc.*, 458 S.W.3d 276, 284 n.19 (Ky. 2014); *Estep v. Johnson Cnty. Newspapers, Inc.*, 578 S.W.3d 740, 744 (Ky. Ct. App. 2019).
5. If the statements contained in the Heligman Letter are not protected by an absolute privilege, whether the hearing and charging officer Defendants’ introduction of the Heligman Letter in the disciplinary process is protected by the qualified privilege. *See Harstad v. Whiteman*, 338 S.W.3d 804, 813 (Ky. Ct. App. 2011); *White v. Bourbon Community Hosp., LLC*, No. 5:14-CV-79, 2016 WL 208303, at *7 (E.D. Ky. Jan. 15, 2016); *Duncan v. Lifeline Healthcare of Somerset, LLC*, No. 2012–CA–000061, 2013 WL 844186, at *6 (Ky. Ct. App. Mar. 8, 2013); *Baskett v. Crossfield*, 228 S.W. 673, 676 (Ky. 1920); *Wolff v. Benovitz*, 192 S.W.2d 730, 665–

66 (Ky. 1945); *see also Adkins v. CSX Transportation, Inc.*, No. 3:18-0321, 2021 WL 3276602 (S.D. W. Va. July 30, 2021).

6. If the statements contained in the Heligman Letter are not protected by an absolute or qualified privilege, whether the hearing and charging officer Defendants' introduction of the Heligman Letter in the disciplinary process is protected by the single publication rule. *See Mitan v. Davis*, 243 F. Supp. 2d 719, 722 (W.D. Ky. 2003).
7. Whether CSXT caused anyone to breach an actual contract with Plaintiffs. *See Seeger Enters., Inc. v. Town & Country Bank & Tr. Co.*, 518 S.W.3d 791, 795 (Ky. Ct. App. 2017).
8. Whether CSXT engaged in unjustified interference with Plaintiffs' business expectancies and whether such interference, if any, caused special damages. *See Snow Pallet, Inc. v. Monticello Banking Co.*, 367 S.W.3d 1, 6 (Ky. Ct. App. 2012).
9. Whether CSXT acted with oppression, fraud or malice sufficient for an award of punitive damages. *See K.R.S. § 411.184*.
10. Whether CSXT's conduct amounted to gross negligence sufficient for an award of punitive damages. *See Profitt v. Highlands Hosp. Corp.*, No. 7:19-15-KKC, 2022 WL 1275632, at *9 (E.D. Ky. Apr. 28, 2022); *W.T. Sistrunk & Co. v. Meisenheimer*, 265 S.W. 467, 468 (Ky. 1924).
11. Whether CSXT exercised at least slight care in sending the Heligman Letter. *See Severe v. Middle Tenn. Truss Co.*, No. 1:16-CV-00040, 2019 WL 4061680, at *6 (W.D. Ky. Aug. 28, 2019).

D. Anticipated Evidentiary Questions

1. Whether the Court should exclude testimony and opinions from William Baldwin, Ph.D. for lack of foundation and because his testimony is not based on sufficient facts and data or reliable principles and methods applied reliably to the facts of the case. *See K.R.E. 702; see also Hayes v. Colgate-Palmolive Co.*, No. 2019-CA-1343-MR, 2021 WL 298377, at *8 (Ky. Ct. App. Jan. 29, 2021).
2. Whether the Court should exclude argument or evidence concerning the remand decision issued by the Eastern District of Kentucky in *Carey v. CSX Transportation, Inc.*, No. 18-79-HRW, 2019 WL 181120 (E.D. Ky. Jan. 11, 2019). *See K.R.E. 401; 402; 403; see also Win Min Htut v. Capozza*, No. 17-cv-4021, 2018 WL 10015629, at *6 n.7 (E.D. Pa. July 17, 2018); *Singletary v. Reed*, No. 06-C-323-C, 2007 WL 5517464, at *4 (W.D. Wis. June 1, 2007); *Martin v. Wallace*, ___ S.W.3d ___, 2022 WL 1284030, at *5 (Ky. Apr. 28, 2022); *Nipper v. Snipes*, 7 F.3d 415, 418 (4th Cir. 1993); *Radio Sys. Corp. v. Lalor*, No. C10-828RSL, 2014 WL 4626299, at *2 (W.D. Wash. Sept. 12, 2014).

3. Whether the Court should exclude argument or evidence concerning any individual conditions or treatments. *See* K.R.E. 401; 402; 403; *see also Harstad v. Whiteman*, 338 S.W.3d 804, 810 (Ky. Ct. App. 2011); *Snow Pallet, Inc. v. Monticello Banking*, 367 S.W.3d 1, 6 (Ky. Ct. App. 2012).
4. Whether the Court should exclude argument or evidence concerning claims of exoneration by subsequent investigation. *See* K.R.E. 401; 402; 403; *see also Harstad v. Whiteman*, 338 S.W.3d 804, 810 (Ky. Ct. App. 2011).
5. Whether the Court should exclude argument or evidence CSXT is preventing treatment by or payment to Plaintiffs. *See* K.R.E. 802; 403; 801; *see also Chandler v. Robinson*, No. 2014-CA-000963-MR, 2017 WL 652145, at *7 (Ky. Ct. App. Feb. 17, 2017); *In re Centrix Fin., LLC*, No. 09-cv-01542 2015 WL 3407321, at *3 (D. Colo. May 26, 2015).
6. Whether the Court should exclude non-disclosed evidence. *See Edwards v. State Farm Mut. Auto. Ins. Co.*, 389 S.W.3d 641, 643 (Ky. Ct. App. 2012); *Rossi v. CSX Transp., Inc.*, 357 S.W.3d 510, 518 (Ky. Ct. App. 2010); *see also* C.R. 37.02.
7. Whether the Court should exclude argument or evidence concerning alleged violation of federal statutes. *See Lewis v. B & R Corp.*, 56 S.W.3d 432, 438 (Ky. 2001); *Adkins v. CSX Transp., Inc.*, 553 F. Supp. 3d 308, 310 (S.D. W.Va. 2021); *Adkins v. CSX Transp., Inc.*, No. 3:18-0321, 2021 WL 3731828, at *3–5 (S.W. W.Va. Aug. 23, 2021); K.R.E. 401.
8. Whether the Court should exclude unfounded speculation and hearsay. *See* K.R.E. 401; 403; 802.
9. Whether the Court should exclude argument or evidence that appeals to the jury's sympathies. *See S.-Harlan Coal Co. v. Gallaiier*, 41 S.W.2d 661, 663 (Ky. 1931).
10. Whether the Court should exclude "Golden Rule" argument or suggestions that the jury should "send a message." *See Locke v. Swift Transp. Co. of Ariz., LLC*, No. 5:18-CV-00119, 2019 WL 6037666, at *2 (W.D. Ky. Nov. 14, 2019).
11. Whether the Court should exclude argument or evidence concerning emotional distress damages. *See Leath v. Webb*, No. 5:17-cv-38, 2018 WL 4440682, at *2–3 (W.D. Ky. Sept. 17, 2018).

E. List of All Pending Motions and Matters

1. Unserved Individual Defendants' Renewed Motion to Dismiss;
2. Dr. Heligman's Renewed Motion to Dismiss;
3. CSX Transportation Inc.'s Motion for Summary Judgment;
4. Served Individual Defendants' Motion for Summary Judgment;

5. Unserved Individual Defendants' Motion for Summary Judgment;
6. Dr. Heligman's Motion for Summary Judgment;
7. Motion *in Limine* to Exclude Evidence or Argument Concerning the Remand Decision;
8. Motion *in Limine* to Exclude Evidence or Argument Concerning Any Individual Conditions or Treatments;
9. Motion *in Limine* to Exclude Evidence or Argument Concerning Claims of Exoneration by Subsequent Investigation;
10. Motion *in Limine* to Exclude Evidence or Argument that CSXT Is Preventing Treatment by or Payment to Plaintiffs;
11. Omnibus Motion *in Limine*; and
12. Motion for Leave to File Documents Under Seal.

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Case No.: 18-CI-00348
Hon. Judge John F. Vincent**CERTIFICATE OF SERVICE**

The undersigned attorney hereby certifies that on this 26th day of August, 2022, the foregoing was served by KCOJ e-filing to the following counsel of record:

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