

**COMMONWEALTH OF KENTUCKY
GREENUP CIRCUIT COURT
CIVIL BRANCH**

DANIEL J. CAREY II, D.C.; CAREY
CHIROPRACTIC AND REHABILITATION,
INC.; SHANNON M. JOHNSON, D.C. d/b/a
JOHNSON CHIROPRACTIC,
Plaintiffs,

v.

Case No. 18-CI-00348

CSX TRANSPORTATION INC.; CSX
CORPORATION; CRAIG S. HELIGMAN, M.D.;
GUS THOELE; CURT SHOGREN; MILTON
STORM; DILLON DOUG JONES; TOM
DEANGELO; SHAWN LUSK; ELIZABETH
CREEDON; and KENNETH RAY EMERSON.
Defendants.

PLAINTIFFS' PRETRIAL MEMORANDUM

I. SUCCINCT STATEMENT OF THE FACTS OF THE CASE.

Plaintiffs, Dr. Daniel J. Carey II (“Carey”) and Dr. Shannon M. Johnson (“Johnson”), are duly licensed chiropractic doctors living and working in Greenup County, Kentucky. Through their respective practices, the doctors frequently see and treat patients suffering from various ailments and working in various local industries. This includes, among others, railroad workers. Due to the strenuous and physical nature of their work, it is no surprise that railroad employees often experience various types of musculoskeletal injuries and repetitive trauma from years of manual labor. It is also no surprise that railroad workers in the greater Ashland/Huntington/Proctorville area seeking chiropractic care obtained treatment from either Dr. Carey or Dr. Johnson.

However, in or around the summer of 2017 Defendants launched an unprecedented and wholly unsupported campaign claiming that Drs. Carey and Johnson conspired with their railroad employee patients to falsify medical records for the purpose of fraudulently obtaining health benefits. On July 14, 2017 defendant CSXT Chief Medical Officer Dr. Craig Heligman sent the first of a series of letters to the U.S. Railroad Retirement Board (RRB), private health insurance providers, and the Kentucky and Ohio chiropractic licensing boards accusing Plaintiffs of engaging in excessive, inappropriate, and fraudulent treatment practices (collectively, the “Heligman Letters”). Defendants then charged every CSXT employee treating with the Plaintiffs during a certain time period with having engaged in dishonesty and fraud. Pursuant to the relevant labor agreements between the company and the respective unions, a series of internal disciplinary hearings were held, and the charged individuals were ultimately dismissed from employment with CSXT. During these hearings, the defendant CSXT Officers¹ re-published the defamatory statements contained in the Heligman Letters and pursued charges of dishonesty and fraud against various CSXT employees based on these statements. Additionally, CSXT sent letters to Drs. Carey and Johnson, and to the CSXT employees they were treating, stating that the Company would no longer accept medical documentation from either doctor - effectively ending their ability to treat CSXT employees and eliminating a significant portion of their patient base.

As a direct and proximate cause of Defendants’ false and defamatory allegations, Plaintiffs have suffered damages in the way of, among other things, direct business losses and harm to their otherwise untarnished reputations. Accordingly, Plaintiffs brought this action in the Greenup County Circuit Court for the Commonwealth of Kentucky for the recovery of monetary damages and other relief for Defendants acts of defamation *per se* and tortious interference.

¹ Defendants Gus Thoele, Curt Shogren, Milton Storm, Dillon Doug Jones, Tom DeAngelo, Shawn Lusk, Elizabeth Creedon, and Kenneth Ray Emerson (collectively “CSXT Officers”).

On or about August 7, 2018, Defendants filed a Notice of Removal based on diversity of citizenship pursuant to 28 U.S.C. § 1332 and asserting that certain non-diverse parties were fraudulently joined to the action and therefore should be disregarded by the Court. Following briefing by the parties in the United States District Court for the Eastern District of Kentucky, District Judge Henry R. Wilhoit, Jr. found “no shenanigans here” and remanded the case to Greenup County for lack of diversity jurisdiction. *Daniel J. Carey II, D.C. et al. v. CSX Transportation, Inc., et al.*, 18-cv-00079-HRW, at *5 (E.D. Ky. Jan. 11, 2019). In so holding, Judge Wilhoit specifically found that the statements contained in the Heligman Letters, and re-published on numerous occasions by Dr. Heligman and his co-defendants, “are defamatory, not purely opinion.” *Id.* at *6. He further found that the defamatory statements are not privileged because neither Dr. Carey or Dr. Johnson “is, or was, employed by CSXT; nor did they have any direct involvement with the employment of their patients.” *Id.* at *8. Finally, he found that the defendants’ “hail Mary” argument that the defamation claim is barred by the single publication rule fails because “the introduction of the Heligman letters by the Officers during various CSX employee disciplinary hearings constitutes republication to a new audience.” *Id.* at *9. Most notably, Judge Wilhoit expressed the likelihood that the statements contained in the Heligman Letters would be proven false:

The basis for Dr. Heligman’s allegations of excessive treatment and fraud were based on nothing more than his own unsupported conclusions. Dr. Heligman never evaluated the respective employees, never requested that they be examined by another doctor, never reviewed their medical records, and never spoke with either [Dr. Carey or Dr. Johnson].

Id. at *7 (emphasis added).

The undisputed evidence here demonstrates that the Defendants are liable for defamation *per se* under Kentucky law because no issue of material fact remains as to liability. Plaintiffs

therefore request the court enter judgment as a matter of law in their favor and that the case proceed to a jury trial solely on compensatory and punitive damages.

II. THE QUESTIONS OF FACT.

1. Whether the statements in the Heligman Letters are defamatory in that they exposed Plaintiffs to “(1) public hatred, ridicule contempt or disgrace;” (2) “caused them to be shunned or avoided;” or “impugned [their] competence, capacity, or fitness in the performance of [their] profession.” *Sandmann v. WP Co.*, 401 F. Supp. 3d 781, 790 (E.D. Ky. 2019); *Dennison v. Murray State University*, 465 F. Supp. 2d 733, 749 (W.D. Ky. 2006).

2. Whether the statements in the Heligman Letters are about the Plaintiffs. *Columbia Sussex Corp. v. Hay*, 627 S.W.2d 270, 273 (Ky.Ct.App. 1981).

3. Whether the statements in the Heligman Letters were published to third parties. *Columbia Sussex Corp. v. Hay*, 627 S.W.2d 270, 273 (Ky.Ct.App. 1981).

4. What are the economic compensatory damages owed to Plaintiffs? *Columbia Sussex Corp. v. Hay*, 627 S.W.2d 270, 273 (Ky.Ct.App. 1981).

5. What are the non-economic compensatory damages owed to Plaintiffs? *Columbia Sussex Corp. v. Hay*, 627 S.W.2d 270, 273 (Ky.Ct.App. 1981).

6. What are the punitive damages owed to Plaintiffs? *Disabled American Veterans v. Crabb*, 182 S.W.3d 541, 547 (Ky. Ct. App. 2005).

III. ISSUES OF LAW APPLICABLE TO THE FACTS.

1. Whether Plaintiffs are entitled to judgment as to liability on their claim for defamation *per se* and the attendant conclusive presumption of both malice and compensatory and punitive damages. *Disabled American Veterans v. Crabb*, 182 S.W.3d 541, 547 (Ky. Ct. App. 2005); *Columbia Sussex Corp., Inc. v. Hay*, 627 S.W.2d 270, 274 (Ky. Ct. App. 1982).

2. Whether Defendants' are entitled to any of the three defenses available to defamation: truth, privilege, or the single publication rule. *Daniel J. Carey II, D.C. et al. v. CSXT Transportation, Inc., et al.*, 18-cv-00079-HRW, at *5 (E.D. Ky. Jan. 11, 2019); *Smith v. Martin*, 331 S.W.3d 637, 640 (Ky. Ct. App. 2011); *Mitan v. Davis*, 243 F. Supp.2d.719 (W.D. Ky. 2003).

IV. ANTICIPATED EVIDENTIARY QUESTIONS.

1. Whether the Court should exclude testimony and opinions of Craig Heligman, M.D. as an "expert" because he is a named defendant in the case, and because he is an occupational medicine doctor with no training or experience in chiropractic care, is not licensed to practice in Kentucky or Ohio, and hasn't personally treated patients since 2012. He is therefore incapable of offering scientific, technical, or other specialized knowledge that will assist the jury. Ky. R. Evid. 702. Further, because he made the subject defamatory statements regarding Drs. Carey and Johnson, his testimony would be cumulative, self-serving and prejudicial. Ky. R. Evid. 104; *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993); *Mitchell v. Commonwealth*, 908 S.W.2d 100, 102 (Ky. 1995).

2. Whether the Court should exclude evidence related to Public Law Board decisions with regard to the CSXT employees who were fired because they treated with Drs. Carey and Johnson. Public Law Boards are a creature of the Railway Labor Act, 45 U.S.C. § 151 which governs the relationship between railroads and labor unions. Public Law Board decisions on not remotely judicial, or even quasi-judicial, and any findings by a PLB has no bearing on whether Plaintiffs were defamed. Such decisions also constitute inadmissible hearsay. Ky. R. Evid. 801, 805.

3. Whether the Court should exclude evidence of the disposition of the *Adkins, et al. v. CSXT Transp., et al.*, No. 3:18-cv-321 (S.D.W.V., Feb. 15, 2018), the settlements that resulted, and/or the currently pending appeal before the Fourth Circuit Court of Appeals. The Plaintiffs here were not parties to that litigation, the claims asserted there do not apply to the Plaintiffs here, and any such evidence would only tend to confuse the jurors and would not have the tendency to make the existence of any fact more or less probable. Ky. R. Evid. §§ 401, 402, 403.

4. Whether the Court should exclude evidence that the Defendants had a “good faith” or “honest belief” that the Plaintiffs were engaged in fraudulent practices or otherwise improperly treating their patients. These are not defenses to a defamation action and the uncontroverted evidence is that the Defendants made no effort to determine the truth or falsity of their statements about the Plaintiffs. *Daniel J. Carey II, D.C. et al. v. CSXT Transportation, Inc., et al.*, 18-cv-00079-HRW, at *5, 7 (E.D. Ky. Jan. 11, 2019).

V. PENDING MOTIONS AND MATTERS.

1. Plaintiffs Motion for Partial Summary Judgment as to liability on their defamation claim.

2. Plaintiffs Motion for Sanctions for Defendants’ failure to comply with Court’s Order and applicable Rules by not having their clients and the mandatory mediation.

3. Dr. Heligman’s Motion to Dismiss claiming he was not served.

4. Dr. Heligman’s Motion for Summary Judgment.

5. Defendants Gus Thoele, Tom Deangelo, Shawn Lusk, Elizabeth Creedon’s Motion to Dismiss.

6. Defendants Gus Thoele, Tom Deangelo, Shawn Lusk, and Elizabeth Creedon’s Motion for Summary Judgment.

7. CSX Transportation Inc.'s Motion for Summary Judgment.
8. Defendants Curt Shogren, Milton Storm, Delando Jones, and Kenneth Ray Emmerson's Motion for Summary Judgment.
9. CSXT's Motion in Limine to Exclude Evidence or Argument Concerning the Remand Decision.
10. CSXT's Motion in Limine to Exclude Evidence or Argument Concerning Any Individual Conditions or Treatments.
11. CSXT's Motion in Limine to Exclude Evidence or Argument Concerning Claims of Exoneration by Subsequent Investigation.
12. CSXT's Motion in Limine to Exclude Evidence or Argument that CSXT Is Preventing Treatment by or Payment to Plaintiffs.
13. CSXT's Omnibus Motion in Limine.
14. Plaintiffs' Motions in Limine.

Respectfully submitted this 26th day of August 2022.

By:

s/Jeff R. Dingwall

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on August 26, 2022, the foregoing was served via email to the following:

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DATED: August 26, 2022.

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