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Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-001957-MR

GRANT THORNTON, LLP APPELLANT

v.

APPEAL FROM KENTON CIRCUIT COURT
HONORABLE PATRICIA M. SUMME, JUDGE
ACTION NO. 07-CI-02647

WILLIAM J. YUNG; MARTHA A. YUNG; AND THE 1994 WILLIAM J. YUNG FAMILY TRUST APPELLEES

OPINION
AFFIRMING IN PART,
REVERSING IN PART,
AND REMANDING

** ** ** ** **

BEFORE: CLAYTON, MAZE, AND THOMPSON, JUDGES.

MAZE, JUDGE: Grant Thornton, LLP (Grant Thornton) appeals from a judgment of the Kenton Circuit Court in favor of William J. and Martha A. Yung (collectively, the Yungs), and the 1994 William J. Yung Family Trust (the Trust).

Following a bench trial, the circuit court found that Grant Thornton engaged in extensive fraud and negligence in the course of providing tax and accounting services to the Yungs and the Trust. Based on these findings, the trial court awarded the Yungs and the Trust compensatory damages totaling nearly $20 million and punitive damages of $80 million.

Grant Thornton challenges the trial court's findings of fraudulent misrepresentation and omissions. Grant Thornton also argues that the trial court improperly calculated compensatory damages. Grant Thornton objects to the trial court's failure to enforce the limitation-of-liability clause in its Engagement Letter, as well as the award of damages based upon the taxes and interests which the Yungs and the Trust incurred as a result of the transactions at issue. Grant Thornton also contends that punitive damages were not warranted or should be limited to no more than the amount of compensatory damages. Lastly, Grant Thornton seeks a modification of the trial court's awards of prejudgment and postjudgment interest.

The trial court's findings of fraud, gross negligence, and the amount of compensatory damages were supported by substantial evidence and were not clearly erroneous. We further find that punitive damages were appropriate under the facts of this case. However, we must conclude that the amount of punitive damages was unconstitutionally excessive in light of all relevant factors. We further find that the trial court properly directed that the judgment shall bear interest at the statutory rate. However, the trial court incorrectly stated the

prejudgment interest rate. Therefore, we affirm the trial court's judgment in all respects except for the award of punitive damages and the amount of prejudgment interest. Consequently, we must vacate the award of punitive damages and remand for entry of a new judgment of punitive damages in the same amount as compensatory damages. The trial court shall also enter a new judgment which sets out the correct prejudgment interest rate of 8% *per annum*.

I. Facts and Procedural History

William J. Yung is a successful hotelier and entrepreneur. He, along with his wife, Martha, and the Trust, own a hospitality company, Columbia Sussex Corporation (CSC), headquartered in Crestview Hills, Kentucky. Yung also oversees and owns controlling interests in a large number of other business enterprises. Of particular significance to this case, the Yungs and the Trust are the owners of two holding corporations, Wytec, Ltd. and Casuarina Cayman Holdings, Ltd.

These two corporations are based in the Cayman Islands and own hotel and casino facilities. The Cayman corporations are not obligated to make distributions to their shareholders. As a result, profits could accumulate in the Caymans with no United States tax consequences. However, the corporations had made prior distributions to the U.S. shareholders.

Grant Thornton is a public accounting firm headquartered in Chicago, Illinois. The firm offers audit, tax, and business consulting services, and targets mostly middle-market companies for those services. Prior to 2000, Grant Thornton

had provided a range of tax-related services to the Yungs, the Trust, and their affiliated corporations. In 1999, Sara Williams, a former employee of Grant Thornton, became CSC's tax director. Upon returning to Grant Thornton later that year, Williams informed Grant Thornton of the funds held by the Cayman corporations. Based on this information, individuals within Grant Thornton began to develop strategies for transferring the money to the United States while avoiding or minimizing tax liability.

One of these strategies involved a new product which Grant Thornton was developing: the Leveraged Distribution 301 (Lev301). To carry out the Lev301 transaction, a foreign corporation would first borrow money to purchase Treasury Notes. These Notes would be encumbered for their full amount to secure the debt incurred by the foreign corporation to purchase the Notes. Next, the fully encumbered Notes would be transferred to corporate shareholders in the United States. Since the Notes were fully encumbered, they had no taxable value and would not be reported as income. When the foreign corporations repaid the loans, the loan repayment would not result in reportable income to the shareholders because they were not co-obligors on the loans.

Grant Thornton met with the Yungs during July 2000 to discuss the Lev301. At that meeting, J. Michel, an agent of Grant Thornton, advised the Yungs that the product could serve as an effective means of transferring the Cayman funds without tax liability. Michel told the Yungs that, in the "worst-case scenario," the Yungs could be liable for payment of the taxes and interest but no

additional penalties. At a later meeting in September, Michel told the Yungs that a local large aircraft engine manufacturer and a large consumer product manufacturer had successfully used the Lev301 strategy.[1]

But in order to avoid that liability, the Internal Revenue Service (IRS) requires a non-tax-related "business purpose" as the primary motivation for using a tax shelter such as the Lev301. The Tax Code provides a defense to penalties for taxpayers who act in reasonable reliance on the advice of a qualified tax advisor. Pursuant to these provisions, the Yungs sought a "Short-Form Model Opinion" stating that they were relying on the advice of Grant Thornton that the Lev301 strategy had a non-tax-related business purpose. On December 28, 2000, Grant Thornton issued its Short-Form Opinion letter which set out the Lev301 strategy and stated that the IRS would "more likely than not" uphold the non-taxability of the Lev301 transaction.

After issuance of the Short-Form Opinion letter, the Yungs and their affiliated corporations began carrying out the Lev301 transactions. In early 2001, the IRS issued new regulations which called into question the viability of the Lev301 strategy. In response to the regulations and based on other concerns, Grant Thornton removed the Lev301 from its Client Matrix and suspended the sale of the product to new customers. However, Grant Thornton advised the Yungs that the

[1] Although Michel did not mention the companies by name, the Yungs understood the statement to refer to General Electric and Proctor & Gamble, respectively.

new regulations would not adversely affect the transactions, and it encouraged them to continue with the strategy.

In April 2001, Grant Thornton resumed the sale of the Lev301 product. However, Grant Thornton did not disclose substantial internal or external concerns about the viability of the product. During that same period, Grant Thornton prepared the 2000 tax returns for the Yungs and the Trust, but those returns did not report the Lev301 transactions. In August 2001, Grant Thornton issued a Long-Form Opinion in which it reiterated its prior "more likely than not" opinion regarding the taxability of the Lev301 transactions. However, this Opinion Letter failed to note that the underlying loans had been changed from recourse to non-recourse, thus affecting their taxability under the IRS regulations. Grant Thornton issued similar letters to other customers using the Lev301 product, and pointed to CSC as a successful user of the strategy.

During the first part of 2002, Grant Thornton prepared the 2001 tax returns for the Yungs and the Trust. These returns did not disclose the repayment of the loans which the Treasury Notes secured. In internal correspondence, Grant Thornton suggested that the Yungs could only avoid IRS scrutiny if they "won the audit lottery." After much internal discussion, Grant Thornton permanently discontinued the Lev301 product in July 2002.

In December 2002, the IRS issued a summons to Grant Thornton for documents relating to its promotion of Lev301 and the names of its clients who participated in the product. Grant Thornton did not disclose the summons to the

Yungs or other clients using the Lev301. The Yungs did not learn of the summons until September 2003, when the Department of Justice brought an action to enforce the December 2002 summons from the IRS. Pursuant to that action, Grant Thornton informed the IRS that the Yungs, the Trust, and the affiliated corporations had employed the Lev301 strategy.

In May 2004, the IRS commenced an audit of the Yungs and the Trust concerning the Lev301 transactions. Grant Thornton undertook a defense of the audit on behalf of the Yungs and the Trust. The IRS ultimately found that the Lev301 transactions did not have a non-tax-related business purpose, and concluded that the distributions were fully taxable. In addition to taxes and interest, the IRS assessed a twenty-percent penalty. In January of 2007, the Yungs and the Trust entered into a settlement with the IRS for $11,837,860 in back taxes, $5,021,494 in interest, and $1,555,873 in penalties.

Shortly after entering into the settlement, the Yungs and the Trust brought this action against Grant Thornton. After extensive discovery, the matter proceeded to a six-week bench trial in April and May of 2012. Thereafter, on November 8, 2013, the trial court issued a 211-page Findings of Fact, Conclusions of Law, and Judgment in favor of the Yungs and the Trust. The trial court found that Grant Thornton was aware that the Lev301 product did not have a legitimate, non-tax-related business purpose and would most likely be disallowed by the IRS. Nevertheless, Grant Thornton knowingly made fraudulent misrepresentations and omissions of material facts about the viability of the Lev301 product in order to

induce the Yungs and the Trust to follow the strategy. The court also found that the Yungs justifiably relied upon the representations of Grant Thornton's agents and its opinion letters. The court further found that Grant Thornton's actions amounted to gross negligence and breach of its duties to the Yungs and to the Trust.

Based upon these findings, the trial court awarded compensatory damages to the Yungs and the Trust in the amount of $19,315,227. Of this amount, the trial court ordered Grant Thornton to pay $4,682,786 to the Yungs, and $14,632,441 to the Trust. These damages included the total amount of taxes, interest, and penalties incurred as a result of the Lev301 transactions, as well as the $900,000 in fees which the Yungs and the Trust paid to Grant Thornton for this flawed strategy. The trial court separately awarded the Yungs and the Trust a total of $80,000,000 in punitive damages based upon Grant Thornton's fraud and gross negligence. The trial court apportioned $55,000,000 of this award to the Yungs and $25,000,000 to the Trust.

After entry of the judgment, Grant Thornton filed a motion for additional findings of fact pursuant to CR[2] 52.02, and to alter, amend, or vacate the judgment pursuant to CR 59.05. In an order entered on November 18, 2014, the trial court modified its award of prejudgment interest, but otherwise denied the

[2] Kentucky Rules of Civil Procedure.

motions to modify the judgment. Grant Thornton now appeals from this judgment.[3]

II. Standard of Review

In cases which are tried without the intervention of a jury, the trial court's findings of fact should not be reversed unless they are determined to be clearly erroneous. In making such consideration, the appellate court must keep in mind that the trial court had the opportunity to hear the evidence and observe the witnesses, so as to judge their credibility, and therefore, is in the best position to make findings of fact. CR 52.01. *See also Bealert v. Mitchell*, 585 S.W.2d 417, 418 (Ky. App. 1979). On the other hand, the trial court's conclusions of law are subject to *de novo* review. *A & A Mech., Inc. v. Thermal Equip. Sales, Inc.*, 998 S.W.2d 505, 509 (Ky. App. 1999).

III. Fraud Claims

Grant Thornton first focuses on the trial court's judgment finding that it was liable to the Yungs and the Trust for fraud, both by direct misrepresentation and by material omission. In an action for fraud, the party claiming harm must establish six elements of fraud by clear and convincing evidence as follows: (1) material representation, (2) which is false, (3) known to be false or made recklessly, (4) made with inducement to be acted upon, (5) acted in reliance thereon, and (6) causing injury. *United Parcel Serv. Co. v. Rickert*, 996 S.W.2d

[3] William and Martha Yung filed a separate cross-appeal from the portion of the judgment dismissing their claims for reputational injury. However, on motion by the Yungs, this Court dismissed their cross-appeal by order entered on September 16, 2015.

464, 468 (Ky. 1999), citing *Wahba v. Don Corlett Motors, Inc.*, 573 S.W.2d 357, 359 (Ky. App. 1978). To establish an actionable case of fraud based upon suppression of a fact, the Yungs and the Trust must demonstrate that: (1) Grant Thornton had a duty to disclose a material fact, (2) Grant Thornton failed to disclose same, (3) Grant Thornton's failure to disclose the material fact induced them to act, and (4) they suffered actual damages therefrom. *Smith v. Gen. Motors Corp.*, 979 S.W.2d 127, 129 (Ky. App. 1998).

Grant Thornton challenges the legal sufficiency of the Yungs' claim of fraud by misrepresentation. In particular, Grant Thornton argues that its opinions and predictions regarding whether the IRS would allow the tax shelter are not actionable as fraud. Grant Thornton further argues that the Yungs and the Trust failed to show justifiable reliance upon those opinions and representations. With regard to claim of fraud by omission, Grant Thornton contends that it did not have a duty to disclose the internal concerns and dissenting opinions about the legality of the Lev301 strategy.

a. *Opinions and Predictions not Actionable as Fraud*

As a general rule, a misrepresentation must relate to a past or present material fact. A mere statement of opinion or prediction regarding a future event may not be the basis of an action. *Flegles, Inc. v. TruServ Corp.*, 289 S.W.3d 544, 549 (Ky. 2009), citing *McHargue v. Fayette Coal & Feed Company*, 283 S.W.2d 170, 172 (Ky. 1955). Thus, forward-looking about investment prospects generally cannot be the basis for a fraud claim. *Id.* However, there are recognized

“deception” exceptions to this general rule where the opinion either incorporates falsified past or present facts or is so contrary to the true current state of affairs that the purported prediction is an obvious sham. *Id.*

This statement describes two distinct exceptions. *Republic Bank & Trust Co. v. Bear Stearns & Co.*, 683 F.3d 239, 249 (6th Cir. 2012). The first is relatively broad. It prevents a party from lying about past or present facts, but shielding themselves from liability by using statements of opinion or prediction. A party cannot avoid liability for fraud when he misrepresents objective data as part of a prediction or opinion about a future event. *Id.* at 249-50. The second exception is narrower, implicating only the present, and involving an improbable description of the whole current state of affairs. *Id.* at 250. In other words, a prediction regarding a future event may be actionable as fraud when the declarant “falsely represents his opinion of a future happening.” *Flegles*, 289 S.W.3d at 549, citing *Kentucky Electric Development Company’s Receiver v. Head*, 252 Ky. 656, 68 S.W.2d 1, 3 (1934).

Most of the Kentucky cases applying this rule, including *Flegles*, involve predictions or opinions about future investment or business strategies. The current case, on the other hand, involves Grant Thornton’s opinions about the future application of existing tax laws and regulations. We recognize that there is a significant degree of uncertainty about how the IRS may apply these laws and whether those laws and regulations are subject to change. However, there is an

existing body of law and precedent which a tax advisor must draw upon before making predictions about any particular tax strategy.

The Yungs and the Trust alleged that Grant Thornton made material misrepresentations concerning past and present facts in its recommendations regarding the Lev301. In 1999, the IRS had issued a notice rejecting a tax product called the Bond and Option Sales Strategy (BOSS). The BOSS transaction was substantially similar to Lev301 in that it attempted to avoid taxes on income from foreign corporations through distribution of encumbered securities. The IRS concluded that the BOSS transaction was not allowable for Federal income tax purposes and may be subject to additional penalties. Following issuance of the first BOSS notice, the IRS imposed new disclosure and reporting requirements on tax shelters. The IRS also issued another notice rejecting a transaction that was derivative of BOSS.

Despite these warnings and new regulations, Grant Thornton continued to market its Lev301 product to customers such as the Yungs and the Trust. The Yungs allege that Grant Thornton actively promoted Lev301 as means of avoiding tax liability on distributions from the Cayman corporations, while knowing that the IRS had called this type of tax shelter into question. The Yungs also allege that Grant Thornton affirmatively misrepresented that it had already successfully used the Lev301 to avoid tax liability on foreign distributions.

Grant Thornton also represented that Lev301 had survived review by an outside law firm. However, that firm, Baker & McKenzie, warned Grant

Thornton that Lev301 was flawed and could not be used to successfully avoid tax liability. In addition, Grant Thornton misrepresented the viability of Lev301 even after the IRS issued new regulations in early 2001 which clearly condemned the tax shelter. Grant Thornton actively misrepresented the effect of these regulations and continued to encourage the Yungs to proceed with the transactions. At the same time, Grant Thornton removed the Lev301 product from its Client Matrix based upon these concerns. Grant Thornton did not advise the Yungs that it was no longer offering the Lev301 to other customers.

Under the circumstances, we agree with the trial court that the deception exceptions clearly apply to Grant Thornton's representations concerning future events. Grant Thornton made material misrepresentations concerning both past and future facts in support of its predictions about the viability of the Lev301. Furthermore, Grant Thornton made these representations with substantial knowledge that the opinion was not accurate based upon the law or the facts as they existed at the time or as likely to exist in the future. Consequently, the trial court properly allowed the Yungs and the Trust to pursue fraud claims arising from Grant Thornton's predictions about the non-taxability of the Lev301 transactions.

b. Justifiable Reliance

The court in *Flegles* cautioned that the deception exceptions do not relieve market participants, particularly experienced participants such as the Yungs and the Trust, of their duty to protect themselves. *Id.* at 550. Even when the representations are made with the intent to deceive, the recipients of business

representations have a duty to exercise common sense and ordinary vigilance or inquiry. *Id.* Grant Thornton argues that the Yungs failed to show that they justifiably relied upon the representations. Most notably, Grant Thornton points out that its Engagement Letter with the Yungs explicitly warned that the opinions regarding the viability of the Lev301 strategy entailed significant risk.

Grant Thornton cites to a number of cases from other jurisdictions holding that, as a matter of law, a taxpayer cannot justifiably rely upon alleged misrepresentations concerning the legality of a tax shelter when he knew or should have known that he was participating in a scheme of doubtful legality. In *Shalam v. KPMG LLP,* 89 A.D.3d 155, 158, 931 N.Y.S. 2d 592 (N.Y. App. Div. 2011), a New York appellate court held that an opinion letter stating that the IRS would "more likely than not" accept a tax shelter should place an ordinary person on notice that the odds in favor of legality could be as slim as 51% to 49%. "Where the odds in favor of legality are virtually equivalent to the odds in favor of illegality, even a taxpayer with less business experience than plaintiff will apprehend the substantial risk that his tax avoidance strategy will not pass muster with the IRS." 89 A.D. at 158. *See also Salt Aire Trading LLC v. Enter. Bank & Trust Corp.*, 38 Misc. 3d 1227, 967 N.Y.S.2d 869 (N.Y. Sup. Ct. 2013), and *DDRA Capital, Inc. v. KPMG, LLP*, no 1:04-0158 (D. V.I. 2014).

However, in each of these cases, the taxpayer admitted to possessing information which would conclusively establish that he knew or should have known that he was participating in a scheme of doubtful legality. A taxpayer

cannot justifiably rely on misrepresentations by willfully blinding himself to information, by failing to ask questions, to pay attention to details, or to read the documents he signed. *Shalam*, 89 A.D.3d at 159. On the other hand, the mere fact that a taxpayer is a wealthy and sophisticated business person is insufficient to draw the conclusion that, as a matter of law, he should have known of the substantial risk that the tax strategy would not succeed. *Johnson v. Proskauer Rose LLP*, 129 A.D.3d 59, 73, 9 N.Y.S.3d 201, 211-12 (N.Y. App. Div. 2015). Indeed, wealthy taxpayers often seek the advice of professionals to navigate the complexities of the tax laws. In the absence of a taxpayer's admission to actual or constructive knowledge of information showing that the tax opinion letter was fraudulent, the question of justifiable reliance is generally an issue of fact. *See Rohland v. Syn-Fuel Associates-1982 Ltd. P'ship*, 879 F. Supp. 322, 333 (S.D.N.Y. 1995), and *Duke v. Touche Ross & Co.*, 765 F. Supp. 69, 74 (S.D.N.Y. 1991)

In the current case, there was no allegation that the Yungs actually knew that the Lev301 transactions were fraudulent. The Yungs admitted that they sought to avoid taxation of income from the Cayman corporations, but only if it could be done legally and without attracting scrutiny from the IRS. Furthermore, unlike in *Shalam* and *Salt Aire*, the Yungs did not participate in the development or implementation of the Lev301 strategy. Grant Thornton developed Lev301 and marketed it to the Yungs as a legitimate and likely successful tax shelter.

Moreover, the Yungs do not allege that they relied only on the opinion letters in choosing to go forward with the Lev301 transactions. Rather, they allege

that Grant Thornton held itself out as giving an honest and professional opinion concerning the legality of the tax shelter. The Yungs assert that Grant Thornton engaged in an ongoing pattern of misrepresentations and omissions of material information concerning the viability of the strategy. Furthermore, the trial court found that Grant Thornton consistently misled the Yungs about the risks. Under the circumstances, we agree with the trial court that there was an issue of fact whether the Yungs justifiably relied on Grant Thornton's opinions and representation.

c. *The Katz Teller Review and Discovery Issues*

Nevertheless, Grant Thornton points out that the Yungs had the opportunity to seek independent review of its advice regarding the Lev301. The Yungs sought review from an outside tax firm, Katz, Teller, Brant & Hild (Katz Teller), on whether reliance on Grant Thornton's opinion would provide protection against penalties. Katz Teller reviewed the transaction and signed off on the Grant Thornton opinion. However, Katz Teller cautioned that the reliance on the opinion could not guarantee avoidance of a penalty. During the negotiations prior to December 28, 2000, the Yungs sought to redraft the Engagement Letter to require Grant Thornton to assume the risk of such penalties. Since the Yungs had the opportunity to obtain an independent review of Grant Thornton's opinion and representations, Grant Thornton argues that the Yungs cannot show that they justifiably relied upon any misrepresentation.

In a separate but related argument, Grant Thornton challenges the trial court's pretrial rulings limiting its discovery of the advice which Katz Teller provided to the Yungs in response to this inquiry. Grant Thornton maintains that this advice was directly relevant to the Yungs' claim that they justifiably relied on the Opinions and the misrepresentations. Grant Thornton also contends that the Yungs waived any attorney-client privilege by selectively disclosing portions of the Katz Teller advice to the IRS and to third parties. Since the trial court denied its motion to compel discovery of this information, Grant Thornton argues that it was deprived of its right to evidence disputing the Yungs' claims of justifiable reliance.

The trial court agreed that the evidence was relevant. However, the court concluded that the Yungs and the Trust did not waive their attorney-client privilege simply by pleading a claim sounding in fraud or misrepresentation. Rather, the Yungs could only waive the privilege through an affirmative act. *See Chase Manhattan Bank N.A. v. Drysdale Sec. Corp.*, 587 F. Supp. 57, 58-59 (S.D. N.Y. 1984). *But see Am. Home Assur. Co. v. Fremont Indem. Co.*, 1993 WL 426984 (S.D. N.Y. Oct. 18, 1993), holding that the attorney-client privilege may be breached where it appears that there is a good faith basis for believing that invasion of the attorney-client privilege would shed light on the validity of an essential element of the plaintiff's claim. *Id.* at 6. *See also Allen v. W. Point-Pepperell Inc.*, 848 F. Supp. 423, 429 (S.D.N.Y. 1994), discussing the disagreement between the

expansive and restrictive views concerning the extent of an implied waiver of attorney-client privilege.

The trial court found that the Yungs had made a limited waiver of privilege with respect to their disclosure to the IRS that Katz Teller had advised them that reliance upon an opinion by Grant Thornton would protect them from penalties. Consequently, the trial court allowed limited discovery from Katz Teller with respect to these disclosures. However, the trial court concluded that Grant Thornton failed to establish a waiver of the attorney-client privilege with respect to the remaining communications from Katz Teller. As a result, the trial court did not allow discovery from Katz Teller as to these matters.

Under KRE[4] 503, a client has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made for the purpose of facilitating the rendition of professional legal services to the client. Any advice given to the Yungs by the attorneys at Katz Teller clearly falls within the privilege. The privilege may not be overcome by a showing of need by an opposing party to obtain the information contained in the privileged communication. *The St. Luke Hosps., Inc. v. Kopowski*, 160 S.W.3d 771, 777 (Ky. 2005). Furthermore, the Yungs did not waive the privilege merely by admitting that Katz Teller reviewed the opinion and Engagement Letter submitted by Grant Thornton. The inference of waiver does not arise where the client does not reveal

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[4] Kentucky Rules of Evidence.

substantive information, nor mislead the defendant or the court by relying on an incomplete disclosure. *U.S. v. White*, 887 F.2d 267, 271 (D.C. Cir. 1989).

On the other hand, a client does waive the privilege if he voluntarily discloses or consents to disclosure of any significant part of the privileged matter. *3M Co. v. Engle*, 328 S.W.3d 184, 188 (Ky. 2010). This waiver may be explicit, or it may be implied when the client takes a position that places but the substance of the communications in issue. "A position that seems often to bring implied waiver into play is clients' claim that they acted or refrained from acting on advice of counsel…" *Id.*, quoting Robert G. Lawson, *The Kentucky Evidence Law Handbook*, § 5.05 [10], at 363–64 (4th ed. 2003). Grant Thornton contends that the Yungs waived their privilege with Katz Teller by placing the issue of justifiable reliance at issue. Grant Thornton also argues that the Yungs waived the privilege by voluntarily disclosing portions of their communications to the IRS in support of their "reasonable cause" defense to the tax penalties.

The trial court noted that the Yungs made conflicting assertions concerning the basis for the opinions of the Katz Teller attorneys.

> In argument and numerous documents before the court, it has been asserted that Katz Teller advised plaintiffs and the Trust that it would be reasonable to rely on Grant Thornton's opinion regarding the tax consequences of the leverage distribution, and further claimed that Katz Teller provided this advice based on Grant Thornton's reputation and long-term relationship with plaintiffs and not on a legal analysis of the actual opinion. However, in the Fast Track Submission by plaintiffs and the Trust to the IRS §I(E), p. 8, they stated that "Katz Teller reviewed the recapitalization documents for proper form and

> evaluated the legal significance of Grant Thornton's opinion."

Trial Court Order, February 17, 2012, Record on Appeal (ROA) at 5136.

Based on these disputed facts, the trial court found that the Yungs had made a limited waiver of privilege to the extent of their disclosures to the IRS. However, the court concluded that any other advice from Katz Teller remained privileged, thus ending the inquiry.

The party asserting the attorney-client privilege has the burden to establish all of the elements of the privilege. *Lexington Pub. Library v. Clark*, 90 S.W.3d 53, 62 (Ky. 2002). While the attorney-client privilege presents mixed questions of law and fact, our review is generally *de novo* regarding both the existence of the privilege and the question of waiver. *Id.* While we agree that the advice was clearly privileged, the substantive question is whether the Yungs and the Trust waived the privilege.

As one of the essential elements of their case, the Yungs and the Trust must show that they justifiably relied on Grant Thornton's misrepresentations. Any contrary advice that Katz Teller gave would undermine the basis for their reliance. Likewise, the fact that the Yungs told the IRS that Katz Teller reviewed a draft of the Long-Form Opinion would tend to show that they did not rely exclusively on Grant Thornton's misrepresentations. As the trial court found, the Yungs' conflicting assertions on this point suggests that they waived the privilege, at least to the limited extent of their disclosures to Grant Thornton and to the IRS.

However, the trial court was also required to determine whether allowing the Yungs to assert the privilege would be manifestly unfair to Grant Thornton. *3M Co. v. Engle*, 328 S.W.3d at 188-89. Grant Thornton concedes that the Yungs told it about the advice from Katz Teller, and that it advised the Yungs to cite to that advice during the IRS audit. Grant Thornton had the opportunity to question the Yungs about their conflicting representations and had full access to the Yungs' disclosures to the IRS concerning the basis for the advice from Katz Teller. The trial court also noted that any documents prepared in anticipation of litigation would be covered by the less restrictive work-product doctrine set out in CR 26.02. Since Grant Thornton was able to obtain discovery of these matters based upon the Yungs' limited waiver of privilege discovery, we conclude that Grant Thornton was not unfairly prejudiced by failing to find that the Yungs fully waived their attorney-client privilege with Katz Teller.

d. Conclusions on Justifiable Reliance

Based on the Yungs' limited waiver of privilege, the trial court found that they did not seek advice from Katz Teller until after the Lev301 transactions were completed. In support of this contention, the Yungs testified that Grant Thornton did not provide a draft of the Long-Form Opinion until February of 2001. Furthermore, the Yungs testified that Katz Teller did not conduct a full review of the transactions and documents, but only advised that they could reasonably rely upon Grant Thornton's expertise. The Yungs also alleged that both the Short-Form and the draft of the Long-Form Opinion misrepresented the risks of the

transactions and failed to include material information about the applicable IRS requirements. These misrepresentations and omissions would have materially affected the Yungs' ability to obtain a meaningful independent review.

In addition, the trial court specifically found that the Yungs did not rely only on the Opinion Letters. The Yungs and the Trust had a long-established relationship with Grant Thornton for tax services. The Yungs repeatedly informed Grant Thornton of their concerns about the legality of any tax-avoidance strategy, since IRS scrutiny would adversely affect the operation of their casino holdings in the United States. Grant Thornton also knew that the Yungs placed enormous trust in its tax advice. The trial court found that Grant Thornton used that trust to induce the Yungs and the Trust to proceed with the Lev301 transactions.

The trial court specifically cited to several specific representations as a basis for supporting the Yungs' reasonable reliance on Grant Thornton's advice. First, Grant Thornton repeatedly emphasized that, in the "worst-case scenario," the Yungs would only be liable for taxes and interest. The court concluded that these representations falsely bolstered the "more likely than not" confidence levels stated in the Opinion Letters. Second, Joe Yung, CSC's Vice President of Development (and the Yungs' son), informed Grant Thornton that the Yungs did not want to be a "guinea pig" for the Lev301 strategy. J. Michel falsely represented that two major corporations had successfully used the strategy, and directly implied that those companies were General Electric and Proctor & Gamble.

Third, the court found that the December 28, 2000 Short-Form Opinion falsely represented Grant Thornton's confidence level in the validity of the Lev301 transaction. While a "more likely than not" opinion sets out at least a 50.1% confidence that a court would uphold the non-taxability of the transaction, the trial court found that Grant Thornton did not actually hold that confidence level. Indeed, Grant Thornton had received contrary advice from Baker & McKenzie and from persons within its own organization. In internal correspondence, J. Michel admitted to a 9/10 chance that the IRS would disallow the transaction. And finally, in January 2001, Grant Thornton informed the Yungs that the new IRS regulations bolstered the strength of the Short-Form Opinion. In fact, Grant Thornton had not reached a conclusion regarding the effect of the new regulations at that time. Even though the transactions could still have been unwound at that point, Grant Thornton advised the Yungs that "it's all good" and the new regulations would not adversely affect the legality of the transactions. The Long-Form Opinion compounded these misrepresentations by failing to address the new regulations and the change in the status of the underlying loans.

The trial court concluded that the parties' relationship and these representations served as a basis for the Yungs' justifiable reliance on Grant Thornton's Opinions. While the Yungs perhaps could have obtained independent review of the transactions from Katz Teller, we cannot say that this opportunity entirely vitiates the basis for their reliance on Grant Thornton. The Yungs had ample reasons to place their trust in Grant Thornton, and the evidence shows that

Grant Thornton deliberately misled them concerning the risks of the Lev301 strategy. Therefore, there was substantial evidence to support the trial court's conclusions that the Yungs and the Trust justifiably relied on Grant Thornton's misrepresentations and omissions. Consequently, the trial court did not clearly err in finding Grant Thornton liable for fraud.

e. Fraud by Omission

Finally, Grant Thornton contends that the trial court erred in finding that it owed a duty to disclose facts which were adverse to its opinions recommending the Lev301 strategy to the Yungs and the Trust. A duty to disclose is created only where a confidential or fiduciary relationship between the parties exists, or when a statute imposes such a duty, or when a defendant has partially disclosed material facts to the plaintiff but created the impression of full disclosure. *Rivermont Inn, Inc. v. Bass Hotels & Resorts, Inc.*, 113 S.W.3d 636, 641 (Ky. App. 2003). The trial court found that Grant Thornton owed confidentiality and fiduciary duties to the Yungs and the Trust by operation of law. *See* KRS[5] 325.440 and 26 U.S.C. § 7525. Furthermore, Grant Thornton knew that the Yungs placed a great deal of confidence in the soundness of its tax advice based upon their long-term relationship with the firm. Under the circumstances, we have no difficulty in finding that Grant Thornton had a fiduciary duty to disclose material facts relating to its tax advice.

[5] Kentucky Revised Statutes.

Nevertheless, Grant Thornton argues that it did not owe a duty to disclose dissenting or contrary opinions about the legality of the Lev301 strategy. The duty to disclose is limited to past or present facts, not opinions. *Giddings & Lewis, Inc. v. Indus. Risk Insurers*, 348 S.W.3d 729, 748 (Ky. 2011). *See also Hill v. Gozani*, 651 F.3d 151, 153 (1st Cir. 2011). However, the trial court identified a number of highly significant facts which were directly relevant to the Yungs' decision to proceed with the Lev301 transactions.

First, as previously noted, Grant Thornton failed to inform the Yungs and the Trust that the Lev301 required "list maintenance," thus leading them to believe that it was not required.[6] Second, Grant Thornton failed to inform the Yungs that the Lev301 bore substantial similarities to BOSS, which the IRS had previously rejected. Thirdly, and more significantly, Grant Thornton failed to disclose that it had not been able to obtain an endorsement of the Lev301 by an outside law firm. In fact, the outside firm, Baker & McKenzie, raised major concerns about Lev301, and particularly its similarity to the prohibited BOSS transactions. And finally, Grant Thornton failed to inform the Yungs and the Trust that it withdrew the Lev301 product from its Client Matrix in January 2001 following issuance of the IRS regulations.

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[6] The IRS requires tax advisors, such as Grant Thornton, to register and to maintain a list of all transactions that are the same or substantially similar to one of the types of transactions that the IRS has determined to be an abusive tax shelter. The BOSS and similar transactions were subject to this requirement in 2001. The list must identify each entity or individual to whom Grant Thornton acted as a material advisor with respect to the reportable transaction. Once created, the list must be maintained by the tax advisor and is subject to periodic inspection by the IRS. In addition, Grant Thornton was required to advise the Yungs and the Trust of the list maintenance requirement for the Lev301 transaction.

Contrary to Grant Thornton's position, these matters did not relate only to internal discussions and dissenting opinions. Rather, these facts were directly relevant to the confidence level expressed in its December 28, 2000 Short-Form Opinion and in the August 2001 Long-Form Opinion. The omission of these facts, together with the misrepresentation of other facts and the partial disclosure of other facts in the Opinions, induced the Yungs to believe that Grant Thornton made a full disclosure of all material facts concerning the soundness of the Lev301 strategy. Grant Thornton had an undisputable duty to disclose these facts under the circumstances. Consequently, the trial court properly found that Grant Thornton's omission of these material facts amounted to fraud.

IV. Compensatory Damages

Grant Thornton does not address the trial court's findings that it was negligent in its advice to the Yungs and the Trust concerning the non-taxability of the Lev301 transactions. There was substantial expert testimony to support that conclusion. Rather, Grant Thornton focuses on the trial court's award of compensatory damages relating to both the fraud and the negligence claims.

a. *Limitation of Liability Clause in Engagement Letters*

Grant Thornton first argues that the trial court failed to enforce the limitation of liability clause in its Engagement Letters. The Letters provide that Grant Thornton's "maximum liability… arising for any reason relating to the Opinion shall be the amount of fees paid for this engagement." Thus, Grant Thornton contends that the clause limits its liability for professional negligence

(including gross negligence) to the $900,000 in fees paid by the Yungs and the Trust.

Since the trial court also awarded damages based upon fraud, the limitation of liability clause does not operate to limit the amount of damages. Grant Thornton cannot contractually limit its liability arising from its own fraudulent conduct. *Bryant v. Troutman*, 287 S.W.2d 918, 921 (Ky. 1956). Agreements to exempt future liability for either ordinary or gross negligence are not invalid *per se*, but they are generally disfavored and are strictly construed against the parties relying upon them. *Hargis v. Baize*, 168 S.W.3d 36, 47 (Ky. 2005).

In *Peoples Bank of N. Kentucky, Inc. v. Crowe Chizek & Co. LLC*, 277 S.W.3d 255 (Ky. App. 2008), this Court addressed the applicability of a limitation of liability clause in an action involving professional negligence. This Court held that the clause will be upheld only if: (1) it explicitly expresses an intention to exonerate by using the word "negligence;" or (2) it clearly and specifically indicates an intent to release a party from liability for a personal injury caused by that party's own conduct; or (3) protection against negligence is the only reasonable construction of the contract language; or (4) the hazard experienced was clearly within the contemplation of the provision. *Id.* at 263, citing 57A Am. Jur. 2d, *Negligence* § 53 (2016). The trial court noted that the clause at issue does not explicitly use the word "negligence," nor was a protection against negligence the only reasonable construction of the "any reason" language.

Grant Thornton maintains that the "any reason" language in the Engagement Letter necessarily encompasses negligence resulting in the imposition of taxes and penalties by the IRS. But since the trial court also found that this conduct amounted to fraud, the scope of that language relating to negligence is moot. Therefore, we decline to address the issue further.

b. *Whether Taxes Incurred Are Recoverable as Damages*

Grant Thornton next argues that the Yungs and the Trust were not entitled to recover for their tax liability arising from the Lev301 transactions. *Alpert v. Shea Gould Climenko & Casey*, 160 A.D.2d 67, 72, 559 N.Y.S. 2d 312 (N.Y. App. Div. 1990), and *DCD Programs, Ltd. v. Leighton*, 90 F.3d 1442, 1447 (9th Cir. 1996). Grant Thornton contends that allowing recovery of those taxes places the Yungs and the Trust in a better position than they would have been but for the fraud and the negligence; i.e., the Yungs retain the benefit of the $30,000,000 distribution without any of the associated tax liability. According to Grant Thornton, this benefit amounts to a windfall to the Yungs in excess of their actual injury.

While a plaintiff may not recover for a tax liability incurred solely because of erroneous advice, the Yungs and the Trust may recover if the tax liability would not have been incurred but for Grant Thornton's fraud and negligence. *Maese v. Garrett*, 329 P.3d 713, 717 (N.M. 2014). *See also Seippel v. Jenkens & Gilchrist, P.C.*, 341 F. Supp. 2d 363, 384 (S.D. N.Y. 2004), *amended on reconsideration*, 2004 WL 2403911 (S.D.N.Y. Oct. 26, 2004); *Eckert Cold*

Storage, Inc. v. Behl, 943 F.Supp. 1230, 1234 (E.D. Cal. 1996); *Deloitte, Haskins & Sells v. Green*, 198 Ga. App. 849, 403 S.E.2d 818, 820 (1991); and *Whitney v. Buttrick*, 376 N.W.2d 274, 279 (Minn. App. 1985).

The trial court found that the Yungs would not have attempted to domesticate the profits from the Cayman corporations but for Grant Thornton's advice and misrepresentations concerning the non-taxability of the Lev301 transactions. Grant Thornton told the Yungs that the objective of the Lev301 distributions was "to structure distributions in order to permanently avoid taxability to shareholders." Furthermore, the trial court specifically accepted William Yung's testimony that he would not have made this distribution if it were taxable. Rather, the Yungs would have kept the profits offshore, retaining them for foreign investment and distribution.

Grant Thornton takes issue with this finding, noting evidence that in 2000, the Yungs directed another $14,812,000 in taxable distributions from the Cayman corporations. Grant Thornton also points to William Yung's statements to the IRS that he made the Lev301 distributions to finance his acquisition of another company. Notwithstanding the factual dispute, we find that the trial court's findings on this point were supported by substantial evidence.

c. *Whether Interest Incurred Is Recoverable*

Grant Thornton further argues that the Yungs and the Trust were not entitled to the award of damages for the interest they paid to the IRS. Like the previous issue, there is a split of authority regarding whether interest paid on back

taxes is recoverable. Some jurisdictions hold that such interest is not damages but rather reflects the value of the use of money that should have been paid as taxes. *Leendertsen v. Price Waterhouse*, 81 Wash. App. 762, 766, 916 P.2d 449, 451 (1996), citing *Freschi v. Grand Coal Venture*, 767 F.2d 1041 (2d Cir.1985), *vacated on other grounds*, 478 U.S. 1015, 106 S. Ct. 3325, 92 L. Ed. 2d 731 (1986); *Stone v. Kirk*, 8 F.3d 1079 (6th Cir. 1993); *Orsini v. Bratten*, 713 P.2d 791, 794 (Alaska, 1986); *Alpert*, 160 A.D. 2d at 72. Other jurisdictions hold that interest is recoverable when the taxpayer would not have incurred the tax liability or the interest but for the wrongful conduct or negligence. *Maese*, 329 P.3d at 719. *See also O'Bryan v. Ashland*, 717 N.W.2d 632, 638 (S.D. 2006); *Ronson v. Talesnick*, 33 F.Supp.2d 347, 354 (D. N.J. 1999) (*superseded by statute on other grounds*); and *McCulloch v. Price Waterhouse LLP*, 157 Or. App. 237, 246, 971 P.2d 414, 419 (1998).

While we agree with Grant Thornton that interest on a legitimate tax liability is generally not recoverable, we see no reason to treat interest differently than the underlying tax obligation. Therefore, we conclude that interest may be awarded upon proof that the underlying tax liability would not have been incurred but for the fraud or negligence. As previously noted, the trial court found that the Yungs would not have made the Lev301 distributions had they been properly advised that they would be taxable. Furthermore, the Yungs were subject to additional interest because Grant Thornton failed to properly report the distributions as income, and because of the delay in paying the tax liability during

audit proceedings. Under the particular circumstances of this case, we conclude that the trial court properly allowed the Yungs and the Trust to recover interest on their tax liabilities.

d. *Whether Damages Should Be Offset by Profits Realized*

Grant Thornton also contends that the Yungs' award for taxes and interest should be offset by any profits which they realized as a result of the Lev301 transaction. It points out that the Yungs and the Trust had immediate use of the full amount of the distributions from 2001 until the settlement with the IRS in January 2007. During that time, the Yungs realized profits from their investment of that income in the United States. Since the Yungs received this benefit from the Lev301 transactions, Grant Thornton argues that their damages should be offset accordingly.

The "benefits rule" applies when a defendant's tortious conduct has both caused harm to and conferred a benefit on a plaintiff. When this dual effect occurs, the benefits rule permits the value of the benefit conferred to be considered in mitigation of damages. *Carroll v. LeBoeuf, Lamb, Green & MacRae, LLP*, 392 F. Supp. 2d 621, 629 (S.D. N.Y. 2005). In such cases, the defendant accountant may present evidence showing how the plaintiff benefited from the malpractice to reduce the plaintiff's recovery. *Id.* at 630. *See also* Restatement (Second) of Torts § 920 (1979).

However, Grant Thornton bore the burden of proof to show such mitigation, and it does not contend that the trial court refused to allow it to present

such evidence. The trial court simply was not convinced that any profits earned by the Yungs were the result of Grant Thornton's misconduct, instead of the Yungs' own investment skill. Likewise, the trial court was not convinced that the Yungs would not have earned a similar profit had they invested the income outside of the United States. Therefore, the trial court did not err in reducing the damages awarded to the Yungs and the Trust to reflect such profits.

e. *Fratzke Issue*

Grant Thornton's final issue relating to compensatory damages concerns the Yungs' alleged failure to update the amount of their claim for damages prior to trial. CR 8.01(2) provides that, when a party asserts a claim for unliquidated damages, the amount claimed shall not exceed the last amount stated in its answers to interrogatories. If a party does not seasonably supplement the answer, that party cannot recover more than the last amount identified. *Fratzke v. Murphy*, 12 S.W.3d 269, 272 (Ky. 1999). Grant Thornton argues that the Yungs are barred from recovering for additional taxes and issues beyond what they set out in their interrogatory responses.

However, CR 8.01 and *Fratzke* expressly apply to claims for unliquidated damages. Unliquidated damages are defined as those which have not been determined or calculated, or not yet reduced to a certainty in respect to amount. *Nucor Corp. v. General Elec. Co.*, 812 S.W.2d 136, 141 (Ky. 1991). On the other hand, liquidated damages involve amounts which are "capable of ascertainment by mere computation, can be established with reasonable certainty,

can be ascertained in accordance with fixed rules of evidence and known standards of value, or can be determined by reference to well-established market values." *3D Enterprises Contracting Corp. v. Louisville & Jefferson Cnty. Metro. Sewer Dist.*, 174 S.W.3d 440, 450 (Ky. 2005). In determining whether a claim is liquidated or unliquidated, one must look at the nature of the underlying claim, not the final award. *Id.*

In the current case, the Yungs' claims for taxes were for a fixed and ascertainable amount, requiring no calculation by the court. While their claim for interest was not entirely fixed, the amount could be calculated in reference to underlying tax obligation. Since these claims involved liquidated damages, the provisions of CR 8.01(2) did not apply.

V. Punitive Damages

Grant Thornton also challenges the trial court's awards of punitive damages for fraud and gross negligence. A party is entitled to have the jury instructed on the issue of punitive damages "if there was *any evidence* to support an award of punitive damages[.]" *Shortridge v. Rice*, 929 S.W.2d 194, 197 (Ky. App. 1996). Punitive damages are given to the plaintiff over and above the full compensation for his injuries for the purpose of punishing the defendant, teaching him not to do it again, and deterring others from following his example. *Hensley v. Paul Miller Ford, Inc.*, 508 S.W.2d 759, 762 (Ky. 1974). KRS 411.184 authorizes an award of damages only upon a showing by clear and convincing evidence that the defendant acted with fraud, oppression, or malice. However, the

Kentucky Supreme Court has held that, under the common law, punitive damages may be awarded on a showing of gross negligence, and that KRS 411.184 cannot constitutionally exclude recovery of punitive damages on this basis. *Williams v. Wilson*, 972 S.W.2d 260, 264 (Ky. 1998).

KRS 411.184(1)(b) defines "fraud" as meaning "an intentional misrepresentation, deceit, or concealment of material fact known to the defendant and made with the intention of causing injury to the plaintiff." "Gross negligence. . . is a wanton or reckless disregard for the lives, safety or property of others." *Phelps v. Louisville Water Co.*, 103 S.W.3d 46, 51–52 (Ky. 2003). The threshold for the award of punitive damages is whether the misconduct was "outrageous" in character, not whether the injury was intentionally or negligently inflicted. *Horton v. Union Light, Heat & Power Co.*, 690 S.W.2d 382, 389 (Ky. 1985). In a case where gross negligence is used as the basis for punitive damages, gross negligence has the same character of outrage justifying punitive damages as willful and malicious misconduct in torts where the injury is intentionally inflicted. Just as malice need not be expressed and may be implied from outrageous conduct, so too may wanton or reckless disregard for the rights of others be implied from the nature of the misconduct. *Id.* at 389–90. However, a finding of gross negligence clearly requires more than a failure to exercise ordinary care. It requires a finding of a failure to exercise even slight care such as to demonstrate a wanton or reckless disregard for the rights of others. *Phelps*, 103 S.W.3d at 51-52.

a. *Award of Punitive Damages Based on Fraud and Gross Negligence*

Grant Thornton contends that its Opinion Letters concerning the non-taxability of the Lev301 transactions cannot be deemed fraudulent as a matter of law. But as set out above, the trial court expressly found that Grant Thornton induced the Yungs and the Trust to engage in the Lev301 transactions through fraudulent misrepresentations and omissions. Furthermore, the trial court relied on expert testimony to hold that Grant Thornton's advice concerning the Lev301 was grossly negligent. We find no basis to disturb these holdings.

Nevertheless, Grant Thornton argues that *Williams v. Wilson* only authorizes the recovery of punitive damages for personal injuries and death caused by gross negligence. Grant Thornton contends that this rule cannot extend to gross negligence causing only economic losses. However, in *Peoples Bank of N. Kentucky, Inc. v. Crowe Chizek*, *supra*, this Court held that a party may assert a claim for punitive damages arising from gross negligence in an accounting malpractice case. 277 S.W.3d at 268. In any event, the trial court properly awarded punitive damages based upon its finding of fraud. Therefore, any question concerning the award of punitive damages for gross negligence is moot.

b. *Whether Punitive Damages Were Excessive*

Grant Thornton primarily argues that the amount of punitive damages award was constitutionally excessive in light of the standards set out by the United States Supreme Court in *State Farm Mutual Automobile Ins. Co. v. Campbell,* 538 U.S. 408, 123 S. Ct. 1513, 155 L. Ed. 2d 585 (2003), and *BMW of N. America v.*

Gore, 517 U.S. 559, 116 S. Ct. 1589, 134 L. Ed. 2d 809 (1996). In *State Farm*, the Court specified that "(1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases." 538 U.S. at 418, 123 S. Ct. at 1520. Appellate courts must review a trial court's application of these factors on a *de novo* basis. *Id.* at 418, 123 S. Ct. at 1520.

1. Reprehensibility

Of the three factors, "the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct." *Id.* at 419, 123 S. Ct. at 1521, citing *Gore*, 517 U.S. at 575, 116 S. Ct. 1599. *State Farm* instructs courts

> to determine the reprehensibility of a defendant by considering whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident.

Id., citing *Gore*, 517 U.S. at 576-577, 116 S. Ct. at 1589.

Grant Thornton again points out that the harm caused was entirely economic. And while the Yungs suffered a significant tax liability and penalties, Grant Thornton notes that it provided them with an extensive defense during the

audit proceedings. Finally, Grant Thornton notes that the Yungs had sophisticated business holdings and were clearly not in a financially vulnerable position. Grant Thornton contends that these factors weigh against a finding that its actions were reprehensible.

The Yungs respond that Grant Thornton's actions involved intentional misconduct and gross breaches of its duty of reasonable care. They allege that Grant Thornton abused its position of trust in order to sell a dubious tax shelter. Grant Thornton was aware that the Yungs were highly reluctant to engage in a tax shelter which could attract the attention of the IRS and adversely affect the regulation of their casino holdings. Nevertheless, Grant Thornton repeatedly misrepresented the risks about the Lev301, and withheld information about the IRS's rejection of similar tax shelters. Grant Thornton was aware that the Yungs could suffer significant liability if the IRS rejected the shelter, but nevertheless encouraged the Yungs to continue with the transactions.

The Yungs also argue that Grant Thornton compounded its errors by failing to report the income from the Lev301 transactions and by separately dealing with the IRS during the audit to protect its interests. Finally, the trial court found that Grant Thornton engaged in the misconduct in order to compete with other large accounting firms to capture the relationship of clients like the Yungs. The Yungs contend that these factors weigh heavily toward the trial court's finding that Grant Thornton's actions were highly reprehensible.

Grant Thornton points to *Chicago Title Ins. Corp. v. Magnuson*, 487 F.3d 985 (6th Cir. 2007), in which the Sixth Circuit set aside a punitive damages award arising from claims of breach of contract and tortious interference with a contractual relationship. Although the corporate plaintiff established that the defendant acted with malice, the Sixth Circuit noted that the harm caused was only economic and the plaintiff was not financially vulnerable. Furthermore, the misconduct was limited to the single transaction with the plaintiff. In the absence of any other reprehensibility factors, the Sixth Circuit concluded that the plaintiff was not entitled to any award of punitive damages. *Id.* at 1000-01.

We do not read *Magnuson* as prohibiting a punitive damages award to any sophisticated business suffering only economic loss. A punitive damage award is not prohibited simply because some factors weigh in the defendant's favor. *Diesel Mach., Inc. v. B.R. Lee Indus., Inc.*, 418 F.3d 820, 839 (8th Cir. 2005). Unlike in *Magnuson*, Grant Thornton used its success in selling the Lev301 to the Yungs to market the tax shelter to other clients. Consequently, the misconduct was not limited to only its behavior toward the Yungs and the Trust. Given the trial court's other findings that Grant Thornton engaged in an ongoing fraud and breach of a confidential and fiduciary relationship, we conclude that the trial court could properly weigh the reprehensibility factors more heavily in favor of the Yungs and the Trust than Grant Thornton.

In a related argument, Grant Thornton argues that the trial court improperly considered the injury to the Yungs' reputation caused by the IRS audit.

As previously noted, the Yungs separately asserted a claim for compensatory damages for damages to their casino holdings corporation caused by increased regulatory scrutiny upon the discovery of his failure to report taxable income. The Yungs specifically claimed that the IRS audit forced them to withdraw from the purchase of a casino in Missouri. The trial court dismissed the claim, noting that any injury was suffered by the corporation, which was not a party to the action. However, the court concluded that the reputational injury could be considered for punitive damages purposes to determine the egregiousness of the conduct and the likelihood of harm.

Grant Thornton contends that the inclusion of this factor improperly compensated the Yungs for an item of compensatory damages which they would not otherwise be entitled to collect. But in determining the amount of punitive damages, the trier of fact may consider the harm likely to result from the defendant's conduct as well as the harm that actually has occurred. *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 21, 111 S. Ct. 1032, 1045, 113 L. Ed. 2d 1 (1991). "It is appropriate to consider the magnitude of the *potential harm* that the defendant's conduct would have caused to its intended victim if the wrongful plan had succeeded, as well as the possible harm to other victims that might have resulted if similar future behavior were not deterred." *TXO Prod. Corp. v. All. Res. Corp.*, 509 U.S. 443, 460, 113 S. Ct. 2711, 2721-22, 125 L. Ed. 2d 366 (1993). The Yungs presented evidence showing that Grant Thornton knew of their concerns that a risky tax strategy would affect the regulation of their casino

holdings. The trial court could properly consider Grant Thornton's knowledge of the actual and potential harm as a factor in determining the reprehensibility of the conduct.

2. Ratio of Punitive to Compensatory Damages

With regard to the second factor, the Court in *State Farm* suggested that "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." *Id.* at 425, 123 S. Ct. at 1524. While a higher ratio may be appropriate where a particularly egregious act has resulted in only a small amount of economic damages, it is clearly excessive where there is an award of substantial compensatory damages. *Ragland v. DiGiuro*, 352 S.W.3d 908, 921-24. (Ky. App. 2010). Grant Thornton points out that the trial court awarded the Yungs approximately $4.6 million in compensatory damages, but $55 million in punitive damages, resulting in a ratio of approximately 11.7:1.

The Yungs respond that the United States Supreme Court has consistently rejected a bright-line ratio or mathematical formula to determine the reasonableness of a punitive damages award. *State Farm*, 538 U.S. at 424-25, 123 S. Ct. at 1524. Furthermore, they argue that this court should consider the constitutionality of the punitive damages based on the total judgment, not just the separate awards to the Yungs and the Trust. When viewed in this light, the Yungs contend that the ratio between punitive and compensatory damages is only 4:1 and well within constitutional limits.

On this latter point, we agree with the Yungs that the trial court could properly consider the total award of compensatory damages in order to set the total amount of punitive damages. While the Yungs and the Trust had distinct interests and damages, Grant Thornton owed the same duties to them, and all of its misconduct was substantially related. Under the circumstances, we may consider the constitutionality of punitive damages based upon the total award.

Grant Thornton further argues that, even if punitive damages were warranted, the ratio cannot exceed 1:1. In *State Farm*, the Supreme Court noted that, "when compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." *Id.* at 425, 123 S.Ct. 1513. Grant Thornton also cites to a number of cases in which the Sixth Circuit reduced punitive damages to a 1:1 ratio based on the high amount of compensatory damages and the limited number of reprehensibility factors. *See Burton v. Zwicker & Associates, PSC*, 577 F. Appx 555, 566 (6th Cir. 2014), *cert. denied*, 135 S. Ct. 1531, 191 L. Ed. 2d 560 (2015); *Morgan v. New York Life Ins. Co.*, 559 F.3d 425, 442 (6th Cir. 2009); *Bridgeport Music, Inc. v. Justin Combs Pub.*, 507 F.3d 470, 487-88 (6th Cir. 2007), and *Bach v. First Union Nat'l Bank*, 149 Fed. Appx. 354, 356 (6th Cir. 2005).

Like the plaintiffs in these Sixth Circuit cases, the Yungs and the Trust were highly sophisticated parties and the loss which they suffered was purely economic. Even though the Yungs and the Trust suffered significant tax liabilities and penalties, the Lev301 transactions also allowed them to domesticate the

distributions income from the Cayman corporations. The Yungs had full use of that income until the settlement in 2007. And finally, the Yungs and the Trust were awarded substantial compensatory damages, including the fees paid to Grant Thornton, as well as the taxes, interest, and penalties assessed by the IRS. In light of this substantial recovery, Grant Thornton contends that the punitive damages award cannot exceed the award of compensatory damages.

3. Sanctions for Comparable Misconduct.

The third *State Farm* factor requires the Court to compare the punitive damages award to any civil penalties authorized or imposed in comparable cases. The existence of such penalties has a bearing on the seriousness with which a State views the wrongful action. *State Farm*, 538 U.S. at 428, 523 S. Ct. at 1526. While the IRS imposed approximately $224,938 in civil fines on Grant Thornton, those fines were based on its failure to properly register two transactions by other clients. In addition, Grant Thornton states that the IRS chose not to pursue any civil or criminal proceedings against it, even though it brought criminal proceedings and levied substantial civil fines against the professional services company KPMG for similar BOSS-type transactions during the same period. Thus, Grant Thornton contends that the punitive damages award was disproportionate to civil and criminal penalties which it actually faced in this case.

The trial court concluded that Grant Thornton's fraudulent conduct exposed it to substantial criminal and civil penalties ranging into the hundreds of millions of dollars, as demonstrated by the penalties imposed against KMPG. The

court found that these potential penalties demonstrate the seriousness of its misconduct, even though Grant Thornton was able to avoid these consequences based upon its cooperation with the IRS. As a result, the trial court concluded that the punitive damages award of $80,000,000 was not disproportionate to these potential penalties.

c. Conclusions as to Excessiveness of Punitive Damages

As noted above, there was sufficient evidence to support the trial court's conclusions that Grant Thornton acted with either fraud or gross negligence. Therefore, punitive damages were justified under KRS 411.184. The central issue in this case is whether the award of punitive damages was constitutionally excessive.

As an initial matter, there is some question concerning this Court's authority to reduce an award of punitive damages. Traditionally, Kentucky courts did not have the authority to correct an excessive award by remittitur. *Louisville & N. R. Co. v. Complete Auto Transit*, 259 S.W.2d 483, 484 (Ky. 1953), and *Louisville & N. R. Co. v. Earle's Adm'x*, 94 Ky. 368, 22 S.W. 607 (1893). In *Hanson v. Am. Nat'l Bank & Trust Co.*, 865 S.W.2d 302 (Ky. 1993), *overruled on other grounds by Sand Hill Energy, Inc. v. Ford Motor Co.*, 83 S.W.3d 483, 495 (Ky. 2002), the Kentucky Supreme Court stated, "This Court is unaware of any authority in this jurisdiction for court-ordered remittitur of punitive damages or for the fixing of the amount of such damages, and it will not here establish such precedent." 865 S.W.2d at 310.

But while Kentucky courts may not have a statutory or common law basis to reduce a damages award, *State Farm* and *Gore* require courts to consider the excessiveness of a punitive damages award under a due process analysis. "In considering the constitutionality of an award of punitive damages, this Court is required to conduct a *de novo* review of the trial court's determination that the award was not so grossly excessive as to violate due process." *Phelps*, 103 S.W.3d at 53, citing *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 121 S. Ct. 1678, 149 L. Ed. 2d 674 (2001). Applying this analysis, this Court has reduced the unconstitutionally excessive award of punitive damages to a level which satisfies due process. *See Ragland v. DiGiuro*, 352 S.W.3d at 924, *McDonald's Corp. v. Ogborn*, 309 S.W.3d 274 (Ky. App. 2009)

Our Supreme Court has never endorsed this authority explicitly. However, such constitutional review is squarely within the authority of an appellate court. Therefore, we conclude that this Court necessarily has the authority and the responsibility to reduce an award of punitive damages when it is constitutionally excessive.

Thus, the question before this Court is whether the 4:1 ratio awarded in this case is constitutionally excessive. In *Haslip*, *supra*, the United States Supreme Court suggested that a 4:1 ratio is "close to the line," but still may be constitutionally permissible if supported by objective criteria. 499 U.S. at 23, 111 S. Ct. at 1046. However, the Sixth Circuit cases cited by Grant Thornton hold that the reprehensibility factors favor a lower ratio of punitive to compensatory

damages, particularly where the harm caused was entirely economic, the plaintiffs were sophisticated business entities who were not financially vulnerable, and the underlying award of compensatory damages was substantial. In such circumstances, the Sixth Circuit cases hold that the ratio of punitive to compensatory damages may not exceed 1:1.

We conclude that the reasoning of these cases is applicable to the current case. As Grant Thornton points out, the Yungs were not economically vulnerable and suffered only an economic injury. The infliction of only economic harm can still merit a substantial penalty, especially when done intentionally through affirmative acts of misconduct. But not all acts which cause economic harm are sufficiently reprehensible to justify a significant sanction in addition to compensatory damages. *Gore*, 517 U.S. at 576, 116 S. Ct. at 1599.

Moreover, the Yungs and the Trust recovered substantial compensatory damages from Grant Thornton. These damages included the full amount of taxes and interest owed to the IRS as a result of Grant Thornton's misconduct. As a result, the Yungs have obtained the full use of all of the dividends from the Cayman corporations, but without the attendant tax liability. The Yungs and the Trust also recovered the full amount of the fees which they paid to Grant Thornton. The trial court's award of nearly $20 million in compensatory damages weighs heavily against the imposition of a higher multiple of punitive damages. *State Farm*, 538 U.S. at 425, 123 S. Ct. at 1524.

In Section V(b)1 above, we held that the trial court could properly consider the potential damage to the Yungs' reputation in determining the reprehensibility of Grant Thornton's conduct. With regard to compensatory damages, the trial court specifically found that any reputational damages were not personal to the Yungs, but accrued to the corporate holdings. Consequently, the court declined to factor this injury into its award of compensatory damages to the Yungs.

But in assessing punitive damages, the trial court found that Grant Thornton was aware of the likelihood of damage to the Yungs' personal reputation in the casino industry. While we agree with this conclusion, we cannot agree with the trial court's further suggestion this knowledge served as a basis to enhance the amount of punitive damages awarded to the Yungs. Punitive damages are not compensation for injury. They serve to punish reprehensible conduct and to deter its future occurrence. *Cooper Indus.*, 532 U.S. at 432, 121 S. Ct. at 1683, citing *Haslip*, 499 U.S. at 54, 111 S. Ct. 1032 (O'Connor, J., dissenting). *See also Phelps*, 103 S.W.3d at 55, and *Hensley*, 508 S.W.2d at 762. We conclude that the trial court was not authorized to enhance the award of punitive damages based only upon the potential harm to the Yungs' reputations in the casino industry.

It appears that the trial court may also have considered certain discovery issues involving Grant Thornton in its decision to enhance the award of punitive damages. While we have addressed the extensive dispute regarding discovery of advice from Katz Teller to the Yungs, the trial court spent far more

time on the Yungs' motions to compel discovery from Grant Thornton. At one point, this litigation nearly came to a complete halt over these matters. The trial court was undoubtedly frustrated by this behavior, and it may have led the court to weigh punitive damages more harshly. Although we can appreciate this tendency, we must point out that any discovery violations must be remedied separately from the underlying conduct.

The trial court further noted that Grant Thornton's misconduct did not involve isolated instances of fraud or malice. Rather, Grant Thronton engaged in fraudulent conduct over an extended period of time. Furthermore, Grant Thornton used the Yungs to market the Lev301 to thirteen other customers, and sold a similar product to twenty-two other customers. In *State Farm*, the United States Supreme Court addressed whether a defendant's out-of-state conduct may be considered in awarding punitive damages. Based upon the Due Process Clause, the Court held that such conduct may only serve in assessing the reprehensibility of the defendant's conduct to the extent that it has a nexus to the specific harm suffered by the plaintiff. *State Farm*, 538 U.S. at 422, 123 S. Ct. at 1522.

Grant Thornton's conduct in this case has the necessary nexus to its misconduct toward third parties, and the trial court properly considered such conduct in determining the reprehensibility of its behavior. But while Grant Thornton cold have been subject to enormous civil and criminal penalties based on its conduct toward other customers, the IRS and other regulatory agencies declined to impose anywhere near the full potential penalties based upon Grant Thornton's

conduct toward the Yungs and other customers. This fact weighs against the imposition of additional punitive damages based on such conduct. *Id.* at 422-23, 123 S. Ct. at 1523.

Nevertheless, we agree with the trial court that Grant Thornton's fraudulent conduct over an extended period of time and toward multiple customers justifies an award of significant punitive damages. Furthermore, even after Grant Thornton knew that the IRS was inquiring into the Yungs' use of the Lev301, it failed to inform the Yungs of the IRS summonses or of the significant change to the regulatory climate. And once the audit proceedings began, Grant Thornton directed the Yungs to provide information to the IRS which protected its own interests over theirs.

While Grant Thornton's conduct clearly merits a significant award of punitive damages, we conclude that the 4:1 ratio awarded in this case was manifestly unreasonable in light of the objective criteria as found by the trial court. The goals of punishment and deterrence would be served sufficiently by the imposition of punitive damages equaling no more than the amount of compensatory damages; or a 1:1 ratio. Such damages would adequately punish Grant Thornton for its misconduct without exceeding the scope of constitutional due process. Therefore, we vacate the award of punitive damages and remand this matter for entry of a new award of punitive damages.

VI. Awards of Prejudgment and Postjudgment Interest

Finally, Grant Thornton argues that the trial court erred in its awards of both prejudgment and postjudgment interest to the Yungs and the Trust. While we are reducing the award of punitive damages, the question of interest is still relevant with respect to the award of compensatory damages, as well as to the award of punitive damages in the judgment entered upon remand. The Yungs concede that the trial court's judgment erroneously awarded prejudgment interest in the amount of 8% *per diem*, rather than the statutorily authorized 8% *per annum*. Therefore, we will remand this matter for a correction of the clerical error.

Grant Thornton also contends that the trial court abused its discretion by requiring that the judgments bear interest at the full, postjudgment rate. KRS 360.040 provides that a judgment shall bear 12% interest *per annum*. While the statute permits a court to impose a rate of less than 12%, the court is not required to do so simply because market conditions would provide a lesser rate of return. *Emberton v. GMRI, Inc.*, 299 S.W.3d 565, 584 (Ky. 2009). *See also Univ. Med. Ctr., Inc. v. Beglin*, 432 S.W.3d 175, 180 (Ky. App. 2014).

Indeed, in *Emberton* and *Morgan v. Scott*, 291 S.W.3d 622 (Ky. 2009), our Supreme Court rejected the same argument which Grant Thornton makes here. Although a trial court may consider the effects of market rates in determining whether to award a lower interest rate on postjudgment interest, it is not obligated to do so. *Emberton*, 299 S.W.3d at 585; *Morgan*, 291 S.W.3d at 644. The fact that the trial court could have chosen to impose a lower interest rate does

not necessarily mean that its decision to impose a higher rate was an abuse of discretion.

VII. **Conclusions**

As we conclude this opinion, this Court would like to compliment the trial court and the parties' counsel for their excellent work in relating to this appeal. The trial court's findings of fact and conclusions of law were exceptionally thorough and well-written. The trial court's opinion, as well as the briefs and oral arguments of counsel, were of great assistance to the Court in sorting through the complex factual and legal issues presented on appeal.

To summarize our holdings above, we conclude that the trial court's factual findings were supported by substantial evidence and should not be disturbed. There is a legitimate question whether the Yungs and the Trust justifiably relied upon Grant Thornton's misrepresentations and omissions, since they had the opportunity to seek advice from outside counsel. The trial court did not clearly err in finding only a limited waiver of attorney-client privilege and restricting further discovery of communications between the Yungs and their outside counsel. Consequently, the trial court properly quashed the subpoenas. The trial court's findings that the Yungs and the Trust justifiably relied on Grant Thornton were supported by substantial evidence of record.

With regard to damages, we conclude that the finding of fraud precluded application of the limitation-of-liability clause. We agree with Grant Thornton that taxes and interest incurred are generally not recoverable, but there

was substantial evidence to support the trial court findings that the Yungs would not have incurred that liability but for Grant Thornton's inducement of them to engage in those transactions. The trial court's findings with respect to the amount of compensatory damages were supported by substantial evidence.

The most difficult question concerns the trial court's award of punitive damages. Based on the trial court's findings of fraud and gross negligence, we conclude that punitive damages were clearly warranted. On the other hand, we must conclude that the overall 4:1 ratio of punitive to compensatory damages was excessive. Under the circumstances present in this case, we must conclude that punitive damages greater than a 1:1 ratio exceeded the bounds of constitutional due process. And lastly, we conclude that the trial court did not abuse its discretion in its award of postjudgment interest. However, the trial court made a clerical error in stating the rate of prejudgment interest. Therefore, we shall remand this matter for a correction of that portion of the judgment.

Accordingly, the judgment of the Kenton Circuit Court is affirmed in all respects except for the award of punitive damages and the amount of prejudgment interest. We hereby vacate the award and remand for entry of a new judgment of punitive damages which equal the amount of compensatory damages. This matter is also remanded for entry of a corrected judgment setting out prejudgment interest at a rate of 8% *per annum*.

JUDGE CLAYTON CONCURS.

THOMPSON, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

THOMPSON, JUDGE, DISSENTING: Respectfully, I dissent. Although the majority's opinion is well written and provides an excellent discussion of punitive damage law and the constitutional implications of a punitive damage award, I disagree with its decision to reduce the punitive damage award from a 4:1 ratio to a 1:1 ratio. I do so because I believe that the majority applies an incorrect standard of review to the factual findings made by the trial judge after a lengthy bench trial.

The trial court, the majority, and I are in agreement that punitive damages were authorized. The trial court made detailed findings regarding Grant Thornton's actions constituting fraud by misrepresentation, fraud by omission and gross professional negligence, which were established by clear and convincing evidence. The question is whether the punitive damages are so excessive as to offend constitutional principles.

In *BMW of North America, Inc. v. Gore,* 517 U.S. 559, 574-575, 116 S.Ct. 1589, 1598-99, 134 L.Ed.2d 809 (1996), the Supreme Court set forth three guideposts to consider when determining the excessiveness of a punitive damage award for constitutional purposes. It later summarized the *Gore* guideposts as follows:

> (1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive

> damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.

State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 418, 123 S. Ct. 1513, 1520, 155 L.Ed.2d 585 (2003). These same factors apply whether punitive damages are awarded by a jury or following a bench trial.

In *Cooper Industries, Inc. v. Leatherman Tool Group, Inc*., 532 U.S. 424, 436, 121 S.Ct. 1678, 1685-86,149 L.Ed.2d 674 (2001), the Court held that in reviewing a lower court's determination of the constitutionality of the amount of a punitive damage award, an appellate court should apply a de novo standard of review. However, *Cooper* and subsequent case law do not mandate de novo review of the factual findings regarding the *Gore* criteria. As noted in *Phelps v. Louisville Water Co.*, 103 S.W.3d 46, 54 (Ky. 2003) (quoting *Cooper,* 532 U.S. at 440, 121 S.Ct. 1678), "[w]hile we are required to review the excessiveness of the award pursuant to the factors articulated in *Gore* de novo, it of course remains true that appellate courts should defer to the trial court's findings of fact unless they are clearly erroneous." The majority has overlooked that while the *Gore* factors are applied in a de novo fashion, an appellate court is required to defer to the trial court's factual findings.

As declared in *Gore*, the degree of reprehensibility is "[p]erhaps the most important indicium of the reasonableness of a punitive damages award[.]" *Gore,* 517 U.S. at 575, 116 S.Ct. at 1599. Courts must determine the degree of reprehensibility by considering whether:

> [T]he harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident.

Campbell, 538 U.S. at 419, 123 S.Ct. at 1521.

Determining the degree of reprehensibility involves a judgment regarding the facts. Although decided prior to *Cooper*, the Court's analysis in *Johansen v. Combustion Eng'g, Inc.*, 170 F.3d 1320, 1335 (11th Cir. 1999) (internal quotations and citations omitted), is persuasive:

> Although the proper characterization of a question as one of fact or law is sometimes slippery, the degree of reprehensibility of the defendant's conduct is essentially a judgment about facts. Such judgments are properly the role of the district court and we will not second guess the judge who sat through the trial, heard the testimony, observed the witnesses and had the unique opportunity to consider the evidence in the living courtroom context while we have only the cold paper record. When findings of fact are based on determinations about witnesses' credibility, the deference accorded the trial judge is even more significant for only the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said.

In *Cooper*, 532 U.S. at 440, 121 S.Ct. at 1687–88, the Supreme Court acknowledged that with respect to the *Gore* reprehensibility guidepost, trial courts "have a somewhat superior vantage over courts of appeals" attributable to their superior position to judge witness credibility and demeanor.

Although not an exclusive list, there are several indicia of reprehensibility: deliberate false statements, acts of affirmative misconduct or concealment of evidence of improper motive, and repetition of tortious conduct. *Gore*, 517 U.S. at 576, 116 S.Ct. at 1599. After conducting a month-long trial, the trial court made extensive findings of fact regarding the reprehensibility of Grant Thornton's conduct and found Grant Thornton acted with intentional malice, trickery and deceit. I would defer to the trial court's factual finding regarding the degree of reprehensibility of Grant Thornton's conduct. After accepting the trial court's factual findings, I believe this factor weighs heavily in favor of affirming the amount of punitive damages under a de novo standard of review.

Admittedly, the remaining two factors–the ratio of punitive damages to compensatory damages and the comparison of the award to any civil or criminal penalties–are not fact-intensive to the extent both are based on mathematical computations. Nevertheless, they cannot be considered in isolation from the most compelling factor, the reprehensibility of the defendant's conduct.

In discussing appropriate ratios in *Campbell*, the United States Supreme Court declined to "identify concrete constitutional limits on the ratio between harm, or potential harm, to the plaintiff and the punitive damages award." *Campbell*, 538 U.S. at 424, 123 S.Ct. at 1524. The only conclusion to be drawn from existing federal law is that "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." *Id.* at 425, 123 S. Ct. at 1524.

Although the ratio in this case is 4:1, well below the constitutionally double-digit ratio, the majority believes a 1:1 ratio is more constitutionally acceptable. The ratio itself, being only 4:1, carries with it no indicia of excessiveness of the punitive damages award. However, I admit that the high amount of the compensatory award and the amount of punitive damages awarded combined may border on the outer limits of constitutionality. As recognized in *Ragland v. DiGiuro*, 352 S.W.3d 908, 921 (Ky.App. 2010), "a higher ratio is constitutionally acceptable when the compensatory award is lower and . . . *vice versa*." Nevertheless, I believe the trial court's findings regarding the reprehensibility of Grant Thornton's behavior should be afforded deference.

The third *Gore* guidepost requires an inquiry into the civil penalties authorized or imposed in comparable cases. I agree with the Court in *McLemore ex rel. McLemore v. Elizabethton Med. Inv'rs, Ltd. P'ship*, 389 S.W.3d 764, 790 (Tenn. App. 2012), that the first two guideposts should be afforded considerably more weight. However, here, as found by the trial court, the possible civil penalties, both monetary and the loss of professional licenses, are severe.

As the majority observes, the trial judge did a commendable job acting as judge and fact-finder after the right to a jury trial was waived. After hearing the evidence, she made extensive findings of facts and conclusions of law. Her decision to award punitive damages in the amount of a 4:1 ratio was not driven by passion or prejudice and the award is not an arbitrary deprivation of property. In contrast, the majority's holding that this single-digit ratio is unconstitutional

seems to be an arbitrary usurpation of the trial judge's role as fact-finder. This Court did not hear the evidence or observe the witnesses. On the basis of the "cold paper record" this Court has found that the punitive damages were excessive. *Johansen*, 170 F.3d at 1335. I cannot agree that the majority's judgment regarding the amount of punitive damages should be substituted for those of the trial judge. I would affirm.

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