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Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000018-MR
AND
NO. 2007-CA-000133-MR

UNIVERSITY MEDICAL CENTER, INC. D/B/A UNIVERSITY OF LOUISVILLE HOSPITAL — APPELLANT/CROSS-APPELLEE

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE DENISE CLAYTON, JUDGE
ACTION NO. 04-CI-01605

MICHAEL G. BEGLIN, EXECUTOR OF THE ESTATE OF JENNIFER W. BEGLIN; MICHAEL G. BEGLIN, INDIVIDUALLY; MICHAEL G. BEGLIN, PARENT AND NEXT FRIEND OF THE MINORS, WILLIAM PATRICK BEGLIN AND KELLY ANN BEGLIN[1]; WILLIAM PATRICK BEGLIN, INDIVIDUALLY; KELLY ANN BEGLIN, INDIVIDUALLY — APPELLEES/CROSS-APPELLANTS

OPINION
AFFIRMING

** ** ** ** **

[1] At times, Kelly Ann Beglin is referred to as Kelly Ann Beglin Hamilton.

BEFORE: VANMETER AND WINE, JUDGES; GUIDUGLI,[2] SENIOR JUDGE.

VANMETER, JUDGE: University Medical Center, Inc. d/b/a University of Louisville Hospital (the Hospital), appeals from the Jefferson Circuit Court's judgment awarding appellees/cross-appellants $9,047,003.09 after a jury found that the Hospital, or its employees and agents, acted negligently in causing the 2003 death of Jennifer Beglin.[3] We affirm. As a result, we need not reach the merits of the protective cross-appeal filed by appellees/cross-appellants from the same judgment.

I. General Facts

Beglin suffered from Crohn's disease since the birth of her first child in 1987. Due to the effects of this disease, Beglin underwent an ileocolic resection in 1989 and an angular anoscopy in 1998. During the latter surgery, Dr. Susan Galandiuk removed Beglin's abdominal colon and connected the end of her small bowel to a discharge bag. Beglin suffered significant blood loss during this surgery. Her blood was typed and screened during the surgery, and she received a blood transfusion after the surgery. After Beglin was discharged from the hospital, she developed coagulopathy,[4] which required readmission to the hospital and another blood transfusion.

[2] Senior Judge Daniel T. Guidugli sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

[3] The jury found that Dr. Susan Galandiuk and Dr. Guy Lerner, other defendants below, were not negligent in causing Beglin's death. These two defendants are not parties to this appeal.

[4] Coagulopathy is a "[d]efect in the blood clotting mechanisms." *Taber's Cyclopedic Medical Dictionary* 374 (16th ed. 1989).

On July 14, 2003, Beglin reported to the Hospital in anticipation of undergoing a complete proctectomy. She discussed her bleeding history with some nurses and Dr. Guy Lerner, the chief anesthesiologist. Dr. Lerner discussed the matter with Dr. Galandiuk, who was to perform Beglin's surgery, and the doctors agreed that it was unlikely Beglin would experience another surgical bleeding episode. Indeed, Dr. Galandiuk had previously independently determined that it was unnecessary to type and cross-match Jennifer's blood in preparation for the surgery, which was expected to last 2.5 to 3 hours, with a loss of approximately 400 cc's of blood.

Unfortunately, by 1.5 hours into the surgery, at 6:30 p.m., Beglin had already lost 500 cc's of blood. Albumin and other fluids were ordered from the blood bank and transfused into Beglin. Dr. Lerner subsequently noticed a decrease in Beglin's pulse and ordered that a blood sample be taken for typing and cross-matching in the event a blood transfusion was needed. However, conflicting testimony was adduced at trial as to when this order was given. Dr. Lerner testified that he gave the order before he left the operating room, and that he returned to the operating room and the sample then was sent between 7:30 and 7:45.[5] Similarly, Dr. Ozan Akca testified that he drew the blood sample between 7:30 and 7:40 and gave it to Nurse Barbara Cantrell to send to the blood lab before 7:45. Dr. J. Cheng placed the timing slightly later, testifying that Dr. Lerner gave the order after he returned to the operating room at 7:45, that Dr. Akca took the

[5] Dr. Lerner acknowledged, however, that he earlier testified by deposition that he ordered the sample to be drawn when he returned to the operating room between 7:30 and 7:45.

blood sample, and that it was sent for testing within ten minutes of the order, *i.e.*, by 7:55. Cantrell placed the timing even later, testifying that when Dr. Lerner initially stated at 7:45 that he needed blood, she called the blood bank to see if Beglin had a sample on file. However, Beglin's drawn blood sample was not given to Cantrell until 8:05. Cynthia Williams in the blood bank entered Beglin's sample information into the computer at 8:20, after it was processed through a centrifuge for eight minutes.

In any event, it was undisputed that the process of typing, cross-matching, and obtaining blood for a transfusion takes 45 to 50 minutes. Thus, relying on the range of times provided in the testimony as to when Beglin's blood sample was drawn, the blood for Beglin's transfusion was expected to arrive in the operating room at some point between 8:15 and 8:55.

Meanwhile, at 8:12 or 8:15 it was determined that Beglin's hemotacrit and hemoglobin levels were extremely low. Cantrell told Dr. Lerner that they were ten minutes away from receiving units of Beglin's blood type, or they could obtain units of universal blood in the same amount of time,[6] and Dr. Lerner opted to wait for units of Beglin's blood type. Dr. Lerner testified at trial that he ordered universal blood, stat, when units of Beglin's blood type did not arrive by 8:25, although he acknowledged that he testified by deposition that he did not order

[6] The parties indicate in their briefs that to obtain universal blood, it took either ten minutes, or one minute per unit, up to ten minutes maximum.

universal blood until 8:35. Dr. Akca testified, by contrast, that universal blood was ordered between 8:15 and 8:25.

The Hospital's blood bank records indicate that units of universal blood were released at 8:46, and the anesthesia log indicates that the transfusion began between 8:47 and 8:50. At around 8:50, Beglin experienced dilutional coagulopathy[7] and more blood loss. She suffered cardiac arrest, was given CPR, was resuscitated, and eventually was sent to recovery. Unfortunately, Beglin incurred brain damage due to a lack of oxygen-carrying blood. She died October 9, 2003, after life support systems were withdrawn.

Beglin's husband, Michael G. Beglin, filed suit against the Hospital individually, as executor of the Estate of Jennifer W. Beglin, and as parent and next friend of minors William Patrick Beglin and Kelly Ann Beglin. After a trial, the jury found that the Hospital acted negligently in treating Beglin and awarded the following damages: $1,922,102.00 for the destruction of Jennifer Beglin's power to labor and earn money; $367,358.09 for medical expenses incurred; $7,543.00 for funeral and burial expenses; and $1,500,000.00 for each child's loss, until age 18, of their mother's love, affection, guidance, and services. The jury also awarded $3,750,000.00 in punitive damages, resulting in a total award of $9,047,003.09. The trial court entered judgment accordingly; this appeal followed.

II. Spoliation/Missing Evidence Instruction

[7] "Dilutional coagulopathy" means that blood is diluted to the extent that there is not a sufficient amount of platelets to allow the blood to clot. *In re Nance*, 143 S.W.3d 506, 509 (Tex. App. 2004).

The Hospital's first argument is that the trial court erred by giving the following missing evidence instruction to the jury:

> If you find from the evidence that an incident report was in fact prepared by Nurse Barbara Cantrell recording material information about Mrs. Beglin's surgery, and if you further find from the evidence that University Medical Center, Inc. d/b/a University of Louisville Hospital, intentionally and in bad faith lost or destroyed the incident report, you may, but are not required to, infer that the information recorded in the incident report would be, if available, adverse to University Medical Center and favorable to the plaintiffs.

We disagree.

The Kentucky Supreme Court declined to create a new cause of action for "spoliation of evidence" in *Monsanto Co. v. Reed*, 950 S.W.2d 811, 815 (Ky. 1997), a products liability action. Instead, the court explained that "[w]here the issue of destroyed or missing evidence has arisen, we have chosen to remedy the matter through evidentiary rules and 'missing evidence' instructions." *Id.*

"[A]bsent some degree of 'bad faith,' [a criminal] defendant is not entitled to an instruction that the jury may draw an adverse inference from that failure." *Estep v. Commonwealth*, 64 S.W.3d 805, 810 (Ky. 2002). The Hospital argues that Beglin was not entitled to a missing evidence instruction because there was no evidence of bad faith regarding the missing incident report; instead, the report was, at most, lost. In support, the Hospital describes and relies upon Cantrell's trial testimony as follows:

> During trial, [Cantrell] testified that she completed an "incident report" at the suggestion of Elaine Strong, the

> charge nurse, following Jennifer's surgery. [Cantrell] testified that the only information she would have recorded in the report was that CPR was performed in the OR. [Cantrell] acknowledged that in an earlier deposition she had testified that she did not believe she had completed an incident report, but if she had she would have included a chronology and her perception of events that occurred during surgery. [Cantrell] testified at trial that she placed the report in the bin at the front desk.

(Internal footnotes omitted.) Appellees argue, on the other hand, that the very nature of the incident report is such that the Hospital would not want it available for litigation.

Regardless of whether the trial court was persuaded that the Hospital acted in bad faith in causing the incident report to not be produced, the court did not err by instructing the jury as it did. Simply put, the court left the decision as to whether the Hospital acted in bad faith up to the jury. It instructed that if the jury found that Cantrell recorded in a report material information about Beglin's surgery, and if the jury found that the Hospital intentionally and in bad faith lost or destroyed the report, it could, but was not required to, infer that the information if available would be adverse to the Hospital/favorable to the plaintiffs. Thus, the jury was not required to weigh the evidence at all, much less in favor of appellees.

III. Punitive Damages

A. Jury Instruction

The jury awarded Beglin $3,750,000 after receiving the following punitive damages instruction:

[I]f you are further satisfied from clear and convincing evidence that University Medical Center, Inc. d/b/a University of Louisville Hospital, acted in reckless disregard for the lives, safety or property of others, including Jennifer Beglin, during the operation from the time blood was ordered until it was delivered, you may in your discretion award punitive damages against this defendant in addition to the damages awarded under Verdict Form A [regarding compensatory damages]. Clear and convincing evidence means that you must be persuaded that the truth of the contention is highly probable. The evidence must be substantially more persuasive than a preponderance of the evidence, but it does not have to be beyond a reasonable doubt. You are not required to award punitive damages.

Your discretion to determine and award an amount, if any, of punitive damages is limited to the following factors:

the harm to Jennifer Beglin as measured by the damages you have awarded under Verdict Form A; and

the degree of reprehensibility, if any, of the defendant's conduct. This includes whether the conduct evinced an indifference to or a reckless disregard of the health and safety of others and whether the harm was the result of intentional malice, trickery, or deceit, or mere accident.

"Punitive damages" are damages awarded against a defendant for the purpose of punishing the defendant for its misconduct in this case and deterring it and others from engaging in similar conduct in the future.

If you award punitive damages, they must [be] fixed with calm discretion and sound reason, and must never be either awarded, or fixed in amount, because of any sympathy, or bias, or prejudice with respect to any party to the case.

If you award punitive damages, you will state the amount separately from the sum or sums awarded under

> Verdict Form A. You may not award punitive damages against one defendant because of the conduct of any other defendant. You must judge each defendant individually based on its own independent acts or conduct. To award punitive damages against University Medical Center, Inc. d/b/a University of Louisville Hospital, you also must find by clear and convincing evidence that University Medical Center (1) should have anticipated the conduct in question, or (2) that it authorized the conduct in question, or (3) that it ratified the conduct in question. The amounts of the punitive damages award, if any, must represent the degree of punishment, if any, that you believe is appropriate for the defendant based on that defendant's own conduct and not the conduct of any other defendant.

The Hospital argues that the trial court erred by so instructing the jury. We disagree.

The well-established common law standard for awarding punitive damages is gross negligence. *Kinney v. Butcher*, 131 S.W.3d 357, 358-59 (Ky.App. 2004) (quoting *Williams v. Wilson*, 972 S.W.2d 260 (Ky. 1998)). Gross negligence is defined as "a 'wanton or reckless disregard for the safety of other persons.'" *Id.* at 359 (quoting *Phelps v. Louisville Water Co.*, 103 S.W.3d 46, 52 (Ky. 2003)). In order to recover punitive damages, a plaintiff must prove his case by clear and convincing evidence. KRS 411.184(2).

Here, the jury was instructed to award punitive damages only if it found that the Hospital acted recklessly with regard to Beglin's safety "during the operation from the time blood was ordered until it was delivered[.]" The Hospital argues in its brief, however, that there was no evidence that Cantrell either (1) delayed taking action regarding the blood sample for 20 minutes even though she

knew it was a "stat" order, or (2) "kept the anesthesiologists in the dark the entire time they were demanding updates." Rather, the Hospital argues that Cantrell was performing many tasks in the operating room, including calling the blood bank, and that at worst, there was a lack of communication in the operating room as to when Beglin's sample was sent to the blood bank.

However, "[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.'" *Thomas v. Greenview Hospital, Inc.*, 127 S.W.3d 663, 673 (Ky.App. 2004) (overruled on other grounds) (quoting *Shortridge v. Rice*, 929 S.W.2d 194, 197 (Ky.App. 1996)). Here, drawing all reasonable inferences in favor of appellees, *Thomas*, 127 S.W.3d at 673, we conclude that the trial court did not err by instructing the jury on punitive damages. From the testimony, the jury could have inferred that Beglin's blood sample was drawn between 7:30 and 7:40, but that Cantrell did not send the sample to the blood bank until 8:05. Moreover, the jury could have inferred that Cantrell informed Dr. Lerner at 8:15 that they were ten minutes away from receiving Beglin's blood type, even though she knew that she did not send the sample until 8:05, and it took 45 to 50 minutes to type, cross-match, and obtain blood.

Additionally, evidence was introduced that while universal blood was ordered as early as 8:15, and it took up to ten minutes to receive universal blood, universal blood was not released from the blood bank until 8:46. The evidence also showed that Cantrell made twelve to eighteen calls to the blood bank but did

not respond to a technician's statement that emergency release blood was available. The jury also heard evidence that Beglin's blood order form said that the blood was needed in endoscopy at 8:20, and that there were some irregularities in the execution of the Hospital's blood policies. Such evidence clearly warranted a punitive damage instruction.

B. Principal/Employer Liability

Next, the Hospital argues that even if a punitive damages jury instruction was warranted, the Hospital was not liable for these damages as it neither authorized, ratified, nor should have anticipated any grossly negligent conduct by its agents or employees. We disagree.

Pursuant to KRS 411.184(3), punitive damages shall not be assessed "against a principal or employer for the act of an agent or employee unless such principal or employer authorized or ratified or should have anticipated the conduct in question." Here, drawing all reasonable inferences in favor of appellees, *Simpson County Steeplechase Ass'n, Inc. v. Roberts*, 898 S.W.2d 523, 527 (Ky.App. 1995), the trial court did not err by instructing the jury on punitive damages against the Hospital. Simply put, the jury could have believed that the Hospital should have anticipated a mishap in light of evidence that there were some irregularities in the execution of the Hospital's blood policies. Further, the jury could have believed that the Hospital ratified the conduct by failing to perform an adequate investigation following Beglin's surgery, as evidenced by the fact that

the Hospital did not uncover in its investigation that there was a delay in getting blood to the operating room.[8] As appellees argue, a jury need only find one of authorization, ratification, or anticipation in order to award punitive damages against a principal or employer.

C. Constitutionality

Next, the Hospital argues that the jury's punitive damages award was grossly excessive or arbitrary, in violation of the Due Process Clause. We disagree.

A punitive damages award may "enter the zone of arbitrariness that violates the Due Process Clause of the Fourteenth Amendment" only when it may be categorized as "grossly excessive" in relation to a State's legitimate interests in punishing unlawful conduct and deterring its repetition. *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 568, 116 S.Ct. 1589, 1595, 134 L.Ed.2d 809 (1996). In reviewing a punitive damages award, we must consider: "(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 v. Campbell*, 538 U.S. 408, 418, 123 S.Ct. 1513, 1520, 155 L.Ed.2d 585 (2003).

[8] While the jury instructions required the jury to find evidence of "reckless disregard for the lives, safety or property of others . . . during the operation from the time blood was ordered until it was delivered," the instructions did not require the jury to find evidence of ratification in that same time period.

Appellate courts must "conduct *de novo* review of a trial court's application" of these three factors to a jury's award. 538 U.S. at 418, 123 S.Ct. at 1520.

The first factor, the "degree of reprehensibility of the defendant's misconduct," is the "most important indicium of the reasonableness of a punitive damages award[.]" 538 U.S. at 419, 123 S.Ct. at 1521 (quoting *Gore*, 517 U.S. at 575, 116 S.Ct. at 1599). In *Campbell*, the United States Supreme Court set forth five factors for determining the reprehensibility of a defendant's misconduct.[9] We conclude that the facts in the matter *sub judice* meet two of the five factors for reprehensibility in that physical harm resulted to Beglin, and the jury found that the conduct evinced the "indifference to or a reckless disregard of the health or safety of others." As such, the first factor of three factors shows that some reprehensibility is present. *See Steel Technologies, Inc. v. Congleton*, 234 S.W.3d 920, 931 (Ky. 2007) (where harm was physical and the conduct in question involved reckless disregard for the lives or safety of others, some reprehensibility was present). *See also* 538 U.S. at 419, 123 S.Ct. at 1521 ("[t]he existence of any one of these [five] factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect").

[9] The five factors are 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." 538 U.S. at 419, 123 S.Ct. at 1521.

With regard to the second factor, the disparity between the harm suffered by the plaintiff and the punitive damages award, the jury here awarded $3,750,000.00 in punitive damages and $5,297,003.09 in compensatory damages,[10] resulting in a ratio of 0.7 to 1. The United States Supreme Court has declined to "impose a bright-line ratio which a punitive damages award cannot exceed." *Id.* at 425, 123 S.Ct. at 1524. However, it has opined that "[s]ingle-digit multipliers are more likely to comport with due process . . . than awards with ratios in range of 500 to 1, [*Gore*, 517 U.S.] at 582, 116 S.Ct. 1589, or in this case, of 145 to 1." 538 U.S. at 425, 123 S.Ct. at 1524. Here, the ratio of less than one to one clearly supports a finding that the punitive damage award is not excessive. Such is the case even in light of the fact that the compensatory damage award in this matter was substantial. *See* 538 U.S. at 425, 123 S.Ct. 1524 ("[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee").

Finally, although we are unaware of any penalties for comparable behavior suitable for comparison to the punitive damages award herein, for purposes of the third factor, we simply conclude that the award was not excessive under the guidelines of *State Farm v. Campbell* and its progeny.

IV. Damages for Loss of Services

[10] The Hospital argues that we should not consider the $1,500,000 damages awarded to each of Beglin's two children for their loss of their mother's love, affection, guidance, and services until age 18. However, since we hold that the trial court did not err in its instruction on this item of damages, *see infra* Part IV, we consider this measure of damages to be part of the ratio of compensatory damages to punitive damages.

The trial court instructed the jury that it could award money to each of Beglin's two children "for the loss of love, affection, guidance and services, of Jennifer Beglin from the date of her injury until the age of eighteen not to exceed $5,000,000.00, the amount claimed." Based upon this instruction, the jury awarded $1,500,000 to each child. The Hospital argues that the trial court erred by instructing the jury that it could award the children damages for the loss of their mother's services.[11] We disagree.

KRS 411.145(2) provides that a spouse may recover from a third person damages for "loss of consortium." "Consortium" is expressly defined as "the right to the **services**, assistance, aid, society, companionship and conjugal relationship between husband and wife, or wife and husband." KRS 411.145(1) (emphasis added). The Kentucky Supreme Court held in *Giuliani v. Guiler*, 951 S.W.2d 318, 319 (Ky. 1997), that a child's loss of parental consortium claim arises in Kentucky from the common law; however it appears that the court's definition of "parental consortium" in that case did not include, as does KRS 411.145, the right to recover for the loss of services. *See id.* at 322 (right to parental consortium is different from the wrongful death statutes because such statutes are generally limited to economic loss; parental consortium is based on the loss of love and affection). The parties have not cited, nor have we found, any express authority for a child's claim for the loss of his parent's services.

[11] Evidence was introduced that the children sustained an $80,000 loss in the form of Jennifer's household services.

Still, in *Schulz v. Chadwell*, 558 S.W.2d 183, 188 (Ky.App. 1977), this court held that the plaintiff could recover "$3,230.38 for the expense of persons employed by her to come into her home to perform housework and to provide for her personal needs[,]" reasoning as follows:

> If a person is disabled from performing essential household tasks as a direct result of a tortious injury, the injured person should be able to recover the reasonable expense of hiring substitute help. *See Chavez v. United States*, 192 F.Supp. 263, 272-73 (D.Mont.1961).
>
> When the injured person is married, the spouse's claim for loss of consortium includes the loss of the household services of the wife or husband. *Beauchamp v. Davis*, 309 Ky. 397, 217 S.W.2d 822, 825 (1948). *See also Kotsiris v. Ling*, Ky., 451 S.W.2d 411, 412 (1970). In the Restatement (Second) of Torts s 693, comment f, the rule is explained as follows:
>
> > The traditional action running to the husband has included recovery for loss of services of the wife in the home on the theory that he was legally entitled to them. Less attention is given today to the question of whether there is a formal legal right to household services, the emphasis being placed upon those mutual contributions that are normally expected in the maintenance of a household.
>
> If Mr. Chadwell had paid for the expense of household help and filed a claim for loss of consortium, he would have been entitled to recover for that expense. Because Mrs. Chadwell actually paid for the expense of additional household help, we cannot see any reason why she should not be permitted to recover for that expense. Her recovery for that item of expense would, in effect, be for the benefit of the family unit.

Id. Applying this rationale to the matter *sub judice*, where the jury was not instructed as to any damages for Michael Beglin individually, we hold that the trial court did not err by instructing the jury that it could award money to Beglin's children for, the loss of, *inter alia*, services. Certainly these services would have benefited the entire family unit.

V. Doctors' Insurance

Finally, the Hospital argues that the trial court erred by failing to permit it to introduce, under KRE[12] 411[13] as proof of the doctors' bias, evidence that Dr. Galandiuk and Dr. Lerner were insured by the same malpractice carrier. We disagree.

This court held in *Wallace v. Leedhanachoke*, 949 S.W.2d 624, 628 (Ky.App. 1996), a medical malpractice action, that the trial court did not abuse its discretion by ruling inadmissible evidence that the defendant-physician and his expert shared the same liability carrier. Deciding that trial courts facing this issue should balance the probative value of this evidence against the prejudicial effect it might have, we explained that, in that case,

> [t]he mere fact that the two physicians shared a common insurance carrier-absent a more compelling degree of connection-does not clearly evince bias by the expert, and its arguable relevance or probative value is insufficient to outweigh the well-established rule as to

[12] Kentucky Rules of Evidence.

[13] KRE 411 provides in part: "Evidence that a person was . . . insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of . . . bias or prejudice of a witness."

> the inadmissibility of evidence as to the existence of insurance.

Id. at 628. The Kentucky Supreme Court subsequently approved the use of this balancing test when dealing with the issue of commonality of insurance carriers. *Bayless v. Boyer*, 180 S.W.3d 439, 447 (Ky. 2005).

We hold that this balancing test is applicable in the matter *sub judice*, where the Hospital sought to introduce evidence that two co-defendant doctors shared the same insurance carrier. To that end, since the Hospital has not alleged "a more compelling degree of connection" than simply that the doctors shared a common insurance carrier, the trial court did not err by ruling the evidence inadmissible. Nor is there reversible error even if the trial court failed to engage in the balancing test in ruling the evidence inadmissible. *See Bayless*, 180 S.W.3d at 447 (court could not analyze whether trial court's failure to engage in balancing test was prejudicial because there was "no evidence in the record, even by avowal, of commonality of insurance carriers").

VI. Conclusion

The Jefferson Circuit Court's judgment is affirmed.

GUIDUGLI, JUDGE, CONCURS.

WINE, JUDGE, CONCURS IN PART AND DISSENTS IN PART AND FILES SEPARATE OPINION.

WINE, JUDGE, CONCURRING IN PART AND DISSENTING IN PART: Having considered the record of the skillfully tried case as well as the meticulously written briefs and ably argued positions of the parties, I respectfully

dissent as to that portion of the majority opinion relating to the appropriateness of the missing evidence instruction and the subsequent effect on the award of punitive damages. I do, however, concur with the balance of the majority opinion as to the remaining issues.

The appellant Hospital argues that it was reversible error for the trial court to give a spoliation (missing evidence) instruction and to have allowed testimony concerning a missing postoperative incident report prepared by Nurse Barbara Cantrall following the tragic death of Ms. Beglin. Both parties agree that Cantrall prepared the report as instructed by her superiors and she placed it in the appropriate area for maintenance of hospital records. For unexplained reasons, the postoperative report could not be located. More importantly, no one accuses the Hospital or any agent of intentionally destroying the report or exercising bad faith in making the report unavailable. The Beglin Estate insinuates the Hospital intentionally "lost" the postoperative incident report because it was not happy with the information contained therein. Cantrall was deposed prior to and testified during trial. Further, a perioperative log report prepared by Cantrall contained some of the critical information, including when a blood sample was received from one of the attending physicians.

While the Hospital argues that such an instruction, not premised on any evidence of intentional misconduct or bad faith, created a prejudicial result when the jury considered punitive damages, the Beglin Estate disagrees. The

Hospital further argues that the appellee fails to demonstrate how it was actually prejudiced by the absence of the report.

Alleged errors regarding jury instructions are questions of law and must be examined using a *de novo* standard of review. *Hamilton v. CSX Transportation, Inc.,* 208 S.W.3d 272, 275 (Ky.App. 2006). "Each party to an action is entitled to an instruction upon his theory of the case if there is evidence to sustain it." *Farrington Motors, Inc. v. Fidelity & Cas. Co. of N.Y.,* 303 S.W.2d 319, 321 (Ky. 1957).

In *Drury v. Spalding,* 812 S.W.2d 713, 717 (Ky. 1991), with a quotation from *Prichard v. Kitchen*, 242 S.W.2d 988 (Ky. 1951), the Court held:

> The rule is that generally an erroneous instruction is presumed to be prejudicial to appellant, and the burden is upon appellee to show affirmatively from the record that no prejudice resulted; and when the appellate court cannot determine from the record that the verdict was not influenced by the erroneous instruction, the judgment will be reversed.

Generally, an error in the instructions is grounds for reversal, unless it affirmatively appears that it was not prejudicial.

'Since the early 17th century, courts have admitted evidence tending to show that a party destroyed evidence relevant to the dispute being litigated." *Schmid v. Milwaukee Elec. Tool Corp.*, 13 F.3d 76, 78 (3rd Cir. 1994), *citing* Jamie S. Gorelick, Steven Marzen and Lawrence Solum, *Destruction of Evidence,* § 2.1 (1989). "Such evidence permitted an inference, the 'spoliation inference,'

that the destroyed evidence would have been unfavorable to the position of the offending party." *Id.*

Consistently the appellate courts in Kentucky have limited the application of missing evidence instructions to intentional misconduct or bad faith.

A party seeking an adverse-inference instruction or other sanctions for the spoliation of evidence must establish the following elements:

(1) that the party having control over the evidence had an obligation to preserve it at the time it was destroyed;

(2) that the records were destroyed with a culpable state of mind; and

(3) that the destroyed evidence was relevant to the party's claim or defense such that a reasonable trier of fact could find that it would support that claim or defense.

Accordingly, an instruction regarding spoliation of evidence is proper when a party has "*deliberately destroyed evidence or has failed to either produce relevant evidence or explain its nonproduction*." 75A Am. Jur. 2d *Trial* § 1100 (2007) (emphasis added). To be entitled to a jury instruction on lost or destroyed evidence, a defendant must show that the lost or destroyed evidence would have played a significant role in his or her defense and that comparable evidence could not be obtained elsewhere. To play a significant role, the exculpatory nature and value of the evidence must be apparent before the evidence was lost. *Estep v. Commonwealth*, 64 S.W.3d 805, 810 (Ky. 2002).

A defendant's right to an instruction "permitting the jury to draw a favorable inference for the defendant from the destruction of [exculpatory] evidence" was recognized by the Kentucky Supreme Court in *Sanborn v. Commonwealth*, 754 S.W.2d 534, 540 (Ky. 1988), *overruled on other grounds by Hudson v. Commonwealth*, 202 S.W.3d 17, 22 (Ky. 2006). Further, "absent some degree of bad faith a defendant is not entitled to an instruction that the jury may draw an adverse inference from the failure to preserve or collect any evidence." *Peak v. Commonwealth*, 197 S.W.3d 536, 545 (Ky. 2006).

While the missing evidence instruction has its origins in criminal law, our courts have applied the same standards to civil cases as well. *See Monsanto Co. v. Reed*, 950 S.W.2d 811, 815 (Ky. 1997).

In making the determination of whether to give these instructions, trial courts should decide if the failure to produce the evidence "will substantially prejudice appellant's right to fair trial." *Tinsley v. Jackson*, 771 S.W.2d 331, 332 (Ky. 1989). However, before a "missing evidence" instruction can be given, there must be some intentional conduct to hinder discovery on the part of the party who is unable to produce the requested evidence. *Estep, supra*.

> The Sixth Circuit has defined spoliation of evidence as "the *intentional* destruction of evidence that is presumed to be unfavorable to the party responsible for the destruction." *Beck v. Haik*, 377 F.3d 624, 641 (6th Cir. 2004) (emphasis added).

Clearly the Hospital should have preserved the postoperative report. For unexplained reasons, it was lost or destroyed.

The appellant's request for a missing evidence instruction was based upon the supposition alone that the postoperative report must have contained damaging information that the Hospital desired to withhold. There is no testimony to support that supposition. If the intent of such an instruction is to punish conduct such as intentional destruction of evidence or to fail to preserve such evidence, the remedy would not be appropriate under these circumstances. The appellee does not show by any affirmative evidence the information contained on the postoperative form could not be obtained from any other source. To the contrary, the perioperative log report and Cantrall's testimony supported the appellee's contention that the blood sample had not been submitted in a timely manner. While I do not agree with the Hospital that the punitive damages award was excessive, I cannot find that the supposition the Hospital intentionally destroyed the postoperative record had no influence on the award.

For these reasons, I would reverse the judgment of the trial court and remand this matter for a new trial.

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