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Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-000856-MR
AND
NO. 2017-CA-000884-MR

LOUISVILLE SW HOTEL, LLC
AND LTS HOSPITALITY
MANAGEMENT, LLC — APPELLANTS/CROSS-APPELLEES

APPEAL AND CROSS-APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE ANGELA MCCORMICK BISIG, JUDGE
ACTION NO. 14-CI-003303

CHARLESTINE LINDSEY, INDIVIDUALLY;
CHARLESTINE LINDSEY, AS ADMINISTRATRIX
OF THE ESTATE OF CHANCE BROOKS, A MINOR
AND STEVEN BROOKS, JR. — APPELLEES/CROSS-APPELLANTS

OPINION
AFFIRMING AS TO THE APPEAL AND
REVERSING AND REMANDING AS TO THE CROSS-APPEAL

** ** ** ** **

BEFORE: COMBS, LAMBERT AND K. THOMPSON, JUDGES.

THOMPSON, K., JUDGE: Charlestine Lindsey, individually as the natural mother and guardian of Chance Brooks; Charlestine Lindsey, as the Administratrix

of the Estate of Chance Brooks, a minor; and Steven Brooks, Jr., individually as the natural father of Chance Brooks (collectively "the Estate") filed this action against Louisville SW Hotel, and LTS Hospitality Management, LLC for the wrongful death of Chance and for loss of consortium after Chance drowned in the pool at the Comfort Inn located on Dixie Highway in Louisville, Kentucky. Louisville SW Hotel is the owner of the Comfort Inn and LTS Hospitality Management manages and operates the hotel. For convenience, we refer to those entities as the "Comfort Inn." Following the entry of a judgment after a jury verdict, Comfort Inn appealed and the Estate cross-appealed.

Comfort Inn presents the following issues: (1) whether the trial court improperly admitted evidence of the Louisville Metro Health Department's inspection reports generated over a two-year period noting violations of pool maintenance by the Comfort Inn; (2) whether the Estate was improperly permitted to seek recovery of the full amount of Chance's medical bills when a reduced amount paid by Medicaid satisfied the amount owed; (3) whether evidence of the Comfort Inn's revenue and expenses in the two months preceding Chance's drowning was improperly introduced; (4) whether the jury was improperly instructed as to the duty owed to Charlestine and Chance; (5) whether there was

clear and convincing evidence to support a punitive damages award; and (6) whether the trial court should have further reduced the punitive damages award.[1]

On cross-appeal, the Estate presents the following issues: (1) whether the trial court erred in not granting its motion for a new trial based on the jury's award of zero damages for Chance's power to labor and earn money, zero damages for Chance's physical pain and suffering, and zero damages loss of consortium to Charlestine and Steven; and (2) whether the trial court erred in reducing the punitive damages awarded.

We conclude the jury's award of zero damages for Chance's power to labor and earn money, zero damages for Chance's pain and suffering and zero damages for loss of consortium requires a new trial on those issues. After retrial, the trial court is instructed to reconsider the remitter of punitive damages based on the ratio of compensatory damages to the $3 million in punitive damages awarded. As to all other issues presented, we affirm.

On March 15, 2014, Charlestine, Chance and four other children arrived at the Comfort Inn to celebrate the birthday of Moses Lindsey's child. Moses, who was a registered guest at the hotel, also took five children with her to

[1] The issues are presented in different order than presented by the parties. We address them in the order stated for ease of reading this opinion.

the hotel. The ten children brought to the hotel by the two women ranged in age from six months to twelve years.

Moses testified that when she arrived at the hotel, the only non-custodial staff on duty was the front desk clerk, Luke Hansen. She testified the lobby was busy with other guests checking in and attending other parties. When Moses checked in, most of the hotel's eighty-five rooms were booked.

Moses checked in with the five children she brought but was never advised by Hansen that there was any group party policy regarding the use of the pool. A short time later, Charlestine arrived through the hotel's front door with the five children she brought to the party. She and the children walked past Hansen who did not comment on the group's size breaking any hotel policy regarding the number of party guests. After calling Moses from the lobby, the two groups met and Charlestine and Moses assisted the children in getting dressed to swim and departed to the pool.

Charlestine testified that she was aware no lifeguard was on duty. She instructed Chance to stay in the shallow end of the pool.

At some point, Moses returned to her room with the six-month-old baby leaving Charlestine at the pool with the other nine children. Charlestine was in the hot tub with three of the younger children while the other six children, including Chance, were in the pool.

While Charlestine was in the hot tub, Chance got out of the pool at the shallow end, walked to the deeper end, and entered the pool. The water was over his head at 4.8" inches deep. A surveillance video shows Chance immediately go into distress upon entering the deeper end of the pool and after a minute, go under water and not resurface. Charlestine did not see Chance get out of the shallow end of the pool, did not see him enter the deeper end of the pool, or see him in distress.

Soon after Chance submerged, Charlestine began to gather the children to join Moses for dinner. She testified she looked into the pool but, because of the cloudy pool water, did not see Chance's body at the bottom. She then went to Moses's hotel room. Upon realizing Chance was not in the room, Charlestine returned to the pool and circled the pool looking directly into the water while standing poolside. Charlestine testified that the cloudy water prevented her from seeing Chance's body.

Charlestine testified she realized Chance was submerged in the pool only after Chance's brother felt Chance's body underwater and alerted her. Charlestine entered the pool, went underwater with her eyes open, and searched for her missing son. Charlestine testified that despite she was only feet away from Chance's body, she was unable to see him because of the water's cloudiness.

Approximately eleven minutes after going under water, Chance was pulled from the pool unconscious. He was taken to the hospital where he remained

on life support until his death on March 28, 2014. This action was filed on June 20, 2014.

At trial, the Estate maintained that the Comfort Inn was grossly negligent in permitting the pool to be overcrowded, maintaining the pool in such a condition that its cloudiness prevented Chance's body from earlier discovery and resuscitation, and having inadequate staff on duty on the date Chance drowned.

The Estate introduced eight reports generated by the Louisville Metro Health Department noting violations committed by the Comfort Inn for not performing chemical testing or logging those tests as required by the Health Department in the two years prior to Chance's drowning. The reports advised the Comfort Inn that the items marked as violations are considered violations of Kentucky Revised Statutes (KRS) 211.180 and 902 Kentucky Administrative Regulations (KAR) 10:120 and must be corrected within ten days or further action would be taken. Seven of those violations occurred between April 2010 and March 2012. In March 2012, the Health Department conducted an administrative conference with the Comfort Inn to address issues relating to pool chemical logging and testing. The last Health Department report regarding chemical testing and logging occurred on May 24, 2013, just ten months prior to this incident.

Tim Wilder, the Louisville Metro Health Department's Environmental Health Supervisor, testified logging and testing pool chemicals multiple times per

day is highly important to pool safety. According to his testimony, testing and logging the pool water chemicals assist the pool operator to adapt for higher bather loads as more people in the pool require additional chemicals to keep the pool water safe and the water clear. He testified the lack of testing and logging by the Comfort Inn was particularly troublesome because the hotel used a tiny video monitor to track bather load. The Comfort Inn's pool safety expert as well as the Estate's testified that in regard to pool safety, regulatory code compliance is the bare minimum standard of care.

John Lott, the owner of LTS Hospitality Management, LLC, and Hansen testified that the Health Department warnings and directions to the hotel regarding pool maintenance were not communicated up or down the chain of supervision. Lott testified that although he was to be notified of problems with pool inspections, he was only notified of any problem when the Comfort Inn's general manager, Randy Murdock, notified him that the Health Department called in Murdock for an administrative conference in March 2012.

The Comfort Inn's log showed during the week Chance drowned, its staff tested and logged pool chemicals each day two times (except on the day of the drowning it was done only once because the pool was closed after Chance drowned). That testing was not in compliance with the Health Department's testing requirements pursuant to 902 KAR 10:120.

Murdock testified that when he went into the pool area on the evening of the drowning, he noticed the water was cloudy. Health Department investigator, Ann Wethington, testified that when she inspected the pool water two days after the drowning, the main drain was barely visible because of the cloudy water. Wethington confirmed that Louisville Metro Health Department policy was that the main drain of a pool be clearly visible.

The jury viewed the surveillance video recording of the pool on the date of Chance's drowning. Although the quality was not optimal, the jury could see Chance enter the pool and struggle to stay afloat. The jury could also see children swim next to Chance's body in what appeared to be cloudy water unaware he was underwater and his loved ones searching for him unable to see Chance at the bottom of the pool. It also showed that at one time, more than five bathers were in the pool.

The Comfort Inn was responsible for enforcing the Health Department's 2-5 rule, which allows no less than two bathers, and no more than five bathers in the pool at one time without the presence of a qualified pool attendant or life guard. The rule was posted in the pool area. Swimmers and pool operators are subject to a $100 fine for violation of the rule.

To enforce that rule at the Comfort Inn, the front desk clerk monitored the number of bathers in the pool from a small monitor located at the hotel's front

desk displaying sixteen different security footage channels. Only one of those channels displayed the pool in an area approximately five inches wide. Hansen testified he did not know how many bathers were in the pool when Chance went underwater.

Dr. Jerome H. Modell, a Florida physician specializing in anesthesiology and intensive-care medicine, testified on the Estate's behalf as a drowning expert. In 1971, he authored a book titled "The Pathophysiology and Treatment of Drowning and Near-Drowning" and has treated more than 100 near-drowning adult victims in his clinical practice. Dr. Modell also relied on an article written by Dr. Lowson who was shipwrecked in the early 1900's and almost drowned. In his article, Dr. Lowson described what occurred to him physically when submerged.

Dr. Modell testified that a drowning victim suffers "great pain" in the chest which increases with each effort of expiration and inspiration. However, he did not offer any testimony regarding studies or accounts of a five-year-old child submerged underwater or the time it takes for that child to lose consciousness. He did testify that if Chance's body was earlier discovered, he would have had a strong chance for resuscitation and survival.

Sara Ford testified as a vocational economics expert on behalf of the Estate. She testified that based on familial data and vocational economic statistical

analysis, Chance's lifetime earning capacity was between $1,890,874 with a high school diploma and $3,770,805, with a bachelor's degree. The Comfort Inn offered no evidence as to Chance's employment or earnings prospects.

The trial court denied the Comfort Inn's motion *in limine* to exclude testimony or evidence that the Estate incurred past medical expenses over $24,284.15, the amount paid by Medicaid. The remaining medical expenses billed, $181,395.10, was written off by Medicaid. The trial court denied the motion and permitted the Estate to admit a summary of Chance's medical expenses and to seek the full $205,579.25 from the jury.

The Comfort Inn also filed a motion *in limine* to prohibit and exclude any evidence or testimony regarding its financial records. The trial court denied the motion. At trial, the Estate was permitted to introduce financial records of the Comfort Inn from two months before Chance drowned. Lott testified that it was procedure for him to consider growth trends when staffing the hotel and that the hotel experienced a growth trend for 40% from the months of January to February 2014. Lott confirmed that there was increased convention traffic in March 2014. Evidence was also introduced that Murdock received a bonus for the year preceding the drowning based on the hotel's increased revenues.

At the close of the evidence, the Comfort Inn moved for a directed verdict on the issue of punitive damages. The trial court denied the motion.

The Comfort Inn requested the jury be instructed that the Comfort Inn owed Chance and Charlestine the duty of care owed by a property owner to a trespasser. The trial court rejected that instruction and instead gave an instruction explaining the duty of care a property owner owes to a business invitee.

The jury apportioned fault 65% to Charlestine and 35% to Comfort Inn. It awarded $205,579.25 in medical expenses and $6,191 in funeral expenses. The jury awarded zero damages for Chance's power to labor and earn money and pain and suffering. The jury also awarded zero damages for loss of consortium to either Charlestine or Steven. Finally, the jury awarded $3 million in punitive damages against the Comfort Inn.

Following the jury's verdict, both parties filed post-trial motions for judgment notwithstanding the verdict (JNOV). The Comfort Inn moved for JNOV on punitive damages based on a lack of evidence to support the award or to have the punitive damages award set aside as unconstitutional. Alternatively, it sought remittitur based on the discrepancy between the compensatory damages award and the punitive damages award or a new trial. The Estate sought a new trial on the elements of compensatory damages for which the jury awarded zero dollars.

The trial court denied the motions for a new trial but granted the Comfort Inn's request for remittitur and reduced the punitive damages award to $1,058,851.25. This appeal and cross-appeal followed.

THE COMFORT INN'S APPEAL

We first address the evidentiary issues presented by the Comfort Inn's appeal. Our standard of review under the Kentucky Rules of Evidence (KRE) is whether the trial court abused its discretion. *Goodyear Tire & Rubber Co. v. Thompson*, 11 S.W.3d 575, 578 (Ky. 2000).

The Comfort Inn argues that the trial court improperly admitted the Louisville Metro Health Department reports. It argues the reports were evidence of prior bad acts that were inadmissible under the KRE.

KRE 401 requires that any evidence admitted at trial be relevant in that is has a "tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." KRE 402 provides that "[e]vidence which is not relevant is not admissible." Even if relevant, evidence is not admissible "if its probative value is substantially outweighed by the danger of undue prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence." KRE 403.

Under established case law, "evidence of prior negligent acts or customary practices, offered solely in an attempt to prove negligence on a different occasion, is inadmissible as it offers very little probative value and presents a potential for confusion of the issues." *Davis v. Fischer Single Family Homes, Ltd.*,

231 S.W.3d 767, 777 (Ky.App. 2007). However, the rule is a general one and with all general rules, there are exceptions.

> KRE 404(b) provides in part:
>
> > Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible:
> >
> > (1) If offered for some other purpose, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident[.]

"Although KRE 404(b) usually is cited in the context of a criminal case, it applies to civil cases as well." *Kentucky Farm Bureau Mut. Ins. Co. v. Rodgers*, 179 S.W.3d 815, 819 (Ky. 2005). Under KRE 404(b), evidence of prior bad acts is admissible if it is relevant, probative and its probative value is not outweighed by its prejudicial effect. *Id*. at 819-20.

Discussing the admission of prior bad acts to establish conduct sufficient for the award of punitive damages under the due process clause of the Fourteenth Amendment, the United States Supreme Court explained as follows:

> *A defendant's dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages.* A defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business.
> ...
>
> Although our holdings that a recidivist may be punished more severely than a first offender recognize that

> repeated misconduct is more reprehensible than an individual instance of malfeasance ..., in the context of civil actions *courts must ensure the conduct in question replicates the prior transgressions*.

State Farm Mutual Automobile Insurance Co. v. Campbell, 538 U.S. 408, 422-23, 123 S.Ct. 1513, 1523, 155 L.Ed.2d 585 (2003) (internal citations and quotations omitted) (emphasis added). In *Rodgers*, the Court noted that the requirement in *Campbell* that the "present conduct replicates the prior transgressions" mirrors our requirements under KRE 404(b) for evidence of prior negligent acts to be admissible. *Rodgers*, 179 S.W.3d at 819. However, the *Rodgers* Court explained '"'strikingly similar' does not necessarily mean 'identical.'" *Id*.

The Health Department reports pass the initial requirement of similarity to the misconduct that the Estate alleges against the Comfort Inn. The reports documented that the Comfort Inn was in violation of the Department's requirements for chemical testing of the pool water and logging procedures, the same misconduct alleged by the Estate to have occurred on the day Chance drowned.

Those same reports are relevant to punitive damages. Wanton or reckless disregard for the lives, safety or property of others often involves determining whether the defendant knew his conduct might be harmful to others or the property of others. The reports were highly probative of the Comfort Inn's

knowledge of the need for and importance of testing the pool water and keeping the required logs and its reckless disregard of such safety measures.

The Comfort Inn argues the Health Department's inspection reports were too remote in time to be relevant to the condition of the pool water on the day of Chance's drowning and were unduly prejudicial. "The test as to remoteness is that if the offered evidence is so remote as to have no probative value it should be excluded but if it is relevant and has some degree of probative value, however small, it is admissible, and its weight is for the jury." *Caton v. McGill*, 488 S.W.2d 345, 346 (Ky. 1972). Here, the Health Department's inspection records were all made within two years of Chance's drowning, the last report being generated just ten months prior to his drowning. While not conclusively establishing that the pool water was cloudy on the day Chance drowned, to be relevant, evidence must only raise a fair inference that the pool water was cloudy on that day and the Comfort Inn's knowledge that its testing and logging practices were inadequate. *See Shewmaker v. Richeson*, 344 S.W.2d 802, 805 (Ky. 1961).

We are unpersuaded by the Comfort Inn's argument that the Health Department's reports were unduly prejudicial. No doubt those reports did not further the Comfort Inn's defense that the pool was properly maintained on the day Chance drowned or was an isolated violation. However, the question is not whether there was prejudice, but whether the probative value of those reports was

substantially outweighed by its prejudicial effect. *Rodgers*, 179 S.W.3d at 820. In other words, the prejudice must be unfair and not merely adverse to the opposing parties position at trial. There was nothing unfair about the admission of the reports.

The Comfort Inn argues that the trial court erred when it permitted the Estate to seek recovery of the full amount of medical bills when Medicaid paid only a fraction of the total amount billed and the remaining part was written off. It points out that the amount awarded was not actually paid by anyone because Medicaid paid only $24,184.15 of the total amount. The collateral source rule precludes the Comfort Inn's argument.

"The collateral source rule provides that benefits received by an injured party for his injuries from a source wholly independent of, and collateral to, the tortfeasor will not be deducted from or diminish the damages otherwise recoverable from the tortfeasor." *Schwartz v. Hasty*, 175 S.W.3d 621, 626 (Ky.App. 2005). It "is an exception to the rule against double recovery" in tort actions. *Id*. at 625.

In *Baptist Healthcare Systems, Inc. v. Miller*, 177 S.W.3d 676 (Ky. 2005), the Court concluded that Medicare benefits are governed by the collateral source rule and are treated the same as other types of medical insurance. The plaintiff is allowed to "(1) seek recovery for the reasonable value of medical

services for an injury, and (2) seek recovery for the reasonable value of medical services without consideration of insurance payments made to the injured party." *Id*. at 682. The Court ruled "[i]t is improper to reduce a plaintiff's damages by payments for medical treatment under a health insurance policy if the premiums were paid by the plaintiff or a third party other than the tortfeasor." *Id.*

The value of the medical services rendered to Chance was the amount billed by the medical provider, $205,579.25. The Comfort Inn argues that the collateral source rule should not apply because the Estate received a windfall from the medical expenses awarded. It contends *Baptist Healthcare Systems, Inc*. is distinguishable because it involved payment from Medicare, for which a premium was paid, not Medicaid for which no premium was paid.

The Court in *Baptist Healthcare Systems, Inc*. was clear that application of the collateral source rule was proper without concern for any windfall to the plaintiff. Instead, the Court focused on the benefit that the tortfeasor would receive if medical expenses were reduced by the payment made by Medicare reasoning as follows:

> [I]t is absurd to suggest that the tortfeasor should receive a benefit from a contractual arrangement between Medicare and the health care provider. Simply because Medicare contracted with [the plaintiff's] physician to provide care at a rate below usual fees does not relieve a tortfeasor from negligence or the duty to pay the reasonable value of [the plaintiff's] medical expenses. Therefore, we hold that evidence of collateral source

> payments or contractual allowances was properly withheld from the jury *and her award of medical expenses was proper*.

Id. at 683-84 (emphasis added).

Although the Comfort Inn attempts to distinguish Medicare and Medicaid payments on the basis that no premiums were paid for Medicaid, recently this Court rejected the same argument. In *City of Nicholasville Police Dep't v. Abraham*, 565 S.W.3d 639 (Ky.App. 2018), the plaintiffs introduced evidence of medical expenses of approximately $600,000. The trial court precluded the defendants from introducing evidence that Medicaid paid slightly more than twenty percent, with much of the remainder having been discounted or written off. *Id*. at 646. We affirmed, holding that the reasoning for the application of the collateral source rule in that instance was the same as given in *Baptist Health Care Systems, Inc*. *Id*. at 647. The tortfeasor should not get a break from paying medical expenses for which he is otherwise responsible merely because the injured party was a poor person. *Id*.

The final evidentiary issue is whether the trial court erred when it admitted the Comfort Inn's financial records. At trial, the Estate introduced financial records about revenues in the months before Chance drowned as well as Murdock's bonus received in the prior year based on the hotel's increased revenues. It did so when cross-examining Lott, who testified that occupancy at the

hotel is a factor considered when determining the number of hotel staff for the pool. He confirmed that the hotel experienced a growth trend of 40% from January to February 2014. He also confirmed that there was substantial convention traffic in March 2014.

For almost one hundred years, it has been the rule in Kentucky "that in an action for punitive damages, the parties may not present evidence or otherwise advise the jury of the financial condition of either side of the litigation." *Hardaway Mgmt. Co. v. Southerland*, 977 S.W.2d 910, 916 (Ky. 1998). The presentation of the defendant's financial condition is disfavored because of potential bias a jury might have against big businesses and the possibility that the jury would be led to focus on the financial worth of the defendant rather than the culpability of the defendant's conduct. *Sand Hill Energy, Inc. v. Smith*, 142 S.W.3d 153, 167 (Ky. 2004). Kentucky's punitive damage statute, KRS 411.186, does not alter this rule though it "would permit evidence of the extent to which the defendant profited from the wrongful act, itself." *Hardaway Mgmt. Co.*, 977 S.W.2d at 916 n.2.

The Estate argues that the evidence of the Comfort Inn's revenue and expenses for the months immediately preceding Chance's drowning was not to inform the jury of the Comfort Inn's financial condition but to show a need for increased staffing. We agree.

The danger of bias in informing a jury of a business's over-all financial condition without context to liability did not exist. The jury was only given a snapshot of the revenue generated by the Comfort Inn for the months immediately preceding Chance's drowning that, in turn, established the occupancy of the hotel for that period. According to Lott's testimony, the occupancy of the hotel was a factor in considering the staff required to maintain pool safety. The evidence tended to prove that just prior to Chance's drowning, the hotel had an increased occupancy level and the Comfort Inn should have foreseen on the day of the drowning that additional staff would be needed to maintain the pool and supervise bather safety. We conclude that the trial court did not abuse its discretion.

Having resolved the evidentiary issues, we address the Comfort Inn's argument regarding the jury instruction defining the duty owed to Chance and Charlestine. It is undisputed that Moses was a registered guest at the Comfort Inn and Charlestine was not. The Comfort Inn maintains the jury should have been instructed that Charlestine and Chance were trespassers and its duty to them was only to refrain from inflicting or exposing Chance to wanton or willful injury or from setting a trap for him. It points out that pool use was restricted to registered guests only. This argument is not well taken.

The error raised concerns the trial court's failure to give an instruction that was allegedly required by the evidence. "[T]he trial judge's superior view of that evidence warrants a measure of deference from appellate courts that is reflected in the abuse of discretion standard." *Sargent v. Shaffer*, 467 S.W.3d 198, 203 (Ky. 2015).

The trial court instructed the jury as follows:

> You will find for the Plaintiffs if you are satisfied from the evidence as follows:
>
> (a) That although Chance and Charlestine Lindsey were not registered guests, the Comfort Inn desk clerk should have reasonably anticipated that they would use the pool with one or more of the other guests;
>
> (b) That the swimming pool was in a defective condition;
>
> (c) That such defect was a substantial factor in causing the drowning;
>
> (d) That the Defendants and their employees in the exercise of ordinary care should have discovered such defect in time to prevent the accident.

In *City of Madisonville v. Poole*, 249 S.W.2d 133 (Ky. 1952), the Court addressed whether the duty owed to a guest of a business invitee extends to a guest of that invitee. It concluded that the business owes the same duties to a registered guest's visitor as owed to the registered guest. *Id*. at 135. This is so even if the injury to the guest of an invitee occurs at a place not covered by the

invitation if the injury occurred in a place that patrons or invitees could reasonably be anticipated to go. *Id*. at 136.

Moses was a registered guest at the Comfort Inn and Charlestine and Chance were invited guests to the party she hosted. On the day of Chance's drowning, there were multiple parties at the hotel. The use of the pool by guests attending those parties should have been reasonably anticipated by the Comfort Inn. The trial court did not abuse its discretion when it rejected the Comfort Inn's tendered jury instruction.

The Comfort Inn argues that the evidence was insufficient to support an award for punitive damages and, therefore, the trial court erroneously denied its motion for a directed verdict on the issue of punitive damages and motion for judgment notwithstanding the verdict (JNOV).

When reviewing a ruling denying a motion for directed verdict or JNOV, "[a]ll evidence which favors the prevailing party must be taken as true and the reviewing court is not at liberty to determine credibility or the weight which should be given to the evidence, these being functions reserved to the trier of fact. We may not disturb the trial court's ruling unless the decision is clearly erroneous." *Insight Kentucky Partners II, L.P. v. Preferred Auto. Servs., Inc.*, 514 S.W.3d 537, 546 (Ky.App. 2016).

"[Punitive damages] are given to the plaintiff over and above the full compensation for his injuries, for the purpose of punishing the defendant, of teaching him not to [commit the wrongdoing] again, and of deterring others from following his example." *Hensley v. Paul Miller Ford, Inc.*, 508 S.W.2d 759, 762 (Ky. 1974) (quoting Prosser, *Law of Torts* § 2 (4th Ed.)). To award punitive damages, the fact-finder must first find a failure to exercise reasonable care, and then make an additional finding that the defendants conduct was grossly negligent. *Gibson v. Fuel Transport, Inc.*, 410 S.W.3d 56, 59 (Ky. 2013). Gross negligence is a "wanton or reckless disregard for the lives, safety, or property of others." *Id.* (quoting *Horton v. Union Light, Heat & Power Co.*, 690 S.W.2d 382, 389-90 (Ky. 1985)). Properly, the trial court instructed the jury it could award punitive damages if it found that Comfort Inn acted in reckless disregard for the lives, safety or property of others, including Chance.

A jury is not required to find reckless disregard from an isolated act but may consider the totality of the defendant's acts. Although a "single act of negligence might not constitute gross negligence, gross negligence may result from the several acts." *Horton*, 690 S.W.2d at 388 (quoting *Brown v. Riner*, 500 P.2d 524, 528 (Wyo.1972)). Gross negligence may be based, at least in part, upon evidence regarding the policies and procedures of the company. *Id.* We conclude that under the proper standard of review and the legal standards to establish

punitive damages, the trial court properly denied the Comfort Inn's motions for directed verdict and JNOV.

Even after knowing the chemical testing procedures required by the Health Department, the safety risks of cloudy pools and aware of its duty to enforce the 2-5 rule, the Comfort Inn violated those very rules on the day of Chance's drowning. Moreover, there was evidence the Comfort Inn had no pool maintenance personnel on staff for a period of two months before the day of Chance's drowning despite having staffing policies based on anticipated occupancy which had increased just months prior to Chance's drowning. There was further evidence that the Health Department's repeated warnings and directions to the hotel regarding pool maintenance were never reported to staff so that the violations could be corrected. The jury could reasonably conclude the Comfort Inn knew that the pool was so abysmally cloudy on the day Chance drowned that it was foreseeable that swimmers near a body on the bottom of the pool and those searching for a missing child would be unable to see his body. The evidence was such that this Court is unable to say that the jury's finding that the Comfort Inn was grossly negligent was the result of passion or prejudice.[2]

[2] Although it might seem appropriate to at this point discuss the parties' respective arguments as to the amount of punitive damages awarded, we leave that issue for later.

THE ESTATE'S CROSS-APPEAL

The Estate raises three issues pertaining to inadequacy of the compensatory damages award. First, it claims it is entitled to a new trial on the issue of loss of power to labor and earn wages for which the jury awarded zero damages. With the benefit of binding precedent, the Estate argues that there is an inference that Chance, a five-year-old boy with no disabling condition at the time of his drowning, had some destruction of power to labor and earn money.

Kentucky Rules of Civil Procedure (CR) 59.01(d) permits the grant of a new trial if excessive or inadequate damages appear "to have been given under the influence of passion or prejudice or in disregard of the evidence or the instructions of the court." A "proper ruling on a motion for new trial depends to a great extent upon factors which may not readily appear in an appellate record. Only if the appellate court concludes that the trial court's order was *clearly erroneous* may it reverse." *Turfway Park Racing Ass'n v. Griffin*, 834 S.W.2d 667, 669 (Ky. 1992) (emphasis added). The decision of the trial court is afforded great deference. *Bayless v. Boyer*, 180 S.W.3d 439, 444 (Ky. 2005).

In wrongful death cases, damages for destruction of a child's earning capacity has never required proof of the child's earning power. As observed in *Rice v. Rizk*, 453 S.W.2d 732, 735 (Ky.App. 1970), "[t]o require such proof would be to deny damages in the instant case, as well as in all similar wrongful,

negligent death cases involving infants." There exists "an inference that the child would have had some earning power, and in this lies the basis for recovery." *Id*.

The Court expanded further on *Rice* in *Turfway*, where a four-year-old child fell to his death from a stairwell at the Turfway Park racetrack. Although the trial court instructed the jury it was authorized to award damages for the destruction of the child's power to labor and earn money, the jury returned a verdict of zero damages.

The Supreme Court held that in a wrongful death case, there is an inference of some loss of the child's power to earn money. The Court distinguished zero verdicts in personal injury actions for the loss of power to labor and earn money and those in wrongful death actions:

> There is a fundamental and undeniable difference between personal injury cases and wrongful death cases. In the former, whether and to what extent a plaintiff has sustained injury may, in many cases, contain a measure of uncertainty, while in the latter, there is none. The death of a person results in an irrevocable cessation of possibility and what might be a reasonable analysis by the jury in an injury case simply has no application when death has occurred.

Turfway, 834 S.W.2d at 670. The Court held that "damages flow naturally from the wrongful death of a person unless there is evidence from which the jury could

reasonably believe that the decedent possessed no power to earn money." *Id*. at 671.

In *Turfway*, "there was no evidence that the decedent was other than a normal four-year-old boy and certainly no evidence of a disability so profound as to render him incapable of earning money upon reaching adulthood." *Id*. The Court held "the trial court was clearly erroneous in overruling the motion for a new trial[.]" *Id*. In *Aull v. Houston*, 345 S.W.3d 232 (Ky.App. 2010), this Court applied *Turfway* but reached a different result.

Aull involved the alleged wrongful death of a child who received immunizations at the age of five which allegedly caused his death. Notably, the child had earlier been diagnosed with a disabling condition with a poor prognosis. The trial court granted a partial summary judgment ruling that damages could not be recovered for the destruction of power to earn money because the evidence was undisputed that the child was incapable of ever earning money from his own labor. *Id*. at 234. This Court affirmed holding "the inference that [the child], someday, would have the ability to 'earn' money is simply, and sadly, unreasonable. It was not error for the trial court to conclude that [the child] was unable to earn money" by his own labor. *Id*.

The same distinction cannot be made in this case. Prior to his drowning, Chance was a healthy five-year-old boy with no indication of any disability that would prevent him from earning wages during his lifetime.

The Comfort Inn argues that instead of the inference required in *Turfway*, the jury could infer from his father's lack of education and employment history, Chance would not labor and earn money in his life. This same argument has been soundly rejected.

In *Reffitt v. Hajjar*, 892 S.W.2d 599 (Ky.App. 1994), evidence was produced of the parents' criminal history and lack of employment history. As noted by the Court, the defendant relied "on the old cliché: the apples don't fall far from the tree." *Id*. at 602. The Court used strong language in rejecting the defendant's argument stating: "The jury was seduced by [the defendant's] argument that [the child] would never amount to anything because of his parents' values and life style, we find this argument repugnant as a matter of law and offensive to cherished, although oft fanciful, principles upon which our society is based." *Id*. at 603. The same argument is no less repugnant and offensive today.

The Comfort Inn also argues the jury's verdict must be upheld because it could have reasonably denied damages for destruction of Chance's power to labor and earn money because had he survived, Chance would have suffered brain damage depriving him of the power to labor and earn money. While

that may or not be true, it is not an argument that requires lengthy discussion. Chance did not survive and, therefore, the Comfort Inn's theory based on his hypothetical survival is irrelevant.

Equally unavailing is the Comfort Inn's attempt to avoid liability for destruction of Chance's power to earn money because of the 65% fault apportioned to Charlestine. That fact would not deprive Chance's estate of any such damages but would only require that the Comfort Inn be liable for only 35% of that amount. We conclude that the trial court's acceptance of the Comfort Inn's arguments was clear error.

In accordance with *Turfway*, the zero award for destruction of Chance's power to labor and earn money requires a new trial on that issue. The trial court is instructed to follow the directions and jury instructions given in *Turfway*. *Turfway*, 834 S.W.2d at 672-73. In accordance with those directions, the jury is not required to return a verdict within the parameters stated by any expert on the matter, but the jury must return some amount for the destruction of Chance's power to labor and earn money.

The jury also awarded zero damages for Chance's pain and suffering. In Kentucky, a jury verdict of zero damages for pain and suffering is not inadequate as a matter of law where a jury awards damages for medical expenses. "The law in Kentucky . . . does not require a jury to award damages for pain and

suffering in every case in which it awards medical expenses." *Miller v. Swift,* 42 S.W.3d 599, 601 (Ky. 2001). More recently, the Supreme Court stated that "the general principle advanced in *Miller*—that a zero verdict for pain and suffering may sometimes be appropriate—is not constrained to the facts of that case. Rather, that principle is broadly applicable to cases which claim this type of error." *Bayless,* 180 S.W.3d at 444-45 (internal footnote omitted). Damages for pain and suffering are recoverable only "where there is substantial evidence establishing that pain and suffering actually occurred." *Worldwide Equip., Inc. v. Mullins,* 11 S.W.3d 50, 61 (Ky.App. 1999). If death was instantaneous after the injury or if the victim was unconscious until death, such damages are improper. *Vitale v. Henchey,* 24 S.W.3d 651, 659 (Ky. 2000).

Whether pain and suffering damages are recoverable when death is caused by drowning is an issue not consistently decided by appellate courts. As observed in *Fike v. Peters*, 175 Okla. 334, 52 P.2d 700, 703 (1935), at the time of its decision, courts had taken two different approaches to the issue:

> The weight of authority seems to hold that death by drowning is instantaneous, and that pain suffered after submersion and prior to unconsciousness is so intimately connected with the death struggle as to form no proper distinct basis for damages. The Supreme Court of the United States has followed this view and in the case of *Barton v. Brown*, 145 U.S. 335, 12 S.Ct. 949, 953, 36 L.Ed. 727 in a similar case it was stated by the court as follows: "Had she suffered bodily wounds and bruises, from the result of which she lingered, and

> ultimately died, it is possible that her sufferings during her illness would give a separate cause of action; but the very fact that she died by drowning indicates that her sufferings must have been brief, and, in law, a mere incident to her death." Also, see, *St. Louis, I. M. & S. Ry. Co. v. Craft*, 237 U.S. 648, 35 S.Ct. 704, 59 L.Ed. 1160; *Kennedy v. Standard Sugar Refinery*, 125 Mass. 90, 28 Am.Rep. 214; *Tully v. Fitchburg R. Co.*, 134 Mass. 499; *Cobia v. Atlantic Coast Line Ry. Co*., 188 N.C. 487, 125 S.E. 18; *Beach v. St. Joseph*, 192 Mich. 296, 158 N.W. 1045; *Olivier v. Houghton County St. Ry. Co*., 134 Mich. 367, 96 N.W. 434, 104 Am.St.Rep. 607, 3 Ann.Cas. 53; *Cheatham v. Red River Lines* (D.C.) 56 F. 248; *Sherman v. Western Stage Company*, 24 Iowa, 515. In the case of *Cheatham v. Red River Line, supra*, it was held that the struggle and suffering and pain of the drowning person are substantially contemporaneous with death and as a matter of law inseparable from it.

The Court continued and observed that there is a contrary view that "there is no such thing in any case as death happening simultaneously with the injury causing it, and still less in cases of drowning, and that separate recovery and conscious pain and suffering is proper in such cases." *Id*. It noted that view had "been adopted as the law in the states of Arkansas, New Hampshire, and several other states." *Id*.

As observed in David W. Leebron, *Final Moments: Damages for Pain and Suffering Prior to Death*, 64 N.Y.U. L. Rev. 256, 262 (1989), the view that a drowning victim does not suffer pain and suffering is no longer the majority view. "Although courts occasionally cite the principle that plaintiffs cannot recover for pain and suffering in cases of virtually instantaneous death, nearly all

jurisdictions that allow damages for pain and suffering prior to death accept such damages, even for only a second or two of conscious suffering." *Id*. (footnote omitted). Reflecting the modern view, the Court in *DRD Pool Serv., Inc. v. Freed*, 416 Md. 46, 5 A.3d 45 (2010), held that the issue of pain and suffering of a drowning victim should have been submitted to the jury where there was evidence that the victim was conscience when he entered the water and expert testimony that the victim suffered while drowning.[3]

Here, the issue was properly submitted to the jury. The surveillance video showed that Chance was conscious prior to entering the water and struggled to stay afloat. Dr. Modell provided expert testimony describing the suffering of a drowning victim prior to reaching unconsciousness. Although a young child, certainly Chance felt water filling his lungs and, as evidenced by his struggle to stay above the water, was aware that he was drowning. The Comfort Inn did not produce any evidence to contradict Dr. Modell's testimony regarding the physical pain of drowning was equally applicable to a child. We conclude the trial court erred in denying the Estate's motion for a JNOV.

The jury also awarded zero damages for Charlestine's and Steven's loss of consortium claims. Kentucky's wrongful death statute provides: "In a wrongful death action in which the decedent was a minor child, the surviving

[3] The expert in that case was also Dr. Modell.

parent, or parents, may recover for loss of affection and companionship that would have been derived from such child during its minority, in addition to all other elements of the damage usually recoverable in a wrongful death action." KRS 411.135. The question is whether there is an inference that there is an intrinsic value to the parent-child relationship such that a zero award to Charlestine and Steven requires a new trial for the award of some amount for their loss. As a matter of first impression, we answer that question affirmatively.

In *Turfway*, our Supreme Court embraced the notion that a healthy child's life has value as a future wage earner. That same reasoning is applicable and even more logical when applied to the damages that naturally flow when a parent who has an established parental relationship with an infant child, loses that child as result of a third-parties' negligent conduct.

Addressing a zero award to the parents of an infant in a wrongful death action, the Nebraska Court held a new trial was required. *Brandon ex rel. Estate of Brandon v. Cty. of Richardson*, 261 Neb. 636, 664-66, 624 N.W.2d 604, 625-26 (2001). The Court noted that "[w]hen a child is wrongfully killed, a parent's investment in that child of money, affection, guidance, security, and love is destroyed." *Id*. at 664, 624 N.W.2d at 625. The Court held that "[b]ecause the parent-child relationship has intrinsic value, once a parent-child relationship is proved to exist, destruction of that relationship through the wrongful death of the

child entitles the parent, who is the surviving next-of-kin, to damages." *Id*. at 665, 624 N.W.2d at 625.

As with the destruction of the power to labor and earn money, the jury is not required to award a certain sum. "Evidence regarding the quality and extent of the parent-child relationship may . . . be utilized in determining the amount of those damages." *Id*., 624 N.W.2d 625-26. The amount awarded is to be determined by the fact-finder and will not be reversed on appeal unless the result of passion or prejudice. CR 59.01(d).

Charlestine and Steven testified regarding memories with Chance, the emotional pain endured while Chance lingered on life support following the drowning and the loss suffered after his death. Although the Comfort Inn paints a picture of Steven as a less than attentive father, that evidence goes to the amount of damages, not to the entitlement to some damages for his loss.

While Charlestine shares fault with the Comfort Inn for Chance's drowning, that fault does not preclude her recovery. It only requires that any award be apportioned based on her percentage of fault and the Comfort Inn's percentage.

BOTH PARTIES CLAIM ERROR AS TO THE AMOUNT OF PUNITIVE DAMAGES

The Comfort Inn seeks to further reduce the punitive damages award alleging it is constitutionally impermissible while the Estate argues that the

punitive damages award should be reinstated to the $3 million in punitive damages awarded by the jury.

Initially, we note that if there was doubt among Kentucky jurists, our Supreme Court has clarified that "remittitur of a punitive damage award is proper in a case where the facts justify it." *Yung v. Grant Thornton, LLP*, 563 S.W.3d 22, 61-62 (Ky. 2018). A court has the authority and responsibility to reduce a constitutionally excessive punitive damage award. *Id*. at 63.

When analyzing any punitive damages for excessiveness under the due process clause of the United States Constitution, the United States Supreme Court has set forth three guideposts to consider:

> (1) the degree of reprehensibility of the defendant's conduct; (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.

Campbell, 538 U.S. at 418, 123 S.Ct. at 1520.

As stated in *Campbell*, a trial court is required to compare the compensatory damages awarded by the jury to the punitive damages awarded. The trial court did so and concluded that whether the entire amount of the compensatory damages awarded is used or, as the Comfort Inn argues, the amount of compensatory damages after apportionment is used, the ratio is

unconstitutional.[4] Because we are reversing and remanding for a new trial on compensatory damages, the ratio factor will have to be reconsidered by the trial court. Therefore, we do not address the inadequacy, or the excessiveness of the punitive damages awarded by the trial court.

The judgment of the Jefferson Circuit Court is affirmed except to the extent that a new trial is required on the issues of destruction of Chance's power to labor and earn money, Chance's pain and suffering and Charlestine's and Steven's loss of consortium claims. Following that trial, the trial court is instructed to reconsider the punitive damages awarded.

ALL CONCUR.

[4] "In the majority of jurisdictions, direct reduction of a punitive damages award by the plaintiff's percentage of fault is rejected because such reduction is inconsistent with the purposes of punitive damages[.]" *Lira v. Davis*, 832 P.2d 240, 242-43 (Colo. 1992) (citing cases).

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No brief filed.