SUPREME COURT OF KENTUCKY
2009-SC-000289
(CONSOLIDATED WITH 2009-SC-000839)

UNIVERSITY MEDICAL CENTER, INC.
d/b/a UNIVERSITY OF LOUISVILLE HOSPITAL — APPELLANT/CROSS-APPELLEE

v.

MICHAEL G. BEGLIN, EXECUTOR OF THE ESTATE OF J. W. BEGLIN AND M. G. BEGLIN, et al. — APPELLEES/CROSS-APPELLANT

APPEAL FROM
KENTUCKY COURT OF APPEALS
NOS. 2007-CA-000018 AND 2007-CA-000133

BRIEF OF *AMICUS CURIAE,* KENTUCKY CHAMBER OF COMMERCE

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that true and correct copies of this *Amicus Curiae* Brief were served upon F. Thomas Conway, 238 South Fifth St., 18th Floor, Louisville, KY 40202; Chadwick N. Gardner, 239 South Fifth St., Suite 1916, Louisville, KY 40202; Edward H. Stopher, Raymond G. Smith, Boehl Stopher & Graves, LLP, Aegon Center, Suite 2300, 400 W. Market St., Louisville, KY 40202; Honorable Charles L. Cunningham, Jr., Division Four, Jefferson Circuit Court, 700 W. Jefferson St., Louisville, KY 40202 and Samuel P. Givens, Jr., Clerk, Court of Appeals, 360 Democrat Dr., Frankfort, KY 40601, this 26th day of May, 2010.

Virginia Hamilton Snell

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INTRODUCTION

Justice under law hinges on having a properly instructed jury. And, when a trial court submits inflammatory instructions to a jury without any sufficient evidence to support them, it taints the jury and results in a verdict based on speculation and prejudice. This outcome not only undermines the bedrock rule that a record must contain sufficient evidence to warrant a jury instruction, it also ultimately will harm the economy by inviting unfair, runaway punitive verdicts based on speculation rather than evidence, that alarm all employers, just as the award against Appellant here demonstrates.

The Kentucky Chamber of Commerce, therefore, appears as *Amicus Curiae* out of concern that the Court of Appeals has abandoned long-standing evidentiary predicates that must control whether a lower court can instruct a jury on destruction of evidence and an employer's liability for punitive damages. In addressing these two issues, the Chamber asks this Court to uphold traditional principles necessary to a fundamentally fair trial and conclude: First, a trial court cannot instruct the jury on spoliation of evidence absent proof that a defendant intentionally and in bad faith destroyed evidence **and** that the loss of it prejudiced the plaintiff's case; and second, a trial court cannot instruct a jury on punitive damages against an employer under KRS 411.184(3), absent sufficient evidence that the employer "ratified or should have anticipated the conduct in question."

These principles are critical to the Chamber, a nonprofit trade group established to advance business in Kentucky through leadership and consensus building. The Chamber represents the interests of more than 7,000 businesses engaged in diverse commercial, industrial, agricultural, civic and professional

activities throughout Kentucky, which collectively employ more than half of Kentucky's private workforce. As the principal voice of Kentucky employers, the Chamber is genuinely concerned that the Court of Appeals has expanded Kentucky tort law in a manner that unfairly permits verdicts based on speculation rather than fact, to the detriment of Kentucky employers.

When litigating, businesses are typically defendants in civil – especially tort – actions and thus attractive targets of a plaintiff's demand for a spoliation instruction. All business operations involve records, whether paper or electronic and whether in the hundreds or millions, and human beings conduct those operations. Despite every good intention, policy, or effort, records will be lost and go missing for unknown reasons. Call it mistake or oversight. But missing in no way equates to deliberate destruction. A jury therefore should not be allowed to conjecture otherwise. The Court of Appeals' majority opinion at issue in this appeal, however, leaves no effective barrier in the requirement of sufficient evidence before a jury can consider alleged bad faith spoliation. This results in unfairness. While a spoliation instruction is intended to tilt a trial against a party that willfully and in bad faith destroys evidence, the Court of Appeals now has permitted the spoliation instruction to be given where there has been **no** finding that fairness requires the trial to be tilted against a party that acted wrongfully in destroying evidence. Now, a jury hears argument that it should infer that the content of the missing document would be adverse to the party that did not produce the missing document. The jury also receives an instruction from the judge that permits the jury to use the adverse inference. The argument and instruction tilt the trial, leaving the party that is unable to produce a missing

document (which may never have existed in the first place) with the burden to convince the jury not to speculate that the "missing" document would be adverse. This procedure is fundamentally unfair, and encourages jurors to punish based on speculation and argument rather than evidence.

Common sense dictates that upholding the instruction will encourage plaintiffs to wage discovery war to identify any missing document, whether mistakenly lost or immaterial, solely to obtain a spoliation instruction, which could destroy a defendant's credibility.

And, no doubt an eruption of spoliation instructions in tort cases will lead to a concomitant explosion in punitive awards. As defendants in tort actions, employers are more likely to face the spectre of a punitive damage claim. The Chamber is thus troubled that, on top of a spoliation instruction, the Court of Appeals condones punitive damages against an employer when there is no evidence that it could have foreseen an employee's alleged misconduct – no evidence that a similar occurrence had ever happened in the past. Failing to require sufficient evidence of retaliation or prior knowledge of an employee's misconduct will increase the likelihood of unwarranted punitive damages against Kentucky employers, only to be worsened by an instruction on destruction of evidence.

Any change in the law that inflames juries and renders punitive damages more readily obtainable is obviously bad for business and consequently the economy. But, to emphasize, the Chamber is not asking this Court to change the law to favor business. Rather, the Chamber urges the Court to reaffirm the well-

established legal requirements that must be satisfied before a jury can consider spoliation of evidence and punitive damages against a Kentucky employer.

ARGUMENT

The Chamber leaves any debate about the evidence to the parties. As *Amicus Curiae*, the Chamber may assume facts to be true for purposes of discussion, but it is focused, not on the resolution of factual questions, but on the legal standards that courts should enforce when assessing whether sufficient evidence is present at trial to justify instructions on spoliation or employer liability for punitive damages.

According to the Court of Appeals, the evidence here concerns the cause of Jennifer Beglin's death, namely the failure to deliver blood in a timely fashion from the blood bank to the operating room when Beglin was losing blood during surgery. Her estate sued the Hospital for vicarious liability, claiming that a nurse in the operating room, Barbara Cantrell, "either (1) delayed taking action regarding [Beglin's] 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'" (Opinion, p. 10).

At trial, her estate obtained an instruction on spoliation of evidence based on the Hospital's inability to produce an "Occurrence Report," which any employee may complete for all kinds of events, minor and otherwise. Cantrell said in deposition that she never completed a report because the OR received blood within 45 minutes of being ordered, the usual time it takes. But, she testified the opposite at trial, stating that she prepared a report and placed it in a bin at the front desk. The facts appear to be undisputed that any relevant

information in the report – assuming it ever existed – was available from other sources. And, the Estate never claimed and no evidence suggests that the Hospital deliberately destroyed a report. The report simply could not be found; no one knows what happened to it after – and if – Cantrell placed it in the bin.

The Estate also successfully obtained an instruction on punitive damages against the Hospital. The Court of Appeals upheld it based on the timing of blood delivery to the OR and "some irregularities in the execution of the Hospital's blood policies" (Opinion, p. 11). But on the face of the Court of Appeals' reasoning, these facts concern events during Beglin's surgery. They are entirely irrelevant to whether the Hospital, as an employer, "ratified or should have anticipated the [Cantrell's] conduct in question" under KRS 411.184(3). In concluding that the evidence "clearly warranted a punitive damage instruction," the Court of Appeals not once indicates any facts that support the ratification or "should have anticipated" requirements. To the contrary, the Court of Appeals affirms punitive damage instructions that confine jury consideration to reckless disregard "during the operation from the time blood was ordered until it was delivered" (Opinion, p. 8), but simultaneously overlooks that this timeframe has no bearing on "should have anticipated" – meaning awareness **prior** to the surgery (not during) – and "ratification," which obviously concerns the future, not the operation itself.

The Chamber asks this Court to return to traditional procedural norms which ensured that the punishment of a spoliation instruction and punitive damages is based on evidence and not speculation. The Chamber asks this Court to make clear that trial judges cannot give instructions on spoliation when

there is no evidence of deliberate destruction coupled with bad faith and prejudice to the plaintiff's case, or punitive damage where there is no evidence that similar problems had arisen in the past and no evidence that an employer possessed full knowledge of any alleged misconduct before the lawsuit. This Court should reverse the punitive damage award and remand for a new trial in which the jury receives no spoliation of evidence instruction.

I. FOR JUSTICE TO RESULT AT TRIAL, SUFFICIENT EVIDENCE MUST EXIST TO WARRANT A JURY INSTRUCTION.

In the context of instructions on spoliation of evidence and punitive damages, the applicable legal requirements distill from broader concepts that govern every jury trial. It is fundamental that a judge cannot allow a jury to engage in "speculation, supposition or surmise." *Briner v. Gen. Motors Corp.*, 461 S.W.2d 99, 101 (Ky. 1970). For this reason, a trial court cannot instruct the jury on a theory unless the record contains sufficient evidence to sustain it. "The general rule is that an instruction must not be submitted on an issue that is entirely unsupported by evidence or reasonable inferences therefrom." *West Virginia Tractor and Equipment Company v. Cain*, 487 S.W.2d 910, 911 (Ky. 1972) (citations omitted). *See also, Farrington Motors, Inc. v. Fidelity & Casualty Co.*, 303 S.W.2d 319, 321 (Ky. 1957) (party entitled to instruction "if there is evidence to sustain it"). Speculation improperly carries the day when a trial court gives an instruction without sufficient evidence to support it and a jury engages in speculation when a trial court permits the jury to draw any inference it likes.

An inference is not conjecture; it is logically a "conclusion reasonably drawn from facts **established by evidence**." *Hurt's Adm'r v. Louisville &*

Nashville RR Co., 298 Ky. 617, 183 S.W.2d 628, 629 (1944). The evidence must show "the probable, as distinguished from a possible cause." *Briner*, *supra*, 461 S.W.2d at 101. Prohibiting speculation and requiring "probable" evidence is especially important in the context of alleged spoliation and punitive damages because instructions on these claims enhance the likelihood of a windfall verdict based on passion, not proof.

II. THE TRIAL COURT SHOULD NOT GIVE A SPOLIATION INSTRUCTION ABSENT PROOF OF INTENTIONAL DESTRUCTION OF EVIDENCE, IN BAD FAITH, WITH ATTENDANT PREJUDICE TO A PLAINTIFF'S CASE.

As Judge Wine explains in his dissenting opinion, alleged errors in jury instructions are questions of law subject to a *de novo* standard of review (Opinion, p. 21). He also recognizes that a trial court cannot leave everything to the jury for consideration. A party is not entitled to an instruction on a theory of the case unless "there is evidence to sustain it" (Opinion, p. 21, quoting *Farrington Motors, Inc. v. Fidelity & Cas. Co.*, 303 S.W.2d 319, 321 (Ky. 1957)). And, if an instruction is erroneous, Kentucky courts presume it to be prejudicial to an appellant; appellee has the burden "to show affirmatively from the record that no prejudice resulted." *Id.*, quoting *Drury v. Spalding*, 812 S.W.2d 713, 717 (Ky. 1991).

A missing-evidence instruction is inherently inflammatory at trial. It is designed to have "prophylactic and punitive effects." *Schmid v. Milwaukee Electric Tool Corp.*, 13 F.3d 76, 78 (3d Cir. 1994) (citation omitted). Simply by giving it, a judge – wrapped in the aura of black robes, high on the bench and esteemed by everyone in the courtroom – raises doubt about a party's honesty. Words like "bad faith" and "destroyed," as in the spoliation instruction against the

Hospital, necessarily prompt the jury to believe that the judge found sufficient merit to the issue to warrant jury consideration. The mere notion that a party intentionally "destroyed" evidence potentially taints every aspect of liability and damages simply because the deliberate destruction of evidence constitutes such serious, offensive misconduct, tantamount to a lie that leaves the jury suspecting every statement from a defendant's mouth.

That is why a spoliation instruction becomes a sledgehammer against a defendant in the hands of plaintiff's counsel to be pounded heavily, particularly in the context of a plea for punitive damages. For this reason, Kentucky courts have long imposed standards that must be met before a trial court can instruct a jury on spoliation of evidence.

Reviewing the jurisprudence underlying spoliation instructions in his dissenting opinion, Judge Wine agrees with the Hospital that no instruction is proper absent sufficient evidence on the threshold criteria. First, courts require proof that records were destroyed with a "culpable state of mind," namely intentionally **and** in bad faith (Opinion, p. 22). *See Coulthard v. Commonwealth*, 230 S.W.3d 572, 581 (Ky. 2007) (spoliation instruction "clearly not warranted"). Intent alone is insufficient because a defendant could act deliberately on the belief the action was correct; the additional element of "bad faith" makes the action "culpable." In *Estep v. Commonwealth*, 64 S.W.3d 805, 810 (Ky. 2002), this Court discussed the principles that "emerge from the evolution of our case law" in the subject of missing evidence. It concluded "absent some degree of 'bad faith,' the defendant is not entitled to an instruction that the jury may draw an adverse inference from that failure [to preserve evidence]." *Id. See also, Roark*

v. Commonwealth, 90 S.W.3d 24, 38 (Ky. 2002) ("absent some degree of bad faith" improper to give spoliation instruction).

Second, a plaintiff must demonstrate that "the lost or destroyed evidence would have played a significant role in . . . [the plaintiff's case] . . . and that comparable evidence could not be obtained elsewhere" (Opinion, p. 23). *See also, Tinsley v. Jackson*, 771 S.W.2d 331, 332 (Ky. 1989) (ordering court to determine whether missing evidence will "substantially prejudice" appellant). Based on evidence in the record, Judge Wine concludes that a new trial is appropriate because the Estate failed to establish any predicate for a spoliation instruction.

> 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.

(Opinion, p. 24-25).

The trial court should decide whether sufficient evidence is present to support these elements, rather than defer wholly to a jury. This Court endorsed a gate keeping function in *Tinsley* when ordering a new trial. "Upon remand, the trial court should conduct a hearing to determine whether failure . . . to produce [evidence] will substantially prejudice appellant's right to a fair trial." *Id.* at 332.

III. THE TRIAL COURT SHOULD NOT INSTRUCT ON PUNITIVE DAMAGES AGAINST AN EMPLOYER ABSENT PROOF THAT THE EMPLOYER "RATIFIED OR SHOULD HAVE ANTICIPATED THE CONDUCT IN QUESTION."

KRS 411.184(3) provides: "In no case shall punitive damages 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" (emphasis added) (other sections of this statute held unconstitutional, *Williams v. Wilson*, 972 S.W.2d 260 (Ky. 1998)). This provision broadly limits an employer's vicarious liability for punitive damages only to those situations where the employer has actively condoned an employee's gross negligence. *Berrier v. Vizar*, 57 S.W.3d 271, 283 (Ky. 2001).

A trial court should not permit a jury to speculate about what an employer "should have anticipated." "Anticipate" has teeth. It means to "foresee" or to "realize beforehand." AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE, 5th Ed. BLACK'S LAW DICTIONARY defines "anticipation" as "probability, not possibility," as applied to a duty to anticipate consequences of an employee's conduct. At the least, an employer cannot anticipate conduct that has never before occurred; conduct cannot be "foreseen" if it is unprecedented.

In *Patterson v. Tommy Blair, Inc.*, 265 S.W.3d 241, 245 (Ky. App. 2007), the plaintiff sought to hold an employer vicariously liable for punitive damages based on an employee's conduct in repossessing a car, namely shooting the tires out with a gun he usually carried. Even though the proof showed that the employee routinely carried a gun – which violated company policy – no evidence suggested that he had "previously repossessed any vehicles in an impermissible

manner." *Id.* at 245. To anticipate misconduct an employer must be on notice that the same or similar conduct had occurred in the past.

The verdict against the Hospital disturbs the Chamber because the record is undisputed that delivery of blood from the blood bank to the OR had never previously been a problem. Two of Beglin's surgeons testified that the Hospital – Kentucky's only level 1 trauma center – had "all the resources you need to take care of critically ill patients." VR No. B8; 17:7/27/06; 12:12:35. The Hospital processes more than 17,000 specimens a year and the record rebuts any hint of a "pattern of conduct," which should be central to satisfying the "should have anticipated" standard in KRS 411.184(3).[1] To the contrary, the chief anesthesiologist during Beglin's surgery testified that blood getting to the OR "[n]ever [has] been an issue. When we needed blood products, we could get blood products." VR No. B9; 7/17/06; 12:40:54. While the Court of Appeals looks to "some irregularities" during the surgical procedure, that fact remains immaterial to what would have put the Hospital on notice **before** the surgery or to what it knew before the Estate filed suit.

Just as "should have anticipated" requires the occurrence of the same conduct in the past, "ratification" contemplates full knowledge of the material facts when something goes wrong. *See Short v. Metz Co.*, 165 Ky. 319, 176 S.W. 1144 (Ky. 1915). It cannot mean denying allegations after a lawsuit is filed because employers are entitled to a defense in litigation. If a defense equals ratification, every plaintiff in a disputed case with an employer could receive a

[1] *Ky. Farm Bureau Mut. Ins. Co v. Troxell*, 959 S.W.2d 82 (Ky. 1997).

punitive damage instruction. As the Idaho Supreme Court observes, "the plaintiffs' position, if adopted, would effectively require a principal to admit its agent's negligence or wrongdoing in every case to avoid a finding of ratification. Such a double-edged position is not sound policy." *Manning v. Twin Falls Clinic & Hosp., Inc.*, 122 Idaho 47, 830 P.2d 1185, 1194 (Idaho 1992).

Likewise, the Court of Appeals adopts a troubling rule in suggesting ratification can be based on an employer's "inadequate" investigation following Beglin's death – "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" (Opinion, p. 12). The adequacy of an investigation after the fact should be irrelevant. The law requires no investigation in the first place. And, it creates uncertainty and ambiguity in the law for businesses if a punitive damage instruction can be based on second guessing the degree of an employer's inquiry. How are employers to know what to do, especially when they are unaware of an unprecedented problem?

But the Hospital's Director of Risk Management nevertheless reviewed Beglin's patient records, the five-page pre-operative report, the anesthesia records, and the post-surgery report immediately after the surgery. Shortly after surgery, Dr. Lerner wrote a summary of events that occurred in the OR (VR No. B9: 7/17/06; 11:45:18). Dr. Okea signed it to confirm its accuracy (VR No. 1314: 7/24/06; 16:29:10). No part of these contemporaneous records revealed a delay in the delivery of blood. Moreover, none of the doctors filed an Occurrence Report or mentioned any delay in receiving blood until after the Estate sued. Nothing that the Hospital saw advised it of any delay in blood ordering or

delivery. If it had observed a problem, the Hospital would have had every reason and motive to correct it.

Vicarious liability for **punitive** damages should be rare. Defendant employers are often viewed as "deep pockets," and sympathetic jurors may be inclined to help surviving family members simply because a business "can afford it." For this and other practical reasons, this Court should require meaningful evidence of ratification or reasonable anticipation before a jury has any opportunity to consider punitive damages.

IV. THE APPELLATE COURT'S DEVIATIONS FROM TRADITIONAL KENTUCKY PROCEDURES VIOLATE DUE PROCESS AND SHOULD BE REVERSED.

The procedures adopted by the trial and appellate court in this case for the spoliation and punitive damages instructions deviate from traditional Kentucky procedures, which provided a judicial gatekeeper to determine whether sufficient evidence was present to warrant the instructions. Under the new Court of Appeals' procedure, juries may speculate that a missing document would be adverse, merely because the document cannot be produced. This is particularly invidious where, as here, the witness who allegedly prepared the document squarely contradicted her own previous sworn testimony that the document was never created. Having speculated that a missing document would be adverse, juries then may speculate that the information contained in the document supports a punitive damages award.

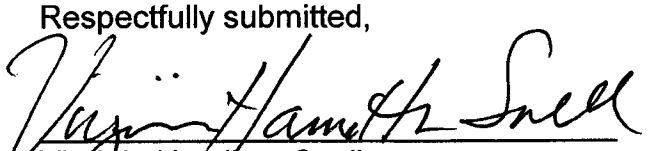
The result is arbitrary and unfair punishment which violates due process. *See, Honda Motor Co. v. Oberg*, 512 U.S. 415, 432 (1994) (unanimous opinion of the Court holding that Oregon's changed procedure violates due process, stating

that: "Punitive damages pose an acute danger of arbitrary deprivation of property. . . . Judicial review of the amount awarded was one of the few procedural safeguards which the common law provided against that danger. Oregon has removed that safeguard without providing any substitute procedure and without any indication that the danger of arbitrary awards has in any way subsided over time."); *Giaccio v. State of Pennsylvania*, 382 U.S. 399, 402-03, 86 S.Ct. 518, 520-21, 15 L.Ed.2d 447 (1966)("[A] law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits or leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case"); *Grayned v. City of Rockford*, 408 U.S. 104, 108-09, 92 S.Ct. 2294, 2298-99, 33 L.Ed.2d 222 (1972)("It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application" [footnotes omitted]. This Court should reject the new procedures resulting from the Court of Appeals' Opinion.

CONCLUSION

The Chamber supports a prosperous business climate in Kentucky. As an *amicus curiae*, it does not seek the adoption of rules only because they may help business. Rather, the Chamber asks the Court to reaffirm and give clear meaning to a trial court's gate-keeping function under well-established law. Small and large businesses depend on record keeping and their operations could involve millions of documents. To permit a spoliation instruction simply because a document is "missing" is fundamentally unfair and disregards the need for sufficient evidence of intent, coupled with bad faith and substantial prejudice to the plaintiff. Similarly, a trial court should never even allow jury consideration of punitive damages against employers unless sufficient evidence proves that the employer ratified or reasonably should have anticipated the alleged misconduct. Businesses in Kentucky need trial courts to stand between a failure in proof and jury speculation.

Respectfully submitted,



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