SUPREME COURT OF KENTUCKY
2009-SC-000289
CONSOLIDATED WITH 2009-SC-000839
(2007-CA-000018 AND 2007-CA-000133)

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

v.

APPELLANT/CROSS-APPELLEE'S COMBINED REPLY/RESPONSE BRIEF

MICHAEL G. BEGLIN, EXECUTOR
OF THE ESTATE OF J.W. BEGLIN
AND M.G. BEGLIN, ET AL. — APPELLEE/CROSS-APPELLANT

APPEAL AND CROSS-APPEAL
FROM JEFFERSON CIRCUIT COURT
ACTION NO. 04-CI-001605

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CERTIFICATE OF SERVICE

It is hereby certified that a copy of the foregoing was mailed to the following this 27th day of September, 2010, to F. Thomas Conway, 238 South Fifth Street, 18th Floor, Louisville, KY 40202; Chadwick N. Gardner, 239 South Fifth Street, Suite 1916, Louisville, KY 40202; Honorable Charles L. Cunningham, Jr., Division Four, Jefferson Circuit Court, 700 West Jefferson Street, Louisville, KY 40202 and Samuel P. Givens, Jr., Clerk, Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601. I further certify that the record on appeal was not withdrawn by the party filing this Brief.

COUNSEL FOR APPELLANT/CROSS-APPELLEE

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II. INTRODUCTION

Intentional, bad faith conduct and actual prejudice are the touchstone of a missing evidence instruction.[1] Yet, Beglin's brief does not refer this Court to a single evidentiary *fact* from which the jury could infer that the Hospital intentionally and in bad faith destroyed the incident report, as the trial court's instruction required, other than that the incident report was missing.

Beglin repeatedly proclaims that he was "prejudiced" by the missing incident report. His brief, however, is utterly silent in identifying any actual prejudice. Contrary to the teachings of *Roark*, *Estep* and numerous other cases, Beglin justifies the missing evidence instruction because "[s]urely a party is prejudiced when deprived of freshly reliable documentary evidence."[2]

Ignoring his own counsel's closing argument that the jury should send a message to the Hospital in the form of punitive damages because "not in my community are you going to fail to preserve an incident report," Beglin's states that "UMC falsely argues the missing evidence instruction was linked to the punitive damages instruction."[3] However, just a few pages earlier in his brief Beglin tells this Court that the missing incident report directly bore upon punitive damages because "if Cantrall [checked certain boxes in the missing incident report] UMC undeniably adopted, authorized or ratified the conduct in question."[4]

And, Beglin urges this Court to hold that the Hospital "ratified" the alleged misconduct of Cantrall solely because the Hospital's investigation did not reveal that

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[1] *Estep v. Commonwealth*, 64 S.W.3d 805, 810 (Ky. 2002); *Roark v. Commonwealth*, 90 S.W.3d 24, 37-38 (Ky. 2002); *Fields v. Commonwealth*, 274 S.W.3d, 375, 416 (Ky. 2008).

[2] Appellee Brief, p. 40.

[3] Appellee Brief, p. 41.

[4] Appellee Brief, p. 36.

there was a delay in blood getting from the blood bank to the OR. This argument, however, ignores that not one of the four doctors who participated in the surgery recorded, much less reported, any delay until after this suit was filed. It is undisputed that the Hospital did not possess the "full knowledge" that ratification requires.

There is no evidence in this record to justify the missing evidence and punitive damage instructions. The Kentucky Chamber of Commerce and the Kentucky Hospital Association's amicus briefs accurately identify the harm that will inevitably flow if evidence of intentional, bad faith conduct and prejudice are no longer required for a missing evidence instruction, and if an employer's vicarious liability for punitive damage no longer depends upon evidence of prior, similar misconduct but may simply be predicated on the indefinable adequacy of its post-event investigation. A search for a missing document will become an end in itself, regardless of the significance of the document.

The Hospital was denied a reasonably fair trial. It is entitled to a directed verdict on Beglin's punitive damage claim and a new trial on liability and compensatory damages.

III. ARGUMENT

A. There Was No Factual Support For The Trial Court's Missing Evidence Instruction And It Substantially Prejudiced The Hospital

1. There must be intentional bad faith conduct and actual prejudice to justify a missing evidence instruction

A missing evidence instruction is "intended to prevent unfair prejudice to litigators and to insure the integrity of the discovery process."[5] This Court's opinions,

[5] *Swofford v. Eslinger*, 671 F. Supp. 2d 1274, 1279 (M.D. Fla. 2009)(quoting *Flury v. Diamler Chrysler Corp.*, 427 F.3d 939, 944 (11th Cir. 2005).

and those of an overwhelming number of other courts, clearly reflect the fact that a document that is lost or missing, without anything more, is not sufficient as a matter of law to qualify for a missing evidence instruction.[6] In *Fields,* for example, this Court stated that "there was no other evidence of bad faith;"[7] in *Farmer*, this Court stated that "Farmer cites no evidence to suggest bad faith,"[8] and in *Tinsley* this Court directed that the "trial court should conduct a hearing to determine whether the failure of the Commonwealth to produce the 'sleeper' will substantially prejudice appellant's right to a fair trial."[9] As with any inference, a finding of intentional, bad faith destruction of a document and substantial prejudice may only be "drawn from facts established by evidence."[10]

According to Beglin, this Court's decision in *Estep* holds that when there is no explanation for a missing or lost report, a missing evidence instruction is warranted as a matter of law.[11] This Court in *Estep* said no such thing. In referring to its decision in *Tinsley*, this Court in *Estep* held that "a missing evidence instruction is appropriate only where significant evidence was forever lost by the Commonwealth to the prejudice of the defendant's right to a fair trial."[12] This Court's subsequent decisions in *Fields* and *Mills v. Commonwealth*[13] make clear that intentional, bad faith conduct and actual prejudice may not be inferred solely because a document is missing or lost; bad faith and actual prejudice must be proven.

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[6] *Tinsley v. Jackson*, 771 S.W.2d, 331, 332 (Ky. 1989); *Estep*, 64 S.W.3d at 809; *Roark*, 90 S.W.3d at 37-38; *Farmer v. Commonwealth*, 309 S.W.3d 266-271 (Ky. App. 2009); *Fields*, 274 S.W.3d at 416.

[7] *Fields*, 274 S.W.3d at 416 (emphasis added).

[8] *Farmer*, 309 S.W.3d at 271 (emphasis added).

[9] *Tinsley*, 771 S.W.2d at 332.

[10] *Hurt's Adm.'r v. Louisville & Nashville R.R. Co.*, 298 Ky. 617, 183 S.W.2d 628, 629 (1944).

[11] Appellee Brief, p. 25.

[12] 64 S.W.3d at 809 (emphasis added); citing *Tinsley*, 771 S.W.2d at 332.

[13] 170 S.W.3d 310, 332 (Ky. 2005).

In addition to ignoring Kentucky cases demonstrating that evidence of bad faith and substantial prejudice are required before a missing evidence instruction is appropriate, Beglin also chooses to ignore the Hospital's numerous non-Kentucky cases dealing with lost or missing evidence because "most cases UMC relies upon contained some explanation as to how or why the" document was missing.[14] However, the decisions in *Brewer v. Dowling,*[15] *Thomas v. Cleveland Clinic Found.*,[16] *Alvariza v. Home Depot,*[17] *Leatherwood v. Wadley,*[18] *Bashir v. Amtrak,*[19] *Cortes v. Peter Pan Bus Lines, Inc.*,[20] and *Veloso v. Western Betting Supply Co., Inc.*,[21] all dealt with lost or missing evidence for which there was no explanation. Each of these cases held that a missing document alone does not justify a spoliation instruction. This principle represents the common sense conclusion that in many instances there is no explanation for a lost or missing document, and to require a party to have an explanation would obligate that party to explain the unexplainable – why a document was lost or is missing.[22]

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[14] Appellee Brief, p. 24.
[15] 862 S.W.2d 156 (Tex. App. 1993).
[16] 2005 WL 2100922 (Ohio App. 8 Dist. 2005).
[17] 240 FRD 586 (D. Colo. 2007).
[18] 121 S.W.3d 682 (Tenn. App. 2003).
[19] 119 F.3d 929 (11th Cir. 1997).
[20] 455 F. Supp. 2d 100 (D. Conn. 2006).
[21] 281 F. Supp. 2d 743 (D.N.J. 2003).
[22] Beglin's reliance upon the decision in *Swofford* for the proposition that lost documents, *ipso facto,* give rise to the presumption of bad faith destruction mischaracterizes the *Swofford* decision. In *Swofford,* the Court found that the documents were destroyed intentionally, in bad faith and resulted in substantial prejudice.

2. The evidence did not support a missing evidence instruction

Contrary to Beglin's brief, whether the trial court's missing evidence instruction should have been given is a question of law reviewed *de novo*. The abuse of discretion test is inapplicable.[23]

Because Beglin did not attempt to prove that the Hospital intentionally, in bad faith, "lost" the incident report, he contends that such proof is unnecessary since "under [UMC's] policy, one does not 'accidentally' lose the incident report."[24] To justify this conclusion, Beglin relies upon the fact that the Hospital considers an incident report both important and confidential. In fact, Beglin finds it highly significant that one of the policy reasons underlying incident reports is "to provide information necessary for defending the hospital's staff or physician in a lawsuit."[25]

The Hospital has never disputed that incident reports are to be maintained in confidence, "employees were not to make any statements admitting fault, liability" and that the information may be necessary for defending the Hospital's staff or a physician. But, these reasons are no different from the reasons that many corporations rely upon in maintaining a multitude of documents in the ordinary course.

The fact that the Hospital considered the information recorded in an incident report "necessary for defending the hospital's staff or physician in a lawsuit" does not justify the inference, as urged by Beglin, that if the incident report is missing it must have been destroyed. Nor do any of the other policy objectives behind the Hospital's decision to have incident reports warrant this conclusion. Indeed, it can just as forcefully be

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[23] *McKinney v. Heisel*, 947 S.W.2d 32, 35 (Ky. 1997); *Hamilton v. CSX Transp., Inc.*, 208 S.W.3d 272, 276 (Ky. App. 2006); *Prichard v. Kitchen*, 242 S.W.2d 988, 992 (Ky. 1951).

[24] Appellee Brief, p. 33.

[25] *Id.*

argued that it was in the Hospital's best interest to locate the incident report because there was not a scintilla of evidence that anything in the report was unfavorable to the Hospital.

Beglin also asks this Court to infer bad faith, intentional misconduct and prejudice because the information requested by an incident report "prove materiality, prejudice and incentive to destroy.[26] To justify this gross misstatement of fact, Beglin attempts to dissect the various check boxes in an incident report. The only questions on the incident report that potentially applied to Jennifer Beglin's surgery and which the instructions directed a nurse such as Cantrall to complete, were the "Statement of Facts" on page 1 and the block on page 3 relating to the "Operating Room," nothing else.[27] The remainder of the incident report did not concern the operating room or was to be completed by someone other than a nurse, such as a "Department Manager."

Nevertheless, Beglin speculates that perhaps Cantrall completed the boxes under the heading "POST ANESTHESIA CARE UNIT (PACU)" concerning "excessive blood loss" and "life-threatening complication of anesthesia."[28] Nurse Cantrall, however, was a circulating nurse in the OR, not PACU. Beglin suggests that perhaps Cantrall checked the boxes concerning "post operative nerve damage or neurological deficit" or "life-threatening complication of anesthesia" in the "SURGICAL OUT PATIENT/CLINIC" section of the incident report.[29] Jennifer Beglin was never in the Surgical Out Patient/Clinic at the Hospital. Next, Beglin refers this Court to the "GENERAL" section of the incident report and states that perhaps Beglin completed the "gut feeling" box that

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[26] Appellee Brief, p. 34.
[27] Appellant Brief, p. 13.
[28] Appellee Brief, p. 34.
[29] *Id.*

a patient is litigious.[30] There was no evidence that Cantrall ever met Jennifer Beglin or her family, an obvious prerequisite to developing any "gut feeling."

Beglin refers this Court to the "CONTRIBUTING CAUSE CODES" on page 4 of the incident report. Despite the fact that page 4 expressly states that the "Occurrence Severity Codes" was a section to be completed by the "Department Manager," Beglin tells the Court that "Barbara Cantrall should have checked every box above."[31] Indeed, Beglin tells this Court that "Incentive to destroy or 'lose' the occurrence report is apparent if Cantrall checked boxes on page 4 of UMC's occurrence report," even though these sections didn't apply to Cantrall.[32]

Without a doubt, Beglin would cite this Court to evidence that the Hospital intentionally and in bad faith lost the incident report if such evidence existed. There are no such references to the record because Beglin's position at trial was that the law permitted a jury to assume solely from a missing document that it was intentionally, in bad faith destroyed and that Beglin was thereby prejudiced. Indeed, that is exactly what Beglin's counsel told the trial judge.[33]

Beglin also tells this Court that the Hospital had an "[i]ncentive to destroy or lose" the incident report because it ignored Jennifer's "history of bleeding disorders" by failing to pre-order blood.[34] The undisputed evidence, however, was that the doctors were responsible for deciding whether pre-ordered blood was appropriate,[35] and Drs.

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[30] Appellee Brief, p. 35.
[31] *Id.*
[32] *Id.* at 36.
[33] VR No. B18: 7/28/06; 10:08:04.
[34] Appellee Brief, p. 26.
[35] VR No. B8: 7/14/10; 14:34:15; 15:37:08.

Galandiuk and Lerner decided that pre-scheduled blood was unnecessary.[36] There is no evidence that justified the missing evidence instruction.

3. The trial court violated its gatekeeper responsibility by giving a missing evidence instruction when there was no evidence to justify the instruction

It has always been the Hospital's position that there was no evidence of intentional, bad faith conduct and actual prejudice to warrant a missing evidence instruction, and that it was reversible error for the trial court to give the instruction.[37] A trial judge is always obligated to determine if there is evidence to justify an instruction.[38] That is part of a trial judge's gatekeeper responsibility. It is therefore astounding that Beglin would deny the existence of this gatekeeper duty and state that the Hospital's argument "that a trial judge must make a preliminary 'judicial determination' of bad faith or intentional conduct is nowhere in Kentucky jurisprudence."[39]

The Hospital has never argued that the trial court was required to conduct a separate hearing, as suggested by Beglin. In this case, however, the trial court abdicated its gatekeeper duty and simply let the jury decide if "University Medical Center, Inc., d/b/a University of Louisville Hospital, intentionally and in bad faith lost or destroyed the incident report" when there was no evidence to justify that conclusion.[40]

The Court of Appeals approved this new procedure because, "simply put, the [trial] court left the decision as to whether the Hospital acted in bad faith up to the

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[36] VR No. B8: 7/14/06; 14:34:15; 15:37:08.
[37] VR No. B17: 7/27/06; 16:07:17-16:07:48.
[38] *W. Va. Tractor & Equip., Co. v. Cain*, 487 S.W.2d 910 (Ky. 1972); *Young v. Vista Homes, Inc.*, 243 S.W.3d 352 (Ky. App. 2007).
[39] Appellee Brief, p. 29.
[40] TR, Vol. 22, pp. 3251-3270.

jury."[41] Indeed, the Court of Appeals held that the jury was "not required to weigh the evidence at all," which traditionally is the primary purpose of a jury.[42] It was improper for the trial court to give a missing evidence instruction.

4. The Hospital was prejudiced by the trial court's missing evidence instruction

Beglin states that the Hospital has never claimed that the missing evidence instruction infected the jury's verdict on liability and compensatory damages, but only punitive damages.[43] That is untrue. The Hospital objected to the trial court giving any missing evidence instruction,[44] and stated in its initial brief to this Court that it is "impossible to conclude that the erroneous missing evidence instruction did not affect the jury's verdict on liability and compensatory damages."[45] In the Court of Appeals, the Hospital argued that the trial court's spoliation instruction prejudiced the jury's liability verdict and therefore compensatory verdict.[46]

According to Beglin, actual prejudice is unnecessary because in *Chumbler v. Commonwealth*,[47] this Court held that the "availability of evidence through other means does not eliminate prejudice or preclude a missing evidence instruction."[48] Beglin's reading of *Chumbler* is inaccurate. In *Chumbler*, this Court only held that there was no error in the trial court giving a missing evidence instruction where a videotape had been

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[41] Opinion, p. 7.
[42] *Id.* at 8.
[43] Appellee Brief, p. 19.
[44] T.R., Vol. 22, pp. 3251-3270
[45] Appellant Brief, p. 30.
[46] Appellant's Court of Appeals Brief, pp. 19, 20, 21.
[47] 905 S.W.2d 488 (Ky. 1995).
[48] Appellee Brief, p. 37.

destroyed but photographs existed. It did not eliminate the need for actual proof of prejudice, which is clear from subsequent decisions of this Court.[49]

Next, Beglin relies upon *Swofford v. Eslinger* for the proposition that actual prejudice is irrelevant when a party destroys evidence. *Swofford* says no such thing. First, there is no evidence in the Beglin case that the Hospital "destroyed" anything. Second, in *Swofford* the Court not only found intentional, bad faith conduct, but that "the prejudice to the Plaintiffs is substantial."[50]

The remainder of Beglin's argument attempts to equate actual prejudice with relevance. For example, Beglin asserts that the incident report "would have proven valuable," was "valuable evidence," and then jumps to the conclusion that "surely a party is prejudiced when deprived of freshly reliable documentary evidence."[51] Absent from Beglin's argument, however, is any attempt to show actual prejudice – evidence that was crucial to proving his claim.[52]

Make no mistake about it, if Beglin had argued to the trial court that actual prejudice existed and if there was evidence of actual prejudice, it would be front and center in Beglin's brief. There is no such evidence. Nor was there any prejudice because Beglin had the anesthesia log, the peri-operative report prepared by Cantrall, and the testimony of Cantrall and Drs. Galandiuk, Okca, Cheng and Lerner. Beglin's counsel seized upon the missing incident report for one purpose only, to make the jury mad at the Hospital by believing it had destroyed the incident report because it was damaging to the Hospital.

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[49] *See e.g., Roark, Mills, Farmer* and *Fields*.
[50] 671 F. Supp. 2d at 1282.
[51] Appellee Brief, p. 40.
[52] *Swofford*, 671 F. Supp. 2d at 1280; *Foss v. Kincade*, 766 N.W.2d 317, 323-324 (Minn. 2009).

Because there was no evidence that the Hospital intentionally and in bad faith destroyed the incident report as the jury instruction required, or that Beglin was prejudiced by its absence, the trial court's instruction is presumed prejudicial.[53] It is Beglin's responsibility to demonstrate that it is "clear and free of all doubt" that this erroneous instruction did not have any "prejudicial effect on the minds of some of the jurors."[54] Beglin's brief is a testament to why it is impossible for him to satisfy this test.

Instead of admitting that his counsel improperly urged the jury to award punitive damages because of the missing incident report, Beglin refers to this portion of his closing argument as "a few short lines" that constitute "a microcosm of a lengthy list of negligent conduct."[55] Beglin's reticence to acknowledge that he linked punitive damages with spoliation is understandable. Beglin's counsel knew that the incident report was outside the scope of the trial court's punitive instruction but nevertheless argued that the two were connected. Counsel for the Hospital objected to Beglin commingling spoliation with punitive damages.[56]

While it appears obvious that the missing evidence instruction had a significant, prejudicial impact on the jury's liability, compensatory and punitive award, Beglin does not attempt to show that there was no prejudice. Instead, he argues that because the jury was not required to answer the missing evidence instruction in the affirmative or negative, it is impossible to know what the jury did.[57]

It is Beglin's burden, however, to prove that no prejudice occurred, not the Hospital's burden to prove prejudice. Beglin acknowledges that "the jury's use of [the

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[53] *McKinney*, 947 S.W.2d at 35 (Ky. 1997); *Hamilton, supra.*

[54] *Hamilton, supra;* citing *Southeastern Greyhound Lines v. Buckles*, 183 S.W.2d 965, 966 (Ky. 1944).

[55] Appellee Brief, p. 42.

[56] VR No. B8: 7/28/06; 17:53:39-17:54:15.

[57] Appellee Brief, p. 43.

missing evidence instruction] is completely unknown."[58] Thus, Beglin cannot demonstrate to this Court that it is "clear and free of all doubt" that there was no "prejudicial effect on the minds of some of the jurors," and the instruction was therefore prejudicial as a matter of law.[59]

B. The Hospital Was Entitled To A Directed Verdict On Beglin's Punitive Damage Claim

1. Nurse Cantrall was not "authorized" to violate her job responsibilities or to lie to the operating room doctors as claimed by Beglin

In his counterstatement of facts, Beglin lays out his position that Cantrall was grossly negligent in numerous respects. For example, Beglin tells this Court that Cantrall "never oriented the anesthesia surgical team to the blood expected arrival time," she let the blood sample "lie in the operating room for 20 minutes which is unacceptable," and "ignored" statements of a blood bank technician that emergency release blood was available.[60] Indeed, throughout the trial Beglin premised his negligence and punitive damage claim on the conduct of Cantrall.

Beglin never contended in the trial court that the Hospital "authorized" Cantrall's alleged gross negligence. Nor did the Court of Appeals find any such "authorization" to justify the punitive award. Now, however, Beglin contends that the Hospital "clearly authorized" Cantrall's conduct and that she was just "doing her job."[61] According to Beglin, Cantrall was the "only circulating nurse working the OR during the relevant

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[58] *Id.* at 44.
[59] *Hamilton, supra.*
[60] Appellee Brief, pp. 6, 9.
[61] *Id.* at 44, 45.

time" and the Hospital "gave her complete discretion and authorization to run the OR."[62] Hence, Beglin asserts, the authorization requirement of KRS 411.184(3) was satisfied.

Noticeably absent from Beglin's argument is any reference to evidence that Cantrall was authorized to delay sending a blood sample to the blood bank for 20 minutes, or to lie to the doctors about when typed and cross-match blood could be expected in the OR. There is not a shred of evidence from which anyone could reasonably conclude that the Hospital "authorized" these alleged acts of gross negligence.

Cantrall, who was under the direction and control of the operating team, was not authorized to disobey instructions of the surgeons, to lie to the surgeons or to take any action that was inconsistent with her responsibilities as a nurse in the OR. To claim otherwise is disingenuous at best. Cantrall's responsibility was limited to performing her duties in a professional manner consistent with the Hospital's policies. There is no evidence that Cantrall was empowered to engage in the alleged gross misconduct or that the Hospital authorized it. Cantrall's OR responsibilities do not remotely resemble the factual situation that existed in *Northeast Health Mgmt., Inc. v. Cotton*,[63] *Simpson County Steeplechase Ass'n, Inc. v. Roberts*,[64] or *Kroger Co. v. Willgruber*,[65] in which an employee was given virtual carte blanche authority by his employer.

2. There was no evidence that the Hospital "should have anticipated a mishap" thereby justifying an award of punitive damages[66]

The Court of Appeals held, without explanation, that:

> [t]he jury could have believed that the Hospital should have anticipated a mishap in light of the evidence that there was

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[62] *Id.* at 45.
[63] 56 S.W.3d 440 (Ky. App. 2001).
[64] 898 S.W.2d 523 (Ky. App. 1995)
[65] 920 S.W.2d 61 (Ky. 1996).
[66] Opinion, p. 12.

> some irregularities in the execution of the Hospital's blood policies.[67]

Beglin's argument concerning punitive damages does not mention this holding of the Court of Appeals. However, in discussing his version of the "facts" Beglin identifies what he considers to be reckless misconduct of the blood bank.

Beglin begins by criticizing the Hospital for its purported failure to transfer from the blood triplicate form to the computer the "time [blood was] needed" and "where" it was needed before discarding the form. It was undisputed, however, that all blood orders from the OR are processed "stat – immediately and without delay."[68] Indeed, after repeatedly chastising the Hospital for not recording when blood was needed in the OR, Beglin's brief admits that "all OR blood requests are to be processed STAT."[69] Moreover, the computer field for "where" on the blood bank's computer does not apply to the emergency room or OR,[70] and the computer entry reflecting that blood was needed in "endoscopy" is a red herring because no one ever suggested that the blood bank mistakenly sent Jennifer's transfusion blood to "endoscopy."

Beglin also contends that the blood bank computer entry "20:20" (8:20 p.m.) posed "an insurmountable problem" for the Hospital.[71] According to Beglin, this entry must have reflected when the blood bank knew that blood was due in the OR because otherwise there was no record that the blood bank knew when blood was "needed."[72] Not only is Beglin's position contrary to his admission that blood is always ordered STAT, the entry "20:20" was automatically recorded by the computer when the blood bank staff

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[67] *Id.*
[68] VR No. B16: 7/26/06; 10:53:25.
[69] Appellee Brief, fn. 104(1), p. 53.
[70] VR No. B12: 7/20/06; 15:25:40.
[71] Appellee Brief, p. 13.
[72] *Id.*

first entered data into the computer.[73] Clearly, 20:20 did not "coincide with Dr. Lerner's testimony" as to when he ordered blood because even if Dr. Lerner's testimony is accepted he did not expect typed and cross-matched blood in the OR until 8:30.[74]

There is not a scintilla of evidence from which a jury could conclude 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 policy."[75] The evidence is undisputed that there had never been a prior incident similar to what Beglin contends occurred in the OR during Jennifer's surgery. Dr. Lerner testified that "I've been doing it for 15, 20 years now, right? I've never ever had a time where I had to wait for blood."[76] Dr. Okca testified that "this was unusual."[77] Dr. Galandiuk testified "we're working at a Level One trauma center ... we can rapidly deliver blood at 10 minutes notice."[78]

Beglin does not direct this Court's attention to any evidence that Cantrall or any other operating nurse ever delayed in sending a blood sample from the OR to the blood bank, or failed to properly keep doctors in the OR accurately apprised of when blood was expected to arrive. Indeed, Beglin does not cite this Court to any evidence where there had ever been a delay in the delivery of typed and cross-matched blood or emergency blood to the OR. The absence of such evidence is fatal to the Court of Appeals' conclusion that the Hospital "should have anticipated" an "irregularity" on the evening of Jennifer's surgery.[79]

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[73] VR No. B12: 7/20/06; 12:06:01.
[74] VR No. B9: 7/17/06; 14:51:37; Appellee Brief, p. 9.
[75] Opinion, p. 12.
[76] Appellee Brief, p. 7.
[77] VR No. B14: 7/24/06; 16:04:28.
[78] Appellee Brief, p. 8.
[79] Opinion, p. 12.

C. There Is No Evidence The Hospital "Ratified" Cantrall's Alleged Gross Negligence By "Fail[ing] To Acknowledge That Any Complication Occurred"[80]

The Court of Appeals also held that the trial court's punitive damage instruction was proper because the jury:

> [c]ould 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.[81]

While Beglin devotes scant attention to this argument, his failure to address the cases cited in the Hospital's initial brief is revealing. Beglin's brief concedes that none of the doctors – Galandiuk, Okca, Cheng or Lerner – ever reported to the Hospital that there was any delay in the delivery of blood from the blood bank to the OR until after this lawsuit was filed. It is therefore not surprising that when the Hospital undertook its investigation it did not learn of any delay.

Since the issue of delay in delivery of blood only arose after suit was filed, it was impossible for the Hospital to learn of it through its investigation. It is thus undisputed that the Hospital did not have "full knowledge" of the events that allegedly occurred in the OR following its investigation, and therefore did not ratify the alleged acts of Cantrall or anyone else.[82] There was no factual basis for the trial court's punitive damage instruction or the punitive award.

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[80] Appellee Brief, p. 46.

[81] Opinion, p. 12.

[82] *Short v. Metz Co.*, 165 Ky. 319, 176 S.W. 1144 (Ky. 1915); *Manning v. Twin Falls Clinic & Hosp., Inc.*, 122 Idaho 47, 830 P.2d 1185 (Idaho 1992); *Broudy-Kantor Co. v. Levin*, 135 Va. 283, 116 S.E. 677 (Va. 1923).

D. The Hospital Is Entitled To A Directed Verdict On The Punitive Damage Claim For Lack Of Sufficient Evidence, Or In The Alternative, A Fundamentally Fair New Trial That Does Not Violate Due Process

Beglin's brief does not squarely address the procedural Due Process violations raised by the Hospital's appeal, which are based on the "missing evidence" and punitive damage instructions given by the trial court. Instead, Beglin argues that "UMC does not contest whether the evidence supported a punitive damages award in this court" but only "claims the award was excessive."[83] This is incorrect. The Hospital challenges the award as both arbitrary and grossly excessive.

In its Opening Brief, the Hospital argued that the trial procedures, including the "missing evidence" and punitive damage instructions, as well as the $3,750,000 award, violated the Hospital's due process rights. The Due Process Clause places procedural limits on awards and amounts of punitive damages. The Hospital has asked this Court to reverse, remand and re-try the compensatory damages claim in this case because the trial procedures violated the Hospital's Due Process rights, or in the alternative, to vacate the punitive damage award, which is grossly excessive because the lack of fundamental fairness in the trial procedures tainted the punitive damage award.

Beglin alleged, but failed to meet its burden of proof at trial, that the Hospital was vicariously liable for the allegedly grossly negligent conduct of its employees in supplying blood to Jennifer during her surgery. Beglin alleged, but failed to meet its burden of proof at trial, that the Hospital authorized, ratified or anticipated the allegedly grossly negligent conduct of its employees that occurred before or during the surgery related to the delivery or non-delivery of blood to Jennifer in the OR. Beglin's arguments, post-surgery, that the Hospital's employees did or did not complete an

[83] Appellee Brief, p. 53.

incident report that is or is not missing is not relevant to whether the Hospital had the requisite state of mind to be punished for supplying or not supplying blood during surgery.

Punitive damages are only available after an initial finding that an injured plaintiff is entitled to compensatory damages. Conduct that did not cause Jennifer injury during her surgery does not entitle Beglin to compensatory damages. The existence or non-existence of a post-surgery incident report logically cannot be the proximate cause of whether Jennifer timely received blood in the OR during surgery. The existence of a post-surgery incident report, which by definition issued after the surgery was concluded, did not cause Jennifer's death, and therefore, should not have been considered by the jury as a basis for punishing the Hospital for her death.[84]

Thus, the trial court adopted trial procedures that violated the Hospital's due process rights to a fundamentally fair trial. The "missing evidence instruction" in combination with the punitive damage instruction tainted the jury's verdict. An award of punitive damages required a finding that the Hospital was vicariously liable for the gross negligence of an employee that caused Plaintiff's injuries.[85] Spoliation, if found, would have permitted a judicial sanction against the Hospital for "missing evidence" that was

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[84] *See, State Farm Mut. Auto. Ins. Co. v. Campbell*, 127 S.Ct. 1513, 1523 (2003)(discussing the due process prohibition against awarding punitive damages based on conduct of nonparties, the Court stated that: "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.")(emphasis added). In Appellee's Brief pp. 53-54, fn. 146, Beglin offers a list of supporting evidence that does not include citations to the trial record; that is not limited to acts or omissions that occurred before the end of that surgery and is not limited to only those actions that were a proximate cause of the harm suffered by Jennifer, for which the Hospital can be punished in this case. Nonetheless, Beglin alleges that this lengthy list of evidence in fn. 146 "supports a finding of recklessness." Beglin then concludes that the Hospital authorized that conduct, because the Hospital never argued that Cantrall acted outside her authority.

[85] *Id.*

not available. But spoliation did not cause Plaintiff's injury and should not have been permitted to serve as the basis for a punitive damages award.[86] The jury should not have been allowed to arbitrarily and excessively punish the Hospital for conduct that could not have caused Beglin's death, namely, the existence or non-existence of a post-surgery incident report. This Court should vacate the punitive damage award as arbitrary, thereby rendering moot whether the award was grossly excessive. If this Court decides that sufficient evidence supports the punitive damage award, then the Hospital requests that the punitive award be reduced to the lowest possible amount that supports the State's interests on the evidence in this case.

IV. BEGLIN'S CROSS-APPEAL

A. Beglin Did Not Preserve His Claim That The Original Discharge Summary Was Admissible

Contrary to CR 76.12(4)(c)(v), Beglin fails to identify where, or even how, he preserved for appellate review his assertion that the original Discharge Summary was admissible. Kentucky appellate courts have consistently held that a reviewing court will not search the record to determine if an issue was properly preserved.[87] The party raising an issue on appeal is responsible for specifying where the issue was preserved.[88] Thus, Beglin has failed to preserve this issue.

Nevertheless, Beglin's contention that the Hospital removed the original Discharge Summary is untrue. Dr. Galandiuk, who is not a Hospital employee, re-dictated the summary and substituted it for the original because the physician who

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[86] *Id.*

[87] *Monroe v. Cloar*, 439 S.W.2d 73 (Ky. 1969); *Ventors v. Watts*, 686 S.W.2d 833, 835 (Ky. App. 1985).

[88] *Ventors, supra.* at 834-835; *Elwell v. Stone*, 799 S.W.2d 46, 47-48 (Ky. App. 1990).

prepared the original summary had made so many errors – at least according to Dr. Galandiuk.[89]

B. If There Was Any Error In The Court Preventing Beglin's Counsel From Arguing To The Jury That Beglin Should Be Compensated For "Loss Of Enjoyment Of Life," It Was Harmless Error

Beglin acknowledges that he was not entitled to a separate instruction on hedonic damages.[90] Instead, he asserts that he was entitled to argue to the jury that it should consider Jennifer's lost enjoyment of life in awarding damages for pain and suffering. He does not suggest, however, that the trial court's ruling was other than harmless error.[91]

In *Adams,* this Court held that damages for lost enjoyment of life are compensable in the form of mental suffering.[92] In other words, there is no separate, compensable category of damages for diminished enjoyment of life. Consistent with this principle, the trial court permitted Beglin's counsel wide latitude in arguing that the jury should award Beglin damages for pain and mental suffering but without specifically mentioning "lost enjoyment of life." The jury unanimously determined that Jennifer never regained consciousness after surgery and therefore did not award any damages for pain and suffering.[93]

Even if the court should have allowed Beglin's counsel to specifically refer to lost enjoyment of life, there was no error. In *Westfield Ins. Co. v. Hunt*, the Court of Appeals held that there can be no recovery for loss of enjoyment of life unless the deceased

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[89] VR No. B5: 7/11/06; 16:42:16.

[90] *Adams v. Miller*, 908 S.W.2d 112, 116 (Ky. 1995).

[91] VR No. B18; 7/28/06; 13:02:19. Beglin also contends that the trial court mishandled the matter by "instructing the jury to draw a line through that part of the instructions after they had been tendered to the jury." In reality, the court advised the jury that it was making certain changes to the court's copy of the instructions and asked the jury to listen to those changes – one of which was to eliminate the reference to loss of enjoyment of life.

[92] *Adams*, 908 S.W.2d at 116.

[93] T.R. Vol. 22, 3251-3270.

experienced "a period of consciousness following the accident."[94] The jury unanimously determined that Jennifer never had any conscious awareness or pain perception following surgery.[95] As a result, Beglin was not entitled to damages for pain and suffering, including damages for lost enjoyment of life.

C. The Trial Court Did Not Abuse Its Discretion By Ruling That The Type And Screen And Maximum Surgical Blood Order Schedule Adopted By The Hospital Almost Two Years After Beglin's Surgery Was Inadmissible Based On KRE 401, 403 and 407

At the time of Jennifer's surgery the decision to pre-order blood resided solely with the surgeon and anesthesiologist.[96] Dr. Galandiuk was acutely aware of Jennifer's earlier surgeries, and she and Dr. Lerner testified that it was solely their decision not to pre-order blood.[97] Dr. Galandiuk made it crystal clear that there was no information the Hospital could have provided her that would have changed her decision not to pre-order blood.[98]

More than 21 months after Jennifer's surgery the Hospital adopted a new policy concerning blood utilization procedures for elective surgeries, entitled Type & Screen and Maximum Surgical Blood Order Schedule (MSDOS) ("MSDOS"). Under MSDOC, physicians still retain the right to decide whether pre-ordered blood is appropriate for the particular surgical procedure involved.

Prior to trial, the Hospital filed a motion *in limine* to exclude any reference to MSDOS because: (1) it was irrelevant to Beglin's claims; (2) it was inadmissible because its probative value was substantially outweighed by the danger of undue prejudice; and

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[94] *Westfield Ins. Co. v. Hunt*, 897 S.W.2d 604, 609 (Ky. App. 1995)(discretionary denied and opinion order unpublished 1/10/96).
[95] T.R. Vol. 22, 3251-3270.
[96] VR No. B9: 7/17/06; 14:13:20; VR No. B8: 7/14/06; 14:47:45.
[97] *Id.*
[98] VR No. B8: 7/14/06; 14:47:45.

(3) MSDOS constituted an inadmissible subsequent remedial measure.[99] The trial court agreed.

Beglin did not attempt to introduce any evidence that the Hospital could have, but did not, adopt a different policy from the one in existence at the time of Jennifer's surgery. Thus, there was no issue concerning whether the Hospital could have or should have adopted a different policy.

Subsequent remedial measures are inadmissible to establish a defendant's negligent conduct.[100] Thus, evidence of the Hospital's MSDOS was inadmissible. Beglin's attempt to now argue that the MSDOS should have been admitted to prove control or feasibility is inaccurate because there was never an issue concerning whether the 2003 policy was appropriate.

Nor was the MSDOS admissible under Rules 403 and 401. Rule 403 directs that evidence may be excluded "[i]f its probative value is substantially outweighed by the danger of undue prejudice." If Beglin had been permitted to introduce this evidence, it would have unfairly prejudiced the Hospital because the jury could have assumed that the Hospital was negligent in failing to adopt a different blood utilization procedure than the one in existence in 2003.

In applying Rule 403, a court "should consider alternate means by which the facts sought to be proven can be established" without risk of prejudice.[101] During the trial, Beglin had an abundance of "alternative means," including medical records and expert testimony, upon which he could and did effectively rely upon in lieu of the Hospital's MSDOS policy.

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[99] T.R., Vol. 14, 1955-1975.

[100] *Hall v. Amer. Steamship Co.*, 688 F.2d 1062, 1066 (6th Cir. 1982).

[101] Underwood and Weissenberger, Kentucky Evidence 2005-2006 Courtroom Manual 403 (2005).

Lastly, the Hospital's MSDOS procedure was irrelevant. KRE 401 limits admissible evidence to matters that tend to "prove or disprove" the facts at issue. The 2005 MSDOS did not tend to prove or disprove whether the Hospital violated the standard of care in 2003.

D. The Trial Court Properly Ruled That The Hospital's Root Cause Analysis Was Protected By The Attorney-Client Privilege And The Work-Product Doctrine

The trial court denied Beglin's motion to compel production of the Hospital's root cause analysis because it had been prepared under the direction and control of the Hospital's counsel and was, therefore, protected by the work-product doctrine and attorney-client privilege. A root cause analysis is neither an incident report nor a peer review report: it is a self-critical analysis of an unexpected occurrence involving death or serious physical or psychological injury, or the risks thereof, whose purpose is to analyze the event so that a hospital and the health care community-at-large can learn and build upon its experience of the event.

In 1995, the Joint Commission on Accreditation of Healthcare Organizations ("JCAHO") adopted a Sentinel Event Report ("SER") policy to encourage and assist healthcare facilities in promoting efficiency and high quality patient care. It requires that healthcare facilities perform a self-critical, root cause analysis of these sentinel events and submit their SERs to JCAHO for review and approval. Under the guidance and advice of its counsel, the Hospital conducted a root cause analysis following Jennifer's surgery. The Hospital's attorney was integrally involved in every step of the analysis, including conducting interviews with Hospital employees.

The attorney-client privilege protects from discovery "confidential communication[s] made for the purpose of facilitating a rendition of professional legal

services to the client."[102] In order "for the privilege to attach, the statement must be a confidential communication made to facilitate the client in his/her legal dilemma."[103] The Hospital's root cause analysis fits squarely within the scope of the attorney-client privilege.

The root cause analysis is also protected by the work-product doctrine. CR 26.02(3)(a) provides that work-product materials are protected unless the adverse party can demonstrate "substantial need of the materials" and is "unable without undue hardship to obtain the substantial equivalent" by other means. Beglin's motion to the trial court, like his brief on appeal, glosses over the fact that he never demonstrated "undue hardship" in obtaining the substantial equivalent of the root cause analysis through discovery, or even had a substantial need for the material.

The only document Beglin claims he was unable to obtain was the missing incident report, but that document alone did not deprive him of any evidence that he was able to obtain through other sources. The trial court correctly concluded that the Hospital's root cause analysis was protected by the work-product doctrine and attorney-client privilege. Certainly the court did not abuse its discretion in reaching that conclusion.

While the trial court did not address the Hospital's argument that the root cause analysis was also subject to the self-critical analysis privilege, that privilege equally applies. The self-critical analysis privilege protects certain critical self-appraisals from discovery. It permits individuals or businesses to candidly assess their compliance with regulatory and legal requirements without creating evidence that may be used against

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[102] KRE 503(b).

[103] *Haney v. Yates*, 40 S.W.3d 352, 354 (Ky. 2000).

them in future litigation. The rationale for the doctrine is that a critical self-evaluation promotes the compelling public interest in observance of the law.[104]

The purpose of a root cause analysis is to permit healthcare facilities to implement plans to identify and reduce future risks. The goal of improving the healthcare system will clearly suffer if such information is subject to discovery because healthcare organizations will be dissuaded from collecting and assessing information that could serve as a ready-made tool kit for plaintiffs' attorneys.

The trial court correctly concluded that the root cause analysis was privileged. Beglin's brief does not make any attempt to provide this Court with concrete reasons why the trial court was wrong or how Beglin's case was substantially prejudiced by its ruling.

V. CONCLUSION

For all of the reasons set forth above, the Hospital is entitled to a directed verdict on punitive damages and a new trial on liability and compensatory damages.

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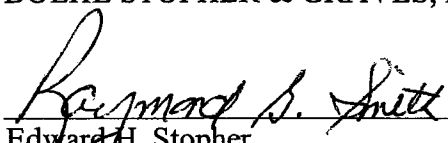

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[104] Lawson's Kentucky Evidence Law, § 5.25, pp. 391-392 (4th ed. 2003); *Bredice v. Doctor's Hosp., Inc.*, 50 FRD 249 (D.D.C. 1970), *aff'd* 479 F.2d 920 (D.C. Cir. 1973); *In re Crazy Eddy Sec. Litig.*, 792 F. Supp. 197 (E.D.N.Y. 1992); *Keyes v. Lenoir Rhyne Coll.*, 552 F.2d 579 (4th Cir. 1977).