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Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-002090-MR

STEEL TECHNOLOGIES, INC. APPELLANT

v.

APPEAL FROM GALLATIN CIRCUIT COURT
HONORABLE STANLEY BILLINGSLEY, JUDGE
CIVIL ACTION NO. 02-CI-00162
CIVIL ACTION NO. 02-CI-00172
CIVIL ACTION NO. 02-CI-00180

ESTATE OF MELISSA GAYLE CONGLETON;
JACOB CONGLETON; SAMANTHA CONGLETON; AND
SENTRY SELECT INSURANCE COMPANY APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: MINTON AND TACKETT, JUDGES; HUDDLESTON, SENIOR JUDGE.[1]

HUDDLESTON, SENIOR JUDGE: Steel Technologies, Inc. appeals from a Gallatin Circuit Court judgment based on a jury verdict that awarded over $3.7 million in damages to the estate and two minor children of Melissa Congleton. Melissa was killed when a steel coil weighing over 30,000 pounds fell from a tractor-trailer

[1] Senior Judge Joseph R. Huddleston sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

owned by Steel Technologies and struck the pickup truck she was driving. The issues on appeal are whether the award of $1 million in punitive damages was supported by the evidence and fell within constitutionally-permissible limits; whether damages for emotional anxiety preceding an injury are recognized under Kentucky law; and whether the loss of parental consortium damages awarded to Melissa's two children were supported by the evidence and were excessive.

PROCEDURAL HISTORY

The accident that led to these lawsuits occurred on October 7, 2002. Ralph Arnold, an employee of Steel Technologies, was driving a tractor-trailer loaded with steel coils along Highway 421 in Henry County.

When a van in front of his truck slowed to turn left, Arnold braked and one of the coils broke loose. The coil fell from the trailer and struck an oncoming pickup truck in the opposite lane. The driver of the pickup, Melissa Congleton, a married mother of two, died shortly afterwards.

At trial, Arnold testified that he had used only three chains to secure the steel coil to the trailer although he knew that federal regulations required at least five chains. He said that he used the lesser number of chains to save time because he was paid according to the amount of steel he could haul during his shift.

Three complaints were filed in Gallatin Circuit Court following the accident: one on behalf of Melissa's estate for wrongful death and personal injuries; one on behalf of her two minor children, Jacob and Samantha, for loss of parental consortium; and one by her husband, Jason Congleton, for loss of spousal consortium. Prior to trial, the circuit court granted summary judgment to the plaintiffs on the issue of Steel Technologies' liability in all three actions. The court also granted Steel Technologies' motions for summary judgment on the claim of loss of spousal consortium and the claim of intentional infliction of emotional distress made in Jacob and Samantha's complaint. The court denied Steel Technologies' motion for summary judgment on the claim of pain and suffering that was made in the wrongful death action, and reserved judgment on its motion for summary judgment on the claim for punitive damages, stating that "the motion will be denied if Plaintiff produces credible evidence that [Steel Technologies] had experienced previous similar incidents, and will be granted if Plaintiff fails to produce such evidence."

Because the issue of Steel Technologies' liability had already been resolved, the trial, which was held from August 4-6, 2003, was concerned solely with determining the character and the amount of the damages. Testimony was heard from Steel Technologies' traffic manager, its safety manager, and its vice-

president for operations; from the tractor-trailer driver, Ralph Arnold; from Jason Congleton's stepmother, a former employee at Steel Technologies; from the Emergency Medical Services employee who first treated Melissa at the scene of the accident; from the Kentucky State Police officer who investigated the accident; and from Jason Congleton.

The jury awarded a total of $3,767,267.00 in damages, allocated as follows: for the lost earning capacity of Melissa Congleton, $660,000.00; for funeral expenses, $7,267.00; for serious emotional anxiety, $100,000.00; for loss of parental consortium, $1 million each to Jacob and Samantha; and for punitive damages, $1 million. A final judgment reflecting the jury's verdict was entered on August 11, 2003, and the verdict and judgment were subsequently affirmed by an order of the court denying Steel Technologies' motion for judgment notwithstanding the verdict.

We are asked to determine whether the award of $1 million in punitive damages was warranted by Steel Technologies' conduct, whether the award violated the provision of Kentucky Revised Statutes (KRS) 411.184 that places limitations on the vicarious liability of employers, and finally, whether the amount of the award violates the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States which prohibits a state from imposing a "grossly excessive"

punishment on a tortfeasor.[2] We are next asked to decide whether the circuit court erred in allowing the estate to recover damages for emotional anxiety suffered by Melissa in the brief interval between the time the steel coil fell from the trailer and struck her vehicle. Finally, we are asked to determine whether the evidence supports the damages for loss of parental consortium awarded to Melissa's two minor children, and whether those damages were improperly calculated to compensate the children for loss of parental consortium during their entire lifetimes. Steel Technologies does not challenge the amount of damages awarded for lost earning capacity or for funeral expenses.

I. PUNITIVE DAMAGES

1. Evidentiary Basis

Under KRS 411.184(1)(f), "punitive damages" are defined as "exemplary damages [that is] damages, other than compensatory and nominal damages, awarded against a person to punish and to discourage him and others from similar conduct in the future."

The United States Supreme Court has explained that,

> [i]n our federal system, States necessarily have considerable flexibility in determining the level of punitive damages that they will

[2] BMW of North America, Inc. v. Gore, 517 U.S. 559, 562, 116 S. Ct. 1589, 1592, 134 L. Ed. 2d 809 (1996), citing TXO Production Corp. v. Alliance Resources Corp., 509 U.S. 443, 454, 113 S. Ct. 2711, 2718, 125 L. Ed. 2d 366 (1993).

> allow in different classes of cases and in any particular case. Most States that authorize exemplary damages afford the jury similar latitude, requiring only that the damages be reasonably necessary to vindicate the State's legitimate interests in punishment and deterrence.[3]

Steel Technologies argues that insufficient evidence was produced at trial that the corporation acted with sufficiently wanton disregard for the lives and safety of others to warrant the imposition of punitive damages. The company further claims that the evidence that was admitted served improperly to inflame the passion and prejudice of the jury.

In examining the evidence supporting a judgment entered upon a jury verdict, our standard of review is highly deferential.

> [Our role] is limited to determining whether the trial court erred in failing to grant the motion for directed verdict. All evidence which favors the prevailing party must be taken as true and [we are] 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. The prevailing party is entitled to all reasonable inferences which may be drawn from the evidence. Upon completion of such an evidentiary review, [we] must determine whether the verdict rendered is palpably or flagrantly against the evidence so as to indicate that it was reached as a result of passion or prejudice. If [we] conclude that such is the case, [we are] at liberty to reverse the judgment on the grounds that the trial court erred in

[3] Id., 517 U.S. at 568 (citations omitted).

> failing to sustain the motion for directed verdict. Otherwise, the judgment must be affirmed.[4]

At trial, Charles West, the traffic manager for Steel Technologies, and Gary Lucas, the safety manager, testified about three episodes preceding the Congleton accident in which steel coils fell from trucks. The first episode involved a truck delivering steel coils to the Steel Technologies facility in 1993. The truck was neither owned by Steel Technologies nor driven by one of Steel Technologies' employees. The trailer broke and a steel coil fell off. The truck rolled over, killing the driver. The second episode occurred in 2001, when a Steel Technologies driver, who was hauling a load of steel coils, went into a corner too quickly. The trailer tilted and two coils broke free and hit the road. The third episode occurred on September 1, 2002, approximately one month before the Congleton accident. A Steel Technologies' driver swerved because he could not stop in time to avoid a car slowing in front of him. The trailer jackknifed and a coil broke free, but it did not fall into the roadway. Charles West testified that following this incident he scheduled safety awareness meetings, but none were held before the Congleton accident.

Steel Technologies argues that the first incident, which resulted in the death of the driver, served only to

[4] Lewis v. Bledsoe Surface Mining Co., 798 S.W.2d 459, 461-62 (Ky. 1990) (citations and quotation marks omitted).

inflame the jury's passion and prejudice against corporations. It further argues that the other two incidents were so different from the Congleton accident that they served only to punish Steel Technologies for dissimilar acts, a practice specifically condemned by the United States Supreme Court in State Farm Mutual Automobile Insurance Company v. Campbell.[5] We disagree. These other episodes served to show that Steel Technologies was on notice that steel coils could break free from trailers when their drivers had to stop or swerve suddenly. Furthermore, prior instances are not the only circumstances under which foreseeability, and thus a duty to protect, may exist. To so hold would make the first incidence of a falling bridge or a collapsing building excusable. And, in any event, federal safety regulations put Steel Technologies on notice that loads of steel coils should be properly secured to insure the safety of other highway users.

In State Farm, the U.S. Supreme Court reviewed an award of $145 million in punitive damages against an insurance company for its bad faith failure to settle an automobile accident claim. The Court found the award excessive, partly on the ground that it was used to punish the perceived deficiencies of the insurance company's operations throughout the country rather than the conduct directed specifically toward the

[5] 538 U.S. 408, 123 S. Ct. 1513, 155 L. Ed. 2d 585 (2003).

plaintiffs. In other words, the punitive damages were awarded in part to punish and deter conduct that bore no relation to the plaintiffs' harm. As the Court stressed, "[a] defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business."[6]

The situation here is distinguishable. There is no indication that the punitive damage award was intended to punish Steel Technologies for the three prior incidents involving steel coils falling from trucks. Rather, the incidents served to show that Steel Technologies was aware that steel coils could fall from its trailers but failed to take appropriate steps (such as regular inspections) to ensure that the company drivers secured the coils with a sufficient number of chains.

We are not persuaded that the account of the first episode involving another company's truck and driver inflamed the jury's passion and prejudice against corporations in general or Steel Technologies in particular. Steel Technologies argues that this effect was exacerbated by the closing argument of plaintiff's counsel who said that

> [t]his jury is a lighthouse to this entire country. It has the power to send a message and keep the light burning and warn every truck line hauling these steel coils that it is beyond the community standards of this small county, it is beyond the public policy of this jury, it is beyond the standards

[6] Id., 538 U.S. at 423.

> which we're willing to accept to attempt to have a thirty-some-odd unit truck line traveling over the roads, the American highways, without any safety director in the seat beside that driver on any day, of any week, of any month, of any year. It is beyond the standards that we will accept for them not to check their loads pursuant to the CDL [Commercial Driver's License] requirements. It can't be let go.

No contemporaneous objection was made to this argument. "The function of the Court of Appeals is to review possible errors made by the trial court, but if the trial court had no opportunity to rule on the question, there is no alleged error for this court to review."[7] Even had Steel Technologies not failed to preserve this issue for review, the comments were not sufficiently inflammatory to mandate reversal of the verdict. We reach this conclusion by comparing the comments with those made by plaintiff's counsel in the case relied on by Steel Technologies, Clement Brothers Co. v. Everett.[8] The Everetts had sued the Clement Brothers' mining company for damages to their house allegedly caused by nearby blasting. Very little evidence was offered regarding the damage done to the house, yet the jury awarded $5,000.00 in punitive damages. The Court held that this was partly the result of an improper argument by plaintiff's counsel in which

[7] Kaplon v. Chase, 690 S.W.2d 761, 763 (Ky.App. 1985), citing Payne v. Hall, 423 S.W.2d 530 (Ky. 1968); Ky. R. Civ. Proc. (CR) 59.06.

[8] 414 S.W.2d 576 (Ky. 1967).

> the appellant company was pictured as a rich, grasping, foreign corporation running ruthlessly roughshod over the poor, honest, long-suffering citizens of Barren County; its attorney as a rich man who would be upset if it were his "mansion" that suffered the blasting damage. Repeated references were made to the appellant's four-million-dollar contract. The jury was asked whether it would let "these people from North Carolina come in here and destroy a good woman's property?" The appellant was compared to a wolf devouring a lamb. The jury was asked to imagine a little child in the appellees' yard having been struck and killed by a large boulder from the blasting operation. The jurors were told that if they did not give the requested damages the appellees "will have to look at your faces then in their memory."[9]

The remarks made by plaintiff's counsel in the Congleton case certainly do not approach this level of impropriety, and they do not warrant reversal of the punitive damage award.

Steel Technologies also urges us to apply the reasoning of two Kentucky cases involving accidents between cars and trucks in which our courts refused to allow punitive damages even though the owners of the trucks had failed to observe statutory regulations.

In the first case, Horn v. Hancock,[10] a tractor-trailer was transporting a heavy piece of equipment that qualified as an oversized load. The truck was without the lead escort vehicle

[9] Id. at 577.

[10] 700 S.W.2d 419 (Ky.App. 1985).

required by statute for loads of that size. An automobile driver, Marksberry, who was following the trailer across a bridge pulled out to see if he could pass. Maxine Horn, who was approaching from the opposite direction, became startled when she saw the wide load and Marksberry's car. She tried to brake or pull to the right, but she struck the curb and bounced into the trailer. This Court held that the failure of the company that owned the trailer to follow the statutory requirement to supply a lead vehicle was insufficient to warrant an instruction on punitive damages because there was not a sufficient causal connection between Mrs. Horn's injuries and the failure to have a lead vehicle.[11]

Similarly, in Keller v. Morehead,[12] a trailer that was 21 inches over the permissible statutory width collided with a vehicle being driven the opposite way. Kentucky's highest court refused to reverse the refusal to give an instruction on punitive damages because there was no evidence that the width of the trailer, or the failure of its owner to obtain a permit to allow it to travel the roadways, was the proximate cause of the accident.[13]

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[11] Id. at 421.

[12] 247 S.W.2d 218 (Ky. 1952).

[13] Id. at 220.

In the case of Steel Technologies, however, there was a clear causal connection between Melissa's fatal injury and the company's failure to take measures to ensure that its driver secured the steel coil with the requisite number of chains.

2. Vicarious Liability

Steel Technologies next argues that it was improper to assess punitive damages against the company for the unauthorized negligent acts of its employee driver. KRS 411.184(3) provides that punitive damages will not "be assessed against a principal or employer for the act of an agent or employee unless such principal or employer authorized or ratified or should have anticipated the conduct in question." This statutory section is founded in the doctrine of vicarious liability.

> Vicarious liability, sometimes referred to as the doctrine of respondeat superior, is not predicated upon a tortious act of the employer but upon the imputation to the employer of a tortious act of the employee "by considerations of public policy and the necessity for holding a responsible person liable for the acts done by others in the prosecution of his business, as well as for placing on employers an incentive to hire only careful employees."[14]

Steel Technologies argues that no evidence was offered that it had any reason to anticipate that its driver would fail to secure his load properly. In fact, evidence was offered to

[14] American General Life & Accident Ins. Co. v. Hall, 74 S.W.3d 688, 692 (Ky. 2002), quoting Johnson v. Brewer, 266 Ky. 314, 98 S.W.2d 889, 891 (Ky. 1936).

show that drivers were paid according to the amount of steel they were able to haul, thus giving them an incentive to save time by using fewer chains to secure their loads, that responsibility for securing the loads rested entirely on the drivers, that there was no inspection whatsoever (on either a regular or random basis) of the trailers before they left Steel Technologies' facility, and that the driver involved in the accident with Melissa had received no training on how to secure loads on the new model of trailer he was driving on that day. In light of this evidence, the finding of the jury that Steel Technologies should have anticipated the conduct of its driver in not using the proper number of chains was not so palpably or flagrantly against the evidence so as to indicate that it was reached as a result of passion or prejudice.

3. Due Process Violation

We are also asked to determine whether the amount of punitive damages violated Steel Technologies' due process rights.

> Despite the broad discretion that States possess with respect to the imposition of criminal penalties and punitive damages, the Due Process Clause of the Fourteenth Amendment to the Federal Constitution imposes substantive limits on that discretion. That Clause makes the Eighth Amendment's prohibition against excessive

> fines and cruel and unusual punishments applicable to the States.[15]

Our standard of review for this constitutional claim is *de novo*.[16]

Steel Technologies contends that the jury instructions on punitive damages gave the jury "no guidance and unfettered discretion" to assess an "unlimited" amount of damages. This specific argument regarding the instructions was not preserved for review. Kentucky Rules of Civil Procedure (CR) 51 "requires the lawyers in a case to assist the judge in giving correct instructions and disallows an *ex post facto* objection as a means of obtaining a reversal of the judgment on appeal."[17] Furthermore, under CR 51(3), objections to jury instructions must be specific.[18] Finally, we note, the jury instructions on punitive damages were identical to the proposed jury instructions submitted by Steel Technologies itself on July 26, 2003.

We shall nonetheless review the instructions, in part because of the size of the punitive award and also the seriousness of the claim. The jury was instructed as follows:

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[15] Cooper Industries, Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 433 121 S. Ct. 1678, 1685, 149 L. Ed. 2d 674 (2001), citing Furman v. Georgia, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972) (*per curiam*).

[16] Id., 532 U.S. at 436.

[17] Cox v. Hardy, 371 S.W.2d 945, 947 (Ky. 1963).

[18] See International Harvester Co. v. Huber, 359 S.W.2d 616, 618 (Ky. 1962), citing Johnson v. Gaines, 313 S.W.2d 408 (Ky. 1958).

> Do you, the jury, believe that clear and convincing evidence has established that the accident about which you have heard evidence was the result of Ralph Arnold acting in reckless disregard for the lives or safety of others and that Steel Technologies, Inc. should have anticipated that Ralph Arnold would so act?
>
> If you have answered "Yes" to the [above] question . . . you may in your discretion assess punitive damages against Steel Technologies, Inc. If you believe from the evidence that punitive damages should be assessed in addition to the damages you have already awarded, you should consider the following factors in determining the amount,
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> (a) The likelihood at the relevant time that serious harm would arise from the acts of Steel Technologies, Inc.;
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> (b) The degree of Steel Technologies, Inc.'s awareness of that likelihood;
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> (c) The profitability of the misconduct to Steel Technologies, Inc.;
>
> (d) The duration of the misconduct and any concealment of it, and;
>
> (e) Any failure of Steel Technologies, Inc. to remedy the misconduct once it became known.
>
> "Punitive Damages" are to be awarded for the sole purpose of punishing the reckless disregard of lives, safety or property and discouraging it in the future.

The text of this instruction follows almost exactly the language of KRS 411.186, the statute that sets forth the factors to be considered in the assessment of punitive damages. Although the constitutionality of that statute has not been

reviewed, the U.S. Supreme Court has approved jury instructions with substantially similar wording modeled on an Oregon statute corresponding to KRS 411.186. The Court observed that "[t]hese substantive criteria . . . gave the jurors 'adequate guidance' in making their award" and noted that in an earlier case the Court had even deemed instructions where "the jury was told only the purpose of punitive damages (punishment and deterrence) and that an award was discretionary, not compulsory" constitutionally sufficient.[19] Thus, we do not agree with Steel Technologies' contention that this instruction gave the jury "no guidance and unfettered discretion" to assess an "unlimited" amount of damages.

Steel Technologies goes on to argue that the application of any of the three guideposts established by the U.S. Supreme Court[20] to gauge whether an award of punitive damages is unconstitutionally excessive mandates reversal of the award in this case.

The first guidepost requires us to review the reprehensibility of the defendant's conduct which is determined by considering whether

> the harm caused was physical as opposed to economic; the tortious conduct evinced an

[19] Honda Motor Co., Ltd. v. Oberg, 512 U.S. 415, 442, 114 S. Ct. 2331, 2345, 129 L. Ed. 2d 336 (1994), citing Pacific Mutual Life Ins. Co. v. Haslip, 499 U.S. 1, 18, 111 S. Ct. 1032, 1043, 113 L. Ed. 2d 1 (1991).

[20] BMW v. Gore, supra, note 2, 517 U.S. at 574.

> indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident.[21]

Steel Technologies admits that the harm in this case was physical as opposed to economic, but maintains that none of the other factors indicating reprehensibility were present. The Supreme Court has certainly not dictated, however, that all of the factors must be present to support a finding of sufficient reprehensibility to support a punitive damages award of this magnitude. Furthermore, the evidence supports the view that Steel Technologies was indifferent to the health and safety of others in failing to train its drivers and to conduct any inspection of its trucks even after the company became aware that the steel coils could become dislodged from the trailers if the trucks had to stop or swerve suddenly.

Citing the next guidepost, Steel Technologies argues that the ratio between the compensatory damages ($667,267.00) and the punitive damages ($1 million) is impermissibly great. In State Farm, the Supreme Court cautioned that "in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process. . . . [A]n award of more than four times the amount of

[21] State Farm v. Campbell, supra, note 5 at 419.

compensatory damages might be close to the line of constitutional impropriety."[22] The award here represents a ratio of 1 to 1.5 which is well within these limits.

Steel Technologies contends, however, that when the compensatory damages are substantial, a lesser ratio for punitive damages is required in order to meet the demands of due process. Although we agree that the compensatory damages are substantial in this case, the injury suffered was the most serious harm that can befall an individual. The Supreme Court has stressed that we "must ensure that the measure of punishment is both reasonable and proportionate to **the amount of harm to the plaintiff** and to the general damages recovered."[23]

The trilogy of cases in which the Supreme Court has delineated due process jurisprudence in regard to punitive damages all involved non-physical harm and punitive damages that exceeded compensatory damages more than a hundredfold.[24] We conclude that the ratio of punitive to compensatory damages in this case was well within the constitutional parameters

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[22] Id. at 425.

[23] Id. at 426 (emphasis supplied).

[24] See BMW v. Gore, supra, note 2 (consumer not informed that his new car had been repainted, compensatory damages of $40,000.00, punitive damages of $2 million); Cooper Industries v. Leatherman Tool Group Inc., supra, note 15 (false advertising of a multipurpose tool, $50,000.00 in compensatory damages and $4.5 million in punitive damages); State Farm Mut. Auto. Ins. Co. v. Campbell, supra, note 5 (bad faith insurance claim, $1 million in compensatory damages and $145 million in punitive damages).

established by the Supreme Court, particularly when we compare the harm suffered by Melissa to that suffered by the plaintiffs in these other cases.

Steel Technologies also argues that the punitive damages far exceed the maximum civil penalty of $10,000.00 that could have been imposed on Steel Technologies' driver.[25] It is also necessary to consider, that "although the exemplary award was 'much in excess of the fine that could be imposed,' imprisonment was also authorized in the criminal context."[26]

Steel Technologies nonetheless argues that Kentucky had "no predictable standard for imposition of punitive damages in October 2002 when the subject accident occurred and had none in August 2003 when the case was tried, so any award of punitive damages would violate the Due Process Clause of the Fifth Amendment[27] to the Constitution." As has been established,

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[25] This amount refers to KRS 534.030(1) which provides that the maximum fine for a felony shall not exceed $10,000.00.

Steel Technologies has also directed us to two sections of the Code of Federal Regulations. The first section, 49 CFR § 392.9(a)(1), provides that "[a] driver may not operate a commercial motor vehicle and a motor carrier may not require or permit a driver to operate a commercial motor vehicle unless . . . [t]he commercial motor vehicle's cargo is properly distributed and adequately secured as specified in §§ 393.100 through 393.142 of this subchapter." We fail to see the immediate relevance of this section to the argument at hand, except as a means of reiterating that Ralph Arnold alone was solely responsible for Melissa's death. If anything, however, this section of the Code suggests that the driver's supervisor or employer is also responsible for ensuring that the load is properly secured. The other citation to the Code was incomplete and could not be located.

[26] BMW v. Gore, supra, note 2, at 583 (citation omitted).

[27] Steel Technologies' brief states "Fifth Amendment"; we assume it intended to refer to the Fourteenth Amendment.

however, the jury instructions closely tracked the language of KRS 411.186 that provides constitutionally-sufficient standards for assessing punitive damages.

II. DAMAGES FOR EXTREME EMOTIONAL ANXIETY PRIOR TO INJURY

Steel Technologies' next argument concerns damages in the amount of $100,000.00 that were awarded by the jury under the following instruction:

> If you believe from the evidence that Melissa Congleton, as a result of the steel coil falling off the truck and colliding with her vehicle suffered serious emotional anxiety arising from the fear of injury, and that said fear was reasonable, that the occurence [sic] of such injury was a reasonable medical likelihood, and the anxiety was caused by exposure to the risk for which Steel Technologies, Inc. is legally responsible, then you may decide to award damages for emotional distress by Melissa Congleton, if any, from the time she may have anticipated said event, and up until the moment she lost conscionsness [sic].

The evidence to support this instruction was provided, in part, by the emergency worker who was the first to treat Melissa immediately following the accident. The worker testified that Melissa "looked like she had seen the steel coming and her face was fixed in a scream" and that "she was scared when it fell on her."

Steel Technologies argues that this jury instruction and the subsequent award of $100,000.00 for this claim were

improper on both procedural and substantive grounds. First, Steel Technologies contends that no claim for emotional distress was made in the pleadings, and further, that it could not stem from the personal injury claim because the trial court granted a directed verdict on the issue of conscious pain and suffering. Second, it argues that this claim is based on a cause of action that is not recognized in the Commonwealth of Kentucky and is contrary to this state's case law which demands an "impact" prior to any incurrence of damages. Steel Technologies does not, however, contend that the amount of the award is excessive.

We address first the contention that this instruction was improperly offered because there was no basis for it in the pleadings. The complaint filed on behalf of Melissa's estate alleges, in relevant part, that: "Plaintiff [Jason Congleton, the administrator], on behalf of decedent, brings this cause of action for 1) lost wages and earning capacity; 2) pain; 3) suffering; 4) traumatic death; [and] 5) massive and permanent injury."

Setting aside for a moment the question of whether it was proper to allow damages for fear that occurred before the injury, it is well-established that a plaintiff may recover for mental suffering as part of a personal injury claim without making a separate claim for negligent infliction of emotional distress. "The words 'pain and suffering' as used in the law

are a term of art meaning the 'physical pain and mental suffering' attendant to a personal injury."[28] "It is the well-settled rule that the measure of damages for personal injury is for physical and mental suffering (and loss of time if asked) and impairment of earning ability."[29]

> It shall be lawful for the personal representative of a decedent who was injured by reason of the tortious acts of another, and later dies from such injuries, to recover in the same action for both the wrongful death of the decedent and for the personal injuries from which the decedent suffered prior to death, including a recovery for all elements of damages in both a wrongful death action and a personal injury action.[30]

Steel Technologies points out that the circuit court granted a directed verdict on the claim of conscious pain and suffering. At the time it granted the directed verdict on this claim, however, the court also stated that "the period of time when it started to occur until her consciousness was lost is a time period . . . subject to the issue of fright. If there's a touching, Kentucky allows fright. But pain and suffering, that's out. Conscious pain and suffering, that's out." Steel Technologies raised no objection at the time to the court's

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[28] Department of Educ. v. Blevins, 707 S.W.2d 782, 785 (Ky. 1986) (citations omitted).

[29] Illinois Central R. Co. v. Frick, 256 Ky. 317, 76 S.W.2d 13, 15 (1934) (citations omitted).

[30] KRS 411.133.

announcement that it would instruct on damages for any fear suffered immediately prior to Melissa's loss of consciousness. The court later elaborated that this claim was part of the personal injury action, stating "it's the old tort for fright" and that negligent infliction of emotional distress was implied in the tort.

The question remains whether Kentucky permits damages for fear that occurs immediately prior to a tortiously-inflicted injury, and is caused by anticipation of that injury. Inasmuch as there is no Kentucky case law that directly addresses this scenario, we turn to the Restatement (Second) of Torts. Section 456 provides that:

> If the actor's negligent conduct has so caused any bodily harm to another as to make him liable for it, the actor is also subject to liability for
> (a) fright, shock, or other emotional disturbance resulting from the bodily harm or from the conduct which causes it, and
>
> (b) further bodily harm resulting from such emotional disturbance.

Comment e. is particularly relevant to this case:

> The rule stated in Clause (a) is not limited to emotional disturbance resulting from the bodily harm itself, but includes also such disturbance resulting from the conduct of the actor. **Thus one who is struck by a negligently driven automobile and suffers a broken leg may recover not only for his pain, grief, or worry resulting**

from the broken leg, but also for his fright at seeing the car about to hit him.[31]

This view of pre-injury fear as an integral part of a larger, ongoing ordeal is applicable to the facts of this case.[32] Steel Technologies has urged us instead to apply the holdings of several Kentucky cases that involved stand-alone claims for negligent infliction of emotional distress. We believe that these cases are not directly relevant because the fact patterns and claims are significantly different.[33] In Deutsch v. Shein,[34] a physician subjected a patient to X-rays without first establishing whether she was pregnant. When she discovered that she was pregnant and that there was a likelihood that the baby had been damaged by the X-rays, she had an abortion. There was no evidence that the fetus had actually been damaged by the X-rays. The Kentucky Supreme Court allowed her to assert a claim for negligent infliction of emotional distress against the physician, explaining that the X-rays bombarding her body were sufficient to establish an "impact." The Court explained the

[31] Emphasis supplied.

[32] See Beynon v. Montgomery Cablevision Ltd., 718 A.2d 1161, 1169 n. 6 (Md. 1998), citing Thomas D. Sydnor II, Note, Damages for a Decedent's Pre-Impact Fear: An Element of Damages under Alaska's Survivorship Statute, 7 Alaska L. Rev. 351, 352 (1990).

[33] See Justice Kennedy's dissent in Norfolk & Western Ry. Co. v. Ayers, 538 U.S. 135, 171, 123 S. Ct. 1210, 1230, 155 L. Ed. 2d 261 (2003), citing with approval the Restatement (Second) of Torts § 456, including Comment e., and distinguishing damages for emotional harms that are less direct and may be recovered only pursuant to a stand-alone tort action for negligent infliction of emotional distress.

[34] 597 S.W.2d 141 (Ky. 1980).

rationale underlying the "impact" requirement: "It is well established in this jurisdiction that 'an action will not lie for fright, shock or mental anguish which is unaccompanied by physical contact or injury. The reason being that such damages are too remote and speculative, are easily simulated and difficult to disprove, and there is no standard by which they can be justly measured."[35] Significantly, the Court was quoting directly from Morgan v. Hightower's Adm'r,[36] an early case in which the plaintiff unsuccessfully attempted to recover for emotional distress caused by witnessing a suicide. Similarly, in Wilhoite v. Cobbe,[37] another "bystander" case, a mother was not permitted to recover for negligent infliction of emotional distress caused by witnessing her daughter being hit by a car. And, in Michals v. William T. Watkins Memorial United Methodist Church,[38] parents of children exposed to asbestos tried unsuccessfully to recover for fear of future injury although the children had not contracted any illness as a result of the exposure. These cases all involve a serious degree of remoteness between the plaintiff and the tortfeasor, raising issues of proximate cause.

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[35] Id. at 145-46.

[36] 291 Ky. 58, 163 S.W.2d 21 (1942).

[37] 761 S.W.2d 625, 626 (Ky.App. 1989).

[38] 873 S.W.2d 216 (Ky.App. 1994).

In Melissa's case, there is no "proximate cause" problem. Her death occurred shortly after the coil slid from the truck as a result of the defendant's negligence. There were no intervening causes, her death was foreseeable, and there was no question of fear of future harm that had not yet come to pass. The cases cited by Steel Technologies would be of greater relevance if the coil had fallen from the trailer and narrowly missed hitting Melissa's vehicle, and she had subsequently filed a claim for negligent infliction of emotional distress.

Steel Technologies also cites cases from other jurisdictions where recovery for "pre-impact fright" is not permitted. Several of these come from jurisdictions where recovery for such damages is expressly barred by statute,[39] which is not the case in Kentucky. The others generally do not allow such claims on the grounds that they are overly speculative.[40] A number of jurisdictions do, however, allow such claims.[41] We

[39] See, e.g., Gilbaugh v. Balzer, 2001 WL 34041889 (D.Or. 2001), an unpublished federal case from Oregon where recovery was barred by Oregon Rev. Stat. 30.020(2), which limits recovery of damages to the period "between injury to the decedent and the decedent's death." Similarly, in Stecyk v. Bell Helicopter Textron, Inc., 53 F. Supp. 2d 794 (E.D. Pa. 1999), the federal court did not allow damages for pre-impact fright because they were barred under the survival statutes of Pennsylvania and Delaware.

[40] See, e.g., Bowen v. Lumbermen's Mutual Cas. Co., 517 N.W.2d 432, 435 (Wis. 1994), in which the Wisconsin Supreme Court refused recovery on the ground that it would "too likely open the way to fraudulent claims." Other jurisdictions that do not allow these claims include Illinois, Arkansas and Kansas.

[41] The jurisdictions that allow recovery include Louisiana, New York, Texas, Michigan, Nebraska, Maryland, Georgia and Florida. For a survey and

agree with a comment contained in a dissent of the Maryland Court of Special Appeals (in an opinion subsequently reversed by the Court of Appeals of Maryland) that it is unfair to allow tortfeasors to benefit because the injuries they caused were fatal rather than serious.[42] Furthermore, while "the usual sequence is impact followed by pain and suffering, we are unable to discern any reason based on either law or logic for rejecting a claim because in this case, . . . this sequence was reversed."[43]

III. LOSS OF PARENTAL CONSORTIUM

Finally, Steel Technologies argues that the award of $1 million to each of Melissa's children, Jacob and Samantha, for loss of parental consortium, was unsupported by the evidence. Specifically, the company points to the fact that neither child testified, nor was any expert testimony on this subject offered.

The fact that the children themselves did not testify is not dispositive. The logical extension of this argument is that if the children had been infants, they could not have recovered any such damages because they were not old enough to

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discussion of the case law, see Beynon v. Montgomery Cablevision, supra, note 32; Nelson v. Dolan, 434 N.W.2d 25 (Neb. 1989).

[42] Beynon, supra, note 32, at 1166, citing the dissent in Montgomery Cablevision Ltd. Partnership v. Beynon, 116 Md. App. 363, 696 A.2d 491, 510 (1997).

[43] Id. at 1170, quoting Solomon v. Warren, 540 F.2d 777, 793 (5th Cir. 1976).

verbalize their feelings. Furthermore, the record reflects that testimony was offered as to the children's emotional state by their grandmother and father.

There is no need for expert testimony to assist the jury in assessing damages for loss of parental consortium. According to Kentucky Rules of Evidence (KRE) 702, which governs the admissibility of testimony by experts:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Thus, as the Supreme Court of Kentucky has said,

> the test for allowing an expert witness is whether his testimony would assist the trier of fact. . . . A witness may become qualified by practice or an acquaintance with the subject. He may possess the requisite skill by reason of actual experience or long observation.[44]

Steel Technologies does not specify the type of expert or the type of testimony that could have assisted the jury in determining the amount of damages for loss of parental consortium. "The courts and litigants constantly call upon jurors to use their common sense and life experience during jury

[44] Farmland Mut. Ins. Co. v. Johnson, 36 S.W.3d 368, 388-89 (Ky. 2000) (citations and internal quotation marks omitted).

service."[45] Assessing a loss of parental consortium claim is a task ideally suited to the life experience of the members of the jury; the value of a mother's consortium is something well within the experience of most jurors and does not require expert testimony. We quote from an opinion of the Georgia Court of Appeals: "Damages for loss of consortium are not capable of exact pecuniary measure and must be left to the enlightened conscience of impartial jurors taking into consideration the nature of the services, society, companionship and all the circumstances of the case."[46]

Steel Technologies also argues that the jury instruction on this claim was "open-ended" because it did not specify that under Kentucky case law, such damages could not be awarded to cover the entire lifetime of the children, but could only be awarded for the period ending with their attaining the age of majority. Steel Technologies insists that plaintiffs' counsel said in closing argument that the jury could award damages extending for the children's lifetime.

The jury was instructed to

> determine from the evidence the sum or sums of money, if any, that will reasonably compensate Jacob Congleton and Samantha

[45] Tabor v. Commonwealth, 948 S.W.2d 569, 573 (Ky.App. 1997) (citations omitted).

[46] Mortensen v. Fowler-Flemister Concrete, Inc., 555 S.E.2d 492, 494 (Ga. Ct. App. 2001) (citations omitted).

> Congleton for whatever loss of services, aid, society, and companionship as you believe from the evidence each of them has sustained or is reasonably certain to sustain as a direct result of the accident about which you have heard evidence.

Steel Technologies neither raised this specific objection to the jury instructions nor asked that limiting language stating that damages could be awarded only for the period of the children's minority be included. Nonetheless, we have reviewed the record and disagree with Steel Technologies that plaintiff's counsel advised the jury that it could award damages extending for the lifetime of the children. Plaintiffs' counsel asked the jury to award damages "for the love, guidance and the society that she [Melissa] would give to them had she been here **throughout the remainder of her natural days**."[47] The only implication we are able to draw from these words was that the damages should extend for Melissa's natural lifetime, not that of the children.

Steel Technologies also objects to comments by plaintiffs' counsel that it insists invoked the prohibited "Golden Rule" by implying that the jury should award damages equivalent to the value of the services rendered by each juror's mother during each juror's lifetime. Plaintiffs' counsel stated, "I ask myself what I owe my mother – I use that as my

[47] Emphasis supplied.

guide." We discern no error in this comment, which was merely an appeal to the life experience of the jurors. More importantly, no contemporaneous objection to this comment was made by counsel for Steel Technologies. The issue was not, therefore, preserved for review.

The damages awarded in this case were considerable, but in view of the serious consequences of the accident and the weight of evidence that supported the jury's finding that Steel Technologies should have anticipated that its driver would act with reckless disregard for the lives and safety of others, we affirm the judgment.

TACKETT, JUDGE, CONCURS.

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

MINTON, JUDGE, CONCURRING IN PART AND DISSENTING IN PART: The trial court ruled that a pain and suffering instruction was not warranted because the decedent died instantaneously from the impact between her vehicle and Steel Technology's runaway coil. But the trial court instructed the jury that if it believed from the evidence that the decedent "suffered serious emotional anxiety arising from the fear of injury," then the jury could award damages for "emotional distress suffered" by the decedent "from the time she may have anticipated the event [] and up until the moment she lost

consciousness." The jury returned a $100,000 verdict under this instruction. And the trial court entered judgment accordingly.

By affirming this judgment, the majority recognizes for the first time in Kentucky pre-impact fear to be a compensable component of conscious pain and suffering. This claim arose in the context of a survival action under KRS 411.133. But for prospective application, the holding here makes no distinction between claims for pre-impact fear in anticipation of certain death and claims in anticipation of any actionable injury. Specifically, the majority embraces the broadest application of RESTATEMENT (SECOND) OF TORTS § 456(a), as elucidated by Comment e. So, in reality, we now have opened the door to increased liability via a new element of damages that is free of the traditional moorings that have limited recoveries for the negligent infliction of emotional distress. I most respectfully disagree with the majority's adoption of this new rule; therefore, I dissent.

Our jurisprudence has adhered to the strict common law doctrine requiring a physical impact or injury that *results* in emotional distress in order for the emotional distress to be compensable. The traditional "impact rule" for non-intentional torts has been thus recognized to be the law:

> It is a rule of longstanding in this jurisdiction that we do not permit damages for mental suffering unless accompanied by

> physical contact or injury; that such damages are presumably "too remote and speculative." []. Although the scope of what should be considered as related to, and the direct and natural consequence of, physical contact or injury, has been expanded [], the rule has not been abandoned. Emotional distress, or psychic injury, must still bear some direct relationship to physical contact or injury.[48]

The majority adeptly avoids the application of the impact rule by categorizing pre-impact fear "as an integral part of a larger, ongoing ordeal" that now can be pled and proved as any claim for pain and suffering. In so doing, the majority reasons that it has not really departed from the impact rule; but it has only reversed the sequence to allow recovery when the impact follows fear, as well as when the impact results in mental suffering. But reversing the usual sequence abandons the rationale of the impact rule: any compensated mental pain and suffering must be caused by a physical impact.[49]

The majority cites Deutsch v. Shein in which the court explained the rationale for the impact rule by stating: "The reason being that such damages are too remote and speculative,

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[48] Schork v. Huber, 648 S.W.2d 861, 866 (Ky. 1983) (citations omitted).

[49] Solomon v. Warren, 540 F.2d 777, 796-797 (5th Cir. 1976) (Gee, J., dissenting).

are easily simulated and difficult to disprove, and there is no standard by which they can be justly measured."[50]

Admittedly, the concerns expressed in Deutsch about simulated claims are eliminated by the RESTATEMENT'S requirement of bodily harm; but the concerns over the speculative nature of the claim and the lack of an adequate measuring standard remain.

Therefore, I would reverse the damage award for pre-impact fear. I concur in the balance of the opinion.

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[50] 597 S.W.2d 141, 146 (Ky. 1980).