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Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-000969-MR

FUEL TRANSPORT, INC. AND
TROY E. VANDERPOOL — APPELLANTS

v.

APPEAL FROM KNOTT CIRCUIT COURT
HONORABLE KIM C. CHILDERS, JUDGE
ACTION NO. 05-CI-00103

GARNETT GIBSON, AS EXECUTOR AND
PERSONAL REPRESENTATIVE OF THE
ESTATE OF TOPSIE GIBSON — APPELLEE

OPINION
AFFIRMING IN PART AND
REVERSING IN PART

** ** ** ** **

BEFORE: CLAYTON AND THOMPSON, JUDGES; LAMBERT,[1] SENIOR JUDGE.

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

CLAYTON, JUDGE: Appellants, Fuel Transport, Inc. and Troy E. Vanderpool (Vanderpool), bring this appeal in a wrongful death case against appellee, Garnett Gibson, as executor and personal representative of the estate of Topsie Gibson, from the final judgment of the Knott Circuit Court entered on January 8, 2008, and the trial court's denial of their posttrial motions entered on May 1, 2008. For the reasons stated herein, we affirm in part and reverse in part.

On March 22, 2005, plaintiffs, Garnett Gibson, as executor and personal representative of the estate of Topsie Gibson (Estate), and Roger Russell (Russell) filed a complaint in Knott Circuit Court for compensatory and punitive damages against appellants for personal injuries and damages as a result of an accident between Russell and Topsie's vehicle and a truck and trailer owned by Fuel Transport and operated by Vanderpool. The accident, which occurred on November 2, 2004, was caused when the appellants' trailer overturned and spilled its cargo of coal across a dark, unlit portion of Kentucky State Road 80, at or near the county line between Knott and Floyd counties. Plaintiffs filed this action on March 22, 2005, alleging ordinary negligence against Vanderpool in causing the accident, vicarious liability and negligent entrustment on the part of Fuel Transport, and gross negligence against Fuel Transport for failing to properly maintain the truck involved in the accident. Trial commenced on December 3, 2007.

On December 4, 2007, the morning following the commencement of trial, Russell settled his claims with appellants, leaving the Estate as the sole

plaintiff. The trial continued with the appellants and the Estate and concluded on December 5, 2007. After less than two hours deliberating, the jury unanimously found in favor of the Estate and awarded $2,121,371.31 in compensatory damages against both appellants and an additional $2 million in punitive damages against Fuel Transport. Judgment was entered by the court on January 8, 2007.

On appeal, appellants present the following issues: (1) the trial court erred in denying their motion for a new trial based on prejudicial juror misconduct and bias; (2) the court erred in permitting the jury to consider punitive damages against Fuel Transport; (3) the punitive damages awarded were unconstitutionally excessive; (4) the award for pain and suffering was unsupported by evidence and based on passion and prejudice; (5) the court erred in its instructions on pain and suffering and punitive damages; and (6) the court erred in refusing to transfer venue.

I. JUROR MISCONDUCT

Appellants contend that a new trial should have been granted based on alleged juror misconduct. We review the trial court's denial of a motion for a new trial for abuse of discretion. *Kaminski v. Bremner, Inc.*, 281 S.W.3d 298, 304 (Ky. App. 2009). Presuming the trial court to be correct, we will reverse its decision only upon a clear showing that the trial judge acted in a manner which was "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Id.* (quoting *Lester v. Com.*, 132 S.W.3d 857, 863 (Ky. 2004) (citations omitted)). Because we find that the trial court was correct in denying appellant's motion for a

new trial based on the alleged juror misconduct, we affirm its decision on this issue.

Appellants argue that one of the jurors, Lisa Short (Short), concealed the fact that her father had been killed in an automobile accident. This issue was first raised in appellants' January 18, 2008, "Motion for Judgment NOV or in the Alternative, a New Trial" wherein they argued that Short's familial history tainted the jury. Appellants claim that they only discovered Short's "significant bias" in a posttrial interview. Had Short's personal history been revealed during voir dire, appellants argue she would either have been struck for cause or appellants would have used a preemptory strike to remove her from the panel.

Voir dire is the means by which a party can "ascertain whether a cause for challenge exists, [or] whether it is expedient to exercise the right of peremptory challenge[]" by determining whether a juror has the necessary qualifications, has prejudged a case, or is free from prejudice or bias. *Sizemore v. Com.*, 306 S.W.2d 832, 834 (Ky. 1957) (citing 50 C.J.S. *Juries*, § 273). Merely having a similar background is not enough to justify excusing a juror for cause. *See Allen v. Com.*, 278 S.W.3d 649 (Ky. App. 2009); *Richardson v. Com.*, 161 S.W.3d 327 (Ky. 2005); *Hodge v. Com.*, 17 S.W.3d 824 (Ky. 2000). Instead, bias or impartiality must be proven by the party alleging such and will not be presumed. *Hicks v. Com.*, 805 S.W.2d 144 (Ky. App. 1990). Where a challenge to juror qualification is first raised after a verdict is rendered, the party seeking relief must "allege facts, which if proven to be true, are sufficient to undermine the integrity of

the verdict." *Gordon v. Com.*, 916 S.W.2d 176, 179 (Ky. 1995). Thus, in order to obtain a new trial based on alleged juror mendacity, "a party must first demonstrate that a juror failed to answer honestly a material question on *voir dire*, and then further show that a correct response would have provided a valid basis for a challenge for cause." *Adkins v. Com.*, 96 S.W.3d 779, 796 (Ky. 2003) (quoting *McDonough Power Equipment., Inc. v. Greenwood*, 464 U.S. 548, 556, 104 S.Ct. 845, 850, 78 L.Ed.2d 663 (1984)).

In *Sizemore*, 306 S.W.2d 832, the Court reversed the trial court's judgment based on the failure of two jurors during voir dire to disclose that they had been related to a victim of a crime similar to that charged against the accused. During voir dire in a murder trial, the potential jurors were asked whether any of them "had ever been interested in the prosecution of a case in which a person had been killed." *Id.* at 833. It was later revealed that two of the jurors had been related to a victim killed by her husband; one as an uncle and the other by marriage. *Id.* Although the Court recognized that the term "interested" could be interpreted different ways, the Court nonetheless held that the jurors were under a duty to disclose their relationship to a murder victim where under the circumstances described it would be "difficult to conceive of a situation where complete indifference existed." *Id.* at 834. Therefore, the judgment was reversed due to the failure of the jurors to disclose information that may have been of "great value to the attorney for the defense in determining whether bias, actual or implied, existed." *Id.*

By contrast, in *Moss v. Com.,* 949 S.W.2d 579, 580-82 (Ky. 1997), no error in failing to disclose was found where one of the jurors later admitted he knew the two testifying police officers. During voir dire, the jurors were asked if they had "any relationship or knowledge of these officers . . . that would affect your ability to be fair to both sides in this case?" *Id.* at 580. Although no juror responded in the affirmative, one of the jurors later approached the court, out of the presence of any of the parties, and revealed that he knew both officers but that his knowledge would not affect his ability to be impartial. *Id.* at 581. The trial court did not disclose this conversation to the parties. *Id.* On appeal, it was held that, although it was improper for the court to not have disclosed this information to the parties, no reversible error had occurred. *Id.* Although the defendant alleged that had this juror's relationship to the officers been known he would have challenged him for cause or struck him preemptively, the court noted that not only would the juror not likely have been struck for cause, but that the defendant had "failed to ask any question which would have led to disclosure of the information revealed to the court." *Id; see also Holladay v. Holladay*, 294 Ky. 540, 172 S.W.2d 36 (Ky. 1943). Since the juror had answered truthfully the question asked, the defendant's failure to ask the "proper question," which may "have triggered a more complete response," precluded relief. *Moss*, 949 S.W.2d at 582 (citing *Whisman v. Com.*, 667 S.W.2d 394 (Ky. App. 1984)); *see also Roy L. Jones Truck Line v. Johnson*, 225 S.W.2d 888, 896 (Tex. App. 1949). The Court further held that,

> it is entirely speculative and quite possibly self-serving for appellant to assert that he would have used a peremptory challenge to exclude this juror. If we allowed such a practice, after-acquired information could always be used in post-trial assertions that a particular juror would have been excused had the undisclosed information been known.

Moss, 949 S.W.2d at 581.

Similarly, in reviewing the record, this Court finds that appellants failed to ask a proper question which may have elicited the response that they now complain is prejudicially omitted. Appellants argue that Short failed in her duty to disclose that her father had been involved in a fatal automobile accident. They further allege that not only did her father's accident ultimately affect her decision, but had she disclosed this information, she would have either been removed for cause or preemptively struck from the panel of jurors.

During voir dire, appellants asked, in essence, whether any potential juror would be unable to set aside his or her own life experiences in order to render a verdict on the facts presented. Neither Short nor any of the other jurors responded. Furthermore, while appellants asked the jurors if they had ever been involved in a motor vehicle accident, they failed to ask the jurors if any family member had been in such an accident. The appellants failed to ask the proper question which would have elicited a more complete response.

We cannot find from the scant evidence presented that Short would have been stricken for cause merely because she had a familial tragedy involving a motor vehicle accident. Furthermore, we note that Short was one of the only two

jurors who did not sign the verdict form awarding compensatory damages to the Estate for the maximum amount requested. We cannot see how Short's presence on the jury tainted the verdict, particularly in light of her failure to agree to the compensatory damages awarded. Therefore, we affirm the trial court's denial of a new trial based on alleged juror mendacity.

II. PUNITIVE DAMAGES

Appellants claim that the court erred in denying its motion for a directed verdict on the issue of punitive damages. They contend that the evidence did not support a finding that Fuel Transport engaged in reprehensible conduct sufficient for a finding of gross negligence. They argue that evidence was introduced that was irrelevant and inflamed the jury into awarding excessive punitive damages.

A. Appellants' Motion for Directed Verdict.

In ruling on Fuel Transport's motion for a directed verdict on the issue of punitive damages, the trial court was under a duty to consider the evidence in the strongest possible light in favor of the party opposing the motion. "Furthermore, it is required to give the opposing party the advantage of every fair and reasonable inference which can be drawn from the evidence. And, it is precluded from entering . . . a directed verdict . . . unless there is a complete absence of proof on a material issue in the action, or if no disputed issue of fact exists upon which reasonable men could differ. *See Sutton v. Combs*, 419 S.W.2d 775 (Ky. 1967)." *Taylor v. Kennedy*, 700 S.W.2d 415, 416 (Ky. App. 1985). "On

appeal the appellate court considers the evidence in the same light." *Sutton,* 419 S.W.2d at 777. Further, we examine whether the evidence supported the jury's verdict or whether the verdict is so "palpably or flagrantly against the evidence" that it appears to have been made as a result of passion or prejudice. *Childers Oil Co., Inc. v. Adkins*, 256 S.W.3d 19, 25 (Ky. 2008); *Bierman v. Klapheke*, 967 S.W.2d 16, 18-19 (Ky. 1998); *Lewis v. Bledsoe Surface Min. Co.*, 798 S.W.2d 459, 461-62 (Ky. 1990). All evidence and inferences will be viewed in the light most favorable to the prevailing party, and we will not substitute our opinion for that of the jury. *Lewis*, 798 S.W.2d at 461-62; *Commonwealth Life Ins. Co. v. Auxier*, 470 S.W.2d 335, 337 (Ky. 1971). We will affirm the judgment unless the evidence had no probative value and was so speculative or conjectural that a directed verdict should have been granted as a matter of law. *Lewis*, 798 S.W.2d at 461-62; *Harris v. Cozatt, Inc.*, 427 S.W.2d 574, 575 (Ky. 1968).

In cases alleging gross negligence and requesting punitive damages, "[a] party plaintiff is entitled have [her] theory of the case submitted to the jury if there is *any evidence to sustain it*." *Shortridge v. Rice*, 929 S.W.2d 194, 197 (Ky. App. 1996) (quoting *Clark v. Hauck Mfg. Co.*, 910 S.W.2d 247, 250 (Ky. 1995)). If there was any evidence to support the Estate's theory that Fuel Transport had acted with gross negligence, the Estate had the right to an instruction on punitive damages. *Shortridge*, 929 S.W.2d at 197.

B. Gross Negligence and the Imposition of Punitive Damages.

Appellants argue that the imposition of punitive damages in a motor vehicle accident is improper without a showing of "truly gross negligence." While appellants are correct that *Kinney v. Butcher*, 131 S.W.3d 357, 359 (Ky. App. 2004), holds that punitive damages are usually improper in a motor vehicle accident, we disagree with their attempts to characterize *Kinney* as setting forth a new standard for gross negligence.

Kentucky has consistently held that "'gross negligence' [involves] a 'wanton or reckless disregard for the safety of other persons.'" *See Gersh v. Bowman*, 239 S.W.3d 567, 572 (Ky. App. 2007)(quoting *Kinney v. Butcher*, 131 S.W.2d 357, 359 (Ky. App. 2004)); *Peoples Bank of Northern Kentucky, Inc. v. Crowe Chizek and Co. LLC*, 277 S.W.3d 255, 267-68 (Ky. App. 2008); *Phelps v. Louisville Water Co.*, 103 S.W.3d 46, 52 (Ky. 2003); *City of Middlesboro v. Brown*, 63 S.W.3d 179, 181 (Ky. 2001); *Williams v. Wilson*, 972 S.W.2d 260, 261 (Ky. 1998); *Horton v. Union Light, Heat & Power Co.*, 690 S.W.2d 382, 387-88 (Ky. 1985). It is not necessary for a jury to find the defendant acted with express malice; rather, the defendant's actions can be so reckless and outrageous that malice can be implied from the facts. *Horton*, 690 S.W.2d at 389-90.

Although the Estate requested punitive damages against both appellants, the trial court did not allow an instruction of punitive damages against Vanderpool for his negligence in contributing to the accident. Instead, punitive damages were considered solely against Fuel Transport based on the Estate's argument that Fuel Transport, in failing to inspect, repair or maintain its vehicle,

evidenced a wanton or reckless disregard for the safety of others which was a substantial factor in causing the accident.

Appellants argue that the evidence did not support a finding of gross negligence against Fuel Transport because the fifth wheel's alleged defectiveness, along with Fuel Transport's alleged knowledge of its condition, was unsupported by the evidence, was irrelevant and caused juror confusion.

Following the accident, the Estate conducted an interview of Linville Issac (Issac), who had re-sold the truck to Fuel Transport one week before the accident. Issac told the Estate's expert, accident reconstructionist Joseph Stidham (Stidham), that he had informed both David Clifton (Clifton), the owner of Fuel Transport, and Vanderpool that there was a dangerous degree of slack in the fifth wheel and that he had demonstrated that slack to both Clifton and Vanderpool. Isaac also informed Stidham, and testified at trial, that he had been injured in an accident only weeks prior to November 2, 2005, when a different trailer had come loose from the fifth wheel while he was driving the truck. Isaac testified that he made some repairs to the fifth wheel but that it still had dangerous slack in it when he re-sold it to Fuel Transport one week before the accident.

The Estate theorized that the accident occurred when slack in the fifth wheel caused the trailer to jerk and overturn and that both Clifton and Vanderpool had knowledge of the fifth wheel's condition, yet took no action to repair it. Clifton and Vanderpool, however, denied any knowledge of the fifth wheel's dangerous condition or that Isaac had ever demonstrated the slack in the fifth

wheel. Clifton did acknowledge that Isaac had made some repairs to the fifth wheel just prior to it being repurchased by Fuel Transport. Despite knowing this and acknowledging that any inspections, repairs or maintenance on Fuel Transport's trucks were the responsibility of the company, Clifton did not know whether Fuel Transport had made any inspections, repairs or maintenance on the fifth wheel during the short time they had possession of the truck before the accident.

Appellants argue that even if they had been aware of the defective fifth wheel, mere failure to fix the problem did not constitute gross negligence. The jury heard testimony from Stidham, who explained that the fifth wheel was responsible for safely steering the trailer and opined that a damaged fifth wheel could cause results similar to those that occurred here. Using models, he demonstrated the mechanicals of the truck and trailer connection and opined that the trailer would have jerked and begun to lean toward the outside of the curve. This behavior of the trailer prior to the accident was corroborated by Vanderpool's own testimony. Stidham's testimony that the dangerous fifth wheel caused the accident was further bolstered by Vanderpool, who testified that the trailer became separated from the truck during the accident and that the fifth wheel was visibly damaged after the accident. The appellants' expert disagreed with Stidham's findings and testified that no distinct cause of the accident could possibly be determined.

Fuel Transport argues that there was no evidence that it had a history of other similar accidents, no record of poor vehicle maintenance, no motive to refuse to repair the fifth wheel, and no evidence of a pattern of misrepresentation which contributed to the accident. They further argue that punitive damages against them were improper because the mere failure to repair the fifth wheel did not meet the standard of "reprehensible conduct" sufficient for a finding of gross negligence.

Gross negligence requires "a finding of failure to exercise reasonable care, and then an additional finding that this negligence was accompanied by 'wanton or reckless disregard for the lives, safety, or property of others.'" *Horton,* 690 S.W.2d at 389-90. Therefore, a punitive damage claim must be based on misconduct that is "outrageous," regardless of whether it was negligently or intentionally inflicted. *Id.* The Court further instructs that "outrageous" conduct is that which is "willful, malicious, and without justification." *Id.* at 389. Moreover, under KRS 411.184(2), the plaintiff must prove outrageous conduct by "clear and convincing evidence." In our opinion, although Fuel Transport failed to exercise reasonable care, the failure did not rise to the level of wanton or reckless disregard for others.

Similar to *Kinney*, an award of punitive damages in this case would "eliminate the distinction between ordinary and gross negligence." *See Kinney*, 131 S.W.3d at 359. As the Court stated:

> Nearly all auto accidents are the result of negligent conduct, though few are sufficiently reckless as to amount to gross negligence, authorizing punitive damages. We are of the opinion that punitive damages should be reserved for truly gross negligence[.]

Id.

In the case at hand, the record is devoid of clear and convincing evidence proving that the actions of Fuel Transport comprised gross negligence. Here, the jury was presented with the facts that the driver of a coal truck got in the wrong lane and then overcorrected causing the load to overturn. Tragically, a few moments later the vehicle in which the decedent was a passenger crashed into the coal debris. Furthermore, it is suggested that Fuel Transport should have checked the fifth wheel after repurchase of the truck. But nowhere did Issac warn or even imply to Fuel Transport that without checking the fifth wheel, an accident was likely to occur. An apparent conversation between the seller of the truck and Fuel Transport's management suggestion that the fifth wheel may need attention does not establish reprehensible or malicious behavior necessary for an award of punitive damages. The Estate did not provide clear and convincing evidence showing Fuel Transport's actions to be "outrageous" conduct which was willful and malicious.

Here, the trial court overruled Fuel Transport's motion. But even viewing the evidence in the strongest possible light for the appellant, we cannot concur with the trial court's decision to overrule Fuel Transport's directed verdict

motion. Therefore, we reverse the trial court's denial of the directed verdict and vacate the award of punitive damages.

C. The Affidavit of Fuel Transport.

Appellants next argue that they should be awarded a new trial because the punitive damages were awarded in part based on the improper use of an affidavit that, according to appellants, inflamed the passions and prejudice of the jury. Although we have reversed the court's decision to deny Fuel Transport's motion for directed verdict on punitive damages, we will address this particular argument. Again, we review the court's denial of a motion for new trial for abuse of discretion. *Kaminski*, 281 S.W.3d at 304.

One week before trial commenced, appellants filed for summary judgment based on their assertion that plaintiffs had failed to prove that Fuel Transport was the owner of the truck or trailer involved on the day of the accident and, on that basis, punitive damages should be excluded against Fuel Transport. An affidavit by Fuel Transport's co-owner Della Clifton was attached to this motion in support of the appellants' contention that Isaac was the owner of the truck, having previously purchased the truck and trailer involved from Fuel Transport under a conditional sales contract. This affidavit alleged that Isaac, not Fuel Transport, both owned the truck and trailer and employed Vanderpool at the time of the accident. Plaintiffs objected to this motion and introduced a counter-affidavit from Isaac in which he stated he had sold the truck and trailer back to Fuel Transport a week before the accident and had never employed Vanderpool.

The day before trial, appellants partially retracted their lack of ownership claim in a letter addressed to the court and stated that they were now uncertain whether Fuel Transport or Isaac owned the truck at the time of the accident.[2] The morning of trial, Fuel Transport moved to pass on their motion for summary judgment without admitting that Fuel Transport, not Isaac, was the owner of the truck and trailer and Vanderpool's employer. Appellants then argued in opening statements, and again following Isaac's testimony, that the ownership of the truck was still in dispute and moved for a directed verdict on punitive damages on the basis that Fuel Transport did not own the truck. The court ultimately ruled that ownership was still an issue in this case.

Appellants argue that, since by the time of trial there was no dispute over ownership of the truck, the court improperly permitted the Estate to use the affidavit when questioning both Isaac and David Clifton. However, contrary to appellants' assertions, it appears from the record that ownership *was* still at issue in this case as appellants maintained their position during the trial that they neither owned the truck nor employed Vanderpool on the date of the accident. Even had the issue of ownership been resolved prior to trial, as appellants now claim, we cannot find that the Estate's use of the affidavit was improper.

Although appellants objected to the admission of their affidavit into evidence, we cannot find the court abused its discretion in allowing it to be entered

[2] This letter was referenced in pretrial motions on the morning of December 3, 2007, although the letter was not filed in the office of the clerk until December 5, 2007.

into evidence. Appellants claim that the affidavit was used only as a smear tactic to prejudice the jury against Fuel Transport. We do not agree.

As acknowledged by appellants prior to closing arguments, and as evidenced by the Estate's own closing argument, the affidavit was used primarily to attack the credibility of Fuel Transport's owner and representative, Clifton. During a deposition which had been taken prior to the affidavit being filed, and again during trial, Clifton, co-owner of Fuel Transport, admitted to owning the truck and employing Vanderpool on the date of the accident. He further admitted that the affiant, Della Clifton, was his wife, that he was present when the affidavit was made, was aware of its contents including the portions of the affidavit denying ownership and employment of Vanderpool, and that the statements denying such ownership and employment relationship were false. Under these circumstances, this Court finds that the affidavit was properly admitted as it affected the credibility of Clifton, a key witness for Fuel Transport. *See* Kentucky Rules of Evidence (KRE) 801; *Zachem v. S.G. Adkins & Son*, 232 Ky. 119, 22 S.W.2d 413 (1929).

Appellants are correct that it would have been an improper use of the affidavit to support an award for punitive damages. In *Gersh v. Bowman*, 239 S.W.3d 567, 573 (Ky. App. 2007), we held that it was error for the trial court to permit introduction of the defendant's alleged concealment of discoverable information as the plaintiff did not sustain any direct damages as a result of such concealment. We nonetheless found that the alleged concealment was not the sole

basis for the punitive damage claim and upheld the jury's verdict awarding punitive damages. *Id.*

Similarly, in this case, the concealment of the identity of the owner of the truck was not used solely as a basis for punitive damages. As the Estate pointed out, the identity of the truck owner was vital to prove control of the truck for a finding of negligence against Fuel Transport. For that purpose, the statements in the affidavit were themselves relevant as they disavowed ownership of the truck.

Moreover, we cannot agree with appellants that the Estate's use of the affidavit formed the basis of the punitive damage award or prejudiced the jury against Fuel Transport. Although the Estate questioned Clifton about the motives for filing the affidavit as a dishonest attempt to get out of the litigation, we cannot find that the jury was unduly prejudiced by this line of questioning nor that this was the exclusive use the Estate made of the affidavit. Instead, we note that the affidavit was properly used by the Estate to question Clifton's credibility, as Clifton and Vanderpool were the persons whom Isaac had allegedly informed of the fifth wheel's condition.

Additionally, we cannot find that appellants made any specific objections to the use of Fuel Transport's affidavit during the testimony of Clifton nor did they timely request the court to limit the jury's consideration of that affidavit. However, had the appellants timely requested such a limiting instruction and the court properly admonished the jury, we cannot find that the affidavit was improperly admitted nor that it was used to inflame the passions and prejudice of

the jury. We therefore hold that the court did not abuse its discretion in not ordering a new trial based on the Estate's use of the affidavit of Fuel Transport.

D. The Measure of Punitive Damages.

Appellants next argue that the jury award of $2 million dollars was excessive and violated both the U.S. Constitution and Kentucky law. They further argue that the disparity between the actual harm caused and the punitive damage award requires a reversal of this issue. However, since we have determined that the court should have granted the directed verdict motion on the issue of punitive damages, we will not address this argument.

III. PAIN AND SUFFERING

Appellants next contend that the pain and suffering award was excessive, was based on passion and prejudice, and was not supported by the evidence. They further assert that they did not waive any right to contest the pain and suffering award. As the trial court has the responsibility of determining whether an award of damages is excessive, we will not reverse the trial court's decision unless it is clearly erroneous. *Gersh*, 239 S.W.3d at 574 (citing *Burgess v. Taylor*, 44 S.W.3d 806, 813 (Ky. App. 2001).

In *Gersh*, as in this case, the appellant contended that the jury's pain and suffering award of $2 million was excessive. *Gersh,* 239 S.W.3d at 574. The trial court had instructed the jury to award no more than $2 million for pain and suffering, the amount that was ultimately awarded. *Id.* We noted that, as in this case, the appellants did not preserve their argument that the award was excessive

as they failed to object to the $2 million limit on the possible recovery. *Id.* We further found that, had the issue been preserved, there was evidence from which the jury believed that the plaintiff had "suffered terribly and [would] continue to do so in the future." *Id.* at 575. Therefore, we find that appellants waived the right to challenge the $2 million awarded for pain and suffering.

Even had appellants preserved this issue, there was evidence presented that Topsie was responsive to stimuli, that she was repeatedly given pain medication (which would indicate a continuation of pain), and that she had intervals of at least partial consciousness from the time she suffered the injuries until her death. We have previously held that damages for pain and suffering may be awarded "if the injured person was 'partly conscious,' had intervals of consciousness, or was conscious for a short time before death." *Vitale v. Henchey*, 24 S.W.3d 651, 659 (Ky. 2000). We therefore uphold the trial court's determination that the damages for pain and suffering were not excessive.

E. Jury Instructions

Appellants complain that the jury instructions provided the wrong standard for assessing pain and suffering and incorrectly stated the standard for punitive damages. They argue that a new trial is warranted because of the flawed instructions. We disagree.

Jury instructions are statements of law which we review *de novo.* *Reece v. Dixie Warehouse and Cartage Co.*, 188 S.W.3d 440, 449 (Ky. App. 2006). Each party is entitled to instructions on their theory of the case if supported

by the evidence. *Farrington Motors, Inc. v. Fidelity & Casualty Co. of New York*, 303 S.W.2d 319, 321 (Ky. 1957) (citations omitted). While Kentucky uses a "bare bones" approach to jury instructions, the instructions should accurately and adequately state the applicable law as it relates to the issues and act as a guide to the jury in arriving at a proper and just verdict. *Reece*, 188 S.W.3d at 450 (quoting *Shewmaker v. Richeson*, 344 S.W.2d 802, 806 (Ky. 1961)); *see also Olfice, Inc. v. Wilkey*, 173 S.W.3d 226 (Ky. 2005). Jury instructions should neither "over-emphasize an aspect of the evidence or amount to a comment on the evidence." *McKinney v. Heisel*, 947 S.W.2d 32, 34 (Ky. 1997) (citing *McGuire v. Com.*, 885 S.W.2d 931 (Ky. 1994); and *Ford Motor Co. v. Fulkerson*, 812 S.W.2d 119 (Ky. 1991)).

Appellants argue that the court erred in failing to instruct the jury to award damages for "conscious" pain and suffering. However, we note from the record that appellants failed to object to the jury instructions until immediately prior to the instructions being read to the jury. In their objection, appellants failed to specify on what grounds they believed a "conscious" pain and suffering instruction should be given, failed to provide the court with any caselaw supporting their position, and yet acknowledged that there was evidence that Topsie had experienced "periods" of consciousness prior to her death. Furthermore, appellants' tendered jury instructions also failed to request "conscious" pain and suffering. Therefore, we find this error to have been waived. Kentucky Rules of Civil Procedure (CR) 51(3); *Mapother and Mapother, P.S.C. v. Douglas*, 750

S.W.2d 430, 431 (Ky. 1988); *City of Dawson Springs v. Reddish*, 344 S.W.2d 826, 827 (Ky. 1961).

Appellants next claim that the punitive damage instruction did not properly limit the jury to award punitive damages only if they found that Fuel Transport's conduct to be "willful" and causally related to the accident. Although appellants objected to the jury being given any punitive damages instructions and specifically asked that the jury be instructed to find a causal relationship between Fuel Transport's conduct and the accident, we note that they failed to tender any jury instructions on punitive damages themselves. Given our decision to vacate the punitive damage award, we do not need to address this any further. However, we note that we agree with the trial court's instruction on punitive damages as well as the decision to deny the postrial motions regarding the punitive damages instruction.

IV. VENUE

Appellants' final argument is that the court abused its discretion in denying their motion to amend their answer to challenge venue and in refusing to dismiss the action in Knott County or transfer it to Floyd County. Appellants request that this case be transferred to Floyd County should a new trial be granted. Because we have affirmed the trial court's denial of appellants' motions for a new trial or judgment NOV on all issues presented, this issue is moot.

However, we will state that we find the trial court properly denied appellants' requests for a change of venue. After considerable time had passed,

discovery had been taken and appearances before the court, appellants filed a motion for a change of venue, alleging they had only recently discovered that the accident had actually occurred in Floyd County. Although KRS 452.105 requires a judge to transfer a case upon motion and finding that venue is improper, challenges to venue can be waived by failing to timely raise the issue in a responsive pleading or motion. CR 12.08(1); *Fritsch v. Caudill*, 146 S.W.3d 926 (Ky. 2004); *Jaggers v. Martin*, 490 S.W.2d 762 (Ky. 1973); *Licking River Limestone Co. v. Helton*, 413 S.W.2d 61, 63 (Ky. 1967). The trial court found that appellants were at least constructively aware of the accident location but had waived this issue by failing to timely bring it to the court's attention. Furthermore, the court held that transferring venue at the point it was raised would have been unduly prejudicial to the plaintiffs. We find no fault with the court's ruling in this respect.

V. CONCLUSION

The decision of the Knott Circuit Court is affirmed in part and reversed in part, and this case is remanded to the circuit court with instructions to vacate that portion of the judgment awarding punitive damages.

ALL CONCUR.

BRIEFS FOR APPELLANTS:

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