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COMMONWEALTH OF KENTUCKY
ROWAN CIRCUIT COURT
DIVISION NO.: I
19-CI-90125

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Electronically Filed

VONTELLA COMBS, Individually, and as
Administratrix of the Estate of Bryce Kolton
Wade Combs

PLAINTIFF

v.

HOUSING AUTHORITY OF
MOREHEAD, and CITY OF
MOREHEAD, KENTUCKY

DEFENDANTS

MOTION FOR NEW TRIAL

The Plaintiff, Vontella Combs, Individually and as Administratrix of the Estate of Bryce Kolton Wade Combs (“Combs” or “Plaintiff”), pursuant to CR 59.01 (b) and (f), moves the Court for a new trial. In support of this Motion, Plaintiff states as follows:

A new trial should be granted pursuant to CR 59.01(b) due to jury misconduct. Kentucky Revised Statute 29A.310 and the Court’s corresponding admonitions given throughout the trial specifically prohibit jurors from forming an opinion about the case or sharing that opinion with fellow jurors prior to the case being submitted to the jury. Members of the jury violated those standards.

Attached hereto as Exhibit 1 is the affidavit of Betty Whitaker, who while waiting to testify on February 7, 2023, personally heard members of the jury making (to each other) both generalized statements of having formed an opinion about the case, specific statements expressing opinions about Plaintiff bearing responsibility for Bryce Combs’ death, and questioning why the suit had

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even been filed. These statements were made within earshot of additional jurors several days before the case was finally submitted to the jury, and were obviously prejudicial to Plaintiff.

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Kentucky Revised Statute 29A.310 provides, in relevant part:

If the jury is permitted to separate, either during the trial or after the case is submitted to them, they shall be admonished by the court that it is their duty not to converse with, nor allow themselves to be addressed by, any other person on any subject of the trial; and that, during the trial, it is their duty not to form or express an opinion thereon, until the case is finally submitted to them.

KRS 29A.310(1). The conduct observed by Whitaker is in violation of these statutory prohibitions on discussing the case with any other person and forming opinions prior to final submission. The jurors' formation and discussion of their individual opinions about the case prior to final submission are grounds for a new trial. *See Doyle By & Through Doyle v. Marymount Hosp., Inc.*, 762 S.W.2d 813, 816–17 (Ky. App. 1988); CR 59.01(b).

Whitaker's affidavit is competent evidence supporting the motion, *Crawford v. Marshall Emergency Servs. Assocs., PSC*, 431 S.W.3d 442, 448 (Ky. App. 2013), and must be accepted as true unless countered. *Butler v. Com., Dep't of Highways*, 387 S.W.2d 867, 868 (Ky. 1965). Plaintiff is entitled to a new trial.

In addition, the jury verdict in this case was not sustained by sufficient evidence and a new trial should be granted pursuant to CR 59.01(f). Rule 59.01(f) provides that the Court may grant a new trial to all or any of the parties, on all or any part of the issues, where the verdict is not sustained by sufficient evidence or is contrary to law. A CR 59.01(f) ruling is a "discretionary function assigned to the trial judge." *Turfway Park Racing Ass'n v. Griffin*, 834 S.W.2d 667, 669 (Ky. 1992).

At trial, the Plaintiff proved that Morehead did not meet its duties to construct, repair and maintain safe storm sewers within City of Morehead, and in particular, the storm sewer at issue.

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Morehead, apparently believing it had no duty, presented no evidence to rebut Plaintiff's proof on these matters. Indeed, the City's Director of Public Works, Greg Jones, and the City's Administrator and trial representative, Rodney Fouch, both admitted that at the time Bryce Combs drowned in 2018: (1) neither Jones nor anyone else in his department had education or training related to storm sewers (VR¹ 2/9/2023; 9:03:30 a.m.)(VR 2/9/2023; 9:08:55 a.m.); (2) Morehead had no idea where storm sewers were located in City (VR 2/9/2023; 9:03:40 a.m.)(VR 2/9/2023; 9:11:23 a.m.); (3) Morehead had no system of regular maintenance and repair on storm sewers in City (VR 2/9/2023; 9:05:23 a.m.)(VR 2/9/2023; 9:11:40 a.m.). Fouch also admitted that in his role as the City's Flood Plain Administrator, he had learned that in last 20 years there have been heavier rains and more frequent rains than anytime in last 100 years, but that he had not used that information to assess whether the City's existing storm sewers, including the sewers in question, were capable of handling contemporaneous rainfall conditions (VR 2/9/2023; 9:09:53 a.m.).

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Once a municipality establishes or opens a sewer, it has a ministerial duty to non-negligently construct, maintain, and repair the sewer system. *Mason*, 122 S.W.3d 500, 504 (Ky. 2003). "Even if a municipality did not originally construct a sewer system, if it uses a sewer system for municipal purposes, the municipality's "duty to its inhabitants [is] the same as if the sewer had been originally constructed" by the municipality." *Mason*, 122 S.W.3d 500, 504-505 (Ky. 2003). Further, because runoff and capacity needs of sewer systems change over time, the City's affirmative duty of ordinary care required it continually assess whether older storm sewers could function safely in the present day. *Id.* 505 (City had duty to "properly maintain its 1930's sewer system so that it could function safely in the 1990's.").

¹ While the Clerk has obviously not designated a record in this case, the Plaintiff has nonetheless used the citation format provided in CR 98 to refer to video recordings of the trial provided by the clerk.

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Just before this case went to trial, the Kentucky Court of Appeal elaborated on the continuing repair duty described in *Mason*. In *Albright v. Louisville & Jefferson Cnty. Metro. Sewer Dist.*, No. 2021-CA-0181-MR, 2023 WL 324311, at *9 (Ky. App. Jan. 20, 2023), the Court of Appeals explained that “[a] drainage pipe located close to homes in a residential subdivision that presents significant safety risks to those in its immediate vicinity could reasonably be viewed as needing ‘repair.’” In other words, the City’s duty includes the proactive responsibility to locate and repair storm sewers in residential subdivisions that present significant safety risks.

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Beyond testimony from Jason Robertson and Cindy Rowland proving that they had seen City employees removing debris from the catch basin at the upstream end of the flume, there was no proof that the City did any sort of repair on the storm sewer in question (VR 2/8/2023; 3:13:45 p.m.; 3:16:06 p.m.) (VR 2/7/2023; 2:54:17 p.m.). In fact, the City argued and its employees repeatedly disputed the idea that it performed *any* maintenance on or near the flume. The City of Morehead presented no evidence of any kind by which the jury could have determined that it met its duties with regard to the storm sewers in issue. Rodney Fouch testified about his understanding, developed in his role as flood plain administrator, that many communities, including Morehead, have experienced heavier and more frequent rains in the last twenty years (VR 2/9/2023; 9:09:53 a.m.). Yet, while acknowledging changes in rainfall amounts, the City presented zero testimony that it even considered evolving capacity needs in any part of the relevant storm sewer system.

Neither Defendant offered proof to rebut Plaintiff’s expert testimony that the storm sewer was unreasonably dangerous, carrying enough water to foreseeably sweep a child away into a raging creek. Indeed, the only defense expert on liability, Eric Dawalt, disclaimed any opinions with regard to the flume’s safety (VR 2/10/2023; 2:15:10 p.m.), and admitted that the flume and underlying pipe were not constructed according to standard engineering practices (VR 2/10/2023;

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2:07:55 p.m.; 2:26:10 p.m.; 2:33:50 p.m.), a standard referenced in HUD standards in place at the time of original construction. Dawalt also admitted that the standard engineering practices in place at the time of construction (essentially to move water off of a property as quickly as possible) where no longer utilized because they were dangerous (VR 2/10/2023; 2:43:33 p.m.). The Defendants presented no proof rebutting the fact that they allowed the unreasonably dangerous storm sewer to exist in Rawcel Heights, and no proof that they took precautions against the dangers it posed.

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Likewise, the Housing Authority presented no evidence that it met its legal obligations to warn of a dangerous condition on its property. Plaintiff testified that she had no idea that the storm sewer in question was dangerous or even carried water in the fashion that occurred in September 2018 (VR 2/7/2023; 9:32:48 a.m.). The Housing Authority, a landlord, offered no contrary proof that it warned Plaintiff or Bryce Combs about the dangerous storm sewer on its property. Of course a landlord has a duty to warn tenants of dangerous conditions. *Whatley v. Blue Lick Apartments, Ltd.*, 200 S.W.3d 497, 499 (Ky.App.2006) (“A landlord owes a heightened duty of care to its tenants in contrast to the duty a landowner owes to a business invitee.”); *Davis v. Coleman Mgmt. Co.*, 765 S.W.2d 37, 38 (Ky.App.1989) (A landlord owes not only a duty to warn, but also a duty to “exercise reasonable diligence to keep common areas retained under the landlord's control in a safe condition for the tenants.”).

Housing Authority employee Joe Smoot testified that a former maintenance supervisor who retired prior to the events in question knew that during heavy rains the catch basin at the beginning of the flume would clog and water would flow in the flume, but that, despite this institutional knowledge, the catch basin had not been cleaned out prior to the 2018 rain event in question (VR 2/8/2023; 3:43:10 p.m.; 3:45:53 p.m.). Robertson, who worked in maintenance for the Housing

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Authority and was the maintenance supervisor at the time of Bryce Combs' drowning, specifically testified that he had never even seen the throat opening of the box inlet into the pipe leading to the flume (VR 2/8/2023; 3:02:42 p.m.). Cindy Rowland testified that water raged through the flume in April of 2015 at a level higher than in September of 2018, when Bryce was swept away (VR 2/7/2023; 2:40:25 p.m.). Multiple Housing Authority employees testified about seeing Bryce Combs, and other children, playing, unsupervised, on its property, prior to Combs drowning. (VR 2/8/2023; 3:16:15 p.m.; VR 2/8/2023; 3:53:15 p.m.) Of course, "[i]n a closely built-up residential neighborhood children are as much a part of the natural scene as grasshoppers. Their intrusive appearance upon and around the unenclosed premises of such an area is to be expected." *Mason*, 122 S.W.3d at 507 (quoting *Goben v. Sidney Winer Co.*, Ky., 342 S.W.2d 706, 711 (1960)).

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The jury's verdict is still more inconsistent with Kentucky law in light of its preliminary findings and rejection of the Act of God defense. The jury found that Bryce Combs entered the water at the concrete flume. (Jury Instructions, filed February 14, 2023, Interrogatory. No. 1). The jury also rejected the Act of God defense. (Jury Instructions, filed February 14, 2023, Interrogatory No. 2). In light of the Defendants' failure to offer any proof that their duties were met, the jury's factual finding concerning Bryce Combs entering the water at the concrete flume, and rejection of the Act of God defense, the verdict is not supported by sufficient evidence, and a new trial should be granted.

CONCLUSION

The jury's verdict was tainted by misconduct, not sustained by sufficient evidence, and the Plaintiff respectfully submits that the Court should grant this Motion and that a new trial should be granted.

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NOTICE OF HEARING

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This motion shall come on for hearing at 9 a.m. on June 16, 2023, or as soon thereafter as counsel may be heard.

Respectfully submitted,

/s/ Mickey T. Webster

Mickey T. Webster

Lexy G. Holland

WYATT, TARRANT & COMBS, LLP

250 West Main Street, Suite 1600

Lexington, KY 40507-1746

Telephone: (859) 233-2012

mwebster@wyattfirm.com

Counsel for Plaintiff

CERTIFICATE OF SERVICE

This is to certify that on May 12, 2023, the foregoing was filed electronically, which effected service upon the following counsel of record by Clerk of the Court:

Katherine J. Hornback
Reinhardt & Associates, PLC
449 Lewis Hargett Circle, Suite 210
Lexington, KY 40503
khornback@reinhardtlaw.com
Counsel for Defendant,
Housing Authority of Morehead

Jeff Walther
Erica K. Mack
Walther, Gay & Mack, PLC
163 E. Main Street, Suite 200
Lexington, KY 40588-1598
emack@wgmfirm.com
jwalther@wgmfirm.com
Counsel for Defendant,
City of Morehead, Kentucky

/s/ Mickey T. Webster

Counsel for Plaintiff

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