COMMONWEALTH OF KENTUCKY
COURT OF APPEALS
CASE NO. 2022-CA-0828-MR

ANTHONY BRADLEY, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF MITZI WESTOVER — APPELLANTS

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
CASE NO. 18-CI-004436

LOUISVILLE MEGA CAVERN, LLC — APPELLEE

BRIEF ON BEHALF OF APPELLANTS

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(CERTIFICATE OF SERVICE ON INSIDE OF COVER)

CERTIFICATE OF SERVICE

I certify that on the 1st day of November 2022, the original and four copies of this brief were served via Federal Express on Clerk of the Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601. One copy of this brief was served via U.S. Mail on: Hon. Annie O'Connell, Judge, Jefferson County Judicial Center, 700 W. Jefferson St., Courtroom 701, Louisville, KY 40202. Further, pursuant to agreement of the parties, one copy of this brief was served via email upon: Maxwell D. Smith, Ashley Brown, William J. Barker II, Betsy R. Catron, Gregg E. Thornton, Ward Hocker & Thornton PLLC, 333 W. Vine St., Suite 1100, Lexington, KY 40507, max.smith@whtlaw.com, abrown@whtlaw.com, will.barker@whtlaw.com, betsy.catron@whtlaw.com, gthornton@whtlaw.com. I further certify that the record on appeal was returned to the Circuit Court.

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INTRODUCTION

In a wrongful death case arising from the negligent operation of an underground ropes course, the circuit court erroneously allowed Louisville Mega Cavern ("LMC") to introduce and repeatedly emphasize an unenforceable pre-injury release—thus allowing the jury to make its own determination of enforceability. The circuit court also erred by failing to instruct the jury on specific duties owed by LMC, erroneously admitted highly prejudicial evidence regarding the presence of hydrocodone in decedent's urine without any evidence of intoxication therefrom, and erroneously excluded evidence of LMC's duties and fault.

STATEMENT CONCERNING ORAL ARGUMENT

Given the trial record and issues raised in this appeal, pursuant to CR 76.12(4)(c)(ii) of the Kentucky Rules of Civil Procedure, Appellants believe that oral argument would be helpful to address the important issues in this case, all of which warrant a new trial.

STATEMENT OF POINTS AND AUTHORITIES

STATEMENT OF THE CASE

Louisville Mega Cavern ("LMC") is a former limestone mine turned adventure park[1] that spans more than 100 acres, with 17 miles of roadways—all underground.[2]

On August 19, 2017, Mitzi Westover became stuck and suspended by a body harness while traversing LMC's "Mega Quest" ropes course.[3] Although the literature that accompanied the harnesses indicated that suspension in a harness can cause "suspension trauma"[4]—a condition whereby the harness restricts blood flow back to the heart causing unconsciousness and death due to lack of oxygen to the brain[5]—LMC never passed that warning on to Westover.[6]

Westover was initially responsive while she was stuck, but the situation turned into an emergency.[7] She was suspended in the harness for approximately twelve minutes while she waited on LMC's staff to lower her.[8] The delay was due, in large part, to understaffing[9] and the failure of LMC staff to recognize the signs of suspension trauma.[10] Although Westover became stuck at 5:59 pm, 911 was not called until 6:09 pm.[11] Westover lost

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[1] R.1491 (LMC brochure).
[2] VR 6/16/21 at 3:14:26-3:14:35 (testimony of LMC employee Garrett Lee).
[3] *See* VR 6/21/21 at 4:22:59-4:26:50; Plaintiffs' trial exhibit 5.
[4] *See* **Appendix tab 5:** English portion of Plaintiffs' trial exhibit 14, (R.1532-1533) at 2.
[5] *See* R.2043-2046 (2011 OSHA bulletin alerting employers about the risk of suspension trauma); *see also* VR 6/17/21 at 4:20:33-4:23:38 (testimony of former LMC employee Elijah Bauer—who was not present during Westover's medical emergency—indicating that he was aware of the risk of suspension trauma at the time of incident); R.2033 (2014 IRATA industry standards stating that suspension trauma "is a condition in which a suspended person, e.g. in a harness, can experience certain unpleasant symptoms, which can lead to unconsciousness and eventually death" and that, when people remain motionless in a harness, they experience the effects of suspension trauma, "including loss of consciousness, in just a few minutes.").
[6] VR 6/17/21 at 4:31:09-4:34:24 (testimony of Elijah Bauer); VR 6/21/21 at 3:52:18-3:52:36.
[7] VR 6/16/21 at 3:44:59-3:46:40, 3:59:01-4:03:30 (testimony of Mega Quest course monitor Garrett Lee).
[8] *See* Plaintiffs' trial exhibit 21 (timestamped photo showing Westover suspended in harness at 5:59 pm); VR 6/21/21 at 3:10:22-3:10:37, 3:11:33-3:11:49 (former LMC employee Amber Breedlove testifying she first saw Westover at 6:11 pm, approximately the time Westover got to the ground).
[9] VR 6/18/21 at 4:28:36-4:29:23 (testimony of Quinton Wilkins); VR 6/16/21 at 3:58:30-4:01:50 (testimony of Garrett Lee).
[10] VR 6/16/21 at 3:21:40-3:23:00, 3:24:09-3:25:04 (testimony from LMC course monitor Garrett Lee that he was not trained on the risks associated with suspension trauma).
[11] *See* Plaintiffs' trial exhibits 7 and 21.

consciousness while suspended[12] and was eventually lowered to the ground, where she waited for another nine minutes for first responders.[13] LMC had defibrillators mounted on the walls, signaling to customers that LMC was prepared for emergencies,[14] but none of LMC's employees were trained in basic first aid.[15] Further, LMC had no Emergency Action Plan.[16] Thus, no one offered much-needed cardiopulmonary resuscitation ("CPR") or used an automated external defibrillator ("AED") on Westover while she waited for first responders.[17] Westover never regained consciousness, was declared brain dead at the hospital, and was later removed from life support.[18]

At trial, Dr. George Nichols opined that Westover's death was caused by suspension trauma-induced cardiac arrest.[19] Another expert, Dr. Craig Beavers, testified that, if CPR and defibrillation had been administered in a timely manner, Westover likely would have survived.[20] Time is of the essence in rendering CPR. When someone is in cardiac arrest without CPR, brain damage can begin within four to six minutes.[21] Westover's widower Anthony Bradley filed suit against LMC in a dual capacity as an

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[12] VR 6/16/21 at 4:03:17-4:03:32 (testimony of Garrett Lee); VR 6/21/21 at 4:27:42-4:27:52.
[13] VR 6/21/21 at 3:10:22-3:10:37, 3:11:33-3:11:49 (former LMC employee Amber Breedlove testifying she first saw Westover at 6:11 pm, approximately the time Westover got to the ground); VR 6/18/21 at 9:22:01-9:23:00 (LMC's former general manager Jeremiah Heath testifying that first responders arrived at 6:20 pm).
[14] VR 6/17/21 at 3:31:10-3:32:21 (testimony of Gerald Hoefs).
[15] *See* R.1597 (LMC's Responses to Plaintiffs' Second Set of Requests for Admissions).
[16] *See* **Appendix tab 6:** 5/16/17 Audit Report, Plaintiffs' trial exhibit 2 at LMC1968.
[17] *See* R.1487 (Bradley's deposition testimony); VR 6/21/21 at 4:31:18-4:31:28.
[18] *See* R.1606 (Norton Audubon Hospital record indicating Westover suffered "severe anoxic brain injury" and cardiopulmonary arrest and was deemed "brain dead").
[19] *See* R.1609-1613 (Nichols Report).
[20] VR 6/18/21 at 1:36:33-1:37:07 (Dr. Beavers explaining that one study published in the New England Journal of Medicine indicated that, when an AED was administered within 3 minutes of cardiac arrest, patients had an 80% survival rate); *id.* at 1:37:56-1:38:44 (Dr. Beavers explaining that defibrillation within the first minute of a ventricular dysrhythmia is 100% successful in restoring a perfusing rhythm); *id.* at 1:42:44-1:43:09 (Dr. Beavers testifying that, if Westover had received early CPR and early defibrillation (within three minutes of cardiac arrest), she more than likely would have survived); *see also* R.3028 (Expert report of LMC expert Gregory Davis: "[T]he most likely cause of death for Ms Westover was sudden cardiac death (ventricular dysrhythmia) . . . .").
[21] *See* R.1592 (Red Cross CPR manual); VR 6/18/21 at 1:44:40-1:45:39 (Dr. Beavers testifying that, with CPR and defibrillation, "time is of the essence"); VR 6/17/21 at 3:28:34-3:28:51 (Gerald Hoefs testimony).

individual, for his independent loss of spousal consortium, and as Administrator of Westover's estate, for personal injury, wrongful death, and punitive damages.[22]

ARGUMENT

I. The trial court erred by admitting the pre-injury liability release as evidence.[23]

Westover booked the Mega Quest ropes course using LMC's website, which represented that LMC followed ACCT industry standards and had "professionally trained" staff.[24] Neither was true.[25] Indeed, the LMC employee in charge of training was not qualified to be a trainer and himself had no emergency response training.[26] When booking her appointment online, Westover, like all Mega Quest participants, signed a "Participant Agreement" that consists of a pre-injury liability release.[27] But the release contained no information about the risks of suspension trauma nor did it alert Westover to the lack of training of LMC staff. In fact, Westover and her family were told that LMC employees were there to help them, if needed.[28] Even Garrett Lee—the sole course monitor on duty at the time of the incident—was under the mistaken impression that someone at LMC knew

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[22] *See* R.5389-5397 (Plaintiffs' First Amended Complaint); *see also* **Appendix tab 7:** Plaintiffs' Revised Proposed Jury Instructions (R.5818-30), at 4-5.

[23] The issue was preserved via Plaintiffs' response to LMC's motion for summary judgment (R.1442-1476, with related exhibits at R.1477-2185); the order denying the motion for summary judgment (R.5483-5488, **Appendix tab 4**), Plaintiffs' motion *in limine* (R.4721-4746), the proposed jury instructions (R.5820, **Appendix tab 7** at 3), and the trial court's rejection of a limiting instruction (VR 6/3/21 at 2:22-2:25; VR 6/22/21 at 3:26:35-3:28:25, 3:29:32-3:32:21; VR 6/23/21 at 9:31:35--9:33:26).

[24] **Appendix tab 8:** LMC web site screen shot, Plaintiffs' trial exhibit 13.

[25] *See* R.2154 (deposition testimony of LMC Vice President Charles Park); 6/16/21 VR 3:20:11-3:20:40, 3:31:54-3:32:00 (LMC employee Garrett Lee, who was the sole course monitor at the time of incident, testifying that professional training was never offered to him); *id.* at 3:40:06-3:40:49 (Lee testifying that he had not been trained to use LMC's defibrillators); VR 6/16/21 at 3:21:40-3:23:00, 3:24:09-3:25:04 (testimony from LMC course monitor Garrett Lee that he was unaware of the risks associated with suspension trauma).

[26] R.5984 ("On the date of the incident, Chase Cannon was responsible for providing training . . . ."); R.5967-5968 (Chase Cannon 7/30/19 deposition, testifying he never received emergency response training). Pursuant to ACCT standards, Chase Cannon was not qualified to train others, as he had not reached the age of 21. *See* R.5966 (Cannon testifying that, at the time of the incident, he was 19 or 20 years old). R.6010 (testimony of LMC Executive VP Charles Park acknowledging that an ACCT train the trainer program requires that trainer-trainees be at least 21 years old).

[27] **Appendix tab 9:** Participant Agreement, Plaintiffs' trial exhibit 1.

[28] VR 6/16/21 at 3:19:54-3:20:06 (testimony of LMC employee Garrett Lee).

how to perform CPR.[29] Further, the Participant Agreement mentions the importance of a training video—a video never shown to Westover.[30]

Despite this, LMC filed a motion for summary judgment, arguing *inter alia* that the "negligence claim fails as a matter of law because [Decedent] Westover waived any potential negligence claim by signing a valid pre-injury release."[31] In denying that motion, the trial court recognized that "pre-injury releases are often unenforceable because they are 'disfavored and are strictly construed against the parties relying on them.'"[32] Although all parties agreed that the enforceability of the waiver was a legal issue,[33] the trial court held that "there [were] material issues of fact remaining."[34]

While LMC's motion was pending, Plaintiffs filed a motion *in limine* to exclude the Participant Agreement on the basis that "the enforceability of the Participant Agreement is a matter of law"[35] and that—because it was unenforceable as a matter of law—it was irrelevant and would "confuse and mislead the jury."[36] The trial court denied the motion.[37] On the first day of trial, the court acknowledged the problems with admitting the Participant Agreement:

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[29] VR 6/16/21 at 3:40:22-3:41:56.
[30] **Appendix tab 9:** Participant Agreement, Plaintiffs' trial exhibit 1 at 2; R.1489 (Bradley deposition: "Q. Did anyone ever show you a training video prior to entering the ropes course? A. No."); VR 6/21/21 at 3:42:27-3:43:49 (Bradley trial testimony).
[31] LMC's Motion for Summary Judgment, R.1389-1401 at R.1393.
[32] **Appendix tab 4:** Order denying LMC's Motion for Summary Judgment, (R.5483-8) at 5 (quoting *Miller v. House of Boom Ky., LLC,* 575 S.W.3d 656, 660 (Ky. 2019)).
[33] *See* LMC's Motion for Summary Judgment, R.1389-1401 at R.1393; Plaintiffs' Response to LMC's Motion for Summary Judgment ("Kentucky law is clear that LMC's pre-injury release is unenforceable, as it violates public policy, is unconscionable, and—pursuant to established Kentucky law—may not bind Ms. Westover's wrongful death beneficiaries.").
[34] **Appendix tab 4:** Order denying LMC's motion for summary judgment, (R.5483-8) at 5.
[35] *See* Plaintiffs' Motion to Exclude Participant Agreement, R.4721-46 at 4721.
[36] *See* Plaintiffs' Motion to Exclude Participant Agreement, R.4721-46 at 4745 ("Because the Participant Agreement is unenforceable, it is therefore not admissible, as it has no tendency to make the existence of any fact of consequence more or less probable.").
[37] VR 6/3/21 at 2:22-2:25 ("There are still material issues of fact that exist to get this to a jury. So, that motion is denied.").

> **The Court finds that the language in the participant agreement—the majority of the language in the participant agreement, first of all, states law that at this stage really is—is not relevant. It goes to—it potentially would confuse the jury and speak to the ultimate issue of liability in this case.**[38]

Yet the trial court refused to change its ruling. Due to the court's ruling, Plaintiffs reluctantly introduced the agreement without waiving the objection as allowed by *O'Bryan v. Hedgespeth*, 892 S.W.2d 571, 574 (Ky. 1995).[39] Defense counsel enlarged the Participant Agreement and emphasized its importance repeatedly.[40] Defense counsel told the jury, during opening statement, that Westover signed a waiver.[41] Defense counsel also questioned several witnesses regarding the Participant Agreement[42] and attempted to have LMC's CR 30.02(6) designees[43] and expert witnesses[44], as well as Bradley[45], interpret the Participant Agreement for the jury.

Due to the admission of the Participant Agreement into evidence and its repeated

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[38] *See* VR 6/16/21 at 9:37:17-46 (emphasis added).

[39] "Our Supreme Court has explained that a motion in limine preserves the objection regardless of a party's choice to act first in introducing the unfavorable evidence." *Pierson v. Hartline*, 2021 WL 2272769, at *9 (Ky. App. June 4, 2021) (citing *O'Bryan v. Hedgespeth*, 892 S.W.2d 571, 574 (Ky. 1995)). *See* VR 6/16/21 at 9:28:35-43 (Plaintiffs' counsel: "We're going to introduce the participant agreement into evidence based on your ruling, over our objection."); **Appendix tab 9:** Participant Agreement, Plaintiffs' trial exhibit 1 (a redacted version of the Participant Agreement was admitted into evidence. The redactions removed a small portion of the language regarding an inapplicable agritourism defense).

[40] VR 6/18/21 at 9:38:30 (Defense counsel placing enlarged Participant Agreement in front of the jury); *id.* at 11:20:57 (same); *id.* at 3:32:20 (same); VR 6/22/21 at 8:52:20 (same); VR 6/23/21 at 10:24:42-56 (Defense counsel during closing argument: "[T]hey told you that I've put [the Participant Agreement] in your face every chance I get, and you better believe it. I'm going to do it again because it's important.").

[41] *See* VR 6/16/21 at 10:18:12-20 ("She did sign the Participant Agreement -- or a waiver, so to speak.")

[42] *See* VR 6/18/21 at 9:41:10-9:44:01, 9:55:29-46 (testimony of Jeremiah Heath), 11:28:15-11:32:37 (testimony of Charles Park), 3:49:40-3:52:41, 3:58:07-4:00:58 (testimony of George Nichols); VR 6/22/21 at 8:52:16-8:55:54, 9:46:14-9:50:53 (testimony of William Smock).

[43] *See* VR 6/18/21 at 9:40:14-37 (testimony of Jeremiah Heath) ("Q. Mr. Heath, can you read for me what's in red? A. It says "Participant agreement including assumption of risk and agreement of release and indemnification." Q. What does that mean? A. Basically, that they're—they're saying that they agree to everything that is written— [objection]").

[44] *See* VR 6/22/21 at 9:46:14-9:50:53 (testimony of William Smock) ("[T]he form says "impairing legal drugs." You're not supposed to go up there if you have impairing legal drugs. Based on the toxicology report she's got narcotic in her system at a therapeutic level. That's an impairing legal drug."); *see also* VR 6/22/21 at 10:32:55-10:33:20.

[45] VR 6/21/21 at 4:46:59-5:05:43 (testimony of Anthony Bradley).

emphasis, without conceding the admissibility of the Participant Agreement,[46] Plaintiffs requested that the court give a limiting instruction indicating that

> The "Participant Agreement" bearing Mitzi Westover's signature is not enforceable as a matter of law. That is, you may not determine that Mitzi Westover waived her right to sue for negligence or seek damages. Further, you may not determine that Defendant Louisville Mega Cavern, LLC is immune from lawsuit. However, you may consider the "Participant Agreement" for the purpose of determining whether Mitzi Westover was aware of the risks associated with participation in the "Mega Quest" ropes course.[47]

During discussion regarding jury instructions, Plaintiffs again argued that the enforceability of the Participant Agreement was a matter of law for the court to decide.[48] However, the court declined to give any limiting instruction or make a ruling on the enforceability of the Participant Agreement.[49] Plaintiffs' argument that "because this is a legal issue, the jury is going to be confused about what to do with the waiver"[50] is supported by the questions jurors in fact asked during trial:

- "Does 'each' employees [sic] ask the customer has he or she read the waiver and 'understand' the risk of the extreme park or challenge . . .[?]"
- "Could her cognitive impairments or limitations affect her ability to fully assess and understand the scope of the Participant Agreement?"[51]

During closing argument, Defense counsel again emphasized the Participant Agreement, telling the jury "you all are going to get to look at this and you all are going to have the opportunity to read this document in full when you go back to the jury deliberation room.

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[46] **Appendix tab 7:** Plaintiffs' Revised Proposed Jury Instructions, (R.5818-30) at 3 n. 2 ("In tendering this proposed instruction, the Plaintiff does not concede or waive the admissibility of the 'Participant Agreement.' It should not be admissible because it is unenforceable.").
[47] **Appendix tab 7:** Plaintiffs' Revised Proposed Jury Instructions, (R.5818-30) at 3.
[48] **Appendix tab 7:** Plaintiffs' Revised Proposed Jury Instructions, (R.5818-30) at 3; VR 6/22/21 at 3:26:35-3:28:25, 3:29:32-3:32:21; VR 6/23/21 at 9:31:35-9:32:42.
[49] *See* VR 6/23/21 at 9:32:42-9:33:26; **Appendix tab 1:** Judgment (R.6166-6171) and Final Jury Instructions and Verdict (R.5843-55).
[50] VR 6/22/21 at 3:29:36-41.
[51] **Appendix tab 10:** Juror questions regarding the Participant Agreement (separate envelope in record).

And I'm telling you this is one of the most important documents you will see in this case."[52] The jury returned a defense verdict on liability.[53] In denying Bradley's Motion for a New Trial, the trial court did not address any of his arguments regarding the Participant Agreement and simply concluded that the Participant Agreement was signed by Westover and was "relevant evidence and properly admitted."[54]

a. Pre-injury releases are disfavored, especially when they come in the form of adhesion contracts drafted by for-profit businesses.

Pre-injury releases are "'disfavored and are strictly construed against the parties relying on them."' *See Miller v. House of Boom Kentucky, LLC,* 575 S.W.3d 656, 660 (Ky. 2019) (quoting *Hargis v. Baize,* 168 S.W.3d 36, 47 (Ky. 2005)). Courts (not juries) must analyze pre-injury releases "for violations of public policy." *Miller,* 575 S.W.3d at 660 (citing *Cobb v. Gulf Refining Co.,* 145 S.W.2d 96, 99 (Ky. 1940)). Indeed, like all written instruments, the effect of a pre-injury release should not be determined by a jury.[55]

A pre-injury release is unenforceable where the party relying on it has committed "willful or wanton negligence" or when "contrary to public policy." *See United Servs. Auto. Ass'n v. ADT Sec. Servs.,* 241 S.W.3d 335, 341 (Ky. App. 2006); RESTATEMENT

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[52] VR 6/23/21 at 10:25:03-10:25:19 (emphasis added).

[53] **Appendix tab 1:** Judgment (R. 6166-6171) and Final Jury Instructions and Verdict, (R.5843-55) at 3. The Circuit Court imposed costs following the verdict and judgment that included improper costs and costs for which LMC had abandoned its request. **Appendix tab 3:** Order on costs**;** R.6132-6141 (exceptions to bill of costs); VR 10/4/21 at 2:38:50-2:39:13 (defense counsel stating that most of Plaintiffs' objections to the bill of costs were "well-taken"); *id.* at 2:41:50-2:51:46 (argument of Plaintiffs' counsel); *id.* at 2:51:46-2:53:11 (defense counsel abandoning all sought costs, with the exception of seven deposition transcripts).

[54] **Appendix tab 2:** Order Denying Motion for New Trial, (R.6197-6201) at 2. In this Order, the trial court misattributed one of LMC's arguments to the Plaintiffs. Bradley has never argued that the Participant Agreement is a party admission governed by KRE 801(A)(b). Even if the Participant Agreement could have been considered an adoptive admission, it was still irrelevant under Rules 401-403.

[55] *See Morganfield Nat. Bank v. Damien Elder & Sons*, 836 S.W.2d 893, 895 (Ky. 1992) ("The construction as well as the meaning and legal effect of a written instrument, however compiled, is a matter of law for the court."); *Cinelli v. Ward,* 997 S.W.2d 474, 476 (Ky. App. 1998) ("It is well established that construction and interpretation of a written instrument are questions of law for the court."); *Kentucky Union Co. v. Hevner,* 275 S.W. 513, 514 (Ky. 1924) ("The rule is well settled that the construction of a written instrument is for the court and is not to be submitted to the jury.").

(SECOND) OF CONTRACTS § 195(1) (1981) ("A term exempting a party from tort liability for harm caused intentionally or recklessly is unenforceable on grounds of public policy.").

Courts have drawn an important distinction between pre-injury releases and post-injury releases:

> "Indeed, the law generally treats preinjury releases or indemnity provisions with greater suspicion than postinjury releases. ***An exculpatory clause that relieves a party from future liability may remove an important incentive to act with reasonable care.*** These clauses are also routinely imposed in a unilateral manner without any genuine bargaining or opportunity to pay a fee for insurance. The party demanding adherence to an exculpatory clause simply evades the necessity of liability coverage and then shifts the full burden of risk of harm to the other party. Compromise of an existing claim, however, relates to negligence that has already taken place and is subject to measurable damages. Such releases involve actual negotiations concerning ascertained rights and liabilities."

Miller, 575 S.W.3d at 662 (quoting *Hawkins v. Peart,* 37 P.3d 1062, 1066 (Utah 2001)) (internal citation omitted) (emphasis added). Pre-injury releases are especially disfavored when the party seeking enforcement is a commercial, for-profit entity, such as LMC, because "[a] commercial entity has the ability to purchase insurance and spread the cost between its customers. It also has the ability to train its employees and inspect the business for unsafe conditions." *Miller,* 575 S.W.3d at 662.

Kentucky courts also more closely scrutinize pre-injury releases involving bodily injury than those involving mere monetary damages. *See Cumberland Valley Contractors, Inc. v. Bell County Coal Corp.,* 238 S.W.3d 644, 653 (Ky. 2007) ("exculpatory clauses have been invalidated more frequently in the context of personal injury cases"); *Jones v. Hanna,* 814 S.W.2d 287, 289 (Ky. App. 1991) ("[O]ne may contract away future negligence if such is not willful and wanton, and not resultant in personal injury."). Further factors that mitigate against enforcement of a pre-injury release include the unequal

bargaining power of the parties,[56] the injured party's lack of knowledge or familiarity with the activity,[57] and the injured party's inability to obtain similar services without entering into an exculpatory agreement.[58] It is also appropriate to consider whether the party relying on the pre-injury release, through its own actions, undermines, contradicts, or minimizes the language and effect of the pre-injury release.

b. Westover did not possess equal bargaining power, was unfamiliar with ropes courses, and was not able to obtain similar services elsewhere.

Here, Westover did not have equal bargaining power with LMC. She was not able to negotiate with LMC concerning the provisions in its pre-injury release.[59] Nor was she able to obtain similar services without entering into an exculpatory agreement. Indeed, LMC advertises its Mega Quest ropes course as "the ONLY fully underground aerial ropes challenge course in the world!"[60] Further, Westover was unfamiliar with ropes courses or zip lines, as she had never participated in such activities prior to the date of incident.[61] As LMC's liability expert testified, the "average ordinary prudent person" would not be aware of the risks of suspension trauma.[62] Thus, Westover was relying exclusively on LMC to

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[56] *Cumberland Valley Contractors, Inc. v. Bell County Coal Corp.,* 238 S.W.3d 644, 650 (Ky. 2007) (noting the significance of the comparative bargaining power of the parties in determining whether to enforce exculpatory clause); *Coughlin v. T.M.H. Intern. Attractions, Inc.,* 895 F. Supp. 159, 161 (W.D.Ky. 1995) (considering "[t]he equal bargaining power of the parties").

[57] *See Cumberland Valley Contractors, Inc.,* 238 S.W.3d at 650 (considering the sophistication of the parties in barring claim due to exculpatory clause); *Coughlin,* 895 F. Supp. at 161 (considering "[t]he knowledge and familiarity of Plaintiff with activity").

[58] *Greenwich Ins. Co. v. Louisville & N.R. Co.,* 66 S.W. 411, 412 (Ky. 1902) (holding that it is in some cases appropriate to consider whether the party seeking enforcement of an exculpatory agreement has "a practical monopoly"); RESTATEMENT (SECOND) OF TORTS § 496B cmt. j (1965) ("disparity in bargaining power may arise from the defendant's monopoly of a particular field of service, from the generality of use of contract clauses insisting upon assumption of risk by all those engaged in such a field, so that the plaintiff has no alternative possibility of obtaining the service without the clause").

[59] R.5906 (Bradley deposition).

[60] *See* R.1491 (LMC brochure).

[61] *See* R.1483 (Anthony Bradley deposition: "Q. Had you all ever ziplined before? A. No. Q. And had you all ever done a ropes course before? A. No.").

[62] R.4326 (deposition testimony of LMC liability expert Michael Smith).

ensure her safety by informing her about the risks associated with traversing a ropes course, to ensure her harness was properly fitted, and to ensure that staff was adequately trained to respond to foreseeable emergency situations. However, she was never warned of the risk of suspension trauma.[63] Westover was also misled about the level of experience possessed by the young people operating Mega Quest.[64] All of these facts indicate that LMC's pre-injury release should not be enforced.[65]

c. The Participant Agreement is ambiguous.

Further, while most of the Participant Agreement language is printed in small, black, non-bolded font, a portion of the pre-injury release in bold, larger, red font indicates that "there is no liability . . . ***in the absence of negligence***."[66] Thus, one may reasonably interpret that provision to mean that there *is* liability where there is negligence. Indeed, Bradley testified that, despite the Participant Agreement, he believed LMC was still responsible for its own wrongdoing.[67] Because the Participant Agreement is an adhesion contract,[68] the doctrine of ambiguity applies. *See Woodson v. Manhattan Life Ins. Co. of New York, N.Y.,* 743 S.W.2d 835, 838-39 (Ky. 1987). That doctrine holds that "[i]f the contract has two constructions, the one most favorable to the [non-drafter] must be adopted. If the contract language is ambiguous, it must be liberally construed to resolve any doubts in favor of the [non-drafter]." *Id.* (citations omitted). Thus, the Participant Agreement must be liberally construed in Westover's favor. *See Hargis v. Baize,* 168 S.W.3d 36, 47 (Ky.

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[63] *See* VR 6/21/21 at 3:52:18-3:52:36.
[64] *See* R.1489 (Bradley testifying that LMC represented that a "long time climber" was working the Mega Quest ropes course).
[65] *See* footnotes 56-58, *supra.*
[66] **Appendix tab 11:** Unredacted Participant Agreement (R.1166-1170) at 4 (emphasis added).
[67] VR 6/21/21 at 3:51:38-3:52:10.
[68] R.1489 (Bradley deposition: "Q. . . . You didn't come up with the language in that document? A. No. . . . Q. And you didn't have the opportunity to suggest that we change certain language, or --- or that sort of thing? A. No.").

2005) (pre-injury releases must be "so clear and understandable that an ordinarily prudent and knowledgeable party to it will know what he or she is contracting away; it must be unmistakable."). In so construing the Participant Agreement, the trial court should have held it inapplicable to claims of negligence.

d. LMC lulled inexperienced patrons into a false sense of safety, thereby encouraging patrons to disregard the Participant Agreement.

Despite the terms of the Participant Agreement, LMC told patrons of the Mega Quest course that course monitors were able to help if needed[69]; LMC had AEDs mounted on the walls[70]; and LMC falsely represented, via its website, that it followed ACCT standards and that its staff were "professionally trained."[71] LMC also advertised that the Mega Quest ropes course was appropriate for people as young as five years-old and weighing as much as 310 pounds.[72] The Participant Agreement itself indicates that Mega Quest is appropriate for people of "average mobility and strength" in "reasonably good health."[73] This created a false sense of safety, thereby lulling inexperienced visitors like Westover into signing and disregarding the Participant Agreement. Such preying on inexperience and lack of knowledge should not be permitted. *Cumberland Valley Contractors, Inc.,* 238 S.W.3d at 650 (considering the sophistication of the parties in barring claim due to exculpatory clause); *Coughlin,* 895 F. Supp. at 161 (considering "[t]he knowledge and familiarity of Plaintiff with activity").

e. Enforcement of the Participant Agreement violates public policy.

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[69] R.1488-9 (Bradley deposition testimony); VR 6/16/21 at 3:19:54-3:20:06 (testimony of LMC employee Garrett Lee).
[70] VR 6/17/21 at 3:31:10-3:32:21 (testimony of Gerald Hoefs); VR 6/21/21 at 4:17:09-58 (Bradley testifying that he expected LMC staff to be trained to do CPR and use their AEDs).
[71] *See* Plaintiffs' trial exhibit 13.
[72] *See* R.1491 (LMC brochure).
[73] **Appendix tab 9:** Participant Agreement, Plaintiffs' trial exhibit 1 at 2; VR 6/21/21 at 3:45:23-3:45:42; *see also id.* at 3:50:15-3:51:21 (Bradley testifying that, although the Participant Agreement, requires participants to certify they have inspected the ropes course, participants are not actually permitted to do so).

In *Hargis v. Baize,* a wrongful death case, the Kentucky Supreme Court held a pre-injury release unenforceable. 168 S.W.3d 36, 47-48 (Ky. 2005). In that case, the defendant violated a Kentucky statute under which KOSHA safety regulations were promulgated, and the court held that "[a] party cannot contract away liability for damages caused by that party's failure to comply with a duty imposed by a safety statute." *Id.* at 47.

Here, like the defendant in *Hargis,* LMC ignored statutes, regulations, and industry standards pertaining to safety. **Federal and Kentucky department of labor regulations required that LMC ensure that "persons adequately trained to render first aid" were on site.** *See* 803 KAR § 2:310; 29 CFR § 1910.151(b). Further, virtually every industry standard applicable to LMC indicates that someone on site should have been trained in CPR.[74] Yet, LMC did not meet those standards.[75] Although CPR courses generally include training on the use of an AED,[76] LMC did not offer such training to its employees, and as a result, LMC's employees did not know how to use the AEDs available at the site.[77]

Further, at the time of Westover's death, the General Assembly had enacted KRS 247.238, which directed the Department of Agriculture to promulgate regulations "necessary to establish requirements and standards . . . for the operation and regulation of aerial recreational devices, aerial recreational facilities, canopy tours, and zip line tours"

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[74] *See* Plaintiffs' Motion *in Limine* to Exclude Mention of and/or Introduction of Louisville Mega Cavern, LLC's "Participant Agreement," Section II.B. at R.4728-4731; Plaintiffs' trial exhibit 10 at 38 (2016 ACCT standards requiring that a ropes course operator "have onsite, when participants are present, a person trained in basic first aid and CPR."); R.1875 (2014 PRCA standards requiring that "[a]ll facilities should have at least one staff member holding a current level First Aid / CPR certification from a nationally recognized provider."); R.2017 (SPRAT 2007 standards indicating that anyone performing rescue operations "shall hold at least a current First Responder (or equivalent) certification and cardiopulmonary resuscitation (CPR) certification."); R.2030 (2014 IRATA standards indicating that each worksite should have "someone competent in first aid at all times").

[75] *See* **Appendix tab 6:** 5/16/17 Audit Report, Plaintiffs' trial exhibit 2 at LMC1974-5.

[76] *See* VR 6/17/21 at 3:29:49-3:30:25 (testimony of CPR instructor Gerald Hoefs).

[77] *See* R.1597 (LMC's Responses to Plaintiffs' Second Set of Requests for Admissions).

and further directed the Department to rely, in part, on "the latest standards and specifications set forth by the Association for Challenge Course Technology [ACCT]." *See* KRS 247.238(1)(a), (2), (3)(a). Thus, the General Assembly had expressed a public policy of Kentucky that ropes course operators follow industry standards. Because LMC's Mega Quest ropes course falls within the activities covered by KRS 247.238, it was well aware of the forthcoming regulations.[78] At the time of Westover's death, LMC knew that it did not meet then-current ACCT standards on first aid, training, and emergency action plans.[79]

Although LMC falsely claimed, via its website, that it followed ACCT standards,[80] an internal audit report from mid-May 2017 indicates that LMC failed to meet ACCT standards that required LMC to have a written operations manual, a written risk management plan, a written policy on the appropriate staff-to-participant ratio in the Mega Quest ropes course, and an emergency action plan.[81] That report also indicates that **LMC failed to meet ACCT industry standards that required it to have someone on site trained in CPR and first aid**.[82] The report also references industry standards that indicate LMC inform participants of the "inherent and other risks" of the ropes course.[83] However, LMC did not inform its customers of the risks associated with suspension trauma.[84]

At the time of Westover's death in August 2017, LMC's ropes course was staffed by employees who had not been trained to administer CPR, to render first aid, or on the

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[78] *See* Plaintiffs' trial exhibit 19 (email indicating that LMC's Executive Vice President, Charles Park, had read and analyzed the initial draft of the regulation more than a month prior to Westover's death.).
[79] **Appendix tab 6:** 5/16/17 Audit Report, Plaintiffs' trial exhibit 2 at LMC1968, LMC1973-5.
[80] *See* Plaintiffs' trial exhibit 13.
[81] **Appendix tab 6:** 5/16/17 Audit Report, Plaintiffs' trial exhibit 2.
[82] **Appendix tab 6:** 5/16/17 Audit Report, Plaintiffs' trial exhibit 2 at LMC1968.
[83] **Appendix tab 6:** 5/16/17 Audit Report, Plaintiffs' trial exhibit 2 at LMC1971.
[84] Industry standards also indicated LMC's employees should have been trained in recognizing, warning of, and responding to suspension trauma. *See* discussion at page 29, *infra.*

procedures for summoning medical assistance. Chase Cannon, the 20-year-old[85] LMC supervisor on duty, who was in charge of training the other staff, testified that he never received such training.[86] Garrett Lee, the sole Mega Quest course monitor on duty at the time of the incident, testified that he wished he had been trained on basic first aid.[87]

In addition, KOSHA/OSHA regulations required LMC to have an emergency action plan. *See* 803 KAR § 2:304; 29 CFR § 1910.38. The KOSHA regulations required that LMC's written emergency action plan include "[p]rocedures to be followed by employees performing rescue or medical duties." *See* 29 CFR §1910.38(c)(5). LMC was also required to train its employees on its emergency action plan and to have staff on site "adequately trained to render first aid." *See* 29 CFR § 1910.38(e), (f); 803 KAR § 2:310. Yet, LMC did not have a written emergency action plan in place until June 2018, ten months after Westover's death.[88] Even then, LMC's emergency action plan was deemed insufficient by the Department of Agriculture because it did not include a technical rescue or fatality response plan.[89] LMC also failed to have anyone trained in basic first aid on scene at the time of the incident.[90]

In *Coughlin v. T.M.H. Intern. Attractions, Inc.,* the court recognized a "public

[85] R.5966 (Cannon testifying that, at the time of the incident, he was 19 or 20 years old).
[86] R.5967-5968; R.5984 (LMC's verified interrogatory answers: "On the date of the incident, Chase Cannon was responsible for providing training . . . ."). Pursuant to ACCT standards, Chase Cannon was not qualified to train others, as he had not reached the age of 21. *See* R.6010 (testimony of LMC Executive VP Charles Park acknowledging that an ACCT train the trainer program requires that trainer-trainees be at least 21 years old).
[87] VR 6/16/21 at 3:42:03-25.
[88] R.5947 (Kimberly Coleman 3/18/21 deposition: "Q. So when you left in March 2018, the emergency action plans that you were working on had not been approved in order to be actually implemented. Is that – am I getting that right? A. Yes."); R.6011 (LMC Executive VP Charles Park 3/19/21 deposition, acknowledging that LMC may not have had a written emergency action plan in 2017); **Appendix tab 6:** 5/16/17 Audit Report, Plaintiffs' trial exhibit 2 at LMC1974 (recommending that LMC "[d]evelop an Emergency Action Plan" and "train staff in initiating and implementing the Emergency Action Plan").
[89] R.6023 (7/2/18 email from Mylinda Long (Dept. of Agriculture) to Charles Park: "Your Risk Management Plan is also missing a Fatality Response and Technical Rescue Plan.").
[90] R.6051 (former LMC General Manager and CR 30.02(6) designee Jeremiah Heath 12/29/20 deposition).

interest in the physical safety and legal protection of our citizens" in declining to enforce an exculpatory agreement.[91] That same public interest is at issue here. The potential for liability is a powerful incentive for businesses to ensure ropes course operators use reasonable care to mitigate against foreseeable injuries through adequate preparation and training of their employees.[92]

Under the best of circumstances, emergency responders are not able to access the Mega Quest ropes course in enough time to prevent brain damage to someone in need of CPR. Following Westover's death, LMC's former Safety Manager Kimberly Coleman became trained to do CPR and use an AED.[93] Ms. Coleman testified she was trained that, when someone suffers cardiac arrest, brain damage can begin within four minutes.[94] Based on her review of timestamped surveillance video, Ms. Coleman acknowledged that it took longer than four minutes for emergency responders to reach Westover, even after reaching LMC's property.[95] Thus, it was—and is—vital that LMC's staff be properly trained. If the Participant Agreement allows LMC to escape liability for its egregious failures to prepare and train, it will have little incentive to do so, and its operations will continue to be a ticking timebomb ready to explode—again—upon unsuspecting members of the public.

1. LMC's pre-injury release is unenforceable because it is unconscionable.

In light of LMC's failure to prepare and train to mitigate against foreseeable injuries, its "attempt to exempt [it]self from liability for negligent conduct may fail as unconscionable." RESTATEMENT (SECOND) OF CONTRACTS § 195 cmt. b (1981). A contract

[91] *Coughlin v. T.M.H. Intern. Attractions, Inc.,* 895 F. Supp. 159, 162 (W.D.Ky. 1995).
[92] *See Miller v. House of Boom Kentucky, LLC,* 575 S.W.3d 656, 662 (Ky. 2019)
[93] R.5949-5950, 5952-5953 (Kimberly Coleman 3/18/21 deposition).
[94] R.5950-5951 (Kimberly Coleman 3/18/21 deposition).
[95] R.5960 (Kimberly Coleman 3/18/21 deposition).

may be either procedurally or substantively unconscionable. *See Horton v. Wells Fargo Bank, N.A.,* 2015 WL 1969363 at *2 (Ky. App. May 1, 2015). Procedural unconscionability is "determined by scrutinizing various factors: 'the bargaining power of the parties, the conspicuousness and comprehensibility of the contract language, the oppressiveness of the terms, and the presence or absence of a meaningless choice.'" *Id.* Again, here the parties did not have equal bargaining power. The language in the pre-injury release was not bargained-for. The pre-injury release was both verbose and vague, as it related to numerous activities not undertaken by Westover (i.e. bicycling) and failed to mention the risks of suspension trauma or inadequately trained staff. The effect of the contract is extremely oppressive—it allows LMC to commit gross negligence resulting in death, with impunity. Westover was presented with a take-it-or-leave-it adhesion contract. All of the factors weigh in favor of a finding of procedural unconscionability.

In addition, "[s]ubstantive unconscionability is determined by examination of the commercial reasonableness of the contract terms, the purpose and effect of the terms, the allocation of the risk between the parties, and similar public policy concerns." *Id.* (quotations omitted). It is not commercially reasonable for the operator of a ropes course to fail to have an emergency action plan, an operating manual, or a risk management plan or to have inadequately trained staff. Here, if the Participant Agreement is enforced, all of the risk of LMC's failure to plan and train is thrust upon Westover. The public interest in physical safety weighs heavily in favor of a finding of substantive unconscionability. *See Miller,* 575 S.W.3d at 662 ("'An exculpatory clause that relieves a party from future liability may remove an important incentive to act with reasonable care.'" (quoting *Hawkins v. Peart,* 37 P.3d 1062, 1066 (Utah 2001)).

2. LMC's pre-injury release has been previously held to be unenforceable.

At least one other court has declined to enforce a substantially similar version of LMC's pre-injury release. In *Backmeyer v. Louisville Mega Cavern, LLC,* Judge Angela McCormick Bisig declined to enforce LMC's pre-injury release as it pertains to LMC's underground bike park, holding that it was unenforceable on public policy grounds due to the unequal bargaining power of the parties, the public interest in safety, and the injured party's unfamiliarity with the bike park:

> The Court finds the release here to be unenforceable as contrary to public policy because of the unequal positions of the parties. Backmeyer was unfamiliar with LMC's biking course. There is no evidence he had significant experience with the type of biking associated with the course offered by LMC. He was required to rely on LMC for his safety rather than any familiarity with this type of biking or the particular course he was riding on. Admittedly, Backmeyer signed the release, including its inaccurate provision that he had inspected the premises prior to engaging in the activity. Yet that alone does not overcome the unequal bargaining power that resulted from his wholesale reliance on LMC for his safety.
>
> Moreover, any public interest in encouraging commercial biking operations such as LMC's are outweighed by the public interest in physical safety and legal protection. Although concerns over liability due to lack of a valid release may impact the availability of activities such as those offered by LMC, the Court does not find that interest to outweigh the physical safety and legal protection of inexperienced participants in potentially hazardous physical activities.
>
> In sum, although the release executed by Backmeyer meets the criteria for enforceability under *Hargis* it is not enforceable here. Given the disparity in bargaining power between LMC and Backmeyer and because the public interest in safety outweighs the encouragement of activities such as those offered by LMC, the release is unenforceable as a matter of public policy.[96]

As in *Backmeyer,* LMC's Participant Agreement is unenforceable on public policy grounds due to: (1) Westover's unfamiliarity with LMC's ropes course, (2) Westover's unfamiliarity with ropes courses in general, (3) the unequal bargaining power of the parties,

[96] *See* **Appendix tab 12:** *Backmeyer v. Louisville Mega Cavern, LLC,* Order Regarding Motion for Summary Judgment at 8, Case No. 17-CI-5126 (Jeff. Cir. Ct. Div. 10 May 23, 2019), (R.6087-95) at 8.

(4) the public's interest in physical safety, (5) Kentucky legislation and regulations indicating a policy of requiring ropes course operators to prepare for emergencies, (6) LMC's misrepresentations that it was capable of rendering aid and would do so if needed, (7) Westover's inability to obtain similar services elsewhere without signing a pre-injury release, (8) the pre-injury release's failure to mention that LMC staff was not trained to offer basic life support, CPR, or first aid, (9) the pre-injury release's failure to mention the risk of suspension trauma, (10) LMC's willful failure to train its employees, and (11) the unconscionability of the pre-injury release.

3. The pre-injury release is unenforceable because LMC's negligence was willful.

A pre-injury release is unenforceable where the party relying on it has committed "willful or wanton negligence." *See United Servs. Auto. Ass'n v. ADT Sec. Servs.,* 241 S.W.3d 335, 341 (Ky. App. 2006). Here, LMC's CR 30.02(6) designee Jeremiah Heath, who was General Manager at the time of Westover's death, acknowledged that LMC's failure to train its employees in basic first aid was a willful choice.[97] This was in spite of LMC describing its ropes course as "an extreme sport."[98] Because such "willful" negligent failure to train cannot be contracted away, the Participant Agreement was unenforceable for that reason alone.

f. Westover's wrongful death beneficiaries, and Bradley as a consortium claimant, are not bound by LMC's pre-injury release.

Wrongful death beneficiaries are not bound by agreements signed by a decedent

[97] VR 6/18/21 at 9:35:33-9:36:11 (testimony of Jeremiah Heath) ("Q. You know as well as anyone the importance of CPR training. A. Yes, sir. Q. And you knew that before you took the job as General Manager at Louisville Mega Cavern. A. Yes, sir. Q. And yet, you chose not to follow the industry standards that say you're supposed to train your employees to do CPR and first aid if you're running a place like this. A. No. We had not done them at this time. No. Q. And that was your all's choice. A. Yes. We did have a choice. Q. That was a willful choice. A. Correct.").

[98] VR 6/16/21 at 1:52:44-1:53:01 (testimony of LMC owner Jim Lowry).

during her lifetime. *See Ping v. Beverly Enterprises, Inc.,* 376 S.W.3d 581, 599 (Ky. 2012). Rather, a wrongful death claim belongs to the wrongful death beneficiaries as a separate and distinct right from any right held by a decedent during her lifetime. *Moore v. Citizens Bank of Pikeville,* 420 S.W.2d 669, 672 (Ky. 1967) (noting that "the wrongful death action is not derivative.... [It] is distinct from any [right] that the deceased may have had if he had survived."); *Pete v. Anderson,* 413 S.W.3d 291, 300 (Ky. 2013) ("[W]hile a survival action is derivative of a personal injury claim which belongs to the estate, a wrongful death action is an independent claim belonging to the intended beneficiaries under KRS 411.130.").

In *Ping v. Beverly Enterprises, Inc.,* the Kentucky Supreme Court held that, because the right of statutory wrongful death beneficiaries to institute a wrongful death action accrues separately and distinctly from any right of the estate, "a decedent cannot bind his or her beneficiaries to arbitrate their wrongful death claim." 376 S.W.3d at 599. The court reasoned that, by enacting KRS 411.133,[99] "the General Assembly has left no doubt that in this state wrongful death and survival actions are separate and distinct." *Id.* at 598. Thus, even where a contract was validly executed by a decedent, "a non-signatory who receives no substantive benefit under a contract" may not be bound by the contract. *Id.* at 599. The fact that a contract signed by a decedent mentions a third party does not, in itself, render the release enforceable against the third party. Plaintiffs may not have their tort claims "swept up" into a contract's provisions "merely by being mentioned in the contract as potential claimants." *Id.* at 600; *see also Kindred Nursing Centers Limited Partnership v.*

[99] "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." KRS 411.133.

Cox, 486 S.W.3d 892, 896 (Ky. App. 2015) (following *Ping* and noting the lack of cases where "Kentucky courts have previously enforced contracts against wrongful death beneficiaries without them being parties to the contract at issue.").Thus, even if LMC's Participant Agreement is enforceable as to Westover's Estate's personal injury claim (it is not), it cannot be applied to the wrongful death claim, which belongs to the wrongful death beneficiaries, or to Bradley's loss of consortium claim, which is derivative of—yet separate and distinct from—the wrongful death claim. *See Martin v. Ohio Cnty. Hosp. Corp*., 295 S.W.3d 104, 110 (Ky. 2009) ("[KRS 411.145], which makes loss of consortium a personal right which can be claimed directly by the spouse, is in line with the recognition by these other states that the claim is separate from the claim for the injuries to the deceased spouse.")

Likewise, even if enforceable, the Participant Agreement cannot preclude a punitive damage claim, which Kentucky recognizes as a separate claim, to the extent that the punitive damages claim relates to the wrongful death. *See Chelsey v. Abbott,* 524 S.W.3d 471, 480-481 (Ky. App. 2017) (recognizing that a claim for punitive damages is independent and extricable from its related claim for compensatory damages).

g. It was prejudicial error to admit the unenforceable Participant Agreement into evidence.

Because the Participant Agreement is unenforceable, it is not admissible, as it has no tendency to make the existence of any fact of consequence more or less probable. *See Matador Production Co. v. Weatherford Artificial Lift Systems, Inc.,* 450 S.W.3d 580, 594 (Tex. App. 2014) (holding that liability-limiting waiver was unenforceable and, therefore, improperly admitted at trial, resulting in reversible error); *Blue Valley Co-op. v. National Farmers Organization,* 600 N.W.2d 786, 793-796 (Neb. 1999) (overruled on other grounds

by *Weyh v. Gottsch,* 929 N.W.2d 40 (2019)) (admission of unenforceable waiver was reversible error). In *Matador Production Co.,* the court held that introduction of an unenforceable liability-limiting agreement at a jury trial was an abuse of discretion constituting reversible error. 450 S.W.3d at 594.

Further, in *Blue Valley Co-op v. National Farmers Organization,* the Supreme Court of Nebraska held the trial court's admission of an unenforceable waiver clause was an abuse of discretion. 600 N.W.2d at 793-796. The court reasoned that, because the clause was unenforceable, "it had no tendency to make any . . . facts of consequence more or less likely and was irrelevant." *Id.* at 794. In holding that the abuse of discretion constituted reversible error, the court noted:

> In the instant cause, the jury was not specifically instructed that the waiver clause was unenforceable or that they should disregard the clause. As such, the jury could easily have been confused or misled as to whether [the defendant] could be held liable—even if [the defendant] was negligent and such negligence caused the harm to [the plaintiff's] corn.

Id. at 795.

As in *Blue Valley Co-op,* the jury here received no guidance on what to do with the pre-injury release and, therefore, was able to determine what legal effect the pre-injury release was to have, even though the trial court acknowledged that the Participant Agreement contained irrelevant language that was likely to confuse the jury as to the ultimate issue of liability.[100] "The rule is well settled that **the construction of a written instrument is for the court and is not to be submitted to the jury**."[101] Thus, it was error

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[100] *See* VR 6/16/21 at 9:37:17-46.

[101] *Kentucky Union Co. v. Hevner,* 275 S.W. 513, 514 (Ky. 1925) (emphasis added); *Morganfield Nat. Bank v. Damien Elder & Sons,* 836 S.W.2d 893, 895 (Ky. 1992) ("The construction as well as the meaning and legal effect of a written instrument, however compiled, is a matter of law for the court."); *Cinelli v. Ward,* 997 S.W.2d 474, 476 (Ky. App. 1998) ("It is well established that construction and interpretation of a written instrument are questions of law for the court."); PALMORE & CETRULO, KENTUCKY INSTRUCTIONS TO JURIES § 13.11(J) ("Instructions must not leave issues of law to the determination of the jury.").

to allow the jury to construe and determine the effect of the Participant Agreement. The trial court should have held it to be unenforceable as a matter of law and prevented its admission into evidence as irrelevant.

The trial court further erred by declining to instruct the jury as to the unenforceability of the Participant Agreement and as to the purpose for which the Participant Agreement could be considered (if any), once introduced. *See* KRE 105(a). The Plaintiffs were greatly prejudiced by the admission of the pre-injury release. Defense counsel discussed the release at length at every opportunity: opening statement, cross-examination, closing argument. The admission of the Participant Agreement was an abuse of discretion, in violation of KRE 401, 402, and 403. The error was not harmless, and it affected Plaintiffs' substantial rights, warranting a new trial.

II. The court erred by failing to give a proper duty instruction.[102]

Prior to trial, the Plaintiffs tendered proposed jury instructions that included the following language regarding the duties owed by LMC to the Decedent:

> It was the duty of Louisville Mega Cavern, LLC to exercise "ordinary care" in the operation of the Mega Quest ropes course in order to prevent foreseeable injury. That general duty includes the following specific duties:
>
> (1) to make the conditions of the "Mega Quest" ropes course reasonably safe; and
>
> (2) to discover unreasonable risks of harm associated with the "Mega Quest" ropes course; and either
>
> (a) take active steps to make those risks safe; or
> (b) give adequate warning of those risks.
>
> For the purpose of these instructions, an "unreasonable risk" is one that is recognized by a reasonable company in similar circumstances as one that should be avoided or minimized, or one that is in fact recognized by Louisville Mega Cavern, LLC. Even if you find that Louisville Mega Cavern, LLC adequately warned of the

[102] This issue was preserved via Plaintiffs' tendered instructions (R.5818-5830) and Plaintiffs' arguments at trial (VR 6/22/21 at 3:22:58-3:25:59, 3:37:26-57, 3:39:22-32; VR 6/23/21 at 9:13:12-9:15:31).

> risks associated with participation in the "Mega Quest" ropes course, you may find that Louisville Mega Cavern, LLC failed to exercise ordinary care by failing to adopt further precautions to protect against those risks, if it was foreseeable that, despite the warning, some risk of harm remained.[103]

During argument regarding jury instructions, Plaintiffs' counsel reiterated the need for instructions on the specific duties owed by LMC to Westover.[104] Rather than giving any instruction on the specific duties, the court simply instructed the jury that "Louisville Mega Cavern, LLC had a duty to exercise ordinary care for the safety of its patrons."[105]

"[A] party is entitled to a jury instruction in every duty supported by the facts entered into by the evidence, whether that duty is a common law duty or a statutory duty. *Clark v. Hauck Mfg. Co*., 910 S.W.2d 247, 251 (Ky. 1995). Whether a trial court issued the proper jury instruction is a question of law, which this Court reviews *de novo*. *Maupin v. Tankersley*, 540 S.W.3d 357, 360 (Ky. 2018). Kentucky law is clear that an instruction misstates the law "by failing to sufficiently advise the jury 'what it [had to] believe from the evidence in order to return a verdict in favor of the party who [had] the burden of proof.'" *Office, Inc. v. Wilkey*, 173 S.W.3d 226, 229 (Ky. 2005) (quoting *Meyers v. Chapman Printing Co., Inc*., 840 S.W.2d 814, 824 (Ky. 1992)). "Erroneous jury instructions are presumptively prejudicial." *Jones by & through Jones v. IC Bus, LLC*, 626 S.W.3d 661, 687 (Ky. App. 2020) (reversing judgment on jury verdict due to incomplete and erroneous jury instructions)

Although Kentucky jury instructions should generally be "bare bones," "[i]f there is a question as to whether or not a party has violated a specific duty, the violation of which would constitute negligence, certainly the instructions should state that duty." PALMORE &

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[103] **Appendix tab 7:** Plaintiffs' Revised Proposed Jury Instructions, (R.5818-5830) at 4-5 (footnotes omitted).
[104] *See* VR 6/22/21 at 3:22:58-3:25:59, 3:37:26-57, 3:39:22-32; VR 6/23/21 at 9:13:12-9:15:31.
[105] **Appendix tab 1:** Judgment (R.6166-6171) and Final Jury Instructions and Verdict, (R.5843-5855) at 2.

CETRULO, KENTUCKY INSTRUCTIONS TO JURIES § 13.11(J). In *Smith v. Smith,* the Supreme Court held that it is reversible error to fail to instruct on the specific duties that a business owner owes to invitees. 563 S.W.3d 14, 18 (Ky. 2018). In *Smith,* much like this case, the trial court gave the following duty instruction: "It was the duty of the Defendant, Barbara Smith, to exercise ordinary care to maintain her premises in a reasonably safe condition for use of her guests, including the Plaintiff, Bonnie Smith." *Id.* at 17. The Supreme Court held that the "single 'ordinary care' jury instruction does not properly instruct the jury on . . . a possessor's duty." *Id.* at 18. Here, there is no dispute—nor can there be—that Mitzi Westover was an invitee of LMC. Thus, the jury should have been instructed as to the specific duties LMC owed to her as an invitee.

LMC had a duty to make the conditions of the "Mega Quest" ropes course reasonably safe. *Shelton v. Kentucky Easter Seals, Soc., Inc.,* 413 S.W.3d 901, 908, n.27 (Ky. 2013) ("possessors of land are required to maintain the premises in a reasonably safe condition"). LMC also had a duty to discover unreasonable risks of harm associated with the ropes course and either take active steps to make those risks safe or give adequate warning of those risks.[106] Even if LMC had adequately warned Westover of the risks associated with the ropes course, the jury could still have found that LMC failed to exercise ordinary care by failing to adopt further precautions to protect against those risks, if it was

[106] *Shelton,* 413 S.W.3d at 914 (holding that possessor of land "has a duty to an invitee to eliminate or warn of unreasonable risks of harm"); *see also id.* at 908 n.27 ("'In some cases but not all, reasonable care under the circumstances requires an inspection of the premises and active steps to make them safe. In other cases, the landowner may satisfy his duty of reasonable care by providing a warning.'") (quoting DAN B. DOBBS, ET AL., THE LAW OF TORTS § 276 (2d ed. Updated 2013)); *see also id.* at 915 (holding that, if a possessor of land attempts to cure a hazard with a warning, the warning must be adequate); *West v. KKI, LLC,* 300 S.W.3d 184, 191 (Ky. App. 2008) ("Under common-law premises liability principles, the duty owed by the premises owner to an invitee is a general duty to exercise ordinary care to keep the premises in a reasonably safe condition and to warn invitees of dangers that are latent, unknown, or not obvious. The owner's duty to invitees is to discover the existence of dangerous conditions on the premises and either correct them or warn of them.") (citations omitted).

foreseeable that, despite the warning, some risk of harm remained.[107] However, the jury was not instructed on ***any*** of these specific duties, thus warranting a new trial.

III. The court erred by admitting evidence of hydrocodone in Westover's urine.[108]

Upon Westover's arrival at Norton Audubon Hospital, a blood sample was taken, which was later submitted for laboratory analysis and screening for toxicology purposes as part of the autopsy.[109] Urine samples were also taken and submitted to the lab.[110] The toxicology results indicated the presence of three substances: oxycodone, oxymorphone, and hydrocodone.[111] Oxycodone—for which Westover had a prescription—was detected in the low therapeutic range, and oxymorphone is merely a metabolite of oxycodone.[112] Laboratory analysis was not able to determine a level of hydrocodone in Westover's body.[113] In fact, LMC's retained toxicologist Dr. Greg Davis testified that there is no indication that the hydrocodone was having any effect on her central nervous system at the time of her death and that he could not say she was impaired.[114]

Plaintiffs moved to exclude introduction of the presence of hydrocodone in Westover's urine.[115] The court denied the Motion.[116] In its opening statement, LMC told

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[107] *See* RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 18(b) (2010) ("Even if the defendant adequately warns of the risk that the defendant's conduct creates, the defendant can fail to exercise reasonable care by failing to adopt further precautions to protect against the risk if it is foreseeable that despite the warning some risk of harm remains."); *see also Shea v. Bombardier Recreational Products, Inc.,* 2012 WL 4839527 at *5 (Ky. App. Oct. 12, 2012) (recognizing claim for negligent failure to warn).

[108] This issue was preserved via Plaintiffs' motion *in limine* (R.4697-4712 at 4701-4703, VR 6/3/21 at 14:20:33-14:21:04) and Plaintiffs' objection which was overruled at trial (VR 6/16/21 at 9:38:16-9:39:55; VR 6/18/21 at 2:04:44-2:06:34, 2:32:00-14).

[109] *See* Defendants' trial exhibit 1 (toxicology results).

[110] *See* Defendants' trial exhibit 1 (toxicology results).

[111] *See* Defendants' trial exhibit 1 (toxicology results).

[112] R.3013, 3014 (Dr. Smock deposition); VR 6/18/21 at 2:02:55-2:03:15 (Dr. Beavers testimony); VR 6/21/21 at 4:46:28-41 (Bradley testimony). Westover was a long-term user of opioids, which were prescribed to her for migraine headaches. *See* VR 6/21/21 at 4:45:47-55; R.3035 (she had hydrocodone as early as 2006).

[113] *See* Defendants' trial exhibit 1 (toxicology results).

[114] R.3020.

[115] *See* R.4697-4712 at 4701-4703.

[116] *See* VR 6/3/21 at 14:20:33-14:21:04; VR 6/16/21 at 9:38:16-9:39:55; VR 6/18/21 at 2:04:44-2:06:34, 2:32:00-14 (toxicology report admitted as Defense trial exhibit 1 over Plaintiffs' objection).

the jury that Westover "had hydrocodone in her system. The evidence will show you that she didn't have an active prescription for hydrocodone."[117] LMC proceeded to question several witnesses as to Westover's hydrocodone use.[118] LMC further elicited testimony that suggested to the jury that Westover was using hydrocodone without a prescription.[119] The expert witnesses agreed that there was no evidence that hydrocodone was having any effect on Westover at the time of the incident.[120] Even Dr. Davis was confused by defense counsel's use of the hydrocodone evidence at trial:

> Q. You agree with me, Doctor, that [hydrocodone] was having no effect on her central nervous system at the time she fell on the ropes course?
>
> A. That is correct. If it's only in her urine, it's not affecting her brain.[121]

Further, Dr. Davis testified that the assertion Westover was using hydrocodone without a prescription could not be supported.[122] Indeed, as LMC's attorneys only obtained some of Westover's prescription records the week before trial,[123] the possibility that LMC's counsel missed prescription records showing Westover had an active hydrocodone prescription at the time of her death could not be ruled out. Also, the hydrocodone in Westover's urine could have simply been a contaminant in her oxycodone, as it is known that oxycodone—a substance for which Westover had a known prescription[124]—can become contaminated

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[117] *See* VR 6/16/21 at 10:30:38-50 (LMC's opening statement).
[118] *See* VR 6/16/21 at 4:40:45-49 (testimony of Garrett Lee); VR 6/17/21 at 4:51:17-50 (testimony of Elijah Bauer); VR 6/18/21 at 2:02:55-2:03:15, 2:04:34-44, 2:18:43-2:19:11 (testimony of Dr. Beavers); VR 6/18/21 at 3:52:41-3:58:07 (testimony of George Nichols); VR 6/22/21 at 9:17:50-9:18:30 (testimony of William Smock).
[119] VR 6/18/21 at 2:02:55-2:03:15, 2:04:34-44, 2:18:43-2:19:11 (testimony of Dr. Beavers).
[120] *See* VR 6/18/21 at 2:58:14-3:00:54 (testimony of Dr. Beavers); *id.* at 4:17:12-4:18:30 (testimony of Dr. Nichols); VR 6/22/21 at 1:57:05-1:58:07 (testimony of Dr. Davis); R.3013 (Dr. Smock deposition).
[121] VR 6/22/21 at 1:57:05-1:58:07.
[122] R.3020-3021 (Deposition testimony of Dr. Davis: "Q. And so you note in your report, Doctor, that you didn't see that she had a current prescription for hydrocodone at the time of her death. Would you agree with me that the fact that you didn't see it in the medical records doesn't mean that it wasn't prescribed? A. Yes, I would agree.").
[123] *See* VR 6/18/21 at 2:02:25-2:02:53 (defense counsel stating he received pharmacy records "last week").
[124] VR 6/18/21 at 2:02:55-2:03:15 (testimony of Dr. Beavers).

with hydrocodone through the manufacturing process.[125] Therefore, even if Westover did not have an active prescription for hydrocodone, it is improper to infer that she was taking hydrocodone pills without a prescription.

No eyewitness testified that Westover appeared impaired or intoxicated.[126] The only LMC employee to have any interaction with her prior to the incident testified that, in the fifteen minutes he interacted with her, he did not notice any impairment or intoxication.[127] Thus, evidence of hydrocodone in Westover's urine was without probative value and was, especially coupled with implications that Westover was using hydrocodone without a prescription, highly prejudicial. Where the only effect of toxicology evidence is to brand a party as a drug user, such evidence is unduly prejudicial. *Burton v. Com.,* 300 S.W.3d 126, 138 (Ky. 2009) (holding that urinalysis was unduly prejudicial and improperly admitted where it did not indicate defendant was intoxicated at the time of incident).

IV. The court erred by limiting Plaintiffs' ability to cross-examine witnesses regarding OSHA standards and literature.[128]

At trial, several LMC witnesses testified, incorrectly, that LMC was not required to train its staff in basic first aid. LMC's owner Jim Lowry testified "**We're not required to do that**."[129] LMC's former safety manager Kimberly Coleman also testified that it was her

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[125] VR 6/18/21 at 2:19:15-2:21:38 (trial testimony of Dr. Beavers); VR 6/18/21 at 3:48:44-3:49:15 (trial testimony of Dr. Nichols); Mayo Clinic Laboratories, Opiates, Random, Urine, available at https://www.mayocliniclabs.com/testcatalog/Clinical+and+Interpretive/8473 (last visited April 14, 2021) ("Trace amounts of hydrocodone can also be found in the presence of approximately 100-fold higher concentrations of oxycodone or hydromorphone since it can be a pharmaceutical impurity in these medications."); West R., et al., Anomalous observations of hydrocodone in patients on oxycodone. Clin. Chim. Acta. (Jan. 14, 2011) ("Oxycodone preparations are known to have small amounts of hydrocodone as an impurity . . . ."); R.3036-3037 (Craig Beavers deposition).

[126] *See* VR 6/21/21 at 3:49:25-3:49:43, 5:08:48-5:09:19 (Bradley testifying that Westover was not impaired or intoxicated).

[127] VR 6/17/21 at 4:24:02-4:24:56, 4:45:00-4:45:12.

[128] The issue was preserved by the Court's order excluding OSHA matters over Plaintiffs' arguments (VR 6/17/21 at 5:04:40-5:10:56 and VR 6/22/21 at 1:17:27-56).

[129] VR 6/16/21 at 11:19:42-55 (emphasis added).

understanding that LMC was not required to train its employees to ACCT standards because it was "not required by Kentucky law at that time."[130] LMC's former General Manager Jeremiah Heath repeated the same talking point in his trial testimony.[131]

When Plaintiffs' counsel attempted to rebut the implication that LMC followed the standard of care by questioning LMC's former General Manager Jeremiah Heath using OSHA literature pertaining to zip line operators like LMC, defense counsel objected,[132] resulting in the court stating, "**I don't think the OSHA standards apply and are relevant here.** So, I'm going to ask you to move on."[133] The court later stated: "**We're not talking about OSHA anymore**."[134]

The court's limiting of OSHA publications is contrary to established Kentucky law. In *Spencer v. Arnold,* 2020 WL 4500589 at *7 (Ky. App. July 24, 2020) this Court held that "[i]ndustry standards or manuals can inform the standard of care that will satisfy a duty." (citing *Carman v. Dunaway Timber Co., Inc.,* 949 S.W.2d 569 (Ky. 1997)). In *Carman*, the Supreme Court held that OSHA regulations were properly introduced as evidence of negligence where the injured party was not an employee. *Carman,* 949 S.W.2d at 571. Thus, the court's exclusion of OSHA regulations and publications and limiting of Plaintiffs' ability to cross-examine with these materials was error. Jurors were left with the mistaken impression that LMC followed all applicable laws and industry standards, although LMC failed to train its employees in CPR, first aid, and suspension trauma.

The excluded OSHA pamphlet indicates that zip line operators[135] should be

[130] VR 6/17/21 at 1:08:52-1:09:33 (emphasis added).
[131] VR 6/17/21 at 5:21:01-35 (emphasis added).
[132] *See* VR 6/17/21 at 5:02:36-50.
[133] VR 6/17/21 at 5:04:40-5:10:56 (emphasis added).
[134] *See* VR 6/22/21 at 1:17:27-56 (emphasis added).
[135] LMC's Mega Quest ropes course contained two zip lines. *See* R.1506.

prepared to perform rescue operations and should be familiar with ACCT and PRCA standards.[136] Consistent with OSHA regulations,[137] those industry standards indicate that ropes course operators should "have onsite, when participants are present, a person trained in basic first aid and CPR,"[138] that "[a]ll facilities should have at least one staff member holding a current level First Aid/CPR certification from a nationally recognized provider,"[139] and that a ropes course worker should show an understanding of the "causes, symptoms and preventative strategies for suspension trauma," "demonstrate methods / techniques to prevent suspension trauma," and demonstrate "[i]nterpersonal skills to communicate participant self-rescue and suspension trauma prevention techniques."[140] That LMC did not train its employees in these areas was relevant to show its failure to satisfy its tort duties. The OSHA pamphlet was important to show that the Department of Labor recognizes these standards as applicable to the zip line/ropes course industry and to show that LMC's refusal to follow industry standards was unreasonable.

V. The trial court erred by excluding CR 30.02(6) testimony of LMC's fault.[141]

Prior to the close of Plaintiffs' case-in-chief, Plaintiffs' counsel sought to read into evidence a brief portion of the transcript from former LMC General Manager Jeremiah Heath's December 29, 2020 deposition.[142] That deposition was taken pursuant to CR

[136] **Appendix tab 13:** OSHA pamphlet on "Protecting Zip-Line Workers," (R.2036-41) at 3,4.
[137] *See* 803 KAR § 2:310; 29 CFR § 1910.151(b).
[138] Plaintiffs' trial exhibit 10 at 38.
[139] R.1875.
[140] R.1976.
[141] The issue was preserved based on the Court's exclusion of the evidence at trial over Plaintiffs' arguments (VR 6/22/21 at 8:26:46-8:30:14).
[142] *See* VR 6/22/21 at 8:26:46-8:30:14; **Appendix tab 14:** Heath CR 30.02(6) testimony excerpt, (R.1524) at 198 (Q. Do you recall telling any of the employees at Louisville Mega Cavern that they were not allowed to do CPR? A. Only the ones that did not have a certification."); *see also See* R.1597 (LMC's Responses to Plaintiffs' Second Set of Requests for Admissions indicating that none of its employees were trained in CPR).

30.02(6), as Heath was designated by LMC to testify on its behalf.[143] Plaintiffs' counsel sought to read into evidence a portion of the transcript wherein Heath stated that he had instructed LMC employees *not* to perform CPR.[144] LMC ***did not*** object to the pertinent portion of Mr. Heath's deposition testimony when it filed its Deposition Objections.[145] However, LMC did object, unexpectedly, at trial.[146] Pursuant to LMC's objection, which was not based on any rule of evidence, the court excluded the deposition testimony.[147]

CR 32.01(b) states that deposition testimony of a "person designated under Rule 30.02(6) . . . may be used by an adverse party for any purpose." In *Lambert v. Franklin Real Estate Co.,* 37 S.W.3d 770, 778-779 (Ky. App. 2000), this Court held that it was error for the trial court to deny a request to read a deposition into the record pursuant to CR 32.01(b). Because Heath's deposition testimony was given as LMC's CR 30.02(6) designee, the Plaintiffs should have been permitted to read his deposition to the jury. Because the substance of the testimony was on a major point in the litigation—LMC's instruction to employees *not* to perform CPR—the error was prejudicial.

CONCLUSION

Appellants respectfully request that this Court set aside the judgment on the jury verdict and order on costs, and remand for a new trial consistent with this Court's opinion.[148]

/s/ Brenton D. Stanley (Appellants' Counsel)

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[143] R.1511 (noting that Heath's deposition was given as a "CORPORATE REPRESENTATIVE").
[144] *See* VR 6/22/21 at 8:26:46-8:30:14.
[145] *See* R.2411-2418 (LMC's Deposition Objections); *see also* R.240 (Order requiring objections to depositions to be filed 30 days prior to trial).
[146] *See* VR 6/22/21 at 8:26:46-8:30:14.
[147] *See* VR 6/22/21 at 8:26:46-8:30:14.
[148] The jury did not reach issues concerning apportionment and damages. Although the circuit court erred as to those issues, any error is moot as it will be considered on remand for a new trial. "Therefore, no discussion of these issues [on appeal] is necessary except to decree that the award of costs is hereby vacated." *Jones by & through Jones v. IC Bus, LLC*, 626 S.W.3d 661, 687 (Ky. App. 2020).

APPENDIX

Tab 1: Judgment on Verdict and Final Jury Instructions and Verdict (R.6166-6171; R.5843-55).

Tab 2: Order Denying Motion for New Trial (R.6197-6201).

Tab 3: Order on Costs (R.6195-6196).

Tab 4: Order denying LMC's Motion for Summary Judgment (R.5483-8).

Tab 5: English language portion of Plaintiffs' trial exhibit 14—Singing Rock Profi Worker III General Instructions for Use.

Tab 6: Plaintiffs' trial exhibit 2—5/16/17 Audit Report.

Tab 7: Plaintiffs' Revised Proposed Jury Instructions (R. 5818-30).

Tab 8: Plaintiffs' trial exhibit 13—LMC Web Site Screen Shot.

Tab 9: Plaintiffs' trial exhibit 1—Participant Agreement (partially redacted).

Tab 10: Juror questions regarding the Participant Agreement (separate envelope in record).

Tab 11: Unredacted Participant Agreement (R.1166-1170).

Tab 12: *Backmeyer v. Louisville Mega Cavern, LLC,* Order Regarding Motion for Summary Judgment, Case No. 17-CI-5126 (Jeff. Cir. Ct. Div. 10 May 23, 2019) (R.6087-95).

Tab 13: OSHA pamphlet on "Protecting Zip-Line Workers" (R.2036-41).

Tab 14: Excerpt from deposition of LMC CR 30.02(6) designee Jeremiah Heath (R.1524).

Tab 15: Unpublished Appellate Opinions cited in brief:
Pierson v. Hartline, 2021 WL 2272769 (Ky. App. June 4, 2021);
Spencer v. Arnold, 2020 WL 4500589 (Ky. App. July 24, 2020);
Horton v. Wells Fargo Bank, N.A., 2015 WL 1969363 (Ky. App. May 1, 2015);
Shea v. Bombardier Recreational Products, Inc., 2012 WL 4839527 (Ky. App. Oct. 12, 2012).

APPENDIX TAB 1

CASE NO. 18-CI-004436
Electronically Filed

JEFFERSON CIRCUIT COURT
DIVISION TWO (2)
JUDGE ANNIE O'CONNELL

ANTHONY BRADLEY, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF MITZI WESTOVER — PLAINTIFF

v.

LOUISVILLE MEGA CAVERN, LLC AND LOUISVILLE UNDERGROUND, LLC — DEFENDANTS

JUDGMENT ON VERDICT

On Tuesday, June 15, 2021, the above-styled cause came to be heard for trial by jury. Prior to the trial, Plaintiff Anthony Bradley, Individually and as Administrator of the Estate of the Mitzi Westover's claims against Louisville Underground, LLC were dismissed. At trial, Plaintiff proceeded with wrongful death, loss of consortium and punitive damages claims against the Defendant, Louisville Mega Cavern, LLC.

Plaintiff and Louisville Mega Cavern, LLC appeared both in person and by and through their respective counsel, and announced that they were ready for trial. A jury was thereupon selected, composed of 14 persons by agreement, and such jury was impaneled and sworn. The parties presented evidence for seven days, continuing through June 15, June 16, June 17, June 18, June 21, June 22, and June 23. One member of the jury panel (Brittany Slaughter, Juror # 2746158) was unable to attend on the second day of evidence and was excused from service, and another member of the jury panel (Norma Nangju, Juror #2746129) was selected by random drawing as an alternate and was excused prior to deliberations, such that 12 persons remained on the jury panel.

After having heard the testimony, the instructions of the Court, and closing arguments from counsel, the jury retired for deliberation and returned in open Court the following verdict:

GENERAL INSTRUCTIONS

(a) Immediately upon retiring to the jury room, you should elect one of you as a foreperson. The foreperson is merely a representative designated to communicate with the Court on behalf of the jury. The foreperson's opinion holds no weight greater than that of any other juror during your deliberations.

(b) In order to answer any of the questions which follow, nine (9) or more of you must agree, however, the nine (9) or more of you who agree upon one question do not have to be the same nine (9) who agree upon another question.

(c) If all twelve (12) of you agree on the answer to a question, the foreperson alone can sign, however, if the answer is not unanimous, the answer must be signed by the nine (9) or more of you who agree.

Please proceed to Instruction No. 1.

INSTRUCTION NO. 1

Louisville Mega Cavern, LLC had a duty to exercise ordinary care for the safety of its patrons.

"Ordinary care," as applied to Louisville Mega Cavern, LLC, means such care as you would expect an ordinarily prudent company engage in the same type of business to exercise under similar circumstances.

Please proceed to Question No. 1.

QUESTION NO. 1

Are you satisfied from the evidence presented that Louisville Mega Cavern, LLC (a) failed to exercise "ordinary care" in the operation of the Mega Quest course and (b) that such failure was a substantial factor in causing injury to Mitzi Westover?

YES _____ NO __X__

_____
Foreperson (if unanimous)

/s/ John Robertson (Juror # 2746165)

/s/ Vincent Korfhage (Juror # 2746027)

/s/ John Hardin (Juror # 2746110)

/s/ Patricia Feeley (Juror # 2746046)

/s/ James Florence (Juror # 2746250)

/s/ Choya Smith (Juror # 2746137)

/s/ Benjamin Pope (Juror # 2746150)

/s/ Loren Atherton (Juror # 2745920)

/s/ David Metzger (Juror # 2745946)

_____

_____

If you answered "YES", please proceed to Instruction No. 2.

If you answered "NO", please inform the Bailiff you have reached a verdict and await further instructions from the Court.

MIS : 000004 of 000006

Annie O'Connell

Judge Annie O'Connell, Jefferson Circuit Court Division Two

ENTERED IN COURT
DAVID L. NICHOLSON, CLERK
OCT 04 2021
BY ED
DEPUTY CLERK

PREPARED AND TENDERED BY:

/s/ Maxwell D. Smith
Gregg E. Thornton
Ashley K. Brown
Maxwell D. Smith
Ward, Hocker & Thornton, PLLC
Counsel for Defendant Louisville Mega Cavern, LLC

CLERK'S CERTIFICATE OF SERVICE

It is hereby certified that a true and correct copy of the foregoing has been served upon the following:

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Lexington, KY 40507
Counsel for Defendant Louisville Mega Cavern, LLC

On this the _____ day of _____, 2021.

_____
CLERK, JEFFERSON CIRCUIT COURT

G:\CASES\CL\CL6527\pleadings\210629.Judgment on Verdict.wjb.dj.docx

Filed 18-CI-004436 07/12/2021 David L. Nicholson, Jefferson Circuit Clerk

COMMONWEALTH OF KENTUCKY
JEFFERSON CIRCUIT COURT
DIVISION 2
CIVIL ACTION NO. 18-CI-004436

ANTHONY BRADLEY, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF MITZI WESTOVER — PLAINTIFF

V.

JURY INSTRUCTIONS

LOUISVILLE MEGA CAVERN, LLC — DEFENDANT

***** ***** *****

GENERAL INSTRUCTIONS

(a) Immediately upon retiring to the jury room, you should elect one of you as a foreperson. The foreperson is merely a representative designated to communicate with the Court on behalf of the jury. The foreperson's opinion holds no weight greater than that of any other juror during your deliberations.

(b) In order to answer any of the questions which follow, nine (9) or more of you must agree. However, the nine (9) or more of you who agree upon one question do not have to be the same nine (9) who agree upon another question.

(c) If all twelve (12) of you agree on the answer to a question, the foreperson alone may sign. However, if the answer is not unanimous, the answer must be signed by the nine (9) or more of you who agree.

Please proceed to Instruction No. 1.

INSTRUCTION NO. 1

Louisville Mega Cavern, LLC had a duty to exercise ordinary care for the safety of its patrons.

"Ordinary care," as applied to Louisville Mega Cavern, LLC, means such care as you would expect an ordinarily prudent company engaged in the same type of business to exercise under similar circumstances.

Please proceed to Question No. 1.

QUESTION NO. 1

Are you satisfied from the evidence presented that Louisville Mega Cavern, LLC (a) failed to exercise "ordinary care" in the operation of the Mega Quest course and (b) that such failure was a substantial factor in causing injury to Mitzi Westover?

YES _____ NO ✓

_____
Foreperson (if unanimous)

John B. Ralston
Vincent Bonfiglio
John Hardin
Patricia Adley
Karen C. Thorn
Thomas A. Smith
Brian Pope
Karen Mathewson
David J. McKay

If you answered "YES", please proceed to Instruction No. 2.

If you answered "NO", please inform the Bailiff you have reached a verdict and await further instruction from the Court.

INSTRUCTION NO. 2

COMPARATIVE FAULT

It was Mizti Westover's duty, as a patron of Louisville Mega Cavern, LLC, to exercise ordinary care for her own safety.

"Ordinary Care," as applied to Mitzi Westover, means such care as you would expect an ordinarily prudent person to exercise under similar circumstances.

If you find that Louisville Mega Cavern, LLC failed to exercise ordinary care, but are also satisfied from the evidence that Mitzi Westover (a) failed to comply with her duty to exercise ordinary care for her own safety; and (b) that her failure to exercise ordinary care was a substantial factor in causing her injuries, you will determine from the evidence the percentage of fault attributable to each party.

Please proceed to Question No. 2.

QUESTION NO. 2

Are you satisfied from the evidence that Mitzi Westover (a) failed to exercise ordinary care for her own safety in attempting the Mega Quest course and (b) that her failure to exercise ordinary care was a substantial factor in causing her injury?

YES _____ NO _____

_____
Foreperson (if unanimous)

_____
_____
_____
_____
_____
_____
_____
_____
_____
_____
_____

If you answered "YES", please proceed to Question No. 3.

If you answered "NO", please proceed to Instruction No. 3.

QUESTION NO. 3

If you found from the evidence that Mitzi Westover (a) failed to exercise ordinary care for her own safety in attempting the Mega Quest course and (b) that her failure to exercise ordinary care was a substantial factor in causing her injury, what percentage of fault is attributable to each of the parties?

Louisville Mega Cavern, LLC	_____ %
Estate of Mitzi Westover	_____ %
Total	100 %

_____
Foreperson (if unanimous)

Please proceed to Instruction No. 3.

INSTRUCTION NO. 3

DAMAGES – PHYSICAL OR MENTAL SUFFERING

You found for the Estate of Mitzi Westover and you will determine from the evidence and award the Estate a sum of money that will fairly and reasonably compensate the Estate for any physical or mental suffering that you believe she sustained as direct result of this incident.

Please proceed to Question No. 4.

QUESTION NO. 4

Please list the amount which, from the evidence presented, will fairly and reasonably compensate the Estate of Mitzi Westover for any physical or mental suffering that you believe she consciously endured as a direct result of this incident.

$ _____ (not to exceed $20,000,000)

_____
Foreperson (if unanimous)

_____
_____
_____
_____
_____
_____
_____
_____
_____
_____
_____

Please proceed to Instruction No. 4.

INSTRUCTION NO. 4

LOSS OF SPOUSAL CONSORTIUM

If you found for the Plaintiff under Question No. 1, you will determine from the evidence and award Anthony Bradley a sum of money that will fairly and reasonably compensate him for whatever loss of services, assistance, aid, society, companionship, and conjugal relations you believe from the evidence he has sustained or is reasonably certain to sustain in the future as a direct result of his wife's death.

Please proceed to Question No. 5

QUESTION NO. 5

Please list the amount which, from the evidence presented, will fairly and reasonably compensate Anthony Bradley for whatever loss of services, assistance, aid, society, companionship, and conjugal relations you believe from the evidence he has sustained or is reasonably certain to sustain in the future as a direct result of his wife's death.

$ _____ (not to exceed 20,000,000)

_____
Foreperson (if unanimous)

_____
_____
_____
_____
_____
_____
_____
_____
_____
_____
_____

Please proceed to Instruction No. 5.

INSTRUCTION NO. 5

PUNITIVE DAMAGES

For the purpose of this Instruction,

"Malice" means a) conduct that was specifically intended by the defendant to cause tangible or intangible injury to plaintiff; OR b) conduct that was carried out by the defendant with both flagrant indifference to plaintiff's rights and a subjective awareness that such conduct would result in human death or bodily harm.

"Gross negligence" means a wanton or reckless disregard for the lives or safety of others.

If you find for the Plaintiff and award a sum or sums in damages, and if you are further satisfied by clear and convincing evidence that Louisville Mega Cavern, LLC acted with malice or gross negligence, you may in your discretion award punitive damages against Louisville Mega Cavern, LLC, in addition to the damages awarded.

"Punitive damages" are damages awarded against a defendant for the purpose of punishing a defendant for its misconduct in this case and deterring it and others from engaging in similar conduct in the future.

Whether you make an award of punitive damages, in addition to the compensatory damages previously awarded, is a matter exclusively within your discretion. If, however, you award punitive damages, in determining the amount thereof, you should consider the following factors:

(a) The likelihood at the time of such misconduct by Louisville Mega Cavern, LLC, that serious harm would arise from it;

(b) The degree of Louisville Mega Cavern, LLC's awareness of that likelihood;

(c) The profitability of the misconduct to Louisville Mega Cavern, LLC;

(d) The duration of the misconduct and any concealment of it by Louisville Mega Cavern, LLC; and

(e) Any actions by Louisville Mega Cavern, LLC to remedy the misconduct once it became known to them.

Please proceed to Question No. 6.

QUESTION NO. 6

If you are satisfied from clear and convincing evidence that punitive damages should be awarded, please list the amount which you believe is appropriate.

$ _____ (not to exceed $20,000,000)

_____
FOREPERSON (IF UNANIMOUS)

1) _____

2) _____

3) _____

4) _____

5) _____

6) _____

7) _____

8) _____

9) _____

10) _____

11) _____
(MEMBERS OF THE JURY, IF NOT UNANIMOUS)

When all of your answers are final, your verdict is complete. Please notify the bailiff. You will return to the courtroom shortly. Thank you for your service.

Annie O'Connell

HON. ANNIE O'CONNELL
JUDGE, JEFFERSON CIRCUIT COURT

ENTERED IN COURT
DAVID L. NICHOLSON, CLERK
JUN 25 2021
BY ED
DEPUTY CLERK

APPENDIX TAB 2

NO: 18-CI-004436

JEFFERSON CIRCUIT COURT
DIVISION TWO
JUDGE ANNIE O'CONNELL

ANTHONY BRADLEY, Individually and as Administrator of the ESTATE OF MITZI WESTOVER **PLAINTIFF**

V.

OPINION AND ORDER DENYING PLAINTIFF'S MOTION FOR A NEW TRIAL

LOUISVILLE MEGA CAVERN, LLC, Et Al. **DEFENDANTS**

****

This action comes before the Court on a Motion for a New Trial brought by the Plaintiff, Anthony Bradley, Individually and as the Administrator of the Estate of Mitzi Westover. The Defendant, Louisville Mega Cavern has filed a Response. Based upon the following, the Court denies Plaintiff's Motion.

OPINION

This case arose from an incident at Mega Cavern's "Mega Quest Course." Mitzi Westover, the Decedent, fell from an element and died several days later. Ms. Westover's husband and Plaintiff, herein, Anthony Bradley, also participated in the activity and filed this action both individually and as Administrator of her Estate.

After a jury trial, Mega Cavern was found to not be liable for Ms. Westover's injuries and subsequent death. The Plaintiff now moves the Court for a new trial based on several factors and the Court will deal with each, in turn.

To begin, throughout the litigation that culminated in a verdict against it, Plaintiff asserted that the Participation Agreement ("Agreement") was unenforceable. Plaintiff argues

that the Agreement is a party admission and that KRE 801A(b) governs it. Under this rule, statements made by a party or a statement that the party has manifested an adoption or belief in are admissible. Mega Cavern asserts that, by signing the Agreement, Ms. Westover adopted the agreement and manifested her belief in the truth of it. Mega Cavern also asserts that the Agreement is a statement against interest, which is also governed by KRE 801A.

The Court agrees that introduction of the Agreement was relevant evidence and properly admitted. The Agreement was electronically signed by Ms. Westover and set forth safety issues that are inherent in the Mega Quest Course. This was an issue dealt with many times during the pre-trial and trial. Therefore, the Court will deny the Plaintiff's Motion on this issue. The Court's prior rulings shall stand and the Plaintiff's Motion is denied on this issue.

Plaintiff next argues that he was entitled to a new trial based on the Introduction of evidence that Ms. Westover had hydrocodone in her urine. Specifically, the Plaintiff asserts that the Court abused its discretion by allowing in the evidence of hydrocodone in Ms. Westover's urine, in violation of KRS §§ 401, 402, and 403.

When Ms. Westover signed the Agreement, she stated that she did not have the presence of an impairing drug in her system. The urine test indicated that she did have hydrocodone in her system and the Court allowed in the test results. All of the experts were allowed to be examined on the issue of whether this test proved an incapacity and whether it could have been an error. Mega Cavern asserts that its use for this evidence was to draw a connection to the Agreement and this Court agrees that it could be used for that purpose. Therefore, the Court will deny the Plaintiff's Motion on this issue, as well.

Next, Plaintiff contends that the Court improperly denied his request to read testimony of Mega Cavern's CR 30.02(6) designee into evidence. Specifically, Plaintiff asked, in its case in

chief, to read into evidence a portion of the transcript from Jeremiah Heath's December 29, 2020 deposition. Mr. Heath was designated by Mega Cavern to testify on its behalf. In deciding not to allow the testimony to be read into the record, the Court determined that there was an objection in the middle of Mr. Heath's live testimony regarding what was sought to be read regarding an event that took place at a swim meet. The Court also reasoned that there would not be an opportunity for cross examination of the witness if the deposition testimony was read to the jury. The Court concludes that its ruling based on the reasoning set forth above was not in error and, therefore, denies the Plaintiff's Motion on this issue.

Next, the Plaintiff asserts that he was improperly restrained from cross-examining witnesses regarding OSHA regulations. Plaintiff points to the testimony of witness Jim Lowry[1], Kimberly Coleman[2], and Jeremiah Heath.[3] The Court held, on the record as follows:

> **Judge:** Ok. So, for the record, we're talking about questioning the current witness who was an employee at…Mega…Cavern…and the document purports to come from OSHA and the Department of Labor seal is on it, though it appears to have been printed from online.
>
> **Plaintiff's Counsel:** It is. It's available on the Department of Labor web site.
>
> **Judge:** Ok. And it's called "Protecting Zip Line Workers." The issue is with respect to language included on a page of this document that starts in relatively bold headline "employers must" colon. Then there is a bulleted list of what employers must do according to this list. And the, in smaller font, almost a footnote, we've got "employers and workers should consult ANSI/PRCA American National Standards." There's a number here and then it says "rope challenge course operation and training standards and ANSI/ACCT March 2016 Challenge Course/Zip Line Tour Standards" when selecting, evaluating, and using zip line specific safety systems. It really isn't clear to this Court, from this particular language, what that language even means "when selecting, evaluating, and using zip line specific safety systems." This document appears to be aimed-again-at the workers-employers and workers. And this doesn't seem to speak

[1] Mega Cavern's owner.
[2] Former Safety Manager at Mega Cavern.
[3] Former General Manager at Mega Cavern.

specifically to customers using zip lines. Once again, going back to our earlier arguments about OSHA. The employers in this company are not suing. It's the customers. These specific customers who are-the Plaintiff has done a very nice job of talking about the various industry standards that were out there and developing at the time, but frankly, I don't think the OSHA standards apply and are relevant here. So, I'm going to ask you to move on.

Plaintiff's Counsel: Your Honor, may I say one more thing?

Judge: Sure.

Plaintiff's Counsel: There is a section here that says that "employers must train workers to safely interact with zip line riders" - there were zip lines within this ropes course -"including guiding and catching as well as rescue operations."

Judge: Ok.

Plaintiff's Counsel: And so their training - or their lack of training on rescue operations is relevant. And the fact that you do it is all the more reason they should have done it.

Judge: I appreciate that, and that's a fairly decent argument, but it doesn't get you there, so let's move on.

The Plaintiff did, however, question the witnesses regarding OSHA requirements[4] and the Court finds no error in the ruling set forth above nor is it persuaded by Plaintiff's current argument. Therefore, the Court denies the Plaintiff's Motion on this issue.

The final issue upon which the Plaintiff moves for a new trial involves alleged errors regarding the jury instructions. Plaintiff argues that the Court erred by failing to instruct the jury on the specific duties Mega Cavern owed to its invitees. He contends that the single "ordinary care" instruction was incorrect.

Kentucky courts have held that jury instructions should be "bare bones". In keeping with this mandate, the Court concluded that the jury instruction submitted set forth the proper duties

[4] See 6/16/21 at 1:31:02, *et seq*; 6/17/21 at 5:02:41, *et seq.* and 5:30:20-5:31:57, *et seq.*

owed to Ms. Westover. Therefore, the Court will deny the Plaintiff's Motion on this remaining issue.

ORDER

WHEREFORE IT IS HEREBY ORDERED AND ADJUDGED that the Motion for a New Trial filed by the Plaintiff be and hereby is **DENIED**.

This is a final and appealable Order and there is no just cause for delay.

/s/ HON. ANNIE O'CONNELL
electronically signed
6/10/2022 1:42:50 PM ET

ANNIE O'CONNELL, Judge

APPENDIX TAB 3

NO: 18-CI-004436

JEFFERSON CIRCUIT COURT
DIVISION TWO
JUDGE ANNIE O'CONNELL

ANTHONY BRADLEY, Individually and as Administrator of the ESTATE OF MITZI WESTOVER **PLAINTIFF**

V. **ORDER AWARDING COSTS**

LOUISVILLE MEGA CAVERN, LLC, Et Al. **DEFENDANTS**

****

This action comes before the Court on the Defendant, Louisville Mega Cavern LLC's (Mega Cavern) Bill of Costs. The Plaintiff has filed Exceptions and the Court awards the following Costs:

• Medical Records-HMC Hershey Medical Center	$395.50
• Medical Records - UVA Health Systems	10.00
• Medical Records - PSH Internal Medicine Hope Dr.	11.52
• Medical Records - Johns Hopkins Hospital	24.38
• Medical Records - Penn State Hershey Med. Ctr.	308.69
• Commonwealth Medical Legal Services - Copy Charge	125.00
• Video Deposition of Charles Par (3/23/21)	102.26
• Video Deposition of Dr. George Nichols	615.75
• Jose Gonzalez Deposition Charge	562.00
• Dr. Craig Beavers Deposition Charge	500.00
• Linda Jones Deposition Charge	450.00

- Video Deposition of Garrett Lee (3/25/21) 126.26
- Video Deposition of Jim Lowry (3/23/21) 18.76
- Video Deposition of Jeremiah Heath (3/23/21) 47.42
- Commonwealth Med. Leg. Services - Dr. Nichols Depo 437.50

Total: 3,735.04

These costs and figures were arrived at as follows:

CR 54.04 does not permit "...the recovery of Costs associated with procuring copies of a deposition." *Helm Co., LLC v. Humana Ins. Co. of Kentucky*, 2014 WL 4802918 at *1 (Ky. App. Sept. 26, 2014). The itemized costs that were allowed were halved based on the agreement with Defendant Louisville Underground, LLC at the time of the Agreed Order of Partial Dismissal[1]. Since the costs were shared by Louisville Underground and Louisville MegaCavern, only half may be claimed.

WHEREFORE IT IS HEREBY ORDERED AND ADJUDGED that the Plaintiff shall be liable to Defendant Louisville Mega Cavern in the amount of $3,735.04 for Costs.

/s/ HON. ANNIE O'CONNELL
electronically signed
6/10/2022 1:42:09 PM ET

ANNIE O'CONNELL, Judge

[1] Entered June 4, 2021.

APPENDIX TAB 4

NO: 18-CI-004436

JEFFERSON CIRCUIT COURT
DIVISION TWO
JUDGE ANNIE O'CONNELL

ANTHONY BRADLEY, Individually and as Administrator of the ESTATE OF MITZI WESTOVER **PLAINTIFF**

V.

OPINION AND ORDER DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

LOUISVILLE MEGA CAVERN, LLC, Et Al. **DEFENDANTS**

****

This action comes before the Court on the Defendant, Louisville Mega Cavern LLC's (Mega Cavern) Motion for Summary Judgment on the issues of immunity, waiver, and punitive damages. The Plaintiff has filed a Response to which Mega Cavern has filed a Reply and the matter now stands submitted. The Court finds as follows:

OPINION

This case arose from an incident at Mega Cavern's "Mega Quest Course" (the "Course"). Mitzi Westover, the Decedent, fell from an element while on the Course and died several days later. Ms. Westover's husband, Anthony Bradley, also participated in the activity and filed this action both individually and as Administrator of her Estate.

Briefly, Ms. Westover, Mr. Bradley, and their niece, Hannah Folk, purchased tickets for the Course while on a vacation to Louisville, Kentucky. While on the Course, Ms. Westover started an element that consisted of two horizontal ladders that were suspended from overhead wire ropes. She fell on the first ladder and was assisted up by a Mega Cavern employee, Garrett Lee. On the second ladder, however, a rescue was necessary and was made via a line lower kit.

During the rescue, Ms. Westover became unconscious and unresponsive. She was taken via EMS to Norton Audubon Hospital where she later died.

Mega Cavern has moved the Court for summary judgment asserting that it is entitled to immunity under Kentucky law because it is an agritourism business and that Ms. Westover waived any claims for liability by electronically signing a Participation Agreement for herself. It also asserts that the Plaintiff's claim for an award of punitive damages should be dismissed.

In Kentucky, a movant should not succeed on a motion for summary judgment unless it appears impossible for the non-moving party to produce evidence warranting a judgment in his favor. *Steelvest, Inc. v. Scansteel Serv. Ctr.*, 807 S.W. 2d 476 (Ky. 1991). The term "impossible" is used in a practical sense and not in an absolute sense. *Perkins v. Hausladen*, 828 S.W. 2d 652 (Ky. 1992). Put simply, *Steelvest* merely states that the trial court should refrain from weighing evidence at the summary judgment stage. Instead, the inquiry should be whether, from the evidence of record, facts exist which would make it impossible for the non-moving party to prevail. *Welch v. American Publishing Co. of Kentucky*, 3 S.W. 3d 724, 730 (Ky. 1999). "The Movant bears the initial burden of convincing the court by evidence of record that no genuine issue of fact is in dispute, and then the burden shifts to the party opposing summary judgment to present 'at least some affirmative evidence showing that there is a genuine issue of material fact for trial.'" *Hallahan v. The Courier Journal*, 138 S.W. 3d 699, 705 (Ky. App. 2004) (quoting *Steelvest*, *Id.* at 482.)

The Kentucky Supreme Court has further opined that "[t]he circuit judge must examine the evidentiary matter, not to decide any issue of fact, but to discover if a real or genuine issue exists. All doubts are to be resolved in favor of the party opposing the motion." *City of Florence, Kentucky v. Chipman*, 38 S.W. 3d 387, 390 (Ky. 2001).

Mega Cavern first contends that the Plaintiff's action against it should be dismissed because it is entitled to agritourism immunity under KRS §247.809. The statute provides as follows:

> (1) Except as provided in subsection (2) of this section:
>
> (a) An agritourism professional is not liable for injury to or death of a participant resulting exclusively from the inherent risks of agritourism activities, so long as:
>
> 1. The warning contained in KRS 247.8091 is posted as required; or
>
> 2. The agritourism professional has a signed release from the participant indicating that the participant has received written notice of the warning contained in KRS 247.8091; and
>
> (b) No participant or participant's representative can maintain an action against or recover from an agritourism professional for injury, loss, damage, or death of the participant resulting exclusively from any of the inherent risks of agritourism activities. In any action for damages against an agritourism professional for agritourism activities, the agritourism professional shall plead the affirmative defense of assumption of the risk of agritourism activities by the participant.
>
> (2) Nothing in subsection (1) of this section prevents or limits the liability of an agritourism professional if the agritourism professional:
>
> (a) Commits an act or omission that constitutes negligence or willful or wanton disregard for the safety of the participant, and that act or omission proximately causes injury, loss, damage, or death to the participant; or
>
> (b) Has actual knowledge or reasonably should have known of:
> 1. A dangerous condition on the land, facilities, or equipment used in the activity; or
> 2. The dangerous propensity of a particular animal used in the activity;
> and does not make the danger known to the participant, and the danger proximately causes injury, loss, damage, or death to the participant.

(3) Any limitation on legal liability afforded by this section to an agritourism professional is in addition to any other limitations of legal liability otherwise provided by law.

K.R.S. § 247.801 provides the following definitions for KRS §247.809:

As used in KRS 247.800 to 247.810:
(1) "Agritourism" means the act of visiting:
(a) A farm or ranch; or
(b) Any agricultural, horticultural, or agribusiness operation;
for the purpose of enjoyment, education, or active involvement in the activities of the farm, ranch, or operation;

(2) "Agritourism activity" means any activity that:
(a) Is carried out on a farm, ranch, agricultural operation, horticultural operation, or agribusiness operation; and
(b) Allows or invites participants to view or participate in activities for recreational, entertainment, or educational purposes. Qualifying activities may include farming, ranching, historic, cultural, civic, or ceremonial activities, including but not limited to weddings and ancillary events; harvest-your-own operations; farmers' markets; or natural resource-based activities. The activities may qualify as agritourism activities whether or not a participant pays to view or to participate in the activity;

(3) "Agritourism building" means any building or structure or any portion thereof that is used for one (1) or more agritourism activities;

(4) "Agritourism professional" means any person, including employees or authorized agents acting on behalf of the agritourism professional, who is engaged in the business of providing one (1) or more agritourism activities;

(5) "Inherent risks of agritourism activity" means those dangers or conditions that are an integral part of an agritourism activity, including certain hazards, such as surface or subsurface conditions; natural conditions of land, vegetation, or water; the behavior of wild or domestic animals; and the ordinary dangers of structures or equipment used in farming and ranching operations; and

(6) "Participant" means any person, other than the agritourism professional, who engages in an agritourism activity.

To begin, Plaintiff contends that Mega Cavern does not qualify as an agribusiness under the statute and this Court agrees. The definition does not include a business such as Mega Cavern and the Course upon which Ms. Westover was injured. However, while Mega Cavern may be registered as an agribusiness, it is not entitled to summary judgment on the issue of immunity because, as the Plaintiff contends, there is evidence that Ms. Westover's death was not an inherent risk of the activity but a result of Mega Cavern's negligence. The Plaintiff has shown that there are material issues of fact regarding such negligence and, therefore, summary judgment must be denied.

Next, Mega Cavern contends that it the action should be dismissed against it because Ms. Westover waived any negligence action she had by signing the Participation Agreement prior to beginning the Course. In Kentucky, the use of pre-injury releases are often unenforceable because they are "disfavored and are strictly construed against the parties relying on them." *Miller as Next Friend of E.H. v. House of Boom Kentucky, LLC*, 575 S.W. 3d 656, 660 (Ky. 2019) (quoting *Hargis v. Baize*, 168 S.W. 3d 36, 47 (Ky. 2005). In the face of willful or wanton negligence, the Participation Agreement signed by Ms. Westover would not hold. Therefore, the Court finds that there are material issues of fact remaining on this issue and that summary judgment must be denied.

The last issue upon which the Defendants ask this Court to rule is whether the Plaintiff's claim for punitive damages should be dismissed. Kentucky law allows for an award of punitive damages when there is a showing of gross negligence on the part of the defendant. The Kentucky Supreme Court has defined "gross negligence" as "wanton or reckless disregard for the lives, safety, or property of others." *Saint Joseph Healthcare v. Thomas*, 487 S.W. 3d 864, 870 (Ky. 2016).

KRS 418.186(1) provides that the jury should assess whether punitive damages should be awarded in concurrence with other issues. Therefore, the Court will not grant summary judgment to Mega Cavern on the issue of punitive damages.

ORDER

IT IS HEREBY ORDERED AND ADJUDGED that the Motion for Summary Judgment brought by Defendant, Louisville Mega Cavern, LLC be and hereby **DENIED**.

/s/ HON. ANNIE O'CONNELL
electronically signed
6/3/2021 4:10:38 PM ET

ANNIE O'CONNELL, JUDGE
Jefferson Circuit Court, Div. 2

APPENDIX TAB 5

ENGLISH

GENERAL INSTRUCTIONS FOR USE

Do not use this product without having read carefully and understanding these technical instructions.

This product makes part of fall arrest system. It is designed to be used for with a dynamic mountaineering rope or low-stretch rope. If the fall arrest system consists of static equipment alone (low-stretch rope, tape slings...) and if there is risk of a fall, it is essential to **introduce a shock absorber (EN 355) into the safety chain to lower the potential shock load.**
This technical notice illustrates ways of using this product. Only some types of misuse and forbidden uses currently known are represented (shown in the crossed out diagrams). Many other types of misuse exist, and it is impossible to enumerate, or even imagine all these. **Only the techniques of use shown in the diagrams and not crossed out are authorised.** All other uses are excluded due to the danger of death. In case of doubt or problem of understanding, contact SINGING ROCK.
Activities at height such as climbing, via ferrata, caving, rappelling, ski-touring, rescue, work at height and exploration are dangerous activities which may lead to severe injury or even death. You personally assume all the risks and responsibilities for all damage, injury or death, which may occur during or following use of our products in any manner whatsoever. If you are not able, or not in a position to assume this responsibility or to take this risk, do not use this equipment.

USE

An adequate apprenticeship in appropriate techniques and methods of security is essential to use this product. This product must be only used by competent person and responsible person or those placed under the direct visual control of a competent and responsible person. Physical condition of the user can have an influence on his safety during normal or emergency use.

The knowledge of basic rescue techniques is required to use this product.
Check the compatibility of this product with the other components of your equipment. The use of unsuitable combination of products in a safety chain or damage of any component of a safety chain may result in serious or even fatal accident. We recommend checking the function of a safety system and equipment on safe place without risk of fall.
During the use take appropriate working procedures to eliminate the cause and effects of suspension trauma. To ensure the good maintenance and traceability of this product it is best to allocate it to a sole user. Before and after each use it is necessary to check the condition of webbing, ropes and stitching, including the less accessible areas. Do not hesitate to scrap a product showing signs of wear which might affect its strength or limit its function. For the harnesses, it is important that the user checks buckles and other fastenings regularly during use. Damp and icy conditions may make the manipulation during adjustment of the harness difficult, influence on the strength of the harness is negligible. If it is possible to load in case of use over the edge, the appropriate precautions should be taken.
Do not continue to use this product after a major fall (for example a fall factor 1 with dynamic rope), not visible internal damage may have occurred, thus reducing its strength. Do not hesitate to contact SINGING ROCK in case of doubt. Any modification or repair outside our production facilities is forbidden.

MAINTENANCE

The product may be washed in clean cold water of domestic quality. If still soiled it may be washed in warm water (30 °C maximum) and if required using pure soap (e.g. Lux soap flakes, stergene) at the approximate dilution, with pH range 5.5 and 8. 5. If the disinfection is necessary, use weak (1%) dilution of Potassium permanganate. Then rinse thoroughly and dry slowly away from direct heat and UV radiation. Detergents must not be used.
If needed lubricate the mobile components of metal parts with a silicone based lubricant (ensure, the lubricant does not come into contact with the textile parts).

INSTRUCTIONS FOR TRANSPORT AND STORAGE

All chemical products, corrosive materials and solvents should be regarded as harmful.
Always carry and store a product in its bag. Do not store the product in corrosive environment (high salinity places). Despite its UV protection it is recommended that this product is stored away from direct light, in a well-ventilated place away from all sources of direct heat. Check that it is not too crumpled or crooked. Never store the product, which is not dried completely.
Use this product above a minimum of –40 °C (–40 °F) and a maximum of 80 °C (176 °F).

LIFETIME AND INSPECTION

Lifetime of this product depends on the frequency and the environment (salt, sand, moisture, chemicals, etc.) in which it is used. Without taking wear or mechanical damage into account and on conditions specified in this instructions for use this product may be used 15 years since the date of production and 10 years since the date of first use. However mechanical damage can occur during the first use, which can limit the lifetime of this product only to this first use.
Pay special attention to products, which are subject to quicker wear or in frequent contact with abrasive surfaces (e.g. lanyards, sewn slings, fall absorbers).
The user shall check the product:

1. **before and after each use,**
2. **during use** (condition of particular elements of safety chain and their proper connection).

Check for:
The fabric: Cuts, tears, abrasion and damage caused by use and ageing, heat or chemicals and so on.
The stitching: Cut, torn, worn or loose threads.
The metal components: Proper function of the buckles and other metal components.
The marking: Readability of the product labels.
We recommend recording the inspection results.
To prolong the life of this product, care in use is necessary. Avoid rubbing against abrasive surfaces or sharp edges.

SINGING ROCK GUARANTEE

This product is guaranteed for 3 years against any faults in materials or manufacture. Limitations of the guarantee: normal wear and tear, modifications or alternations, bad storage. Equally excluded from the guarantee are damage due to accidents, to negligence, and uses fo**r which the pro**duct is not designed. SINGING ROCK is not responsible for the consequents, direct, indirect, accidental or any other type of damage befalling or resulting from use of its products.
This product may be used with other components in a compatible system.

APPENDIX TAB 6

HUBBARD
MERRELL
ENGINEERING

1623 N First Street, Ste 201
Flagstaff, Arizona 86004

Office: (928) 526-6174

May 16, 2017

Louisville Mega Cavern
1841 Taylor Avenue
Louisville, KY 40213

RE: Operations Audit for the Zip Line Tour and Quest Aerial Adventure Course, Louisville, KY

Dear Mr. Charles Park,

Hubbard Merrell Engineering performed an Operations Audit Site Visit on May 3rd and 4th at the Louisville Mega Cavern in Louisville, Kentucky. The attached spreadsheet indicates ANSI/ACCT 03-2016 Operation Standards that were evaluated during the site visit as well as items observed or reviewed by the auditor. Auditor comments and recommendations are also noted for corresponding Standards.

The original scope of work included an audit using the ASTM F2959-16 Standard in addition to the ANSI/ACCT Standard listed above. It was determined that no documentation from the original manufacturer of the course(s) and/or designer/engineer for the course(s) was available for review at the time of the site visit. Without this type of documentation, it is not feasible to complete an audit using the ASTM F2959-16 Standard at this time. Louisville Mega Cavern should locate and provide historic designer/manufacturer information for each course or engage in a reverse engineering design process to evaluate the existing course(s) using the ASTM F2959-16 Standard.

The following items were observed or reviewed during the site visit:

1. Equipment specified for use on the Zip Line Tour and Quest Aerial Adventure Course was reviewed, but not inspected individually at the time of the audit.
2. Patron Screening procedures were administered by trained Louisville Mega Caverns staff.
3. Patron Safety Speeches for each course were delivered by trained Louisville Mega Caverns staff.
4. Flow and usability of the Zip Line Tour and Quest Aerial Adventure Course was assessed by the auditor.
5. On the Zip Line Tour, appropriate anchor points and transfers for patron belay systems were conducted by trained Louisville Mega Caverns staff.
6. Existing documentation for the courses was reviewed by the auditor

As a result of the review above, Hubbard Merrell has noted several recommendations to be considered by Louisville Mega Cavern. Recommendations can be found on the attached spreadsheet. Please let me know if you have additional questions.

Sincerely,

Micah Henderson
Aerial Adventure Course Department Manager
ACCT Inspector # 5079930

LMC1966

Standard	Supporting Information Reviewed	Comments	Recommendations
ANSI/ACCT 03-2016 - Chapter 2 - Operations Standards, Section B - Operations Management and Section C.1 - Staff Core Competencies			
B.1.1. The organization shall provide services consistent with its mission, goals, and objectives.	1. Brochure 2. Website 3. Interviews with key staff	Key words used to describe current operation: Underground/history/adventure/adrenaline/geology/mining/green building technology	1. Identify mission, goals and objectives in writing. 2. Consider adding history/purpose section to employee handbook.
B.1.2. The organization shall represent itself, and market its products and services, accurately to the public.	1. Brochure 2. Website 3. Interviews with key staff	Website is informative and consistent with operating practices observed.	
B.1.3. The organization shall meet mandated codes of conduct with respect to employee's and client's rights and confidentiality.	1. Employee Handbook - Confidential Information 2. E-waivers - Agreement for personal health condition		
B.1.4. The organization and its staff shall operate within the bounds of their organizational and individual competencies.	1. Interview with Staff	There are multiple categories of training given to staff. The model is progressive cross-training.	1. Identify categories of competencies for staff and the training required for each, and include in the employee handbook.
B.1.5. The organization shall follow applicable laws and regulations.	1. Employee handbook 2. Employee notices posted in break room 3. OSHA notices in handbook 4. KY Dept. of Agriculture regulations	Kentucky regulations for Aerial Adventure Courses exist, but seem to be loosely enforced at this time. Louisville Mega Cavern is working toward exceeding requirements.	1. Formally document policies and procedures for each Aerial Adventure Course operation and arrange for jurisdictional and/or auditor review.
B.1.6. The organization shall have knowledge of and conduct operations in accordance with applicable local, regional, and national environmental guidelines.	1. Sister company, Louisville Underground manages all maintenance for the building/cavern. 2. Cavern is classified as a Green Building.	This is a man made mine/cave. They do not have to follow same rules for natural cave environments. Water is pumped out of the cavern daily and held in retention ponds until is acclimates to normal temp levels prior to releasing into a nearby stream.	1. Confirm that a building permit was obtained for the adventure park and the zip line tour. 2. Provide any additional written evidence of following environmental guidelines.
B.2.1 The organization shall have a risk management system in place that addresses the identification, mitigation, and ongoing monitoring of reasonable, foreseeable risks to the organization, its staff and its participants.	1. Staff Interviews	All risk management plans were identified through staff interviews. Verbal information is not sufficient as a system.	1. Risk assessment should be documented for each activity and be included within a master assessment for the cavern. Mitigation and ongoing monitoring strategies should be created as part of the risk management plan for the cavern.

Standard	Supporting Information Reviewed	Comments	Recommendations
ANSI/ACCT 03-2016 - Chapter 2 - Operations Standards, Section B - Operations Management and Section C.1 - Staff Core Competencies			
B.2.2. The organization shall maintain written records for a period of time which takes into account statues of limitations pertaining to claims under pertinent laws.	1. Daily inspection checklist records. 2. Interview with HR staff member about personnel files for employees.	Records are currently kept indefinitely within the HR dept. Historic course records also kept forever, but not centrally located. Need to find out original company and scope of work.	1. Locate historic records for the course, identify original course installer/consultant and scope of work.
B.2.3. The organization shall maintain professional inspection reports for at least the life of each specific element.			1. Locate historic inspection reports for both courses as well as rock anchor inspection reports.
B.2.4. The organization shall have adequate written policies, procedures, and/or practices that establish minimum acceptable criteria for all course operations.			1. Develop separate operations manuals for the Adventure Course and the Zip Line Tour.
B.2.5. The organization shall have a written plan in place for the reasonable management of emergencies.		Review the evacuation plan from the towers on the Zip Line tour. It may not be reasonable to evacuate an injured person using an auto-belay system.	1. Develop an Emergency Action Plan for both courses and the Cavern.
B.2.5.1. The organization shall have onsite, when participants are present, a person trained in basic first aid and CPR.		Not currently meeting this standard	1. Provide first aid and CPR to key staff that will be on site when patrons are present.
B.2.6. The organization should maintain appropriate types and amounts of insurance coverage for each location in which they operate.	1. Staff Interviews	The operation is currently insured, however the types and amounts of coverage were not immediately known by staff.	1. Provide current certificates of insurance for operations.
B.2.7. The organization shall engage in a review of its practices by an external qualified person(s), at least once every five (5) years.	1. Currently being performed.	No previous reviews have occurred. Zip Tour has existed for 7. Quest has existed for 5.	1. Maintain report from this audit as part of the permanent records for the courses.
B.2.8. The organization shall ensure a qualified person is responsible for administrative and operational decisions	1. Staff Interviews 2. Organizational chart with current staff member roles and responsibilities was available on a dry erase board in a supervisor's office.	Current system seems adequate, but due to multiple levels of staff competency it is difficult to understand the full scope of decision making.	1. Formalize an organization chart that identifies the supervisory system for the organization. Auditor suggests including this in the employee handbook.

Standard	Supporting Information Reviewed	Comments	Recommendations
ANSI/ACCT 03-2016 - Chapter 2 - Operations Standards, Section B - Operations Management and Section C.1 - Staff Core Competencies			
B.2.9. The organization shall maintain written documentation of an acceptance inspection for all new installations and major modifications			1. Provide all previous inspection reports for both courses.
B.2.10. The organization shall have its course(s) inspected by a qualified inspector annually, or more frequently, as specified by the designer, manufacturer or other qualified person.			1. Provide all previous inspection reports for both courses.
B.2.11. The organization shall take appropriate actions based on the results and recommendations of an inspection report provided by a qualified inspector.			1. Provide all previous inspection reports for both courses and documentation for any follow-up maintenance that occurred in response to the reports.
B.2.12. The organization shall conduct and document periodic internal monitoring of its course and equipment as designed by the manufacturer or a qualified person.			1. Develop a periodic internal monitoring schedule for all courses and related equipment. Include this document in the Operations Manuals for each course.
B.2.13. The organization shall ensure a pre-use check is conducted for each course element and related equipment according to a written checklist. The pre-use check shall be developed by the designer, manufacturer, installer, or qualified person and the check shall be documented prior to participant use.	1. Course Inspection In/Out control sheet - for Zip Tour		1. Update the Zip Tour In/Out control sheet to include daily operational testing and maintenance follow up section. 2. Create an In/Out control sheet for Quest that includes daily operational testing for zip lines and maintenance follow up section.
B.2.13.1. For zip lines, the pre-use check shall include one full cycle, or as recommended by the original equipment manufacturer, by staff prior to operations with participants to assess sufficiently the condition and functionality of the activities and the zip line(s).	1. Course Inspection In/Out control sheet - for Zip Tour		1. Update the Zip Tour In/Out control sheet to include daily operational testing and maintenance follow-up section. 2. Create an In/Out control sheet for Quest that includes daily operational testing for zip lines and maintenance follow-up section.

Standard	Supporting Information Reviewed	Comments	Recommendations
ANSI/ACCT 03-2016 - Chapter 2 - Operations Standards, Section B - Operations Management and Section C.1 - Staff Core Competencies			
B.2.14. Critical maintenance items discovered during in-house monitoring and pre-use checks which pose an immediate risk to participants or staff shall be documented.	1. Course Inspection In/Out control sheet - for Zip Tour		1. Update the Zip Tour In/Out control sheet to include daily operational testing and maintenance follow-up section. 2. Create an In/Out control sheet for Quest that includes daily operational testing for zip lines and maintenance follow-up section.
B.2.15. Critical maintenance items documented during in-house monitoring and pre-use checks shall be addressed.	1. Course Inspection In/Out control sheet - for Zip Tour		1. Update the Zip Tour In/Out control sheet to include daily operational testing and maintenance follow-up section. 2. Create an In/Out control sheet for Quest that includes daily operational testing for zip lines and maintenance follow-up section.
B.2.16. Remediation of critical maintenance items shall be documented.	1. Course Inspection In/Out control sheet - for Zip Tour		1. Update the Zip Tour In/Out control sheet to include daily operational testing and maintenance follow-up section. 2. Create an In/Out control sheet for Quest that includes daily operational testing for zip lines and maintenance follow-up section.
B.2.17. The organization shall have a policy for assessing and confirming that activity corridors are clear of obstructions and hazards before each and every participant starts the activity.			1. Create policy for assessing and confirming activity corridors are clear and add to the In/Out control sheet for each course.
B.2.18. The organization shall have an appropriate participant screening process.	1. Waiver 2. Check in sheet ("Are You Ready to Zip?" form) 3. Safety speech and practice zip/belay transfer area. Ongoing supervision throughout activity.		1. Further develop safety briefing procedures for large school groups. Consider developing two briefing areas for operational screening.

Standard	Supporting Information Reviewed	Comments	Recommendations
ANSI/ACCT 03-2016 - Chapter 2 - Operations Standards, Section B - Operations Management and Section C.1 - Staff Core Competencies			
B.2.19. Prior to participation, the organization shall inform participants of the existence of inherent and other risks of course activities, describing a sampling of risks.	1. Waiver		1. Suggest adding signage to inform participants of risks. 2. Suggest adding signage to communicate relevant rules for the courses.
B.2.20. The organization shall have a written participant supervisory plan.			1. Develop a participant supervisory plan for each course and include in the Operations Manual.
B.2.21. The organization shall have written, site-specific procedures for all activities or types of activities.			1. Develop an Operations Manual for each course that includes site-specific procedures for all activities.
B.2.22. The organization shall have a system in place for incident documentation.	1. Incident report form	Incident report forms are filed and kept indefinitely.	
B.2.23. The organization shall perform an annual analysis of all incident documentation. Findings shall be documented in writing. Findings shall be documented, including any remedial measures or changes implemented.			1. Develop a policy and procedure to analyze incident documentation annually and record findings and remedial measures.
B.2.24. The organization should take appropriate measures to provide access to basic amenities for staff and participants.	1. Break room for staff 2. Gift/snack/visitor center for guests		
B.2.25. The organization shall operate each course element according to the original equipment manufacturer and/or qualified person's recommended procedures regarding and not limited to capacities, weights, and number of participants.		Currently determining capacities, weights and participant numbers internally through management.	1. Recommend locating original manufacturer information for both courses and/or having existing courses reverse engineered to provide appropriate recommendations for capacities, weight requirements and numbers of participants.

Standard	Supporting Information Reviewed	Comments	Recommendations
ANSI/ACCT 03-2016 - Chapter 2 - Operations Standards, Section B - Operations Management and Section C.1 - Staff Core Competencies			
B.2.26. Where courses are used in dark or low light environments the organization shall: * Provide appropriate lighting of all takeoff and landing areas. *Provide personal light or reflective material on each participant. *Provide lighting at all exit and entry areas or any other areas necessary for operations. *Provide sufficient emergency lighting to facilitate evacuation in the event of an emergency or power failure.	1. Motion sensor lighting at takeoff and landing areas. 2. Each participant has a headlamp on at all times (red/white light). 3. Staff has headlamp on at all times and an additional flashlight and spare batteries available on their person at all times. 4. Walking path lighting available between zips. Headlamps are used to access zip line course. 5. Reflective DOT tape and signage marks exit pathway from all areas of the zip and quest areas of the cavern.		1. Consider adding additional lighting for steps or significant changes in elevation.
B.3.1. The organization shall have employment policies in place.	1. Employee handbook		
B.3.2. The organization shall have a means of communicating employment policies to staff.	1. Employee handbook. 2. Bi-annual staff meetings. 3. Addendums to the employee handbook are provided and requested to be added to their handbook. 4. Notices and schedules are posted on the employee Facebook page.		
B.3.3. The organization shall define adequate, minimum qualifications for all staff.			1. Develop adequate, minimum qualifications for all staff and add to the Employee Handbook.
B.3.4. The organization shall have an appropriate screening process in place for staff.	1. Employee application 2. Reference calls 3. In-person interviews prior to hiring		1. Background check 2. Driver's License check
B.3.5. The organization shall maintain a current personnel file for each staff member.	1. Personnel files are stored within the HR department 2. Access is limited to HR staff 3. Employee files kept indefinitely		

Standard	Supporting Information Reviewed	Comments	Recommendations
ANSI/ACCT 03-2016 - Chapter 2 - Operations Standards, Section B - Operations Management and Section C.1 - Staff Core Competencies			
B.3.6. The organization shall have a system in place for training staff and volunteers in necessary skills and competencies, beyond those skills of initial employment, and all training shall be documented.	1. Written test used upon completion of zip tour training.	Written tests are kept on file for each person that completes zip line training.	1. Maintain a training roster for all trainings for Quest and Zip Tour courses including dates of training, trainer & trainee name and brief description of training. 2. Recommend developing a skills checklist for each person and each skill.
B.3.7. The organization shall have a staff assessment system in place addressing core, technical and facilitation competencies necessary to conduct course operations.	1. Written test used upon completion of zip tour training.	Written test are kept on file for each person that completes zip line training.	1. Maintain a training roster for all trainings for Quest and Zip Tour courses including dates of training, trainer & trainee name and brief description of training. 2. Recommend developing a skills checklist for each person and each skill.
B.3.8. The organization shall conduct staff assessments annually.			1. Develop procedures to conduct staff assessments annually. Include in Employee Handbook.
B.3.9. The organization shall have a system in place for supervising and monitoring the performance of all staff.		Staff monitor job description described in interviews.	1. Document a job description for the Staff Monitor and identify how this position provides ongoing monitoring of the performance of all staff.
B.3.10. The organization shall maintain documentation of agreements with independent contractors and staff.	1. Staff agreements are kept in personnel file for each individual	No independent contractors are used for the Zip Tour or Quest.	
C.1.1. The organization's staff shall conduct activities according to the mission and ethical standards that guide the organization.	1. Handbook Acknowledgement 2. Pay Scale addendum form		1. Identify mission, goals and objectives in writing.
C.1.2. The organization's staff shall operate within the limits of their technical and facilitation skill level.			1. Develop policy on staff roles and responsibility sheet and include in Employee Handbook.

Standard	Supporting Information Reviewed	Comments	Recommendations
ANSI/ACCT 03-2016 - Chapter 2 - Operations Standards, Section B - Operations Management and Section C.1 - Staff Core Competencies			
C.1.3. The organization's staff shall remain current in challenge course and canopy/zip line tour industry practices and standards.	1. ACCT annual conference attendance by key staff for the past several years		1. Consider integrating a broad industry standard lesson into staff training curriculum 2. Develop relationship(s) with 3rd party professionals within the industry to provide annual inspections and 3rd party training on the Mega Cavern courses.
C.1.4. The organization's staff shall have a knowledge level of venue and specific activities appropriate to their job duties.	1. Cavern education and orientation inside the cavern was highly consistent between staff when interviewed.	New staff orientation (play day) is provided for each new staff member and continued training and development of staff uses a progressive cross-training model	1. Document procedures for training new staff and the continued development pathway for existing staff within the Mega Cavern activities.
C.1.5. The organization's staff shall know duty relevant participant information.	1. Participant height/weight/apparel 2. Completion of waiver is verified prior to participation 3. No medical information is gathered.		
C.1.6. The organization's staff shall understand and maintain client confidentiality.		Confidential information is not gathered for participants, but when staff receive confidential information they recognize the concept of confidentiality.	
C.1.7. The organization's staff shall determine the appropriate staff-to-participant ratio for activities.		A policy exists for Quest and Zips, but is not currently documented.	1. Develop written policy for Quest and the Zip Tour.
C.1.8. The organization's staff shall be capable of initiating and implementing the organization's Emergency Action Plan.			1. Develop an Emergency Action Plan for both courses and the Cavern. 2. Train staff in initiating and implementing the Emergency Action Plan.

Standard	Supporting Information Reviewed	Comments	Recommendations
ANSI/ACCT 03-2016 - Chapter 2 - Operations Standards, Section B - Operations Management and Section C.1 - Staff Core Competencies			
C.1.9. The organization's staff shall follow organizational policies and procedures for restrictions, limitations and participant screening. This should include, and is not limited to: * Weight, age, height, and/or medical conditions * Intoxication * Dress and footwear requirements * Physical limitations * Element capacity * Weather and environmental conditions	1. "Are You Ready to Zip?" form 2. Quest check-in procedure for verifying height/weight		1. Document the screening procedures for participants and include in the Operations Manual for each activity.
C.1.10. The organization's staff shall know and implement site-specific first aid procedures.		Staff are currently providing first aid materials, not treatment. No one on-site is currently trained in first aid.	
C.1.11. The organization's staff shall know and communicate activity associated inherent risks to participants.	1. Waiver 2. Safety speech for each course 3. Individual briefing prior to each zip line ride		1. Recommend documenting items/concepts required to be communicated in each course's safety briefing
C.1.12. The organization's staff shall follow the original manufacturer and/or vendor recommended course use procedures regarding capacities, weights, and maximum simultaneous participants.			1. Recommend locating original manufacturer information for both courses and/or having existing courses reverse engineered to provide appropriate recommendations for capacities, weight requirements and numbers of participants.

APPENDIX TAB 7

CASE NO. 18-CI-004436

JEFFERSON CIRCUIT COURT
DIVISION TWO (2)
JUDGE ANNIE O'CONNELL

ANTHONY BRADLEY,
Individually and as Administrator of the Estate of
MITZI WESTOVER PLAINTIFF

v. ***ELECTRONICALLY FILED***

LOUISVILLE MEGA CAVERN, LLC, *et al.* DEFENDANT

PLAINTIFF'S REVISED PROPOSED JURY INSTRUCTIONS

It is your duty to decide this case, based solely upon the evidence and the Court's Jury Instructions.

The first thing you should do, upon retiring to deliberate the case, is select a Foreperson from among you to serve as your presiding officer.

_____
HON. ANNIE O'CONNELL
JUDGE, JEFFERSON CIRCUIT COURT

DATE:_____

INSTRUCTION NO. 1

Your verdict will be determined by how you answer the questions posed in these instructions. Nine (9) or more of you must agree in order to make any of the determinations required by these instructions. If all twelve (12) of you agree on an instruction, it need only be signed by the Foreperson. Otherwise, if less than unanimous, it must be signed by the nine (9) or more who agree. **The same nine (9) jurors do NOT have to agree on each determination.**[1]

PROCEED TO INSTRUCTION NO. 2

[1] KRS 29A.280; *Young v. J.B. Hunt Transp., Inc.,* 781 S.W.2d 503, 506 (Ky. 1989) ("[W]e hold that the requirement of "agreement of at least three-fourths (¾) of the jurors" contained in KRS 29A.280 is satisfied by the agreement of any nine jurors on any issue separately submitted to the panel.").

INSTRUCTION NO. 2: PARTICIPANT AGREEMENT UNENFORCEABLE

The "Participant Agreement" bearing Mitzi Westover's signature is not enforceable as a matter of law. That is, you may not determine that Mitzi Westover waived her right to sue for negligence or seek damages. Further, you may not determine that Defendant Louisville Mega Cavern, LLC is immune from lawsuit. However, you may consider the "Participant Agreement" for the purpose of determining whether Mitzi Westover was aware of the risks associated with participation in the "Mega Quest" ropes course.[2]

PROCEED TO INSTRUCTION NO. 3

[2] For the same reasons previously set forth in Plaintiff's Response to Defendant Louisville Mega Cavern, LLC's Motion for Summary Judgment (filed March 30, 2021) and Plaintiff's Motion *in Limine* to Exclude Mention of and/or Introduction of Louisville Mega Cavern, LLC's "Participant Agreement" (filed May 26, 2021), the "Participant Agreement" is unenforceable as a matter of law. Further, the jury should not be permitted to determine the legal effect of the Participant Agreement. *See Morganfield Nat. Bank v. Damien Elder & Sons,* 836 S.W.2d 893, 895 (Ky. 1992) ("The construction as well as the meaning and legal effect of a written instrument, however compiled, is a matter of law for the court."); *Cinelli v. Ward,* 997 S.W.2d 474, 476 (Ky. App. 1998) ("It is well established that construction and interpretation of a written instrument are questions of law for the court."); *Kentucky Union Co. v. Hevner,* 275 S.W. 513, 514 (Ky. 1924) ("The rule is well settled that the construction of a written instrument is for the court and is not to be submitted to the jury."). In tendering this proposed instruction, the Plaintiff does not concede or waive the admissibility of the "Participant Agreement." It should not be admissible because it is unenforceable. *See Matador Production Co. v. Weatherford Artificial Lift Systems, Inc.,* 450 S.W.3d 580, 594 (Tex. App. 2014) (holding that liability-limiting waiver was unenforceable and, therefore, improperly admitted at trial, resulting in reversible error); *Blue Valley Co-op. v. National Farmers Organization*, 600 N.W.2d 786, 793-796 (Neb. 1999) (overruled on other grounds by *Weyh v. Gottsch,* 929 N.W.2d 40 (2019)) (admission of unenforceable waiver was reversible error). However, given the Court's denial of Plaintiff's Motion *in Limine* to Exclude Mention of and/or Introduction of Louisville Mega Cavern, LLC's "Participant Agreement," a limiting instruction is warranted. *See* KRE 105 (when evidence is admissible for one purpose but not another, upon request, the court shall admonish the jury regarding the proper scope of the evidence).

INSTRUCTION NO. 3: LIABILITY OF DEFENDANT LOUISVILLE MEGA CAVERN, LLC

Plaintiff claims that the Defendant Louisville Mega Cavern, LLC was negligent in the operation of the "Mega Quest" ropes course. Negligence means failure to use ordinary care.[3] "Ordinary care," for the purpose of this instruction, means the same degree of care as a prudent company engaged in a similar or like business would exercise under the circumstances.[4]

It was the duty of Louisville Mega Cavern, LLC to exercise "ordinary care" in the operation of the Mega Quest ropes course in order to prevent foreseeable injury.[5] That general duty includes the following specific duties:

(1) to make the conditions of the "Mega Quest" ropes course reasonably safe;[6] and

(2) to discover unreasonable risks of harm associated with the "Mega Quest" ropes course; and either

(a) take active steps to make those risks safe; or

(b) give adequate warning of those risks.[7]

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[3] *CSX Transp., Inc. v. Begley,* 313 S.W.3d 52, 65-66 (Ky. 2010) (finding no error in instruction that negligence is "'failure to use ordinary care under the circumstances.'").

[4] *T & M Jewelry, Inc. v. Hicks ex rel. Hicks,* 189 S.W.3d 526, 530 (Ky. 2006) ("Ordinary care is the same degree of care as a prudent person engaged in a similar or like business would exercise under the circumstances.").

[5] *Id.* ("In general, this Court has adopted a 'universal duty of care' which requires every person to exercise ordinary care in his activities to prevent foreseeable injury.").

[6] *Shelton v. Kentucky Easter Seals, Soc., Inc.,* 413 S.W.3d 901, 908, n.27 (Ky. 2013) ("possessors of land are required to maintain the premises in a reasonably safe condition") (citing DAN B. DOBBS, ET AL., THE LAW OF TORTS § 276 (2d ed. Updated 2013) and William Prosser & W. Page Keeton, Prosser & Keeton on Torts 61 (5th ed. 1984) ("[T]he obligation of reasonable care is a full one, applicable in all respects, and extending to everything that threatens the invitee with an unreasonable risk of harm.")).

[7] *Shelton* at 914 (holding that possessor of land "has a duty to an invitee to eliminate or warn of unreasonable risks of harm"); *see also id.* at 908 n.27 (quoting DAN B. DOBBS, ET AL., THE LAW OF TORTS § 276 (2d ed. Updated 2013)) ("'In some cases but not all, reasonable care under the circumstances requires an inspection of the premises and active steps to make them safe. In other cases, the landowner may satisfy his duty of reasonable care by providing a warning."); *see also id.* at 915 (holding that, if a possessor of land attempts to cure a hazard with a warning, the warning must be adequate); *West v. KKI, LLC,* 300 S.W.3d 184, 191 (Ky. App. 2008) ("Under common-law premises liability principles, the duty owed by the premises owner to an invitee is a general duty to exercise ordinary care to keep the premises in a reasonably safe condition and to warn invitees of dangers that are latent, unknown, or not obvious. The owner's duty to invitees is to discover the existence of dangerous conditions on the premises and either correct them or warn of them.") (citations omitted).

For the purpose of these instructions, an "unreasonable risk" is one that is recognized by a reasonable company in similar circumstances as one that should be avoided or minimized, or one that is in fact recognized by Louisville Mega Cavern, LLC.[8] Even if you find that Louisville Mega Cavern, LLC adequately warned of the risks associated with participation in the "Mega Quest" ropes course, you may find that Louisville Mega Cavern, LLC failed to exercise ordinary care by failing to adopt further precautions to protect against those risks, if it was foreseeable that, despite the warning, some risk of harm remained.[9]

If you find that Defendant Louisville Mega Cavern, LLC failed to exercise a duty under this instruction, and that such failure was a substantial factor in causing injury to Mitzi Westover, you will find for the Plaintiff Anthony Bradley; otherwise, you will find for the Defendant Louisville Mega Cavern, LLC.

We, the Jury, find in favor of the Plaintiff:

YES_____ NO_____ _____
FOREPERSON (if unanimous)

IF NOT UNANIMOUS, THE NINE (9) OR MORE WHO AGREE:

_____ _____

_____ _____

_____ _____

_____ _____

[8] *Shelton* at 914 ("An unreasonable risk is one that is 'recognized by a reasonable person in similar circumstances as a risk that should be avoided or minimized' or one that is 'in fact recognized as such by the particular defendant.' Put another way, '[a] risk is not unreasonable if a reasonable person in the defendant's shoes would not take action to minimize or avoid the risk.'") (citations omitted).

[9] *See* Restatement (Third) of Torts: Phys. & Emot. Harm § 18(b) (2010) ("Even if the defendant adequately warns of the risk that the defendant's conduct creates, the defendant can fail to exercise reasonable care by failing to adopt further precautions to protect against the risk if it is foreseeable that despite the warning some risk of harm remains."); *see also Shea v. Bombardier Recreational Products, Inc.,* 2012 WL 4839527 at *5 (Ky. App. Oct. 12, 2012) (recognizing claim for negligent failure to warn).

PROCEED TO INSTRUCTION NO. 4

INSTRUCTION NO. 4: PAIN AND SUFFERRING

If you find for the Plaintiff under Instruction No. 3, you shall determine from the evidence and award a sum of money that will fairly and reasonably compensate for whatever physical or mental suffering you believe from the evidence Mitzi Westover sustained as a direct result of the incident.[10] You may not reduce the amount of damages because of Mitzi Westover's preexisting physical conditions that may have made her more susceptible to injury, or to greater injury, than would have been the case with better health.[11]

$_____ (not to exceed $20,000,000.00)

_____
FOREPERSON (if unanimous)

IF NOT UNANIMOUS, THE NINE (9) OR MORE WHO AGREE:

_____ _____

_____ _____

_____ _____

_____ _____

_____ _____

_____

PROCEED TO INSTRUCTION NO. 5

[10] JOHN S. PALMORE & DONALD P. CETRULO, KENTUCKY INSTRUCTIONS TO JURIES § 39.02.
[11] *Morgan v. Scott,* 291 S.W.3d 622, 640 (Ky. 2009).

INSTRUCTION NO. 5: LOSS OF CONSORTIUM

If you find for the Plaintiff under Instruction No. 3, you shall determine from the evidence and award a sum of money that will fairly and reasonably compensate Plaintiff Anthony Bradley for the loss of services, assistance, aid, society, companionship, and conjugal relationship provided by Mitzi Westover that you believe he has sustained or is reasonably certain to sustain in the future as the result of the death of Mitzi Westover.[12] You may not reduce the amount of damages because of Mitzi Westover's preexisting physical conditions that may have made her more susceptible to injury, or to greater injury, than would have been the case with better health.[13]

$_____ (not to exceed 20,000,000.00)

_____
FOREPERSON (if unanimous)

IF NOT UNANIMOUS, THE NINE (9) OR MORE WHO AGREE:

_____ _____

_____ _____

_____ _____

_____ _____

_____ _____

_____

PROCEED TO INSTRUCTION NO. 6

[12] *See* PALMORE & CETRULO, *supra* § 39.09; *Martin v. Ohio County Hosp. Corp.,* 295 S.W.3d 104 (Ky. 2009).
[13] *Morgan v. Scott,* 291 S.W.3d 622, 640 (Ky. 2009).

INSTRUCTION NO. 6: PUNITIVE DAMAGES

If you found for the Plaintiff under Instruction No. 3, and if you are further satisfied by clear and convincing evidence that the Defendant Louisville Mega Cavern, LLC acted toward Mitzi Westover with reckless disregard for the lives, safety, or property of others, including Mitzi Westover, you may award punitive damages against LMC.[14]

We, the Jury find that Defendant Louisville Mega Cavern, LLC is liable to the Plaintiff under this instruction, on the question of Punitive Damages:

YES_____ NO_____

_____
FOREPERSON (if unanimous)

IF NOT UNANIMOUS, THE NINE (9) OR MORE WHO AGREE:

_____ _____

_____ _____

_____ _____

_____ _____

_____ _____

_____

PROCEED TO INSTRUCTION NO. 7

[14] *See Horton v. Union Light, Heat & Power Co.,* 690 S.W.2d 382, 388 (Ky. 1985) (holding that punitive damages may be awarded where there is a finding of gross negligence, which is defined as "misconduct of a character evidencing, 'a wanton or reckless disregard for the lives, safety or property of other persons.'"); *Williams v. Wilson,* 972 S.W.2d 260, 261 (Ky. 1998); *see also* PALMORE & CETRULO, *supra* § 39.15.

INSTRUCTION NO. 7: ASSESSMENT OF PUNITIVE DAMAGES

If you find for the Plaintiff under Instruction No. 6, you shall determine from the evidence and award a sum of money for the purpose of punishing Defendant Louisville Mega Cavern, LLC for its misconduct in this case and deterring it and others from engaging in similar misconduct in the future.[15] You may not reduce the amount of damages because of Mitzi Westover's preexisting physical conditions that may have made her more susceptible to injury, or to greater injury, than would have been the case with better health.[16]

In determining the amount of punitive damages, you should assess the reprehensibility of Defendant Louisville Mega Cavern, LLC's conduct,[17] considering:

1. The nature of the harm (physical injury versus property damage);[18]
2. The degree to which Defendant Louisville Mega Cavern, LLC's conduct evinced an indifference to or reckless disregard for the health and safety of others;[19]
3. The financial vulnerability of the target of the misconduct;[20]
4. The degree to which Defendant Louisville Mega Cavern, LLC's conduct involved repeated actions as opposed to an isolated incident;[21]

[15] *Yung v. Grant Thornton, LLP,* 563 S.W.3d 22, 64 (Ky. 2018) ("A jury uses a punitive damages award to punish a defendant, deter future wrongdoing, and express its moral condemnation.") (citing *Cooper Industries, Inc., Leatherman Tool Group, Inc.,* 532 U.S. 424*,* 432(2001); *Hensley v. Paul Miller Ford, Inc.,* 508 S.W.2d 759, 762 (Ky. 1974)).
[16] *Morgan v. Scott,* 291 S.W.3d 622, 640 (Ky. 2009).
[17] *Yung* at 65 ("Simply put, the amount of an award [for punitive damages] should embody the fact-finder's determination as to the degree of reprehensibility reflected in the defendant's actions.").
[18] *Id.* at 66 ("Reprehensibility is assessed by considering whether . . . the harm caused was physical as opposed to economic.").
[19] *Id.* ("Reprehensibility is assessed by considering whether . . . the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others.").
[20] *Id.* ("Reprehensibility is assessed by considering whether . . . the target of the conduct had financial vulnerability.").
[21] *Id.* ("Reprehensibility is assessed by considering whether . . . the conduct involved repeated actions or was an isolated incident.").

5. The likelihood at the time of such misconduct by Defendant Louisville Mega Cavern, LLC that serious harm would arise from it and the degree of its awareness of that likelihood;[22]
6. The profitability of the misconduct;[23]
7. The duration of the misconduct and any concealment of it by Defendant Louisville Mega Cavern, LLC;[24] and
8. Any actions by Defendant Louisville Mega Cavern, LLC to remedy the misconduct once that misconduct became known.[25]

$_____ (not to exceed $200,000,000.00)

_____
FOREPERSON (if unanimous)

IF NOT UNANIMOUS, THE NINE (9) OR MORE WHO AGREE:

_____ _____

_____ _____

_____ _____

_____ _____

_____ _____

_____

[22] KRS 411.186(2) ("In determining the amount of punitive damages to be assessed, the trier of fact should consider the following factors: (a) The likelihood at the relevant time that serious harm would arise from the defendant's misconduct; (b) The degree of the defendant's awareness of that likelihood; (c) The profitability of the misconduct to the defendant; (d) The duration of the misconduct and any concealment of it by the defendant; (e) Any actions by the defendant to remedy the misconduct once it became known to the defendant").
[23] *Id.*
[24] *Id.*
[25] *Id.*

PLEASE INFORM THE DEPUTY SHERIFF YOU HAVE REACHED A VERDICT.

Respectfully submitted,

/s/ Brenton D. Stanley
Brenton D. Stanley
MORGAN & MORGAN
2037 Lakeside Dr.
Louisville, KY 40205
P: (217) 714-1661
bstanley@forthepeople.com

and

Jason Swinney
MORGAN & MORGAN
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and

William McAfee
Pro hac vice #PH25147241
MORGAN & MORGAN
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1974 Douglass Blvd., Suite 5
Louisville, KY 40205
P: (502) 552-4146
F: (502) 470-7235
molly@stanleylawlouisville.com
Counsel for the Plaintiff

CERTIFICATE OF SERVICE

This is to certify that a true and accurate copy of the foregoing was electronically filed and served on June 23, 2021, upon those listed in the below service list.

Via email:

Greg E. Thornton, Esq.
Maxwell D. Smith, Esq.
WARD, HOCKER & THORNTON, PLLC
Vine Center
333 W. Vine St., Suite 1100
Lexington, KY 40507
gthornton@whtlaw.com
max.smith@whtlaw.com
Counsel for Defendants Louisville Mega Cavern, LLC and Louisville Underground, LLC

/s/ Brenton D. Stanley
Counsel for Plaintiff

APPENDIX TAB 8

MEGA QUEST FAQ

CAN I SCHEDULE A SPECIAL OCCASION EVENT?

DO YOU HAVE BIRTHDAY PARTIES?

WHAT ARE THE QUALIFICATIONS FOR PARTICIPATION?

WHAT EQUIPMENT WILL I BE WEARING ON THE COURSE?

WHAT SHOULD I WEAR?

DO YOU HAVE GROUP RATES?

ARE RESERVATIONS REQUIRED?

SHOULD I MAKE AN ADVANCED RESERVATION?

WHAT IS YOUR CANCELLATION POLICY?

WHAT IF I AM AFRAID OF HEIGHTS?

HOW FAR WILL I BE UNDERGROUND?

HOW SAFE IS IT?

All underground adventure activities carry certain inherent risks. Our course is built to A.C.C.T. (Association for Challenge Course Technology) professional construction standards. Our tour guides are professionally trained and our equipment is of the highest quality. The course and equipment are inspected daily.

MAY I BRING A CAMERA?

WHAT EQUIPMENT WILL I BE WEARING ON THE COURSE?

HOW MUCH SHOULD I TIP MY GUIDES?

WHAT IF I AM PREGNANT?

MEGA QUEST RIGHT OF REFUSAL

APPENDIX TAB 9

LOUISVILLE MEGA CAVERN™ Participant Agreement

LOUISVILLE MEGA CAVERN, LLC
d/b/a MEGA ZIPS, MEGA QUEST, MEGA TRAM & MEGA UNDERGROUND BIKE PARK
1841 TAYLOR AVENUE, LOUISVILLE, KY 40213 PHONE: (877)-614-6342 FAX: (502) 451-0216
WEB: www.LouisvilleMegaCavern.com

Participant Agreement (Including Assumption of Risks and Agreement of Release and Indemnification)

This Agreement must be read, understood, and signed by all adult participants and by a parent or legal guardian (both hereinafter referred to as Parent) of a minor (under 18 years of age) participant (Minor Participant), or, if applicable, an Other Responsible Adult. Parent signs and agrees for himself or herself and on the behalf of the Minor Participant. This Agreement may be used for all members of a family. If the Parent is not present, a photo copy of his or her valid driver's license must accompany this Agreement. If Parent is not available, an Other Responsible Adult may, by signing, agree, among other things, to the child's participation (confirming the Parent's consent thereto) and to protect and indemnify the Released Parties from claims of the Minor Participant and others as described in the Release and Indemnity section below.

In consideration of the services of Louisville Mega Cavern, LLC, Louisville Underground, LLC and MERLU, LLC (hereinafter, together, referred to as Provider) allowing me access to and use of its facilities, I the undersigned adult participant (Participant) and/or the parent or guardian of a Minor Participant (Parent), or Other Responsible Adult, for myself and on behalf of the Minor Participant, understand, acknowledge and agree as follows:

Description of Activities: Services and facilities provided include ziplines, sky bridges, staircases, cargo net inclines, obstacles, platforms, towers, hiking, dirt jumps, ramps, tunnels, mountain bike trails and related activities, all located within the cavern.

Zip line and challenge course equipment: Participants in zipline and challenge course activities wear safety harnesses and helmets (which shall be attached and adjusted by Provider's staff) and are clipped onto overhead steel cables with attached safety lanyards. No modification of safety equipment is allowed.

The Mega Zips ziplines are long cable traverses over which Participants slide between platforms or mounds on steel cables, at significant heights and speeds utilizing safety harnesses, helmets and associated hardware. A Mega Zips Participant must be at least seven years old and weigh between 55 and 285 pounds. Participants who are seven through fourteen years old must be accompanied by Parent or Other Responsible Adult. Provider's staff shall be responsible for all Equipment Transfers (that is, attaching and disconnecting from ziplines or other supports). Mega Zips tour groups will be led by two trained guides over approximately 1500 feet of sometimes rough and uncertain terrain on the floor of the cavern.

The Mega Quest aerial challenge course is self-guided and includes short ziplines, sky bridges and walkways, (some inclined), located high in the cavern and some consisting of planking supported by steel cables and cable handrails. Mega Quest Participants are responsible for making all Equipment Transfers on their own after watching a training video, the careful viewing of which is extremely important, and receiving instructions and training from tour guides using special equipment. The age limit for the Mega Quest challenge course is five years old. Participants must be able to reach a height of 50 inches with the palm of the hand with an outstretched arm while standing flatfooted on the floor, and weigh less than 310 pounds.

The Mega Underground Bike Park is comprised of over 320,000 square feet of (predominantly dirt) tracks, jumps, berms, bridges and other features designed for a challenging bike experience. Bikes, helmets and pads are available for rent, and Participant shall be responsible for keeping safety equipment secure and operable. Bikers must be at least seven (7) years old to be on the course and bikers under twelve (12) years of age must be accompanied on the course by a Parent or Other Responsible Adult. Bikers are solely responsible for their safety and the safety of others on the course and must comply with all rules and policies communicated to them, by signage or otherwise. Bikers must operate and perform at all times within their competencies, and in full control of their bikes.

Medical and SafetyConcerns: The activities are designed for Participants of average mobility and strength who are in reasonably good health. Underlying medical problems including, for example, obesity, high blood pressure, cardiac and coronary artery disease, pulmonary problems, pregnancy, arthritis, tendonitis, other joint and muscular-skeletal problems, or other medical, physical, psychological and psychiatric problems, may impair the safety and wellbeing of Participants on the course. All such conditions may increase the inherent risks of the experience and cause Participants to be a danger to themselves or others and Participants therefore must carefully consider those risks before choosing to participate, and they must fully inform the Provider or its staff of any issues, in writing, prior to using the Facilities. Provider reserves the right to exclude anyone from participating because of medical, safety, or other reasons it deems appropriate. Participant, Parent or Other Responsible Adult: (1) represents that each Participant or Minor Participant is physically able to participate in the activities without being a danger to themselves or to others; (2) acknowledges that participation is purely voluntary, and done so in spite of the risks; (3) is not pregnant, nor under the influence of alcohol, illegal drugs, or impairing legal drugs; (4) agrees to abide by all instructions provided by the Provider or the Provider's staff; (5) will not make any adjustments to zipline or challenge course equipment but, instead, will allow all adjustments to be made only by or with the assistance of Provideror its staff; (6) will not intentionally flip over or invert while riding on the ziplines. Parent or Other Responsible Adult certifies that they have discussed these requirements with each Minor Participant, if any, and that the Minor Participant understands these stipulations and agrees to comply with them.

Inherent and Other Risks: Serious injuries can occur in zipline courses, challenge course tours, and bike park activities including the risk of injury or death. Risks include among others the following: falls, contact with other participants and fixed or falling objects, and moving about or being transported over the sometimes uneven terrain and grounds on which the activities are initiated and conducted; emotional risks, which include unwelcome or inadvertent touching while zipline and challenge course tour guides are attaching and adjusting harnesses and helmets and while transferring equipment; hurt feelings or panic and psychological trauma (including fear of heights and enclosed spaces; the nature of the property and cavern in which the activities are conducted, including hilly and rocky terrain, cliffs, ravines, creek beds and a lake. Risks of the bike activities

include loss of control, excessive speed, exceeding one's abilities, violation of rules, failure or malfunction of the bike or other equipment, defects in the design or maintenance of the various course features, and collisions with other bikers and structures. Injuries may be the consequence of, among other circumstances, the activity undertaken, the environmental hazards (including terrain, falling rock and atmosphere in the cavern), and errors in judgment or other negligence of staff or participants, and may occur in spite of efforts of staff to prevent them. The physical risks range from small scrapes and bruises to bites and stings, broken bones, sprains, neurological damage, and in extraordinary cases, even death. These risks, and others, are inherent to the activities -- that is, they cannot be eliminated without changing the essential nature, educational and other values of the experience. In all cases, these inherent risks, and other risks which may not be inherent, whether or not described above must be accepted by those who choose to participate.

Assumption of Risks/Limited Duty to Protect: I have inspected the Facilities and understand the nature of the activities in which I and/or the Minor Participant will engage as described above. I acknowledge and voluntarily assume, and agree that Provider has no duty to protect against, the risks of illness, injury, and death associated with these activities, inherent and otherwise, and whether or not described above, including those which may result from the negligent acts or omissions of other participants or staff. I have discussed the activities and risks with each Minor Participant, if any, who understands them and agrees to participate nevertheless.

Release and Indemnity: I, an adult Participant, or Parent (or, with respect to the indemnity below, if applicable, Other Responsible Adult), for myself and to the maximum extent allowed by law, on behalf of the Minor Participant, hereby release and agree to hold harmless and indemnify (that is, protect and defend, including by paying claims, costs and attorney fees) Provider, their respective owners, officers, agents, and employees, and the owner or owners of the property on which the activities take place (the Released Parties) from, and agree not to sue them for any liability for causes of action, claims and demands of any kind and nature whatsoever, including personal injury and death, products and premises liability and otherwise, that may arise out of or relate in any way to my or the Minor Participant's enrollment or participation in Provider's programs. The claims hereby indemnified against include, among others, claims of other participants and members of my or the Minor Participant's family, arising out of losses caused by, or suffered by, me or the Minor Participant. The agreements of release and indemnity include claims of negligence of a Released Party including without limitation claims of gross negligence, but not claims of willful injury.

Other Provisions:

To the maximum extent allowed by law, Provider denies any and all representations or warranties, expressed or implied, of condition, fitness or otherwise, pertaining to the bikes, other equipment provided, and premises; and Participants accept and use such equipment and premises as they are, and at their own risk.

Provider may refuse participation in its zipline tour or challenge course or underground bike park course to any person deemed by it to be a hazard to himself, herself or to others. Provider may alter its published or announced requirements for participation in its zipline or challenge course tour and bike park activities and for use of its property at any time and for any reasons that it may deem appropriate.

Should any part of this Agreement be judged invalid by a court with proper jurisdiction, all other parts not so judged shall nevertheless remain valid and in effect.

Provider reserves the right to use voice, video or other photographic images of a Participant for future marketing, educational, or other purpose, and I, for myself and for each Minor Participant, if any, hereby consent to such use, without compensation.

The substantive laws of the State of Kentucky shall govern this agreement and any dispute between me or the minor child or anyone else acting on behalf of me or the child, and Provider. Any suit filed against a Released Party shall be filed and maintained only in the courts of Jefferson County, Kentucky.

[redacted]

[redacted]

You are assuming the risk of participating in this activity. [redacted]

m cJ

Initial

I have read, fully understand, and hereby agree to the terms of this agreement, voluntarily and with knowledge of the activities and their risks. I acknowledge that this agreement shall be effective and binding upon me, my heirs, assigns, personal representatives, and estates.

WARNING: A PERSON FORGING THE SIGNATURE OF ANOTHER OR MISREPRESENTING HIS OR HER CAPACITY AS A SIGNATORY WILL BE DEEMED TO HAVE AGREED TO PROTECT THE RELEASED PARTIES AGAINST ANY CLAIM.

August 19, 2017

Participants Name

Mitzi
First Name*

N/A
Middle Name

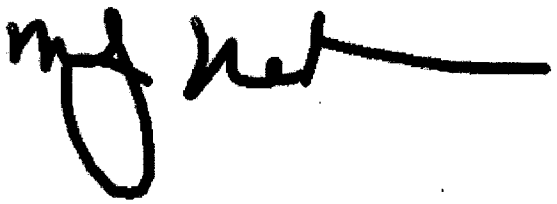
Westover
Last Name*

717-939-1071
Phone*

Female

Participants Date of Birth*

6 - June 6 1961



Participants Signature*

Email Address

DragonRhage@aol.com
Email*

DragonRhage@aol.com
Confirm Email*

☐ Check to receive information, news, and discounts by e-mail.

Emergency Contact

Anthony Bradley
Emergency Contact's Name*

717-982-1014
Emergency Contact's Phone Number*

Electronic Signature Consent*

☑ By checking here, you are consenting to the use of your electronic signature in lieu of an original signature on paper. You have the right to request that you sign a paper copy instead. By checking here, you are waiving that right. After consent, you may, upon written request to us, obtain a paper copy of an electronic record. No fee will be charged for such copy and no special hardware or software is required to view it. Your agreement to use an electronic signature with us for any documents will continue until such time as you notify us in writing that you no longer wish to use an electronic signature. There is no penalty for withdrawing your consent. You should always make sure that we have a current email address in order to contact you regarding any changes, if necessary.

APPENDIX TAB 10

✓ IT HAS BEEN STATED EARLIER THAT STAFF WOULD REFUSE ADMISSION IF PARTICIPANT DOES NOT MEET CRITERIA AS STATED IN AGREEMENT.

HAVE ANY PARTICIPANTS BEEN REFUSED ADMISSION BASED ON ~~DRUG~~ OBESITY OBESITY ?

≥ each "

Does employees ask the customer has he or she Read the Waiver and "understood" the Risk of the Extreme Part or Challenge have any questions before taking the Challenge.

- When you say having reviewed "Thousands of pages of documents". Is that an expression to describe a large quantity or a literal statement?

- Could her cognitive impairments or limitations affect her ability to fully assess and understand the scope of the Participant's Agreement?

APPENDIX TAB 11

Participant Agreement

LOUISVILLE MEGA CAVERN, LLC
d/b/a MEGA ZIPS, MEGA QUEST, MEGA TRAM & MEGA UNDERGROUND BIKE PARK
1841 TAYLOR AVENUE, LOUISVILLE, KY 40213 PHONE: (877)-614-6342 FAX: (502) 451-0216
WEB: www.LouisvilleMegaCavern.com

Participant Agreement (Including Assumption of Risks and Agreement of Release and Indemnification)

This Agreement must be read, understood, and signed by all adult participants and by a parent or legal guardian (both hereinafter referred to as Parent) of a minor (under 18 years of age) participant (Minor Participant), or, if applicable, an Other Responsible Adult. Parent signs and agrees for himself or herself and on the behalf of the Minor Participant. This Agreement may be used for all members of a family. If the Parent is not present, a photo copy of his or her valid driver's license must accompany this Agreement. If Parent is not available, an Other Responsible Adult may, by signing, agree, among other things, to the child's participation (confirming the Parent's consent thereto) and to protect and indemnify the Released Parties from claims of the Minor Participant and others as described in the Release and Indemnity section below.

In consideration of the services of Louisville Mega Cavern, LLC, Louisville Underground, LLC and MERLU, LLC (hereinafter, together, referred to as Provider) allowing me access to and use of its facilities, I the undersigned adult participant (Participant) and/or the parent or guardian of a Minor Participant (Parent), or Other Responsible Adult, for myself and on behalf of the Minor Participant, understand, acknowledge and agree as follows:

Description of Activities: Services and facilities provided include ziplines, sky bridges, staircases, cargo net inclines, obstacles, platforms, towers, hiking, dirt jumps, ramps, tunnels, mountain bike trails and related activities, all located within the cavern.

EXHIBIT
3

Zip line and challenge course equipment: Participants in zipline and challenge course activities wear safety harnesses and helmets (which shall be attached and adjusted by Provider's staff) and are clipped onto overhead steel cables with attached safety lanyards. No modification of safety equipment is allowed.

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The Mega Quest aerial challenge course is self-guided and includes short ziplines, sky bridges and walkways, (some inclined), located high in the cavern and some consisting of planking supported by steel cables and cable handrails. Mega Quest Participants are responsible for making all Equipment Transfers on their own after watching a training video, the careful viewing of which is extremely important, and receiving instructions and training from tour guides using special equipment. The age limit for the Mega Quest challenge course is five years old. Participants must be able to reach a height of 50 inches with the palm of the hand with an outstretched arm while standing flatfooted on the floor, and weigh less than 310 pounds.

The Mega Underground Bike Park is comprised of over 320,000 square feet of (predominantly dirt) tracks, jumps, berms, bridges and other features designed for a challenging bike experience. Bikes, helmets and pads are available for rent, and Participant shall be responsible for keeping safety equipment secure and operable. Bikers must be at least seven (7) years old to be on the course and bikers under twelve (12) years of age must be accompanied on the course by a Parent or Other Responsible Adult. Bikers are solely responsible for their safety and the safety of others on the course and must comply with all rules and policies communicated to them, by signage or otherwise. Bikers must operate and perform at all times within their competencies, and in full control of their bikes.

Medical and SafetyConcerns: The activities are designed for Participants of average mobility and strength who are in reasonably good health. Underlying medical problems including, for example, obesity, high blood pressure, cardiac and coronary artery disease, pulmonary problems, pregnancy, arthritis, tendonitis, other joint and muscular-skeletal problems, or other medical, physical, psychological and psychiatric problems, may impair the safety and wellbeing of Participants on the course. All such conditions may increase the inherent risks of the experience and cause Participants to be a danger to themselves or others and Participants therefore must carefully consider those risks before choosing to participate, and they must fully inform the Provider or its staff of any issues, in writing, prior to using the Facilities. Provider reserves the right to exclude anyone from participating because of medical, safety, or other reasons it deems appropriate. Participant, Parent or Other Responsible Adult: (1) represents that each Participant or Minor Participant is physically able to participate in the activities without being a danger to themselves or to others; (2) acknowledges that participation is purely voluntary, and done so in spite of the risks; (3) is not pregnant, nor under the influence of alcohol, illegal drugs, or impairing legal drugs; (4) agrees to abide by all instructions provided by the Provider or the Provider's staff; (5) will not make any adjustments to zipline or challenge course equipment but, instead, will allow all adjustments to be made only by or with the assistance of Provideror its staff; (6) will not intentionally flip over or invert while riding on the ziplines. Parent or Other Responsible Adult certifies that they have discussed these requirements with each Minor Participant, if any, and that the Minor Participant understands these stipulations and agrees to comply with them.

Inherent and Other Risks: Serious injuries can occur in zipline courses, challenge course tours, and bike park activities including the risk of injury or death. Risks include among others the following: falls, contact with other participants and fixed or falling objects, and moving about or being transported over the sometimes uneven terrain and grounds on which the activities are initiated and conducted; emotional risks, which include unwelcome or inadvertent touching while zipline and challenge course tour guides are attaching and adjusting harnesses and helmets and while transferring equipment; hurt feelings or panic and psychological trauma (including fear of heights and enclosed spaces; the nature of the property and cavern in which the activities are conducted, including hilly and rocky terrain, cliffs, ravines, creek beds and a lake. Risks of the bike activities

include loss of control, excessive speed, exceeding one's abilities, violation of rules, failure or malfunction of the bike or other equipment, defects in the design or maintenance of the various course features, and collisions with other bikers and structures. Injuries may be the consequence of, among other circumstances, the activity undertaken, the environmental hazards (including terrain, falling rock and atmosphere in the cavern), and errors in judgment or other negligence of staff or participants, and may occur in spite of efforts of staff to prevent them. The physical risks range from small scrapes and bruises to bites and stings, broken bones, sprains, neurological damage, and in extraordinary cases, even death. These risks, and others, are inherent to the activities -- that is, they cannot be eliminated without changing the essential nature, educational and other values of the experience. In all cases, these inherent risks, and other risks which may not be inherent, whether or not described above must be accepted by those who choose to participate.

Assumption of Risks/Limited Duty to Protect: I have inspected the Facilities and understand the nature of the activities in which I and/or the Minor Participant will engage as described above. I acknowledge and voluntarily assume, and agree that Provider has no duty to protect against, the risks of illness, injury, and death associated with these activities, inherent and otherwise, and whether or not described above, including those which may result from the negligent acts or omissions of other participants or staff. I have discussed the activities and risks with each Minor Participant, if any, who understands them and agrees to participate nevertheless.

Release and Indemnity: I, an adult Participant, or Parent (or, with respect to the indemnity below, if applicable, Other Responsible Adult), for myself and to the maximum extent allowed by law, on behalf of the Minor Participant, hereby release and agree to hold harmless and indemnify (that is, protect and defend, including by paying claims, costs and attorney fees) Provider, their respective owners, officers, agents, and employees, and the owner or owners of the property on which the activities take place (the Released Parties) from, and agree not to sue them for any liability for causes of action, claims and demands of any kind and nature whatsoever, including personal injury and death, products and premises liability and otherwise, that may arise out of or relate in any way to my or the Minor Participant's enrollment or participation in Provider's programs. The claims hereby indemnified against include, among others, claims of other participants and members of my or the Minor Participant's family, arising out of losses caused by, or suffered by, me or the Minor Participant. The agreements of release and indemnity include claims of negligence of a Released Party including without limitation claims of gross negligence, but not claims of willful injury.

Other Provisions:

To the maximum extent allowed by law, Provider denies any and all representations or warranties, expressed or implied, of condition, fitness or otherwise, pertaining to the bikes, other equipment provided, and premises; and Participants accept and use such equipment and premises as they are, and at their own risk.

Provider may refuse participation in its zipline tour or challenge course or underground bike park course to any person deemed by it to be a hazard to himself, herself or to others. Provider may alter its published or announced requirements for participation in its zipline or challenge course tour and bike park activities and for use of its property at any time and for any reasons that it may deem appropriate.

Should any part of this Agreement be judged invalid by a court with proper jurisdiction, all other parts not so judged shall nevertheless remain valid and in effect.

Provider reserves the right to use voice, video or other photographic images of a Participant for future marketing, educational, or other purpose, and I, for myself and for each Minor Participant, if any, hereby consent to such use, without compensation.

The substantive laws of the State of Kentucky shall govern this agreement and any dispute between me or the minor child or anyone else acting on behalf of me or the child, and Provider. Any suit filed against a Released Party shall be filed and maintained only in the courts of Jefferson County, Kentucky.

WARNING

Under Kentucky law, there is no liability for an injury to or death of a participant in an agritourism activity conducted at this agritourism location if the injury or death results exclusively from the inherent risks of the agritourism activity and in the absence of negligence. You are assuming the risk of participating in this agritourism activity. KRS 247.800-247-8010.

Initial

I have read, fully understand, and hereby agree to the terms of this agreement, voluntarily and with knowledge of the activities and their risks. I acknowledge that this agreement shall be effective and binding upon me, my heirs, assigns, personal representatives, and estates.

WARNING: A PERSON FORGING THE SIGNATURE OF ANOTHER OR MISREPRESENTING HIS OR HER CAPACITY AS A SIGNATORY WILL BE DEEMED TO HAVE AGREED TO PROTECT THE RELEASED PARTIES AGAINST ANY CLAIM.

August 19, 2017

Participants Name

Mitzi
First Name*

N/A
Middle Name

Westover
Last Name*

717-939-1071
Phone*

Female

Participants Date of Birth*

6 - June 6 1961

Participants Signature*

Email Address

DragonRhage@aol.com
Email*

DragonRhage@aol.com
Confirm Email*

☐ Check to receive information, news, and discounts by e-mail.

Emergency Contact

Anthony Bradley
Emergency Contact's Name*

717-982-1014
Emergency Contact's Phone Number*

Electronic Signature Consent*

☑ By checking here, you are consenting to the use of your electronic signature in lieu of an original signature on paper. You have the right to request that you sign a paper copy instead. By checking here, you are waiving that right. After consent, you may, upon written request to us, obtain a paper copy of an electronic record. No fee will be charged for such copy and no special hardware or software is required to view it. Your agreement to use an electronic signature with us for any documents will continue until such time as you notify us in writing that you no longer wish to use an electronic signature. There is no penalty for withdrawing your consent. You should always make sure that we have a current email address in order to contact you regarding any changes, if necessary.

APPENDIX TAB 12

No. 17-CI-005126

JEFFERSON CIRCUIT COURT
DIVISION TEN (10)
JUDGE ANGELA MCCORMICK BISIG

JEFF BACKMEYER PLAINTIFF

vs.

ORDER REGARDING
MOTION FOR SUMMARY JUDGMENT

LOUISVILLE MEGA CAVERN, LLC DEFENDANT

* * * * *

This matter is before the Court on a Motion for Summary Judgment by Defendant Louisville Mega Cavern, LLC ("LMC") filed on October 29, 2018. Plaintiff Jeff Backmeyer ("Backmeyer") filed a Response on December 11, 2018. LMC filed a Reply on January 11, 2019.

The Court heard oral argument on May 8, 2019. The Honorable Scott E. Karem represented Backmeyer. The Honorable Douglas P. Dawson represented LMC. The matter now stands submitted. The Court, having considered the written memoranda, oral argument, record in the case, and being otherwise sufficiently advised, rules as follows.

BACKGROUND

This is an action for negligence. On October 14, 2016, Plaintiff Jeff Backmeyer and his family took a trip to the Louisville Mega Cavern bike park operated by Defendant LMC. Upon arrival, Backmeyer passed two signs which advised him that under Kentucky law, LMC would not be liable for injuries or death from the inherent risks of an agritourist activity without concurrent negligence. Backmeyer then entered LMC's facility and signed a participant agreement at a self-service kiosk using an electronic signature. The agreement included language purporting to release LMC from liability for injuries arising from or relating to participation in

the activities offered. The agreement also included a provision mirroring the language of the signs outside regarding agritourism immunity.

Backmeyer and his party subsequently began to ride mountain bikes in the bike park. They took a break and went to another area of the facility so the children in the group could traverse the underground ropes course. Backmeyer later returned to the bike park. While riding on the course, he attempted to climb an obstacle on his bike with the goal of reaching the top of a shipping container. Unfortunately, the maneuver was unsuccessful, causing Backmeyer to fall and sustain injuries. Backmeyer therefore brought this action against LMC, alleging that its negligence, recklessness, and failure to warn caused his injuries. LMC now moves for summary judgment.

1. *LMC's Argument*

LMC seeks summary judgment for three reasons. First, it claims immunity under KRS 247.809. More particularly, LMC contends that because the attractions at Louisville Mega Cavern are agritourist activities, and because Backmeyer's injuries resulted exclusively from an inherent risk associated with those activities, LMC is immune from suit.

Second, LMC alleges that Backmeyer both signed an enforceable exculpatory clause and assumed the risk of injury exclusive and inherent to the activity he undertook. LMC notes that a party may waive its right to make a claim before injury occurs. According to LMC, because Backmeyer signed a valid exculpatory clause before suffering the resulting injury, LMC is exempt from liability.

Third, LMC asserts it owed no duty to Backmeyer. LMC maintains that the injury Backmeyer incurred from his fall is inherent to the activity and not due to any negligent acts or omissions by LMC.

2. Backmeyer's Argument

Backmeyer argues that summary judgment is inappropriate for three reasons. First, the waiver which was electronically signed is an adhesion contract and is thus invalid, and that in any event further discovery on that issue is needed. Second, Backmeyer contends LMC is not immune under KRS 247.809 since it acted in a negligent manner. Third, Backmeyer asserts LMC was negligent in providing inadequate lighting, poor signage, and its overall chaotic environment which made it difficult for Backmeyer to stay focused. Backmeyer maintains that this alleged conduct was a substantial factor in causing his injuries.

OPINION

1. Summary Judgment Standard

Civil Procedure Rule 56.03 authorizes summary judgment "if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56.03. The Court must view the record "in a light most favorable to the party opposing the motion, and all doubts are to be resolved in his favor." Steelvest, Inc. v. Scansteel Serv. Ctr., Inc., 807 S.W.2d 476, 480 (Ky. 1991).

Summary judgment is proper when "it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor and against the movant." Paintsville Hosp. Co. v. Rose, 683 S.W.2d 255, 256 (Ky. 1985) (quoting Roberson v. Lampton, 516 S.W.2d 838, 840 (Ky. 1974)). The term "impossible" is used in a practical sense and not in an absolute sense. Perkins v. Hausladen, 828 S.W.2d 652 (Ky. 1992). When considering a motion for summary judgment, the "focus [of the court] should be on what is of record rather than what might be presented at trial." Welch v. Am. Publ'g Co. of Kentucky, 3

S.W.3d 724, 730 (Ky. 1999). "The party opposing summary judgment cannot rely on their own claims or arguments without significant evidence in order to prevent a summary judgment." Hallahan v. The Courier-Journal, 138 S.W.3d 699, 705 (Ky. App. 2004).

The non-movant cannot defeat a properly supported summary judgment motion "without presenting at least some affirmative evidence showing that there is a genuine issue of material fact for trial." Steelvest, 807 S.W.2d at 482. Even if a trial court believes the party opposing the motion for summary judgment may not succeed at trial, "it should not render a summary judgment if there is any issue of material fact." Id. This is because it is the court's duty to examine the evidence, "not to decide any issue of fact, but to discover if a real issue exists." Id.

2. Agritourism Immunity

The Court finds LMC is an agritourism business, but is not entitled to agritourism immunity. The Court agrees that LMC is an agritourism business under KRS 247.801 even though it is not a farm or ranch. Indeed, LMC is currently designated as an agritourism business by the Kentucky Department of Agriculture.

Moreover, under KRS 247.801(1) "agritourism" means the act of visiting any agribusiness operation for the purpose of enjoyment, education, or active involvement in the activities of the operation; and under KRS 247.801(2), "agritourism activity" means any activity that is carried out on an agribusiness operation, and allows or invites participants to view or participate in activities for recreational, entertainment, or educational purposes. Qualifying activities include natural resource-based activities in addition to typical agricultural or horticultural activities. Id. LMC falls within the scope of these definitions.

LMC offers activities directly tied to the use of the land belonging to LMC. Backmeyer visited and paid admission to LMC for the purpose of using its Mega Bikes section of the LMC

property to ride his mountain bike on its underground dirt track as a recreational activity. Although LMC's activities may not be akin to activities on a farm or ranch, the attractions within LMC's facilities are described, published, and advertised as connected with natural resources on its website. In addition, those activities, including the Mega Bikes section, are in direct connection with the land: the facility is in a former limestone quarry; tours strategically highlight early cavern formations; underground ziplines traverse specific cavern areas; and LMC offers trails and tours tailored towards bicycle riders based on the natural resources surrounding it. Visiting and using the LMC's underground bike track for purposes of active recreation constitutes active involvement in a natural resource-based business. Thus, LMC's facilities and business fall under "agritourism" and "agritourism activity" as defined in KRS 247.801(1) and (2).

However, agritourism activity operators are entitled to immunity from liability only for injuries *exclusively* resulting from inherent risks of the agritourism activities conducted on their properties. KRS 247.809(1). Thus, if the injury or death results from a risk not inherent to the agritourism activity, immunity is unavailable.

Such is the case here. KRS 247.801(5) defines "inherent risks of agritourism activity" as "those dangers or conditions that are an integral part of an agritourism activity," and lists in particular "surface or subsurface conditions; natural conditions of land, vegetation, or water; the behavior of wild or domestic animals; and the ordinary dangers of structures or equipment used in farming and ranching operations." The court interprets a statute according to its plain meaning and to give effect to the legislative intent in enacting it. Travelers Indem. Co. v. Armstrong, 565 S.W.3d 550, 559 (Ky. 2018). Commonwealth v. Montague, 23 S.W.3d 629, 631 (Ky. 2000). In addition, "[a] general rule of statutory construction provides that the enumeration

of particular items excludes other items that are not specifically mentioned." Commonwealth v. Harris, 59 S.W.3d 896, 900 (Ky. 2001).

The items enumerated in KRS 247.801(5) as risks inherent to agritourism activities are risks specifically arising from the agricultural or natural resource nature of the activity. In contrast, the structure upon which Mr. Backmeyer sustained his ultimate injury bears no relation to the land or natural resource aspect of the activity offered by LMC, but rather to biking. The risk of falling off of one's bike is inherent to the activity of biking but bears no relationship to the natural resource-based aspect of LMC's operations. Put differently, Backmeyer's fall could have occurred in any setting, and may not be the result of biking in a cavern in particular. Thus, falling was not a risk inherent to the agritourism activity offered by LMC under KRS 247.801(5) and therefore LMC is not entitled to agritourism immunity under KRS 247.809.

3. Release

LMC also contends it is entitled to summary judgment because Backmeyer signed a release before riding the bike path. Backmeyer claims he did not have the opportunity to read the release, which was delivered to him electronically at LMC's kiosk, and therefore the exculpatory clause is invalid. LMC asserts in response that Backmeyer had a duty to read the release and that the release was valid. However, the Court does not find the release enforceable.

In Hargis v. Baize, 168 S.W.3d 36 (Ky. 2005), the Kentucky Supreme Court held that a release within an independent contractor's contract was held invalid since it did not identify the type of injury for which liability was to be released. The Court further held that a pre-injury release injury will be upheld only if: (1) it explicitly expresses an intention to exonerate by using the word "negligence;" (2) it clearly and specifically indicates an intent to release a party from liability for a personal injury caused by that party's own conduct; (3) protection against

negligence is the only reasonable construction of the contract language; or (4) the hazard experienced was clearly within the contemplation of the provision. Hargis, 168 S.W.3d at 47.

Admittedly, the release at issue before the court meets each of these criteria for enforceability. First, in the waiver Backmeyer explicitly released "claims of negligence" against LMC. Motion, Ex. 7 at 4. Second, the waiver also expressly demonstrates an intent to release LMC from any claim or cause of action that may arise out of participation in LMC's programs. Id. (releasing "claims and demands that may arise out of or relate in any way to participation in [LMC's] programs."). Third, these provisions together make plain that protection against negligence is the only reasonable construction of the waiver's language. Finally, Backmeyer's fall on the bike course occurred during his participation in LMC's activities and was thus clearly within the contemplation of the provision. Backmeyer signed the participant agreement, then commenced use of LMC's facility. The release satisfies all four factors outlined in Hargis.

However, a waiver that meets the Hargis requirements may nonetheless be unenforceable on public policy grounds. "Under Kentucky law, a party to a contract may agree to release another from liability for ordinary or gross negligence, but not for willful or wanton negligence *or where contrary to public policy*." United Servs. Auto. Ass'n v. ADT Sec. Servs., 241 S.W.3d 335, 341 (Ky. App. 2006) (emphasis added). In considering whether a release is contrary to public policy, the Court must look to whether the public interest requires performance of the duties in the agreement and whether the parties had equal footing with one another. Greenwich Ins. Co. v. Louisville & N. R. Co., 112 Ky. 598, 66 S.W. 411, 412-13 (1902). Where the parties possess unequal bargaining power, an exculpatory contract is unenforceable. Coughlin v. T.M.H. Intern. Attractions, 895 F. Supp. 159, 161 (W.D. Ky. 1995) (citing Jones v. Hanna, 814 S.W.2d

287 (Ky. App. 1991)). Whether a contract is unenforceable due to unequal bargaining power is to be determined on a case-by-case basis under the totality of facts.

The Court finds the release here to be unenforceable as contrary to public policy because of the unequal positions of the parties. Backmeyer was unfamiliar with LMC's biking course. There is no evidence he had significant experience with the type of biking associated with the course offered by LMC. He was required to rely on LMC for his safety rather than any familiarity with this type of biking or the particular course he was riding on. Admittedly, Backmeyer signed the release, including its inaccurate provision that he had inspected the premises prior to engaging in the activity. Yet that alone does not overcome the unequal bargaining power that resulted from his wholesale reliance on LMC for his safety. See id. (finding release unenforceable due to unequal bargaining power where an inexperienced participant relied on commercial caving operator for his safety).

Moreover, any public interest in encouraging commercial biking operations such as LMC's are outweighed by the public interest in physical safety and legal protection. Although concerns over liability due to lack of a valid release may impact the availability of activities such as those offered by LMC, the Court does not find that interest to outweigh the physical safety and legal protection of inexperienced participants in potentially hazardous physical activities.

In sum, although the release executed by Backmeyer meets the criteria for enforceability under Hargis it is not enforceable here. Given the disparity in bargaining power between LMC and Backmeyer and because the public interest in safety outweighs the encouragement of activities such as those offered by LMC, the release is unenforceable as a matter of public policy. Backmeyer will still carry the burden of proving any omission or act of the LMC caused his

claimed injuries, but the Court does not find the case can be resolved as a matter of law. Accordingly, LMC is not entitled to summary judgment.

ORDER

WHEREFORE, IT IS HEREBY ORDERED AND ADJUDGED that Motion of the Defendant, Louisville Mega Cavern, LLC, for Summary Judgment against the Plaintiff, Jeff Backmeyer, is **DENIED**.

IT IS SO ORDERED this ____ day of _____, 2019.

/s/ HON. ANGELA MCCORMICK. BISIG
electronically signed
5/23/2019 2:08:57 PM

JUDGE ANGELA MCCORMICK BISIG
DIVISION TEN (10)
JEFFERSON CIRCUIT COURT

cc: Scott E. Karem
Douglas P. Dawson

APPENDIX TAB 13

PROTECTING

Zip-Line Workers

OSHA® Occupational Safety and Health Administration

Recreational zip-lining

is a popular activity found at places such as parks, summer camps, amusement parks, and resorts. While many enjoy zip-lines, working around them can be dangerous. Workers may be injured or killed by:

- Falls
- Colliding with riders
- Getting entangled with ropes
- Catching nip points (pinch points) on rotating parts

Employers are responsible for providing free protective equipment such as:

- Harnesses or lanyards attached to an anchor or line. Seat harnesses may only be used in conjunction with safety nets or with lines that prevent workers from moving beyond the edge.
- Guardrails
- Safety nets
- Helmets
- Gloves

Industry Standard	
When freefall is potentially:	
Greater than 2 feet	Full body harness attached at center back with a shock absorbing lanyard
Less than 2 feet	Full body harness attached at center back or front

Employers must train workers to:

- Identify fall or other hazards including riders moving down the line.
- Inspect, test and use fall protection systems and protective equipment.
- Always connect to a line or anchor when working at heights.
- Follow the manufacturer's instructions for equipment use, inspection and maintenance.
- Recognize and report equipment defects.
- Safely interact with zip-line riders (e.g., guiding and catching, as well as rescue operations).
- Safely operate the course per company policy.

Employers must:

- Check the worksite for possible workplace hazards.
- Maintain all equipment.
- Provide safe means of access to the platform.
- Check platforms and lines regularly (e.g., before each work shift and before each use) to identify and fix unsafe conditions.
- Provide protective equipment that properly fits each worker and is in good working condition.
- Ensure that fall protection systems are installed, used and properly maintained.
- Instruct participants on zip-lining procedures that are intended to keep workers safe.

Employers and workers should consult ANSI/PRCA American National Standard (ANS) 1.0-.3-2014, "Rope Challenge Course Operation & Training Standards" and "ANSI/ACCT 03-2016 Challenge Course/Zip Line Tours Standards" when selecting, evaluating and using zip-line specific safety systems.

Stay connected to a line when working at heights.

As a worker, you have the right to:

- A safe and healthy workplace. Your employer is required to provide a workplace that does not put you at risk of injury, illness or death.
- Say something about safety concerns without being punished. If you see hazards or an injury, speak up! By law, your employer cannot retaliate against you for exercising your rights.
- Receive information and training in a language and vocabulary you understand. This includes information on workplace hazards, how to prevent them, and the OSHA standards that apply to your workplace.
- Ask OSHA to inspect your workplace if you think it's dangerous. To request an inspection, call 1-800-321-OSHA (6742).

Cover photo: Challenge Designs (CDI)

Do you have a safety concern? Call OSHA. We can help. It's confidential.

U.S. Department of Labor

OSHA®

Occupational Safety and Health Administration

1-800-321-OSHA (6742) • www.osha.gov

OSHA 3845-08 2016

APPENDIX TAB 14

KENTUCKIANA
COURT REPORTERS

CASE NO. 18-CI-004436

ANTHONY BRADLEY, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OFMITZI WESTOVER,

V.

LOUISVILLE MEGA CAVERN, LLC, ET AL.

DEPONENT:

JEREMIAH HEATH

DATE:

December 29, 2020

JEFFERSON CIRCUIT COURT

DIVISION TWO (2)

JUDGE ANNIE O'CONNELL

CASE NO. 18-CI-004436

ANTHONY BRADLEY,

INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF

MITZI WESTOVER,

PLAINTIFF

V.

LOUISVILLE MEGA CAVERN, LLC, ET AL.,

DEFENDANTS

DEPONENT: JEREMIAH HEATH

DATE: DECEMBER 29, 2020

REPORTER: VICTORIA JADICK

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APPEARANCES

ON BEHALF OF THE PLAINTIFF, ANTHONY BRADLEY, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF MITZI WESTOVER:

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APPEARANCES (CONTINUED)

ON BEHALF OF THE DEFENDANTS, LOUISVILLE MEGA CAVERN, LLC AND LOUISVILLE UNDERGROUND, LLC:

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ALSO PRESENT: CHELSEA STAPLES, VIDEOGRAPHER

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EXHIBITS

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PREVIOUSLY MARKED EXHIBITS

PREVIOUSLY MARKED EXHIBITS (CONTINUED)

STIPULATION

The VIDEO deposition of JEREMIAH HEATH, CORPORATE REPRESENTATIVE, taken at MORGAN & MORGAN, 420 WEST LIBERTY STREET, SUITE 260, LOUISVILLE, KENTUCKY 40202, on TUESDAY, the 29th day of DECEMBER, 2020, at approximately 9:29 a.m.; said VIDEO deposition was taken pursuant to the KENTUCKY Rules of Civil Procedure. It is agreed that VICTORIA JADICK, being a Notary Public and Court Reporter for the State of KENTUCKY, may swear the witness.

PROCEEDINGS

VIDEOGRAPHER: We are now on the record. My name is Chelsea Staples. I'm the video technician today, and Victoria Jadick is the court reporter. Today is the 29th day of December 2020, and the time now is 9:29 a.m. We're at the offices of Morgan & Morgan, Louisville, Kentucky 40220 [sic], to take the deposition of Jeremiah Heath, Louisville Mega Cavern, LLC, Corporate in the matter of Anthony Bradley individually and the administrator of the estate of Mitzi Westover versus Louisville Mega Cavern, LLC et al, pending in the Circuit Court of Jefferson County, Kentucky, case number 18-CI-004436. Will Counsel please identify themselves for the record?

MR. STANLEY: I'm Brenton Stanley and Molly Stanley for the plaintiff.

MR. SMITH: Max Smith on behalf of the defendants.

VIDEOGRAPHER: Okay. Sir, will you please raise your right hand for the court reporter?

THE WITNESS: Uh-huh.

COURT REPORTER: Do you solemnly swear or affirm that the testimony you're about to give will

be the truth, the whole truth, and nothing but the truth?

THE WITNESS: I do.

COURT REPORTER: Thank you.

DIRECT EXAMINATION

BY MR. STANLEY:

Q Good morning, Mr. Heath.

A Morning.

Q We met yesterday morning via Zoom. I want to apologize to you and to everyone here that we have to be here in person today. It was my intent to do this remotely yesterday. Since the pandemic has been going on, I've done probably three dozen or so depositions via Zoom remotely, like we intended to do yesterday, but I suspect that the reason we couldn't get it done yesterday had something to do with the Nashville blast. Otherwise, it's just a really big coincidence that this is the first problem that I've had. So I want to apologize to you that we have to be here today. But because we are here in person, I'm completely understanding if you'd like to keep your mask on for the duration of this.

A Okay.

Q I also would be understanding if you wanted to take it off since you are on camera, and I won't

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to -- to adhere to those standards.
Q And you're saying it didn't have the force of law?
A Correct.
Q Okay. And I guess my question is a little bit different than that.
A Okay.
Q My question is, based on what we've seen in terms of -- from the industry standards and how folks were trained and what the response was, do you feel like the people at Louisville Mega Cavern that day complied with ACCT standards?
MR. SMITH: Object to form. You can answer.
A No. We -- we did not have anybody -- well, again, I would have to go into their personnel records to verify. Based on what you're saying, what you show me today, we did not have anybody certified which would have conformed to ACCT standards.
Q Do you recall telling any of the employees at Louisville Mega Cavern that they were not allowed to do CPR?
A Only the ones that did not have a certification.
Q So you told people who didn't have a CPR certification that they're not allowed to do CPR?

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A Yeah. As an emergency response, if you don't have the certification, we don't want you doing it and being liable for doing -- doing more damage.
Q Have you ever had to call 911 for somebody who needed CPR?
A Yes.
Q Did you know that 911 operators will actually walk you through the steps of doing CPR?
A No. I do not. I don't remember hearing that.
Q Okay. And the time that you had to call 911 for someone who needed CPR, can you tell me what the situation was?
MR. SMITH: Object to form. We're straining kind of outside of the notice here. I'll let him answer. Go ahead.
THE WITNESS: Go ahead?
A I believe it was at a swim meet, and there were already nurses present who immediately started performing the CPR. They had more certifications or more advanced certifications than the lifeguards present. So then 911 was called, and that was already in process.
BY MR. STANLEY:
Q Did that person make it?
A Yeah.

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MR. STANLEY: I think that's all the questions that I have. I'm going to turn it over to Mr. Smith.
MR. SMITH: Okay. You're done.
MR. STANLEY: Okay.
THE WITNESS: That's it?
VIDEOGRAPHER: Okay. Off the record at 3:24.
(EXHIBIT 1-11 MARKED FOR IDENTIFICATION)
(DEPOSITION CONCLUDED AT 3:24 P.M.)

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CERTIFICATE OF REPORTER

COMMONWEALTH OF KENTUCKY AT LARGE

I do hereby certify that the witness in the foregoing transcript was taken on the date, and at the time and place set out on the Title page hereof, by me after first being duly sworn to testify the truth, the whole truth, and nothing but the truth; and that the said matter was recorded by me and then reduced to typewritten form under my direction, and constitutes a true record of the transcript as taken, all to the best of my skill and ability. I certify that I am not a relative or employee of either counsel and that I am in no way interested financially, directly or indirectly, in this action.

VICTORIA JADICK,
COURT REPORTER/NOTARY
MY COMMISSION EXPIRES:01/28/2023
SUBMITTED ON: 01/07/2021

APPENDIX TAB 15

2021 WL 2272769
Only the Westlaw citation is currently available.

Unpublished opinion. See KY ST RCP Rule 76.28(4) before citing.

NOT TO BE PUBLISHED
Court of Appeals of Kentucky.

Micheal PIERSON, Appellant
v.
Stephanie HARTLINE and Liberty Mutual Fire Insurance Company, Appellees

NO. 2019-CA-1684-MR
|
JUNE 4, 2021; 10:00 A.M.

APPEAL FROM BOONE CIRCUIT COURT, HONORABLE JAMES R. SCHRAND, II, JUDGE, ACTION NO. 16-CI-01442

Attorneys and Law Firms

BRIEFS AND ORAL ARGUMENT FOR APPELLANT: Jay R. Vaughn, Sarah N. Emery, Fort Wright, Kentucky, Jonathan Rabinowitz, Lexington, Kentucky, Kevin C. Burke, Jamie K. Neal, Louisville, Kentucky.

BRIEF AND ORAL ARGUMENT FOR APPELLEE LIBERTY MUTUAL INSURANCE COMPANY: Douglas W. Langdon, Christopher G. Johnson, Allison W. Weyand, Louisville, Kentucky.

BRIEF AND ORAL ARGUMENT FOR APPELLEE STEPHANIE HARTLINE: Robert Steinmetz, Louisville, Kentucky, Samuel A. Gradwohl, Cincinnati, Ohio.

BEFORE: JONES, LAMBERT, AND L. THOMPSON, JUDGES.

OPINION

JONES, JUDGE:

***1** Appellant Micheal Pierson ("Pierson") brings this appeal following the jury verdict rendered in Boone Circuit Court in favor of Appellee Stephanie Hartline ("Hartline") and that court's subsequent dismissal of Pierson's bad faith claim against Hartline's insurer, Liberty Mutual Fire Insurance Company ("Liberty Mutual"), for violations of the Kentucky Unfair Claims Settlement Practices Act ("KUCSPA"). The trial court ruled that evidence of Pierson's suspended license was admissible at trial under KRS [1] 186.640. In *voir dire*, approximately twenty potential jurors indicated that Pierson's suspended license would affect their ability to render a fair and impartial decision. Although Pierson's counsel moved to strike sixteen of those jurors, the trial court excused only eight for cause. Pierson then used his peremptory strikes to remove three more of those jurors from the panel.

1 Kentucky Revised Statutes.

Evidence of Pierson's suspended license was referenced throughout the trial. At the end of trial, the jury returned with a unanimous verdict for Hartline, and the trial court subsequently dismissed Pierson's claim against Liberty Mutual under CR [2] 12.02. For the reasons set forth below, we reverse and remand for a new trial and reinstate Pierson's bad faith claim pending the outcome of the new trial.

2 Kentucky Rules of Civil Procedure.

I. BACKGROUND AND PROCEDURAL HISTORY

On December 28, 2014, Pierson and two friends, Torin DeJoy and Rob Fogelsong, went for a motorcycle ride westbound on KY 20/Petersburg Road, a two-lane road in Petersburg, Boone County, Kentucky. At the same time, Hartline and her family departed their home at around 4:30 p.m. on a trip to the grocery store. Hartline and her two children rode in her 2015 Chevrolet Suburban eastbound on Petersburg Road, while her husband followed behind in his own vehicle.

Pierson and Hartline entered into a curve in the road at the same time, travelling in opposite directions, and collided. Upon impact, Pierson was thrown from his motorcycle into a roadside ditch. Pierson sustained devastating injuries, including multiple open fractures on his left arm and torn ligaments and menisci in his right knee. As a result, Pierson underwent surgery and to date has accumulated $72,542.90 in medical bills; he will require additional, future surgery.

The parties dispute which vehicle crossed the centerline, causing the collision. DeJoy, who rode his motorcycle behind Pierson, testified that he saw Hartline's Suburban cross the centerline into Pierson's lane of travel, causing the collision. Hartline's husband, Jeff, who drove his own vehicle behind

his wife's, testified that Hartline was "entirely in her lane" at impact and said it "looked like the motorcycle failed to turn and just went straight" instead of curving to the right with the roadway. Both parties presented testimony from accident reconstruction experts interpreting the physical evidence at the scene of the accident, most notably an extended gouge mark beginning in Hartline's lane that Hartline argued was created by her vehicle's steering component that was damaged in the accident.

***2** On October 26, 2016, Pierson filed a negligence claim against Hartline in Boone Circuit Court. On August 29, 2019, he amended that complaint to assert a bad faith claim against Hartline's insurer, Liberty Mutual, for alleged violations of the KUCSPA. The trial court bifurcated the claims against Liberty Mutual, and the claims against Hartline proceeded to trial.

Before trial, Pierson filed a motion *in limine* asking the trial court to preclude Hartline from presenting evidence regarding Pierson's suspended license. Pierson had testified during his pretrial deposition that his Florida motorcycle operator's license was suspended at the time of the crash for failure to pay fines.

> Q: You had told – you testified earlier, early on in your deposition that at the time of this crash your motorcycle license had been suspended due to failure to pay a ticket; is that accurate?
>
> A: Correct.
>
> Q: What was that fine or that ticket for?
>
> A: For the light coming over – it was a nonmoving violation.
>
> Q: Okay. The ticket you received had nothing to do with the operation of a motorcycle?
>
> A: No.
>
> Q: It was an equipment issue?
>
> A: Right. It was a light, yeah.
>
> Q: Okay. And because the light or I guess the ticket hadn't been paid, your license got suspended?
>
> A: Correct.
>
> Q: Any other reasons that you had a suspended motorcycle license other than an equipment issue?
>
> A: It was a failure to pay tickets, and they were all nonmoving violations except for the failure to maintain lane ... [referring to his testimony just two pages earlier, "When I was like 19 or 20, I got a failure to maintain lane. It was – it looked like a turn lane, but it wasn't a turn lane. I got a ticket for that."].

Pierson Deposition at 81-83.

Pierson argued that evidence of his suspended license was irrelevant pursuant to KRE [3] 401 and unduly prejudicial pursuant to KRE 403. Citing *Rentschler v. Lewis*, 33 S.W.3d 518, 520 (Ky. 2000), Pierson pointed out the Kentucky Supreme Court previously held that even under KRS 186.640, such evidence is generally inadmissible because it has no bearing on whether the person was negligently operating his or her vehicle in such a way as to cause the accident at issue.

3 Kentucky Rules of Evidence.

On August 14, 2019, the trial court denied Pierson's motion, explaining:

> As noted in *Tipton v. Estill Ice Co.*, 132 S.W.2d 347 (1939), KRS 186.640 purports only to create a rebuttable presumption, which serves only to require the party against whom it operates to introduce evidence to rebut it. If this burden of going forward is not satisfied, the party in whose favor the presumption operates is entitled to a directed verdict. If the burden is satisfied, the presumption disappears and plays no further role in the case. *Rentschler*[, 33 S.W.3d at] 520-21. The Court finds that KRS 186.640 creates a rebuttable presumption of negligence for a driver with a suspended license and, therefore, testimony as to the suspension of Plaintiff's license shall be allowed.

Record ("R.") at 511.

Pierson then filed a motion seeking clarification of the trial court's order regarding the timing of when such evidence could be produced. Specifically, Pierson argued that the evidence of the suspended license should not be allowed until Pierson had the opportunity to rebut the presumption, therefore precluding any admission or mention of the issue during *voir dire*, opening statements, or Pierson's case-in-chief.

***3** On the morning of August 19, 2019, the first day of trial, the trial court took up Pierson's motion for clarification. Pierson argued that allowing such evidence would violate KRE 609 as Kentucky only allows evidence of a crime if it was "punishable by death or imprisonment for one (1) year or more under the law under which the witness was convicted." Pierson also challenged the constitutionality of KRS 186.640 as arbitrary and capricious in violation of Sections 1, 2, and 3 of the Kentucky Constitution, violating the separation of powers doctrine in Sections 27 and 28 of the Kentucky Constitution, and infringing on the exclusive rulemaking authority of the Court for practice and procedures in Sections 109 and 116 of the Kentucky Constitution.

Ultimately, the trial court rejected Pierson's arguments, ruling that "the statute says what it says." Video Record ("VR") 8/19/19 at 9:08:30-9:09:00. As the trial court interpreted the statute, KRS 186.640 allows reference to the suspended license at any point during the trial.

In light of the trial court's ruling, Pierson's counsel preemptively brought up the fact that Pierson was operating his motorcycle with a suspended license during *voir dire.* When asked whether Pierson would be "starting out on a level playing field" in light of the fact that he was "operating on a suspended license" on the day of the crash, a majority of the potential jurors indicated that there would be a "strike against [Pierson] starting out." VR 8/19/19 at 9:37:00-9:42:30. Ultimately, twenty jurors were called to the bench for further questioning about their admitted predisposition against Pierson. Pierson's counsel moved to strike sixteen of those jurors; of those sixteen, the trial court excused only eight for cause. The remaining eight jurors all expressed a bias against Pierson to some degree based on his suspended license. [4] However, upon questioning at bench, each of these jurors (122, 219, 383, 238, 55, 214, 399, and 226) confirmed upon further questioning that they could be fair and impartial and render a verdict based on all of the evidence presented.

4 Regarding their perceived biases, the remaining eight jurors expressed:

> Juror 122: stated his belief that "if you're not allowed to do it, don't do it"; the suspension is "not a major strike, but it's a strike";
>
> Juror 219: stated that she would worry about his suspended license; Pierson is at least "50%" at fault; "it's always in the back of her mind";
>
> Juror 383: the license suspension would weigh about "25%" against Pierson;
>
> Juror 238: driving on a suspended license is "breaking the law"; "you're on the road and you're not supposed to be"; "it's a factor"; "3" out of ten against Pierson;
>
> Juror 55: the suspension makes it "difficult"; "he was out on the road illegally"; "it may be a difficulty" at the end;
>
> Juror 214: would have a "15%" "negative" predisposition against Pierson;
>
> Juror 399: the license suspension "bothers her" because Pierson broke the law; she's a "rule follower"; she's in a "gray area";
>
> Juror 226: she's "already judging him"; the license suspension would "impact" how she would view the case.

VR 8/19/19 at 9:46:46, 9:54:00, 10:05:00, 10:19:14, 10:22:10, 10:30:50, 10:33:33, 10:40:49.

Pierson used his three peremptory strikes to remove Jurors 219, 55, and 226, and indicated on his strike sheet that he would have removed three other jurors who ultimately served on the panel. This left five jurors sitting on Pierson's jury – Jurors 383, 238, 214, 122, and 399 – who had expressed doubts regarding the license suspension.

Both parties made reference to Pierson's suspended licensed throughout the trial. During opening statements, Hartline's counsel reminded jurors that Pierson "had no driver's license, as we all know.... It had been suspended for at least six years prior to this accident." VR 8/19/19 at 1:56:19-1:56:26. On cross-examination, Hartline's counsel asked DeJoy whether he knew if Pierson had a motorcycle license on the day of the accident. Hartline's counsel also questioned Pierson regarding his license suspension, eliciting testimony that Pierson knew his license was suspended and had still been operating his motorcycle during that suspension on a regular basis. Finally, Hartline's counsel returned to the subject at the beginning of closing, stating that "Pierson hadn't had a driver's license in years," and that he was "unable to operate a motorcycle." VR

8/22/19 at 9:17:13-9:17:48. Hartline's counsel further opined that "[i]f [Pierson] just would have been obeying the law that states that he cannot operate a motorcycle or motor vehicle without a license, this accident doesn't take place." *Id.*

***4** The jury returned a unanimous verdict in favor of Hartline. Hartline's duty of care was addressed in Question No.1 of the jury instructions:

> Do you find from the evidence that Stephanie Hartline violated any of her duties enumerated in Instruction No. 3 AND such failure was a substantial factor in causing the motor vehicle accident on December 28, 2014?

R. at 575.

Below that, the instructions stated: "If you have answered 'no' to Question No. 1, your verdict is complete." Having answered "no," the jury did not reach the issue of whether Pierson had breached his duty of care and instead returned to the courtroom. On September 16, 2019, the trial court entered a judgment consistent with that verdict.

Approximately one week later, Pierson moved for judgment notwithstanding the verdict, or in the alternative, a new trial. On October 17, 2019, the trial court denied that motion:

> [Pierson] first argues that this Court should have granted his motion to prohibit references to the suspension of the Plaintiff's driver's license. He argues that this evidence was irrelevant and inadmissible, and, by ruling against [Pierson], the Court permitted evidence that had no bearing on whether [Pierson] operated his vehicle in a negligent way to be introduced. As argued by [Hartline], [Pierson] elicited testimony that he was a capable and competent motorcycle operator. Additionally, [Pierson's] expert Neil Gilreath, an accident reconstructionist, opined that [Pierson] was a seasoned rider as he has been riding since he was in grade school, and that he was positioned properly in [the] left one-third of his lane when the accident occurred.
>
> ....
>
> The Court still finds that KRS 186.640 creates a rebuttable presumption of negligence for a driver with a suspended license and, based on the evidence presented by [Pierson] as noted above, testimony as to the suspension of [Pierson's] license was properly allowed.
>
> [Pierson] next argues that this Court should have held that KRS 186.640 is unconstitutional in three ways. First, that it is it is [sic] arbitrary and capricious in violation of Sections 1,2, [sic] and 3 of the Constitution. Second, that it violates the separation of powers doctrine in Sections 27 and 28 of the Kentucky Constitution. Finally, that it infringes on the exclusive rulemaking authority of the Court for practice and procedures in Section 109 and 116 of the Kentucky Constitution. The Court does not find it appropriate to declare KRS 186.640, as based on the above analysis, the Court finds testimony about the license suspension was relevant and probative and not unduly prejudicial [sic].
>
> [Pierson] further argues that this Court should have prohibited evidence of the suspended license under KRE 609 as a suspended license is not a felony. The Court finds that this argument is not well-taken, in that the evidence of the suspended license was not used to show that [Pierson] had a criminal background, but rather to dispute [Pierson's] evidence that he was a capable driver and competent motorcycle operator.
>
> Lastly, [Pierson] argues that the Court by failing to grant the entirety of [Pierson's] Motions to Strike for Cause, a jury was impaneled that was prejudicial to [Pierson]. In support, he argues that during *voir dire* several jurors indicated that they would not be entering the trial giving both sides a level playing field, even indicating percentages to which [Pierson] would be starting at a deficit. [Pierson] contends that, although each juror said they could be fair and impartial, they should still have been stricken from the panel because their previous answers were not rehabilitated. [Pierson] argues that as the Court only excused eight jurors for cause, denying seven to nine of [Pierson's] challenges for cause, [Pierson] was forced to use three peremptory strikes to remove jurors who should have been excused for cause, resulting in three jurors who should have been stricken for cause making it onto the jury. "To determine whether a reasonable ground existed to doubt a challenged juror's ability to render a fair and impartial verdict, the trial court must weigh the probability of bias or prejudice based on the entirety of the juror's responses and demeanor." *Sturgeon v. Commonwealth*, 512 S.W.3d 189, 195. "In the final analysis, whether to excuse a juror rests upon the sound discretion of the trial court." *Id.* at 192. This Court finds that the jurors empaneled had the ability to

render a fair and impartial verdict based on their responses during *voir dire.*

***5** This Court finds [Pierson's] arguments and current statutory and case law do not provide grounds to vacate its previous decisions or the verdict rendered by the Jury.

R. at 658-60.

Shortly thereafter, Liberty Mutual moved pursuant to CR 12.02 to dismiss Pierson's bad faith claim against it as the underlying case had been resolved in favor of Hartline. The trial court granted the motion:

Liberty Mutual argues that [Pierson's] claims are not sustainable in light of the jury's verdict in favor of Ms. Hartline. They contend that [Pierson] cannot establish the type of wrongful conduct necessary to satisfy the threshold for bad faith liability because the jury refuted Hartline's liability, Liberty Mutual does not have an obligation to pay [Pierson's] claim under the terms of the applicable insurance policy [sic].

[Pierson] objects to the request for dismissal, arguing that it is premature to render a decision as, at the time of the filing of his response, there were pending post-trial motions that had not been ruled on by the Court. As the motions referenced have now been denied by this Court, the Court finds this argument moot. [Pierson] further argues that his pending appellate remedies also make it premature for the Court to rule on the underlying motion. The Court disagrees. [Pierson] has set forth no further grounds for denial of [Liberty Mutual's] motion to dismiss.

R. at 677-78.

Pierson timely appealed.

II. STANDARDS OF REVIEW

"When construing a statute, this Court is presented with an issue of law which we address *de novo.*" *Jefferson County Bd. Of Educ. v. Fell*, 391 S.W.3d 713, 718 (Ky. 2012) (citing *Cumberland Valley Contractors, Inc. v. Bell County Coal Corp.*, 238 S.W.3d 644, 647 (Ky. 2007)). "In reviewing the trial court's ruling on evidentiary issues, the appellate court applies an abuse of discretion standard." *Summe v. Gronotte*, 357 S.W.3d 211, 213 (Ky. App. 2011) (citing *Barnett v. Commonwealth*, 317 S.W.3d 49, 61 (Ky. 2010)).

"The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999) (citations omitted). The test is not whether an appellate court would have decided the matter differently, but whether the trial court's rulings were clearly erroneous or constituted an abuse of discretion. *Cherry v. Cherry*, 634 S.W.2d 423, 425 (Ky. 1982). Reversal is only warranted if the error, unless corrected, would prejudice the substantial rights of a party. *Davis v. Fischer Single Family Homes, Ltd.*, 231 S.W.3d 767, 776 (Ky. App. 2007). A substantial possibility that the jury verdict would have been different had the excluded evidence been allowed to be presented must exist. *Crane v. Commonwealth*, 726 S.W.2d 302, 307 (Ky. 1987); CR 61.01, KRE 103. Additionally, alleged errors regarding jury instructions are considered questions of law examined under a *de novo* standard of review. *Hamilton v. CSX Transp., Inc.*, 208 S.W.3d 272, 275 (Ky. App. 2006).

Porter v. Allen, 611 S.W.3d 290, 294 (Ky. App. 2020) (footnote omitted).

Our Court reviews a trial court's CR 12.02 dismissal *de novo. Seiller Waterman, LLC v. RLB Properties, Ltd.*, 610 S.W.3d 188, 195 (Ky. 2020); *Hardin v. Jefferson County Bd. of Educ.*, 558 S.W.3d 1, 5 (Ky. App. 2018).

III. ANALYSIS

***6** Pierson presents several issues on appeal: (1) the trial court erred in admitting evidence of Pierson's suspended license; (2) the trial court erred in failing to exclude jurors for cause; and (3) the trial court erred in dismissing his bad faith claim against Liberty Mutual. Because we disagree with the trial court's interpretation of KRS 186.640 and its subsequent evidentiary ruling regarding the suspended license, we need not address the issue of jury selection.

At the heart of this appeal is KRS 186.640, which provides:

> Any driver involved in any accident resulting in any damage whatever to person or to property who is ineligible to procure an operator's license, or

> being eligible therefor has failed to procure a license, or whose license has been canceled, suspended or revoked prior to the time of the accident, shall be deemed *prima facie* negligent in causing or contributing to cause the accident.

Our courts have limited the application of KRS 186.640 since its inception. Just three years after the statute was enacted (then KS § 2739m–62), the former Court of Appeals addressed whether the rebuttable presumption created by KRS 186.640 requires a corresponding jury instruction. In *Tipton v. Estill Ice Company*, 279 Ky. 793, 132 S.W.2d 347 (1939), an unlicensed driver was involved in an accident and was sued for negligence. *Id.* at 349. The *Tipton* Court declined to require an instruction and "unhesitatingly h[e]ld that it was not competent for the Legislature to make the mere failure to secure operator's license *prima facie* evidence that the driver involved in an accident was negligent in causing or contributing to such accident." *Id.* at 350. The Court further noted that there was no showing that the driver was ineligible to procure a license,[5] and "the mere failure ... to procure an operator's license prior to the accident had no 'natural and rational evidentiary relation to – or a logical tendency to prove the principal act.' " *Id.* (quoting *Commonwealth v. Kroger*, 276 Ky. 20, 122 S.W.2d 1006, 1007 (1938) ("Moreover, the right to prescribe for a rebuttable one is qualified to this extent—that the prescribed facts for creating the *prima facie* presumption shall have 'a natural and rational evidentiary relation' to, and a logical tendency to prove, the principal fact.")). Accordingly, the failure to procure a license is irrelevant and not *prima facie* evidence when the failure does not have a dispositive effect on the cause of action.

[5] At this time, the *Tipton* Court appeared to differentiate between failure to procure an operator's license and having had an operator's license suspended or revoked. *Tipton*, 132 S.W.2d at 350.

In 2000, our Supreme Court had occasion to address KRS 186.640 in *Rentschler v. Lewis*, *supra*, this time in application to a suspended license. In *Rentschler*, it was discovered that the defendant involved in a parking lot collision had had his license suspended for "failure to attend alcohol classes following a prior alcohol-related motorcycle accident[.]" *Rentschler*, 33 S.W.3d at 519. The trial judge held the evidence of the suspended license inadmissible and refused to provide a jury instruction regarding the rebuttable presumption created by KRS 186.640. *Id.* In its discussion, the *Rentschler* Court discussed the admissibility of a suspended license under KRE 401 and KRS 186.640 in tandem:

> Prior to [the enactment of KRS 186.640], our predecessor Court had held in *Moore v. Hart*, 171 Ky. 725, 188 S.W. 861 (1916) that evidence that a motor vehicle was unregistered and its operator unlicensed, both in violation of applicable statutes, was inadmissible "unless such violation has some causal connection with the producing of the injury." *Id.*, 188 S.W. at 864. Some sixteen years after the enactment of KRS 186.640, our predecessor Court held in *Baber v. Merman*, Ky., 249 S.W.2d 142 (1952) that "evidence that the plaintiff ... had no driver's license was irrelevant" to the issue of contributory negligence. *Id.* at 144. These cases are consistent with the definition of relevancy now contained in KRE 401, *viz*:
>
> > ***7** "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.
>
> The fact of consequence in this case is whether the manner in which [the defendant] operated his vehicle was a substantial factor in causing the accident. His status as a licensed or unlicensed driver would not tend to prove or disprove that fact. Therefore, the trial judge *correctly concluded that such evidence was irrelevant*, thus inadmissible.

33 S.W.3d at 519 (emphasis added).

The *Rentschler* Court explained that evidence of a suspended license, even in light of KRS 186.640, is only relevant if it tends to prove or disprove that the manner in which the person operating the vehicle at issue was a substantial factor in causing the collision. If a suspended license is not a "fact of consequence" in whether a driver operates his vehicle in a negligent manner, evidence of that suspension is irrelevant and, therefore, inadmissible.

Consequently, we must determine whether the trial court appropriately allowed references to Pierson's suspended

license. "It is within the discretion of the trial court to determine whether the probative value of proffered evidence is substantially outweighed by undue prejudice." *Kroger Co. v. Willgruber*, 920 S.W.2d 61, 67 (Ky. 1996) (citing *Ford Motor Co. v. Fulkerson*, 812 S.W.2d 119 (Ky. 1991)).

> All relevant evidence is admissible, except as otherwise provided[.] "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of undue prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence. The inclusionary thrust of the law of evidence is powerful, unmistakable, and undeniable, one that strongly tilts outcomes toward admission of evidence rather than exclusion. The language of KRE 403 is carefully calculated to leave trial judges with extraordinary discretion in the application and use of [KRE 403].

Probus v. Commonwealth, 578 S.W.3d 339, 346-47 (Ky. 2019) (internal quotation marks and citations omitted).

The trial court found that, without distinction, KRS 186.640 "creates a rebuttable presumption of negligence for a driver with a suspended license, and, therefore, testimony as to the driver's license shall be allowed." R. at 511. Without addressing *Rentschler*'s acknowledgement that evidence of a suspended license may be irrelevant and therefore inadmissible under certain circumstances, the trial court also later agreed with Hartline's averment that this evidence shows Pierson's inexperience and lack of competency riding a motorcycle.

We, like the *Rentschler* Court, cannot agree with this logic. Although Hartline maintains that the suspended license proves that Pierson had not ridden a motorcycle in years, the very collision at the center of this litigation disproves that line of logic. Although Hartline claims the suspended license proves Pierson's inexperience riding a motorcycle, her own counsel elicited testimony from Pierson that he routinely operated motorcycles both before and after the collision while his license was suspended. The evidence affirmatively established that Pierson continued to ride motorcycles despite his unlicensed status and had done so for years. Therefore, we cannot conclude that the suspended license was relevant with respect to whether Pierson was an experienced rider.

***8** Moreover, Pierson's license was suspended only for failure to pay ticket fines; therefore, all the suspension denotes is that Pierson did not pay his fines as required. The trial court noted that one of those tickets, received when Pierson was a teenager, was for failure to maintain lane. However, the suspension was solely for failure to pay ticket fines; had Pierson paid his fines as required, any evidence of this traffic violation would have been barred under KRE 609 and KRE 403. *Price v. Bates*, 320 S.W.2d 786, 789 (Ky. 1959) ("[T]he courts have generally refused to permit the cross-examination of a driver in civil actions as to prior arrests or convictions for traffic offenses, on the ground that the introduction of such evidence would lead to a consideration of collateral issues having no bearing on the question of a driver's negligence in the accident under consideration.").

To the extent that Pierson's suspended license is relevant to Pierson's skill as a motorcyclist, the trial court must still consider whether there is other, less prejudicial evidence that may be used to support the same proposition. *See, e.g.*, *Hall v. Commonwealth*, 468 S.W.3d 814, 824 (Ky. 2015) ("[I]n exercising its discretion under Rule 403, a trial court must consider in the balancing test ... other available evidence to prove the fact in issue."). Here, Hartline had other avenues through which to allege that Pierson was not an experienced rider, which she did in fact utilize. For example, Hartline's accident reconstructionist testified regarding a taped interview of Fogelsong upon which he relied in rendering his expert opinion. In that interview, Fogelsong stated that he believed Pierson to be an inexperienced motorcycle rider. Fogelsong, who had only just met Pierson on the day of the accident, expressed that he was not confident in Pierson's skills riding the high horse-powered motorcycle he rode that day.

"Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of undue prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence." KRE 403. The former high court has previously found evidence of traffic violations to be so prejudicial as to require reversal in civil cases. *Price*, 320 S.W.2d at 789 ("We consider the evidence [of traffic violations] not only highly incompetent but of such prejudicial nature that, standing alone, it constitutes a sufficient reason for reversal of the judgment in this case.").

Here, the unduly prejudicial nature of the suspended license is illustrated by Hartline's closing argument. Hartline's counsel argued in closing, "If he just would have been obeying the law that states that he cannot operate a motorcycle or motor vehicle without a license, this accident doesn't take place." VR 8/22/19 at 9:17:13. This same argument that a defendant's "status as an unlicensed driver was relevant because he 'had no legal right to be on the highway when the accident occurred,' " was condemned by *Renztler* as "cruel and almost savage[.]" *Rentschler*, 33 S.W.3d at 519-20 (citations omitted).[6] Notwithstanding any probative value in introducing evidence of Pierson's suspended license, we hold that it is substantially outweighed by its prejudicial effect and should have been excluded pursuant to KRE 403.

6 Pierson challenges the constitutionality of KRS 186.640 facially and as applied by the trial court. Because we disagree with the trial court's interpretation of KRS 186.640 and the applicable case law, we need not address Pierson's constitutional challenge. As discussed by *Rentschler*, "the legislature [is] competent to create statutory presumptions, [so long as] the right to provide for a rebuttable presumption is qualified to the extent that the prescribed facts for creating the prima facie presumption shall have a natural and rational evidentiary relation to, and a logical tendency to prove, the principal fact." 33 S.W.3d at 520 (internal quotation marks and citations omitted). Pierson's argument that KRS 186.640 discriminates against individuals who cannot afford to pay their motor vehicle fines, as Pierson alleges he was unable, is rendered immaterial by the *Rentschler* and *Tipton* Courts' interpretations of KRS 186.640.

***9** Hartline argues that even if admission of the suspended license was erroneous, it was harmless error due to the nature of the jury instructions. According to Hartline, this is so because the jury ultimately only reached the instruction of whether Hartline had breached her duty of ordinary care. "The test for harmless error is whether there is any reasonable possibility that absent the error the verdict would have been different." *Renfro v. Commonwealth*, 893 S.W.2d 795, 797 (Ky. 1995), *abrogated on other grounds by* *Stringer v. Commonwealth*, 956 S.W.2d 883 (Ky. 1997) (citing *Crane v. Commonwealth*, 726 S.W.2d 302 (Ky. 1987)). "[I]f upon a consideration of the whole case this court does not believe there is a substantial possibility that the result would have been any different, the irregularity will be held nonprejudicial." *Matthews v. Commonwealth*, 163 S.W.3d 11, 27 (Ky. 2005) (citation omitted).

Hartline relies upon *Renfro* in arguing that the error committed by the trial court was ultimately harmless. In *Renfro*, the court permitted an expert witness to testify that the appellant caused the collision as opposed to clarifying for the jury which factors the jury could use to determine causation. *Renfro*, 893 S.W.2d at 797.

> The testimony by the witness was a *single statement.* In reviewing the record, *the evidence against Appellant was overwhelming.* Law enforcement officers saw Appellant driving his vehicle erratically and at a high rate of speed. Toxicology reports established that Appellant was highly intoxicated. Witnesses saw Appellant's car, traveling very fast and in the passing lane, enter the intersection against the red light and strike a second vehicle, which then hit the victim.

Id. (emphasis added).

In comparison, evidence of the suspended license in this case was brought up in *voir dire*, opening statements, witness testimony, and closing arguments. Strategically, Pierson was forced to establish during *voir dire* that he was on the road illegally, even if it had little to no bearing on his

ability to operate his vehicle. Moreover, Hartline's counsel was permitted to argue in closing that if Pierson had been following the law and not operating a motorcycle without a license, the accident would not have occurred. The case before us is a "he said, she said" case. Pierson and Hartline both presented evidence that they were not at fault, ultimately making this case one of credibility. Thus, the jury's determination that it believed Hartline and that she did not breach her duty of ordinary care necessarily determines that it did not believe Pierson. We find that it is reasonably possible that Pierson's suspended license affected his credibility.

Hartline also argues that Pierson "opened the door" to the admission of his suspended license by raising the issue first during *voir dire* and thereby waived any objection. She relies upon *Asher v. Commonwealth*, 275 S.W.2d 416, 418 (Ky. 1955), in which the appellant "made no objection" at trial but then complained on appeal. In rejecting that argument, the Court noted the lack of objection and that the appellant also introduced the same evidence himself. *Id.* at 418-19. In the present case, the trial court denied Pierson's motion *in limine* to exclude the evidence entirely and ruled prior to the start of trial that KRS 186.640 would allow reference to Pierson's suspended license at any point throughout the trial. Our Supreme Court has explained that a motion *in limine* preserves the objection regardless of a party's choice to act first in introducing the unfavorable evidence:

> The evidence as presented through the plaintiffs' case obviously prejudiced the jury's award. Left for the defendant to present after the plaintiffs had apparently concealed it, such evidence would have been even more devastating, adding insult to injury. The appellee argues that we should not assume that if the plaintiffs had not gone forward with this evidence the defendant would have done so. If such was not the defendant's intention, the time to say so was when the motion to exclude the evidence was made, thus mooting the issue. The likelihood the defendant would not present this evidence after prevailing against the motion *in limine* borders on absurdity.

***10** *O'Bryan v. Hedgespeth*, 892 S.W.2d 571, 574 (Ky. 1995). If Pierson had not raised the suspended license in *voir dire*, he would have lost all opportunity to exclude potential jurors with prejudices from the jury.

Finally, we address the trial court's dismissal of Pierson's bad faith claim under CR 12.02.[7] "CR 12.02(f) is designed to test the sufficiency of a complaint[,]" and it is proper to grant such a motion only if "it appears the pleading party would not be entitled to relief under any set of facts which could be proved in support of his claim." *Hardin*, 558 S.W.3d at 5; *James v. Wilson*, 95 S.W.3d 875, 883-84 (Ky. App. 2002). Although Pierson requested that the trial court deny Liberty Mutual's motion to dismiss pending the outcome of his post-trial motions and appellate review, the trial court granted Liberty Mutual's motion to dismiss "in light of the jury's verdict" in favor of Hartline. R. at 677.

7 Pierson claims that reversal is required because "Liberty Mutual did not truly challenge Pierson's complaint against it, but rather made a motion for summary judgment couched as a motion to dismiss." Appellant's Brief at 21. However, Liberty Mutual explicitly requested in its motion to dismiss that the trial court take judicial notice of the pleadings before it, including the jury's verdict and the judgment for Hartline. Our Court has expressly recognized that considering matters of public record, including pleadings in the trial court record, does not convert a motion to dismiss into a motion for summary judgment. *Netherwood v. Fifth Third Bank, Inc.*, 514 S.W.3d 558, 563-64 (Ky. App. 2017).

"An insurer's violation of the UCSPA creates a cause of action both for the insured as well as for those who have claims against the insureds, and the same standard applies in both types of cases." *Gale v. Liberty Bell Agency, Inc.*, 911 F. Supp. 2d 488, 495 (W.D. Ky. 2012).

> To succeed on [a] third-party suit, our decision in *Wittmer v. Jones*[, 864 S.W.2d 885 (Ky. 1993)] requires [a plaintiff] to show that: (1) the insurer must be obligated to pay the claim under the terms of the policy; (2) the insurer must lack a reasonable basis in law or fact for denying the claim; *and* (3) it must be shown that the insurer either knew there was no reasonable basis for denying

> the claim or acted with reckless disregard for whether such a basis existed[.] Proof of this third element requires evidence that the insurer's conduct was outrageous, or because of his reckless indifference to the rights of others.
>
> Use of the conjunctive "and" in our *Wittmer* test is quite revealing—it combines the individual items of *Wittmer*, creating a prerequisite that all elements of the test must be established to prevail on a third-party claim for bad faith under the KUCSPA.

Hollaway v. Direct Gen. Ins. Co. of Mississippi, Inc., 497 S.W.3d 733, 737-38 (Ky. 2016) (internal quotation marks, footnotes, and citations omitted).

With regard to the first *Wittmer* element, whenever liability is not "beyond dispute," a "defendant ha[s] a right to litigate its case" and is under "no duty to make an offer" unless and until it becomes "beyond dispute." *Lee v. Medline Protective Co.*, 904 F. Supp. 2d 648, 652 (E.D. Ky. 2012) (an insurer "is entitled to challenge a claim and litigate it if the claim is debatable on the law or the facts.") (citation omitted); *see also* *Empire Fire & Marine Ins. Co. v. Simpsonville Wrecker Serv., Inc.*, 880 S.W.2d 886, 890 (Ky. App. 1994). "[T]he injured person must first establish his claim against the wrongdoer in his action for negligence and thereafter be assured of the fruits of his victory by being permitted to collect from the indemnity company." *N.Y. Indem. Co. v. Ewen*, 221 Ky. 114, 298 S.W. 182, 185 (1927). In *Pryor v. Colony Insurance*, 414 S.W.3d 424, 432-33 (Ky. App. 2013), our Court explained:

> ***11** [T]he general rule declared in [the] seminal case [*Ewen*, 221 Ky. 114] is that a complainant must first establish liability before seeking indemnity from an insurer in an action based on the insured's negligence. *Id.* The prohibition of direct actions against insurers until liability has been established has remained the law in Kentucky. *See* *State Auto. Mut. Ins. Co. v. Empire Fire & Marine Ins. Co.*, 808 S.W.2d 805, 808 (Ky. 1991); *Cuppy v. General Accident Fire and Life Assur. Corp.*, 378 S.W.2d 629, 632 (Ky. 1964); *Chambers v. Ideal Pure Milk Co.*, 245 S.W.2d 589, 591 (Ky. 1952); and *Ford v. Ratliff*, 183 S.W.3d 199, 203 (Ky. App. 2006).
>
> ....
>
> [A]n insurance company's violation of the UCSPA creates a private cause of action both for the named insured and for those who have claims against the named insured, and the same standards govern both types of cases. *Motorists Mut. Ins. Co. v. Glass*, 996 S.W.2d 437, 452 (Ky. 1997). But a third-party claimant may only sue the insurance company under UCSPA when coverage is not contested or already established. *Knotts v. Zurich Ins. Co.*, 197 S.W.3d 512, 516 (Ky. 2006). And, as stated by Chief Justice Robert Stephens in his concurring opinion in *Curry v. Fireman's Fund Ins. Co.*, 784 S.W.2d 176, 178 (Ky. 1989):
>
> > An insured does not avail himself of this cause of action by merely alleging bad faith due to an insurance company's disputing or delaying payment on a claim.... An insurer's refusal to pay on a claim, alone, should not be sufficient to trigger the firing of this new tort.

However, this is not to say that a bad faith claim may not be brought at the same time as the underlying negligence claim. "[A]t trial the underlying negligence claim should first be adjudicated. Only then should the direct action against the insurer be presented." *Wittmer*, 864 S.W.2d at 891. As Justice Leibson explained in his dissenting opinion in *Federal Kemper Insurance Company v. Hornback*, 711 S.W.2d 844 (Ky. 1986):

> *A bifurcated procedure was the proper way to try the present case.* This procedure better protected the rights of the insurance company/movant because it kept out of the contract phase evidence which was relevant to the issue of bad faith but unnecessary and possibly prejudicial to the insurance company in the trial of the preliminary question of liability under the insurance contract.

Id. at 849 (Leibson, J., dissenting) (emphasis added). [8]

[8] Justice Leibson's dissenting opinion was later incorporated by reference in the Kentucky Supreme

> Court's majority opinion in *Curry v. Fireman's Fund Insurance Company*, 784 S.W.2d 176, 178 (Ky. 1989).

Before the trial court, Liberty Mutual argued that Pierson's claims are not sustainable in light of the jury's verdict in favor of Ms. Hartline:

> As a matter of law, the jury's verdict means that [Hartline's] liability was never "beyond dispute," and therefore [Pierson's] bad faith claims must fail. *See* [*Wittmer*, 864 S.W.2d at 890]; *Coomer v. Phelps*, 172 S.W.3d 389 (Ky. 2005). Moreover, because the jury refuted Hartline's liability, Liberty Mutual has never had any obligation to pay [Pierson's] claim under the terms of the applicable insurance policy – another requisite element of a bad faith claim.

R. at 622. Because the jury's verdict must be reversed, however, it cannot serve as the basis for dismissal of Pierson's bad faith claim. *Bruce v. Commonwealth*, 465 S.W.2d 60, 61-62 (Ky. 1971) (reversal of a judgment "extinguishes *in toto* the jury verdict upon which it was based"). A new trial is required regarding Pierson's negligence claim; should Pierson prove successful upon retrial, he should be permitted to prove his bad faith claim. Accordingly, we reverse and remand on the issue of bad faith.

IV. CONCLUSION

***12** In light of the foregoing, we reverse and remand for a new trial and proceedings consistent with this Opinion.

ALL CONCUR.

All Citations

Not Reported in S.W. Rptr., 2021 WL 2272769

2020 WL 4500588
Only the Westlaw citation is currently available.

Unpublished opinion. See KY ST RCP Rule 76.28(4) before citing.

NOT TO BE PUBLISHED
Court of Appeals of Kentucky.

George A. SPENCER, Appellant
v.
Travis A. ARNOLD and Central Transport, LLC, Appellees

NO. 2018-CA-000479-MR
|
JULY 24, 2020; 10:00 A.M.
|
Discretionary Review Denied March 17, 2021

APPEAL FROM JEFFERSON CIRCUIT COURT, HONORABLE A.C. MCKAY CHAUVIN, JUDGE, ACTION NO. 14-CI-003490

Attorneys and Law Firms

BRIEFS FOR APPELLANT: Aaron G. Whaley, Louisville, Kentucky, Kevin C. Burke, Jamie K. Neal, Louisville, Kentucky, Jay Vaughn, Ft. Wright, Kentucky.

BRIEF FOR APPELLEES: Daniel E. Murner, Elizabeth Winchell, Lexington, Kentucky.

BEFORE: ACREE, GOODWINE, AND KRAMER, JUDGES.

OPINION

ACREE, JUDGE:

***1** George Spencer brings this appeal following a jury verdict and judgment in favor of defendants in his Jefferson Circuit Court personal injury action. Spencer was injured when the vehicle he was driving collided with a tractor-trailer driven by Travis Arnold and owned by Central Transport, LLC. Finding no error, we affirm.

BACKGROUND

On March 2, 2012, Spencer left his work at Transit Authority of River City (TARC), traveling northbound on South 10th Street in his TARC work vehicle, a Ford Taurus. Central Transport driver Arnold was driving his employer's tractor-trailer eastbound on West Broadway.

At the intersection, the front of Spencer's vehicle struck the driver's side of the forty-eight (48) foot-long trailer just in front of the trailer's tandem wheels.[1] The intersection was controlled by a traffic light. Spencer suffered a collapsed lung, fractured ribs, and various scrapes and contusions. His medical expenses totaled over $62,250. Spencer filed a negligence action against Arnold and Central Transport on July 1, 2014. The case was decided by a jury trial.

1 Initially, Spencer believed and alleged that Central Transport's tractor struck his vehicle. (Record (R.) at 2). He gave deposition testimony more specifically stating that the front of Central Transport's tractor struck the driver's side front fender and door of the government vehicle he was driving. (Video Record (V.R.) 2/20/18 4:42:10-4:42:54). He corrected his testimony at trial, agreeing with the experts that the impact was between his vehicle and Central Transport's trailer just in front of its tandem wheels. (V.R. 2/20/18 9:47:20-9:48:15).

Both parties testified they entered the intersection under a green light, making this, in the words of defense counsel, a classic "he said/he said" case that hinged largely on the credibility of witnesses. The jury returned a 9-3 verdict in favor of Arnold and Central Transport and the circuit court entered a judgment accordingly. Spencer says the circuit court erred in four ways: (1) failing to strike a juror for cause; (2) refusing to allow Spencer to impeach Arnold using a drug test; (3) failing to include a jury instruction on Arnold's higher duty; and (4) prohibiting evidence of Central Transport's policies and driving standards references, including the Commercial Driver's License (CDL) manual.

STANDARD OF REVIEW

We review decisions regarding juror strikes and evidentiary rulings for abuse of discretion. *McDaniel v. Commonwealth*, 341 S.W.3d 89, 92 (Ky. 2011). The test for abuse of discretion is whether the decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles. *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

"Alleged errors regarding jury instructions are considered questions of law that we examine under a *de novo* standard of review." *Hamilton v. CSX Transportation, Inc.*, 208 S.W.3d 272, 275 (Ky. App. 2006) (citation omitted). When examining jury instructions for error, they must be read as a whole. *Carmical v. Bullock*, 251 S.W.3d 324, 328 (Ky. App. 2007).

ANALYSIS

Striking Juror 1967798

***2** Spencer argues the circuit court erred by not allowing him to strike Juror 1967798 for cause. Compelled to strike Juror 1967798 peremptorily, Spencer exhausted his peremptory strikes and had to allow the seating of another juror he otherwise would have stricken.

Two situations may constitute reasonable grounds to excuse a prospective juror for cause. First, a juror may be excused whenever he or she expresses or shows an inability or unwillingness to act with entire impartiality. *Rankin v. Commonwealth*, 327 S.W.3d 492, 496 (Ky. 2010). Second, a juror may be excused because of "the prospective juror's relationship with some aspect of the litigation...." *Id.*

Spencer asserts Juror 1967798 made several troubling statements demonstrating her inability to be impartial, characterizing them as: (1) her concern that six years had elapsed between the accident and the trial (V.R. 2/19/18 11:52:40-11:53:47); (2) her "unwillingness" to find more than one person at fault because she believed one person is "guilty" and the other is "innocent" (V.R. 2/19/18 12:01:32-12:01:35); and (3) her views about pain and suffering, including her belief that a large pain and suffering award (such as one million dollars) would be difficult "because it takes [her] back to the time lapse." (V.R. 2/19/18 12:23:40-12:25:25). We address each issue in turn.

We do not agree that Juror 1967798 disqualified herself by expressing her concern about the lapse of time. The Juror actually said, "When they said the time lapse, I, you know, I could make a fair decision and all, but I was just going like, 2012? ... [inaudible]. (V.R. 2/19/18 11:53:00). Counsel asked whether the delay between the accident and the trial would impede her ability to make a fair decision. She said, "Even with the [delay] I could still be fair." (V.R. 2/18/19 11:53:11-11:53:38). Simple inquisitiveness about the time lapse is not sufficient evidence of her partiality and it was not abuse of discretion to so hold.

Spencer also misconstrues the Juror's views on apportionment of fault. When asked if she believed only one person could be at fault for an accident, the Juror raised her hand and stated, "I believe that one can be at fault." Counsel then asked, "If the evidence supports it, can ... if there's two cars involved in the crash, can both [drivers] be at fault?" The Juror answered affirmatively, stating, "If the evidence supports it." (V.R. 2/18/19 12:02:31-12:02:44). When Counsel asked if anyone had a further problem with the concept, she did not raise her hand. We consider this merely evidence that Juror 1967798 did not understand the concept of shared fault, but when explained to her, she agreed she would rely on the evidence to make her decision.

Spencer's third concern relates to Juror 1967798's comments regarding pain and suffering. Her initial comment was that "pain and suffering is something you can never put a price tag on." (V.R. 2/18/19 12:23:56-12:24:05). Later, she declared, "I can be fair and impartial on pain and suffering." (V.R. 2/18/19 12:24:50 – 12:24:55). The circuit court clarified her position further by asking about "pain and suffering" and her "reaction to that"; then, the court asked, "[D]oes that mean that, once you hear the proof, the number is in flex, right?" She responded, "Yeah, it's still in the back of my mind but I can put all that aside to make a fair decision is what I'm trying to say." (V.R. 2/18/19 12:25:20-12:25:41). She was asked moments later if her feelings on pain and suffering would keep her from viewing the parties as being on a level playing field. She unequivocally stated, "No." As *voir dire* continued, Juror 1967798 did state the time lapse would affect her ability to award a million dollars for pain and suffering. (V.R. 2/18/19 12:36:56-12:37:10). However, because Spencer capped his pain and suffering claim at $250,000, the comment was irrelevant and harmless. (R. at 208). Nevertheless, the circuit court stepped in and asked the Juror, hypothetically, if she could award a million dollars, if that was what the case was worth. Juror 1967798 retracted her statement and said if she believed the case was worth a million dollars, she could award that amount. (V.R. 2/18/19 12:45:35-12:46:02).

***3** Given the circuit court's broad discretion, we find no error here. The court did not abuse that discretion by declining to strike Juror 1967798 for cause.

Impeachment

Spencer believed Arnold lied in his deposition and sought to reveal that lie to the jury. On cross-examination during the defense case, Spencer's counsel began asking Arnold questions about his employment at Central Transport. Although the deposition itself is not a part of the record on appeal, the trial video transcript shows Arnold confirming his September 22, 2015 deposition testimony beginning at page 10, line 22, as follows:

> Q: When did you stop working for Central [Transport]?
>
> A: Five months ago.

(V.R. 2/20/18 3:50:13-3:50:36). Arnold then agreed with Spencer's counsel's conclusion that this meant he stopped working for Central Transport in April 2015. (*Id.*). After pursuing a line of unrelated questioning, Spencer's counsel asked for a sidebar and proffered to the circuit court the following: [2]

> In Mr. Arnold's deposition, I asked him point blank if he had ever taken a drug test and if he ever failed a drug test and he said no. In fact, three months prior to that he had been drug tested by Central Transport and failed that drug test. I concede to you that that's not relevant [garbled] but the fact that he lied about it under oath is. And under [KRE [3]] 608, I'm allowed to cross[-examine] him on that.... This whole case is about who's telling the truth here. [KRE] 608(b), "specific instances of conduct." I've got a good faith basis. I've got the report. I can show him the report.

Like the deposition, the report is not a part of the record on appeal. However, during the sidebar, counsel read parts of it, including that it showed a "verified result positive for ... amphetamine, methamphetamine." It is dated "June 8, 2015, three months before the deposition," which also means it was dated two months after Arnold's employment with Central Transport ended. Central Transport produced it in response to Spencer's discovery request. Nothing was proffered to show Arnold was ever aware of the test results.

2 The quotations that follow are excerpts from the sidebar. (V.R. 2/20/18 4:05:54-4:22:30).

3 Kentucky Rules of Evidence.

Assessing the proffer, the judge asked Spencer's counsel, "How do you prove that up? You've got a report from whom that says what?" Spencer's counsel responded, "Well, I'm going to, from that. But I've asked about it.... The Kentucky Manual on Evidence says that you can give him a document to refresh his recollection...." Spencer's counsel stated the report is his good faith basis under KRE 608 to ask Arnold the question, but everyone agreed the document itself was inadmissible.

Attempting to bolster his argument, Spencer's counsel said, "This [pointing to the report] coincides with the time he alleges he quit working for Central Transport. I believe he was terminated from Central Transport because that is a non-negotiable, terminatable offense in accordance with Central Transport's regulations. And I believe he lied about why he quit, too."

After expressing doubt that such an inquiry was permissible under KRE 608(b), the circuit court stated another concern, that if Arnold knew about the report and was asked whether he ever failed a drug test, he would be put in the untenable position of having to admit a crime or commit perjury. Said the court, "Well, the other issue is because it is a criminal behavior, he could take the Fifth Amendment and not answer your question."

***4** After removing the jury from the courtroom, the circuit court explained the evidentiary dilemma to Arnold in lay terms and questioned him about his knowledge of his right to assert his Fifth Amendment privilege against self-incrimination. The court asked Arnold if he was willing to answer the question, "Have you ever failed a drug test?" Arnold expressed concern that if the jury heard him "plead the Fifth" it would prejudice his case. The court assured him he would not have to assert the privilege in the jury's presence. With the jury still absent, Arnold chose not to answer the question; the circuit court responded, "I accept your assertion

of your Fifth Amendment right," and prohibited Spencer from pursuing this line of questioning.

The circuit court's first instinct was correct. Spencer's question is prohibited by KRE 608(b). The rule says:

> Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness: (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified. No specific instance of conduct of a witness may be the subject of inquiry under this provision unless the cross-examiner has a factual basis for the subject matter of his inquiry.

KRE 608(b).

As Professor Lawson points out, KRE 608(b) is comprised of two rules within a rule. The "First Rule" is "a general proposition against introduction of specific acts to attack or support credibility of witnesses." Robert G. Lawson, *The Kentucky Evidence Law Handbook* § 4.25[4][b], at 364 (2019 ed.). Without this prohibition, "collateral issues will overwhelm decisive issues, waste court time, and confuse decision makers.... [T]he bad effects of admitting such evidence would simply outweigh its probative value." *Id.* Spencer wanted to present evidence to prove the very kind of collateral issue the rule prohibits.

Spencer's problem begins with the very question he wanted to ask – whether Arnold ever failed a drug test.[4] No matter how that question is answered, it is not probative of Arnold's credibility for telling the truth. *See* *United States v. Sellers*, 906 F.2d 597, 602 (11th Cir. 1990) ("[P]rior instances of drug use are not relevant to truthfulness for purposes of Fed. R. Evid. 608(b)."); *United States v. Tanksley*, 35 F.3d 567, at *3 (6th Cir. 1994) (same). To demonstrate Arnold's deposition testimony was false would require additional questions; even more questions would be required to show Arnold knew his answer was false. The rule prohibits that. *Miller v. Commonwealth*, 585 S.W.3d 238, 243 (Ky. App. 2018) (KRE 608(b) "allows *inquiry* into a witness's specific instances of past conduct for purposes of impeachment, not *extrinsic evidence*.").

4 The circuit court expressly ruled, "You can't say, 'Hey, were you fired because you failed a drug test?' " (V.R. 2/20/18 4:20:30-4:20:34).

The "First Rule's" limitation on this kind of extrinsic evidence "is essential to the part of KRE 608(b) that removes from the general prohibition specific acts that can be proved through cross-examination (the 'second rule')." Lawson, § 4.25[4][b], at 365. Hence, under the "Second Rule," Spencer could make a limited inquiry of Arnold specifically regarding whether his deposition testimony was truthful; provided, of course, that in the circuit court's discretion, Spencer had a good faith, factual basis for doing so.

***5** The circuit court appears to have accepted the drug test report as a factual basis for the inquiry, even though it was placed in Arnold's Central Transport personnel file two months after he left Central Transport's employ. We cannot say that was an abuse of discretion. However, that good faith, factual basis only allowed Spencer to make a limited inquiry of Arnold, phrasing the question similarly to the very example Professor Lawson gives: "KRE 608(b) permits a party to cross-examine witnesses about specific acts that are probative of character for truthfulness or untruthfulness (*i.e.*, to ask on cross if a witness ... lied under oath in another proceeding)." Lawson, § 4.25[4][b], at 365. The permissible question is whether Arnold lied during his deposition. Spencer never sought to ask that question. If we assume he had sought to ask that permissible question, the circuit court correctly noted that under KRE 608(b), no matter how Arnold answered, Spencer could have asked nothing further. *Sneed v. Burress*, 500 S.W.3d 791, 794 (Ky. 2016) (" '[T]he cross-examiner is bound by the witness's answer and is not authorized to contradict that answer by introduction of what the Rule calls "extrinsic evidence." ' " (quoting Lawson § 4.25[4][c], at 319 (5th ed., 2013))). As the circuit court said when referencing

KRE 608(b), "If he says, 'No,' you're stuck with that." (V.R. 2/20/18 4:08:58-4:09:03).

Spencer's specific proposed questions were appropriately disallowed by the circuit court's proper application of KRE 608(b). Discussion of Fifth Amendment rights outside the presence of the jury was superfluous, irrelevant, and harmless. Therefore, we decline to address whether it was proper for the circuit court to raise the issue. That takes us to Spencer's next argument – improper jury instruction.

Jury Instructions

Circuit courts must instruct the jury on every theory reasonably supported by the evidence. *McAlpin v. Davis Construction, Inc.*, 332 S.W.3d 741, 744 (Ky. App. 2011). An "erroneous instruction is presumed to be prejudicial." *McKinney v. Heisel*, 947 S.W.2d 32, 35 (Ky. 1997) (citation omitted). The question here is: did the evidence support an instruction on Arnold's duty under a federal regulation, or would an instruction based on that regulation have been erroneous? We conclude the evidence did not support the proposed instruction. Furthermore, we conclude on these facts that the parties' duties to one another were equal and reciprocal and giving an instruction imposing a higher duty on one driver would have been error.

Spencer argued the evidence reasonably supported a jury instruction that Arnold owed a higher duty to exercise extreme caution and should have reduced his speed. This duty, he says, derives from federal regulation of commercial vehicle drivers, incorporated by Kentucky law. Specifically, Spencer claims Arnold was required to "exercise extreme caution in the operation of a tractor trailer" under "hazardous conditions" including "mist, rain," and that such conditions required that Arnold's "speed shall be reduced when such conditions exist." (Appellant's brief, p. 6 (citing 49 C.F.R. [5] § 392.14 and 601 KAR [6] 1:005)). He claims failure to instruct the jury on the duty imposed upon Arnold by 49 C.F.R. § 392.14, part of the Federal Motor Carrier Safety Regulations, or FMCSR, was error. We disagree.

5 Code of Federal Regulations.

6 Kentucky Administrative Regulations.

The regulation upon which Spencer based his claim to instruct the jury on Arnold's higher duty of care says:

> Extreme caution in the operation of a commercial motor vehicle shall be exercised when hazardous conditions, such as those caused by snow, ice, sleet, fog, mist, rain, dust, or smoke, adversely affect visibility or traction. Speed shall be reduced when such conditions exist. If conditions become sufficiently dangerous, the operation of the commercial motor vehicle shall be discontinued and shall not be resumed until the commercial motor vehicle can be safely operated. Whenever compliance with the foregoing provisions of this rule increases hazard to passengers, the commercial motor vehicle may be operated to the nearest point at which the safety of passengers is assured.

49 C.F.R. § 392.14.

Focusing on the pertinent parts of the regulation, it says: "Extreme caution in the operation of a commercial motor vehicle shall be exercised when hazardous conditions, such as those caused by ... mist, [or] rain ..., adversely affect visibility or traction." *Id.* The rationale underlying this federal regulation is mirrored in Kentucky's own statute governing speed. KRS 189.390(2) says that, notwithstanding a posted speed limit, "[a]n operator of a vehicle upon a highway shall not drive at a greater speed than is reasonable and prudent, having regard for the traffic and for the condition and use of the highway." The obvious predicate when seeking to hold a driver to the duties under either of these laws is proof of driving conditions. At a minimum, Spencer needed to present evidence that visibility or traction was adversely affected by mist or rain when the accident occurred. Such evidence is lacking.

***6** Spencer does not cite this Court to any part of the record that describes weather or road conditions at the time of the accident. However, we have examined the record in search of such support. Spencer himself testified that he believed Arnold could not see his own red light because "the sun was in his eyes...." (V.R. 2/20/18 10:20:39-10:21:10). He shortly thereafter said it was a "stormy day, sun comes in and

out." (V.R. 2/20/18 10:37:01-10:37:13). Arnold testified only that it was a "gloomy day." (V.R. 2/20/18 03:37:01-03:31:13). The photographs taken immediately after the accident show a damp roadway; however, there is no indication of standing water or puddles of any kind, no indication of rain on either Spencer's vehicle or Arnold's vehicle, no persons in the photos are using umbrellas or other protective weather gear such as raincoats or hats, and the wipers of passing vehicles are in the down position. [7]

[7] Exhibits 3, 4, and 5, and Plaintiff's Exhibits G (series of 7 photos) and I (series of 3 photos).

In short, no evidence indicates any "hazardous conditions ... adversely affect[ed] visibility or traction...." 49 C.F.R. § 392.14. That alone justifies rejecting Spencer's proposed instruction.

Furthermore, Spencer labels this case a "he said/she said" case as to who ran a red light. The critical mutual duties here were to obey a traffic control device. The duties, each to the other, were equal and reciprocal. As said in *Railway Express Agency, Inc. v. Bowles*:

> Where the circumstances of an automobile collision are such that the duties of the respective drivers are equal and reciprocal, it is prejudicial error to give instructions imposing upon the drivers unequal duties. Williams v. Coleman's Adm'x, 273 Ky. 122, 115 S.W.2d 584 [(1938)]; Dixie Ohio Express Co. v. Vickery, 306 Ky. 171, 206 S.W.2d 821 [(1947)]. The circumstances in the instant case are substantially the same as those in the two cited cases, wherein the judgments were reversed because the instructions did not place the same duties on both drivers.

325 S.W.2d 337, 338 (Ky. 1959).

Railway Express and the two cases it cites addressed accidents involving one car and one truck, and in *Dixie Ohio Express Co. v. Vickery*, the truck was identified as a tractor-trailer. Although these cases predate the federal regulation, we conclude the regulation would have made no difference. The opinions in these cases share a common theme expressed in the earliest of them – that a party is unjustifiably prejudiced by disparate instructions defining his duty both under the common law and again by a refined statutory definition of the care that should be taken to satisfy that duty. The Court in *Dixie Ohio* assessed this argument as follows:

> '[A]lthough the duties of the drivers of the truck and car when meeting and attempting to pass each other on this occasion were reciprocal and the same, the instructions as given did not impose the same duties on both or so admeasure them, but unequally imposed upon the truck driver the observance of two duties, imposed respectively both by the statutes and the common law, whereas only the one duty of [exercising ordinary] care was imposed upon Coleman, the driver of the car.
>
> 'Appellants contend, and we conceive properly, that by reason of such unwarranted difference and discrimination made in the two instructions, so specifically detailing and defining the duties of the defendants' driver while not so defining like duties as imposed upon Coleman, the defendants were prejudiced and therefore entitled to a reversal.'

Dixie Ohio, 206 S.W.2d at 823 (quoting *Williams*, 115 S.W.2d at 588).

We conclude that if the circuit court had granted Spencer's request for lop-sided duty instructions, it would have invited a strong argument for prejudicial error under *Railway Express*. Even without that argument, the instruction Spencer asked the circuit court to give was not supported by the evidence. The circuit court instructed the jury in accordance with Palmore's Jury Instructions. We hold there was no error in the jury instructions.

Evidence of Requirements of CDL Manuals and the Like

***7** At the pretrial conference, Arnold moved to exclude reference to Central Transport's manuals and policies, arguing Arnold should be held to the same legal duty as all motorists.

Arnold and Central Transport argued that the issue was which driver entered the intersection in violation of a traffic control device; *i.e.*, a lighted red traffic signal.

Not inconsistently with our discussion of the jury instruction, *supra*, the circuit court expressed a belief that reference to other standards alleged to be applicable to one driver but not applicable to both would confuse the jury and lead them to believe failure to comply with a manual is failure to comply with legal duties. However, the circuit court did not grant Arnold and Central Transport's motion. The court's written order held the issue in abeyance "in anticipation of content and context necessary to issue a ruling being developed at trial." (R. at 342-43). Spencer never sought to introduce any evidence from the manual at trial.

The circuit court made a similar ruling, not expressly refusing evidence of the contents of the CDL manual and FMCSR, as the following exchange shows:

> Court: There's a way to do it that is perfectly acceptable if you can do it deftly. Essentially you are saying, and the way you do it is to tie it into one of those actual duties. But you cannot create a separate standard, you cannot create a separate set of duties, the jury is not going to be instructed about ---
>
> Counsel: Just for the record, we cannot reference the Kentucky CDL manual, is that accurate.
>
> Court: I don't know if you can or not, that's not what I am saying. What I'm saying is that anything that you talk about has to be a violation of the applicable law. And the CDL manual alone is not the applicable law. It can be done. It just has to be done in a way that's, um, not going to confuse the jury or run the risk of confusing the jury about what the actual standard is. So, I am not saying you can't talk about it. I'm saying, I don't know how to say it any differently, anything that you talk about in terms of the violation of the applicable standard of care is in the instruction. Those are the only duties that anybody has....

(V.R. 2/20/18 9:24:24-9:25:50).

The circuit court expressed a similar determination referring to the FMCSR. Said the court, "If it doesn't translate into a direct violation of one of the actual duties that he has, it's not going to be admitted." (V.R. 2/20/18 9:19:56).

We can find no error here. After the circuit court declined to unequivocally grant Arnold and Central Transport's motion to exclude the evidence, Spencer never tested the extent to which evidence of the various standards expressed in the documents might be allowed.

To the extent Spencer argues Central Transport's manual, the CDL handbook, and FMCSR establish separate duties, we are unpersuaded. Industry standards or manuals can inform the standard of care that will satisfy a duty, but neither establishes the duty itself. *See* *Carman v. Dunaway Timber Co., Inc.*, 949 S.W.2d 569, 571 (Ky. 1997) (Appellee permitted "to introduce evidence of custom within the industry to prove this standard of care [and] Appellant was permitted to introduce the KOSHA regulation as evidence to the contrary. The jury instructions accurately framed the issue of whether [Appellee] had complied with its common law duty."); *Vick v. Methodist Evangelical Hosp., Inc.*, 408 S.W.2d 428, 429-30 (Ky. 1966) ("[E]ven though there was expert testimony that [defendants] acted in accordance with good and accepted standards ... the jury could reject this evidence and find negligence....").

***8** We hold there was no error in the circuit court's treatment of Spencer's efforts to introduce matters relating to Central Transport's manual, the CDL manual, or the FMCSR.

CONCLUSION

For the foregoing reasons, we affirm the Jefferson Circuit Court's February 23, 2018 judgment upon a jury verdict dismissing the complaint.

ALL CONCUR.

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NOT TO BE PUBLISHED
Court of Appeals of Kentucky.

Josephine B. HORTON, Harry Horton Louisville/ Jefferson County Metro Government, Appellants
v.
WELLS FARGO BANK, N.A., Appellee

NO. 2014–CA–000110–MR
|
MAY 1, 2015; 10:00 A.M.

APPEAL FROM JEFFERSON CIRCUIT COURT, HONORABLE MITCHELL PERRY, JUDGE, ACTION NO. 06–CI–003748

Attorneys and Law Firms

BRIEF FOR APPELLANTS: Gwendolyn Horton, Louisville, Kentucky

BRIEF FOR APPELLEE: Edmund S. Sauer, Nashville, Tennessee

BEFORE: COMBS, J. LAMBERT AND STUMBO, JUDGES.

OPINION

COMBS, JUDGE:

***1** Harry and Josephine Horton appeal the order of the Jefferson Circuit Court which denied their objections to a master commissioner's report. We have reviewed the record and the law, and we affirm.

On April 27, 2006, Wells Fargo Bank filed a complaint for foreclosure of a mortgage on the Hortons' residence. Other than requests for discovery filed by the Hortons, litigation stagnated for several years. On July 19, 2012, the trial court granted the Hortons' motion for conciliation. On December 29, 2012, Wells Fargo and the Hortons entered into a loan modification agreement. The new amount due included attorney's and litigation fees in excess of $11,000.[1]

1 Throughout the record and in their brief, the Hortons recite the total amount as $11,367.10. However, the agreement itemizes $3,840.00 for attorney fees and $7887.10 for litigation fees. The sum of those figures is $11,727.10. Wells Fargo has not referred to a precise amount in its pleadings or brief.

On January 29, 2013, the Hortons filed a motion raising exceptions to the inclusion of the attorney and litigation fees. The motion also demanded an accounting of the fees. The motion was referred to the master commissioner for a recommendation. The master commissioner's report was entered on June 26, 2013, recommending denial of the Hortons' motion. On July 9, 2013, the Hortons filed a motion for exceptions to the report. The trial court denied the motion on December 20, 2013. This appeal followed.

On appeal, the Hortons' single issue is that the inclusion of the fees in the loan modification agreement was unconscionable and should not be enforced. The trial court is afforded great deference in its assessment of conscionability, and we may not disturb its finding "unless there is some evidence of fraud, undue influence, overreaching, or evidence of a change of circumstances since the execution of the original agreement." *Peterson v. Peterson,* 583 S.W2d 707, 712 (Ky.App.1979). Whether a contract is unconscionable is fact-sensitive; therefore, courts make determinations on a case-by-case basis. *Conseco Finance Servicing Corp. v. Wilder,* 47 S.W.3d 335, 342 (Ky.App.2001).

An unconscionable contract is unenforceable. *Schnuerle v. Insight Communications Co.,* 376 S.W.3d 561, 575 (Ky.2012); *AT & T Mobility LLC v. Concepcion,* —— US ——, 131 S.Ct. 1740, 1747, 179 L.Ed. 742 (2011). The unconscionability doctrine is meant to prevent "one-sided, oppressive and unfairly surprising contracts...." *Conseco,* 47 S.W.3d at 341. An unconscionable contract is "one which no man in his sense, not under delusion, would make, on the one hand, and which no fair and honest man would accept, on the other." *Louisville Bear Safety Service, Inc. v. South Central Bell Telephone Co.,* 571 S.W.2d 438, 439 (Ky.App.1978) (quoting *Black's Law Dictionary,* 1694 (4th ed.1976)).

Our courts have recognized two categories of unconscionability. Procedural unconscionability relates to the formation of a contract. Substantive unconscionability "refers to contractual terms that are unreasonably or grossly favorable to one side and to which the disfavored party does not assent." *Id.* at 577 (quoting *Conseco,* 47 S.W.3d at 343 n.22).

***2** Although the Hortons have not used that terminology, in essence they allege both procedural and substantive unconscionability. They contend that their loan modification agreement was the result of an oppressive bargaining environment. Additionally, they claim that the inclusion of the legal fees is an unjust result.

We are not persuaded that the loan modification agreement is procedurally unconscionable. Procedural unconscionability must be determined by scrutinizing various factors: "the bargaining power of the parties, the conspicuousness and comprehensibility of the contract language, the oppressiveness of the terms, and the presence or absence of a meaningless choice." *Schnuerle,* 376 S.W.3d at 576 (internal citations omitted). The Hortons only cite to one of *Schnuerle* factors—unequal bargaining power which allegedly created an oppressive bargaining environment.

However, the Hortons do not point to any evidence in the record which supports their assertion of an oppressive bargaining environment. They do not offer any proof that they were forced to sign the agreement. In fact, they acknowledge that they understood all the terms in the contract prior to signing and that they were represented by counsel during bargaining. However, the Hortons contend that circumstances forced them into signing the agreement; *i.e.,* if they had not signed it, they would have been subject to further litigation or would have lost their home.

Although the Hortons found themselves in a difficult position, their predicament did not rise to the level of unconscionability as contemplated by the law. On that very point, this Court has held that "consequences per se of uneven bargaining power or even a simple old-fashioned bad bargain" do not create unconscionable contracts. *Conseco, supra.*

Even though the Hortons felt pressured to sign the agreement, they had the opportunity and the right to object to paying the fees in the course of the bargaining negotiations. They had filed a motion to compel discovery, which the court denied. They contend that the denial of that motion prevented them from rejecting the inclusion of fees. Regardless, they elected to enter into the agreement. They had their choice – although admittedly a difficult one.

As Wells Fargo points out, without the opportunity to enter into the agreement, the Hortons would have not had *any* choice; they would have lost their home. It is noteworthy that in *Schnuerle,* our Supreme Court held that a situation of "take it or leave it" in contracts of adhesion is not unconscionable when terms are not hidden and are easily understandable. *Schnuerle,* 376 S.W.3d at 576. There is no dispute that in this case, the terms were clearly set forth and easily comprehensible. Therefore, we are unable to conclude that the contract is one into which no reasonable man would have entered; thus, it was not procedurally unconscionable.

Nor is the loan modification agreement substantively unconscionable. Substantive unconscionability is determined by examination of "the commercial reasonableness of the contract terms, the purpose and effect of the terms, the allocation of the risks between the parties, and similar public policy concerns." *Schnuerle,* 376 S.W.3d at 577 (quoting *Jenkins v. First American Cash Advance of Georgia, LLC,* 400 F.3d. 868, 876 (11th Cir.2005)).

***3** We cannot conclude that the inclusion of legal and attorney's fees in the loan modification agreement is commercially unreasonable. As pointed out earlier, the agreement was a mechanism for the Hortons to remain in their home in spite of their defaulting on the mortgage. Wells Fargo incurred expenses in its measures to recover the money owed to them by the Hortons and by cooperating with them by engaging in negotiations. Therefore, it was commercially feasible to require the Hortons to absorb those expenses in their new contract with Wells Fargo.

Additionally, the Hortons have not set forth any violation of public policy. They suggest that Wells Fargo should have pursued litigation and attorney's fees in a separate action in court. They cite to Kentucky Revised Statute[s] (KRS) 355–2.302(2). However, that statute is part of the Uniform Commercial Code, which relates solely to transactions involving goods—not real estate. On the contrary, attorney's fees are accepted as a term of a contract involving real estate. *Kentucky State Bank v. AG Services, Inc.,* 663 S.W.2d 754, 755 (Ky.App.1984). Thus, the Hortons have

not presented any authority to persuade us that the contract satisfied any of the criteria to support their argument of substantive unconscionability.

We affirm the Jefferson Circuit Court.

ALL CONCUR.

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NOT TO BE PUBLISHED
Court of Appeals of Kentucky.

Melissa SHEA, Appellant
v.
BOMBARDIER RECREATIONAL PRODUCTS, INC. and BRP U.S. Inc., Appellees.

No. 2011–CA–000999–MR.
|
Oct. 12, 2012.
|
Discretionary Review Denied by Supreme Court June 12, 2013.

Appeal from Boone Circuit Court, Action No. 08–CI–00952; James R. Schrand II, Judge.

Attorneys and Law Firms

Peter Perlman, Lexington, KY, for appellant.

Lawrence L. Jones II, Amicus Curiae Brief in Support of appellant.

Christopher R. Cashen, Lexington, KY, for appellee.

Before COMBS, DIXON and VANMETER, Judges.

OPINION

VANMETER, Judge.

***1** Melissa Shea appeals from the May 16, 2011, order of the Boone Circuit Court denying her motion for a new trial and judgment notwithstanding the verdict, following entry of a final judgment in favor of Bombardier Recreational Products, Inc. and Bombardier Recreational Products, US, Inc. (hereinafter collectively referred to as "Bombardier") in accordance with the jury verdict. For the following reasons, we affirm.

Shea purchased a 2007 Bombardier Can–Am Outlander 650 XT all-terrain vehicle ("ATV") from Pleasant Valley Outdoor Power, LLC ("Pleasant Valley") in Florence, Kentucky on March 31, 2007. On May 20, 2007, Shea and her fiancé, Butch Martin, were taking turns riding the ATV on a farm in Crittenden, Kentucky. During Shea's third attempt climbing a certain hill, the ATV flipped and she suffered fractures of her C4 and C5 vertebrae, rendering her a permanent quadriplegic. Shea brought claims of strict liability (defective design and failure to warn) and negligence in Boone Circuit Court against the dealer, Pleasant Valley, and the manufacturers, Bombardier. A settlement was reached with Pleasant Valley during trial. Following the trial, the jury returned a verdict in favor of Bombardier. Shea filed a post-trial motion for a new trial and JNOV, which the trial court denied. This appeal followed.

First, Shea claims that the trial court abused its discretion by admitting into evidence a video depicting Bombardier's test track facilities which Bombardier failed to disclose during discovery. We disagree.

We review a trial court's rulings on evidentiary issues for an abuse of discretion. *Partin v. Commonwealth,* 918 S.W.2d 219, 222 (Ky.1996) *overruled on other grounds by Chestnut v. Commonwealth,* 250 S.W.3d 288 (Ky.2008). An abuse of discretion occurs if "the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Goodyear Tire & Rubber Co. v. Thompson,* 11 S.W.3d 575, 581 (Ky.2000) (citation omitted). Further, pursuant to CR[1] 61.01, a verdict should not be disturbed for error in the admission of evidence by the court unless the error violates substantial justice, *i.e.,* affects the substantial rights of the parties.

1 Kentucky Rules of Civil Procedure.

The record shows that during the discovery process, Shea requested Bombardier disclose all "pre-production hill-climbing tests" conducted by or for Bombardier on the subject ATV. On December 16, 2008, the trial court ordered Bombardier to produce copies of the test reports and videos that Shea requested. On February 18, 2009, the trial court ordered Bombardier to produce, at Shea's expense, copies of the actual test documents in the form in which they were generated, or to make the documents available for Shea's attorney to inspect and copy. The court's March 10, 2009, order setting this case for jury trial required the parties to identify and produce for inspection and copying all exhibits intended to be used at trial no more than ten days before trial.

***2** On January 10, 2011, Bombardier produced two videos depicting its test track facilities as exhibits to be used during trial. Shea filed a motion in limine to exclude the videos because they were not produced during discovery. Bombardier asserted that it does not regularly film its tests and therefore did not have videos to produce during discovery. Bombardier argued that the videos were prepared expressly for trial to assist with witness testimony and were not completed until January 7 or 8, 2011. The record reveals that the videos were produced for Shea in compliance with the court order requiring exhibits to be produced no more than ten days before trial. Accordingly, we fail to appreciate how Shea was unfairly surprised or prejudiced by the admission of the videos, and find that the trial court did not abuse its discretion by admitting the videos into evidence.

Next, Shea claims that she was entitled to a new trial because Bombardier presented misleading and prejudicial testimony regarding a brake warning on the ATV. We disagree.

During closing arguments, counsel for Bombardier stated that a message scrolls across the instrument panel of the ATV if the parking brake is applied. This statement was based upon the testimony of Jean–Yves LeBlanc, Director of Product Safety for Bombardier, who testified that when a driver of the ATV applies the brake with the pedal, the word "brake" scrolls across the instrument panel. Post-trial, Shea supplied a report by Thomas Eaton, an engineer, who opined that the scrolling brake message does not appear until after the brake has been engaged for 17 seconds or more. As a result, Shea contends LeBlanc's testimony was misleading and prejudicial, and is grounds for a new trial.

However, we are unable to appreciate any misleading or prejudicial aspect of LeBlanc's testimony. Shea claims to be surprised by LeBlanc's testimony; however, the ATV's Operating Guide, produced by Bombardier during discovery, specifically states that the word "brake" appears on the instrument panel after the parking brake is applied for 15 seconds or more. Shea did not object to LeBlanc's testimony, question him further to clarify his comments regarding the brake message, or present impeachment evidence. With respect to the post-trial report of Eaton, Shea fails to explain why the evidence could not have been discovered or produced at trial under the exercise of due diligence, and thus is not grounds for a new trial. *See* *Leeds v. City of Muldraugh,* 329 S.W.3d 341, 346 (Ky.App.2010) (holding that a new trial could not be granted on basis of newly discovered evidence when party failed to exercise due diligence to discover the evidence before the trial).

Finally, Shea claims that the trial court's instructions to the jury were erroneous. Shea requested that the trial court provide three separate instructions on her claims of negligent failure to warn, strict liability failure to warn, and strict liability defective design. Ultimately, the court submitted a strict liability instruction, under which the jury found in favor of Bombardier. Shea maintains the trial court erred by combining the elements of her strict liability claims of defective design and failure to warn into one instruction because it was misleading. Further, Shea claims the jury should have been instructed on her claims of negligent design and failure to warn. We disagree with both claims of error.

***3** Appellate review of jury instructions is a matter of law and we will examine them under a *de novo* standard of review. *Reece v. Dixie Warehouse & Cartage Co.,* 188 S.W.3d 440, 449 (Ky.App.2006). Kentucky law mandates that jury instructions should only provide the "bare bones" of the issue presented to the jury, and further elaboration may be fleshed out during counsel's closing argument. *Hamby v. Univ. of Kentucky Med. Ctr.,* 844 S.W.2d 431, 433 (Ky.App.1992) (citation omitted). A court's concern is that "[the instructions] must be sufficiently clear to reveal precisely the jury's conclusions: 'An instruction should be free of ambiguity and not open to various interpretations by the jury.' " *Hilsmeier v. Chapman,* 192 S.W.3d 340, 344 (quoting *Coe v. Adwell,* 244 S.W.2d 737, 740 (Ky.1951)).

In the case at bar, the jury instructions read, in pertinent part, as follows:

> Defendant, Bombardier, had a duty to provide an "adequate warning" regarding the ATV in this case. You will find for the Plaintiff, Melissa Shea, if you are satisfied from the evidence that:
>
> 1. The ATV, as designed, manufactured, or distributed by Bombardier, is defective and unreasonably dangerous;
>
> OR
>
> 2. As marketed and distributed by Defendant, Bombardier, the ATV was unreasonably dangerous, without reasonable notice or warning of danger, and the owner's manual or labeling of the ATV was not reasonably adequate to warn an ordinary prudent person that she might be injured during the operation of the ATV;

AND

3. Such failure(s) was a substantial factor in causing the accident and injuries to Plaintiff, Melissa Shea.

Strict liability allows a plaintiff to recover in several ways, such as a theory of defective design, a theory of defective manufacture, or a theory of a failure to warn of danger. *Worldwide Equip., Inc. v. Mullins,* 11 S.W.3d 50, 55 (Ky.App.1999) (citation omitted). Under any theory of strict liability, the plaintiff must establish causation. *Holbrook v. Rose,* 458 S.W.2d 155, 157 (Ky.App.1970). Indeed, if a defendant had a duty to warn, the issues to be resolved are "whether an adequate warning was given and, if not, whether the failure to give it proximately caused the injury." *Post v. Am. Cleaning Equip. Corp.,* 437 S.W.2d 516, 522 (Ky.App.1968).

In the case at hand, Shea argues the instruction was erroneous because it does not reveal whether the jury found the product to be defective or whether Bombardier failed to adequately warn of the ATV's dangers. Though we are unable to discern whether the jury found the ATV to be defective or that Bombardier gave inadequate warnings, the verdict form is clear that the jury believed neither was a substantial factor in Shea's injuries. Such an instruction adequately informed the jury that Bombardier was strictly liable if the ATV was defective, or if the ATV was unreasonably dangerous without adequate warnings, and either the condition or lack of warning caused Shea's injuries. This particular instruction has been approved by the Kentucky Supreme Court. *See Clark v. Hauck Mfg. Co.,* 910 S.W.2d 247, 250–51 (Ky.1995), *overruled on other grounds by Martin v. Ohio County Hosp. Corp.,* 259 S.W.3d 104 (Ky.2009). Since the controlling issue is whether the instruction correctly stated the law, *Olfice, Inc. v. Wilkey,* 173 S.W.3d 226, 230 (Ky.2005), the trial court did not err by joining both theories of strict liability into one instruction because the instruction did not misstate the law.

***4** Additionally, with respect to Shea's claims of negligent design and negligent failure to warn, we find those claims were subsumed by the strict liability instruction to the jury. We acknowledge Shea's argument that she was entitled to have her theory of the case submitted to the jury, *Clark,* 910 S.W.2d at 250; however, redundant instructions are unnecessary. *Reynolds v. Commonwealth,* 257 S.W.2d 514, 516 (Ky.1953).

Negligence and strict liability theories of recovery overlap to the degree that, in either instance, the plaintiff must prove the product was defective and the legal cause of the injury. *See Tipton v. Michelin Tire Co.,* 101 F.3d 1145, 1150 (6th Cir.1996) (holding that under Kentucky law, theories of negligence or strict liability both require that a jury first find the product was defective), *Holbrook,* 458 S.W.2d at 157 (whether the action involves negligent design, negligent failure to adequately warn, or the sale of a defective product that is unreasonably dangerous because of an inherent defect or inadequate warning, in every instance, the product must be a legal cause of the harm"). Under a claim of negligence, a plaintiff must prove a defendant's duty, breach of that duty, and a causal connection between the breach and injury to plaintiff. *Lewis v. B & R Corp.,* 56 S.W.3d 432, 436–37 (Ky.App.2001) (citations omitted). Strict liability may be imposed on a manufacturer of a product if that product is in a defective condition to make it unreasonably dangerous to its user. *Worldwide Equip., Inc.,* 11 S.W.3d at 55 (citing *Restatement (Second) of Torts* § 402A (1965)). The fact remains that, under certain circumstances, distinct causes of action may arise under either a negligence theory or strict liability theory of recovery since negligence claims focus on the conduct of the actor, and strict liability claims focus on the condition of the product. *Montgomery Elevator Co. v. McCullough,* 676 S.W.2d 776, 780 (Ky.1984).

With respect to the negligent design instruction, the foregoing has previously been stated:

> We think it apparent that when the claim asserted is against a manufacturer for deficient design of its product the distinction between the so-called strict liability principle and negligence is of no practical significance so far as the standard of conduct required of the defendant is concerned. In either event the standard required is reasonable care.

Jones v. Hutchinson Mfg., Inc., 502 S.W.2d 60, 69–70 (Ky.1973)). The conclusion follows that if a manufacturer has placed a defective product that is unreasonably dangerous in

the market, it has violated its duty under a negligence standard and may be found strictly liable. *See* Nichols v. Union Underwear Co., 602 S.W.2d 429, 433 (Ky.1980) (holding the fact finder in a design defect case must decide whether the manufacturer acted prudently, *i.e.,* whether the design was defective condition). In light of this, the strict liability instruction took into consideration any evidence presented with respect to the negligent design of the ATV.

***5** In the same vein, we are also persuaded that Shea's claim of negligent failure to warn was adequately represented in the strict liability instruction. The instruction clearly stated that Bombardier had a duty to provide an adequate warning regarding the ATV and provided for Bombardier's liability if the ATV was unreasonably dangerous and Bombardier failed to provide reasonable notice or warning of that danger which was a substantial factor in Shea's injuries. Since the instruction took into account the elements of negligence, a separate negligence instruction regarding a failure to warn would have been redundant with the strict liability instruction.

The order of the Boone Circuit Court is affirmed.

ALL CONCUR.

All Citations

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