IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

CALVIN LONG, Individually and as Administrator of the Estate of Carley Long,	:	**APRIL TERM 2017**
	:	**NO. 3305**
Plaintiff,	:	
vs.	:	
BETHANY CHILDREN'S HOME, INC., d.b.a. BETHANY CHILDREN'S HOME,	:	DOCKETED NOV 6 2019 F. BROWN DAY FORWARD
Defendant.	:	

ORDER

AND NOW, this 6th day of November, 2019, upon consideration of Defendant Bethany Children's Home's Motion for Post-Trial Relief or for a New Trial, and Plaintiff Calvin Long's response thereto, and after argument before this Court, it is hereby **ORDERED** and **DECREED** that Defendant's Motion for Entry of Judgment Notwithstanding the Verdict in Defendant's Favor is **GRANTED**.

The jury verdict on all claims is **VACATED**, and judgment is entered on behalf of Defendant.

See attached Memorandum of Law.

BY THE COURT:

SEAN F. KENNEDY, J.

Long Vs Norfolk Souther-ORDER
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Case ID: 170403305
Control Number: 19045203

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BETHANY CHILDREN'S HOME, INC., d.b.a. BETHANY CHILDREN'S HOME,	:	
Defendant.	:	**POST-TRIAL MOTION**

MEMORANDUM OF LAW

KENNEDY, J. **November 6, 2019**

On April 8, 2019, following a jury trial held before this court, a jury returned a verdict in favor of Calvin Long ("Plaintiff"), and against Bethany Children's Home ("Defendant"), awarding a total of $2,925,000 in combined damages. Both Plaintiff and Defendant have filed Post-Trial Motions seeking relief various forms of relief. Plaintiff seeks relief in the form of delay damages against Defendant and a new trial solely on the amount of punitive damages relating to pre-impact fright, and pain and suffering. Defendant seeks relief in the form a directed verdict against Plaintiff, a new trial or remittitur.

FACTS AND PROCEDURAL HISTORY

The decedent, Carley Long, was a sixteen-year-old girl who resided by court order at Bethany Children's Home. N.T. 4/1/2019 at 106. Her time at Bethany followed a troublesome upbringing, in which she was subject to both physical and verbal abuse from her parents. N.T.

4/2/2019 at 45-46. Her father, Mr. Calvin Long, was prone to drug and alcohol abuse, leading to the parents' separation and his time in rehabilitation, at which point the Office of Children, Youth and Families became involved on Carley's behalf. N.T. 4/2/2019 at 70-74. On May 6, 2015, Carley left her bedroom at Bethany and fled the building by walking down the central stairway to the basement emergency exit. N.T. 3/29/2019 at 69-71. Carley Long tragically died after escaping when she was struck by a train in an apparent suicide. N.T. 3/29/2019 at 69-71. The Register for the Probate of Wills in Berks County then granted her estate's Letters of Administration to Mr. Long, evidenced in a short certificate. N.T. 4/5/2019 at 55-56. Bethany was cited after the incident for violating 55 Pa. Code Ch. 3800, which governs residential facilities. N.T. 3/27/2019 at 41-42.

On April 8, 2019, a two-week trial concluded with a unanimous jury verdict awarding Plaintiff, Calvin Long, individually and as the Administrator of the Estate of Carley Long, $2,925,000.00 in damages against Defendant, Bethany Children's Home, Inc. N.T. 4/8/2019 at 9-10. The verdict comprised of $625,000 in survivor damages, and $2,300,000 in damages to Carley Long from future loss of earnings and lost earnings capacity. *Id.*

This court precluded Plaintiff from arguing for several different forms of damages throughout the course of the trial. Having been shown no evidence disputing that Carley Long's death was instantaneous, the trial court granted Defendant's motion *in limine* to preclude Plaintiff from arguing about conscious pain and suffering. N.T. 3/26/2019 at 9-10. During the trial, Plaintiff's counsel requested that the jury be asked whether Defendant's behavior was reckless. N.T. 4/5/2019 at 22-31. However, Plaintiff's main legal support for this was the Restatement (Second) of Torts § 317, which primarily concerns intentional acts, and the Court therefore declined to allow a reckless question on the verdict sheet in holding that no punitive

nature had been shown. *Id.* Further, the court also declined to allow the instruction of pre-fright damagės to the jury. N.T. Jury Trial, 4/5/2019, at 5-6.

DISCUSSION

Presently before the trial court are the parties' respective post-trial motions for relief rising from the suicide death of Carley Long, a minor who committed suicide after running away from a residential child care facility owned by Defendant, Bethany Children's Home. Plaintiff, Calvin Long, brought suit against Defendant alleging negligence. The trial court addresses each issue raised by both Plaintiff and Defendant. However, the trial court is constrained to agree with Defendant that Plaintiff did not meet his burden in proving negligence.

I. The Plaintiff Established a Right to Relief because Evidence at Trial Proves An Estate Was Raised.

In its first principle issue raised in its Motion for Post-Trial relief, Defendant asserts that Plaintiff failed to present evidence at trial sufficient to establish a right to relief because Plaintiff did not present evidence that any estate was opened or that Plaintiff was the appointed representative of the estate to pursue any claims. The trial court disagrees and must find the evidence presented was sufficient to establish a right to relief.

There is no doubt that the present case was brought as a wrongful death action. Under Pennsylvania Rule of Civil Procedure 2202, an action "for wrongful death shall be brought only by the personal representative of the decedent for the benefit of those entitled by law to recover damages for such wrongful death." *See* Pa.R.C.P. 2202. A personal representative is the "executor or administrator of the estate of a decedent duly qualified by law to bring actions[.]" *See* Pa.R.C.P. 2201. Under both the Pennsylvania Wrongful Death Act and Survival Act, a personal representative is entitled to bring a claim on behalf of the decedent's estate. *See* 42 Pa.C.S.A. § 8301; 42 Pa.C.S.A. § 8302. More specifically, a wrongful death action may be

brought by the family of a decedent to recover the economic loss that it has incurred by the loss of the earnings which the decedent would have provided had the death not occurred, as well as costs incurred by the decedent's death. *See Carroll v. Avallone*, 869 A.2d 522 (Pa. Super. 2005); *see also Slaseman v. Myers*, 455 A.2d 1213 (Pa. Super. 1983). Conversely, a survival action belongs to the decedent and are brought by the administrator of the decedent's estate to recover the loss to the estate resulting from the tort. *Kiser v. Schulte*, 648 A.2d 1 (Pa. 1994).

During an on-the-record discussion regarding points of charge and the verdict sheet, Plaintiff's counsel asked for two lines for damages – one line for survival actions and another line for wrongful death actions. *See* N.T. Jury Trial, 4/5/19, at 52. It was not until this point that Defendant stated that, in its belief, Plaintiff had not "proven an estate has been raised in this case." *Id.* However, Defendant has not cited to any relevant legal authority that affirmatively requires plaintiffs to establish that an estate has been raised through proof offered at trial.

The only threshold requirements in our Rules of Civil Procedure require the initial pleading of the plaintiff in an action for a wrongful death shall state: the plaintiff's relationship to the decedent; plaintiff's right to bring the action; the names and addresses of all persons entitled by law to recover damages; the relationship to the decedent and the action brought on their behalf. *See* Pa.R.C.P. 2204. Plaintiff met these requirements. Plaintiff established that he was appointed as administrator of the decedent's estate and provided the trial court a copy of the short certificate. Accordingly, the trial court declines to grant Defendant's requested relief upon the grounds Plaintiff did not establish an estate was raised.

II. Plaintiff Did Not Present Sufficient Evidence at Trial to Establish a Breach of Duty or Proximate Causation.

In its second issued raised in its Motion for Post-Trial Relief, Defendant asks the trial court to grant a judgment notwithstanding the verdict because: (1) the evidence presented at trial

was insufficient to establish that Defendant breached any duty; and (2) the evidence presented at trial was insufficient to establish proximate causation. The court agrees. For the reasons that follow below, the trial court is constrained to enter a judgment notwithstanding the verdict in Defendant's favor because the evidence presented at trial did not establish Defendant breached a duty or establish proximate causation.

A judgment notwithstanding the verdict can be entered upon two bases: (1) where the movant is entitled to judgment as a matter of law; and/or the evidence was such that no two reasonable minds could disagree the verdict should have been rendered for the movant. *See Prieto Corp. v. Gambone Const. Co.*, 100 A.3d 602, 609 (Pa. Super. 2014). When reviewing a trial court's denial of a motion for judgment notwithstanding the verdict, the appellate courts must consider all evidence admitted to decide if there was sufficient competent evidence to sustain the verdict. *Id.* The appellate courts must view the evidence in the light most favorable to the verdict winner, giving the victorious party the benefit of every reasonable inference arising from the evidence and rejecting all unfavorable testimony and inference. *Id.* Concerning questions of law, the scope of review utilized by reviewing courts in plenary. *Id.* Concerning questions of credibility and the weight accorded the evidence at trial, a reviewing court may not substitute its judgment for that of the finder of fact. *Id.*

Further, our appellate courts have held that the factfinder is free to believe all, part, or none of the evidence and to determine the credibility of witnesses. *See Brown v. Trinidad*, 111 A.3d 765, 770 (Pa. Super. 2015). The trial court may award a judgment notwithstanding the verdict or a new trial only when the jury's verdict is so contrary to the evidence as to shock one's sense of justice. *Id.* In making a determination as to whether this standard has been met, the reviewing court is limited to whether the trial judge's discretion was properly exercised, and

relief will only be granted where the facts and inferences of record disclose a palpable abuse of discretion. *Id.*

A. The Evidence Presented at Trial Failed to Establish that Defendant Breached any Duty.

Plaintiff brought an action against Defendant that was rooted in Defendant's alleged negligence. It is well understood that in Pennsylvania, a plaintiff is required to plead and prove: (1) duty; (2) a breach of that duty; (3) proximate causation; and (4) damages. *See Wittrien v. Burkholder*, 965 A.2d 1229, 1232 (Pa. Super. 2009). Plaintiff primarily sought to prove duty and breach were established through a statute and citation issued to Bethany after this incident. The statute at issue, 55 Pa.Code § 3800, provides oversight for licensed residential facilities for children and lays out the regulations that "a facility needs to be in compliance with" to maintain a license. N.T. Jury Trial, 3/29/19, at 57. The testimony produced at trial failed to demonstrate Defendant was in violation of Chapter 3800. Plaintiff expends much energy reiterating to the trial court that all inferences must be held in a light more favorable to the Plaintiff, as the verdict winner. Having done so, the trial court must still conclude the evidence presented does not establish Defendant breached any duty.

Plaintiff presented the testimony of Brian Hazlak, a supervisor for the Department of Human Services, charged with the oversight of licensing in 14 counties throughout the Commonwealth. *Id.* at 57. Mr. Hazlak testified at length about the statute. Specifically, the statute states: "[t]here shall be one child care worker present with the children for every eight children who are 6 years of age or older, during awake hours." 55 Pa. Code § 3800. Mr. Hazlak testified that Bethany – having 11 children in the home – was in compliance with the Regulations. Defendant was issued a plan of correction which requires those accused of violating the Regulations to "submit and implement a plan to correct and violations of the Regulations."

Id. at 73. The plan of correction issued to Defendant states that all "youth shall be within auditory or visual range at all times." *Id.* at 77. The Regulation does not expressly contain any language that mentions "auditory or visual range." *Id.* at 83. Further, the requirement that staff be within auditory or visual range comes from a compliance guide that is not meant to expand the Regulations, but instead only serves to explain them. *Id.* at 84. During opening statements, Plaintiff's counsel explained to the jury that "present" means within eyeshot or earshot. N.T. Jury Trial, 3/26/2019, at 73. Additionally, the Regulation does not define auditory range and such assessments are left to individual facilities.

Mr. Hazlak did little in way of establishing Defendant's failure to properly supervise the children under its care. The citation Plaintiff emphasizes does not prove Defendant breached a duty. Instead, Mr. Hazlak's testimony obfuscates facts and amplifies inaccuracies that border upon impermissible. Chief among these is Mr. Hazlak's assertion that the decedent was not supervised for the hour prior to her leaving Defendant's premises. During cross-examination, Mr. Hazlak was forced to admit that was simply not true. Mr. Hazlak's report states that Carley received medication at 8:00 p.m. and then asked for aspirin at 8:15 p.m. *Id.* at 93. These two interactions demonstrate that Carley was in auditory and visual range in the hour prior to her departure, and that Defendant was compliant with the Commonwealth's Regulations.

Although the "auditory range" is not contained within the Regulations, testimony from Defendant's staff members demonstrates Defendant was compliant regardless – that the children were in auditory range of staff members. Elaine Gilbert testified extensively that staff members on the first floor can hear the children moving around on the second floor – sometimes even talking in their bedrooms. N.T. Jury Trial, 3/27/19, at 87. Ms. Gilbert testified that staff "can tell where the kids are just from noises that we hear on the first floor." *Id.*

Further, during the trial, Janet Durkin testified that:

> You can hear conversations. You can hear doors opening and closing. You can hear if somebody is taking a shower. You can hear someone laughing. You can hear someone crying. You can hear arguments. You can hear if a TV is on. You can hear that. Similar to if someone, you know, is outside of this building and if you want to be heard, you can hear that.

N.T. Jury Trial, 4/1/19, at 65. The testimony of Patricia Miske likewise stated that on the night Carley left Defendant's property, she could "hear [the children] walking and talking" and that she "could hear the girls moving around . . . [She] could hear the showers going. You knew they were up there." *Id.* Plaintiff asserts in his brief that a DHS worker conducted a test the very next day and determined they were not in appropriate visual or auditory range for the children. *See* Pl. Ans., 6/19/19, at 8. This is a patent mischaracterization of the witness testimony. In fact, Mr. Hazlak testified that he conducted a test and found that staff would be able to hear from the first floor if there was a fight, raised voices, crying or if a child is in danger on the second floor. N.T. Jury Trial, 3/29/19, at 89-90. Each of these witnesses demonstrates that Defendant was actually in compliance with the Regulations.

Even holding all inferences in a light most favorable to Plaintiff as the verdict winner, the evidence adduced at trial simply does not prove Defendant breached any duty to Carley Long. Instead, the trial court heard testimony that the Regulations state Defendant must have a certain number of staff members proportionate to the number of children residing at the facility. Defendant complied with this requirement. The trial court heard testimony that a compliance guide – and not anything that carries the force of law – <u>recommended</u> that Defendant have staff members within auditory and visual range of the children. Defendant complied with this requirement. The jury heard conflicting accounts of the law and was incorrectly informed by

Plaintiff's witness, Mr. Hazlak, that Defendant violated its obligations under § 3800. At its base, Defendant met its obligations and cannot be found to have breached a duty to the decedent.

B. The Evidence at Trial Failed to Establish Defendant's Conduct was the Proximate Cause.

The trial court next turns to Defendant's averment that Plaintiff failed to establish proximate causation against Defendant at trial. The trial court agrees. This contention makes the assumption that Plaintiff was able to prove a breach of duty at trial. Just as the court found there was no breach of duty, the trial court must find that even if Defendant breached a duty, Plaintiff did not establish proximate causation against Defendant. It is fundamental that, in order to recover, a plaintiff must prove that a defendant's actions were both the proximate cause and cause in fact of the plaintiff's injury. *Reilly v. Tiergarten Inc.*, 633 A.2d 208, 210 (Pa. Super. 1993). Conduct is a proximate cause of a plaintiff's harm when the conduct is a "substantial factor in bringing about the harm." *Jones v. Montefiore Hosp.*, 431 A.2d 920, 923 (Pa. 1981). A defendant's liability is "contingent upon the probability or foreseeability of the resulting injury, not merely the possibility that it could occur." *Reilly*, 633 A.2d at 210. Thus, proximate cause is that "which, in a natural and continuous sequence, unbroken by any sufficient intervening cause, produces injury, and without which the result would not have occurred." *Wisniewski v. Great Atlantic and Pacific Tea Co.*, 323 A.2d 744, 748 (Pa. Super. 1978).

In permitting this verdict to stand, Plaintiff asks the trial court to ignore clearly established law in its favor. As a general statement, Pennsylvania law is clear that suicide (or attempted suicide) is not actionable because "suicide constitutes an independent intervening act so extraordinary as not to have been reasonably foreseeable by the original tortfeasor." *Cooper v. Frankford Health Care Sys.*, 960 A.2d 134, 147 (Pa. Super. 2008) (citing *McPeake v. William T.*

Cannon, Esq., 553 A.2d 439, 440 (Pa. Super. 1988)). Pennsylvania courts have adopted only three exceptions to the rule laid out in *McPeake*. These exceptions arise in cases involving:

> [1.] [W]rongful death claims involving hospitals, mental health institutions and mental health professionals, where there is a custodial relationship and the defendant has a recognized duty of care towards the decedent… [;]
>
> [2.] [W]here the defendant was not associated with a hospital or mental health institution, courts have required both a clear showing of a duty to prevent the decedent's suicide and a direct causal connection between the alleged negligence and the suicide … [; and]
>
> [3.] [S]uits brought under the worker's compensation statute.

McPeake, 553 A.2d at 440-41. Here, the first exception is not applicable because Bethany Children's Home is not a hospital, mental health facility or medical facility sufficient to conceivably invoke that exception. Likewise, the third exception is not applicable because the present case plainly does not involve a worker's compensation claim. Thus, Plaintiff may only rely upon the second exception to rule that suicide is not actionable under Pennsylvania law.

The second exception to the rule requires a clear showing: (1) that the defendant has a duty to prevent the suicide; and (2) a direct causal connection between the alleged negligence and the suicide. *McPeake*, 553 A.2d at 441. This exception employs a two-prong test which plaintiff cannot satisfy. Under this test, a plaintiff must establish that: (1) the defendant had a duty to prevent the suicide from happening, and (2) the alleged negligence directly caused the suicide. *See Malloy v. Girard Bank*, 436 A.2d 991 (Pa. Super. 1981) (holding that defendant was not liable for leaving a gun in an unlocked locker in which the decedent found and used to commit suicide); *see also Freedman v. Allentown*, 651 F. Supp. 1046 (E.D. Pa. 1987) (finding that decedent prisoner's history of suicide attempts did not create reasonable foreseeability of his death). Additionally, the preceding two cases that describe this second exception both rejected the imposition of liability.

Stated succinctly, in the present case, the second exception does not apply because no evidence or testimony clearly establishes that Bethany had a duty to prevent Carley Long from committing suicide, or that Defendant's alleged negligence proximately caused her to commit suicide. The duties owed by Defendant rise from the 3800 regulations, which do not require child residential facilities to prevent suicide. Although not binding on this court, the rules regarding third party liability for a decedent's suicide contemplate only two exceptions: first in cases where a tortious act is found to have caused a mental condition in the decedent that proximately resulted in an uncontrollable impulse to commit suicide, or prevented the decedent from realizing the nature of his act.'" *Watson v. Adams*, No. 4:12-cv-03436, 2015 U.S. Dist. LEXIS 41172, *18 (D.S.C. Mar. 31, 2015) (quoting *McLaughlin v. Sullivan*, 461 A.2d 123,124 (N.H. 1983)) (emphasis added). "These cases are very rare and typically involve a physical injury that causes the decedent to have an irresistible impulse to commit suicide." *Id.* The second exception "applies in situations where a defendant may have a duty to prevent a foreseeable suicide because the individual at risk is in the defendant's custody and under the defendant's care." *Id.* at *19.

Plaintiff cannot recover because he did not establish a direct causal connection between Carley Long's suicide and Defendant's alleged negligence. In his brief before the court, Plaintiff meanders between legal assertions and a failure to adduce any testimony or evidence in its support. For instance, Plaintiff avers that during her testimony, Janet Durkin was the corporate designee for Defendant and that Defendant was required to comply with the licensing requirements found in 55 Pa. Code § 3800. *See* Pl. Ans., 6/19/19, at 9. This was not in dispute. The trial court has found Defendant was required to comply with the licensing requirements – and Defendant had complied. At trial, Plaintiff was required to prove Defendant's breach of duty

was a proximate cause of Carley's death because her flight from Bethany Children's Home or suicide was a foreseeable event. This did not happen. Instead, the trial court observed witness after witness testify that the decedent did not exhibit any conduct that her flight or suicide could have been perceived as a threat.

Jennifer Harvey testified that Carley was seen by a psychiatrist and that none of the reports from the psychiatrist ever reflected Ms. Long exhibited suicidal ideations. N.T. Jury Trial, 3/29/19, at 93. Ms. Harvey further testified that Carley had never before left Defendant's property. *Id.* at 123. Most relevantly, when asked whether she was aware of Carley ever attempting to hurt herself or threatening to hurt herself or end her life, Ms. Harvey stated that she was not aware of any such incidents. *Id.* at 124. Jarrell Gallman also testified that, in his interactions with the decedent, he never felt that Carley was likely to cut herself, harm herself or engage in any conduct that would result in harm during the night of her death. N.T. Jury Trial, 3/29/19, at 53.

The testimony elicited at trial from Patricia Miske remains especially relevant – Ms. Miske was the last person to see Carley. Consistent with the testimony of others employed by Defendant, Ms. Miske did not offer any testimony indicating she believed Ms. Long posed a threat of harm to herself or that she was suicidal. Ms. Miske saw the decedent on several occasions between 7:30 P.M. and 8:00 P.M., and again between 8:20 P.M. and 8:30 P.M. N.T. Jury Trial, 4/3/19, at 146-148. The testimony remains clear that Ms. Miske had no reason to suspect or anticipate that Ms. Long posed a threat to herself. For instance, the following exchanges illustrate Ms. Miske's perceptions:

> Plaintiff's Counsel: Did [Jennifer Harvey] tell you Carley said she was going to do something?
>
> Ms. Miske: No, she did not.

Plaintiff's Counsel:	But did [Jennifer Harvey] say Carley said she was going to hurt herself?
Ms. Miske:	I did not hear that.
* * *	
Plaintiff's Counsel:	Did you find out in any way, shape, or form whether being told, witnessing, reading something; any way shape or form in the whole entire world did you ever find out afterwards Carley told or was going to harm herself in any way?
Ms. Miske:	No, I did not. No, I did not.

N.T. Jury Trial, 4/3/19, at 111-112.

At trial, Plaintiff was required to prove Defendant's conduct was the proximate cause of Ms. Long's suicide. Our courts have long held that a suicide constitutes an independent intervening act that is not reasonably foreseeable to the tortfeasor. Here, the only applicable exception to the long-standing rule that a third party is not typically liable for a decedent's suicide requires a plaintiff to make a clear showing of a duty to prevent the decedent's suicide and a direct causal connection between the alleged negligence and the suicide. This requirement was not satisfied in the present case. There was no outward conduct on Ms. Long's part that would have triggered a higher duty of care. Because her suicide was an unforeseeable superseding cause, Defendant's actions cannot be found as the proximate cause of decedent's suicide. Thus, because Defendant was not the proximate cause of Ms. Long's suicide, the trial court must enter a judgment notwithstanding the verdict in Defendant's favor.

III. The Trial Court Did Not Err in its Evidentiary Rulings

In its third issue raised in its Motion for Post-Trial Relief, Defendant alleges several evidentiary errors that improperly impacted the verdict. In Pennsylvania, our reviewing courts have held that when "improperly admitted testimony may have affected a verdict, the only

correct remedy is the grant of a new trial." *Nelson v. Airco Welders Supply*, 107 A.3d 146, 155 (Pa. Super. 2014). The grant of judgment notwithstanding the verdict on the of basis Plaintiff's failure to meet threshold requirements is dispositive of the alleged evidentiary errors – given the only remedy for such errors is the grant of a new trial, the grant of JNOV precludes the trial court from granting a new trial on the basis of alleged evidentiary errors. Despite the grant of a new trial remaining unavailable to Defendant on this basis, the trial court endeavors to review the alleged evidentiary errors.

A. The Disciplinary History of Patricia Miske

Because the evidence of a party's other incidents or past acts generally is inadmissible to prove a propensity to do something or act in a similar way. *See* Pa. R.E. 404(b). In this matter, the repeated presentation of such information to the jury was overly prejudicial. Pennsylvania Rule of Evidence 402 provides: "All relevant evidence is admissible, except as otherwise provided by law. Evidence that is not relevant is not admissible." Only evidence that is relevant is admissible. *See* Pa. R. E. 401 ("'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 than it would be without the evidence."); Pa.R.E. 402; *American Future Syst., Inc. v. BBB*, 872 A.2d 1202, 1212 (Pa. Super. 2005). Relevance is a threshold consideration in determining the admissibility of evidence. *Majdic v. Cincinnati Machine Co.*, 537 A.2d 334, 338 (Pa. Super. 1988).

Further, Pennsylvania Rule of Evidence 403 provides: "Although relevant, evidence may be excluded if its probative value is outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Questions regarding the admissibility of

evidence are within the sound discretion of the trial court. *Potochnick v. Perry*, 861 A.2d 277, 282 (Pa. Super 2004). Pennsylvania trial judges enjoy broad discretion regarding the admissibility of potentially misleading and confusing evidence. *Daset Mining Corp. v. Industrial Fuels Corp.*, 473 A.2d 584, 588 (Pa. Super. 1984). A trial court may properly exclude evidence if its probative value is substantially outweighed by the danger of unfair prejudice. *Id.; see also* Pa. R.E. 403.

Notably, evidence of a party's similar incidents or acts generally is inadmissible but may be admissible to prove a relevant purpose other than to prove a propensity to do or act in a similar way. Pennsylvania Rule of Evidence 404 provides:

> (1) Prohibited Uses. Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.
>
> (2) Permitted to Uses. This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.

See Pa.R.E. 404. Thus, evidence of a person's other acts generally is inadmissible to prove liability or fault by demonstrating the person's propensity to do the thing at issue in the litigation.

In some cases, similar instances are admissible but only where they occur at substantially the same place or involving the same product or under the same or sufficiently similar conditions. *Hutchinson v. Penske Truck Leasing Co*, 876 A.2d 978, 983 (Pa. Super. 2005). The burden is on the proponent of the evidence to establish the other accidents are substantially similar to the accident at issue in the litigation. *Majdic*, 537 A.2d at 341. To be admissible, the other accidents must "be sufficiently similar to plaintiffs accident." *Spino v. John S. Tilley Ladder Co.*, 696 A.2d 1169, 1172 (Pa. 1997).

Defendant asserts the trial court erred in permitting the jury to hear evidence about Ms. Miske's prior work history under the theory that such evidence was inadmissible because it was not relevant. The trial court must disagree with this assessment. The agreed upon jury instructions from the trial court expressly stated that jurors may consider whether Ms. Miske "possessed certain characteristics or propensities or had engaged or was engaging in behavior or conduct that rendered her unfit or incompetent to work" in her position. N.T. Jury Trial, 4/8/19, at 127. Certainly, evidence which demonstrates whether Ms. Miske possessed certain characteristics or propensities that made her unfit to work for Defendant necessitates a recitation of such alleged behavior.

Defendant's employment of Patricia Miske was an issue of much focus in this case. Patricia Miske's conduct was a central question in several relevant exchanges throughout the trial, including that of Patricia Miske herself, N.T. 4/3/2019 at 76-166, as well as James Taylor, N.T. 3/26/2019 at 21-25, 48-65, Elaine Gilbert, N.T. 3/27/2019 at 86-95, Janet Durkin, N.T. 4/1/2019 at 11-37, 111-124, and others. The testimony concerned her work violations and warnings she had received about complying with Defendant's policies and procedures. *Id.* At the conclusion of trial, the court instructed the jury on determining liability, and included the following: that Defendant, as Patricia Miske's employer, is liable for any of her negligent acts or admissions; to determine whether Defendant was negligent in hiring, supervising, or retaining Patricia Miske; and to consider whether Defendant should have known that Patricia Miske's behavior or conduct rendered her unfit or incompetent to work as its employee. *See* N.T. Jury Trial, 4/8/2019, at 126-128.

Although Defendant alleges that testimony regarding Ms. Miske's employment is prejudicial under Pa.R.E. 403, the court found the probative value of such testimony outweighs

any prejudice. Plaintiff would not be able to demonstrate that Ms. Miske was not a suitable employee unless he was able to introduce conduct attesting to such propensities. Therefore, the trial court did not err in permitting the introduction of Ms. Miske's previous disciplinary record.

B. The Evidence of the Decedent's History of Elopement

Defendant's counsel next asserts the trial court erred in its admission of testimony concerning Ms. Long's history of leaving facilities, such as Bethany Children's Home. Witness Jennifer Harvey testified that on January 22, 2015, the decedent left a building without permission. N.T. Jury Trial, 3/19/19, at 113. The testimony by Ms. Harvey also relayed incidents wherein Ms. Long announced that she was running away from the facility. *Id.* Ms. Harvey also described an incident that because the decedent did not get her way, Ms. Long decided to go out alone in dangerous inclement weather. *Id.* Further, there were more examples of Ms. Long's behavior in walking away "too far" and another incident which saw the decedent leave her cottage and walk to another cottage without permission. *Id.* at 114.Although Defendant casts such evidence as not relevant to the present case, the trial court must respectfully disagree.

IV. The Conduct of Plaintiff's Counsel Would Have Warranted a New Trial.

In its fourth issue, Defendant asserts that pervasive misconduct warrants a new trial. If the trial court had not granted a judgment notwithstanding the verdict, the court would agree. The standard of review with respect to inappropriate conduct by counsel is clear: a new trial must be granted where the unavoidable effect of counsel's conduct or language was to prejudice the fact-finder to the extent that the fact-finder is rendered incapable of fairly weighing the evidence and entering an objective verdict. If counsel's misconduct contributed to the verdict, it will be deemed prejudicial and a new trial will be required. *Poust v. Hylton*, 940 A.2d 380, 385 (Pa. Super. 2007).

Whether remarks by counsel warrant a new trial requires an assessment of the circumstances under which the statements were made, and the precaution taken by the court and counsel to prevent such remarks from having a prejudicial effect. It is the duty of the trial judge to take affirmative steps to attempt to cure any harm. There are certain instances where counsel's comments are so offensive or egregious that no curative instruction can adequately obliterate the taint. *Poust*, 940 A.2d at 386 (citing *Siegal v. Stefanyszyn*, 718 A.2d 1274, 1277 (Pa. Super. 1998), *appeal denied*, 739 A.2d 1059 (Pa. 1999) (citations omitted)).

Not every unwise or irrelevant remark made in the course of a trial by a judge, witness, or counsel compels granting of a new trial. *Commonwealth v. Goosby*, 301 A.2d 673, 674 (Pa. 1973). Rather, the award of a new trial is warranted only where the effect of the remark results in the deprivation of a fair and impartial trial. *Id.* Whether counsel's argument is appropriate is a matter primarily to be decided by the trial judge who is present and in the best position to assess the manner of presentation and the effect on the jury. *See Purcell v. Westinghouse Broadcasting Co.*, 191 A.2d 662, 671 (Pa. 1963). As such, an appellate court, by its nature, stands on a different plane than a trial court. *Thompson v. Philadelphia*, 493 A.2d 669, 672 (Pa. 1985).

Whereas a trial court's decision to grant or deny a new trial is aided by an on-the-scene evaluation of the evidence, an appellate court's review rests solely upon a cold record. *Id.* at 672. Thus, appellate review of the trial court's decision to grant or deny a request for a new trial is to focus on whether the trial judge has palpably abused its discretion, as opposed to whether the appellate court can find support in the record for the jury's verdict. *Id.* (citing *Austin v. Ridge*, 255 A.2d 123 (Pa. 1969); *see also Anzelone v. Jesperson*, 258 A.2d 510 (Pa. 1969)).

The trial court is inclined to agree with Defendant's claim that Plaintiff's counsel engaged in a pattern of misconduct that served no other purpose than to prejudice the jury. At the

outset of the case in opening statements, Plaintiff's counsel informed the jury that he would call a DHS witness and that Bethany "pled guilty" to the citation that was issued. N.T. Jury Trial, 3/26/19, at 86. This simply is not possible because parties do not enter pleas, nor are pleas accepted in licensing inspection cases.

From start to finish, Plaintiff's counsel engaged in a pattern of misconduct in a manner so thorough that it escapes this court's ability to recall another like it. Defendant amply briefed the seemingly innumerable instances in which counsel outright ignored the trial court's rulings or attempted to relitigate issues already decided by the court. For instance, the trial court made a pre-trial ruling concerning the introduction of evidence concerning Defendant's staffing and issues around profits. Undeterred, Mr. Pisanchyn brought up such issues numerous times during his examination of witnesses. Plaintiff was warned initially during his examination of witness Elaine Gilbert. However, counsel asked witness Jarrell Gallman if Defendant was "putting profits ahead of safety." N.T. Jury Trial, 3/29/19, at 37.

The examination of witness Janet Durkin presented an egregious violation of the court's rulings and misconduct by counsel. During the initial questioning of Ms. Durkin, counsel was admonished and Defendant's counsel stated that "[Plaintiff] has been told no less than six times not to use those phrases. You continue to do it. You tried to infect in this case the idea that it's profits over safety[.]" N.T. Jury Trial, 4/1/19, at 54. Later, Plaintiff's counsel inquired whether increasing the daily rate would increase Defendant's revenue and, after objection, stated the relevance was that Defendant "put profits over safety." N.T. Jury Trial, 4/1/19, at 106.

Other instances correctly cited by Defendant of Plaintiff willfully ignoring rulings include:

(1) Plaintiff's counsel was addressed for improperly examining witnesses to try to elicit repeat and hearsay testimony and information from prior witnesses or

> outside sources. One example of this occurred in a lengthy discussion during the testimony of Janet Durkin and counsel's attempt to elicit information from records that never were received by Bethany.
>
> (2) Plaintiff's counsel further attempted to introduce impermissible hearsay testimony through witness family members, requiring a lengthy colloquy with the Court about Plaintiffs continued impermissible attempts to introduce that evidence.
>
> (3) Plaintiff's counsel questioned defendant's expert witness about insurance, requiring a discussion in chambers where counsel once again was admonished and then instructed in front of the jury.

See Def. Br., 5/28/19, at 28. Indeed, Plaintiff's counsel took an unprecedented combative tone in remarks to the trial court. For example, after Defendant objected to the introduction of testimony regarding the decedent's aspirations in life – an objection the trial court sustained – Plaintiff's counsel remarked that the court should "explain to [counsel]" why the objection was sustained. N.T. Jury Trial, 4/1/19, at 117. Remarks such as these to the trial court lessen the court's authority in the presence of the jury.

Plaintiff's counsel did not limit the misconduct to attempting introduction of impermissible testimony and evidence. One of the byproducts of Plaintiff's counsel continually ignoring the trial court's evidentiary rulings and introducing impermissible testimony is that Defendant was forced to object at nearly every turn. This improperly cast Defendant in an unfavorable light in the eyes of the jury. Defendant – exercising far greater patience than the trial court would have endeavored – counted a total number of 120 objections and further broke it down by each witness: James Taylor (12 objections); Elaine Gilbert (18 objections); Jarrell Gallman (10 objections); Brian Hazlak (6 objections); Jennifer Harvey (14 objections); Janet Durkin (22 objections) and Patricia Miske (19 objections). Although objections are a natural course in the due course of a trial, such rampant attempts at introducing improper testimony must qualify as misconduct.

It is manifestly improper for counsel, under the guise of examination or cross-examination of witnesses, to seek by the form or contents of questions or behavior, to introduce into a case irrelevant, incompetent, and prejudicial matter. *Hunt. v. Herman Pneumatic Mach. Co.*, 221 Pa. Super. 328, 293 A.2d 105 (1972). Courts have recognized that a counsel's violations of orders and rulings have exhibited a disregard of the court and tainted the proceeding such that no curative instructions would have been appropriate. *Poust v. Hylton,* 940 A.2d 380 (2007). The continued and deliberate conduct by Plaintiff's counsel – despite numerous warnings by the trial court – served no other purpose than to infect the jury. The proper remedy under these circumstances would have been the grant of a new trial.

V. The Trial Court Properly Precluded the Unprecedented Issue of Pre-Impact Damages, and Properly Precluded the Issue of Pain and Suffering Damages in a Case of an Instantaneous Death.

Plaintiff also seeks pre-impact/pain and suffering damages on the basis that Carley Long suffered pre-fright injuries before her death. Pennsylvania only awards pain and suffering damages for that suffered between injury and death. Because nothing in the record supports any indication that Carley Long was not killed instantaneously, and there exists no precedent to support the award of damages for pre-impact fright, Plaintiff is not entitled to either of these forms of damages.

In Pennsylvania, survival actions are based on "the decedent's pain and suffering and loss of gross earning power from the date of injury until death." *Slaseman v. Myers*, 309 Pa. Super 537, 545 (1983). This rule excludes recovery for instantaneous death, which by definition involves neither pain nor suffering. *Fisher v. Dye*, 386 Pa. 141, 148 (1956); *Nye v. Commonwealth, Dept. of Transp.*, 331 Pa. Super. 209, 214 (1984); *Slavin v. Gardner*, 274 Pa. Super. 192, 198 (1979). Further, Pennsylvania courts have never awarded damages for pre-

impact fright, again a matter of limiting survival actions to emotional distress after the injury occurred. *Nye*, 331 Pa. Super. at 215. Pre-impact fright could only lead to damages if it caused a physical manifestation of bodily harm, as to support a claim for physical harm resulting from emotional disturbance. *Id.* at 216; *see Banyas v. Lower Bucks Hospital*, 293 Pa. Super. 122, 128 (1981) (actor liable for causing bodily harm derived from emotional disturbance but not for causing emotional disturbance alone).

The trial court permitted neither of Plaintiff's requests to instruct the jury on pre-impact fright nor on conscious pain and suffering. Plaintiff has presented no evidence to contest that Carley Long was killed instantaneously upon the train striking her, and therefore has not raised the question of any conscious pain and suffering that occurred in between injury and death. Nor is there any precedent for the award of damages for pre-impact fright in Pennsylvania. Emotional disturbance damages would therefore only be warranted if tied to physical harm caused by the train, again a notion which Plaintiff has not raised into question. Both forms of requested damages are unprecedented and improper.

VI. Damages Cannot Be Severed from Liability in a Limited New Trial, and the Court Declines to Grant a New Trial Generally.

Plaintiff also requests the trial court to grant a new trial limited to the damages. Even assuming *arguendo* that Plaintiff's requests had stronger case law support, it is still within the trial court's broad discretion to deny Plaintiff's motion given the prejudices and complications that a new trial may present. Because the issue of damages is not separate from the issue of liability and would essentially require a retrying of this case, Plaintiff's request is not consistent with applicable law.

The primary purpose of post-trial motions is to provide the court an opportunity to review and reconsider its determinations and correct its errors before an appeal. *Jackson v. Kassab*, 812

A.2d 1233, 1235 (Pa. Super. 2002). Trial courts have very broad discretion in granting or denying a new trial, which appellate courts do not interfere with absent abuse of discretion. *Harman ex rel. Harman v. Borah*, 562 Pa. 455, 466 (2000). New trials may only be granted on specific issues to the extent that such is fair to both parties. *Banohashim v. R.S. Enters., LLC*, 77 A.3d 14, 23 (Pa. Super. 2013). If a limited trial would be unfair or unjust to one of the parties, this requires the court to grant a new trial generally instead. *Id.* at 27. The power to grant a new trial is therefore limited and exercised cautiously. *Troncatti v. Smereczniak*, 428 Pa. 7, 9 (1967); *Berkeihiser v. DiBartolomeo*, 413 Pa. 158, 161 (1964). Further, Pa. R. Civ. P. 227.1(b) requires the movant to specify the grounds for relief in a new trial, or for said issues to have been properly preserved and raised in the post-trial motion, or else the issue is waived. *County of Del. V. J.P. Mascaro & Sons, Inc.*, 830 A.2d 587, 590 (Pa. Super. 2003); *M.C. v. Capenos*, 119 A.3d 1092, 1101 (Pa. Cmwlth. 2015).

A trial court may only grant a new trial limited to damages where (1) the issue of damages is not intertwined with the issue of liability and (2) the issue of liability has been fairly determined. *Mirabel v. Morales*, 57 A.3d 144, 152 (Pa. Super. 2012). Otherwise, by granting a new trial, the court would be reverting the case to its pre-trial status and putting all issues in question again; and by streamlining the process for granting a new trial limited to damages, the court would "not aid, but hinder, the administration of justice." *Berkeihiser*, 413 Pa. at 162 (citing *Friedman v. Matovich*, 191 Pa. Super. 275, 280 (1959)).

Plaintiff's motion both lacks legal support regarding the requested damages and requests a new trial that may intertwine damages with liability. Given that a new trial could not properly be limited solely to the issue of damages, this Court would be required to conduct an entire new trial. The punitive damages request, in particular, would entail that Plaintiff use several witnesses

that already testified in the original trial, raising many of the same issues again about Ms. Miske's employment and conduct that largely pertained to the liability question. Further, as the court has already denied Plaintiff's previous motion for reconsideration, to bring in new evidence on the understaffing issue serves no purpose but to further intertwine the issues of liability and damages. Because a limited new trial would bring the aforementioned complications, the trial court in its discretion finds the grant of a new trial to be unwarranted.

VII. Plaintiff is not Entitled to Delay Damages Because the Trial Court has Entered a Judgment Notwithstanding the Verdict Against Plaintiff.

As a final matter, Plaintiff requests the trial court to award delay damages against Defendant. Plaintiff is not entitled to such an award. Pennsylvania Rule of Civil Procedure 238 permits a successful plaintiff in certain civil actions to recover damages for delay, i.e., interest on the amount of his or her award. Pa.R.C.P. 238. The purpose of Rule 238 is twofold: "(1) to alleviate delay in the courts, and (2) to encourage defendants to settle meritorious claims as soon as reasonably possible." Pa.R.C.P. 238, 1988 Explanatory Comment, (*citing Laudenberger v. Port Authority of Allegheny County*, 436 A.2d 147 (1981); *see also Craig v. Magee Memorial Rehabilitation Center,* 512 Pa. 60, 515 A.2d 1350 (1986). In relevant part, Rule 238 states that:

> At the request of the plaintiff in a civil action seeking monetary relief for bodily injury, death or property damage, damages for delay shall be added to the amount of compensatory damages awarded against each defendant or additional defendant found to be liable to the plaintiff in the verdict of a jury ... and shall become part of the verdict, decision or award.

Pa.R.C.P. 238(a)(1). Here, the fundamental requirement for the award of delay damages is a <u>successful</u> plaintiff. Although Defendant did not contest the computation of delay damages, this does not permit Plaintiff to recover delay damages after the trial court has granted a judgment notwithstanding the verdict. Accordingly, because Plaintiff was not successful at trial, he is not entitled to delay damages.

CONCLUSION

Defendant and Plaintiff both filed with the trial Motions for Post-Trial Relief. Defendant avers that Plaintiff did not establish a right to relief because Plaintiff failed to prove that an estate was raised. The trial court must disagree with that assessment and found that an estate was properly raised. Defendant further alleged that Plaintiff did not establish Defendant breached any duty and that Plaintiff failed to prove proximate causation. The trial court agrees with Defendant in this respective. Therefore, the trial court must enter a judgment notwithstanding the verdict and is dispositive of the remaining issues raised in the respective motions for post-trial relief.

BY THE COURT:

SEAN F. KENNEDY, J.