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**STATE OF MINNESOTA
IN COURT OF APPEALS
A16-0704**

J.K., a minor, by and through K. Kimball, as parent and natural guardian,
Appellant,

vs.

New Horizon Kids Quest, Inc.,
Respondent.

**Filed April 10, 2017
Affirmed
Peterson, Judge**

Hennepin County District Court
File No. 27-CV-12-9958

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respondent)

Considered and decided by Peterson, Presiding Judge; Johnson, Judge; and
Bjorkman, Judge.

UNPUBLISHED OPINION

PETERSON, Judge

In this appeal from a judgment that awarded compensatory damages to appellant-child for injuries caused by an assault by another child at respondent's daycare center, appellant argues that the district court abused its discretion by (1) denying his motion to amend the complaint to add a claim for punitive damages and (2) excluding testimony from an expert witness on appellant's loss of future earning capacity. In a conditional related appeal, respondent argues that the district court abused its discretion by admitting evidence of the nature of the assault. We affirm and, therefore, do not address the issue raised in the conditional related appeal.

FACTS

Katie Kimball brings this appeal on behalf of her child, appellant J.K. Kimball brought appellant, then three-and-a-half years old, to a drop-in daycare center owned and operated by respondent New Horizon Kids Quest, Inc. on January 23, 2008. The daycare center was located onsite at the Grand Casino Mille Lacs. While appellant was at the daycare center, he was assaulted by a nine-year-old child. After the assault, appellant had bruises on his face, neck, body, and buttocks and a subconjunctival hemorrhage in his right eye. Parts of the assault were recorded on surveillance cameras, but appellant also spent significant periods with the older child in areas that were hidden from video surveillance. Appellant reported getting hit and choked by the older child. Appellant also told a clinical nurse practitioner, a triage nurse, and an examining emergency-room doctor that he was sexually assaulted.

On appellant's behalf, Kimball brought a tort action against respondent, alleging various counts of negligence and vicarious liability. Before trial, appellant moved to amend the complaint to add a claim for punitive damages and requested sanctions for respondent's spoliation of evidence. The district court granted the motion in part, ruling that the jury would be instructed that it could draw negative inferences from respondent's failure to produce three types of documents: (1) daily folders from January 1, 2005, to the date of the assault, (2) files pertaining to prior incidents that occurred at the daycare center, and (3) internal correspondence related to those other incidents.

The district court denied the motion to add a claim for punitive damages based on its determination that the evidence presented by appellant could not reasonably support, at a clear and convincing standard of proof, a conclusion that respondent's conduct exhibited an intentional or deliberate disregard for the rights or safety of others. The district court rejected appellant's assertions that respondent "had notice that an incident similar to this one might occur," failed to properly train its staff, and "failed to adequately staff the facility."

On December 5, 2014, respondent "agree[d] to admit liability and accept responsibility for damages found to be reasonably sustained by [appellant] as a result of the incident or incidences at [respondent's] facility." The district court construed this admission of liability to require the exclusion of "any evidence related to the acts or omissions of [respondent] that led to the incident."

In another pretrial ruling, the district court granted respondent's motion to exclude evidence from appellant's vocational expert, Dr. Philip Haber, on the ground that the

evidence was speculative. Appellant made an offer of proof, stating that, as a rehabilitation counselor, Haber applied an accepted methodology to determine vocational earning capacity that incorporated a review of medical records, work and school records, and vocational and psychological testing results, to reach an ultimate opinion on a subject's future earning capacity. Haber projected that appellant's lifetime wage loss due to the assault would be between approximately \$1 million and \$3.4 million.

A trial was held from January 20-30, 2015. The jury awarded appellant \$13,532,032.94 for damages. The district court granted respondent's motion for a new trial because appellant's counsel made statements during trial that were improper, prejudicial, and led to an excessive verdict.

Before the second trial, the district court denied appellant's renewed motion to amend the complaint to add a claim for punitive damages and ordered that other pretrial rulings from the first trial would remain in effect. During the second trial, the jury heard testimony from appellant's family, teachers, health-care providers, and experts about the consequences of the assault to appellant and about whether appellant had any conditions that would affect his recovery. The jury awarded appellant \$6,032,585 for damages; the damages award was composed of past health-care expenses (\$32,585); past pain, disability, embarrassment and emotional distress (\$2,150,000); future health-care expenses (\$1,700,000); and future pain, disability, embarrassment and emotional distress (\$2,150,000). The jury did not award any damages for loss of future earning capacity.

The district court denied appellant's posttrial motion for a new trial or for a partial new trial on punitive damages and loss of future earning capacity. Appellant then brought

this appeal to challenge those rulings.¹ Respondent filed a notice of related appeal in which it argues that the district court abused its discretion by admitting the testimony of two medical witnesses regarding the nature of the assault. The related appeal is conditional; respondent seeks relief only if this court rules in favor of appellant.

DECISION

I.

“Punitive damages shall be allowed in civil actions only upon clear and convincing evidence that the acts of the defendant show deliberate disregard for the rights or safety of others.” Minn. Stat. § 549.20, subd. 1(a) (2016). Deliberate disregard is demonstrated

if the defendant has knowledge of facts or intentionally disregards facts that create a high probability of injury to the rights or safety of others and:

(1) deliberately proceeds to act in conscious or intentional disregard of the high degree of probability of injury to the rights or safety of others; or

(2) deliberately proceeds to act with indifference to the high probability of injury to the rights or safety of others.

Id. at subd. 1(b) (2016).

A party must not seek punitive damages when commencing a civil action but may move to amend the pleadings to add a claim for punitive damages. Minn. Stat. § 549.191 (2016). The motion must allege the legal basis for the claim and be accompanied by

¹ Normally, a party may seek review of a denial of a motion to amend to include a claim for punitive damages “on appeal from a final judgment.” *McKenzie v. Northern States Power Co.*, 440 N.W.2d 183, 184 (Minn. App. 1989). By order of this court, appellant’s appeal is construed as taken from the January 19, 2016 final judgment following the second trial and includes within this court’s scope of review the December 31, 2013 order denying appellant’s motion to amend.

affidavits showing the factual basis for the claim. *Id.* The district court shall grant the motion if there is “prima facie evidence” to support it. *Id.* “Prima facie evidence is that evidence which, if unrebutted, would support a judgment in that party’s favor.” *McKenzie*, 440 N.W.2d at 184. “A district court may not allow an amendment for punitive damages when the motion to amend and supporting affidavits do not reasonably allow a conclusion that clear and convincing evidence will establish that the defendant acted with willful indifference.” *J.W. ex rel. B.R.W. v. 287 Intermediate Dist.*, 761 N.W.2d 896, 904 (Minn. App. 2009). This court will not reverse a district court’s denial of a motion to assert a claim for punitive damages “absent a demonstrated abuse of the [district] court’s discretion.” *McKenzie*, 440 N.W.2d at 184.

Appellant’s motion to amend includes broad allegations to support his punitive-damages claim. Appellant alleges that respondent knew that the daycare facility was dangerous, failed to communicate to staff, provided inadequate staff training, improperly counted a front-desk employee when calculating the employee-to-child ratios, failed to properly use a log-in form to ensure supervision of children, improperly tied staff bonuses to reduced labor costs, and was understaffed on the day that appellant was assaulted. In addressing these allegations, the district court grouped them into three general categories: “[Respondent] had notice that an incident similar to this one might occur; [respondent] failed to properly train its staff; and [respondent] failed to adequately staff the facility.”

Prior incidents

Appellant argues that respondent knew that the facility was dangerous because, during the two years before appellant was assaulted, seven other sexual assaults occurred

at the Mille Lacs facility, two sexual assaults occurred at other facilities that respondent operated, and 90 “physically violent incidents” occurred at the Mille Lacs facility. There was also an incident at the Mille Lacs facility in 2004 in which a two-year-old child was assaulted (but not sexually assaulted) by one or more older children, and there were no employees in the area where the assault occurred.

The district court determined that the evidence showed that a majority of the alleged sexual-assault incidents “involve[d] children either pulling down their own pants or the pants of another child, and were perpetrated by the same child, who was eventually asked not to return to the [f]acility;” and one incident involved allegations that a “sexual assault” occurred, but video-surveillance evidence of the assault was inconclusive. The district court noted that the two incidents at other facilities were not similar to appellant’s assault, and respondent did not know about one incident until after appellant’s assault. The district court also found that, while some “physically violent incidents” may have occurred at the facility, they were not of sufficient seriousness or similarity to appellant’s assault to put respondent on notice that an assault of the type that appellant experienced could occur. The district court concluded that “[m]ost importantly, on the night of the incident, [respondent] had no notice, nor any reason to believe, that the child accused of assaulting [appellant] posed a threat to other children.”

We agree with the district court that the evidence about prior incidents at respondent’s facilities was not clear and convincing evidence that respondent had knowledge of facts or intentionally disregarded facts that created a high probability that appellant would be assaulted as he was. But Minn. Stat. § 549.20, subd. 1(a), does not

require proof that a particular injury is highly probable; it requires proof of a high probability of injury. The prior-incident evidence showed that an incident of some sort was possible, and, perhaps, even probable, and an incident less serious than the assault on appellant could cause injury to the rights or safety of others. But we need not decide whether the evidence showed that an injury of any sort was highly probable because the prior-incident evidence was not clear and convincing evidence that respondent acted in conscious or intentional disregard or deliberate indifference to a high probability of injury. The evidence, instead, showed that respondent reacted to prior incidents by asking the child who had perpetrated a majority of the incidents not to return to the facility.

Staff training

Evidence regarding staff training showed that respondent's employee manual informed staff that they were "responsible for supervision, interaction with children, safety and cleaning;" urged staff not to "group up or stand around talking;" and directed staff to "interact and play with each child on his or her level." Respondent used an entry-log system to ensure that staff checked play areas. The district court rejected as unsupported appellant's allegation that respondent failed to regularly call safety meetings, noting that safety meetings were held "monthly and included all employees."

There was evidence that respondent's staff failed to properly supervise the Mille Lacs facility on the day appellant was assaulted, but the staff's failure can be attributed to respondent only if respondent "authorized the doing and the manner of the act, or the agent was unfit and the principal was reckless in employing him, or the principal ratified or approved the act." *Minneapolis Police Dept. v. Minneapolis Comm'n on Civil Rights*, 402

N.W.2d 125, 133 (Minn. App. 1987), *aff'd* 425 N.W.2d 235 (Minn. 1988). Appellant's evidence showed no more than that the staff's failures to act were inconsistent with their training. Also, the evidence showed that an entry-log system to ensure that staff checked play areas was implemented in the wake of the assault-incident in 2004, which indicates that respondent was not indifferent to the possibility of injury to children by assault and, instead, improved its system for providing supervision to reduce the chance of assaults in the future.

Adequate staffing

With regard to ratios of daycare staff to children, the district court determined that the facility

was governed by Tribal law, not Minnesota law. However, [respondent] voluntarily chose to adopt Minnesota staff-to-child ratios at its Mille Lacs facility. Under Minnesota's regulations, such ratios can be increased after age five, to one adult for every 15 children (1:15). Even though 70% of [respondent's] business is for children over the age of five, [respondent] chose to maintain staffing ratios of 1:10 for children 2-1/2 up to the age 10 [footnotes omitted].

Appellant argues that the staff person assigned to work at the front desk should not have been counted when calculating staff-to-child ratios, but he cites no regulation or other authority that does not allow that staff person to be counted.²

² The age groupings of children at the daycare were also asserted by appellant to be a basis for an award of punitive damages, but even appellant's child-care expert "stated this was an acceptable practice," and that employees were trained to encourage children to participate in "age appropriate activities."

On the day of the assault, the facility was “out of ratio” for 32 minutes.³ But the number of children at respondent’s drop-in center regularly changed, and respondent had implemented a computer program to predict staffing needs and minimize the amount of time that the center was understaffed or overstaffed. Respondent also maintained a list of on-call employees to meet staffing needs. The district court concluded that the computer program and the on-call list could not lead one to reasonably conclude that respondent’s staffing practices showed a deliberate disregard for the safety of others and, instead, showed that respondent was aware of the importance of adequate staffing levels and created a system to ensure that staffing was adequate.

The district court also rejected appellant’s claim that respondent “created financial incentives to under-staff” the facility. The district court found that the facility director may have been “told to cut staff when there [were] too many people working, [but she] was [not told] to do so when it would result in the [f]acility going out of ratio.”

Appellant argues that, although the district court ruled that respondent was guilty of spoliation of evidence and that jurors would be instructed that they could draw negative inferences from respondent’s failure to produce documents, the district court did not apply that inference in its analysis and, “instead held that [appellant] had failed to produce *enough* evidence that [respondent] was aware it was disregarding safety requirements.” Appellant contends that the documents that respondent failed to produce would show that prior

³ The district court found that the period of understaffing was 22 minutes, but this appears to be a math error. The district court determined that the facility was out of ratio from 4:38 p.m. until 5:10 p.m., which is a period of 32 minutes.

incidents at respondent's facility occurred when the facility was understaffed. The district court, however, did not deny appellant's motion to add a punitive-damages claim because appellant did not produce enough evidence; the district court concluded that the evidence that was produced was not sufficient to prove deliberate disregard.

We conclude that the district court did not abuse its discretion in denying appellant's motion to amend to add a claim for punitive damages. The district court considered the factual allegations supporting the motion to amend and found that they failed to meet the clear-and-convincing evidence standard to show deliberate disregard for the rights or safety of others. Although the district court acknowledged that appellant "may be able to make out a very strong claim of negligence," evidence that respondent negligently failed to prevent appellant's assault is not sufficient to show that respondent acted with indifference. A district "court may not allow an amendment [to add a claim for punitive damages] where the motion and supporting affidavits do not reasonably allow a conclusion that clear and convincing evidence will establish the defendant acted with willful indifference." *Swanlund v. Shimano Indus. Corp.*, 459 N.W.2d 151, 154 (Minn. App. 1990) (quotation omitted), *review denied* (Minn. Oct. 5, 1990); *see Utecht v. Shopko Dep't Store*, 324 N.W.2d 652, 654 (Minn. 1982) (ruling that more than mere negligence is required to show deliberate disregard necessary for a punitive damages claim); *Bjerke v. Johnson*, 727 N.W.2d 183, 196 (Minn. App. 2007) (affirming denial of a motion to add a claim for punitive damages when plaintiff's affidavits showed "evidence of negligence sufficient for consideration by a jury, but not of deliberate disregard" by the defendant), *affirmed in part, reversed in part on other grounds*, 742 N.W.2d 660 (Minn. 2007); *LeDoux v. Northwest*

Publ'g, Inc., 521 N.W.2d 59, 69 (Minn. App. 1994) (affirming denial of a motion to amend pleadings to add a claim of punitive damages because, although a newspaper was negligent in publishing false news articles about the plaintiff, “the evidence is not clear and convincing that [the defendants] acted with deliberate disregard for [the plaintiff’s] rights.”), *review denied* (Minn. Nov. 16, 1994). We, therefore, affirm the district court’s denial of appellant’s motion to amend the complaint to add a punitive-damages claim.

II.

Appellant argues that the district court abused its discretion by excluding Dr. Philip Haber’s expert testimony on appellant’s loss of future earning capacity. Appellant contends that it was logically inconsistent to submit loss of future earning capacity to the jury and then rule that a qualified expert’s opinion on the topic was unhelpful speculation.

“If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.” Minn. R. Evid. 702. But “an opinion must have foundational reliability.” *Id.* Also, “if the opinion or evidence involves novel scientific theory, the proponent must establish that the underlying scientific evidence is generally accepted in the relevant scientific community.” *Id.* “Determining expert witness competency and foundation for expert testimony lies within the sound discretion of the district court.” *Koch v. Mork Clinic, P.A.*, 540 N.W.2d 526, 529 (Minn. App. 1995) (quotation omitted), *review denied* (Minn. Jan. 12, 1996). Damages are not recoverable in a tort action if they are

“speculative, remote, or conjectural.” *Leoni v. Bemis Co.*, 255 N.W.2d 824, 826 (Minn. 1977) (quotation omitted).

It was not logically inconsistent to submit loss of future earning capacity to the jury and exclude Haber’s expert testimony because it was speculative. The fact that an issue is submitted to the jury does not make every expert’s testimony about that issue admissible; the district court must still exercise its discretion to determine whether there is foundation for the testimony.

Appellant describes Haber as a vocationalist who “is uniquely qualified to assess how a given physical or psychological impairment will impact the ability of a person to earn.” Appellant contends that Haber “calculated what earnings someone of [appellant’s] social and family background might typically have and compared that to the reduced earning capacity of someone with [appellant’s] disability, and proffered an opinion with reasonable certainty about how that loss would be quantified over a working life expectancy.”

To reach his opinion about appellant’s loss of earning capacity, Haber interviewed appellant’s mother and reviewed appellant’s medical records and educational history, which indicated that appellant was performing well academically in kindergarten. Based on his evaluation of the medical records, and particularly a psychological report, Haber reached his opinion that appellant “will experience a significant diminution of occupational opportunity and earning capacity secondary to his assault.” Haber then produced three estimates of appellant’s loss of future earning capacity based on assumptions about the levels of education and income that appellant would achieve if he had not been injured in

the assault compared to income he would earn if problems caused by the assault leave him totally unable to work, reduce his earnings by 30 percent, or reduce his earnings by 50 percent.

The district court determined that Haber's testimony was too speculative for two reasons. First, "we simply do not know much about what [appellant's] income would likely be had the incident never occurred, rendering any estimate a guess." Haber's estimate of appellant's income if he had not been assaulted was based on the premise that children tend to equal or exceed their parent's level of education. The district court found that this estimate was not sufficiently certain and stated:

No one can know where [appellant] is headed from a lifetime earnings standpoint at this stage of his life with enough certainty to figure out whether his future earnings may be affected by the [assault]. There is no significant evidence to establish any diminution based on his current level of functioning.

The district court's second reason for concluding that Haber's testimony was too speculative was that other cases that have allowed damages for loss of earnings for individuals under the age of majority have involved physical injury to the brain or body. The district court acknowledged that these cases do not hold that

psychological injuries related to a traumatic experience should not ever result in loss of earnings damages. . . . However, this does not mean that the Court will allow a party to conjecture that a child is likely to have suffered a career-destroying injury without needing something to show that this possibility is not wholly speculative. Since it does not appear that there is any obvious physically-damaging injury to [appellant's] brain, or his capacity to learn or engage in social behavior in society, it is necessary to show some evidence that could give the jury a basis to find that [appellant] (individually) has lost the ability

to work or at least will be significantly hampered in his ability to work. There has been no such showing and, as [respondent] points out, [appellant] is actually performing well in school.

Appellant claims that the district court excluded Haber's testimony as speculative "because no one knows with certitude what the future will hold for [appellant]." But the district court did not require certitude, the district court stated, "[I]t is necessary to show *some evidence that could give the jury a basis to find* that [appellant] (individually) has lost the ability to work or at least will be significantly hampered in his ability to work." Requiring "some evidence that could give the jury a basis to find" is not requiring certitude.

The district court did not abuse its discretion in concluding that Haber's testimony was too speculative. Although Haber's premise for estimating what appellant's income would have been if he had not been assaulted was not wholly speculative,⁴ it reflected only a general tendency of children to equal or exceed their parent's level of education and was not specifically related to appellant. Haber simply applied this general tendency to appellant. More significantly, Haber did not provide any basis for the jury to determine the extent to which the consequences of the assault would affect appellant's future earnings. Haber provided three estimates of future earnings based on assumptions that appellant's earning capacity would be reduced by 30, 50, or 100 percent, but he did not provide any basis for the jury to determine which of the three applied.

⁴ As the basis for his premise, Haber cited *Pathways to the Future, Vol. IV, A Report on the National Longitudinal Surveys of Youth, Labor Market Experience in 1982*, Center for Human Resource Research, Ohio State University (revised April 1984).

Because we are affirming the judgment, we will not consider the evidentiary issue conditionally raised by respondent.

Affirmed.