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Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-002432-MR

HIGHLANDS HOSPITAL CORPORATION — APPELLANT

v.

APPEAL FROM FLOYD CIRCUIT COURT
HONORABLE EDDY COLEMAN, JUDGE
ACTION NO. 05-CI-01303

LONNA CASTLE — APPELLEE

OPINION
AFFIRMING IN PART, REVERSING IN PART,
AND REMANDING

** ** ** ** **

BEFORE: ACREE AND DIXON, JUDGES; GRAVES,[1] SPECIAL JUDGE.

ACREE, JUDGE: Highlands Hospital Corporation appeals the denial by the Floyd Circuit Court of its motions for judgment notwithstanding the verdict and for a new trial following a jury's verdict holding the Hospital liable to its former employee,

[1] Retired Judge John W. Graves sitting as temporary Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

Lonna Castle, for wrongful termination and awarding her compensatory damages and equitable relief, and punitive damages. We reverse and remand the case for further proceedings.

I. Factual Background

Castle worked as an obstetrical nurse at the Hospital for nearly fourteen years. On September 2, 2005, Castle assisted with the emergency caesarian-section delivery of the child of a patient referred to in the briefs as HS. As part of her duties, Castle filled out and signed a surgical record form. This form contained a box intended to be checked by a nurse to indicate that the patient had signed a specific form consenting to the upcoming surgery. Castle testified at trial and does not now contend otherwise that she checked the box despite the fact that she had not looked at the patient's records to verify that in fact they included a prior consent form.

After the surgery, Hospital personnel discovered there was no signed prior consent form in the file. The obstetrician who performed the surgery sought to correct Castle's error, instructing her to visit the patient in the post-operative recovery room and to obtain the patient's signature on the consent form despite the fact that the surgery had already taken place. Castle complied with that instruction.

These circumstances soon came to the attention of the Hospital's administrators and, on September 8, 2005, Castle was suspended pending further investigation. As a result of the investigation, the Hospital concluded Castle had violated two provisions of its written policies. First, the Hospital found that Castle

falsified a medical record when she incorrectly indicated that the patient's signed consent had been obtained prior to surgery. Second, the Hospital determined that Castle engaged in behavior inconsistent with the practice of nursing when she obtained a signed consent form from a patient who was already in the post-operative recovery room. Both of these acts were "Group I" violations; that is, violations included among those determined by the Hospital's written policies to be of the highest magnitude and for which the prescribed discipline was immediate discharge. Based on Castle's Group I violations, she was discharged on September 21, 2005.

The Hospital made a report of Castle's actions to the Kentucky Board of Nursing (KBN), believing such report was required by KRS 314.031. In pertinent part, the statute makes it "unlawful for any . . . employer of nurses . . . to refrain from reporting to the board a nurse . . . suspected of negligently or willfully acting in a manner inconsistent with the practice of nursing [or] falsifying or in a negligent manner making incorrect entries or failing to make essential entries on essential records." KRS 314.031(4)(c), (i). The KBN performed its own investigation and, after applying its statutory standards, decided to take no formal action against Castle.

As a nurse, Castle was also under certain reporting duties including a requirement that she comply with KRS 216B.165(1) which states, in pertinent part:

> Any . . . employee of a health care facility . . . who knows or has reasonable cause to believe that the quality of care of a patient [or] patient safety . . . is in jeopardy

> shall make an oral or written report of the problem to the health care facility . . . .

KRS 216B.165(1). The record shows that on the same date as the incident involving the consent form, Castle made such an oral report as is required by this statute. This occurred after her supervisor approached her in another patient's room and rebuked her for failing to begin an intravenous drip to induce labor, referred to as induction. Castle responded that she could not begin the induction because there were not enough nurses on the ward. According to Castle, the discussion with her supervisor became quite heated. Castle testified that she had complained of understaffing numerous times within her fourteen-year career at the Hospital.

After she was terminated, Castle brought suit against the Hospital claiming she was fired in retaliation for reporting understaffing on the maternity ward on the day in question. After the Hospital's motions for directed verdict were denied, the jury determined that the evidence supported Castle's claim and awarded her $80,000.00 in back pay, $500,000.00 in front pay, and $250,000.00 in punitive damages. The Hospital filed a timely motion for judgment notwithstanding the verdict and for a new trial. The Hospital's motion contained numerous arguments. Generally, the Hospital argued that Castle failed to present a *prima facie* case for retaliatory discharge, that the trial court improperly admitted irrelevant evidence, that Castle failed to prove entitlement to either compensatory

or punitive damages, and that the jury was improperly instructed. The trial court's order summarily denied the motion, and this appeal followed.

II. Issues on Appeal

In all, the Hospital presents six arguments. The Hospital argues that the trial court erred in denying its motion for JNOV because: (1) as a matter of law, Castle was not entitled to damages for future economic loss ("front pay"); (2) to the extent the law allows an award of front pay, its award is a matter for the court and not the jury; and (3) the evidence was insufficient to support an award of punitive damages. The Hospital also argues that the trial court should have granted a new trial on the issues liability for retaliatory discharge, compensatory damages, and punitive damages because: (4) irrelevant evidence was admitted that was highly prejudicial to the Hospital; (5) the jury was not properly instructed on the issue of liability under KRS 216B.165; and (6) the jury was not properly instructed as to punitive damages. We will address these arguments as they fall into natural categories as follows: first, issues related to the Hospital's liability under KRS 216B.165; second, issues related to the award of "front pay"; and third, issues related to the award of punitive damages.

III. Standard of Review

The variety of arguments presented requires application of a variety of standards of review.

> In ruling on either a motion for a directed verdict or a motion for judgment notwithstanding the verdict, a trial court is under a duty to consider the evidence in the

> strongest possible light in favor of the party opposing the motion. Furthermore, it is required to give the opposing party the advantage of every fair and reasonable inference which can be drawn from the evidence. And, it is precluded from entering either a directed verdict or judgment n.o.v. unless there is a complete absence of proof on a material issue in the action, or if no disputed issue of fact exists upon which reasonable men could differ.

Taylor v. Kennedy, 700 S.W.2d 415, 416 (Ky.App. 1985). A reviewing court may not disturb a trial court's decision on a motion for a judgment notwithstanding the verdict unless that decision is clearly erroneous. *Bierman v. Klapheke*, 967 S.W.2d 16, 18 (Ky. 1998). The denial of a motion for a judgment notwithstanding the verdict should only be reversed on appeal when it is shown that the verdict was palpably or flagrantly against the evidence such that it indicates the jury reached the verdict as a result of passion or prejudice. *Id.* at 18-19.

Furthermore, "whether front pay should be awarded and if so, the amount, are issues for the trial court and not the jury." *Dollar General Partners v. Upchurch*, 214 S.W.3d 910, 918 (Ky.App. 2006), *citing Brooks v. Lexington-Fayette Urban County Housing Authority*, 132 S.W.3d 790, 806 (Ky. 2004). We review such legal determinations *de novo*. *Steel Technologies, Inc. v. Congleton*, 234 S.W.3d 920, 931 (Ky. 2007), *citing Cooper Industries v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 436, 121 S.Ct. 1678, 1685-86, 149 L.Ed.2d 674 (2001).

"[A]buse of discretion is the proper standard of review of a trial court's evidentiary rulings." *Goodyear Tire & Rubber Co. v. Thompson*, 11 S.W.3d 575, 577 (Ky. 2000) (citations omitted). "The test for abuse of discretion

is whether the trial [court's] decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Id.* at 581.

> We review the award of punitive damages *de novo*, mindful that
>
> Exacting appellate review ensures that an award of punitive damages is based upon an "'application of law, rather than a decisionmaker's caprice.'"

State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 419, 123 S.Ct. 1513 (2003), *citing Cooper Industries* at 436, 121 S.Ct. 1678, *quoting BMW of North America, Inc. v. Gore*, 517 U.S. 559, 587, 116 S.Ct. 1589 (1996)(Breyer, J., concurring).

IV. Issues Related To The Hospital's Liability Under KRS 216B.165

Castle based her cause of action for retaliatory discharge on the prohibition contained in KRS 216B.165(3) which states, in pertinent part:

> No health care facility . . . shall . . . subject to reprisal, or directly or indirectly use, or threaten to use, any authority or influence, in any manner whatsoever, which tends to discourage, restrain, suppress, dissuade, deter, prevent, interfere with, coerce, or discriminate against any . . . employee who in good faith reports, discloses, divulges, or otherwise brings to the attention of the health care facility . . . the circumstances or facts to form the basis of a report under subsection[ ] (1) . . . of this section. [See KRS 216B.165(1), *supra*.]

KRS 216B.165(3). Because the legislature did not specify any remedy in that statute, Castle brought her claim pursuant to KRS 446.070, which creates a private right of action for "the violation of any statute[.]" KRS 446.070.

To establish her claim, Castle was required to present evidence that (1) she engaged in a protected activity; (2) the Hospital knew she had engaged in that activity; (3) Castle suffered adverse employment action; and (4) there was a causal connection between the protected activity and the adverse employment action. *Brooks*, *supra*, at 803. There is no real dispute regarding the first three elements of the cause of action, but only as to the causal connection between elements (1) and (3).

The Hospital's argument before this Court as to the jury's determination of liability under KRS 216B.165(3) is that while Castle's complaint only alleged the single report of understaffing on September 2, 2005, she was allowed to present evidence over the Hospital's objection of multiple prior reports. The Hospital also objected to the reference in the jury instruction to "reports" rather than to the single report alleged although the singular form of the word was used in the same instruction in two other places.[2]

We see no error in the trial court's overruling of the Hospital's objection to evidence that Castle made multiple reports. As the Hospital noted, it took no adverse action on the prior occasion of those reports. The jury was properly permitted to consider whether Castle's repeated reports had a cumulative effect on the Hospital's decision to terminate her or, alternatively, whether proof that the Hospital took no adverse action on prior occasions undermined the causal relationship between her final report and her termination.

[2] Castle's motion during the trial to amend the complaint to allege multiple reports in conformity with the evidence was denied by the trial court.

Furthermore, we see no error in the instruction. The Hospital argues the instruction allowed the jury to consider reports of understaffing other than Castle's single report on September 2, 2005. Ultimately, the one-time use of the plural "reports" in the instruction amounts to little more than a typographical error. While the instruction may have drawn the jury's attention to Castle's other reports, it was the admission of that evidence that allowed the jury to consider it. As we have found no error in the admission of that evidence, and as the verdict relative to the finding of a causal connection between Castle's report and her termination is supported by substantial evidence, we will not interfere with the jury's verdict on the issue of the Hospital's liability under KRS 216B.165(3).

V. Issues Related To The Award Of "Front Pay"

The Hospital makes the following argument regarding front pay: (1) equitable remedies are available in statutory causes of action only if the enabling legislation authorizes the equitable remedy; (2) front pay is a form of equitable remedy; (3) the enabling legislation in this case does not authorize any equitable remedy including front pay; (4) Castle is not entitled to recover front pay. We agree and begin our analysis by considering the nature of all retaliatory discharge claims.

The Kentucky legislature defines the parameters of all retaliatory discharge claims. As held in *Louisville & N. R. Co. v. Marshall*, 586 S.W.2d 274 (Ky.App. 1979), the "common law rule has always been that a contract of employment is terminable by either party at will, in the absence of some statutory

or contractual standard that modifies this rule." *Marshall* at 281. Therefore, no cause of action for retaliatory or wrongful discharge will be permitted unless the "discharge is contrary to a fundamental and well-defined public policy as evidenced by . . . a constitutional or statutory provision." *Firestone Textile Co. Div., Firestone Tire and Rubber Co. v. Meadows*, 666 S.W.2d 730, 731 (Ky. 1983)(internal quotation marks and citation omitted). This means that all retaliatory discharge cases in Kentucky are either constitution-based or statute-based. In this case the cause of action is statute-based; the tortious conduct is defined in KRS 216B.165(3) and the cause of action is authorized and the remedy is defined by KRS 446.070. The claim of retaliatory discharge being a creature of statute, it is the legislature that defines the parameters of any recovery.

If a statute prohibits specific conduct, but fails to specify a remedy, we may look only to KRS 446.070 to provide it. *Grzyb v. Evans*, 700 S.W.2d 399, 401 (Ky. 1985). KRS 216B.165(3) prohibited the Hospital from taking adverse employment action against Castle for making certain reports, but that statute does not specify any remedy for its violation. Therefore, we look to KRS 446.070 to determine whether the legislature authorized the remedy Castle seeks. KRS 446.070 provides

> A person injured by the violation of any statute may recover from the offender such damages as he sustained by reason of the violation, although a penalty or forfeiture is imposed for such violation.

Castle's remedy is thus limited to "such damages as [s]he sustained by reason of the violation" of KRS 216B.165.

When the Supreme Court considered the availability of an equitable remedy in a similarly statute-based retaliatory discharge claim, such remedy was determined to be unavailable. *Pari-Mutuel Clerks' Union of Kentucky, Local 541, SEIU, AFL-CIO v. Kentucky Jockey Club*, 551 S.W.2d 801, 803 (Ky. 1977). Like Castle's claim, the discharged employee's claim in *Pari-Mutuel Clerks' Union* was based on a prohibitory statute that did not specify a remedy.[3] Like Castle's claim, the remedy had to be found in KRS 446.070. In *Pari-Mutuel Clerks' Union*, "the relief sought [was] the reinstatement of discharged employes[.]" *Pari-Mutuel Clerks' Union* at 802. Recognizing that the enabling legislation had not authorized such relief, and that granting reinstatement would require the Court to add language to the statute, the Supreme Court said, "Obviously, we must decline to do so, since legislation is constitutionally the exclusive function of the General Assembly and not that of the courts." *Id.* at 803. The discharged employee was limited in his remedy "under KRS 446.070 to recover from his former employer whatever damages he has sustained by reason of the violation." *Pari-Mutuel Clerks' Union* at 803; *Simpson County Steeplechase Ass'n v. Roberts*, 898 S.W.2d 523, 525 (Ky.App. 1995)(interpreting the same enabling legislation "held that the statute does not permit injunctive relief."). We can reach no other conclusion than

[3] In *Pari-Mutuel Clerks' Union*, the discharged employee's claim was based on the employer's violation of KRS 336.130 and brought pursuant to KRS 446.070. The pre-emption of KRS 336.130 by National Labor Relations Act, 29 U.S.C. § 141 *et seq*, was recognized by *Smith v. Excel Maintenance Services, Inc*., 617 F.Supp.2d 520, 523-24 (W.D.Ky. 2008).

that if equitable relief could have been found in KRS 446.070, it would have been found in *Pari-Mutuel Clerks' Union*. Equitable relief is no more available in Castle's case.

Castle attempts to make a distinction between reinstatement and front pay. However, front pay is simply a substitute for reinstatement. *Brooks*, *supra*, 132 S.W.3d at 806 ("front pay either supplements the equitable remedy of reinstatement or acts as a substitute for it"). Furthermore, as the Hospital correctly notes, front pay is still "[c]onsidered an equitable remedy[.]" *Dollar General Partners*, *supra*, 214 S.W.3d at 918. Allowing the equitable remedy of front pay when the equitable remedy of reinstatement is prohibited would create an impermissible incongruity in Kentucky jurisprudence. Consequently, Castle is not entitled to equitable relief in the form of front pay.

Castle argues that in *Brooks, supra,* our Supreme Court discussed and allowed an award of front pay. This argument fails, however, because in *Brooks* the Supreme Court was applying a statute that included language authorizing the "Circuit Court to enjoin further violations[.]" *Brooks* at 809, *quoting* KRS 344.450. The Court concluded that "the power to order reinstatement appears to fall within the trial court's power" under KRS 344.450. *Brooks* at 806. Unlike the statute involved in *Brooks*, there is no language in KRS 216B.165 or KRS 446.070 authorizing the circuit court's exercise of any injunctive authority whatsoever.

Our conclusion that front pay is not an available remedy under KRS 216B.165 obviates the need to address the Hospital's second argument that the

award of front pay is a matter for the court and not the jury. However, as noted in the Standard of Review, *supra*, that issue already has been resolved by *Brooks* and *Dollar General Partners*. *See also, Williams v. Wal-Mart Stores, Inc*., 184 S.W.3d 492, 494 n.1 (Ky. 2005)("the trial court rather than the jury should determine the appropriateness and amount of front pay").

VI. Issues Related To The Award of Punitive Damages

The Hospital presents several arguments challenging the punitive damage award. We take particular note of the arguments that the trial court erred by admitting irrelevant and prejudicial evidence of the Hospital's alleged dissimilar prior bad acts, and that the punitive damage instruction was improper because it was worded in a way that allowed the jury to punish the Hospital for conduct other than that prohibited by KRS 216B.165, all in violation of established principles of due process. We believe these arguments have merit.

Castle and her witnesses offered evidence that the Hospital was understaffed on dates when Castle made no report and on occasions when Castle was not even on duty. Furthermore, Castle presented witnesses who testified to their belief that these incidents of understaffing jeopardized the health and safety of, or actually harmed, patients.[4]

[4] Some stories offered by Castle and her witnesses were clearly intended to inflame the passions of the jury. In one case, a mother was given the wrong medicine and, according to the testimony, nearly died because of the error. In another, a baby stopped breathing after going too long between feedings. Whether these mistakes could have been avoided by increased staffing will never be known. Perhaps the most emotion-evoking example involved a newborn who died while being transported to another hospital. Castle presented no evidence as to the cause of the infant's death or even that the Hospital's maternity ward was understaffed at the time.

The Hospital objected to the admissibility of this evidence because it was not relevant to Castle's claim that she was terminated for her own reporting of understaffing on September 2, 2005, in violation of KRS 216B.165(3). Castle's counsel responded that the evidence was relevant because "in the instructions on punitives, one of the things the jury has to consider is the harm that was caused by the understaffing."[5] Castle's counsel further argued that

> This is not about September 2nd. This is about the staffing problem at Highlands Hospital that happened over a great period of time. And the jury needs to determine what is appropriate for punitive damages, to know what harm was caused not just to the plaintiff but to these other poor victims who weren't ever told what the Hospital did to them.

The trial court considered the parties' arguments and admitted the evidence. At the close of proof, the Hospital moved for directed verdict on the grounds, among others, that there was no admissible evidence supporting an award of punitive damages. The motion was denied.

Counsel for both parties then tendered proposed punitive damage instructions from which the trial court prepared the instruction that was eventually presented to the jury. The Hospital first objected to the use of any punitive damage instruction at all arguing again that the evidence did not warrant one. After the trial court overruled that objection, the Hospital objected to the specific form of the

[5] Castle never argued that evidence of understaffing reports or understaffing itself was relevant to establish that Castle made her September 2, 2005 report in good faith, a liability element of her cause of action rather than an element of damages.

punitive damage instruction the trial court proposed to use.[6] The instruction read, in pertinent part, as follows:

INSTRUCTION NO. 6

> If you answered "YES" to Instruction No. 2 [regarding the Hospital's liability to Castle for retaliatory discharge] and if you are further satisfied from the evidence that in its conduct toward [Castle], the Defendant's employees acted in reckless disregard for the lives, safety or property of others, including [Castle], you may in your discretion award punitive damages against the Defendant in addition to the [compensatory] damages you have awarded . . . .
>
> Your discretion to determine and award an amount, if any, of punitive damages is limited to the following factors:
>
> A. The harm to [Castle] as measured by the [compensatory] damages you have awarded . . . caused by the conduct of the Defendant's employees toward [Castle];
>
> B. The degree, if any, to which you have found from the evidence that the conduct of the Defendant's employees toward [Castle] was reprehensible, considering:
>
> 1. The degree to which the conduct of the Defendant's employees showed an indifference to or a reckless disregard of the health or safety of others;
>
> 2. The degree to which [Castle] had financial vulnerability;
>
> OR

[6] The punitive damage instruction the trial court used was very similar to that proposed by Castle since both were based on John S. Palmore, *Kentucky Instructions to Juries*, § 39.15 (2006). As Castle notes, the trial court "gave the proposed instruction provided by Nurse Castle[.]"

> 3. The degree to which the conduct of the Defendant's employees involved repeated actions as opposed to an isolated incident.

Reminding the trial court of its objection to the admission of understaffing evidence, the Hospital argued that the language in Castle's and the trial court's instructions would allow the jury to punish the Hospital for harm alleged to have been inflicted upon patients rather than punishing the Hospital for terminating Castle. The Hospital's counsel stated,

> It's the same concern I had when they started putting in evidence . . . that back in 2002 or 2003 there was an understaffing on the [maternity] unit. The message to the jury here is, well, let's deal with all that stuff. And that was never this case.
>
> This was never a case against the Hospital for safety or anything else. It was a case of – did Ms. Castle get retaliated against and that was the sum and substance of it.
>
> And this jury instruction is so open-ended that it allows the jury to find them – I mean – I think it is a very serious due process violation to start with. I guess if we have got to instruct on punitive damage we would tender our instruction on that, which at least I believe is more limited.

The trial court overruled the Hospital's objection and its motion for a more limited instruction on punitive damages. Counsel then proceeded to closing arguments.

In closing, Castle's attorney placed strong emphasis on the evidence of understaffing. Re-emphasizing that Castle's complaint was not just about her retaliatory discharge, her counsel said to the jury,

> You've got the power and you've got the opportunity to fix this. The hospital's had the courage to come in here

> and try to cover you up with red fish. Now, do you have the courage to fix the problem?
>
> The most important thing is that when you leave this courthouse today you feel proud of what you've done. You hold your head up high and be proud of your verdict, of what you do today, because God forbid that, this time next year, you should read in the newspaper about a baby dying at Highlands, and look in the mirror and think you had a chance to prevent that.

After the jury determined liability and awarded compensatory and punitive damages, the Hospital moved for judgment notwithstanding the verdict; the motion was denied.

On appeal, the Hospital argues that the evidence of understaffing was not relevant under Kentucky Rule of Evidence (KRE) 401 and therefore inadmissible under KRE 402. Citing KRE 403, the Hospital further argues that even if the evidence is relevant, it should have been excluded as unduly prejudicial. KRE 403 ("Although relevant, evidence may be excluded if its probative value of this evidence is substantially outweighed by the danger of under prejudice, confusion of the issues, or misleading the jury"). The Hospital also argues that under KRE 404(b), "[e]vidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith." KRE 404(b). Finally, the Hospital argues that its due process rights were violated (1) because no punitive damage instruction should have been given, (2) because the trial court's instruction allowed the jury to base a punitive damage award on evidence of the Hospital's dissimilar conduct, and (3) because the trial court

rejected the more narrowly-tailored punitive damage instruction it proposed that would have prevented the jury from considering evidence of dissimilar conduct.

Castle counters these arguments by stating that evidence of the Hospital's "prior bad actions . . . cannot be excluded simply because it might seem 'prejudicial'" and by arguing that "[t]hese shocking facts are central to Nurse Castle's case, and were properly considered by the finder of fact." Regarding the jury instruction, Castle states that the "trial court properly gave the proposed instruction provided by Nurse Castle [because it was] drawn from Palmore, *Kentucky Instructions to Juries*, 5th ed. [as opposed to the Hospital's] proposed jury instructions [that] were copied from an earlier edition of the text [Palmore, 4th ed.], which failed to take into account recent changes in the law on punitive damages."

A. Inadmissibility of Evidence of Dissimilar Acts

These issues of the inadmissibility of evidence of dissimilar acts and the obligation of a trial court to tailor punitive damage instructions are directly addressed in the United States Supreme Court cases of *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 123 S.Ct. 1513 (2003), and *Philip Morris USA v. Williams*, 549 U.S. 346, 127 S.Ct. 1057 (2007), respectively. Therefore, we discuss their applicability here.

Both *State Farm* and *Philip Morris* are the progeny of *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 116 S.Ct. 1589 (1996), which articulated three guideposts for courts to use in evaluating whether punitive damages awards are unconstitutionally excessive: 1) the degree of reprehensibility of the conduct;

2) the ratio of the punitive damages to the actual harm inflicted on the plaintiff; and 3) a comparison of the punitive damages award and the civil or criminal penalties that could be imposed for comparable misconduct. *Gore* at 574-75. The *Gore* guideposts were applied and expounded upon in *State Farm*, which focused on the reprehensibility guidepost and reversed a punitive damage award that was based on evidence of a "defendant's dissimilar acts, independent from the acts upon which liability was premised[.]" *State Farm* at 422.

More recently, in *Philip Morris*, the Court reiterated its concern for a fair process and focused on the need for the trial court, by appropriate instruction, to assure "that juries are not asking the wrong question, *i.e.*, seeking, not simply to determine reprehensibility but also to punish for harm caused strangers." *Philip Morris* at 355.

While *State Farm* and *Philip Morris* give guidance for post-judgment reviews of punitive damage awards, their holdings have real practical value for practitioners, and for trial courts ruling on evidentiary matters such as those now before this Court. This can be seen in the procedural histories of both cases, beginning with *State Farm*. We will discuss *Philip Morris* in the context of our analysis of the punitive damage instruction, *infra*.

In *State Farm*, the United States Supreme Court took discretionary review of a decision by the Utah Supreme Court, captioned *Campbell v. State Farm Mut. Auto. Ins. Co.*, 65 P.3d 1134 (Utah 2001), *rev'd, State Farm Mut. Auto.*

Ins. Co. v. Campbell, 538 U.S. 408, 123 S.Ct. 1513 (2003). The Utah Supreme Court framed the issue as follows:

> Did the trial court commit reversible error by admitting "other acts" evidence in violation of Utah Rule of Evidence 404(b)?

Campbell, 65 P.3d at 1144. Notably, Utah's Rule 404(b) is identical to the Kentucky Rule of Evidence upon which the Hospital relied. The Utah Supreme Court concluded,

> that the trial court did not exceed the permitted range of discretion in finding that the "other acts" evidence was offered for a proper, noncharacter purpose.

Id. at 1157.

After granting certiorari, the United States Supreme Court determined that the Utah courts' analysis was incorrect. However, the Court faced an analytical problem. "[A]dmissibility of other acts evidence is ordinarily governed by Rule 404(b) and . . . since this determination was made by the Utah courts applying their own state evidentiary rules, the Supreme Court had no authority to evaluate whether those rules were properly applied." Jim Gash, *Punitive Damages, Other Acts Evidence, and the Constitution*, 2004 Utah L. Rev. 1191, 1232 (2004)(footnotes omitted).[7] Consequently, the Supreme Court could only

[7] Professor Gash cites as authority, among others, the cases of *Marshall v. Lonberger*, 459 U.S. 422, 438 n.6 (1983) ("[T]he Due Process Clause does not permit the federal courts to engage in a finely tuned review of the wisdom of state evidentiary rules."), and *Patterson v. New York*, 432 U.S. 197, 201-02 (1977) ("it is normally within the power of the State to regulate procedures under which its laws are carried out, . . . and its decision in this regard is not subject to proscription under the Due Process Clause unless it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." (internal quotation marks omitted)).

reverse the Utah Supreme Court if it determined, independently of the state courts' interpretation of its own evidentiary rules, that the admission of other acts evidence violated the United States Constitution. *Id.* at 1231-32.[8] And that is precisely what the Court did.

In *State Farm*, the Court first enumerated the five factors used in determining the reprehensibility of a defendant. They are whether:

> the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident.

State Farm at 419. Particularly applicable both in *State Farm* and in the case now before this Court is the second factor – whether "the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others[.]" *Id.* The legal analogies between the cases do not end there.

In *State Farm*, the Campbells were at fault in an auto accident. Their insurer was State Farm, whose "handling of the claims against the Campbells merits no praise." *Id.* Taken at face value, the Hospital's understaffing likewise merits no praise. In an approach similar to that taken by Castle, the Campbells

[8] *Citing Jammal v. Van De Kamp*, 926 F.2d 918, 919 (9th Cir. 1991) ("While adherence to state evidentiary rules suggests that the trial was conducted in a procedurally fair manner, it is certainly possible to have a fair trial even when state standards are violated; conversely, state procedural and evidentiary rules may countenance processes that do not comport with fundamental fairness."); *id.* at 920 ("The . . . issue is not whether introduction of [the evidence] violated state law evidentiary principles, but whether the trial court committed an error which rendered the trial so arbitrary and fundamentally unfair that it violated federal due process." (internal quotation marks omitted)).

tried to make their case about more than the harm they suffered as a result of the defendant's tortious conduct.

> From their opening statements onward the Campbells framed this case as a chance to rebuke State Farm for its nationwide activities [stating,] "[T]his is a very important case. . . . [I]t transcends the Campbell file. It involves a nationwide practice. And you, here, are going to be evaluating and assessing, and hopefully requiring State Farm to stand accountable for what it's doing across the country, which is the purpose of punitive damages". [parenthetical omitted] This was a position maintained throughout the litigation. In opposing State Farm's motion to exclude such evidence under *Gore*, the Campbells' counsel convinced the trial court that there was no limitation on the scope of evidence that could be considered under our precedents.

State Farm at 420-21.[9] As noted, State Farm objected to the admission of this evidence both under Rule 404(b) and *Gore* but the trial court admitted the evidence. That evidentiary ruling was reversible error. "[T]he Utah courts erred in relying upon this and other evidence: The courts awarded punitive damages to punish and deter conduct that bore no relation to the Campbells' harm."[10] *Id.* at

[9] The parties in the case *sub judice* and the trial court, like the Campbells, referenced *Gore* several times throughout the trial relative to these evidentiary issues.

[10] The United States Supreme Court's use of the plural, "Utah courts," in this quote can only refer to the trial court and the appellate Supreme Court. The procedural history shows that the case was originally decided on State Farm's motion for summary judgment which the Campbell's appealed to the Utah Supreme Court and which that court transferred to the Utah Court of Appeals in accordance with Utah Rules of Appellate Procedure 42. The Campbells appeal of the summary judgment was successful. *Campbell v. State Farm Mut. Auto. Ins. Co*., 840 P.2d 130 (Utah App. 1992). There were no evidentiary rulings addressed by the Utah Court of Appeals in that decision. Upon remand, a jury awarded judgment, including punitive damages, in favor of the Campbells. *Campbell*, 65 P.3d 1141. Both the Campbells and State Farm appealed that judgment directly to the Utah Supreme Court in accordance with that court's original appellate jurisdiction. Utah Const. art. 8, § 3. Therefore, the error in evidentiary rulings was first committed by the Utah trial court, and then by the Utah Supreme Court when it affirmed the trial court.

422. "The Utah Supreme Court's opinion makes explicit that State Farm was being condemned for its nationwide policies rather than for the conduct directed toward the Campbells." *State Farm* at 420.

The rule we take from *State Farm* is this: "A defendant's dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages." *Id.* at 422. This is not only a rule for reviewing courts, but an evidentiary rule for trial courts as well. *See Philip Morris*, 549 U.S. at 352-53, 127 S.Ct. at 1062 (stating that the Court "need now only consider the Constitution's *procedural* limitations." Emphasis supplied.). The Utah Supreme Court understood this. On remand, the Utah Supreme Court acknowledged that

> the Supreme Court leashed us more tightly to the established analytical guideposts of *Gore* . . . by *narrowing the scope of relevant evidence* which we may consider in evaluating the reprehensibility of State Farm's conduct . . . . Drawing on views expressed in *Gore*, the Supreme Court *limited evidence* that can properly be weighed in the reprehensibility scale to behavior which took place within our borders and was directed at the Campbells. [citation omitted]

Campbell v. State Farm Mut. Auto. Ins. Co., 98 P.3d 409, 413 (Utah 2004)(emphasis supplied).

Our own Supreme Court has similarly recognized that *State Farm* is about the inadmissibility of evidence, noting "the United States Supreme Court sharply *limited the use of evidence* of other transgressions to prove entitlement to punitive damages." *Kentucky Farm Bureau Mut. Ins. Co. v. Rodgers*, 179 S.W.3d

815, 819 (Ky. 2005)(emphasis supplied), *quoting State Farm*, 538 U.S. at 422-23, 123 S.Ct. 1513.

The error in admitting evidence of understaffing and the harm Castle's witnesses alleged it caused patients can be summarized as follows. This was dissimilar other acts evidence – not evidence of the tortious act upon which liability was premised – and of the very type prohibited by *State Farm*. Clearly, the act upon which Castle's complaint premised the Hospital's liability was the termination of her employment in violation of KRS 216B.165 and not the Hospital's understaffing.

However, this determination is neither an end to the Hospital's arguments nor our analysis. *Philip Morris* indicates that, by properly instructing the jury, the prejudicial impact of such other acts evidence might be sufficiently tempered to render the erroneous admission of such evidence harmless.

Like *State Farm*, *Philip Morris* illustrates that "the United States Constitution requires both *procedural* and substantive limits on punitive damage awards." *Williams v. Philip Morris Inc.*, 344 Or. 45, 176 P.3d 1255, 1257 (Or. 2008)(emphasis supplied)(on remand from and citing *Philip Morris*, 549 U.S. at 352-53, 127 S.Ct. at 1062). As such, both cases lend themselves to practical application at trial – *State Farm* to the admissibility of evidence and *Philip Morris* to the crafting of jury instructions.

B. Improper Punitive Damage Instruction[11]

[11] A preliminary issue, one never raised or determined, was whether punitive damages are available at all for a cause of action brought pursuant to KRS 446.070 to recover damages for a

Just as in the case *sub judice*, one of the issues in *Philip Morris* "arose in the context of the trial court's refusal to give a particular proposed jury instruction that defendant had requested." *Williams v. Philip Morris Inc.*, 344 Or. 45, 176 P.3d 1255, 1257 (Or. 2008). In both this case and *Philip Morris*, the appellant argued "the trial court should have accepted, but did not accept, a proposed 'punitive damages' instruction" that would have prohibited the jury from punishing the appellant "for injury to other persons not before the court." *Philip Morris* at 350. In both cases, "[t]he judge rejected this proposal[.]" *Id.* at 351.

Philip Morris vacated the Oregon Supreme Court's opinion because "the Due Process Clause prohibits a State from punishing an individual without first providing that individual with 'an opportunity to present every available defense.' *Lindsey v. Normet*, 405 U.S. 56, 66, 92 S.Ct. 862, 31 L.Ed.2d 36 (1972) (internal quotation marks omitted). Yet a defendant threatened with punishment

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violation of KRS 216B.165(3). The Kentucky Supreme Court has held that the punitive damages statutes, KRS 411.184 and KRS 411.186, "apply only to those cases in which punitive damages are already authorized by common law or by statute." *Kentucky Dept. of Corrections v. McCullough*, 123 S.W.3d 130, 139 (Ky. 2003). Castle's cause of action has no counterpart at common law and the implicated statutes do not specify punitive damages as a remedy. In the absence of "[t]he express inclusion of punitive damages in these statutes," *McCullough* at 140, no punitive damage instruction was authorized. *See Jackson v. Tullar*, 285 S.W.3d 290, 298 (Ky.App. 2007)("In determining whether punitive damages are authorized by a particular statute, Kentucky courts have applied a strict, literal interpretation of the relevant statutory language."). However, the Hospital never made this argument and, unlike the defendant in *Childers Oil Co., Inc. v. Adkins*, 256 S.W.3d 19 (Ky. 2008), does not raise this issue as palpable error. Consequently, that argument has been waived.

However, *McCullough* calls into question, if it does not reject outright, the holding in *Simpson County Steeplechase Ass'n v. Roberts*, 898 S.W.2d 523 (Ky.App. 1995), that punitive damages are generally available in retaliatory discharge cases and specifically available in such cases brought pursuant to KRS 336.130. Applying *McCullough*'s reasoning to the facts and statute involved in *Simpson County Steeplechase* would have resulted in a different outcome in that case.

for injuring a nonparty victim has no opportunity to defend against the charge[.]" *Philip Morris* at 353. The Court explained that

> to permit punishment for injuring a nonparty victim would add a near standardless dimension to the punitive damages equation. How many such victims are there? How seriously were they injured? Under what circumstances did injury occur? The trial will not likely answer such questions as to nonparty victims. The jury will be left to speculate. And the fundamental due process concerns to which our punitive damages cases refer – risks of arbitrariness, uncertainty and lack of notice – will be magnified. *State Farm*, 538 U.S., at 416, 418, 123 S.Ct. 1513; *BMW* [*of North America v. Gore*], 517 U.S., at 574, 116 S.Ct. 1589.

Philip Morris at 354. Citing both *Gore* and *Philip Morris* in its brief, the Hospital makes this very argument – allowing the case to center on harm caused to patient-nonparties deprived it of fair notice. We find merit in this argument.

Castle's response is identical to the response of the appellee in *Philip Morris* that "she is free to show harm to other victims because it is relevant to a different part of the punitive damages constitutional equation, namely, reprehensibility." *Id.* at 355. Rejecting this argument, the Supreme Court said "a jury may not go further than this and use a punitive damages verdict to punish a defendant directly on account of harms it is alleged to have visited on nonparties." *Id.* The argument, said the Court,

> raises a practical problem. How can we know whether a jury, in taking account of harm caused others under the rubric of reprehensibility, also seeks to *punish* the defendant for having caused injury to others? Our answer is that . . . where the risk of that misunderstanding is a significant one – because, for instance, of the sort of

> evidence that was introduced at trial or the kinds of argument the plaintiff made to the jury – *a court, upon request, must protect against that risk.*

Id. at 357 (emphasis supplied). The Hospital made that request, specifically arguing that the more limited instruction on punitive damage it proposed would have lessened or eliminated the risk identified in *Philip Morris*. Like the trial court in *Philip Morris*, the trial court in the case before us failed to protect against that risk when it instructed the jury in a way that allowed it to punish the Hospital for harm it allegedly visited upon nonparties. This constitutes reversible error.

Again, this does not end the analysis. If it did, we would remand the case for a new trial on the issue of punitive damages. As we further discuss, the admissible evidence remaining once evidence of understaffing is eliminated does not justify instructing the jury on punitive damages. Therefore, we are vacating the punitive damage award.

The *Restatement (Second) of Torts* § 908(2) (1979), states that "Punitive damages may be awarded for conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others." Kentucky's highest court said, "The threshold for the award of punitive damages in a tort case is whether there is misconduct as described in the *Restatement*, *supra*, 'outrageous' in character[.]" *Horton v. Union Light, Heat & Power Co*., 690 S.W.2d 382, 389 (Ky. 1985). In short, there was nothing outrageous about Castle's termination; her termination harmed no one but Castle. Even if, as the jury found, the Hospital's reasons for terminating her included Castle's making of a report

under KRS 216B.165(1), the proof supported a finding of a non-retaliatory reason as well – the violation of the Hospital's prohibition against falsifying medical records.

Castle presented no evidence at trial and makes no argument here that the Hospital engaged in outrageous conduct other than "that the hospital was chronically short staffed and that she and the other nurses were forced to risk injury or death to their patients and the incident trauma and liability, due to the hospital's wrongful conduct." (Appellee's brief, p. 14). This is not the tortious conduct upon which Castle premised her complaint.

Castle's further argument is somewhat circular. She argues that "the jury had the discretion to award punitive damages upon evidence that [the Hospital's] employees acted 'in reckless disregard for the lives, safety or property of others, including [Castle].'" She confuses jury instruction standards for a finding of "gross negligence" – a basis of liability – and jury instruction standards for finding punitive damages. To some degree, this mistake is understandable. In *Williams v. Wilson*, 972 S.W.2d 260 (Ky. 1998), which Castle cites, the trial court

> submitted the case to the jury for a determination of punitive damages upon an instruction from *Horton v. Union Light, Heat & Power Co.*, Ky., 690 S.W.2d 382, 388 (1985), which requires proof of "wanton or reckless disregard for the lives, safety or property of others."

Williams at 261. However, reading *Horton* reveals the instruction to which *Williams* refers is *not* a punitive damage instruction. In *Horton*, before the Court reached the issue of punitive damages, it said

> the evidence was sufficient for the jury to conclude that the totality of circumstances indicated "a wanton or reckless disregard for the lives, safety or property of other persons." This was the standard for deciding "gross negligence" submitted by the instructions. *These instructions have not been challenged in this case*.

Horton at 387-88 (emphasis supplied). The punitive damage instruction, *not* this liability instruction, was the focus of *Horton*.

Nevertheless, Castle further argues that punitive damages were appropriate because the trial court relied on the current edition of the model jury instruction, Palmore's *Kentucky Instructions to Juries*, Fifth Ed., Vol. 2, § 39.15: Punitive Damages. Because none of the three reprehensibility factors used in Castle's instruction and as described in *State Farm* are present in this case, this argument also fails. *State Farm*, 538 U.S. at 419, 123 S.Ct. 1513 ("The existence of any one of these [reprehensibility] factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect.").

Relying on a model instruction would seem a safe approach, but it is not always so. *Walker v. Commonwealth*, No. 2006-SC-000480-MR, 2007 WL 2404508 *6 (Ky., Aug. 23, 2007)(model instructions are not binding upon the courts).[12] The pitfall that caught Castle and the trial court was the failure of the model instruction to accurately track the law upon which it is based. Specifically, one of the five factors identified in *State Farm* as indicative of reprehensible conduct was whether "the *tortious* conduct evinced an indifference to or a reckless

[12] Cited here in accordance with Kentucky Rule of Civil Procedure (CR) 76.28(4)(c).

disregard of the health or safety of others[.]" *State Farm*, 538 U.S. at 419, 123 S.Ct. at 1521 (emphasis supplied). In the most recent version of Palmore's *Instructions*, the jury is to consider "the degree to which D's conduct evinced an indifference to or a reckless disregard of the health or safety of others[.]" Palmore, *Instructions*, Vol. 2, § 39.15. Notably missing from the model instruction is the qualifying adjective "tortious." *See Lawrence v. Risen*, 598 S.W.2d 474, 476 (Ky.App. 1980)(conduct *first* must be found to be tortious to allow punitive damages; failure of plaintiff's claim "on which actual damages could be awarded . . . precluded [him] from seeking exemplary ones"). The absence of this qualifying language allowed the jury to consider more than the Hospital's tortious conduct; it allowed the jury to consider the conduct Castle made the focus of her case – understaffing – evidence of dissimilar conduct.

We believe it likely that Palmore's model instruction left out the adjective "tortious" to eliminate the need to define the somewhat technical term for the jury. However, the word's elimination from the model instruction neither obviates nor satisfies the trial court's duty to craft a punitive damage instruction that assures the jury's consideration of the reprehensibility factor is limited to the same conduct upon which the defendant's tort liability is based.

What Castle should have presented as evidence and argued to the jury was how "*the conduct that harmed the plaintiff* also posed a substantial risk of harm to the general public, and so was particularly reprehensible[.]" *Philip Morris* 549 U.S. at 355, 127 S.Ct. 1057 (emphasis supplied). Hypothetically, had Castle

been on duty at the moment of her termination, the health or safety of the patients for whom she was providing care, potentially, could have been jeopardized. But that simply was not the case.

There was no evidence that Castle's termination posed any risk, substantial or otherwise, to anyone other than her. Once the inadmissible evidence of understaffing is disregarded, we see there was no evidence that justified including this factor in the punitive damage instruction. It was error to do so.

The second *State Farm* factor for determining reprehensibility used in the instruction was the "degree to which [Castle] had financial vulnerability[.]"

> To be sure, infliction of economic injury . . . *when the target is financially vulnerable,* can warrant a substantial penalty. But this observation does not convert all acts that cause economic harm into torts that are sufficiently reprehensible to justify a significant sanction in addition to compensatory damages.

BMW of North America, Inc. v. Gore, 517 U.S. 559, 576, 116 S.Ct. 1589 (1996).

In the strictest sense, the Hospital's act of terminating Castle caused economic harm because she lost her employment income. However, that kind of "economic harm was a natural consequence of terminating [Castle] from her employment[.]" *Ojeda-Rodriguez v. Zayas*, 666 F.Supp.2d 240, 265 (D.Puerto Rico 2009) (discharged employee alleged defamation and denial of due process hearing). If we were to categorize as financially vulnerable every person who loses employment income, we would then be constrained to say that every termination from employment (or suspension without pay for that matter) is

reprehensible. But that is simply not so. *See, e.g., Morgan v. New York Life Ins. Co*., 559 F.3d 425, 441-42 (6th Cir. 2009)("it would not be accurate to describe [the discharged employee] as financially vulnerable"); *Austin v. Norfolk Southern Corp.*, 158 Fed.Appx. 374, 389 (3rd Cir. 2005)(No evidence "that the [30 day] suspension [without pay] put her [the employee] in a financially vulnerable position"). Obviously, a finding that the tort victim was financially vulnerable must depend on the presence of some additional factor or factors.

Kentucky has not defined "financial vulnerability." In an effort to determine what factors other than loss of employment income would serve to make a discharged employee financially vulnerable, we looked to every readily available case in our sister states and in the federal courts in which financial vulnerability received any discussion at all. Case law is sparse as to this precise issue, and the cases we found are short on analysis. Some cases make no finding of financial vulnerability, but without analysis of any kind as to why.[13] Others do make a finding of financial vulnerability, but do so without explanation.[14] However, several cases do shed a little light on the issue.

Focusing on cases of wrongful or retaliatory discharge, we see that employees were found to be financially vulnerable because certain special circumstances impacted their financial security even before they were terminated

[13] *See*, *e.g.*, *Hines v. Grand Casino of Louisiana, L.L.C. – Tunica-Biloxi Indians*, 358 F.Supp.2d 533, 552 (W.D.La. 2005).

[14] *See*, *e.g.*, *Laymon v. Lobby House, Inc*., 613 F.Supp.2d 504, 513 (D.Del. 2009)("Laymon was economically vulnerable in that she was employed by Lobby House who paid her wages").

and while they still earned a salary. These cases involved employees who were "low-paid" or unskilled or who were older and, because of those circumstances, had minimal prospects for re-employment.[15] In what appears to be a sub-category of this group, single parents were also determined to be financially vulnerable.[16]

Castle has little in common with the employees in these cases. She is neither a single mother nor her family's sole provider. She is not unskilled, uneducated, or elderly. Rather, she is an experienced, educated nurse whose skills have been perennially in high demand. When she marketed those skills, she readily found replacement employment. The Hospital presented evidence that

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[15] *Goldsmith v. Bagby Elevator Co., Inc.*, 513 F.3d 1261, 1283 (11th Cir. 2008)(manual laborer with elevator fabricating company "was financially vulnerable"); *Lopez v. Aramark Uniform & Career Apparel, Inc*., 426 F.Supp.2d 914, 970 (N.D.Iowa 2006)(employees "were poor and uneducated"); *Roby v. McKesson Corp.*, 47 Cal.4th 686, 219 P.3d 749, 793-94 (Cal. 2009) *and Roby* at 801 (Werdegar, J., concurring)(employee known by her employer to be chronically ill, "was a relatively low-level employee who quickly depleted her savings and lost her medical insurance as a result of her termination" and became "completely disabled from employment"); *Gober v. Ralphs Grocery Co*., 137 Cal.App.4th 204, 220, 40 Cal.Rptr.3d 92, 105 (Cal.App. 2006)("victims were a group of grocery store employees"); *Baker v. National State Bank*, 353 N.J.Super. 145, 801 A.2d 1158, 1165 (N.J.Super.A.D. 2002) *and Baker v. National State Bank*, 312 N.J.Super. 268, 711 A.2d 917, 921 (N.J.Super.A.D.1998)(because of their age, employees had difficulty finding new employment, their "family was forced to borrow funds to maintain their household[,]" and they "struggled financially following their termination and had to reduce their standards of living considerably"); *Tomao v. Abbott Laboratories, Inc.*, 2007 WL 2225905, *21, No. 04-C-3470. (N.D.Ill. July 31, 2007)(employee "was over 60 years of age at all times relevant"); *LaMore v. Check Advance of Tennessee, LLC*, No. E2009-00442-COA-R3-CV, 2010 WL 323077, *2, *16, *17 (Tenn.App. January 28, 2010)(single mother of special needs child, was "low-paid" and "unable for other unfortunate reasons, to work"); *see also Parrish v. Sollecito*, 280 F.Supp.2d 145, 163 (S.D.N.Y. 2003)("the evidence in the record does not demonstrate that Parrish was financially vulnerable to the point of being deprived of food, shelter or basic necessities").

[16] *Blount v. Stroud*, 395 Ill.App.3d 8, 915 N.E.2d 925, 942 (Ill.App. 2009)(single mother of two children about to testify for co-worker in discrimination case whose "supervisor told her that the co-worker 'didn't pay your bills,' that he did, and that she should do what he said so that she and her children did not 'go over a cliff' financially."); *Brady v. Curators of University of Missouri*, 213 S.W.3d 101, 111 (Mo.App. 2006)(father of two sons forced to "rely on his former wife for financial help, thus making him financially vulnerable"); *LaMore*, *supra*; *Watson v. E.S. Sutton, Inc.*, No. 02 Civ. 2739 (KMW), 2005 WL 2170659, *17 (S.D.N.Y. September 6, 2005)("single mother . . . was left with no income [and] had to scramble to support herself and her child").

there were other nursing positions available in Castle's area that she did not pursue because, as she acknowledged, she did not read the newspapers in which those jobs were advertised.

Of the cases we found, Castle's circumstances appear more in line with the employees in *Richardson v. Tricom Pictures & Productions, Inc*., 334 F.Supp.2d 1303 (S.D.Fla. 2004), and *Parrish v. Sollecito*, 280 F.Supp.2d 145 (S.D.N.Y. 2003)/*Parrish v. Sollecito*, 249 F.Supp.2d 342 (S.D.N.Y. 2003).

In *Richardson*, the plaintiff's employer discharged her in retaliation for asserting a claim of sexual harassment, thereby depriving her of her income as a sales representative for a media production company. Nevertheless, the court determined "there is no evidence . . . that Richardson was financially vulnerable to a significant degree." *Richardson* at 1324; *see also Morgan v. New York Life Ins. Co.*, *supra*, at 441-42 (6th Cir. 2009)("it would seem to be a stretch to describe [the discharged employee, a 50-year-old insurance company executive] as financially vulnerable"). Richardson, unlike the employees who were determined to be financially vulnerable in the cases cited, *supra*, had a marketable skill set in sales. The only real financial vulnerability Richardson could claim was her temporary loss of income from employment. Castle and Richardson have this in common.

In *Parrish*, the plaintiff was hired as a finance manager at two inter-related auto dealerships. *Parrish*, 249 F.Supp.2d at 344. After asserting a claim of sexual harassment and hostile work environment, Parrish's employment at one of the dealerships was terminated, and this "caused her to lose approximately half of

her income." *Parrish*, 249 F.Supp.2d at 346. Presumably because the work environment at the other dealership remained hostile in her opinion, she resigned from that employment as well. *Parrish*, 249 F.Supp.2d at 346. Although Parrish "testified to being in a vulnerable economic position after her recent divorce, indicating that she desperately needed her job[,]" the court held that "the evidence in the record does not demonstrate that Parrish was financially vulnerable to the point of being deprived of food, shelter or basic necessities." *Parrish*, 280 F.Supp.2d at 163. Like the employee in *Richardson*, Parrish had marketable skills. In Parrish's case, those skills were in finance. In Castle's case, her skills were nursing. The record in Castle's case demonstrates to us that she was not more financially vulnerable when she was terminated than was Parrish or Richardson. Certainly she was not deprived of food, shelter or basic necessities.

We do not intend to indicate that Castle's circumstances were identical to those of Parrish and Richardson. They were not. However, *State Farm* provides a "flexible general standard to be applied to each particular case as the facts required." *Rodgers*, *supra*, 179 S.W.2d at 825. Applying that standard here, we find that Castle has far more in common with Parrish and Richardson than with the employees in other cases who were experiencing financial vulnerability even before their termination. For this reason, we conclude that Castle was not financially vulnerable for purposes of determining under *State Farm* the reprehensibility of the Hospital's conduct in terminating her employment. The evidence in this case did not justify including this factor in the jury instruction.

The third and last of the five *State Farm* factors used in the punitive damage instruction to assist the jury in determining reprehensibility was "[t]he degree to which the conduct of the [Hospital's] employees involved repeated actions as opposed to an isolated incident[.]" *State Farm* includes this factor because, just as "a recidivist may be punished more severely than a first offender . . . repeated misconduct is more reprehensible than an individual instance of malfeasance[.]" *State Farm*, 538 U.S. at 423, 123 S.Ct. 1513, *quoting Gore*, *supra*, 517 U.S. at 577, 116 S.Ct. 1589.

However, as with our consideration of the first factor used in the instruction, we must not lose sight of the conduct we are considering. The question is not whether the evidence revealed repetitive episodes of understaffing. To justify including this factor in the punitive damage instruction, there must have been "evidence of repeated misconduct *of the sort that injured*" Castle. *State Farm*, 538 U.S. at 423, 123 S.Ct. 1513 (emphasis supplied). While "evidence of other acts need not be identical to have relevance in the calculation of punitive damages," *State Farm*, 538 U.S. at 423, 123 SCt. 1513, "courts must ensure the conduct in question *replicates* the prior transgressions." *Id.* (emphasis supplied), *citing TXO Production Corp. v. Alliance Resources Corp*., 509 U.S. 443, 462, n. 28, 113 S.Ct. 2711, 125 L.Ed.2d 366 (1993). In Kentucky, we require such replication to be "so strikingly similar to the present act as to constitute a 'signature crime.'" *Rodgers*, *supra*, 179 S.W.2d at 819, *citing Rearick v. Commonwealth*, 858 S.W.2d 185, 187 (Ky. 1993). Here, no such evidence existed.

Castle presented no evidence whatsoever that her termination in violation of KRS 216B.165 replicated any prior act of the Hospital. In fact, the evidence clearly established the contrary. Despite a fair number of employee reports regarding understaffing, the Hospital never took any adverse action toward any of those employees with the exception of the Hospital's termination of Castle. That was an isolated incident and including this element in the punitive damage instruction was error. Doing so further confused the jury, allowing them, again, to consider, and punish the Hospital for, understaffing.

Because the United States Supreme Court has said that the absence of all of the reprehensibility factors renders any award of punitive damages suspect, it is simple logic to conclude that the same absence renders a punitive damage instruction inappropriate. *See State Farm*, 538 U.S. at 419, 123 S.Ct. 1513. In this case, the award of punitive damages is more than suspect because, in addition to the absence of all the *State Farm* factors, there are other reasons to conclude that punitive damages are not warranted in this case.

We turn again to *State Farm*, in which the Supreme Court said,

> It should be presumed a plaintiff has been made whole for his injuries by compensatory damages, so punitive damages should only be awarded if the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence.

State Farm, 538 U.S. at 419, 123 S.Ct. at 1521. Castle was awarded $80,000 as compensation for the loss of income she experienced between the date of her

termination and the date of the jury's verdict, prior to which she had secured other employment as a nurse. The jury awarded her nothing on her claim of emotional distress caused by her termination. We presume, therefore, that she has been made whole by the award of compensatory damages.

Second, this is a "'mixed-motive' case, *i.e.*, where both legitimate and non-legitimate reasons motivated the decision" to terminate the employee. *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 93, 123 S.Ct. 2148 (2003). The jury's determination that Castle's discharge was retaliatory does not equate to a determination that no legitimate reason existed for her termination. *See First Property Management Corp. v. Zarebidaki*, 867 S.W.2d 185, 188-89 (Ky. 1993)(jury need only "believe[ ] the impermissible reason did in fact contribute to the discharge as one of the substantial motivating factors"). Castle does not dispute either that she falsely reported that a prior consent had been obtained without confirming that fact, or that she obtained a written consent to surgery after the surgery had been completed. Both were legitimate reasons for her termination.

One might argue that a punitive damage instruction could be based solely on the jury's determination that Castle's termination was retaliatory. However, the contrary appears to be the universal rule.[17] The "mere existence of a

[17] *See, e.g., Seitzinger v. Trans-Lux Corp*., 40 P.3d 1012, 1020 (N.M.App. 2001)(citing cases from the Seventh Circuit, Alabama and Mississippi "holding that the mere existence of a retaliatory discharge will not automatically give rise to a right to punitive damages"); *Wallace v. Halliburton Co.*, 850 P.2d 1056, 1060 (Okl. 1993)("to warrant an instruction on punitive damages . . . [t]he fact the employee was discharged in retaliation for filing a workers' compensation claim is not enough"); *Ancira Enterprises, Inc. v. Fischer*, 178 S.W.3d 82, 94 (Tex.App.-Austin, 2005)("evidence of retaliation alone is generally insufficient to support an award of punitive damages"); *see also Reeder-Baker v. Lincoln Nat. Corp*., 649 F.Supp. 647, 663 (N.D.Ind. 1986), *aff'd*, 834 F.2d 1373 (7th Cir. 1987)("Retaliation by itself would obviously not

retaliatory discharge will not automatically give rise to the right to punitive damages." *Peters v. Rivers Edge Min., Inc*., 224 W.Va. 160, 680 S.E.2d 791, 821 (W.Va. 2009)(quotation marks and citation omitted). While Kentucky has not yet addressed this issue, we have no difficulty joining this majority view now. Determination that an employee's discharge is retaliatory is not, by itself, sufficient to sustain an award of punitive damages.

Third, examining the enabling legislation in this case in light of the analysis set forth in *Kentucky Dept. of Corrections v. McCullough*, 123 S.W.3d 130 (Ky. 2003), we are convinced the legislature did not intend that punitive damages be awarded for violations of KRS 216B.165. *McCullough* at 138 (reversing Court of Appeals which, "[d]espite the plain language of the statute" excluding punitive damages, erroneously "held that punitive damages are nonetheless available under KRS 344.450"); *see* footnote 11, *supra*. While the Hospital waived the right to have the punitive damage award set aside solely because the legislature did not authorize that remedy, the intent of the legislature remains a valid consideration in the due process analysis.

When the legislature creates a cause of action, it must decide, as a matter of public policy, whether allowing private litigants to recover punitive damages will "further [the] State's legitimate interests in punishing unlawful conduct and deterring its repetition." *Gore*, 517 U.S. at 568, 116 S.Ct. 1589. Reading KRS 216B.165 together with KRS 446.070, it is clear the legislature did

automatically justify punitive damages.").

not allow private litigants such a right, but instead reserved to the Kentucky Cabinet for Health and Family Services the authority to punish health care facilities for violating KRS 216B.165. *See* KRS 216B.165(5)("All health care facilities and services licensed under this chapter shall, as a condition of licensure, abide by the terms of KRS 216B.155 and this section."); KRS 216B.042(3)("The cabinet may revoke licenses or certificates of need for specific health facilities or health services . . . on the basis of the knowing violation of any provisions of this chapter.").

For a violation of KRS 216B.165, the legislature limited private litigants to recovery only of "such damages as [the plaintiff] sustained by reason of the violation" of the prohibitory statute. KRS 446.070. "Punitive damages are not 'damages sustained' by a particular plaintiff. Rather, they are private fines levied by civil juries to punish a defendant for his conduct and to deter others from engaging in similar conduct in the future." *In re Air Crash Disaster at Gander, Newfoundland*, *On Dec. 12, 1985*, 684 F.Supp. 927, 931 (W.D.Ky. 1987) (interpreting federal law and international treaty). The legislature did not authorize punitive damages in cases brought pursuant to KRS 446.070.

Finally, we conclude that the award of punitive damages was animated by passion and prejudice. While the amount of the award (just more than three times the compensatory award) is not so great by itself as to suggest the influence of passion or prejudice, when combined with the absence of competent evidence of reprehensibility it is "enough to induce us to look to the record for

sources of prejudice." *Clement Bros. Co. v. Everett*, 414 S.W.2d 576, 577 (Ky. 1967). "We find them[,]" as did the Supreme Court in *Clement Bros.*, "in the closing arguments of appellee['s] counsel [which] appear to have been designed specifically to appeal to and arouse the passions and prejudices of the jury." *Id.*; *see also Rockwell Intern. Corp. v. Wilhite*, 143 S.W.3d 604, 629 (Ky.App. 2003)(setting aside punitive damage award based upon "a determination that the verdict was the result of passion or prejudice as indicated by . . . the inflammatory nature of the closing arguments in question."). The focus of Castle's counsel's closing argument was hardly the Hospital's tortious conduct; it was the unproven incidents of understaffing which allegedly placed patients in jeopardy. We are sufficiently convinced not only that the punitive damage award lacked the support of competent evidence, but also that it was the product of the jury's passions and prejudices.

We therefore agree with the Hospital that no punitive damage instruction was justified by the facts of this case. Giving such an instruction allowed Castle to emphasize incompetent evidence resulting in a verdict based on passion and prejudice and otherwise offensive to judicially defined due process protections. The Hospital's motion for judgment notwithstanding the verdict should have been granted. It was clear error to fail to do so.

VII. Conclusion

For the foregoing reasons, we affirm the Floyd Circuit Court judgment upon the jury's verdict regarding the Hospital's liability to Castle for

violating KRS 216B.165 and its award of compensatory damages in the amount of $80,000; we reverse as clearly erroneous the circuit court's denial of the Hospital's motion for judgment notwithstanding the verdict regarding the award of front pay and punitive damages; and we remand the matter for further proceedings consistent with this opinion.

DIXON, JUDGE, CONCURS.

GRAVES, SPECIAL JUDGE, DISSENTS AND FILES SEPARATE OPINION.

GRAVES, SPECIAL JUDGE, DISSENTING: The majority has written a learned opinion with an extended examination of recent United States Supreme Court decisions pertaining to punitive damages. However, I must dissent because those decisions have been read too broadly and have been misapplied to the facts in this case. I read the Supreme Court cases only as limiting the multiplier between actual damages and punitive damages. I do not read those opinions as defining the elements of the actionable wrongdoing.

Moreover, the facts in the United States Supreme Court decisions deal with punishment for extraterritorial torts. In the facts at bar, all the wrongdoing (understaffing) occurred under one roof. Consequently, the trial court was correct in ruling that evidence of understaffing was more probative than prejudicial, as a logical nexus existed between the discharge and the pervasive understaffing.

There are three rationales for awarding punitive damages: punishing the defendant, deterring the defendant from similar conduct in the future, and

acting as an incentive to encourage private lawsuits seeking to assert legal rights. Punitive damages are also thought to have arisen as an additional means of compensation for such costs as attorney fees and damages from emotional injuries which historically were not recoverable in court.

The punitive damages decision is a mixture of arguably predictable components and understandable but unpredictable elements. Jurors' evaluations of wrongfulness are based on the conscience of the community. Punitive damages require jurors to make a qualitative assessment based on a host of facts and circumstances unique to the particular case before it.

Credibility determinations, weighing of evidence, and drawing legitimate inferences from the facts are jury functions, not those of a reviewing court. Inferences from admitted evidentiary facts are as much a prerogative of the fact-finder as inferences as to the credibility of the witnesses. Consequently, judgments NOV should be granted in limited circumstances.

Evidentiary facts alone should not justify a judgment NOV. Even though there may be no dispute as to the facts, inferences of ultimate fact could be drawn from evidentiary facts that raise issues of credibility. Here, inferences from the facts raised a contested factual issue; namely, a connection between the understaffing and the dismissal of the plaintiff.

Reviewing courts invade the province of the jury when they size up the quantum or quality of the evidence or the plausibility of theories. Jury decisions provide many timely benefits; namely, better quality decisions, better

sense and understanding and appreciation of the working of the legal system, and community involvement in the decision. Here, it was reasonable for the jury to return a punitive damages verdict.

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