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# Commonwealth of Kentucky

# Court of Appeals

NO. 2012-CA-000941-MR

SAINT JOSEPH HEALTHCARE, INC. APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE PAMELA R. GOODWINE, JUDGE
ACTION NO. 00-CI-01364

LARRY O'NEIL THOMAS, AS ADMINISTRATOR OF THE ESTATE OF JAMES "MILFORD" GRAY, DECEASED; AND ALL LAWFUL SURVIVORS OF JAMES "MILFORD" GRAY, DECEASED APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, MAZE AND NICKELL, JUDGES.

MAZE, JUDGE: Following a prior appeal, this Court remanded this matter to the Fayette Circuit Court for a new trial on punitive damages against the Appellant, St. Joseph Healthcare, Inc., d/b/a St. Joseph Hospital ("the Hospital"). At the conclusion of that trial, the jury awarded punitive damages against the Hospital in

favor of the Appellee, Larry O'Neil Thomas, as Administrator of the Estate of James "Milford" Gray, ("the Estate"). The Hospital now appeals from orders by the Fayette Circuit Court denying its motion for a directed verdict on the Estate's punitive damages claim, and on its post-judgment motions for a judgment notwithstanding the verdict (JNOV) and for a new trial.

The Hospital argues that a directed verdict was appropriate because the Estate failed to present sufficient evidence that it ratified the conduct of its employees or that the conduct amounted to gross negligence. The Hospital also argues that it was entitled to a new trial based upon misconduct of a juror, errors in the instructions, and the jury's excessive award of punitive damages. With respect to the directed verdict issue, we conclude that the Estate presented sufficient evidence of ratification and gross negligence to submit the matters to the jury. In addition, we find that the trial court did not abuse its discretion by denying the Hospital's motions for a new trial. Hence, we affirm.

## I. Facts and Procedural History

In our prior opinion, we set out the facts of this case as follows: The parties vigorously disagree about the facts of this case. However, they agree that James Milford Gray, age 39, arrived at the emergency room of the Hospital on April 8, 1999, at 8:08 p.m. He was complaining of abdominal pain, constipation for four days, nausea and vomiting. He was seen by Physician's Assistant Julia Adkins and Dr. Barry Parsley. He received medication for pain and later received an enema and manual disimpaction of his colon. Although lab tests were ordered,

either Gray refused to cooperate, or upon reorder, they were never conducted. Likewise, no x-rays were conducted.

Gray was discharged at 12:40 a.m. on April 9, 1999. He was taken by ambulance to the homes of different family members with whom he had previously stayed. However, no family member agreed to provide a place to stay, so he was returned to the Hospital. Upon his return to the emergency room, the Hospital made arrangements for Gray to stay at the nearby Kentucky Inn.

Gray returned to the Hospital at 5:25 a.m. after the staff of the Kentucky Inn contacted 911 on his behalf. He had been vomiting dried blood for several hours. He was again seen and evaluated by both Adkins and Dr. Parsley. Lab tests and x-rays were conducted during this visit. Subsequently, he was discharged by Dr. Jack Geren at 12:15 p.m.

However, Gray died later that day at a family member's home. The autopsy report listed the cause of death as purulent peritonitis caused by a rupture of a duodenal ulcer due to duodenal peptic ulcer disease. The autopsy report also listed constrictive atherosclerotic coronary artery disease as a contributory cause of Gray's death.

Gray's Estate brought this action on April 8, 2000, alleging medical negligence against the Hospital, Dr. Joseph Richardson (a physician who treated Gray during an earlier visit to the Hospital on March 9, 1999), Dr. Parsley, Dr. Geren, Physician's Assistant Adkins, and several members of the nursing staff. In addition, the Estate alleged that the Hospital violated the Emergency Medical

Treatment and Active Labor Act ("EMTALA"). After a lengthy period of discovery, the matter proceeded to trial on October 3, 2005. However, that trial ended in a mistrial.

Prior to the second trial, the Estate settled with Drs. Richardson, Parsley, and Geren. The matter then proceeded to a jury trial on the claims against the Hospital on November 7–9, 14–17, and 21–23, 2005. The jury returned verdicts for the Estate on both the medical negligence and the EMTALA claims. The jury apportioned fault as follows: 15% to the Hospital; 0% to Dr. Richardson; 30% to Dr. Parsley and Physician's Assistant Adkins; 30% to Dr. Geren; and 25% comparative fault to Gray. The jury awarded compensatory damages of $25,000, of which the Hospital's share was $3,750. The jury also assessed punitive damages against the Hospital in the amount of $1,500,000.

Thereafter, the Hospital filed motions for a judgment notwithstanding the verdict and for a new trial. The trial court denied the motions with respect to the jury's findings of liability and the award of compensatory damages. However, the court concluded that the award of punitive damages was clearly excessive and therefore a new trial on that issue was in order.

The Hospital and the Estate each filed an appeal from the trial court's order. In its cross-appeal, the Hospital argued that it was entitled to a directed verdict on the Estate's EMTALA and negligence claims, that the Estate's claim for unliquidated damages should have been dismissed because it failed to disclose the amount of such damages it was seeking, and that it was entitled to a new trial based

upon the Estate's misconduct at trial and other trial errors. The Hospital also argued that the issue of punitive damages should not have been submitted to the jury, or, in the alternative, that the jury instructions regarding punitive damages were inadequate. In its direct appeal, the Estate argued that the award of punitive damages was not excessive and therefore the Hospital was not entitled to a new trial on this issue.

This Court affirmed the trial court in part, reversed in part, and remanded for a new trial on the issue of punitive damages.[1] This Court found that the EMTALA and negligence issues were properly presented to the jury with proper instructions. We also found that the Estate sufficiently supplemented its response regarding unliquidated damages following the first trial, and we concluded that the Hospital was not entitled to a new trial on the EMTALA and negligence claims. This Court further found that the trial court properly set aside the punitive damages award as excessive. However, we further concluded that the instructions on punitive damages were deficient. We directed that the punitive damages instructions on remand must set out the standard of proof and require proof that the Hospital ratified the employee's conduct.

The Hospital and the Estate each filed motions for discretionary review. The Kentucky Supreme Court granted the Hospital's motion. Thereafter, the Supreme Court remanded the action to this Court for reconsideration in light of

[1] *Thomas, et al. v. St. Joseph Healthcare, Inc.*, Nos. 2007–CA–001192–MR & 2007–CA–001244–MR (Ky. App. 2008).

its recent opinion in *Martin v. Ohio County Hospital Corp.*, 295 S.W.3d 104 (Ky. 2009). On remand, this Court concluded that the facts of *Martin* were distinguishable and that the law set out involved a different aspect of an EMTALA claim than was presented here. This Court also reaffirmed its prior holdings regarding punitive damages and remanded the matter to the trial court on that issue. *Thomas v. St. Joseph Healthcare, Inc.*, 335 S.W.3d 460 (Ky. App. 2010).

The case returned to the circuit court for a new trial on punitive damages, which commenced on February 6, 2012. At the close of the Estate's case, the Hospital moved for a directed verdict, arguing that the Estate had not produced sufficient evidence of gross negligence or ratification. The trial court denied this motion and the Hospital renewed its motion for a directed verdict at the close of proof.

On February 29, 2012, the jury returned a verdict in favor of the Estate and awarded punitive damages in the amount of $1,450,000. The Hospital filed a motion for JNOV on grounds of insufficiency of the evidence supporting an award of punitive damages. The Hospital also moved for a new trial, arguing that the award was excessive and based upon other alleged errors during trial. The trial court denied both motions and this appeal followed. Additional facts will be set out later in the opinion as necessary.

## II. Directed Verdict

### *a. Standard of Review*

The Hospital first argues that it was entitled to a directed verdict because the Estate failed to meet its burden of proof on two controlling issues: ratification and gross negligence. In *Daniels v. CDB Bell, LLC*, 300 S.W.3d 204 (Ky. App. 2009), this Court stated the appropriate standard of review of a ruling on a motion for a directed verdict:

> When a directed verdict is appealed, the standard of review on appeal consists of two prongs. The prongs are: "a trial judge cannot enter a directed verdict unless there is a complete absence of proof on a material issue or if no disputed issues of fact exist upon which reasonable minds could differ." *Bierman v. Klapheke*, 967 S.W.2d 16, 18–19 (Ky. 1998). "A motion for directed verdict admits the truth of all evidence which is favorable to the party against whom the motion is made." *National Collegiate Athletic Ass'n By and Through Bellarmine College v. Hornung*, 754 S .W.2d 855, 860 (Ky. 1988), citing *Kentucky & Indiana Terminal R. Co. v. Cantrell*, 298 Ky. 743, 184 S.W.2d 111 (1944).
>
> Clearly, if there is conflicting evidence, it is the responsibility of the jury, the trier of fact, to resolve such conflicts. Therefore, when a directed verdict motion is made, the court may not consider the credibility or weight of the proffered evidence because this function is reserved for the trier of fact. *National*, 754 S.W.2d at 860 (citing *Cochran v. Downing*, 247 S.W.2d 228 (Ky. 1952)).
>
> In order to review the trial court's actions in the case at hand, we must first see whether the trial court favored the party against whom the motion is made, including all inferences reasonably drawn from the evidence. Second, "the trial court must determine whether the evidence favorable to the party against whom the motion is made is of such substance that a verdict rendered thereon would be 'palpably or flagrantly' against the evidence so as 'to indicate that it was reached as a result of passion or prejudice.' " If the answer to this inquiry is affirmative, we must affirm the trial court granting the motion for a directed verdict. *Id.*

> Moreover, "[i]t is well argued and documented that a motion for a directed verdict raises only questions of law as to whether there is any evidence to support a verdict." *Harris v. Cozatt, Inc.*, 427 S.W.2d 574, 575 (Ky. 1968). Further, "a reviewing court cannot substitute its judgment for that of the trial judge unless the trial judge is clearly erroneous." *Bierman*, 967 S.W.2d at 18.

*Id.* at 215.

*b. Ratification*

As noted in our first opinion, Kentucky Revised Statutes (KRS) 411.184(3) limits vicarious liability for punitive damages to instances where the employer "authorized or ratified or should have anticipated" the bad conduct of its employee or agent. Thus, we concluded that the trial court must instruct the jury to make a finding on this issue. Following the eventual remand of this case, the Kentucky Supreme Court further interpreted this statute in *University Medical Center, Inc. v. Beglin*, 375 S.W.3d 783 (Ky. 2011). *Beglin* became final after the jury in this case returned the most recent verdict on punitive damages, but while the Hospital's motions for JNOV and a new trial were pending. The Hospital maintains that *Beglin* would preclude any finding of ratification under the facts presented in this case.

In *Beglin*, the patient suffered an unexpected and substantial blood loss during surgery. Her physicians requested blood for a transfusion. However, the delivery of that blood was delayed for nearly seventy minutes. Furthermore, there was evidence that the hospital failed to conduct a reasonable investigation of the incident and may have intentionally destroyed internal reports documenting the

incident. Nevertheless, the Kentucky Supreme Court held that this conduct was insufficient to show that the hospital authorized, ratified or reasonably could have anticipated the gross negligence of its employees.

In reaching this conclusion, the Court looked to the common meanings of the words "authorize" and "ratify." The Court noted that the term "authorize" connotes that the employer preapproved the conduct. Since the hospital had strict policies requiring prompt fulfillment of blood requests, the Court concluded that the hospital did not authorize and could not reasonably anticipate the gross negligence of its employees in failing to fulfill the blood request. *Id.* at 793.

Along similar lines, the Court pointed out that that definition of the word "ratify" implies that the employer approved of the conduct after the fact. The Court concluded that the poor quality of the hospital's investigation after the fact cannot constitute ratification of the gross negligence of its employees. Consequently, the Court held that the punitive damages instruction should not have been given, and the Court vacated the punitive damages award. *Id.* at 793-94.

In the current case, the Hospital argues that the reasoning of *Beglin* precluded an instruction on punitive damages. The Hospital notes that it had express policies governing the treatment of indigent patients by emergency room staff. The Estate's expert, Nurse Janice Rodgers, testified that that the emergency room nurses and staff failed to follow these policies. As a result, the Hospital

maintains that it could not have ratified or approved the staff's violation of its established policies.

However, the pattern of misconduct by the Hospital employees goes well beyond the relatively discrete instances of gross negligence which occurred in *Beglin*. Even though the Hospital had specific policies in place governing treatment of indigent patients, the evidence presented by the Estate showed that a wide variety of its emergency room staff repeatedly disregarded those standards. The Hospital twice discharged Gray over a period of sixteen hours without stabilizing his condition. During his first trip to the emergency room, Gray complained of extreme abdominal pain and distension. However, the emergency room staff repeatedly dismissed his complaints and his symptoms were not fully recorded. X-rays of Gray's abdomen were taken but have since been lost by the Hospital. Other lab tests were ordered but never conducted. Although the emergency room staff stated that Gray was stable when he was discharged the first time, they did not take or record his vital signs.

Gray returned to the emergency room less than five hours later in considerable pain after repeatedly vomiting dried blood. While lab tests were conducted, the results of those tests were overlooked or ignored and again were not reported to physicians. Despite Gray's continued complaints of pain and critical lab reports, the emergency room staff insisted on discharging him. When family members complained on his behalf, a Hospital social worker and the director of emergency services informed them that they would call the police if Gray

attempted to return. The jury could reasonably believe that this pattern of misconduct represented the Hospital's accepted practice even if it was in violation of written policies.

The Estate also points to the Hospital's actions following Gray's death to support a finding of ratification. The Hospital correctly notes that a negligent investigation or even active concealment is not sufficient to show that it authorized, ratified, or reasonably could have anticipated the misconduct of its employees. *Id.* at 793.[2] Furthermore, the Hospital's vigorous defense of the negligence and EMTALA claims cannot be considered as ratification or approval of its employee's gross negligence. Otherwise, a defendant would be placed in the untenable position of admitting to its agent's negligence or risking having its defense considered as a ratification. *Id.* at 796, (*Scott, J., dissenting*), citing *Manning v. Twin Falls Clinic & Hosp., Inc.*, 122 Idaho 47, 830 P.2d 1185, 1194 (1992).

On the other hand, we do not read *Beglin* as requiring proof that a defendant explicitly approved or ratified the conduct in question. Indeed, the Court in *Beglin* and other Kentucky cases addressing the issue do not discuss what conduct would amount to ratification or approval, but only address what conduct fails to meet that standard. However, it is well established that an intention to ratify may be inferred from the facts and circumstances, but it cannot be inferred

[2] We also note that the jury instructions included the definition of the word "ratify" as set out in *Beglin*.

from acts which may be readily explained without involving any intent to ratify. *Wolford v. Scott Nickels Bus Co.*, 257 S.W.2d 594, 596 (Ky. 1953).

Unlike in *Beglin*, the Hospital's post-incident actions do not demonstrate merely an attempt to distance itself from the conduct of its staff. Rather, the Hospital has consistently affirmed and approved their actions. In particular, the Hospital admitted that it did not conduct any investigation or review of the incident. To the contrary, the Hospital asserts that its staff's actions were entirely appropriate under the circumstances. The Hospital maintained this position even following the adverse judgment on the EMTALA claim and during the subsequent jury trial on punitive damages.[3] Moreover, the Hospital does not point to any other reasonable explanation other than intent to ratify or approve the actions of its emergency room staff.

This is not to say that the Hospital approved of the decision to discharge Gray or the consequences of that action. However, there clearly was evidence showing that the Hospital approved of the actions of its staff which led to that decision and result. Furthermore, the Hospital's position goes well beyond merely defending against the negligence and EMTALA claims. When the evidence is viewed in its entirety, the jury could reasonably find that the Hospital

[3] In support of this conclusion, the Estate points to the testimony of Marilyn Swinford, R.N., the Hospital's director of emergency services. Nurse Swinford was responsible for the day-to-day operations of the emergency room, including standards and procedures for nursing services. During the punitive damages trial, Nurse Swinford specifically testified that she approved of the actions of all of the emergency room nurses and still believed that no one had violated the Hospital's policies. Video Record 24/4/12 CD 24/A-13 at 1:58 – 2:06.

ratified or approved of the actions of its employees. Therefore, the trial court properly submitted the issue of ratification to the jury.

*c. Gross Negligence*

The Hospital next challenges the sufficiency of the evidence supporting the award of punitive damages, arguing that there was no evidence that it acted with gross negligence. Punitive damages are given to the plaintiff over and above the full compensation for his injuries, for the purpose of punishing the defendant, teaching him not to do it again, and deterring others from following his example. *Hensley v. Paul Miller Ford, Inc.*, 508 S.W.2d 759, 762 (Ky. 1974). For these reasons, KRS 411.184 authorizes an award of damages only upon a showing by clear and convincing evidence that the defendant acted with fraud, oppression or malice. However, the Kentucky Supreme Court has held that, under the common law, punitive damages may be awarded on a showing of gross negligence, and that KRS 411.184 cannot constitutionally exclude recovery of punitive damages on this basis. *Williams v. Wilson*, 972 S.W.2d 260, 264 (Ky. 1998).

Gross negligence is a "wanton or reckless disregard for the lives, safety or property of others." *See Phelps v. Louisville Water Co.*, 103 S.W.3d 46, 51–52 (Ky. 2003). The threshold for the award of punitive damages is whether the misconduct was "outrageous" in character, not whether the injury was intentionally or negligently inflicted. *Horton v. Union Light, Heat & Power Co.*, 690 S.W.2d 382, 389 (Ky. 1985). In a case where gross negligence is used as the basis for punitive damages, gross negligence has the same character of outrage justifying

punitive damages as willful and malicious misconduct in torts where the injury is intentionally inflicted. Just as malice need not be expressed and may be implied from outrageous conduct, so too may wanton or reckless disregard for the rights of others be implied from the nature of the misconduct. *Id.* at 389–90. However, a finding of gross negligence clearly requires more than a failure to exercise ordinary care. It requires a finding of a failure to exercise even slight care such as to demonstrate a wanton or reckless disregard for the rights of others. *Phelps*, 103 S.W.3d at 51–52. *See also People's Bank of Northern Kentucky, Inc. v. Crowe Chizek & Co., LLC*, 277 S.W.3d 255, 268 (Ky. App. 2008).

The Hospital points out that it provided a variety of medical services and treatments to Gray. Even if the emergency room staff failed to ensure that Gray was stable at the time of his discharges, the Hospital maintains its provision of this treatment shows that it exercised at least slight care under the circumstances. Given this proof, the Hospital contends that the Estate could not show that it acted with gross negligence, and an instruction for punitive damages was not warranted.

In *Martin v. Ohio County Hospital Corp.*, supra, our Supreme Court held that improper motive is not an element of an EMTALA claim. Rather, EMTALA imposes statutory duties on a hospital and it is strictly liable for breach of these duties. *Id.* at 113-14. Of course, the Court in *Martin* was addressing the hospital's liability for compensatory damages rather than the punitive damages at issue here. However, the focus of the inquiry for gross negligence must still be on

the standard of care imposed by the applicable provisions of EMTALA rather than merely the hospital's general duties of care in a negligence claim.

The EMTALA imposes two primary obligations on certain federally funded hospitals: a screening requirement and a stabilization requirement. The screening requirement is not at issue in this case. With respect to the second requirement, if the hospital determines that the individual has an emergency medical condition, then it must either "stabilize" the medical condition or must arrange for the transfer of the individual to another medical facility. 42 United States Code (U.S.C.) § 1395dd(b)(1). As noted in our prior opinion, "the Hospital's duty to stabilize under EMTALA arises upon its determination that the patient is manifesting symptoms of sufficient severity as to constitute an "emergency medical condition." *Thomas v. St. Joseph Hospital*, 335 S.W.3d at 466. This Court went on to state:

> Although the Hospital is not liable when it fails to detect or misdiagnoses an emergency condition, it must stabilize the emergency medical condition which it actually detects prior to discharging the patient. In assessing the physical stability of a patient, courts have generally focused on the EMTALA requirement that "no material deterioration" of the condition is likely. *Thomas v. Christ Hospital and Medical Center*, 328 F.3d 890, 893 (7th Cir. 2003), *citing St. Anthony Hospital v. U.S. Dept. of Health and Human Services*, 309 F.3d 680, 697 (10th Cir. 2002); *Harry v. Marchant*, 291 F.3d 767, 771 (11th Cir. 2002); *Bryant v. Adventist Health System/West*, 289 F.3d 1162, 1167 (9th Cir. 2002).

*Id.*

As discussed above, the Estate presented evidence showing that the emergency room staff repeatedly dismissed signs that Gray was in distress and failed to document or follow up on those signs. Rather, the staff presumed that Gray was malingering and insisted on discharging him on both occasions. Based on the evidence, the jury could reasonably find that the care and treatment which the staff actually provided were not intended to fulfill its duty to stabilize, but merely to ensure that the physicians reached a similar conclusion. The jury could also find that the staff acted with reckless disregard of its duties to Gray under EMTALA. Therefore, we conclude that the trial court properly submitted the punitive damages claim to the jury.

## III. Motion for a New Trial

a. *Standard of Review*

The Hospital next argues that it is entitled to a new trial on punitive damages due to significant errors in the conduct of the trial on remand. The Hospital asserts that it is entitled to a new trial due to juror misconduct, insufficiency of the instructions, and an excessive award of punitive damages. Kentucky Rules of Civil Procedure (CR) 59.01 permits a trial court to grant a new trial to all or any of the parties and on all or part of the issues for any of the following causes:

> (a) Irregularity in the proceedings of the court, jury or prevailing party, or an order of the court, or abuse of discretion, by which the party was prevented from having a fair trial.
> (b) Misconduct of the jury, of the prevailing party, or of his attorney.
> (c) Accident or surprise which ordinary prudence could not have guarded against.
> (d) Excessive or inadequate damages, appearing to have been given under the influence of passion or prejudice or in disregard of the evidence or the instructions of the court.
> (e) Error in the assessment of the amount of recovery whether too large or too small.
> (f) That the verdict is not sustained by sufficient evidence, or is contrary to law.
> (g) Newly discovered evidence, material for the party applying, which he could not, with reasonable diligence, have discovered and produced at the trial.
> (h) Errors of law occurring at the trial and objected to by the party under the provisions of these rules.

The decision to grant or deny a motion for a new trial under CR 59.01 lies within the discretion of the trial court. *Childers Oil Co., Inc. v. Adkins*, 256 S.W.3d 19, 28 (Ky. 2008); *see also Davis v. Graviss*, 672 S.W.2d 928, 932 (Ky. 1984). A trial court's discretionary decision will not be reversed unless it was "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999). A trial court abuses its discretion when its decision rests on an error of law (such as the application of an erroneous legal principle or a clearly erroneous factual finding), or when its decision cannot be located within the range of permissible decisions allowed by a correct application of the facts to the law. *See Miller v. Eldridge*, 146 S.W.3d 909, 915 n.11 (Ky. 2004). On appeal, this Court must give a great deal of deference to

the trial court's decision to grant or deny a new trial, giving due regard to the trial court's superior position to observe the conduct of the trial. *CertainTeed Corp. v. Dexter*, 330 S.W.3d 64, 71 (Ky. 2010).

b. *Juror Misconduct*

The Hospital first alleges that it was deprived of its right to a fair trial because one of the jurors slept through significant portions of testimony. The matter at issue arose several times at trial. On February 21, 2012, one day after the Hospital began its case-in-chief, the trial court summoned counsel to the bench and advised them that several jurors appeared to be falling asleep at several points during the testimony. The Estate's counsel confirmed the trial court's observation. The trial court also informed counsel that it had learned that one of these jurors, later identified as Juror 4642, was working a third-shift job. The Hospital did not request any relief at that point, but the court stated that it would watch the jurors for signs of inattentiveness. When the jury returned, the court advised the jury to request a break if anyone was having difficulty staying awake.

Two days later, the court directed the parties to take a break from testimony because one of the jurors (also identified as Juror 4642) was "passed out." However, the Hospital did not request any relief at that time. But at the conclusion of the case, the Hospital moved to designate Juror 4642 as the alternate based upon his sleeping at trial. The Hospital's counsel made the request based upon the court's prior observations and upon his observation that Juror 4642 had again fallen asleep during the video testimony of Dr. Geren. The Estate's counsel

noted that this latest incident was not brought to the trial court's attention, and also stated that several other jurors had appeared to be falling asleep at other points during the testimony.

The trial court informed counsel that it had learned from another juror that Juror 4642 was still working his third-shift job in addition to his jury duties. However, the court declined to exclude the juror, noting that it had previously raised this issue with counsel and the parties had not raised this issue since that time. The court also pointed out that other jurors had likely fallen asleep during trial. A different juror was picked as the alternate by random draw and Juror 4642 participated in the jury deliberations on punitive damages.

As the Hospital correctly notes, a "juror's inattentiveness is a form of juror misconduct, which may prejudice the defendant and require the granting of a new trial." *Ratliff v. Commonwealth*, 194 S.W.3d 258, 276 (Ky. 2006). But, as a threshold matter in a case involving a sleeping or otherwise inattentive juror, the aggrieved party must present some evidence that the juror was actually asleep or otherwise inattentive and that some prejudice resulted from that fact. *Id.* Generally, where no objection is made during the progress of trial and there is no evidence beyond bare unsworn hearsay statements that a juror was asleep at some point during the trial, appellate courts are unwilling to find an abuse of discretion by the trial court in denying a motion for a new trial. *Id.*

In this case, the court and both counsel noted that several jurors, including Juror 4642, appeared to be falling asleep during portions of the trial.

However, neither party asked the trial court to question the jurors on the record about any difficulty staying awake. Likewise, the Hospital's counsel did not submit an affidavit recording his observations of the juror. Even with the limited record on appeal, it is clear that the trial court recognized a problem with several jurors staying awake during trial and a particular issue with Juror 4642.

For this reason, the trial court clearly would have been within its discretion to designate Juror 4642 as the alternate and excuse him for cause. However, the trial court is in the best position to determine the nature of the alleged juror misconduct and the appropriate remedy under the circumstances. *Id.* While it may have been a better course for the trial court to designate Juror 4642 as the alternate, we cannot say that the trial court abused its discretion by denying the motion to excuse the juror. *Id. See also Lester v. Commonwealth*, 132 S.W.3d 857, 862 (Ky. 2004); *Young v. Commonwealth*, 50 S.W.3d 148, 164-65 (Ky. 2001); and *Hubbard v. Commonwealth*, 932 S.W.2d 381, 382-83 (Ky. App. 1996).[4]

*c. Jury Instructions*

During the prior trial, the trial court found that Drs. Parsley and Geren were the Hospital's agents for purposes of liability under EMTALA, and this Court held that the jury was properly instructed on this issue. In this appeal, the Hospital argues that the trial court improperly instructed the jury to consider the actions of

[4] The Hospital also argues that Juror 4642 should have been excluded for giving false answers on voir dire concerning his work schedule. However, we find no indication that the Hospital raised this issue to the trial court. Therefore, the Hospital's claims with respect to this alleged misconduct are not preserved.

Drs. Parsley and Geren for purposes of assessing punitive damages. While the Hospital concedes that the physicians must be considered as its agents for purposes of liability under the EMTALA, the Hospital contends that Drs. Parsley and Geren were employed as independent contractors and thus were not its agents for purposes of liability for punitive damages.

This particular question has not been raised in the previous appeal or in any Kentucky cases. Although EMTALA is a federally created action, it incorporates substantive state law in determination of damages. *Smith v. Botsford General Hospital*, 419 F.3d 513, 517 (6th Cir. 2005). Generally, a principal has no vicarious liability for the actions of independent contractors. *Nazar v. Branham*, 291 S.W.3d 599, 606 (Ky. 2009). Thus, in most cases a hospital is not liable for the negligence of its physicians who are clearly employed as independent contractors. *See Paintsville Hospital Co. v. Rose*, 683 S.W.2d 255, 257-58 (Ky. 1985), and *Williams v. St. Claire Medical Center*, 657 S.W.2d 590, 595 (Ky. App. 1983).

However, EMTALA imposes direct, rather than vicarious, liability on a hospital for the actions of its physicians. *Roberts v. Galen of Virginia, Inc.*, 112 F.Supp.2d 638 (W.D. Ky. 2000).[5] Given the non-delegable nature of the duties

[5] Indeed, most federal courts addressing the question have held that EMTALA does not authorize a private cause of action against an individual physician. *Moses v. Providence Hosp. and Medical Centers, Inc.*, 561 F.3d 573, 587 (6th Cir. 2009), citing *Baber v. Hosp. Corp. of Am.*, 977 F.2d 872, 877–78 (4th Cir.1992); *King v. Ahrens*, 16 F.3d 265, 271 (8th Cir.1994); *Eberhardt v. City of L.A.*, 62 F.3d 1253, 1256–57 (9th Cir.1995); *Delaney v. Cade*, 986 F.2d 387, 393–94 (10th Cir.1993); and *Gatewood v. Wash. Healthcare Corp.*, 933 F.2d 1037, 1040 n.1 (D.C. Cir. 1991).

which EMTALA imposes on the Hospital, we conclude that the jury was properly instructed to consider the actions of the physicians in assessing punitive damages. The Hospital's additional liability for punitive damages is adequately covered under the ratification requirement of KRS 411.184(3).

*d. Excessiveness of Punitive Damages*

In the first opinion, this Court addressed the trial court's finding that the original award of punitive damages in the amount of $1,500,000 was excessive. We agreed with the trial court that the award was constitutionally excessive in light of the standards set out by the United States Supreme Court in *State Farm Mutual Automobile Ins. Co. v. Campbell*, 538 U.S. 408, 123 S. Ct. 1513, 155 L. Ed. 2d 585 (2003), and *BMW of North America v. Gore*, 517 U.S. 559, 116 S. Ct. 1589, 134 L. Ed. 2d 809 (1996). The Hospital argues that the jury's most recent award of $1,450,000 is likewise excessive under these standards.

But in our prior opinion, this Court pointed out that that the punitive damages instruction was inadequate in several significant respects and thus a new trial was necessary on that issue. Consequently, any additional discussion concerning the excessiveness of the original award was not necessary to the holding and was not binding on the trial court upon remand. *See Cawood v. Hensley*, 247 S.W.2d 27, 29 (Ky. 1952), and *Board of Claims of Kentucky v. Banks*, 31 S.W.3d 436, 439 n.3 (Ky. App. 2000). Furthermore, since we remanded the matter for a new trial on punitive damages, this Court declined to offer an advisory opinion on what amount of punitive damages would be acceptable.

However, this Court suggested that the applicable factors of KRS 411.186(2) would adequately instruct the jury as to the standards which it should consider in determining the amount of punitive damages. On remand, the trial court accepted this Court's suggestion and included the statutory factors in its punitive damages instruction.

The Hospital does not object to the content of those instructions, but still argues that the reasonableness of punitive damages must be measured in light of the *Campbell* factors. We agree. The United States Supreme Court has recognized that the Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor. *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 433-34, 121 S. Ct. 1678, 1684, 149 L. Ed. 2d 674 (2001), and *BMW of North America v. Gore*, 517 U.S. at 562, 116 S. Ct. at 1592. In *Campbell*, the Court further specified that in order to satisfy due process, punitive damage awards must be evaluated under three factors: "(1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between . . . the civil penalties authorized or imposed in comparable cases." *Campbell*, 538 U.S. at 418, 123 S. Ct. at 1520. Appellate courts must review a trial court's application of these factors on a *de novo* basis. *Id.* at 418, 123 S. Ct. at 1520.

Of the three factors, "[t]he most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the

defendant's conduct." *Id.,* citing *Gore*, 517 U.S. at 575, 116 S. Ct. 1589. *Campbell* instructs courts "to determine the reprehensibility of a defendant by considering 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." *Id.* at 419, 123 S. Ct. 1513, citing *Gore*, 517 U.S. at 576-577, 116 S. Ct. at 1589.

In our previous opinion, we held that the jury could reasonably find that the Hospital evidenced a reckless disregard for the health and safety of others. However, we also pointed out other factors which diminished the reprehensibility of the Hospital's actions. In considering the matter upon remand, the jury clearly found that aggravating conduct by the Hospital's staff outweighed any mitigating factors. While the Hospital's actions toward Gray may have been an isolated incident, EMTALA was enacted to prevent this type of conduct. Moreover, the Hospital's indifference to Gray's suffering created a high risk of physical harm to a person who was in an extremely vulnerable position. Finally, the Hospital's employees went to rather extraordinary lengths to intimidate Gray and his family from attempting to return. Considering the detailed jury instructions, we are satisfied that the jury properly weighed the aggravating and mitigating factors surrounding the Hospital's conduct.

The Hospital next focuses on the second factor: the difference between the award of compensatory damages and punitive damages. The Hospital points out that the punitive damages award is 58 times the compensatory damages award of $25,000. The Hospital also notes that the disparity is even greater considering that the first jury apportioned only 15% of liability directly to the Hospital. Based upon this substantial disparity, the Hospital maintains that the award of punitive damages was clearly excessive.

However, the Supreme Court has consistently rejected a bright-line ratio or mathematical formula to determine the reasonableness of a punitive damages award. *Id.* at 424-25, 123 S. Ct. at 1524. In *Campbell*, the Court suggested that "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." *Id.* at 425, 123 S. Ct. at 1524. But, the Court also noted that "ratios greater than those we have previously upheld may comport with due process where 'a particularly egregious act has resulted in only a small amount of economic damages.' " *Id.,* quoting *Gore*, 517 U.S. at 582, 116 S. Ct. at 1602.

The Court also stated that the measure of punishment must be both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered. *Id.* at 426, 123 S. Ct. at 1524. In addition, the states have considerable flexibility in determining the level of punitive damages that will vindicate the state's legitimate interests in punishment and deterrence. *Gore*, 517 U.S. at 568, 116 S. Ct. at 1595. The Court's discussion on this point indicates that

the degree of reprehensibility and the state's interest in punishment and deterrence may justify a punitive damages award which is substantially greater than the award of compensatory damages.

In our prior opinion, we also evaluated the third *Campbell* factor: comparing the punitive damages award to the civil penalties authorized or imposed in comparable cases. We noted that EMTALA provides for a civil penalty of up to $50,000 for each violation. 42 U.S.C. § 1395dd(d)(1)(A). Even assuming that the Hospital's two discharges of Gray would amount to separate violations of EMTALA, this Court questioned whether a punitive damages award of 15 times the maximum civil penalty was constitutionally permissible.

On the other hand, the existence of civil and criminal penalties has a bearing on the seriousness with which a state views the wrongful action. *Campbell*, 538 U.S. at 428, 523 S.Ct. at 1526. EMTALA was enacted in 1986 "to address a growing concern with preventing 'patient dumping,' the practice of refusing to provide emergency medical treatment to patients unable to pay, or transferring them before emergency conditions were stabilized." *Power v. Arlington Hosp. Ass'n*, 42 F.3d 851, 856 (4th Cir. 1994). The Act imposes certain duties on hospitals with emergency rooms to provide emergency care to all individuals who come there. *Vickers v. Nash General Hospital, Inc.,* 78 F.3d 139, 142 (4th Cir. 1996). As we have noted above, a violation of these duties may have significant consequences on affected persons beyond mere economic damages.

Congress established civil liability and penalties to deter covered hospitals from engaging in conduct which could lead to such consequences.

Furthermore, the civil penalties for violation of the Act are based upon breach of the statutorily imposed duties without regard to intent of the conduct. EMTALA does not require proof of improper motive for violation of the stabilization requirement. *Roberts v. Galen of Virginia*, 525 U.S. 249, 252-53, 119 S. Ct. 685, 686-87, 142 L. Ed. 2d 648 (1999). Where there is proof that the violations were reckless or grossly negligent, a greater award of punitive damages may be appropriate. While the punitive damages award is significantly greater than the potential civil fine which could be imposed against the Hospital, we cannot say that it was clearly excessive in light of all of the circumstances presented in this case.

## IV. **Conclusion**

Based on the foregoing, we find that the trial court did not clearly err by denying the Hospital's motion for a directed verdict on punitive damages. The holding by the Kentucky Supreme Court in *Beglin* interpreting the ratification requirement of KRS 411.184(3) became final after the jury verdict in this case. The application of that holding presents difficulties for the trial court and for this Court. Although much of the legal analysis in *Beglin* was couched in broad terms, the application of that analysis was limited to facts which were considerably different from those presented here. Our Supreme Court in *Beglin* imposed a fairly

high bar for proving that an employer ratified the wrongful conduct of its employees. However, we conclude that the Estate presented sufficient evidence on this issue to survive a motion for directed verdict.

Similarly, the Estate also presented sufficient evidence that the emergency room staff acted with reckless disregard of its duties to Gray under EMTALA. While the staff did not intentionally seek to harm Gray, they overlooked obvious signs that his condition was still unstable in order to remove him from the emergency room. We conclude that the Estate's evidence of gross negligence was sufficient to submit the issue of punitive damages to the jury.

We also find that the trial court did not abuse its discretion by denying the Hospital's motion for a new trial. The trial court's decision not to excuse Juror 4642 was a close call and a different court could have easily reached another decision. Under such circumstances, it would be inappropriate for this court to second-guess the trial court's exercise of its discretion.

We further find that the trial court's instructions to the jury were substantially correct. It is well established that physicians are agents of the Hospital for purposes of liability for compensatory damages under EMTALA. There is no Kentucky caselaw which addresses whether the Hospital may be liable for punitive damages based upon violations of the Act by physicians who are employed as independent contractors. But, given the purpose and scope of EMTALA, we conclude that the trial court properly instructed the jury to consider the actions of the physicians in determining punitive damages.

Finally, the most difficult issue presented in this case concerns whether the jury's award of punitive damages was excessive. Although there is a great deal of caselaw from the United States Supreme Court on this issue, those decisions provide little clear guidance in deciding whether to uphold an award of punitive damages in any particular case. If we were considering only the ratio between the punitive damages award and the compensatory award, then the jury's verdict in this case would be clearly excessive.

However, this factor is only one of several which must be considered, and the greatest weight must be given to the reprehensibility of the conduct. The fact that two separate juries came to such similar conclusions indicates that the jury gave significant weight to this factor. Furthermore, the most recent jury was properly instructed on all of the factors which it must consider in determining the amount of punitive damages. Under the circumstances presented in this case, we conclude that that jury's award of punitive damages was not constitutionally excessive.

Accordingly, the judgment of the Fayette Circuit Court is affirmed.

COMBS, JUDGE, CONCURS.

NICKELL, JUDGE, CONCURS IN PART AND DISSENTS IN PART.

NICKELL, JUDGE, CONCURRING IN PART AND DISSENTING IN PART: Respectfully, I dissent in part from the majority opinion. In its current appeal, the Hospital asserts the most recent jury award of punitive damages is

constitutionally excessive because it violates federal due process. Consistent application of the law compels me to agree, and I must, therefore, dissent. As concerns all other issues, I am in agreement with the majority and would affirm the trial court regarding those matters.

In the preceding trial, a jury awarded Appellees compensatory damages of $25,000, apportioning 15 percent of the liability, or $3,750, to the Hospital. That jury then awarded punitive damages of $1,500,000 against the Hospital. Thus, the previous jury's award of punitive damages *vis-à-vis* the award of compensatory damages resulted in a ratio of 60:1, if referencing the total compensatory damage award of $25,000, or a ratio of 400:1, if referencing the $3,750 portion of the total compensatory damage award for which the Hospital was found liable.

Now, a second jury—having received proper instructions from the trial court as we directed on remand—has returned a similar award of punitive damages against the Hospital in the amount of $1,450,000, a mere $50,000 less than the previous jury awarded. Thus, the current jury's award of punitive damages *vis-à-vis* the award of compensatory damages results in a ratio of 58:1, if referencing the total compensatory damage award of $25,000, or a ratio of 387:1, if referencing the $3,750 portion of the total compensatory damage award for which the Hospital was found liable.

There can no longer be any reasonable denial that the actions of the Hospital toward Gray were reprehensible and egregious. Not one, but now two, juries have so found.

However, the question remains as to whether the current jury's award of punitive damages against the Hospital is constitutionally excessive and contrary to federal due process. Due process analysis has resulted in other punitive damage awards, with both larger and smaller punitive to compensatory ratios being deemed excessive, though similarly arising from reprehensible and egregious behavior. For example, in *Gore*, the offending ratio was 500:1; in *Campbell*, the ratio was 145:1.

It is well-settled that a punitive damages award must bear a reasonable relationship to compensatory damages. *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.,* 532 U.S. 424, 121 S. Ct. 1678, 149 L. Ed. 2d 674 (2001). While courts have been reluctant to identify rigid and defined constitutional limits on the ratio between punitive damages and actual compensatory damages awards, the U.S. Supreme Court has clearly held "few awards exceeding a single-digit ratio between punitive and compensatory damages will satisfy due process." *Campbell*, 538 U.S. at 410, 123 S. Ct. at 1516 (citing *Gore*, 517 U.S. at 581,116 S. Ct. at 1589). Admittedly, the U.S. Supreme Court has concluded "low awards of compensatory damages may properly support a higher ratio than high compensatory awards, if, for example, a particularly egregious act has resulted in only a small amount of economic damages." *Gore*, 517 U.S. at 582, 116 S. Ct. at

1602. Nevertheless, it has been determined that "an award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety." *Campbell,* 538 U.S. at 425, 123 S. Ct. at 1524 (citing *Pacific Life Ins. Co. v. Haslip*, 499 U.S. 1, 23-24, 111 S. Ct. 1032, 1046 113 L. Ed. 2d 1 (1991)).

Following this line of reasoning, in *Ragland v. DiGiuro*, 352 S.W.3d 908 (Ky. App. 2010), a previous panel of our Court reversed a jury award of $3,341,708 in compensatory damages and $60,000,000 in punitive damages, a ratio of 18:1. That case involved the premeditated and senseless killing of a young college student, for which the trial court held it could "find no greater reprehensible conduct." Even so, our Court reversed the large punitive damages portion of the judgment, and remanded with direction to reduce the amount to a constitutionally acceptable amount reflecting a 9:1 punitive to compensatory damages ratio, and thereby comporting with the U.S. Supreme Court's admonition that "few awards exceeding a single-digit ratio . . . will satisfy due process." *Campbell*. In doing so, this Court noted that a constitutional challenge to a punitive damages award is reviewed *de novo*, in part because "[u]nlike the measure of actual damages suffered, which presents a question of historical or predictive fact . . . the level of punitive damages is not really a 'fact' 'tried' by the jury." *Cooper*, 532 U.S. at 437, 121 S. Ct. at 1686 (quoting *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 459, 116 S. Ct. 2211, 135 L. Ed. 2d 659 (1996) (Scalia, J., dissenting)).

In the present case, the jury's $1,450,00 punitive damages award should be compared to the $3,750 compensatory damages award apportioned against the Hospital, not the full $25,000 award, "because a ratio based on the full compensatory award would improperly punish [the Hospital] for conduct that the jury determined to be the fault of" others. *Clark v. Chrysler Corporation*, 436 F.3d 594, 606, n.16 (6th Cir. 2006) (citation omitted). Even if the Hospital's reprehensible and egregious conduct, together with the low compensatory damages award, could permit a somewhat larger punitive damages award, I am convinced a jury award of $1,450,000 in punitive damages—representing a 387:1 ratio in relation to the Hospital's $3,750 in compensatory damages liability—was "grossly excessive," and as such, violative of the Due Process Clause of the Fourteenth Amendment. *Gore*, 517 U.S. at 568, 116 S. Ct. at 1595.

For the foregoing reasons, I would reverse that portion of the judgment of the Fayette Circuit Court pertaining to punitive damages. Consistent with the approach applied in *Ragland*, I would remand with instructions for entry of an award of punitive damages in an amount of no more than $33,750, which would represent a constitutionally sound single-digit ratio of 9:1.

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