RENDERED: MARCH 6, 2020; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2019-CA-000501-MR

RENE A. BOUCHER APPELLANT

v.

APPEAL FROM WARREN CIRCUIT COURT
HONORABLE TYLER L. GILL, SPECIAL JUDGE
ACTION NO. 18-CI-00890

RAND PAUL APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: GOODWINE, KRAMER AND MAZE, JUDGES.

KRAMER, JUDGE: Rene Boucher appeals a jury verdict and judgment of the Warren Circuit Court awarding the appellee, Rand Paul, damages for assault and battery. Upon review, we affirm.

The facts and circumstances surrounding this matter gave rise to the instant civil litigation and a federal criminal proceeding against the appellee, Rene

Boucher. *See United States v. Boucher*, 937 F.3d 702 (6th Cir. 2019). Because the general overview of the facts recited in *Boucher* is consistent with the evidence adduced in this matter, we adopt it in relevant part as follows:

> Paul and Boucher were neighbors. According to Paul, their relationship was unremarkable—they had not directly spoken in years, though they might wave to one another if they crossed paths on the street. From Boucher's perspective, however, problems between them began in the summer of 2017, when he decided to trim the branches of five maple trees in Paul's backyard that had grown over the Boucher/Paul property line. Sometime shortly thereafter, Paul dropped a bundle of limbs and brush at the edge of his property, apparently in the sightline of Boucher's home. A few weeks passed and the bundle remained. Frustrated by the sight of yard debris, Boucher crossed onto Paul's property, removed the limbs and brush, and hauled them off in dumpsters.
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> The following month, Boucher noticed another bundle of limbs and brush in roughly the same location. He hauled it off again. A few days later [on November 2, 2017], a bundle reappeared. This time Boucher did not haul it away; he poured gasoline over the debris and lit a match. The ensuing fireball caught him by surprise. The debris was burned, but so was Boucher—he suffered second-degree burns on his arms, neck, and face.
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> When Paul got on his lawnmower the next day [November 3, 2017], Boucher was watching him from the top of a hill overlooking Paul's property. According to Boucher, he saw Paul "blow all of the leaves from his property onto Boucher's yard." Paul then got off his lawnmower, picked up a few more limbs, and turned toward the site of the burned debris pile. While Paul had his back to the hill, Boucher ran 60 yards downhill and hurled himself headfirst into Paul's lower back. The impact broke six of Paul's ribs, including three that split

> completely in half. After a brief fracas, Paul left the scene and called the police.
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> The Kentucky State Police were the first to respond. In an interview with officers, Boucher admitted to tackling Paul but denied doing so because of Paul's politics. Instead, he described the assault as the culmination of "a property dispute that finally boiled over."
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> . . . .
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> The Warren County Attorney initially charged Boucher with Fourth Degree Misdemeanor Assault under Kentucky law. He was taken into custody for a few days, after which the FBI intervened and the state charges were dropped. The Government then indicted Boucher on one count of assaulting a member of Congress in violation of 18 U.S.C.[1] § 351(e). Boucher pleaded guilty.[2]

Id. at 704-05.

Based upon the above, Paul thereafter sued Boucher in Warren Circuit Court for assault and battery. The ensuing litigation led to a three-day jury trial and ultimately a verdict awarding Paul $7,834.82 for his medical expenses; $200,000 for his pain and suffering; and $375,000 in punitive damages.

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[1] United States Code.

[2] Following his guilty plea, Boucher was sentenced to 30 days in prison along with 100 hours of community service, one year of supervised release, and a $10,000 fine. The United States then appealed, noting Boucher had received a sentence well below federal sentencing guidelines and arguing there had been no compelling justification for the deviation. Upon review, the Federal Court of Appeals agreed, vacated Boucher's sentence, and remanded for resentencing. *See Boucher*, 937 F.3d 702. Boucher subsequently petitioned the United States Supreme Court for discretionary review and to date his petition remains pending.

Boucher now appeals. He has never contested liability for assaulting Paul. Instead, his arguments focus almost entirely upon Paul's compliance with the Civil Rules and the extent of Paul's damages.

Boucher's first argument, and a basis for a directed verdict motion he filed below, is that Paul should have received "zero" for pain and suffering and punitive damages, *i.e.*, the unliquidated components of Paul's award. His argument is based upon CR[3] 8.01(2), which provides in relevant part:

> When a claim is made against a party for unliquidated damages, that party may obtain information as to the amount claimed by interrogatories. If this is done, the amount claimed shall not exceed the last amount stated in answer to interrogatories; provided, however, that the trial court has discretion to allow a supplement to the answer to interrogatories at any time where there has been no prejudice to the defendant.

CR 8.01(2) is based on the premise that a defendant who knows the maximum amount of unliquidated damages at stake in civil litigation is likelier to settle. *LaFleur v. Shoney's, Inc.*, 83 S.W.3d 474, 479 (Ky. 2002). To that end, the rule provides a defendant a means of securing that information from a plaintiff through discovery interrogatories, and it punishes a plaintiff for withholding that information: "If the plaintiff responds to a CR 8.01(2) interrogatory and does not supplement the response, the plaintiff's recovery is limited to the amount stated in

[3] Kentucky Rule of Civil Procedure.

the last response; if the plaintiff does not respond to the interrogatory, the plaintiff is not entitled to an instruction on unliquidated damages." *Greer v. Hook*, 378 S.W.3d 316, 319 (Ky. App. 2012) (citation omitted).

Relying upon this rule, Boucher notes that on January 7, 2019 – approximately two weeks before the circuit court concluded discovery in this matter – Paul filed and served interrogatory responses indicating he was seeking maximums of $500,000 for pain and suffering and $1,000,000 for punitive damages. But, Boucher points out, Paul did not *verify* those interrogatory responses as required by CR 33.01(2).[4] Boucher also notes that after the trial concluded on January 30, 2019 – but before the case was submitted to the jury – he pointed out this deficiency to the circuit court in a directed verdict motion to preclude Paul from recovering pain and suffering or punitive damages pursuant to CR 8.01(2). There, Boucher argued that because Paul's interrogatory responses lacked verification, they did not strictly comply with CR 33.01(2); that because they did not strictly comply, they should be disregarded; and that because they should be disregarded, the circuit court should hold as a matter of law that Paul

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[4] In relevant part, CR 33.01(2) provides:

> Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the reasons for objection shall be stated in lieu of an answer. The answers are to be signed by the person making them, and the objections signed by the attorney making them. . . .

failed to respond to his damages interrogatories and was therefore not entitled to any instruction on unliquidated damages pursuant to CR 8.01(2).

Boucher further notes that the circuit court denied his motion, and he argues this was error. We disagree.

To be sure, strict compliance with CR 8.01(2) has been deemed *mandatory* in instances where a plaintiff has made no response[5] or an inexcusably belated response[6] to an unliquidated damages interrogatory. However, strict compliance with CR 8.01(2) has been deemed *waived* where a plaintiff, through his attorney, makes a timely but unverified response to an unliquidated damages interrogatory, and the inquiring defendant takes no issue regarding the response until after the conclusion of discovery. Those were the circumstances of *Tennill v. Talai*, 277 S.W.3d 248 (Ky. 2009), in which our Supreme Court explained:

> [A]fter requesting discovery through written interrogatories, the opposing party [Talai] scheduled the injured party's deposition for discovery of the "amount of damages" and the nature of the claims, other than medical expenses, lost wages, pain and suffering. Tennill appeared at the deposition and answered all of Talai's questions. Before and after the deposition, Tennill's attorney informed Talai's insurance carrier or his attorney that he was looking for policy limits of $25,000.00 if settled before trial. At no time did Talai's attorney seek a further explanation or investigation of the amount of damages. Under this set of circumstances, we

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[5] *See, e.g.*, *Fratzke v. Murphy*, 12 S.W.3d 269 (Ky. 1999).

[6] *See, e.g.*, *LaFleur*, 83 S.W.3d 474; *Greer*, 378 S.W.3d 316.

> opine, that unlike in *Fratzke* [*v. Murphy*, 12 S.W.3d 269 (Ky. 1999)], the error here in not providing written answers to the interrogatories, was harmless in that Talai's counsel waived strict compliance with CR 8.01(2) when he scheduled a deposition on damages and failed to ask the questions.

Id. at 251.

The relevant circumstances of this case bear no meaningful difference from those presented in *Tennill*: Paul, through his attorney, made a timely[7] but unverified response to Boucher's unliquidated damages interrogatory; and through the remaining weeks allowed for discovery, until the presentation of the evidence had concluded, Boucher raised no objection to the lack of verification. *Cf. Greer*, 378 S.W.3d at 321 (finding no waiver because, unlike the defendant in *Tennill*, "nothing in the record demonstrates [the defendant] had the express opportunity to request the required information and simply failed to do so"). Indeed, additional circumstances of this case support that until January 30, 2019, Boucher deemed the lack of verification inconsequential. On January 22, 2019, for example, the circuit court held extensive oral arguments regarding a motion in limine Paul had filed on January 16, 2019, in which Paul contended:

> Pursuant to CR 8.01(2) and *Fratzke v. Murphy*, 12 S.W.3d 269 (Ky. 1999), Dr. Paul recently supplemented his answers to Defendant's interrogatories and disclosed

[7] In his brief, Boucher emphasizes that he filed motions to compel discovery from Paul during the proceedings below, but he makes no contention that Paul's January 7, 2019 interrogatory responses were untimely.

> the upper limit of his damages. However, the amount of damages awarded at trial is a fact question for the jury. While CR 8.01(2) requires a disclosure of the upper limit of damages to be sought, this discovery rule is designed to allow defendants to plan for the potential exposure and not as a replacement for the jury's discretion in its damages determination. Therefore, this Court should exclude from trial any mention of Dr. Paul's prior damages disclosure.

When asked by the circuit court if Boucher opposed or had any other comment regarding Paul's motion – *in which Paul had overtly represented that his unliquidated damages disclosure complied with the dictates of CR 8.01(2)* – Boucher's counsel had only this to say: "I guess, I guess at some point during their case in chief, they'll have to put some testimony on. That testimony will be what it'll be, I guess." Boucher's counsel then followed his lack of objection to Paul's statement with an act of acquiescence: After the hearing, Boucher *himself* tendered proposed jury instructions that, as written, would have permitted Paul to recover punitive damages and pain and suffering damages.

As a last rebuttal,[8] Boucher adds in his brief:

> [I]f Paul's conduct and strategy of submitting unverified discovery responses is given the imprimatur of this court, then the rule that requires verified responses has absolutely no meaning. Not only will unverified responses—signed only by counsel—be sufficient to

[8] Boucher also invites this Court to comment upon an unpublished case from 2001, which he believes applies to this matter. We decline, and we remind Boucher it is inappropriate to rely upon such authority even for persuasive value. *See* CR 76.28(4)(c).

satisfy the rule, so also would a simple letter from a plaintiff's counsel.

To the extent Boucher is arguing it is imprudent for the attorney rather than the client to sign or verify answers to interrogatories, he is certainly correct. This could be perceived as an attempt by an attorney to provide testimony on behalf of a client and could therefore prompt not only additional discovery, but also a motion for disqualification.

However, it is not our prerogative to overrule precedent from the Kentucky Supreme Court, which found a waiver of strict compliance under analogous circumstances, *i.e.*, where, as in *Tennill*, there is no claim that false answers were procured through fraud and connivance of the opposing party, and there is no indication that the plaintiff otherwise secured any advantage through the lack of verification. Here, the circuit court did not permit Paul to tender jury instructions asking for more than $500,000 for pain and suffering, or $1,000,000 for punitive damages. And, in overruling Paul's motion in limine prior to trial, the circuit court explained in a written order that it regarded Paul's CR 8.01(2) disclosure as *Paul's* CR 8.01(2) disclosure and did not prohibit Boucher from mentioning it to the jury.[9] In short, there is no reversable error in this respect.

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[9] On January 24, 2019, the circuit court entered a written order addressing the various issues raised during the January 22, 2019 pretrial hearing. With respect to Paul's attempt to exclude mention of his CR 8.01(2) disclosure, the circuit court held: "Mr. Paul moved to preclude

Boucher's second argument,[10] which he also asserted in his directed verdict motion, is that Paul should have received no damages for pain and suffering or punitive damages. In the words of his brief, Boucher argues "there was never any evidence in the record either through the discovery process, or at trial, with regard to the *amount* of [Paul's] claims for pain and suffering and/or punitive damages." (Emphasis added.)

We disagree. Paul was not required to prove his pain and suffering was worth a specific amount or that Boucher's conduct warranted a specific monetary penalty. "[D]amages for pain and suffering are not capable of being reduced to an exact and certain sum." *Reams v. Stutler*, 642 S.W.2d 586, 589 (Ky. 1982) (citations omitted). Likewise, any amount of punitive damages awarded will inevitably be arbitrary, and "[t]he judicial function is to police a range, not a point." *Mathias v. Accor Economy Lodging, Inc.*, 347 F.3d 672, 678 (7th Cir. 2003); *see also Simpson County Steeplechase Ass'n, Inc. v. Roberts*, 898 S.W.2d 523, 528 (Ky. App. 1995) ("Punitive damage awards are the product of numerous and sometimes intangible factors. A jury imposing punitive damages must make a

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mention of Paul's damage disclosure to the jury. No law was cited concerning this motion. This motion is denied."

[10] Boucher makes an ostensible additional argument in his brief, in which he combines the substance of his first and second arguments. The basis for that argument has been rejected in his first and second arguments; thus, it would be redundant to address it.

qualitative assessment based on a host of facts and circumstances unique to the particular case before it." (citation omitted)).

Boucher's third argument concerns the matter of provocation. At trial, the circuit court permitted Boucher to introduce all the evidence he wished to adduce in support of his contention that Paul provoked his assault. Furthermore, Boucher reviewed that evidence at length with the jury during his closing arguments and asked the jury to consider it in its assessment, if any, of punitive damages against him. In Boucher's view, however, the circuit court erred by refusing to further instruct the jury that it could reduce his potential liability for punitive damages based upon Kentucky Revised Statute (KRS) 411.010. That statute provides:

> In any civil action for damages inflicted by an assault or by an assault and battery, the defendant may plead as a defense to the claim for punitive damages, and introduce in evidence in mitigation of punitive damages, any matter of provocation that preceded the assault or battery, if the provocation prompted the assault or battery and was of a nature to cause a person of ordinary prudence and judgment to take the action taken by the defendant.

As to why the circuit court denied Boucher a provocation instruction, it deemed Boucher's evidence insufficient within the meaning of this statute. During a March 20, 2019 hearing on Boucher's motion for a new trial, in which Boucher once again asserted such an instruction should have been given, the circuit court explained:

> Taking all the evidence in Mr. Boucher's favor that, yes, he saw Mr. Paul putting piles of limbs on his property, on Mr. Paul's own property at some point, assuming that to be true – by the way, there was no evidence it was actually on or even very close to the property line. It was on Mr. Paul's property. From what I understood, many feet inside the property line. But even if that's true, in my personal opinion, that does not justify an instruction on provocation. And I think Mr. Boucher felt in his mind that these things were being done to provoke him, but he just couldn't come up with any facts that would lead a reasonable person to conclude that Mr. Paul had any clue about Mr. Boucher being upset about anything.

As stated, Boucher argues the circuit court erred in this respect. He reiterates the evidence set forth above and argues, contrary to the circuit court's holding, that it *was* enough to warrant a provocation instruction.

We disagree. Concededly, the law cannot catalogue all the various facts and combinations of facts that could be held to constitute a reasonable or adequate provocation. However, just as "it is the duty of the court to determine whether certain facts constitute an assault[,]"[11] it is likewise the duty of the court to determine whether certain facts, if believed, are "of a *nature* to cause a person of ordinary prudence and judgment"[12] to commit an assault.

Provocation instructions have been authorized pursuant to KRS 411.010 (or its predecessor statute) where evidence indicated the plaintiff, prior to

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[11] *Freeman v. Logan*, 475 S.W.2d 636, 639 (Ky. 1972).

[12] *See* KRS 411.010 (emphasis added).

the violent incident, knew or should have known their conduct might prompt an aggressive response. Examples include a plaintiff's purported use of opprobrious words or epithets toward a defendant. *See, e.g.*, *Johnson v. Tucker*, 383 S.W.2d 325 (Ky. 1964); *Lambert v. Corbin*, 194 Ky. 373, 239 S.W. 453 (1922); *Shields' Adm'rs v. Rowland*, 151 Ky. 136, 151 S.W. 408 (1912); and *Renfro v. Barlow*, 131 Ky. 312, 115 S.W. 225 (1909). They include situations where a plaintiff purportedly initiated physical violence toward a defendant. *See Louisville Ry. Co. v. Frick*, 158 Ky. 450, 165 S.W. 649 (1914). They also include at least one situation in which a plaintiff purportedly endeavored to alienate the affections of a defendant's wife, despite the defendant's repeated warnings to the plaintiff to stay away from his home. *See Hamilton v. Howard*, 234 Ky. 321, 28 S.W.2d 7 (1930).

By contrast, an example of when a provocation instruction should *not* be given is set forth in *Mullins v. Mutter*, 287 Ky. 164, 151 S.W.2d 1047 (1941). The plaintiff in that matter was a sixteen-year-old clerk at a family-owned gas station. The defendant was the owner of the property upon which the gas station was situated, and he and those accompanying him were preparing to consume liquor on the premises. Thereafter,

> Plaintiff, according to the evidence, mildly admonished them that it was not only unlawful to drink spirituous liquor in premises so conducted, but also that she had been instructed by her uncle and aunt to not permit the consumption of liquor in their place of business. Immediately defendant became exceedingly angered and

> reached over the counter in an effort to assault plaintiff in some manner, during which he declared that he was the owner of the premises in which the business was conducted and if plaintiff did not like his conduct she could get out, and during which time he cursed her and called her a damned whore. Plaintiff then made an effort to leave the building, but defendant intercepted her at the end of the counter and commenced to pull her hair and kick and strike and otherwise assault her, whereby she was considerably bruised and otherwise painfully injured.

Id., 151 S.W.2d at 1048.

To be sure, the claim ultimately asserted by the plaintiff in *Mullins* was slander, not assault. But, in resolving the validity of the defendant's asserted defense of provocation, the Court did so in terms broad enough to encompass both torts:

> [P]laintiff in this case did nothing to provoke defendant to perpetrate his assaults on plaintiff's character, or on her person, both of which are conclusively shown to have been the result of her objection to him and his crowd drinking liquor in the premises of which she at the time had the temporary charge. Such admonition furnished no grounds whatever for legal provocation, and defendant was not authorized to construe it as such, nor to have his conduct and words mitigated by any such alleged provocation. The insistence made to the contrary would put it in the power of one to mitigate or excuse his actionable conduct because of an alleged provocation which never occurred. The truth to be gleaned from the entire evidence in the case is that defendant evidently concluded that, since the premises where the transaction happened belonged to him, he had the right to shape his conduct therein according to his own desires, and when a contrary suggestion was made to him by plaintiff he

became angry and engaged in the conduct hereinbefore described.

Id. at 1050.

Nothing indicated the plaintiff in *Mullins* intended to provoke the defendant, and nothing about her conduct was of a nature to cause a person of *ordinary* prudence and judgment to take the action by the defendant. The defendant's attack was caused purely by his subjective reaction to objectively innocuous conduct. Accordingly, the "defendant was not authorized to construe it as [provocation], nor to have his conduct and words mitigated by any such alleged provocation." *Id*.

The facts of this case are analogous to those of *Mullins*. Boucher could only testify he *suspected* Paul was aware and *suspected* Paul was performing yardwork in the manner described to exact revenge against him for trimming branches off some of Paul's maple trees earlier that year.[13] But as the circuit court

[13] In this respect, Boucher testified as follows:

COUNSEL: If you hadn't spoken with Rand Paul, why did you have it in your mind that he might be upset with you?
BOUCHER: Well, he had never placed a brush pile right there on the property line, or two to three feet off the property line, outside my bedroom window where it would make a, be very unsightly. He would always, in the past, he always piled all of his brush down by the lake. And presently, there is a large brush pile down by the lake like he has done for eighteen of the nineteen years I've lived there.
COUNSEL: Alright. So we're at the point where the second brush pile got hauled off.
BOUCHER: Yes, sir.
COUNSEL: Did it reappear?
BOUCHER: Yes, sir.

noted, no evidence indicated Paul was aware that his yardwork upset Boucher. Indeed, Boucher admitted at trial he had never spoken with Paul about his yardwork, or otherwise attempted to communicate his feelings about it to Paul through any other medium (despite having access to Paul's email address, telephone number, mailbox, and living next door to him). Absent any such evidence, the circuit court correctly concluded that, while Paul's yardwork may have caused a *subjective* reaction from Boucher, it was not "of a nature to cause a person of *ordinary* prudence and judgment to take the action" Boucher took. *See* KRS 411.010. Even Boucher appeared to concede that much during trial:

> COUNSEL: So, what transpired on November third?
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> BOUCHER: Well, Senator Paul got back from Washington, and that's the day he used his lawnmower and he started at his house, and he blew the leaves to within five to six feet of the property line. And then of course, those leaves blow into my yard, as the photos will show. But then, he did take his mower, and he got off his mower, so he could then grab the sticks and branches from the large pile he had by the dead stump, and he recreated the pile for the fourth time, where the earth was burnt.
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> COUNSEL: There is a state police photo from that day. It's a smaller version, the jury's looking at the larger version.
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> BOUCHER: Yes sir.
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> COUNSEL: The pile in the background, back behind, is that where he was recreating the pile?

BOUCHER: Yes sir.

COUNSEL: Was he recreating the pile on the place that had been burned on the previous evening?

BOUCHER: Yes sir.

COUNSEL: And what did you do?

BOUCHER: Well, that's when I made a, a great mistake. Probably the biggest mistake of my life. *The pain I was in, I was not thinking rationally*,[14] and I ran outside and I wanted to confront him. And when I saw him making his fifth or sixth trip with his arms full of branches and sticks from the pile near the stump, I tackled him. I tackled him, and I hit him in his left ribs, and it was my left shoulder that hit his ribs, and I injured him and caused him to have his rib fractures. What I did was wrong, and I'm sorry I did it.

(Emphasis supplied.)

In short, the circuit court did not err in this respect, either.

Boucher's fourth argument is that, in his view, the jury's awards of pain and suffering damages and punitive damages were excessive. In that regard, our standard of review is as follows:

In considering whether the verdict should be set aside as excessive, the trial court and appellate court have different functions. When presented with a motion for new trial on grounds of excessive damages, the trial court

[14] "The pain" Boucher referenced in this testimony was from the second-degree burns Boucher had inflicted upon himself around 10 p.m. the prior evening after he had trespassed upon Paul's property and lit Paul's pile of yard waste on fire. From all indications, neither Paul nor his wife witnessed the ensuing blaze; Paul was in Washington, D.C., and his wife testified she was elsewhere attending a fundraiser at the time.

> is charged with the responsibility of deciding whether the jury's award appears "to have been given under the influence of passion or prejudice or in disregard of the evidence or the instructions of the court." CR 59.01(d). This is a discretionary function assigned to the trial judge who has heard the witnesses firsthand and viewed their demeanor and who has observed the jury throughout the trial.

Davis v. Graviss, 672 S.W.2d 928, 932 (Ky. 1984).[15]

> Upon reviewing the action of a trial judge . . . the appellate court no longer steps into the shoes of the trial court to inspect the actions of the jury from his perspective. Now, the appellate court reviews only the actions of the trial judge . . . to determine if his actions constituted an error of law. There is no error of law unless the trial judge is said to have abused his discretion and thereby rendered his decision clearly erroneous. Further, the action of the trial judge is presumptively correct and the appellate court will not hastily substitute its judgment for that of the trial judge, who monitored the trial and was able to grasp those inevitable intangibles which are inherent in the decision making process of our system.

Prater v. Arnett, 648 S.W.2d 82, 86 (Ky. App. 1983) (citations omitted).

Thus, it is up to the trial judge to use his or her discretion in determining whether the jury's award is excessive. We then review the evidence in the record and the decision of the trial judge to determine if there was an abuse of discretion.

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[15] *Davis* was overruled on other grounds by *Sand Hill Energy, Inc. v. Ford Motor Co.*, 83 S.W.3d 483, 493-95 (Ky. 2002). *Sand Hill* was subsequently vacated by *Ford Motor Co. v. Estate of Smith*, 538 U.S. 1028, 123 S.Ct. 2072, 155 L.Ed.2d 1056 (2003).

With that in mind, we begin with Boucher's argument that Paul's damages for pain and suffering were excessive. In his brief, he states:

> At trial it was proved through Paul's own testimony that he missed one week of work (a work week for him is four days, as he travels to Washington on Monday and returns to Bowling Green on Friday). His last visit with a doctor was thirty days following the occurrence in issue. His medical reports indicate consistently that, at best, his pain was "mild" and/or "very mild". He resumed an active lifestyle and enjoyed a complete recovery. He is back to being an avid golfer. He went on two ski trips in the spring of 2018. He traveled frequently around the country, and around the world. He regularly rides his bicycle, and he kayaks on the lake behind his house. Yet, and despite all this, the jury made an award for pain and suffering in the amount of $200,000.00. Respectfully, this award is excessive.

However, Boucher's argument mischaracterizes much of the evidence and, to a large extent, omits any mention of the evidence the jury chose to credit. True, Paul missed one week of work and has, to date, resumed most of his normal life activities. But, "his last visit with a doctor" relative to Boucher's assault was January 19, 2019 – well in excess of "thirty days following the occurrence in issue," when he received surgical intervention for an inguinal hernia causally related to Boucher's attack.[16] Moreover, if any "medical report" classified Paul's

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[16] At trial, Boucher contested whether his assault caused Paul to sustain a inguinal hernia, and the jury found in favor of Paul on that point. On appeal, Boucher raises no argument in that respect and has accordingly abandoned that dispute.

pain as "mild" or "very mild" – and Boucher has not cited any such document in the record[17] – it conflicts with substantial evidence to the contrary.

The evidence adduced at trial regarding Paul's condition following Boucher's assault conformed to the summary of evidence set forth in *Boucher*, 937 F.3d at 706:

> Paul described the extent of his injuries. Because displaced ribs "heal in a crooked fashion," "the free ends of [his] ribs grinded over top of and into each other with any movement," causing him "intense pain." He "had trouble finishing sentences for lack of air to expel," and "throughout the night [he] would pace [while] suffering from involuntary spasmodic breathing." After an attempted return to work 10 days after the assault, his "fever spiked to 102.6 F, despite being on medication to prevent fevers." He returned to the hospital for testing, and "[a] CAT scan showed pneumonia and fluid around [his] lungs." Antibiotics briefly resolved the illness, but a few weeks later "the fevers and spasmodic breathing returned." Another trip to the hospital revealed that Paul had "recurrent pneumonia." This second bout of pneumonia cleared after another round of antibiotics, but additional scans "still show[ed] an area of damaged lung."
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> . . . .

[17] While one of Paul's physicians, Dr. Brian Monahan, wrote in a November 15, 2017 treatment note that Paul was doing "amazingly well" and that Paul's pain was "well controlled," he qualified those statements at trial. There, he testified Paul's rib fractures were "very extensive," and that "amazingly well" reflected his assessment that Paul should have been in much worse shape than Paul was letting on, and that he was amazed Paul was ambulatory. Dr. Monahan also testified that Paul had made the statement that the pain was "well controlled," but that Paul had further stated the pain was nonetheless excruciating.

> Kelley[18] likewise testified that Boucher's assault began "a long odyssey of severe pain and limited mobility for" Paul. "A cough or hiccup would literally drive him to his knees, his face in a white grimace," and "[t]he trauma to his body caused him to suffer night sweats accompanied by uncontrollable shivering and shaking."

To be clear, no doctor testified Paul sustained a minor injury. One of Paul's medical witnesses, Dr. Sean Willgruber, testified that injuries involving six or seven broken ribs are generally regarded as having an estimated 25% mortality rate. It is uncontested that Boucher's assault caused Paul to sustain six broken ribs (three of which were fractured, three of which were displaced); an inguinal hernia; two bouts of pneumonia; and permanent damage to his lungs.

As indicated, during approximately two months following his injury, Paul's three displaced ribs, located in the upper area of the chest that expands and contracts, ground together whenever Paul breathed. Paul assigned a "ten out of ten" to the level of pain in his chest for the first two weeks after the injury, describing a "knife in the back" feeling every time he sneezed, hiccupped, or coughed. He also developed swelling in his lungs, causing him severe shortness of breath.

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[18] "Kelley" is Kelley Paul, Rand Paul's wife. As indicated, the testimony she provided during these proceedings was consistent with the evidence she provided during Boucher's criminal proceedings.

Paul's treating physicians and medical experts who testified regarding the extent of his injuries validated his complaints, agreeing his injuries were substantial enough to warrant hospitalization. Further, they testified Paul's repeated bouts of pneumonia, which had resulted from his injuries, had permanently impaired his lung capacity and rendered him susceptible to future infection, and that Paul's coughing fits – caused by the repeated bouts of pneumonia – had ultimately led to the formation of his inguinal hernia.

Paul needed assistance getting out of bed. He was unable to engage in substantial physical activity for approximately four months after the attack. He testified that while he can perform most of his pre-injury activities now, he performs them differently because he lacks a full range of mobility in his upper body, his ribs are shorter on the left side, and he suffers from intermittent spells of pain – particularly when bending over or with cold weather. Paul's experts also testified that, due to his age, his rib fractures will likely heal with deformities that he will be able to see and feel (*i.e.*, "knuckles"), and his ribs are more susceptible to being broken. Apart from that, Paul testified he is reminded of the attack and experiences anxiety when he suffers from the recurring pain in his chest, or when he is in his own backyard; Boucher is still his neighbor.

As explained in *Stanley v. Caldwell*, 274 S.W.2d 383, 385 (Ky. 1954),

> We have many times written that no rule can be laid down by which damages for pain and suffering in a

> personal injury case may be accurately measured. At best, what is fair and right can only be left up to the judgment and discretion of the jury and this Court will not interfere with the verdict they render unless the assessment of damages was influenced by passion and prejudice, or it is so unreasonable as to appear at first blush disproportionate to the injuries sustained.

(Citations omitted.)

Here, Paul suggested during his closing argument that his pain and suffering, averaged together, was worth $1,000 per day from the date of Boucher's attack until mid-February 2018 – the period when, according to his testimony and medical evidence, his pain and the effects of his injury were the most substantial. Thereafter, Paul suggested his pain and suffering was worth $1,000 per month for the next twenty-four years of his estimated lifespan. He acknowledged most of his pain had subsided after February 2018 (when Paul assigned it a "one out of ten" on a pain scale"); it was merely chronic and controlled with ibuprofen; and that his treating physicians had agreed his condition would not improve beyond that point.

As discussed, the jury awarded Paul $200,000 for pain and suffering, an amount less than his estimate. Even if their award could be considered liberal, it does not shock the conscience; nor is it clearly excessive under the evidence. Accordingly, there is no error in the circuit court's refusal to set it aside.

Next, we address Boucher's argument that Paul's punitive damages were excessive. In the relevant part of his brief, he writes:

Without trivializing the event in issue, it bears reiterating that this entire chain of events stems from a scuffle between two next-door-neighbors over yard maintenance (or a lack of it). Paul was unhappy that Boucher had trimmed his trees, and Paul began constructing mounds of yard trash on the property line to make his point. Boucher repeatedly cleaned them up. During the last "clean up," Boucher burned himself badly with the gasoline that he had used to ignite the fire. The very next day, Paul was reconstructing another trash pile in the same location as the one that had been burned the evening prior. Boucher lost his temper and tackled Paul. This is hardly "reprehensible" as that word is customarily defined and interpreted.

. . . .

Likewise, throughout these proceedings, to include the trial, the proof as it relates to Paul's claim for punitive damages has been consistent and – in many respects – uncontroverted. Immediately after the incident in issue, Boucher was interviewed by the Kentucky State Police and taken into custody on the evening of November 3, 2017. He spent the night in the Warren County Jail and was released on the evening of November 4, 2017. He was charged in the Warren District Court with assault 4th degree, a Class A misdemeanor. Boucher cooperated completely with the KSP, the FBI, and Capital [sic] Police. He gave full, fair, and complete answers to all of their questions.

Paul was apparently dissatisfied with the potential maximum punishment to which Boucher would be exposed in state court, so the government charged Boucher with a felony in federal court in order to "up the ante" on punishment. He accepted the punishment that he received in federal court, and he has served his sentence in federal prison in Chicago. He promptly paid a $10,000 fine to the federal government, and he has completed 100 hours of community service, as ordered.

> He has been compliant in all respects with the terms of his probation.
>
> Boucher has absolutely no criminal record whatsoever. He is a former officer in the United States Army. He is a retired medical doctor. He is devoted to his church, community, and family. The incident in issue is a one-time, isolated occurrence. It is an aberration.
>
> As if this were not enough, he is still the subject of a federal appellate proceeding in which the government is seeking a harsher penalty than what he received from the federal trial court. This appeal is hanging over Boucher like a dark cloud, and there is a real potential that he may have to go back to prison if the government gets its way. Despite all of this, the jury in this case awarded a money judgment in favor of Paul in the amount of $375,000.00. This – like the pain and suffering award – is also clearly excessive.

That said, much of what Boucher emphasizes in his argument has no support in the evidence; was discredited by the jury; or is largely irrelevant. Starting with the matter of relevance, the jury instructions given by the trial court in this case were consistent with KRS 411.186(2), which requires the jury to consider the following factors before arriving at a sum of punitive damages:

> (a) The likelihood at the relevant time that serious harm would arise from the defendant's misconduct;
>
> (b) The degree of the defendant's awareness of that likelihood;
>
> (c) The profitability of the misconduct to the defendant;
>
> (d) The duration of the misconduct and any concealment of it by the defendant; and

> (e) Any actions by the defendant to remedy the misconduct once it became known to the defendant.

While Boucher's cooperation with authorities after his assault upon Paul, his church attendance, his military record, and his status as a retired doctor are all commendable, they had no bearing upon the issue of punitive damages; the same is true of Boucher's ensuing criminal difficulties associated with his assault upon Paul and his criminal record. Accordingly, to the extent the jury ignored or discounted that evidence in its assessment of Boucher's punitive damages, it acted properly.

As to the events that *preceded* Boucher's assault upon Paul – which were a significant reason Paul sought punitive damages – Boucher's account either was not supported in the evidence or was discredited by the jury, which is patently its domain.

We have already addressed Boucher's representation that Paul *provoked* his attack through yardwork. This assertion is not supported by the evidence. Apart from that, his attack was not, as Boucher chooses to characterize it in his brief, "a scuffle between two next-door-neighbors." From all accounts – even from Boucher's own account at trial – it was a one-sided sucker punch. Boucher testified that, from the bedroom window of his house, he witnessed Paul performing yardwork and recognized that Paul was, at the time, wearing headphones that would make it difficult for Paul to hear anything around him. He

testified that after deciding to confront Paul, he chose to exit his home through his front door – where Paul likely would not have seen him approach because it was obstructed by trees – rather than through his back door – where Paul likely would have seen him. He testified he charged at Paul when he recognized Paul was distracted and not looking in his direction. He testified his intent was to injure Paul. Further, he testified that when he attacked Paul, executing a running, downhill tackle and landing the entirety of his body weight upon him, Paul did not see him coming.

In short, while the latter three factors of KRS 411.186(2) had little presence in this case, there was overwhelming evidence of the first two. Paul sustained serious injuries because of Boucher's intentional misconduct. This Court cannot say that the jury's award of $375,000 shocks the conscience or is clearly excessive under the evidence, and it will not second guess the jury on this issue given the evidence presented.

Boucher's final argument is that he should receive a new trial because, in the words of his brief, "the trial court improperly permitted Plaintiff's counsel to cross-examine the Defendant with a pleading that had been filed on behalf of the Defendant by his counsel."

The facts relevant to Boucher's argument are as follows. Over the course of Boucher's trial testimony, Boucher claimed remorse over assaulting Paul

and took responsibility for it. To impeach him in these respects, Paul's counsel then presented Boucher with the pleading Boucher had filed in this matter, in which Boucher had asserted a defense of provocation, and a counterclaim against Paul and his wife for compensatory and punitive damages due to their alleged maintenance of a private nuisance (*i.e.*, their offending pile of yard waste). Based upon this pleading, which recited in substance that Boucher still believed Paul shared responsibility for his assault and that Paul (and his wife) had substantially damaged him through their yardwork, Paul's counsel implied that Boucher's claim of remorse and his claim that he took responsibility for the assault were disingenuous.

Prior to this line of questioning, however, Boucher objected to the use of his pleadings. His objection was the subject of the following discussion before the bench:

> BOUCHER'S COUNSEL: If the court will just hear me out briefly. Um, judge, I think [Boucher's] counterclaim is, is comparing apples to oranges, and, uh, I don't think, well, I think we're gonna have a trial on this counterclaim in front of your honor, without a jury, and I just, I—
>
> COURT: Put it in legal terms.
>
> BOUCHER'S COUNSEL: I don't see the relevance.
>
> COURT: Oh, the relevance?
>
> BOUCHER'S COUNSEL: Yes, sir.

COURT: Okay. Overruled.

BOUCHER'S COUNSEL: Thank you.

After the jury returned its verdict in favor of Paul, Boucher then filed a post-judgment motion for a new trial. There, he abandoned his prior argument that his pleadings were an improper basis of impeachment due to *relevance*. Instead, he argued his pleadings were an improper basis of impeachment because they were *unverified*. The circuit court denied Boucher's motion; Boucher appealed; and, as he did in his post-judgment motion, Boucher continues to argue the circuit court improperly permitted Paul to utilize his pleadings for impeachment purposes because they were unverified.

We disagree. Boucher could have raised his "verification" argument at trial. He did not. Accordingly, the circuit court committed no error in rejecting it; his argument was unpreserved, and he was not at liberty to raise it in a post-judgment motion. *See Hopkins v. Ratliff*, 957 S.W.2d 300, 301 (Ky. App. 1997).

In conclusion, we have reviewed the breadth of Boucher's arguments, and we have found no error. The judgment of the Warren Circuit Court is therefore AFFIRMED.

ALL CONCUR.

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