COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
CASE NO. 2014-SC-008-D
(2012-CA-941-MR)

LARRY O'NEIL THOMAS, as Administrator of
the Estate of JAMES "MILFORD" GRAY, deceased, and
all lawful survivors of JAMES "MILFORD" GRAY, deceased — APPELLEES

On Appeal From Fayette Circuit Court
v. Hon. Pamela R. Goodwine, Circuit Judge
Civil Action No. 00-CI-1364

SAINT JOSEPH HEALTHCARE, INC.,
d/b/a SAINT JOSEPH HOSPITAL — APPELLANT

REPLY BRIEF OF APPELLANT SAINT JOSEPH HEALTHCARE, INC.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the record on appeal was not withdrawn and that a copy of this Reply Brief has been served by mailing a true and correct copy of same to to Honorable Pamela R. Goodwine, Fayette Circuit Court, Robert F. Stephens Courthouse, 120 North Limestone, Lexington, Kentucky 40507; Samuel P. Givens, Jr., Clerk of the Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601; Darryl L. Lewis, Searcy Denny Scarola Barnhart & Shipley, P.A., Post Office Drawer 3626, West Palm Beach, Florida 33402-3626; Charles A. Grundy, Jr., Grundy Law Group, 201 East Main Street, Ste. 510, Lexington, Kentucky 40507; Elizabeth R. Seif, DeCamp Talbott Seif, P.S.C., PNC Tower, 301 East Main Street, Suite 600, Lexington, Kentucky 40507; and William R. Garmer, Garmer & Prather, PLLC, 141 N. Broadway, Lexington, Kentucky 40507 on this the 26th day of January, 2015.

Counsel for Appellant
Saint Joseph HealthCare, Inc.

STATEMENT OF POINTS AND AUTHORITIES

I. THE PUNITIVE DAMAGES AWARD WAS FLAGRANTLY AGAINST THE EVIDENCE.

By setting forth only parts of the proof, the Plaintiff attempts to tell a story in its Brief that is far different than the proof at trial. Much of the Plaintiff's version of events comes from Mr. Gray's own family and friends. The claims of threatening to call the police come from Mr. Gray's two sisters, both of whom worked at Saint Joseph, but did not come to the emergency department to check on him. (Mosley Test., 2/13/12, 22-4-cd=24-8, at 11:31:40; Hughes Test., *id.* at 01:52:22.) Marilyn Swinford, Pamela Blackwell, and Nancy Hicks all denied those claims, and no one other than Mr. Gray's relatives could corroborate them. Michael Scott, who claimed to have heard Mr. Gray screaming in neglect through curtains in the ER, was a childhood friend (Scott Test. played into trial, *id.* at 11:48:30); moreover, in reality, Mr. Scott was up to four rooms away (*id.* at 12:40:00), could not say whether he was in the ER for "fifteen minutes or three hours" (*id.* 11:55:54), and admitted he did not know whether staff actually provided Mr. Gray care during that time. (*Id.* at 11:57:28.)

The Plaintiff is quick to point out that Chesity Roberts claims she would not accept Mr. Gray when the ambulance arrived because Mr. Gray needed medical help. What the Plaintiff does not point out is that (i) the unbiased ambulance driver with no stake in the outcome unequivocally denied this (Jackson Test., played into trial 2/23/12, 22-4-12-CD-24, at 04:21:12), (ii) Ms. Roberts allegedly made this determination by seeing Mr. Gray through the back of an ambulance window in the middle of the night (Roberts Test., 2/14/12, 22-4-12-cd=24-10, at 12:11:45), and (iii) she provided a false name to the police the next day. (*Id.* at 11:35:16.) This Court should not be swayed by a passionate story that is not credible and based largely on emotion and prejudice.

Plaintiff fails to contest Saint Joseph's recitation of the extensive services provided to

Mr. Gray, which establishes that Saint Joseph far exceeded the type of inaction, reckless conduct, or failure of even "slight care" necessary to justify punitive damages. Instead, Plaintiff espouses the theme that even if Saint Joseph did "some things right" initially (*see* Appellee Brief, at 4), it gave up on or did not "stand up for" Mr. Gray. (*See id.* at 7-10.) The facts, however, establish that Saint Joseph did not give up on Mr. Gray.

It is undisputed that even after Mr. Gray was officially discharged by the physicians on April 9, 1999 at 7:07 a.m., Saint Joseph continued to assess and care for Mr. Gray. For example, nurse Nancy Hicks brought Mr. Gray's condition to the attention of Dr. Geren at least two times to make sure he was attended to (Dr. Geren Test. at 16:34:10); as a result Dr. Geren reassessed Mr. Gray at least three or four times (*Id.* at 16:43:15); nurse Vicki Robertson assisted Mr. Gray and cleaned stool off of him (Medical Records, Df. Ex. Vol. 3, Ex. 14); social worker Pam Blackwell spent at least two hours finding Mr. Gray placement (22/4/12/CD/24-16 at 10:03:02); and Saint Joseph provided him free prescription and transportation vouchers just before he left. (Medical Records, Df. Ex. Vol. 3, Ex. 14.)

II. PLAINTIFF PRESENTED NO EVIDENCE OF RATIFICATION.

University Medical Center, Inc. v. Beglin is controlling and dictates reversal. As evidence of ratification, the Plaintiff points to nothing other than (i) various acts it believes that Saint Joseph should have undertaken as punishment or remedial steps, and (ii) Saint Joseph's defense of itself at trial.

Plaintiff's "negative ratification" or "ratification by omission" theory should not be accepted; ratification under KRS 411.184(3) should not be presumed upon evidence that an employer failed to "repudiate," "reprimand," or "sanction" an employee after an alleged tortious act. This Court in *Beglin* pointed out that the concept of ratification is "quite distinct" from a scenario of a poor investigation. *See id.* at 794. Ratification, or *approval*, is

distinct from failing to act in disapproval. Marilyn Swinford's review of the chart with a treating doctor (Appellee Brief, at 18) could arguably be considered a "poor investigation," but, just like in *Beglin*, that failure does not constitute ratification.

Plaintiff has not put forward any affirmative proof—beyond Saint Joseph's defense of itself at trial—that Saint Joseph formally approved or intended to ratify its employees' conduct. "Nonintervention is not ratification." *Pruitt v. Goldstein Millinery Co.*, 184 S.W. 1134, 1137 (Ky. 1916) (emphasis added) (slander case holding that retaining a company's general manager did not constitute ratification of the manager's tortious statements).

Case law from other jurisdictions is also informative. For example, in Idaho, whose law on punitive damages and ratification is similar to Kentucky's,[1] a plaintiff argued that a hospital ratified the conduct of it nurses because they "were not reprimanded or criticized for their conduct . . . ." *Manning v. Twin Falls Clinic & Hospital, Inc.*, 830 P.2d 1185 1192 (Id. 1992). The Supreme Court of Idaho found that the failure to reprimand or discipline an employee was not indicative of intent to ratify. *Id.* Numerous other jurisdictions have also held that the failure to punish or reprimand is insufficient evidence of ratification. *See, e.g.*, *Woodard v. City Stores*, 334 A.2d 189 (D.C. App. 1975); *Costa v. Able Distributors, Inc.*, 653 P.2d 101 (Haw. App. 1982); *Abraham v. S.E. Garages*, 446 P.2d 821 (Haw. 1968); *Fisher v. Hering*, 97 N.E.2d 553 (Ohio App. 1948); *Urabzo v. Humpty Dumpty Supermarkets*, 463 P.2d 352 (Okla. App. 1969); *J.C. Penny Co. v. Gravelle*, 155 P.2d 477 (Nev. 1945); *Green v. Jackson*, 674 S.W.2d 395 (Tex. App. 1984). This rule is based on sound policy reasons:

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[1] Idaho has adopted the definition for "ratification" espoused by the Restatement of Agency §§ 82-83. Kentucky approved the same in *Stewart v. Mitchell's Adm'x*, 301 Ky. 123, 125, 190 S.W.2d 660, 662 (1945). Like Kentucky's courts, the Supreme Court of Idaho stated that the "essence of ratification is a manifestation of intent to approve or sanction an act of an agent by a principal operating with knowledge of all material facts." *Manning*, 830 P.2d at 1192. *Accord Wolford v. Scott Nickels Bus Co.*, 257 S.W.2d 594, 596 (Ky. 1953).

> The continuance of [the defendant's] employment alone is insufficient to show such approval. Such continuance is "*too readily open to explanation on other grounds.*" If we held otherwise, we would in effect be requiring the discharge of an employee whenever an employer learns of an employee's wrongful act. Surely we should wish to promote a policy of clear and objective reflection when a man's job is at stake. Since we are all subject to human frailties, we think the law should permit an employer to retain and give an opportunity to an employee to redeem himself where he has acted tortiously, without the employer being found to have ratified the tort.

Manning, 830 P.2d at 1194 (quoting *Abraham v. S.E. Onorato Garages*, 446 P.2d 821, 827 (1968)) (emphasis added). *See also Wolford*, 257 S.W.2d at 596.

The "absolute approval" referred to in Plaintiff's brief focuses on Saint Joseph's defense at trial. (*E.g.*, Appellee Brief, at 11.) The *Manning* court also addressed this argument, holding that allowing a hospital's defense at trial to constitute ratification would "effectively require a principal to admit its agent's negligence or wrongdoing in every case to avoid a finding of ratification. Such a double-edged position is not sound policy." *Manning*, 830 P.2d at 1194. The Plaintiff concedes that punishing a party for defending itself at trial is not appropriate (Appellee Brief, at 18), but then proceeds to set forth a litany of Marilyn Swinford's testimony at trial as its proof of ratification. (*E.g.*, Appellee Brief, at 12.)

The recent case of *MV Transportation, Inc. v. Allgeier*, 433 S.W.3d 324 (Ky. 2014), is instructive. In *Allgeier*, the plaintiff was in a wheelchair. *Id.* at 328. While exiting an MV bus, she fell, broke both femurs, and was left lying on the sidewalk in the cold for nearly an hour. *Id.* at 328-29. This Court found sufficient evidence that MV had ratified the employee's conduct because MV's driver "was complying with MV's policies and instructions at the time she engaged in that conduct." *Id.* There, MV actually trained its employees to call their employer rather than 911 and to not speak to victims. *Id.*

In stark contrast, the Plaintiff's expert here repeatedly testified that the nurses "violated policy after policy after policy." (Rodgers Test., played into 2/6/12 Trial, 22/2/05/VCR/65-4, at 11:28:05 (emphasis added).) When asked the effect of these policy violations and why it was important to Mr. Gray, the Plaintiff's expert stated:

> St. Joseph's Hospital has policies in place for a reason. They stated in their philosophy how they expected for patients to be cared for. The reason that the policies are even in place is so that people do not get hurt by people who—by nurses, other professional—who don't follow policy. That's why they're even in place. They give your guideline, if you have a question, to follow the policy. The nurses deviated from the standard of care by violating all of these numerous policies and Mr. Gray didn't get the care that he needed and subsequently died.

(*Id.* at 11:28:15.) On at least 10 separate occasions, Ms. Rodgers stated that Saint Joseph's nurses were negligent because they violated the Hospital's policies.[2] The Plaintiff cannot now argue that its claim was not based on a theory of violating policies.

III. SAINT JOSEPH CANNOT BE HELD PUNITIVELY LIABLE FOR ACTS OF INDEPENDENT CONTRACTORS.[3]

Plaintiff is generally correct that Saint Joseph can tell its independent contractor physicians *what* to do, but that Saint Joseph cannot tell its independent contractors *how* to do it. That observation, however, changes nothing in this case. Saint Joseph's contract with the

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[2] (*See, e.g.*, Rodgers Test., played into 2/6/12 Trial, 22/2/05/VCR/65-4, at 10:07:30, 9:44:15, 9:46:20, 9:46:48, 10:07:30, 10:19:50, 10:22:00, 10:23:30, 10:38:00, 10:40:40, 10:44:15, 10:45:50, and 11:16:32 (stating that the nurses failed to follow numerous Saint Joseph Hospital policies); *see also id.* at 10:22:00, 10:23:30, 10:59:04, and 11:23:48 (stating that the nurses violated various Saint Joseph expectations of and job requirements for nurses).)

[3] Plaintiff argues that whether Saint Joseph can be held punitively liable for actions of independent contractors was previously resolved by this Court in the 2008 Opinion. It was not. When Saint Joseph took issue with the jury's questions regarding the role of the physicians (Saint Joseph Appellee Brief at 15-16, 33-34), this Court held that it found the instructions as to the physicians relating to negligence and EMTALA substantially correct, but stated that it would "address issues relating to the punitive damages instructions separately." (2008 Opinion at 27.) The Court, however, never addressed whether the Court's answer to the jury's question regarding consideration of the physicians' conduct in determining punitive damages was in error.

physicians expressly requires them to comply with all state and federal laws (Agreement, ¶ 12, p. 8., R. 1194-1207), and its policies require its emergency department physicians to comply with EMTALA. (Witness Testimony From 2/6/12 Trial, Vol. 1, Eric Munoz' Testimony at 11:57:25.) If Saint Joseph had no such requirements, punitive damages might be appropriate, but that is simply not the case.

Kentucky law, not EMTALA, controls the punitive damages award. EMTALA is silent as to punitive damages and establishes no explicit or implicit policy that a hospital can be punished for acts of individuals who are not its employees. Instead, it states that state law governs damages. And Kentucky law unambiguously limits punitive damages awards to ratified actions of agents or employees. KRS 411.184(3). The trial court found, in an unappealed order, that as a matter of law Dr. Geren and Dr. Parsley were not agents or employees of Saint Joseph. (RA at 1997.) Thus, Saint Joseph cannot be punished vicariously for their acts.

IV. SAINT JOSEPH WAS DENIED A FAIR TRIAL BY ALLOWING THE "SLEEPING JUROR" TO REMAIN ON THE JURY PANEL.

Plaintiff has suggested that the juror referred to by the trial court as the "sleeping juror" merely had his "eyes closed" for significant portions of the trial. (Appellee Brief, at 25.) Such an argument is disingenuous. The Trial Court openly observed that Juror 4642 was sleeping throughout trial. (*See* 22/4/12/CD/24-19 at 3:13:54 (stating Juror 4642 has "passed out"); 22/4/12/CD/24-23 at 4:16:40 (referring to Juror 4642 as the "sleeping juror"); 22/4/12/CD/24-15 at 1:33:24 (describing Juror 4642's sleeping as "constant").) Even counsel for Plaintiff admitted that he had seen the juror "nod" "a couple times." (*Id.*)

The Plaintiff's analysis of *Sluss v. Commonwealth,* 381 S.W.3d 215 (Ky. 2012), regarding a post-verdict challenge based on "bias or partiality," is inapplicable. The excerpts

Plaintiff cites from *Sluss* are about proof of the existence of bias, not proof that the alleged bias actually caused prejudice. But while bias cannot be readily observed, sleeping can. Likewise, *Byrd v. Commonwealth*, 825 S.W.2d 272 (Ky. 1992), addressed prior juror knowledge of the case. This Court noted that such juror misconduct does not necessarily affect whether a trial is fair, and can be cured by an admonition. *See id.* at 275.

A passed out juror, on the other hand, fundamentally negates a fair trial; to sleep through much of the case is equivalent to being absent for much of the case. Kentucky law requires that a defendant in circuit court be provided with a jury of twelve persons. KRS 29A.280. Throughout significant portions of this trial, Saint Joseph had only eleven jurors. This was a violation of Saint Joseph's constitutional right to trial by jury. *See, e.g.*, Ky. Const. § 7; *Brown v. Louisiana*, 447 U.S. 323, 331, (1980) (stating that while the "constitutional guarantee of trial by jury prescribes neither the precise number that can constitute a jury . . . there do exist size and unanimity limits that cannot be transgressed if the essence of the jury trial right is to be maintained.").

Further, Saint Joseph has provided the Court with good law stating that proof of prejudice is unnecessary. (Saint Joseph Appellant Brief, at 29-31.) While "prejudice" dominates the analysis in Plaintiff's brief, the true focus should be "the fundamentally fair trial [courts] are honor-bound to provide": the fair process of a jury trial, rather than the outcome. *See Nunley v. Commonwealth*, 393 S.W.3d 9, 14 (Ky. 2013) (quoting *Ordway v. Commonwealth*, 391 S.W.3d 762, 781 (Ky. 2013)).

Plaintiff cites *Ratliff v. Commonwealth*, 194 S.W.3d 258 (Ky. 2006), which Plaintiff suggests requires Saint Joseph to prove prejudice. *Ratliff* states just the opposite: "[T]he aggrieved party must present some evidence that the juror was actually asleep **or** that some prejudice resulted from the fact." *Id.* at 276. (emphasis added). The word "or" is disjunctive

and expresses an alternative as between two or more subjects or conditions. *Bd. of Nat. Missions of Presbyterian Church in U. S. of Am. v. Harrel's Tr.*, 286 S.W.2d 905, 907 (Ky. 1956). Here, the Trial Court already stated that Juror 4642 was actually sleeping. Proof of prejudice is therefore unnecessary.

V. THE PUNITIVE DAMAGES AWARD IS UNCONSTITUTIONAL.

Plaintiff frames this case in terms of "the punishment fitting the crime." (Appellee Brief, at 41.) Yet, out of all parties in this case, Saint Joseph was found to be the *least* at fault. On liability, the jury assigned 85% of the fault to parties other than Saint Joseph, and found Mr. Gray to be nearly twice as responsible as Saint Joseph for the tragic outcome. (*See* 2008 Opinion at 33 (finding that apportionment of 25% to Gray himself compared to Saint Joseph's 15% "diminish[ed] Saint Joseph's overall responsibility for the injury").) Plaintiff argues that the enormous ratio is allowed for by particularly egregious conduct; yet, unlike many of the cases Plaintiff cites, this case involved a single, isolated, unauthorized and unexpected act of grossly negligent behavior by employees or non-agents.[4]

Plaintiff calls the use of ratios a "mechanistic approach" and suggests it should be ignored altogether (Appellee Brief, at 36), but it is indeed a measure of due process under *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), for commercial and other cases alike. *See, e.g.*, *Ragland v. DiGiuro*, 352 S.W.3d 908, 917 (Ky. App. 2010). The law is clear that punitive damages must bear a reasonable relationship to compensatory damages.

The *only* claim considered by the jury in reaching a compensatory damages award

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[4] *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 462 (1993), involved "bad faith" and a "larger pattern of fraud, trickery and deceit." *Argentine v. United Steelworkers of America, AFL-CIO*, 287 F.3d 476, 488 (6th Cir. 2002), involved conduct that was "intentional, deliberate and akin to deceit." *Wightman v. Consolidated Rail Corp.*, 1999-Ohio-119, 86 Ohio St. 3d 431, 440, 715 N.E.2d 546, 554, involved a "corporate attitude which clearly fails to recognize that the extremely dangerous practice which produced the catastrophic collision needs to be changed." *Ragland v. DiGiuro*, 352 S.W.3d 908, 917 (Ky. App. 2010), involved an intentional killing.

was a claim for pain and suffering. As such, any punitive award must bear relationship to that claim.[5] The jury was inflamed by the fact that throughout the trial Plaintiff argued a de facto wrongful death case, despite having withdrawn that claim. *See Gardner v. Howard,* 197 Ky. 615, 247 S.W. 933, 935 (Ky. 1923) (noting that once a claim is withdrawn, any facts relating only to that claim "must be treated as surplusage.").

When the Plaintiff initially filed this lawsuit, it pleaded claims for both pain and suffering during Mr. Gray's life and for his wrongful death. (Complaint, RA at 1; Amended Complaint, RA at 1517.) The Plaintiff stated that it would pursue all damages available under the wrongful death statute and asserted that Mr. Gray received a monthly disability check of approximately five hundred twenty-five dollars per month ($525/mo., or $6,300/yr.). *See* Plaintiff's Response to Interrogatories and Request for Production of Documents dated August 27, 2001, Response Nos. 33, 37, pp. 13, 14-15. Given Mr. Gray's age of 39 years, assuming a normal life expectancy, the potential damages for the wrongful death claim would have been approximately $200,000.[6] Expert witnesses, however, offered testimony that Mr. Gray's life expectancy likely would have been shortened due to his paraplegia, his need for coronary bypass surgery, and his history of drug and alcohol abuse. (RA at 2397-2403.)

Prior to the first trial, the Plaintiff moved to exclude any reference to Mr. Gray's history of drug and alcohol abuse. (RA at 2179.) Saint Joseph, however, offered several

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[5] Under Kentucky law, claims for pain and suffering prior to death and claims for the wrongful death of a person are two separate and distinct claims with separate and distinct elements of damage. *See* KRS 411.133.

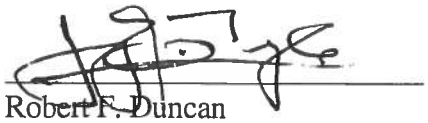
[6] This case was initiated and tried prior to the Court of Appeals opinion in *Aull v. Houston*, 345 S.W.3d 232 (Ky. App. 2010), which held that disability benefits were not a recoverable element of damages under the wrongful death statute. Prior to *Aull*, Kentucky law suggested that such benefits may be recoverable. *See e.g., Heskanp v. Bradshaw's Adm'r*, 294 Ky. 618, 172 S.W.2d 447 (1943); *Louisville & N.R. Co. v. Young's Adm'x*, 253 S.W.2d 585 (Ky. 1952).

reasons that Mr. Gray's history of drug and alcohol abuse would be relevant, including Mr. Gray's life expectancy, which necessarily would have been considered in awarding damages under the wrongful death statute. (RA at 2397-2403.) At the hearing on the Plaintiff's Motion in Limine, counsel for the Plaintiff announced in open court that the Plaintiff would not be pursuing any damages allowed under the wrongful death statute. *See* VR No 1: 9/25/05; 13:10:50. As a result of the Plaintiff's waiver of the wrongful death claim, the Trial Court ruled that evidence related to drug or alcohol use would only be admissible to the extent it was directly related to Mr. Gray's treatment. *See* VR No. 1: 9/30/05; 13:47:30.

The jury in the 2005 trial was only instructed on negligence and EMTALA claims, and the only compensatory damages it was asked to consider were for Mr. Gray's pain and suffering. (RA at 2850.) As evidenced by the verdict form and subsequent judgment, the jury awarded compensatory damages for Mr. Gray's pain and suffering. The jury did not find that Saint Joseph or any Co-Defendant caused Mr. Gray's death, and did not award any damages allowed by the wrongful death statute.

The Plaintiff here made a strategic choice not to pursue its wrongful death claim and it must live with that choice. It cannot forego its wrongful death claim to receive a beneficial evidentiary ruling, and then attempt to recover damages for Mr. Gray's death under the guise of its punitive damages claim and in an amount that is unconstitutionally disproportionate to the remaining compensatory damages.

Respectfully submitted,



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