COMMONWEALTH OF KENTUCKY
WARREN CIRCUIT COURT, DIVISION 2
CIVIL ACTION NO. 09-CI-02159

AMANDA THURMAN, Individually,
as Administratrix of the Estate of BLAKE THURMAN,
and on behalf of the Wrongful Death Beneficiaries
of BLAKE THURMAN,
and CHRIS THURMAN, Individually — PLAINTIFFS

v.

PLAINTIFFS' SUPPLEMENTAL RESPONSE AT THE CLOSE OF DISCOVERY IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS CLAIM FOR PUNITIVE DAMAGES

KAREN S. LYONS, M.D.,
KEITH A. HEWITT, M.D.,
HEWITT & DAVIS PARTNERSHIP
d/b/a HEWITT DAVIS & LYONS — DEFENDANTS

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"This is stuff you learn before you go to medical school.
This is stuff you guys probably know right now, and you're lawyers.
This should not have happened. This baby should be alive. . . .
And the reasons that they give in their depositions are—are insane . . . .
They are obstetricians. They should know. It is their job to know that."
~ Dr. Bruce Ferrara[1]

"[W]hen I reviewed her initial labs, her titers were 1:1 . . . ."
~ Dr. Lyons[2]

"She was sensitized . . . ."
~ Dr. Hewitt[3]

"Q: [C]an you think of any reason that it's in the patient's best interest to defer beyond every four weeks drawing blood to see if these critical values are elevated so that a fetus does not end up with fetalis hydrops and dies?
A: No."
~ Dr. Davis[4]

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[1] Bruce Ferrara, M.D., Dep. 50:14-51:15, Jan. 24, 2011. Dr. Ferrara's deposition is attached as Exhibit 1.
[2] Karen Lyons, M.D., Dep. 11:17-18; *see also id.* at 12:6, 90:1-2, 94:22-23, May 8, 2010.
[3] Keith A. Hewitt, M.D., Dep. 44:25; *see also id.* at 45:1-6, 78:25-79:3, 82-85, July 10, 2010.
[4] Joe T. Davis, M.D., Dep. 82:20-25, Aug. 6, 2010.

I. SUPPLEMENTAL COUNTERSTATEMENT OF FACTS

A. Bruce Ferrara, M.D.

Dr. Bruce Ferrara is a board-certified neonatologist and pediatrician, practicing at the Children's Hospital of Minnesota, in Minneapolis.[5] He has practiced medicine in several states and countries.[6] In the past, Dr. Ferrara has testified primarily *on behalf of* physicians and hospitals in Kentucky cases.[7] He reviewed all pertinent medical records and depositions in this matter.[8]

1. General Opinion of Defendants' Care and Prior Deposition Testimony

Regarding the overall level of care provided by the Defendants to Amanda and Blake Thurman, Dr. Ferrara stated that the Defendants "didn't check anything. I mean, *they ignored this child.*"[9] He later added, "I have to tell you[,] I worked in Phnom Penh in 2002. They don't have physicians in Cambodia. I think this mother would have gotten the same Rh care in Cambodia as she got [from the Defendants], and that concerns me, very much so."[10] He was also critical of the Defendants' "lack of documentation of anything" in Amanda's medical chart.[11]

Amanda's titer levels on June 15 to 16, 2009, were "higher than [he'd] ever seen."[12] In the United States, fetal hydrops is rare, preventable, and "has basically been eradicated by good obstetrical care."[13] When asked about it later, Dr. Ferrara clarified his position, stating, "I don't

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[5] Ferrara Dep. at 7-9. Dr. Ferrara is not a professional expert. He reviews legal cases as an expert "three or four times a year," maybe six times "in a busy year." *Id.* at 22:14-17.
[6] *E.g.*, *id.* at 9-13, 67, 103-04.
[7] *Id.* at 23-24. Dr. Ferrara has testified for the following Kentucky medical malpractice defense firms: Darby & Gazak; Phillips, Parker, Orberson & Arnett; O'Bryan, Brown & Toner; and Thompson Miller & Simpson. *Id.*
[8] *Id.* at 24-25, 27.
[9] *Id.* at 43:6-7 (emphasis added).
[10] *Id.* at 43:5-7.
[11] *Id.* at 66:24.
[12] *Id.* at 83:25.
[13] *Id.* at 37:2-12.

think I've seen a case of hydrops from Rh disease probably in the past 20 years."[14] He works at a major children's hospital with 100-plus beds that handles 1,600 births a year.[15]

Regarding whether Blake's death could be attributable to anything other than Rh disease, he indicated, "I personally think it's ludicrous—ludicrous—to think that this child's hydrops fetalis came from a chromosomal problem or some unknown, undiagnosed structural abnormality."[16] He added, "I guess an analogy is if I stand in the middle of an intersection and I get hit by a truck, one could argue, well, maybe I had a heart attack that killed me before the truck hit me. Maybe I had a stroke, you know, 30 milliseconds before I got wiped out by the truck. I mean, to me, that's the kind of rationale" one is dealing with when alternative causes of death are hypothesized.[17] He concluded that Blake died of fetal hydrops "because he had a [hematocrit] of 10 percent."[18] Blake was born with "800 extra grams of water in his body," weighing "almost twice what he should have been just from water."[19] "That didn't happen in a couple of days."[20]

Regarding the Defendants' prior deposition testimony, Dr. Ferrara stated, "I'm really mystified by the thought processes behind these doctors[,] looking at the objective information that they have [and] coming with the conclusions they came up with."[21] He added,

> [W]hen I read these depositions[,] I'm quite distraught at how anybody could think like these people think, and it just mystifies me how a doctor, somebody who went through pre-medical training and medical school, can look at somebody *who has antibodies to anything* and then say that there is no risk factors.
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> I mean, for Dr. Lyons in her deposition to say that [Amanda] had no risk factors despite the fact that she had anti-C and anti-D . . . mystifies me.

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[14] *Id.* at 87:22-24.
[15] *Id.* at 96-97.
[16] *Id.* at 43:20-23; *see also id.* at 40-43 (discussing other potential causes of death and ruling them out).
[17] *Id.* at 83:15-84:5.
[18] *Id.* at 82:24-83:3. The transcriptionist incorrectly typed "hemoglobin" in the sentence instead of hematocrit.
[19] *Id.* at 85:2-4.
[20] *Id.* at 80:16-19.
[21] *Id.* at 90:16-19.

. . . .

> And again, I don't know if she really concluded that. . . . I don't want to accuse somebody of not telling the truth, I really don't, but I have to—I look at this as she *is either not telling the truth or she is so intellectually challenged that it doesn't make any difference*.
>
> If you're Amanda Thurman, it doesn't make any difference what perspective you're looking at because they have a baby that had an outcome that shouldn't happen in 2009. . . .[22]

2. Failure to Follow Dr. McCay's September 2007 Recommendation

Recall that Amanda first tested positive for Rh antibodies after the birth of her second child in 2007 and that Dr. McCay sent the Defendants' a letter recommending a repeat test in six months.[23] Regarding the Defendants' failure to follow Dr. McCay's September 24, 2007, recommendation, Dr. Ferrara could not "understand why a pathologist sent [the Defendants] a letter telling them that this is a potential problem" and yet they consciously ignored it.[24]

He raised an additional point. On November 2, 2007, Amanda actually came in for a post-partum follow-up visit, five and a half weeks after Dr. McCay sent the letter.[25] Dr. Lyons treated Amanda that day but said nothing to her about Dr. McCay's recommendation.[26] Dr. Ferrara stated, "It was ignored. Why was it ignored? I'm mystified by that."[27] He concluded, "[Y]ou don't need to be an obstetrician or a neonatologist. *You just have to be a person to realize that that kind of information is out there and your doctor knows about it. . . . It's a simple conversation, and if it's my body and it's my future baby, I would want to know about it.* Wouldn't you?"[28]

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[22] *Id.* at 89:8-90:12 (emphasis added).
[23] The McCay Report is attached as Ex. 22 in the Plaintiffs' initial response brief, filed January 21, 2011.
[24] Ferrara Dep. at 50-51.
[25] *Id.* at 56:17-25.
[26] *Id.*
[27] *Id.* at 56:25-57:1.
[28] *Id.* at 57:7-15 (emphasis added).

3. Amanda's First Prenatal Visit on January 19, 2009

Regarding the Defendants' treating Amanda's pregnancy with Blake like all of her previous pregnancies, Dr. Ferrara stated, "I don't understand why in their depositions they talk about giving RhoGAM at 28 weeks during this pregnancy. That's not even a remote consideration for anybody."[29] He added, "Why a med tech wrote 'needs RhoGAM at 28 weeks' and it's signed by [Dr. Lyons], but then [she] says, ['W]ell, I didn't write that,[']that boggles my mind."[30] He concluded,

> You don't have to be an obstetrician to know that doesn't work. . . . *This is stuff you learn in medical school.* This is stuff you guys know right now, and you're lawyers.
>
> This should not have happened. This baby should be alive. This baby should have done well. This mother should have been treated vastly differently than she was. And whether it's neglect, whether it's they just didn't know, I don't know[. B]ut it's not okay.
>
> And they had ample opportunity to talk to the mother. They had ample opportunity to draw titers on the baby. They had ample opportunity to refer this mother to a perinatologist[,] who could have managed this pregnancy far better than they did, and they didn't do it. *They didn't do any of that stuff.*
>
> *And the reasons that they give in their depositions are—are insane. I mean to say that a mother that has anti-D and anti-C has no risk, where do they come up with that kind of statement?*[31]

4. Failure to Order Serial Blood Testing

Regarding the Defendants' failure to detect Amanda's rising antibody titers, he testified,

> They had indication and ample opportunity to check those antibody titers, and they didn't. They *knew* the mother was sensitized . . . . *They're either not telling the truth or these are incredibly compromised intellectual physicians* because this woman was positive, she was sensitized [on January 19, 2009]. *They did blood work on her in March. They did blood work on her in February. They didn't do titers.* The mother presents with hydrops [on June 15, 2009,] and they didn't even do titers for anti-D at that point in time.

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[29] *Id.* at 50:8-11.
[30] *Id.* at 54:13-16.
[31] *Id.* at 50:12-51:15 (emphasis added).

. . . .

> *Karen Lyons signed her initials by a blood test that indicated this mother had this condition in January, and yet from January to June[,] not one thing was done about it.*
>
> There's not one word in the chart about sensitization. There is not one word in the deposition that this mother was counseled that she had this condition. There was *nothing* done.[32]

Additionally, when asked whether the serial testing standard of care is generally available to the public, Dr. Ferrara answered, "Yeah. You can get on—you can Google it. There's a lot of lay sites on Google that say the same thing."[33] He also agreed that the consumer texts cited in the Plaintiffs' response brief accurately identified the serial testing standard of care.[34]

5. Amanda's Walk-In June 8, 2009, Visit to Hewitt, Davis & Lyons: Dr. Hewitt Sends Her Home Without Ordering Ultrasound or Referral to Hospital, Specialist—He is Disinterested

Regarding Amanda's June 8 visit to Hewitt, Davis & Lyons, Dr. Ferrara stated, "Why this mother comes in on June 8th with complaints that *any competent* physician would be worried about if they knew she was sensitized and is *completely ignored,* that boggles my mind too."[35] He noted that Amanda came in complaining not of labor pains but instead about (1) Blake not moving properly, (2) feeling "full of fluid," (3) having abdominal pain, (4) feeling differently than previous pregnancies, and (5) feeling as though she was closer to delivery than she should be.[36]

In his opinion, there was "no question" that Blake was hydroptic at that point.[37] Dr. Ferrara added that had "something been done on June 8th when [Amanda] came in . . . the ability to intervene at that point in time could have been done, *but again[,] the mother was ignored.* . . .

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[32] *Id.* at 46:6-47:6 (emphasis added).
[33] *Id.* at 102:11-15.
[34] *Id.* at 101-102.
[35] *Id.* at 54:17-20.
[36] *Id.* at 58:10-15, 61:9-18.
[37] *Id.* at 55:16-17.

[T]his mother complains about her baby not moving properly. There's no question about that. If you read her deposition, and I read it multiple times, *she had complaints*. . . ."[38]

Regarding Dr. Hewitt's care that day, Dr. Ferrara opined, "If the physician was competent and capable *and concerned* and he thought that that mother needed to go to the medical center for whatever evaluation is done at the medical center, he had every ability to recommend that she go there. He did not do that."[39] Instead, Dr. Hewitt evaluated her and sent her home, writing "minimal things in the chart, wrote a plus by 'fetal movement' despite the fact that I can't see that he did an ultrasound to look at fetal movement. I can't see that he did any physical evaluation[] because it's not documented that there is fetal movement, and yet this mother has a complaint of poor fetal movement."[40]

6. Bizarre Ordering of TORCH Titers on June 15, 2009

A "TORCH titer" is a blood test performed to help screen for certain virus infections in infants who may have been exposed to a causative organism.[41] The five groups of disease-causing organisms whose antibodies are measured by the TORCH test are grouped together because they can cause a cluster of symptomatic birth defects in newborns. This group of defects is sometimes called TORCH infection, or TORCH syndrome.

Dr. Hewitt ordered a TORCH titer for Amanda on June 15, 2009, her final visit before Blake's birth.[42] Dr. Ferrara described this selection of test as "absolutely bizarre," given that the Defendants had information in Amanda's chart indicating she was sensitized—and later testified

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[38] *Id.* at 54:23-55:15 (emphasis added).
[39] *Id.* at 59:24-60:4 (emphasis added).
[40] *Id.* at 60:17-25 (emphasis added).
[41] Although the deposition transcriptionist typed the word in lowercase form, TORCH is an acronym; hence, the change to an all-capitalization style for clarity.
[42] *See* Ferrara Dep. 66-68.

during depositions that they were aware she was sensitized.[43] He stated, "[H]ow bizarre, how absolutely bizarre. They have a mother who is Rh negative, who is sensitized, and they check TORCH titers and they don't check anti-D titers? That is absolutely bizarre." The odd choice of test was a "clear signal" to Dr. Ferrara that the Defendants had "no idea what they were dealing with," given that TORCH infection is "so far down [the list and Rh disease] is so high, and they *ignored* it. I mean, I'm mystified by it. . . . My conclusion is you got some doctors that really can't be that bad. Nobody can be that bad. . . . . They didn't see it, *but that's not what they say in their depositions. How can they say the things in their depositions?*"[44]

7. The Defendants' Unique Standards of Care

Regarding Dr. Hewitt, Dr. Ferrara stated,

> I read in Dr. Hewitt's deposition that one of the reasons he didn't do titers is because he was concerned about the pain and suffering that it might be for [Amanda] to have all of those needle pokes, and so when I went through the chart[,] I counted 16 needle pokes, four injections of RhoGAM, a CT scan of her abdomen, an MRI with IV contrast, a transvaginal ultrasound, two abdominal ultrasounds. . . .
>
> She gave birth. She went through childbirth on two previous occasions, and you really think I'm supposed to believe that after all that that a concern for two extra blood draws was the reason they didn't do antibody titers? You got to be kidding. *He can't be serious.*
>
> . . . .
>
> Do you really mean that[,] after all this stuff [Amanda] went through the previous four years? *Come on, that's not reasonable. I mean, it's just isn't reasonable.*
>
> . . . .
>
> Are you serious? Is that really a justified consideration? I mean, I can't imagine that that was *really the reason* that he

[43] *Id.* at 70:3-71:2; *see also* Lyons Dep. 11:17-18, 12:6, 90:1-2, 94:22-23; Hewitt Dep. 44:25, 45:1-6, 78:25-79:3, 82-85.

[44] *Id.* at 70:19-71:2 (emphasis added).

didn't do the titers . . . .[45]

Regarding Dr. Lyons, the following exchange occurred:

> Q: Did you read in Dr. Lyons' deposition where she testified that she would only begin to do serial testing of titers once a patient's antibody titers reached a critical level?
> A: Yeah, and again, that—I use the word "mystifies." I don't know what other word to use. Why would you do that? It makes no sense[] because once the titers are critical, the intervention isn't to do more titers. It's to do an amniocentesis, to do a Doppler of the arteries in the brain. It's to intervene with the baby, *not to do more titers*.[46]

B. Roy Chamberlain

Roy Chamberlain has worked with the Defendants as a medical ultrasonographer, performing ultrasounds, for 24 years.[47] He works at their office on Mondays, Wednesdays, Thursdays, and Fridays.[48] Chamberlain records the ultrasounds on VHS videotapes[49] that are stored in the Defendants' office.[50] Chamberlain testified, "[W]e do not record back over" the tapes.[51] He has VHS tapes of ultrasounds performed for the Defendants "from 20 years back."[52] Each tape can hold 70 patient ultrasounds.[53]

Chamberlain performed all four of Amanda's ultrasounds during her 2009 pregnancy with Blake.[54] The ultrasound tapes are never handed to a patient when she leaves;[55] they remain on-

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[45] *Id.* at 91:24-93:20 (emphasis added).
[46] *Id.* at 95:18-96:4 (emphasis added).
[47] Roy Chamberlain Dep. 6:15-9:19, Jan. 31, 2011. Chamberlain's deposition is attached as Exhibit 2.
[48] *Id.* at 10:19-20. Recall that June 8 and 15, 2009, were Mondays. Chamberlain was either there or available.
[49] *Id.* at 14:24-15:6.
[50] *Id.* at 15:17-18.
[51] *Id.* at 15:13.
[52] *Id.* at 15:17-18.
[53] *Id.* at 21:8-9.
[54] *See id.* at 8:5-12 (indicating Chamberlain worked at Hewitt, Davis & Lyons in 2009); 16:10:-17:3 (indicating Chamberlain alone performed all four of Amanda's ultrasounds in 2009).
[55] *Id.* at 15:21-23:25-13:2, 22:8-10.

site.[56] Dr. Davis, whose deposition as the Defendants' corporate representative was recently taken, agreed that ultrasound tapes are never given to a patient because it would breach the physician-patient duty of confidentiality.[57] If Drs. Hewitt, Davis, or Lyons wanted to view a video—even when Chamberlain was not there—they could access the video and play it in an exam room.[58]

1. Defendants' February 9, 2011, Supplemental Discovery Response

"The Defendants have Tape # 259 in our offices.
However, Amanda Thurman's ultrasound, as well as others made
on June 15, 2009, was taped over inadvertently by Roy Chamberlain."
~ The Defendants, February 9, 2011[59]

The Thurmans made a discovery request in October 2010 for ultrasounds taken by the Defendants during Amanda's pregnancy with Blake. On November 24, 2010, the Defendants responded by providing the first three of Amanda's four 2009 ultrasounds.[60] However, in their response, the Defendants' claimed Amanda took the fourth ultrasound, captured by Chamberlain on June 15, 2009, with her as she drove away to Baptist Hospital that day.[61] Chamberlain testified that Amanda could not have taken the tape containing the June 15 ultrasound because on *June 17*, Dr. Lyons and Chamberlain viewed that ultrasound together, at Dr. Lyons' request.[62] During the viewing, Dr. Lyons commented that the ultrasound revealed Blake was hydroptic.[63]

Significantly, 16 months later, when the Defendants' office manager, Rosemary Cornett,[64] asked him to make copies of the 2009 ultrasounds for this lawsuit,[65] Chamberlain "couldn't find

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[56] *Id.* at 15:19-23.
[57] Dr. Davis's deposition as corporate representative of Hewitt, Davis & Lyons has not been transcribed yet.
[58] Chamberlain Dep. at 14:3-9.
[59] Supplemental Answers to Pls.' Second Req. for Produc. of Docs 1, Feb. 9, 2011. The document is attached as Exhibit 3.
[60] Resp'ts. Answers to Pls.' Second Req. for Produc. of Docs 1, Nov. 24, 2010. The document is attached as Exhibit 4.
[61] *Id.*
[62] Chamberlain Dep. at 38:11-40:4.
[63] *Id.* at 39:13-17.
[64] Cornette is the office manager at Hewitt, Davis & Lyons. Lyons Dep. 46:11-13.
[65] Chamberlain Dep. at 48:11-21

the last copy of the last—last exam."[66] Chamberlain testified that he told Cornett at that time that the June 15 tape could not be retrieved.[67] Logically, Cornett had to have asked Chamberlain to make the copies *before the Defendants submitted their November 24, 2010, discovery response in which they indicated Amanda had taken the ultrasound.*[68] He initially testified that he did not know what had happened to the June 15 ultrasound[69] but later stated that absent someone else intentionally deleting the tape, it was possible that he taped over all of the patient ultrasounds for that day.[70]

However, in 30 years of practice, Chamberlain could never recall *ever* taping over a single ultrasound, much less an entire days' worth of them:

> Q: And you don't go in and tape over these, do you, sir?
> A: No, sir, because I've got all these back from the other ones.
> Q: You've told us you've got—you've got 20 years—
> A: Yes, sir.
> Q: —worth of videos. If somebody wants to go back and find an image from 20 years, it's there; right?
> A: Yes, sir.
> Q: Okay. So you don't—you personally have been doing this for 30-some years. You don't go in and put a tape in and tape over it, do you?
> A: No, sir. They're—they're plenty cheap. You put in a new one.[71]

On February 9, 2011, after Chamberlain's deposition, the Defendants sent an amended discovery answer, switching positions from their November 24, 2009, response—this time, indicating that they "mistakenly believed" Amanda took her June 15 ultrasound with her to

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[66] *Id.* at 36:22-37:4.
[67] *Id.* at 48:11-49:6.
[68] Chamberlain testified he told her the June 15 tape could not be retrieved "[m]aybe four—four or five weeks ago." *Id.* at 48:16. His recollection of the timetable was correct. The Defendants' November 24, 2009, response would have been submitted a little more than five weeks before Chamberlain gave his January 31, 2011, deposition.
[69] *Id.* at 37:5-7.
[70] *See id.* at 43:4-12 (may have taped over it), 45:8-12 (unless someone else taped over it), 46:6-14 (all June 15 ultrasounds taped over).
[71] *Id.* at 45:8-12.

Nashville but now "understanding" that the entire days' worth of ultrasounds were "taped over inadvertently by Roy Chamberlain."[72]

II. ARGUMENT

A. The Court should deny the Defendants' motion because the Thurmans have presented ample evidence of gross negligence within the causal chain, thus satisfying Kentucky's relaxed "any evidence" summary judgment standard for punitive damages.

The Court should deny the Defendants' motion because they have not met their heavy burden. Kentucky's relaxed any-evidence punitive damages summary judgment standard is purposefully designed to present a very low bar for plaintiffs like the Thurmans to meet because our highest court wants a jury to make the final determination regarding gross negligence. Under Kentucky law, gross negligence means recklessness, which is defined as a reckless disregard for the lives, safety, or property of others. In the medical malpractice context, a physician's failure to perform a test that is the standard of care constitutes recklessness because of the risk that he or she will overlook a serious medical condition. Additionally, courts have held that a failure to diagnose and treat a patient with a highly preventable condition, such as Rh disease, constitutes reckless conduct because of the ipso facto nature of the malpractice. Finally, a physician's disinterested attitude in the midst of what should be a growing concern for his or her patient's condition constitutes recklessness.

Here, The Court should deny the Defendants' motion because numerous individual acts or omissions by the Defendants constituted recklessness in the care and treatment of Amanda and Blake Thurman. Even if the Court determines that any single act did not amount to recklessness, certainly the collective reckless acts of the Defendants merit a punitive damages instruction at trial in April.

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[72] Supplemental Answers to Pls.' Second Req. for Produc. of Docs 1, Feb. 9, 2011.

1. Kentucky's summary judgment standard is purposefully designed to present a very low bar for plaintiffs like the Thurmans.

Kentucky's "any evidence" summary judgment standard for punitive damages is intentionally designed to present a very low bar for the Thurmans to meet. "In cases alleging gross negligence and requesting punitive damages, '[a] party plaintiff is entitled to have [her] theory of the case submitted to the jury if there is *any evidence to sustain it.*'" *E.g.*, *Shortridge v. Rice*, 929 S.W.2d 194, 197 (Ky. App. 1996) (quoting *Clark v. Hauck Mfg. Co.*, 910 S.W.2d 247, 250 (Ky. 1995) (emphasis added). Kentucky's predecessor court of last resort adopted this standard over 100 years ago. *See Mobile & Ohio R.R. Co.*, 80 S.W. 471, 473 (Ky. 1904) (applying the standard).

Particularly in negligence cases, the Kentucky Supreme Court supports relaxed standards of trial court review for summary judgment and directed verdict because the interpretative function of the jury is critical to the development of case law. *Horton v. Union Light, Heat & Power Co.*, 690 S.W.2d 382, 385 (Ky. 1985). Moreover, Kentucky's highest court previously rejected a stricter, more defense-friendly summary standard because it perceived "no oppressive or unmanageable case backlog or problems with unmeritorious or frivolous litigation in the state's courts that would require" adopting one. *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476, 482-83 (Ky. 1991).

2. The Thurmans need only produce "any evidence" of gross negligence, which merely requires a showing of recklessness, to overcome the Defendants' motion. The terms "malice," "fraud," "oppression," "intent," "actual knowledge," "evil motive," and the tort of intentional infliction of emotional distress are irrelevant to the Court's analysis.

(a) The Court should ignore most, if not all, of the Defendants' reply because it relies heavily on unconstitutional and irrelevant law.

First, the punitive damages analysis in *Reffitt v. Hajjar*, 892 S.W.2d 599, 607 (Ky. App. 1994), is bad law and should be ignored by the Court. In their reply, the Defendants relied on *Reffitt* for the proposition that the Thurmans need to show malice, oppression, or fraud, as defined

in KRS 411.184, in order to obtain a punitive damages instruction. Defs.' Reply to Pls.' Resp. to Mot. to Dismiss Punitive Damage Claim 2-6, Jan. 24, 2011. However, the Defendants' argument is unconstitutional—and has been for over 12 years—because it violates the Thurmans' constitutional right to state a common law cause of action for gross negligence. *See, e.g., Williams v. Wilson*, 972 S.W.2d 260, 264-69 (Ky. 1998).[73]

A plaintiff does not have to prove malice, oppression, or fraud in order to submit a punitive damages instruction to a jury. *Id.* In *Williams*, the Kentucky Supreme Court rejected any requirement that a plaintiff must satisfy any of the aforementioned KRS 411.184 definitions in order to obtain a punitive damages trial instruction. *Id.* The court held that the "well established *common law* standard for awarding punitive damages was gross negligence." *Id.* at 264 (emphasis added). Therefore, requiring a plaintiff to satisfy any of the statutory definitions violates her constitutional rights under Kentucky's unique and deeply ingrained jural rights doctrine. *Id.* at 264-69. Under the doctrine, Sections 14, 54, and 241 of the Kentucky Constitution, when read together, preclude any legislation that impairs a right of action in negligence or wrongful death that was recognized at common law, meaning prior to adoption of the 1891 Kentucky Constitution.[74] *Id.* at 267-69. Thus, a plaintiff can—if she chooses—use KRS 411.184 as a statutory avenue to obtain punitive damages but is not required to do so. *See id.* at 264-69. Kentucky law is clear: "[A]ccording to *Williams*, 'oppression, fraud, and malice' need not be proven *at all* . . . ." 2 John S. Palmore, *Palmore: Kentucky Instructions to Juries* § 39.15, at 39-12 (5th ed. 2010) (emphasis added)).[75]

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[73] *Williams* was handed down on April 16, 1998. *Id.* at 260. The landmark opinion is attached as Exhibit 5.

[74] The 1891 Kentucky Constitution is the most recent one. There have been four constitutions accepted in Kentucky since its inception. *See, e.g., Williams*, 972 S.W.2d at 272-73. The previous three were accepted in 1792, 1799, and 1850, respectively. *Id.*

[75] The pertinent section of the *Palmore* treatise is attached as Exhibit 6.

Here, since gross negligence was recognized as a cause of action before 1891, it remains a viable *common law* option that the Thurmans can utilize in order to obtain a punitive damages award. *Id.* In their Complaint, the Thurmans stated two claims for gross negligence. Compl. ¶¶ 29, 39. Therefore, they do not have to prove malice, oppression, or fraud. *See Williams*, 972 S.W.2d at 264-69. Accordingly, any suggestion by the Defendants that KRS 411.184 applies to the Court's analysis is incorrect.[76] *See id.*

Second, the Defendants' reliance on *Humana of Kentucky, Inc. v. Seitz*, 796 S.W.2d 1 (Ky. 1990), is misguided. *Seitz* deals exclusively with the tort of intentional infliction of emotional distress (IIED) and not the entirely different tort of gross negligence. *See id.* The tort of *IIED* has its own unique prima facie elements. *See, e.g., id.* at 796 S.W.2d at 2-3.[77] The tort of *gross negligence* has its own unique prima facie elements. *See, e.g., Horton*, 63 S.W.3d at 389-90. For the Defendants to suggest that the Thurmans must somehow prove the elements of IIED in order to attain a punitive damages instruction based on gross negligence is off-point and deserves no deeper analysis.

(b) Gross negligence merely requires a showing of recklessness—a reckless disregard for the lives, safety, or property of others—and nothing more.

Gross negligence means recklessness and nothing more. Under Kentucky common law, punitive damages are justified when there is (1) a finding of failure to exercise reasonable care—

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[76] In fact, the *only* portion of the statute that is relevant at all to this case is the clear-and-convincing standard of proof by which the *jury* will apply when determining whether punitive damages should be awarded against the Defendants. *See* Ky. Rev. Stat. 411.184(2) (West 2011). However that standard of proof only has bearing on the jury instructions and, arguably, is itself unconstitutional under the jural rights doctrine. Palmore, *supra* § 39.15, at 39-12 (suggesting that the clear and convincing standard of proof for the jury is also unconstitutional under *Williams*). However, for the Defendants' current motion for *summary judgment*, the statute is meaningless because the "any evidence" standard applies and the Thurmans' claim is for common law gross negligence and does not arise from the aforementioned statute or any of its definitions. *See Shortridge*, 929 S.W.2d at 197 ("any evidence" standard applies here); Compl. ¶¶ 29, 39 (gross negligence claims asserted, not arising from statute).

[77] The required prima facie elements of IIED are (1) an intentional or reckless act by a defendant (2) that is outrageous and intolerable, "in that it offends against the generally accepted standards of decency, (3) that causes (4) severe emotional distress to a plaintiff. *Id.* Recall that gross negligence requires (1) ordinary negligence and (2) recklessness. *See, e.g., Horton*, 63 S.W.3d at 389-90.

i.e., ordinary negligence—and (2) an additional finding of gross negligence, defined as a reckless disregard for the lives, safety, or property of others. *E.g.*, *City of Middlesboro v. Brown*, 63 S.W.3d 179, 181 (Ky. 2001).[78]

Gross negligence "'*must* be specifically defined to include the essential element of reckless indifference or disregard for the rights of others.'" *Id.* (quoting Palmore, *supra* § 39.15) (emphasis added). The Kentucky Supreme Court has rejected alternative terminology when defining gross negligence because "the recklessness standard more certainly communicates to the jury what it must believe prior to awarding punitive damages." *Id.* Even the terms "wanton," "outrageous," and "evil motive" are irrelevant because each has "been defined to mean a reckless disregard for the rights of others[] and therefore redundant." Palmore, *supra* § 39.15, at 39-13; *see also Phelps v. Louisville Water Co.*, 103 S.W.3d 46, 52 (Ky. 2003) (indicating that wantonness, outrageousness, and evil motive are all synonyms for recklessness).[79]

Justice Palmore's treatise—the gold standard in Kentucky for jury instruction—was relied on and quoted by the Kentucky Supreme Court in *Brown*. *Id.* Palmore's punitive damages instruction provides, "If you find for P and award him a sum or sums of damages under Instruction _____, and if you are further satisfied from the evidence that in [failing to comply with his duties] [his conducting toward P] D acted [or was acting] in *reckless disregard for the lives, safety, or property of others*, including P, you may in your discretion award punitive damages against the D . . . ." *Id.* (brackets and blanks retained from original; emphasis added). Therefore, when a defendant tosses around collateral terminology, it must be discarded because recklessness *is the only relevant standard* a plaintiff must meet in order to successfully state a common law claim for gross negligence.

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[78] *Brown* is attached as Exhibit 7.
[79] *Phelps* is attached as Exhibit 8.

Note that Kentucky's definition of recklessness includes a menu of options. A plaintiff can show a reckless disregard for (1) life, (2) safety, *or* (3) property in order to submit a punitive damages instruction to her jury. *E.g.*, *Horton*, 63 S.W.3d at 389-90; *Brown*, 63 S.W.3d at 182; *see also* Palmore, *supra* § 39.15, at 39-11.

Significantly, gross negligence "is conduct *lacking intent or actual knowledge of the result.*" *Williams*, 972 S.W.2d at 264 (emphasis added). Therefore, a defendant only has to intend the act or omission that sets in motion the chain of events that cause the result. *Id.*; *see also Restatement (Second) of Torts* § 500 cmt. f (1965) (reiterating same). In order for a defendant's conduct to be reckless, "it is not necessary that he himself *recognize it as being extremely dangerous.*" *Restatement (Second) of Torts* § 500 cmt. c (emphasis added). Instead "it is enough that he knows or has reason to know of circumstances which would bring home to the realization of the ordinary, reasonable man the highly dangerous character of his conduct." *Id.* In other words, if a defendant has knowledge—or should know due to his education or training—of the facts presented "but does not realize or appreciate the high degree of risk involved, although a reasonable man in his position would do so[, a]n objective standard is applied to him, and he is held to the realization of the aggravated risk which a reasonable man in his place would have" known *Id.* cmt. a.

Finally, even when a single act of negligence might not, on its own, constitute gross negligence, gross negligence can result from a set of collective actions. *Horton*, 690 S.W.2d at 388.

Over the past 150 years, Kentucky's highest court has established dual policy rationales for awarding punitive damages. *See Chiles v. Drake*, 59 Ky. (2 Met.) 146 (Ky. 1859), *available at* 1859 WL 5567, at *5. First, punitive damages serve a penal purpose; courts hope to prevent the wrongful act from happening again. *Harrod v. Fraley*, 289 S.W.2d 203, 205 (Ky. 1956). Second,

punitive damages are awarded "because the *injury* has been *increased* by the *manner* [in which] it was inflicted." *Horton*, 690 S.W.2d at 390 (quoting *Chiles*, 1859 WL 5567, at *5) (emphasis in original).

3. The precedent established in* Parrish *and* Thomas *is supported by additional sources.

(a) Parrish and Thomas are applicable to the Thurmans' claims for gross negligence.

(i) A physician's failure to perform a test that is the standard of care constitutes reckless conduct because of the risk that he or she will overlook a serious medical condition.

A physician's failure to perform a simple test that is the standard of care constitute reckless conduct because of the risk that he or she will overlook a serious medical condition. *Parrish v. Ky. Bd. of Med. Licensure*, 145 S.W.3d 401, 406 (Ky. App. 2004).[80] In *Parrish*, the proceeding below found that a radiologist's "'performance of fluoroscopy as part of a barium study is *the* standard of care in the medical profession,' and the failure to perform it is 'gross negligence' because of the risk that a radiologist will miss a serious medical condition *such as an ulcer or tumor*." 145 S.W.3d at 406 (emphasis added).

In their reply, the Defendants' suggested that *Parrish* is inapplicable because it dealt with a medical licensure revocation and was not related to the "punitive damage instruction under KRS 411.184 or KRS 411.130." Defs.' Reply to Pls.' Resp. to Mot. to Dismiss Punitive Damage Claim 5. The Defendants' are incorrect because, as explained above, the Thurmans' do not have to satisfy any of the statutory requirements for punitive damages to state a claim for gross negligence. Moreover, Kentucky only recognizes one definition of gross negligence—recklessness—no matter what the nature of the judicial proceeding. Therefore, the underlying holding in *Parrish* has significant precedential value and, significantly, was *affirmed at two*

[80] *Parrish* is attached as Exhibit 9.

different levels of appellate review. *Parrish*, 145 S.W.3d at 404-06. It remains good law.

(ii) A substantial deviation from the applicable standard of care constitutes reckless conduct.

A substantial deviation from the standard of care constitutes recklessness. *Thomas v. Greenview Hospital, Inc.*, 127 S.W.3d 663, 673 (Ky. App. 2004), *overruled on other grounds by Lanham v. Commonwealth*, 171 S.W.3d 14, 20 & n.4 (Ky. 2005).[81] In *Thomas*, the Kentucky Court of Appeals found that the jury was entitled to award punitive damages because of ambiguities in medical records, failure to perform testing, and failure to follow-up on the decedent's care—of which the court found either individually or collectively constituted a gross deviation from the applicable standard of care. *Id.*

In their reply, the Defendants' made a weak argument that *Thomas* does not apply to the Thurmans' case, essentially because the facts are different. Defs.' Reply to Pls.' Resp. to Mot. to Dismiss Punitive Damage Claim 6. Rarely, if ever, does any one case neatly fit within the facts of another. The Thurmans' have cited *Thomas* for two reasons—(1) that a substantial deviation from the applicable standard of care constitutes gross negligence and (2) for the Kentucky Court of Appeals' reaffirmation of this Commonwealth's relaxed any-evidence punitive damages summary judgment standard.

The facts presented in this matter are quantitatively and qualitatively more egregious than those presented on appeal in *Thomas*. If an appellate court determined that the facts presented in *Thomas* merited punitive damages, certainly the mountain of recklessness evidence presented against the Defendants warrants the same conclusion by the Court.

[81] *Thomas* is attached as Exhibit 10.

(b) Failure to timely diagnose and treat a patient with a highly preventable condition, such as Rh disease, constitutes reckless conduct because of the ipso facto nature of the physician's malpractice.

(i) Graham v. Keuchel

Failure to timely diagnose and treat a patient with Rh disease constitutes reckless conduct because of the "ipso facto" nature of the physicians' malpractice and because of the complete preventability of the disease. *Graham v. Keuchel*, 847 P.2d 342, 363-64 (Okla. 1993).[82] In *Graham*, the parents of a deceased newborn boy sued the treating obstetricians and facility for wrongful death, negligence, failure to warn, and gross negligence. *Id.* at 345-46 & n.4, 363-64. The defendants failed to timely treat the Rh-negative mother. *Id.* at 346-47. First, the OBs did not administer RhoGAM to the mother after a previous miscarriage, causing her to become sensitized. *Id.* Additionally, the OBs failed to type the mother's blood before or during the pregnancy from which the lawsuit arose. *Id.* As a result, the mother developed Rh disease and her son Donald became hydroptic in utero. *Id.* at 346. He died four days after birth. *Id.*

On appeal, the court concluded that the evidence supported a punitive damages instruction below due to the defendants' gross negligence, which the court essentially defined as recklessness. *Id.* at 363-64. The court held,

> The proof adduced at trial does tend to show, among other things: (1) it is standard procedure for doctors to determine a pregnant patient's blood type and Rh-factor, (2) the mother's blood was never typed during the entire course of treatment for her pregnancy and miscarriage, (3) withholding RhoGAM from a woman who is a candidate for it is "*considered malpractice virtually ipso facto, regardless of who seems to be at fault*[,]" and (4) hemolytic disease is "*overwhelmingly preventable.*"
>
> [Additionally, a]n expert witness testified that the doctors' behavior towards the mother showed complete disregard for the patient's welfare. This, and other evidence in the record, indicates that three doctors and a hospital, *any of whom could and should*

[82] *Graham* is attached as Exhibit 11. *Graham* is a landmark case, cited in the *Restatement (Second) of Torts* § 500 and also in 35 ALR 5th 145, *Allowance of Punitive Damages in Medical Malpractice Action* (1996).

> *have been concerned with the mother's Rh-factor, never even considered it.* The jury could conclude from the evidence presented that the doctors were indifferent to the consequences of their actions or demonstrated a *reckless disregard* for their patient's rights. *This evidence would support submission to the jury of punitive damages .*
> . . .

Id. at 364 (emphasis in original). The court affirmed the trial court's decision. *Id.* at 367.

(ii) McCourt v. Abernathy

Additionally, in *McCourt v. Abernathy*, the administrator-husband of his decedent-wife's estate filed suit for wrongful death and survival against two physicians, Drs. Abernathy and Clyde, for failing to treat the wife's infection with antibiotics during earlier treatment visits, resulting in her eventual death from beta strep septicemia. 457 S.E.2d 603, 604-05 (S.C. 1995).[83] The jury returned a verdict for punitive damages, and the physicians appealed. *Id.* at 604.

Expert testimony established that the decedent, Wendy McCourt, had presented herself a total of *three* times to the two physicians with what began as an infected wound on her finger but was not treated with antibiotics until the third visit, at which time the condition required emergent-care hospitalization. *Id.* at 604-05. The evidence further established that when the condition worsened, the physicians failed to order aggressive observation and failed to request timely consultation intervention, which one expert characterized as falling "profoundly below the standard of care." *Id.* at 605-06. Another expert testified that Wendy had a "100% chance of survival" if she had been given antibiotics in a timely manner. *Id.* at 605.

Applying a recklessness standard, the court reasoned,

> We find the record before us contains evidence that both Dr. Abernathy and Dr. Clyde *consciously* failed to exercise due care in treating Wendy. This evidence includes, but is not limited to: (1) failure to properly diagnose and treat Wendy within the standard of care on *three separate occasions*; (2) failure to order timely

[83] *McCourt* is attached as Exhibit 12. *McCourt* is also a landmark case, cited in the ALR treatise, *supra* note 82, and in many law school medical malpractice and torts textbooks.

> diagnostic tests *in light of continual complaints* and no improvement of Wendy's condition; (3) *failure to appreciate the seriousness of Wendy's deteriorating condition* in the face of highly abnormal blood work; (4) *failure to aggressively monitor Wendy's deteriorating condition*; and (5) failure to promptly seek the immediate aid of a specialist once the seriousness of Wendy's condition became apparent. While the evidence indicates a more severe degree of culpability on the part of Dr. Abernathy than Dr. Clyde, the record contains sufficient evidence of conduct on the part of both doctors to support the awards of punitive damages.

Id. at 607-08 (emphasis added). The court determined that the physicians' conduct was reckless and affirmed the decision below. *Id.* at 608.

(c) A physician's disinterested attitude in the midst of what instead should be a growing concern for his or her patient's condition constitutes reckless conduct.

A physician's disinterested attitude in the midst of what instead should be a growing concern for his or her patient's condition constitutes reckless conduct. *Scott v. Porter*, 530 S.E.2d 389 (S.C. Ct. App. 2000).[84] In *Scott*, the appellate court found that the trial record supported a jury's finding of recklessness, in a wrongful death and survival action brought by the parents of a 19-month-old decedent against his defendant-physician, Dr. Porter. *Id.* at 391. Accordingly, the court affirmed a $3.5-million punitive damage award. *Id.* at 391, 397.

The decedent child, Lance, suffered a seizure one morning and was referred to Dr. Porter, a neurologist, for treatment. *Id.* at 391. At Dr. Porter's office, Lance suffered another seizure and was admitted to a local hospital. *Id.* At the hospital, tests revealed that Lance had a low sodium level but Dr. Porter did not feel the test revealed anything "clinically significant." *Id.* Later, Lance suffered another seizure, and Dr. Porter approved an anti-seizure drug. *Id.* In addition, she increased his IV fluid levels. *Id.* She did not order that Lance be placed on an apnea bradycardia monitor; instead, the nursing staff had to order the monitor. *Id.*

At some point later that evening, Lance told his mother he did not feel good. *Id.* at 391-92.

[84] *Scott* is attached as Exhibit 13. *Scott* is also a landmark opinion, cited in the ALR treatise, *supra* note 82.

By the next morning, he could not recognize his mother. *Id.* at 392. Dr. Porter felt it could be the result of the medication she had ordered for Lance and told his mother that she would send him down for a CAT scan "sometime that morning." *Id.* An hour and a half later, while in the CAT scanner, Lance stopped breathing and was intubated. *Id.* Tests later revealed his sodium level was "unusually low." *Id.* Due to Dr. Porter's treatment, Lance suffered severe brain damage and later died in a coma. *Id.* His family sued Dr. Porter for gross negligence, seeking punitive damages. *Id.*

The trial evidence showed that Dr. Porter failed to monitor Lance's blood sodium level after placing him on diluted IV fluid, that she did not order an apnea bradycardia monitor or follow-up sodium tests which—according to expert testimony—would have saved his life, and that she did not arrange for an immediate CAT scan when informed of Lance's altered mental state. *Id.* at 396. The court affirmed the decision below, reasoning, "The totality of the testimony suggested [Dr.] Porter had *a disinterested attitude in the midst of what should have been growing concern for her patient*. Clearly this is evidence Porter *recklessly failed to realize the urgency of Lance's condition* and failed to act quickly to save his life and was therefore *highly culpable*." *Id.* (emphasis added).

4. Numerous individual acts or omissions by the Defendants constituted recklessness in the care and treatment of the Plaintiffs, justifying a jury instruction for punitive damages.

Numerous individual acts and omissions by the Defendants constituted recklessness in the care and treatment of the Thurmans, justifying a jury instruction for punitive damages at trial. Significantly, the following:

1. The Defendants ignored Dr. McCay's September 24, 2007, recommendation to repeat an antibody screen on Amanda following her positive test result after the birth of her second child, Preslee;

2. The absolute preventability of fetal hydrops due to Rh disease, if proper care is given; the fact that Dr. Ferrara has not seen a case of hydrops from Rh disease in 20 years;

3. The Defendants ignored Amanda's January 19, 2009, LabCorp test report that clearly showed Amanda was Rh negative and had additionally tested positive for both anti-D and anti-C antibodies; in other words, the report proved she was sensitized near the eight-week mark of her pregnancy with Blake;

4. The Defendants failed to ever order serial titers, in spite of being consciously aware that Amanda was sensitized before and during her pregnancy and in spite of every reputable medical publication—texts the Defendants indicated they were obligated to read—every experts' testimony in this case, the article written by Dr. Lyons' teacher from residency, consumer texts, and even Internet sources indicating serial testing is *the* standard of care for a sensitized mother-to-be; recall that the Defendants' drew blood on several occasions, knowing Amanda was sensitized, and never ordered a titer for positive Rh antibodies;

5. The Defendants' admission that they had never before treated a patient with both Anti-D and Anti-C antibodies, but yet, they never consulted a single text regarding treatment, never called for a consult, and never recommended Amanda see a specialist;

6. The Defendants' failure to follow-up with Amanda after her May 2009 complaint of vaginal bleeding after intercourse, ignoring an early warning sign of Rh disease, in spite of the fact that they were consciously aware Amanda was sensitized;

7. Dr. Hewitt's disinterested attitude on June 8, 2009, during Amanda's walk-in visit, sending her home after a cursory examination;

8. On June 15, 2009, when Amanda presented at Hewitt Davis & Lyons in a severe condition, Dr. Hewitt ordered TORCH titers instead of an Rh antibody titer, an act that Dr. Ferrara called "absolutely bizarre;"

9. On June 15, 2009, while Blake was dying and there was no time to waste, Dr. Hewitt actually allowed Amanda to drive herself to Baptist Hospital;

10. The Defendants' lack of documentation of Amanda's June 15, 2009, emergent visit and failure to flag her chart as high-risk;

11. The Defendants' questionable deposition responses, which led Dr. Ferrara to conclude that the Drs. Hewitt and Lyons are either not telling the truth or are the most intellectually challenged physicians he has ever studied and provided an opinion about;

12. Drs. Hewitt and Lyons have testified that in spite of all of the aforementioned, they would not change their practice if an Rh-sensitized patient walked into Hewitt Davis & Lyons tomorrow;

13. Though statutorily obligated to do so, Dr. Davis has not reported his colleagues' conduct to the Kentucky Board of Medical Licensure; and

14. The Defendants November 24, 2010, discovery response claimed that Amanda took her June 15, 2009, ultrasound with her to Nashville, in spite of the fact that Chamberlain told the office manager the ultrasound could not be retrieved *before the Defendants' submitted their November response*.

5. *The collective acts or omissions of the Defendants constitute gross negligence in the care and treatment of the Thurmans, justifying a jury instruction for punitive damages.*

If the Court finds that any of the aforementioned individual acts or omissions is insufficient to constitute gross negligence, the collective acts or omissions certainly merit such a finding. Even where a single act of negligence might not, on its own, constitute gross negligence, gross negligence can result from a set of actions in the aggregate. *Horton*, 690 S.W.2d at 388.

6. *The Thurmans have met the any-evidence burden and are entitled to instruct the jury on punitive damages at the close of evidence.*

The Thurmans have met the relaxed gross negligence any-evidence summary judgment standard. Four noteworthy points deserve a deeper final analysis. First, Regarding the 2007 McCay report, Dr. Hewitt was (1) consciously aware that Amanda was sensitized, (2) understood that Rh disease could result in a baby developing fetal hydrops in utero, and (3) ignored Dr. McCay's recommendation. Dr. Hewitt admitted that reports like the one Dr. McCay sent regarding Amanda were frequently sent to the Defendants' office and that "those antibodies [warned of in the report] just spontaneously resolve on their own." Hewitt Dep. 86:21-9:6. He knew Amanda was sensitized. *Id.* at 44:25; *see also id.* at 45:1-6, 78:25-79:3, 82-85 (reiterating same).

Dr. Hewitt did not have to intend or have actual knowledge of the eventual result, *Williams*, 972 S.W.2d at 264, nor did he even need to recognize that his decision to ignore the report was "extremely dangerous," *Restatement (Second) of Torts* § 500 cmt. c. He merely had to intend the conscious act of ignoring the report's recommendation. *See Williams*, 972 S.W.2d at

264 (reiterating same). His conduct is judged by an objective reasonable obstetrician standard of care, and the Court is obligated to hold him to the realization of the "aggravated risk which a reasonable" obstetrician in his position would have known. *See Restatement (Second) of Torts* § 500 cmt. a.

He intended to ignore the report. *E.g.*, Hewitt Dep. 86:21-9:6, 89:12-13. Gross negligence is a reckless disregard for the lives, safety, or property of others. *Brown*, 63 S.W.3d at 181. His conduct constituted recklessness, justifying a jury instruction on punitive damages. *See, e.g.*, *Shortridge*, 929 S.W.2d at 197 ("In cases alleging gross negligence and requesting punitive damages, '[a] party plaintiff is entitled to have [her] theory of the case submitted to the jury if there is any evidence to sustain it."); *Thomas*, 127 S.W.3d at 673 (indicating a substantial deviation from the applicable standard of care constitutes gross negligence).

Second, regarding the January 19, 2009, LabCorp. report, Dr. Lyons was (1) consciously aware that Amanda was sensitized, (2) understood that Rh disease could result in a baby developing fetal hydrops in utero, and (3) ignored the lab results. Dr. Lyons admitted Amanda was sensitized, testifying, "[W]hen I reviewed [Amanda's] initial labs, her titers were 1:1." Lyons Dep. 11:17-18; *see also id.* at 12:6, 90:1-2, 94:22-23 (reiterating same). She did not have to intend or have actual knowledge of the eventual result, *Williams*, 972 S.W.2d at 264, nor did she even need to recognize that her decision to ignore the report was "extremely dangerous," *Restatement (Second) of Torts* § 500 cmt. c. Dr. Lyons' merely had to intend the conscious act of ignoring the report's recommendation. *See Williams*, 972 S.W.2d at 264 (reiterating same). Her conduct is judged by an objective reasonable obstetrician standard of care, and the Court is obligated to hold her to the realization of the "aggravated risk which a reasonable" obstetrician in her position would have known. *See Restatement (Second) of Torts* § 500 cmt. a.

She intended to ignore the report because, according to her unique standard of care, Amanda's titers had not reached a "critical" level yet, nor had Amanda had large hemorrhaging, abruptions, or past tubal pregnancies. Lyons Dep. 73:24-74:6. She initialed the report. Pls.' Response to Defs.' Motion to Dismiss Claim for Punitive Damages, Ex. 23, Jan. 21, 2011. Her conduct constituted recklessness, justifying a jury instruction on punitive damages. *See, e.g.*, *Shortridge*, 929 S.W.2d at 197; *Thomas*, 127 S.W.3d at 673.

Third, the Defendants were consciously aware that Amanda was sensitized and failed to order serial testing to monitor her condition, a basic and required standard of obstetrical care. The Defendants' conduct is analogous to the physicians' recklessness acknowledged in *Graham*, 847 P.2d 432. Here, (1) serial testing is *the* universal "standard procedure" for OBs to treat a sensitized patient, (2) the Defendants never ordered the tests, (3) the Thurmans have produced two experts and numerous reputable texts that indicate a failure to serial test is "virtually ipso facto" malpractice, and (4) have proven that Rh disease is "overwhelmingly preventable." *Id.* at 364; *see also Parrish*, 145 S.W.3d at 406 (indicating that a physician's failure to perform a simple test that is the standard of care constitutes recklessness). Thus, the Defendants were reckless.

Similarly, the facts of this case are analogous to *McCourt*, 457 S.E.2d 603. In *McCourt*, the court held that the two defendant physicians were reckless because they failed to properly treat the decedent on *three* occasions, ignored her complaints and lack of improvement, failed to appreciate the seriousness of the decedent's deteriorating condition, and failed to aggressively monitor the decedent's condition. 457 S.E.2d at 607-08. Here, the Defendants had *nine* opportunities to properly treat Amanda: (1) the 2007 McCay report, (2) Dr. Lyons' treated Amanda five and half weeks later and did not mention the report, and Amanda was treated by the Defendants during her pregnancy with Blake on (3) January 19, 2009, (4) January 30, 2009 (treated by Lyons), (5) February 25, 2009 (Lyons), (6) March 25, 2009 (Hewitt), (7) April 22, 2009 (Lyons), (8) May 15,

2009 (Hewitt), and (9) June 8, 2009 (Hewitt). Because the Defendants either ignored the signs or were disinterested on at least nine occasions, their aggregate conduct amounts to gross negligence. *See Horton*, 690 S.W.2d at 388 (holding that gross negligence can result from a collective set of actions). In fact, *Graham* and *Scott* essentially serve as persuasive affirmations of *Horton*, just in a medical malpractice context.

Fourth, Dr. Hewitt's disinterested attitude and utter failure to realize the urgency of the moment during Amanda's June 8, 2009, walk-in visit is analogous to the physician's reckless conduct acknowledged in *Scott*, 530 S.E.2d 389. Here, Dr. Hewitt sent Amanda home after she made an unscheduled appointment complaining of (1) Blake not moving properly, (2) feeling full of fluid, (3) having abdominal pain, (4) feeling differently than previous pregnancies, (5) feeling as though she was closer to delivery than she should be, (6) having gained ten pounds faster than she had ever done during any previous pregnancy, and (7) a remarkably increased fundal height measurement. Dr. Hewitt called the visit "pretty benign," told her she was going to have a "ten pounder," and sent her home, after a 15-minute cursory exam and in spite of his testimony that his customary practice is to "do lots of ultrasounds" for "just anything that is a little bit of an abnormality." Hewitt Dep. 54:25-55:2.

Clearly, the totality of the testimony presented by the Thurmans' in this motion proves that Dr. Hewitt had a "disinterested attitude in the midst of what should have been a growing concern" for Amanda and Blake. *Scott*, 530 S.E.2d at 396. Instead of properly treating Amanda, Dr. Hewitt "failed to realize the urgency" of the moment and failed to act quickly to save Blake's life. *Id.* His reckless actions that day evidenced "a clear intent to not act appropriately." Kenneth Moise, M.D., Dep. 54:6-7, Dec. 21, 2010.

III. CONCLUSION

The Court should deny the Defendants' motion because numerous individual acts or omissions by the Defendants constituted recklessness in the care and treatment of Amanda and Blake Thurman. Even if the Court determines that any single act did not amount to recklessness, certainly the collective reckless acts of the Defendants merit a punitive damages instruction at trial in April.

Respectfully submitted,

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CERTIFICATE OF SERVICE

It is hereby certified that a copy of the foregoing motion was sent via fax/email and overnight FedEx delivery this 16th day of February 2011 to:

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