UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

WILLIAM H. WILLIAMS, PLAINTIFF	)	
v.	)	CASE 3:16-cv-00236-CHB-RSE
BAPTIST HEALTHCARE SYSTEM, INC. d/b/a BAPTIST HEALTH LEXINGTON, DEFENDANT	)	***ELECTRONICALLY FILED***

DEFENDANT'S RULE 50 AND 59 POST-JUDGMENT MOTIONS

Plaintiff failed to present legally sufficient evidence to support his claims that Baptist's actions caused him any damages. He correspondingly failed to present clear and convincing evidence of gross negligence that could justify an award of punitive damages. This Court should therefore enter judgment for Baptist as a matter of law or, alternatively, order a new trial or reduce the jury's legally excessive award to conform to the evidence.

BACKGROUND

Following this Court's Order Denying in Part and Granting in Part Defendant's Motion for Summary Judgment (R. 143), only Plaintiff's claims for common law medical negligence and EMTALA violations allegedly causing prolonged physical pain and suffering as well as emotional suffering and mental anguish were left for trial. Although the Court had granted summary judgment to Baptist on Plaintiff's claim for punitive damages (*see* R. 143 at 16-24), on October 25, 2021, the Court *sua sponte* reinstated Plaintiff's punitive damages claim at the final pretrial conference. (*See* R. 205 at 29:10-37:16.)

During trial, Baptist stipulated to breaches of the medical standard of care and violations of EMTALA. Thus, the sole issues before the jury were determining whether Baptist's actions caused any damage to Plaintiff and, if so, whether Plaintiff was entitled to punitive damages.

The jury returned a verdict in favor of the Plaintiff, awarding him compensatory damages in the amount of $545,000 (without any distinction made between damages for physical pain and suffering and damages for emotional distress) and punitive damages in the amount of $1,850,000. The judgment of $2,395,000 was entered on September 13, 2022. (R. 290.)

Plaintiff did not present legally sufficient evidence to support the jury's verdict or damages awards. Baptist therefore respectfully makes the following post-judgment motions: (1) under Fed. R. Civ. P. 50(b), Baptist renews its motion for judgment as a matter of law; (2) in the alternative, Baptist moves under Fed. R. Civ. P. 50(b) and 59(a) for a new trial; (3) in the alternative, Baptist moves under Fed. R. Civ. P. 59(e) for a remittitur of the $545,000 and $1,850,000 judgments to amounts supported by the evidence.

ARGUMENT

I. The jury did not have a legally sufficient basis to find that Baptist's actions caused any damage to Plaintiff.

Judgment as a matter of law should be entered when a plaintiff has been fully heard on an issue during trial but failed to present a legally sufficient evidentiary basis for the jury to find in his favor. Fed. R. Civ. P. 50(a)(1). The Court may hear this motion at any time before the case is submitted to the jury. Fed. R. Civ. P. 50(a)(2). If the case is submitted to the jury, the movant may renew its motion no later than 28 days after entry of the judgment. Fed. R. Civ. P. 50(b).

Here, Plaintiff failed to present a legally sufficient evidentiary basis to allow a reasonable jury to find that Baptist's actions caused him any damage. He likewise failed to present clear and convincing evidence of gross negligence so as to allow a reasonable jury to decide that punitive damages are warranted. Further, Baptist properly preserved all of these issues by orally moving for judgment as a matter of law under Fed. R. Civ. P. 50(a) during trial at the close of Plaintiff's case. This Court should grant Baptist judgment as a matter of law under Rule 50(b).

A. Plaintiff did not present legally sufficient evidence to support his claim for prolonged pain and suffering.

1. Plaintiff did not present any evidence that Baptist's failure to communicate the diversion caused any prolonged pain and suffering.

As this Court identified in its summary judgment order, the sole genuine issue of material fact that necessitated a trial on Plaintiff's claim for prolonged pain and suffering was as follows: "[W]hether the Plaintiff would have gotten quicker care at UK Medical Center if he had been sent there in the first place" and, correspondingly, "whether the diversion caused [Plaintiff] to feel extra pain and suffering during the time lost mistakenly going to BHL." (R. 143 at 12.)

Therefore, to avoid judgment as a matter of law, Plaintiff needed to present evidence at trial proving that, if the diversion had been correctly communicated and he had been taken straight to UK, it is more likely than not that he would have received pain-reducing treatment at UK prior to the time that his pain and heart attack resolved on their own. He did not do so. *No witness* offered any opinion regarding when UK likely would have begun rendering treatment, when that treatment likely would have taken effect, or when Plaintiff's pain would have been reduced, had the ambulance gone directly to UK. In fact, no witness from UK testified at all.

Both Dr. Hollingsworth and Plaintiff's expert, Dr. Glaser, testified that after Plaintiff arrived to UK at 12:13 am (after first having gone to Baptist), his chest pain ceased and his heart attack self-aborted *before* UK was able to even get him to the cath lab. As a result, as Dr. Hollingsworth explained, while UK still continued taking him to the cath lab and performed a heart catheterization for diagnostic purposes, they likely took more time doing so than if Plaintiff's heart attack had still been an ongoing emergency. Critically, the jury did *not* hear any evidence regarding at what time UK would have been able to start the cath had Plaintiff gone to UK directly while still experiencing an ongoing heart attack or how that start time would have compared to the time at which Plaintiff's pain and heart attack spontaneously resolved. The jury

therefore had no basis on which to conclude that UK likely would have provided pain-reducing treatment had Plaintiff not "lost time" going to Baptist.

Further, this was a topic on which expert testimony was required. Lay persons may be able to understand that "an individual goes through pain while having a heart attack" (R. 143 at 13), but they have no knowledge regarding the precise time it takes a hospital like UK to intake a heart attack patient arriving by ambulance and actually begin rendering care. Nor do lay persons understand the treatments available to patients experiencing heart attacks and how long it takes those treatments to take effect and actually lessen the pain being experienced by the patient. The jury required the guidance of experts on this issue, but Plaintiff presented none at trial.

Even if expert proof were not required, which it was, Plaintiff presented no lay evidence regarding the extent and duration of his physical pain after he was put in the ambulance. *See Coleman v. Simpson*, 471 S.W.2d 702, 704 (Ky. 1971) (when "[t]he medical evidence supported a finding that the particular condition usually caused pain . . . the plaintiff's own testimony of the extent and duration of his pain was within the province of the jury to weigh and evaluate."). The only physical pain evidence Plaintiff presented was the feeling of "heartburn from hell." But Plaintiff testified that his "heartburn from hell" *preceded* his arrival to Baptist, and is what caused him to present to the Paris-Bourbon County Fire Station and seek treatment on April 4. Plaintiff did not testify as to *when* his "heartburn from hell" resolved, and so did not offer any evidence as to whether it was "prolonged" by the delay caused by being routed through Baptist.

In sum, the jury was left with only pure speculation as to what would have likely happened if Plaintiff had gone straight to UK. The jury was not provided *any* evidence from which it could find that it was more likely than not that Plaintiff in fact likely would have received pain-reducing care at UK prior to his heart attack resolving on its own had he been sent

to UK in the first place. As a result, Baptist is entitled to judgment as a matter of law on Plaintiff's claim that Baptist's failure to correctly communicate the diversion to the ambulance caused Plaintiff to experience any prolonged pain and suffering.

2. Plaintiff did not present any evidence that Baptist's EMTALA violation caused any prolonged pain and suffering.

In this Court's summary judgment order, the Court did not identify any genuine issue of material fact regarding whether Baptist's EMTALA violation caused any prolonged pain and suffering. (*See* R. 143 at 11-13.) Consistent with the evidence on summary judgment, Plaintiff likewise did not present any evidence at trial demonstrating that Baptist's violation of EMTALA caused him to experience any prolonged pain and suffering. The undisputed evidence at trial proved that Plaintiff's heart attack would have resolved at approximately the same time regardless of his location, that Plaintiff's pain and heart attack resolved on their own prior to UK being able to perform a cath, and that Baptist would not have been able to perform a cath sooner than UK had Baptist admitted Plaintiff. Consequently, even if Baptist had complied with EMTALA, Plaintiff's pain and suffering would have been the same.

Plaintiff's expert, Dr. Glaser, testified that Baptist could have complied with EMTALA by admitting Plaintiff and either (1) treating his ongoing STEMI by performing a cath or (2) following the procedure for an appropriate transfer under EMTALA by providing a medical screening exam and stabilizing treatment before transferring him to UK. With respect to the first option, the undisputed evidence is that, because a cardiovascular physician was not on-site at Baptist when Plaintiff arrived and instead the on-call physician (Dr. Hollingsworth) would have had to travel to the hospital, Baptist could not have performed a cath prior to the time that Plaintiff's heart attack resolved on its own. And with respect to the latter option, providing the medical screening and stabilizing treatment prior to transferring Plaintiff to UK would have only

further delayed his transfer to UK. Given that Plaintiff's heart attack resolved before UK was able to perform a cath under the quick transfer that did occur, there is no chance that Plaintiff could have received pain-reducing care at UK if the additional steps of the medical screening and stabilizing treatment had been undertaken.

Thus, the jury did not hear any evidence from which it could conclude that, if Baptist had complied with EMTALA, Plaintiff likely would have received pain-reducing care prior to his pain and heart attack resolving on their own. To the contrary, the undisputed evidence is that Plaintiff received care more quickly by being transferred to UK (even though, as explained above, Plaintiff's heart attack resolved before even UK could render care). As a result, Baptist is entitled to judgment as a matter of law on Plaintiff's claim for prolonged pain and suffering due to Baptist's EMTALA violation.

II. Plaintiff did not present any legally sufficient evidence to support his claim for emotional distress damages.

Having failed to present evidence to support prolonged physical pain and suffering, Plaintiff was left with only a stand-alone claim for emotional distress. Plaintiff also failed to present legally sufficient evidence to support this claim.

In Kentucky, a plaintiff may not recover damages for stand-alone garden-variety emotional distress. Rather, under *Osborne v. Keeney*, 399 S.W.3d 1, 17 (Ky. 2012), a plaintiff may only recover standalone emotional distress damages for a "serious or severe emotional injury." Further, proving a "serious or severe" emotional injury requires expert proof that the injury "significantly affect[s] the plaintiff's everyday life or require[s] significant treatment." *Id.* at 5–6; *see also Indiana Ins. Co. v. Demetre*, 527 S.W.3d 12, 35-39) (Ky. 2017) (holding that *Osborne*'s requirement of expert medical or scientific proof applies in free-standing claims for intentional or negligent infliction of emotional distress).

This Court reasoned in its summary judgment order that this case does "not involve stand-alone emotional injury damages," because Plaintiff alleges the violations caused "physical damage, prolonged pain and suffering, and medical expenses" in addition to mental and emotional anguish. (R. 143 at 14.) But, as explained above and in this Court's grant of summary judgment on Plaintiff's claims for physical damage and medical expenses, none of Plaintiff's claims for non-emotional-distress damages were legally cognizable. When a medical negligence claim results only in emotional distress damages, it is the equivalent of a negligent infliction of emotional distress claim. To find otherwise would allow plaintiffs to work an end-run around *Demetre* and *Osborne* by simply alleging baseless claims for other damages in addition to emotional distress, lose the other damages on summary judgment, and be free to pursue a stand-alone claim of emotional distress without having to marshal expert testimony to satisfy the heightened "serious or severe" standard. Here, Plaintiff has failed to provide legally sufficient proof of his claim for prolonged physical pain and suffering, leaving only a stand-alone emotional distress claim that requires expert testimony of a severe and serious emotional injury.

In this case, Plaintiff presented no evidence of any kind, let alone from a qualified mental health expert, that he sought any treatment at all for emotional distress after this incident, including for anxiety or depression. Likewise, he presented no evidence that this incident affected his life in any manner, much less evidence about how the evidence impacted his everyday life. At most, Plaintiff's medical expert Dr. Glaser accepted that Plaintiff may have been anxious and might have been angry *during the transport*. This testimony is not sufficient expert proof under *Osborne* and *Demetre* to demonstrate legally actionable emotional distress damages. Therefore, judgment as a matter of law is appropriate on Plaintiff's stand-alone claim for severe emotional suffering and mental anguish.

In the alternative, even if *Osborne*'s heightened standard does not apply in this case, Plaintiff still failed to present "clear and satisfactory" proof to support his recovery of emotional damages. *See Demetre*, 527 S.W.3d at 39 (even when *Osborne*'s heightened standard does not apply, the plaintiff must present "clear and satisfactory" proof of emotional damages). Plaintiff's only testimony regarding his emotional distress was that while he was experiencing his heart attack, he was thinking about his family and whether he would make it. Significantly, he did *not* testify about whether or how his emotional distress changed or increased after he was re-routed to UK Medical Center. To the contrary, he explicitly testified that the 6-7 minute transport to UK *did not* feel like an eternity.

Other than his own testimony, Plaintiff's only evidence on this point was EMT witness testimony that he was angry because he was not able to go to the hospital of his choice, and Dr. Glaser's testimony his heart rate increased from 86 to 111, which *could* indicate stress or anger. This evidence falls far short of that which courts have found sufficient to satisfy the "clear and satisfactory" standard. *See, e.g.*, *Demetre*, 527 S.W.3d at 39-40 (plaintiff's testimony regarding years of daily stress and fear of financial ruin constituted "clear and satisfactory" proof of emotional distress); *Nekkanti v. V-Soft Consulting Grp., Inc.*, No. 3:18-CV-784-BJB-RSE, 2022 WL 1504832, at *3 (W.D. Ky. May 12, 2022) (plaintiff's testimony that his termination caused "constant stress," trouble sleeping, headaches, and frustrations with family sufficient to satisfy "clear and satisfactory" standard). Consequently, because the jury was not provided clear and satisfactory evidence from which it could infer that Plaintiff in fact suffered emotional distress due to being turned away from Baptist, judgment as a matter of law should be granted to Baptist on Plaintiff's claims for emotional distress damages.

III. Plaintiff did not present legally sufficient evidence to establish his claim for punitive damages.

As an initial matter, because Plaintiff failed to prove the essential element of causation in the underlying claims, Plaintiff also cannot recover punitive damages as a matter of law. *See, e.g., Commonwealth Dep't of Agric. v. Vinson*, 30 S.W.3d 162, 166 (Ky. 2000). Further, as this Court correctly held in its summary judgment order (R. 143 at 16-24), even if one or more of Plaintiff's claims survives, Plaintiff presented neither clear and convincing evidence of gross negligence[1] nor any evidence that Baptist ratified, authorized, or anticipated Nurse Blankenship's actions.

The mere fact that Baptist violated EMTALA or the standard of care does not create legally sufficient evidence to support a finding of punitive damages. Instead, evidence from which the jury could make "an additional finding that this negligence was accompanied by 'wanton or reckless disregard for the lives, safety or property of others'" was required. *See Horton v. Union Light, Heat & Power Co.*, 690 S.W.2d 382, 389-90 (Ky. 1985). Plaintiff presented no evidence of such wanton or reckless behavior, and instead the undisputed evidence demonstrated that "Nurse Blankenship's actions as well as the policies and procedures which guided them[] were aimed at providing the best care possible for inbound STEMI patients." (R. 143 at 24.) Moreover, Plaintiff presented absolutely no evidence from which the jury could conclude that Baptist ratified, authorized, or anticipated Nurse Blankenship's actions, thereby precluding an aware of punitive damages based on her actions. *See Univ. Med. Ctr., Inc. v. Beglin*, 375 S.W.3d 783, 793 (Ky. 2011).

[1] Throughout this litigation, Plaintiff has not attempted to argue that Baptist's conduct qualified as "oppression, fraud or malice" within the meaning of KRS 411.184. Instead, Plaintiff has pursued punitive damages under only a gross negligence theory, and the jury was instructed on only gross negligence. (*See* Jury Instructions, R. 287 at 20.)

Although juries should consider the question of punitive damages when evidence exists in the record that could support such an award, it is the Court's gate-keeper role to determine whether legally sufficient evidence was, in fact, presented at trial. Because Plaintiff presented no evidence from which a reasonable jury could find by clear and convincing evidence that anyone acted with gross negligence or that Baptist ratified, authorized, or anticipated Nurse Blankenship's conduct, Baptist is entitled to judgment as on a matter of law on Plaintiff's punitive damages claim.

A. Plaintiff cannot recover punitive damages for Nurse Blankenship's actions.

1. Nurse Blankenship's conduct did not rise to the level of gross negligence.

As this Court recognized in its summary judgment order, "Nurse Blankenship's conduct was an act of simple negligence following a first-time situation where BHL was required to divert inbound STEMI patients to UK Medical Center." (R. 143 at 23.) Nurse Blankenship acted with ordinary negligence when she mistakenly believed that the diversion was for only Friday when EMS called on Saturday with Plaintiff in transit 8-10 minutes away. Immediately upon realizing her mistake, she attempted to call EMS to divert them to UK, but the EMS crew had used a cellphone to call Baptist, rather than the radio used by local EMS crews. But Ms. Blankenship did not stop there, and instead attempted contact through the local EMS organizations; however, Bourbon County EMS arrived before she could get through.

At that point, she knew that the reason Baptist was on STEMI diversion was that it had no cardiothoracic surgeons available. Her focus was on getting Mr. Williams the treatment that he needed, and that his best interests were served by going immediately to UK, only 0.9 miles away. In fact, Dr. Glaser testified that had Ms. Blankenship been able to contact and divert Bourbon County EMS while it was 251 yards from Baptist, this would have complied with

EMTALA. Additionally, it is important to note that punitive damages are similar to monetary penalties, which EMTALA allows OIG/CMS to impose. It is undisputed that OIG/CMS investigated and imposed $0 in financial penalties to Baptist concerning this incident.

No witnesses testified that Ms. Blankenship's actions were intended to cause harm to Plaintiff, or that she otherwise was motivated by anything other than ensuring that Plaintiff received the best care possible. Thus, *Horton*'s requirement that there be an "additional finding that this negligence was accompanied by 'wanton or reckless disregard for the lives, safety or property of others'" is wholly lacking. *See* 690 S.W.2d at 389-90. Plaintiff has the burden to prove punitive damages by clear and convincing evidence. In this case, Nurse Blankenship's actions do not provide clear and convincing evidence of gross negligence required to permit punitive damages under Kentucky law.

2. Plaintiff presented no evidence that Baptist ratified, authorized, or anticipated Nurse Blankenship's actions.

Moreover, even if Nurse Blankenship had acted with gross negligence, Plaintiff did not adduce any evidence of ratification, authorization, or anticipation that could have permitted the jury to award punitive damages based on her conduct. KRS 411.184(3) expressly prohibits the assessment of punitive damages against an employer for the conduct of an employee unless the offensive conduct was (1) authorized by the employer; (2) anticipated by the employer; or (3) ratified by the employer. *Beglin*, 375 S.W.3d at 793-794. Thus, in Kentucky it is "very difficult to obtain punitive damages against an employer for the negligent acts of its employees." *Jones v. Blankenship*, Civil No. 6:06-CV-109-KKC, 2007 WL 3400115, *4 (E.D. Ky. Nov. 13, 2007).

As the Kentucky Supreme Court has explained, ratification is a formal process. *Saint Joseph Healthcare, Inc. v. Thomas*, 487 S.W. 3d. 864, 873-74 n.7 (Ky. 2016) ("The verb "to ratify" means: 'to approve and sanction formally: confirm (ratify a treaty).'"). For a defendant to

have authorized the conduct in question, there must be pre-approval. *Beglin*, 375 S.W.3d at 793. "Accordingly, ratification is, in effect, the after-the-fact approval of conduct much as authorization is the before-the-fact approval of the conduct." *Saint Joseph Healthcare*, 487 S.W. 3d. at 873-74 n.7. And for anticipation, "generally courts have declined to find that an employer anticipated the conduct in question absent some pattern of conduct similar to the alleged gross negligence." (R. 143 at 22 (citing *Blankenship*, 2007 WL 3400115, at *4).)

Plaintiff presented no evidence from which a reasonable jury could conclude that Baptist ratified Nurse Blankenship's conduct after-the-fact. Far from condoning Ms. Blankenship's actions, Baptist took immediate steps to ensure such an incident did not happen again. As Dr. Toadvine testified, following the incident with Plaintiff, Baptist "immediately had an interdisciplinary group of clinicians" review the incident in detail and self-identify certain issues. The jury heard evidence that, within a week, Baptist had created a plan, created a PowerPoint presentation for the Emergency Department staff on EMTALA, and coordinated with a third-party organization to provide EMTALA training to all staff. Baptist continued to demonstrate its disapproval of the manner in which Plaintiff was redirected by providing continuing medical education for medical staff, creating a competency and evaluation tool for the emergency department, giving semiannual in-services on EMTALA, revising certain policies and procedures to provide for better communication, instituting emergency department huddles with a daily EMTALA moment, and performing monthly chart audits to make sure patients received a medical screening exam and appropriate care. These actions were the opposite of ratification.

Plaintiff argued that ratification should be inferred merely from the fact that Baptist did not discipline or terminate Nurse Blankenship. But declining to formally reprimand an employee does not equate to an affirmative ratification of the employee's actions. The Eastern District of

Kentucky previously found "no cases holding that the failure to discipline an employee-driver who has been in an accident constitutes ratification by an employer such that punitive damages would be available." *Turner v. Werner Enterprises, Inc.*, 442 F. Supp. 2d 384, 387 (E.D. Ky. 2006). Plaintiff likewise has not presented this Court with any authority indicating that the mere lack of discipline should be construed as affirmative ratification. Such a holding would be particularly inappropriate here, given that, although Baptist did not formally discipline Nurse Blankenship, it clearly communicated its disapproval of her actions through the many steps it took to educate its staff on EMTALA and ensure that a similar situation did not occur again.

Plaintiff also did not present any evidence of anticipation or authorization. As this Court recognized on summary judgment, and as borne out at trial, "[t]here is no indication in the record that Nurse Blankenship had any history of neglecting diversion orders or otherwise mishandling such aspects of patient care" that could have allowed Baptist to anticipate her negligence. (R. 143 at 23.) Similarly, no evidence suggested that Baptist authorized Ms. Blankenship's conduct. While Baptist authorized the diversion plan, it in no sense authorized Ms. Blankenship's deviation from that plan; "[i]n fact, it is precisely because Nurse Blankenship did *not* act in the manner authorized by BHL that Plaintiff came to suffer the injuries in question." (*Id.*)

Accordingly, due to a complete lack of evidence of ratification, authorization, or anticipation, the jury was not presented with legally sufficient evidence from which it could have awarded punitive damages based on Nurse Blankenship's conduct. Baptist is therefore entitled to judgment as a matter of law.

B. Baptist's actions did not rise to the level of gross negligence.

The hospital's actions also did not demonstrate clear and convincing evidence of gross negligence that could support punitive damages as a matter of law. With respect to the propriety of implementing the diversion plan in the first place, Dr. Hollingsworth testified that on April 3,

2015, she and another interventional cardiologist raised concerns to Baptist's administration about the lack of CT-surgery coverage and the safety issues that would present. Namely, should a perforation occur during a cardiac catheterization, the patient would need a transfer to UK Medical Center, unnecessarily risking patient safety. The Chief Medical Officer, Dr. Toadvine, testified that, due to these concerns, he made the decision to place the hospital on diversion for STEMI patients beginning immediately on April 3, 2015 to last through April 5, 2015. Plaintiff presented *no evidence* suggesting that the diversion plan was motivated by any other reason. Thus, far from demonstrating a "wanton or reckless disregard for the lives, safety or property of others," *Horton*, 690 S.W.2d at 389-90, the undisputed evidence at trial showed that the decision to implement the diversion plan was entirely driven by concerns for patient care and safety.

The method in which the diversion plan was communicated also was not indicative of gross negligence. Dr. Toadvine communicated the decision to go on diversion directly to the House Supervisor on April 3, 2015. The Emergency Department Medical Director, Dr. Spanier, testified that verbal communication of an emergency diversion decision is not only reasonable, but *necessary*. He, along with other health care providers, do not check their emails while they are on shift or even the day before their shift. It is common and reasonable to rely on verbal decisions and reports from other providers.

Further, Baptist's verbal communications of the diversion plan was *not* totally ineffective. Charge Nurse Nic Newsome testified that he was, in fact, aware that Baptist was on diversion for STEMI patients on Saturday, April 4, 2015. Plaintiff identified only one employee, Ms. Blankenship, who mistakenly believed that the diversion plan applied only to Friday, April 3, 2015. One floor nurse's misunderstanding is a matter of ordinary negligence, not wanton or reckless indifference to the lives of others. This is particularly true when the undisputed

testimony at trial established that Baptist had not been on diversion at any time in the seven years before April 3, 2015, and so this was an unusual circumstance.

Nor does any cumulative effect of Baptist's conduct provide the clear and convincing evidence of gross negligence that could justify an award of punitive damages. *Horton*, 690 S.W.2d at 388–89. In *Horton*, a key factor to the court's determination that punitive damages were properly presented to the jury was that a Chief Utility Inspector with the Kentucky Public Service Commission "had repeatedly attempted to get the respondent gas company to revise its existing emergency plan" prior to the explosion of plaintiffs' home and had "provided the gas company with a model plan" that would have prevented the explosion if it had been implemented. *Id.* at 387 (stating that the inspector's testimony was "[p]erhaps the most damaging evidence" of gross negligence). But here, there was no similar evidence of a regulatory body ever informing Baptist of deficiencies in its EMTALA procedures or Baptist ignoring corrective advice. Instead, the undisputed evidence at trial demonstrated that the incident was a one-time, isolated event. Due to this material difference, the mere fact that the cumulative evidence in *Horton* supported punitive damages does not indicate that legally sufficient evidence of punitive conduct is present here.

Likewise, in *St. Joseph Healthcare*, the court found that it was reasonable for the jury to conclude that the actions of hospital employees constituted gross negligence when the cumulative evidence reflected a "concerted effort" by multiple hospital employees on more than one occasion to block the patient from seeking treatment at the hospital. *Id.* at 872-73. The Court likewise concluded that the evidence—which included, among other things, the hospital staff removing the paraplegic patient from the hospital, telling him the hospital was not a hotel, and threatening to arrest him if he returned—demonstrated the hospital employees' reckless

disregard for the patient's life and safety. *Id.* at 872–73. In contrast, here there was no evidence whatsoever of a "concerted effort" by Baptist as a whole to block Plaintiff from seeking treatment at the hospital. Instead, it was merely the actions of one nurse—who indisputably was motivated by ensuring that Plaintiff received the best care as quickly as possible—that resulted in Plaintiff being re-routed to UK.

Plaintiff has the burden to show outrageous conduct by clear and convincing evidence. Although Plaintiff identified acts of ordinary negligence, he did not adduce any evidence from which the jury could make the necessary "additional finding that this negligence was accompanied by 'wanton or reckless disregard for the lives, safety or property of others.'" *Horton*, 690 S.W.2d 389-90. Accordingly, because Plaintiff did not present legally sufficient evidence to support a finding that Baptist acted with gross negligence, Baptist is entitled to judgment as a matter of law on Plaintiff's claim for punitive damages.

IV. In the alternative, this Court should order a new trial under Rule 50(b) and 59(a) or reduce the jury's damages award under Rule 59(e) to conform to the evidence presented at trial.

In assessing a motion for a new trial due to excessive damages, the Court must calculate, based on the evidence that was presented at trial, "the maximum amount the jury could reasonable have awarded." *Skalka v. Fernald Envtl. Restoration Mgmt. Corp.*, 178 F.3d 414, 427 (6th Cir. 1999); *see also Lentz v. City of Cleveland*, 333 F. App'x 42, 49 (6th Cir. 2009) ("A district court may reduce an excessive jury award if it is beyond the maximum damages that the jury reasonably could find to be compensatory for a party's loss."). Similarly, a motion for remittitur should be granted when a jury's award is "1) beyond the range supported by proof; 2) so excessive as to shock the conscience; or 3) the result of mistake." *Szeinbach v. Ohio State Univ.*, 820 F.3d 814, 820 (6th Cir. 2016).

Considering the facts presented at trial and previous awards made in similar cases, the

jury's award is excessive and appears to have been influenced by passion and prejudice. This Court should therefore order a new trial or, in the alternative, reduce the damages award to conform to the evidence presented at trial.

A. The jury's compensatory damages award is excessive.

Even if Plaintiff adduced legally sufficient proof that Baptist's actions caused prolonged pain and suffering and emotional distress, the amount awarded by the jury to compensate these alleged injuries is grossly excessive. Indeed, Plaintiff's claimed injuries are even more minor than those presented in cases where the court still determined that damages were excessive.

For instance, in *Lentz*, the Sixth Circuit found that the district court abused its discretion by denying defendant's motion for remittitur of an $707,367.32 emotional distress claim where the distress lasted two years. 333 F. App'x at 49. *Lentz* involved a discrimination claim where Plaintiff was placed on "gym detail" for two years causing depression, adjustment disorder, feeling of going to jail or being in a coffin, and irritability and isolation from family and friends, among other psychological damages. *Id.* The Sixth Circuit found that the jury's award of $707,367.32 was excessive for "temporary emotional harm." *Id.* On remand, the District Court remitted the jury's emotional distress damages award to $200,000. *Lentz v. City of Cleveland*, 694 F. Supp. 2d 758, 760 (N.D. Ohio 2010).

Similarly, in the Sixth Circuit found a $75,000[2] award for emotional distress damages grossly excessive and ordered the Plaintiff to remit one-half of the amount awarded or agree to a new trial. *See Gates v. Guyton*, 853 F.2d 926, 1988 WL 81271 at *3 (6th Cir. 1988) (unpublished table). *Gates* involved excessive use of force by four police officers in slapping

[2] Adjusting for inflation, the $75,000 award in 1988 would amount to approximately $186,662.39 in 2022. U.S. Bureau of Labor Statistics, CPI Inflation Calculator, https://www.bls.gov/data/inflation_calculator.htm

plaintiff, kicking her onto the ground, and kicking and punching her for several minutes while she lay on the ground. *Id.* at *1. The Sixth Circuit found the award clearly erroneous because plaintiff "suffered virtually no physical injuries, and plaintiff did not consult . . . her treating psychiatrist . . . [and] plaintiff suffered barely $1,200 in actual medical expenses." *Id.* at *3.

Here, the jury awarded Mr. Williams $545,000 for prolonged pain and suffering and for emotional distress for the 6–7 minute transfer to UK Medical Center. As explained above, any finding of prolonged pain and suffering was based on pure speculation, as the jury was not presented with any evidence from which it could conclude that under any scenario Plaintiff could have received pain-reducing care prior to his heart attack resolving on its own. With respect to emotional distress, Plaintiff testified only that that he was thinking about his family and whether he would make it while he was experiencing the heart attack; importantly, he did not testify about whether or how his emotional distress changed or increased after he was re-routed to UK. In fact, he explicitly testified that the 6-7 minutes to UK *did not* feel like an eternity. Other than his own testimony, Plaintiff's only evidence on this point was EMT witness testimony that he was angry because he was not able to go to the hospital of his choice, and Dr. Glaser's testimony that he heart rate increased from 86 to 111, which *could* indicate stress or anger.

Plaintiff suffered no physical injuries, and did not prove that he suffered any prolonged pain and suffering. He did not incur medical expenses or treat with a psychiatrist or counselor. Simply put, 6-7 minutes of being angry about going to a different hospital—when Plaintiff has no evidence that he had a right to be seen at a particular hospital, and diverting Plaintiff to a different hospital would have been appropriate if done while he was still en route—is not sufficient to uphold a jury verdict of $545,000 in compensatory damages. The Court should order a new trial under Rule 59(a) or remit the verdict to an amount supported by the evidence.

B. The jury's punitive damages award is excessive.

Likewise, the punitive damages award of $1,850,000 is excessive. The trial court has the authority and responsibility to reduce a constitutionally excessive punitive damage award:

> The Due Process Clause of the Fourteenth Amendment constrains a state court award of punitive damages . . . and, consequently, the courts have the responsibility for determining whether a particular damage award has exceeded constitutional limits. If it has, remittitur is appropriate.

Yung v. Grant Thornton, LLP 565 S.W.3d 22, 63 (Ky. 2018), *citing State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416-418, 123 S. Ct. 1513 (2003); *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 568, 116 S. Ct. 1589 (1996). In the present matter, even if punitive damages were properly presented to the jury for consideration, the $1,850,000 awarded exceeds constitutional limits.

In *BMW*, the United States Supreme Court identified three guideposts to determine if an award of punitive damages is grossly excessive: (1) the degree of reprehensibility; (2) the disparity between the harm and the punitive damages award; and (3) the difference between this remedy and the civil penalties authorized in comparable cases. "Perhaps the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct." 517 U.S. at 574–75. In *State Farm* , the Court further reiterated that the degree of reprehensibility is the "most important indicium of the reasonableness of a punitive damages award." 538 U.S. at 419.

The Court in *Campbell* went on to lay out five criteria that lower courts must consider in determining the reprehensibility of a defendant's conduct:

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

Id.

None of the factors are present here, which, as the Court explained, "renders any award [of punitive damages] suspect." *Id.* First, as explained above, Plaintiff suffered no physical harm. Second, the undisputed evidence demonstrated that Baptist's diversion plan and re-routing Plaintiff to UK Medical Center were taken solely for the purpose of patient safety. Plaintiff did not present any evidence indicating that Baptist was motivated by anything other than patient safety and care. Third, no evidence was presented demonstrating that Plaintiff was a financially vulnerable target or that Baptist's decision to re-route him had financial motivations. In fact, the evidence was that the decision to divert STEMI patients could have resulted in *less* revenue for Baptist because it would not be accepting those patients. Fourth, trial testimony was undisputed that this was a one-time isolated incident. There was no evidence presented that Baptist violated EMTALA before or after this event. Fifth, no evidence was presented that Baptist's actions involved intentional malice, trickery, or deceit.

Further, it is also relevant that Baptist received no sanctions from the OIG for its conduct and that, if it had, its penalty would have been much less than the jury's punitive award. It is undisputed that the OIG has discretion to impose monetary penalties for EMTALA violations and chose not to do so in this case. Fines for EMTALA violations for hospitals with greater than 100 beds may be up to $103,139 for each violation. (*See* CMS Center for Clinical Standard and Quality/Survey & Certification Group, Appendix A, Calculation of CMP Adjustments, *available at* https://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/SurveyCertificationGenInfo/Downloads/Survey-and-Cert-Letter-16-40.pdf.) In the case at hand, CMS found six violations of EMTALA. At most, Baptist could have been fined $618,834. The punitive damages awarded by the jury totals nearly *three times* the amount that

could have been imposed under federal law. This serves as further evidence that the jury's punitive damages award is not supported by the evidence and is unconstitutionally excessive.

Similarly, "[a]lthough the Supreme Court has not identified a concrete ratio, it has emphasized that an award of four times the amount of compensatory damages might be close to the line of constitutional impropriety." *Clark v. Chrysler Corp.* 436 F.3d. 594, 606 (6th. Cir. 2006). Here, the ratio is nearly 3.5:1. This ratio violates Baptist's constitutional due process rights due to the lack of reprehensibility factors and because of the lack of evidence supporting Plaintiff's compensatory damages.

Given that the evidence presented at trial cannot justify the jury's award for either compensatory or punitive damages, it is evident that the jury was inflamed by the improper actions of Plaintiff's counsel. A non-exhaustive list of counsel's improprieties include:

- In opening, showing the jury a slide of EMTALA settlement statistics. Counsel provided no justification for this undeniably inappropriate conduct, and instead immediately agreed to take down the slide—thereby indicating that he knew his action was improper.
- In closing, violating this Court's order (R. 204) by explicitly urging the jury to "send a message" by returning a verdict with "at least two commas."
- In closing, baselessly alleging that Baptist lied to the OIG to avoid termination of the hospital's participation in the Medicare program despite the fact that no testimony regarding Medicare or the process for termination was ever presented during the trial, and no evidence whatsoever suggested that Baptist lied to the OIG.
- In closing, misrepresenting the evidence by stating that there was no evidence of any subsequent remedial measures until December, despite testimony from Susan Mobley, Micki Blankenship, and Nic Newsome that training was implemented within a week of the incident and the existence of a sign-in sheet documenting that 53 individuals received training in April 2015.
- In closing, stating that punitive damage awards go to the state in some jurisdictions, despite the fact that this is not the case in Kentucky.

- Implying without evidence that Baptist violated HIPAA by failing to have its experts sign a Business Associate Agreement, which was wholly irrelevant to Plaintiff's claims.

- In closing, arguing that Baptist did not self-report its EMTALA violation, despite the fact that there is no duty to self-report. The only testimony regarding an obligation to report was Dr. Glaser stating that UK violated its duty to report Baptist.

- In closing, misrepresenting the evidence by arguing that there was no investigation by Baptist into the incident, when the undisputed evidence clearly showed that Baptist immediately undertook an extensive investigation beginning in April 2015.

It is counsel's misconduct, and not the evidence presented at trial, that explains the jury's excessive verdict. Due to the complete lack of evidence to support a $2,395,000 verdict for what amounted to, at most, 6-7 minutes of fleeting anger at being turned away from Baptist, this Court should order a new trial or remit the verdict to an amount supported by the evidence.

CONCLUSION

Plaintiff failed to present legally sufficient evidence to support his claims for prolonged physical pain and suffering, severe emotional suffering and mental anguish, and punitive damages. This Court should therefore enter judgment as a matter of law for Baptist under Rule 50(b) or, in the alternative, order a new trial under Rule 59(a) or reduce the jury's awards under Rule 59(e) to conform to the evidence.

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CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of the foregoing was electronically filed and served, this 11th day of October, 2022, on the following:

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