COMMONWEALTH OF KENTUCKY
PULASKI CIRCUIT COURT
DIVISION II
CIVIL ACTION NO. 15-CI-00774
JUDGE JEFFREY T. BURDETTE

CHEVANNA WALKER, *et al.* PLAINTIFFS

vs.

PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANT LAKE CUMBERLAND REGIONAL HOSPITAL'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON PLAINTIFFS' PUNITIVE DAMAGES CLAIM

LAKE CUMBERLAND REGIONAL HOSPITAL, LLC *et al.* DEFENDANTS

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INTRODUCTION

Aubrey Walker lived for less than 12 hours because she was delivered by a traumatic forceps-assisted breech delivery at Lake Cumberland Regional Hospital ("Lake Cumberland").[1] She suffered a litany of injuries: a cervical spinal cord disruption, long bone fractures, and right eye protrusion,[2] in addition to internal and external hematomas. An expert neonatologist with over 35 years of experience called Aubrey's death the "worst case of trauma" he's ever seen[3] and established Lake Cumberland's egregious systems failure as the cause.[4] Yet Lake Cumberland claims that it is entitled to summary judgment on the issue of punitive damages. It

1 *See* MX 56; Thompson depo. at 31 (Thompson excerpts attached at TAB A).

2 *See* MX 56.

3 Hermansen depo. at 72:18 (Hermansen excerpts attached at TAB B).

4 *Id.* at 35.

argues, in a conclusory fashion, that there are no genuine issues of material fact that would allow a jury to award Plaintiffs' punitive damages, when in fact there are plenty.

In sum, Lake Cumberland falls well short of requiring Plaintiffs to provide the minimal "some affirmative evidence of their right to punitive damages" that Plaintiffs must produce had Lake Cumberland established the prerequisite absence of a genuine dispute of material fact (and it has not). Despite the lack of any requirement that they do so, the evidentiary record established by Plaintiffs fully supports their claims that the conduct of Lake Cumberland, its nurses, and its staff were a substantial factor in causing Aubrey's death. After hearing the evidence, the jury, not the Court now in the pre-trial phase, is in the best position to determine whether this conduct rises to the level of gross negligence and thus justifies a punitive damages award. The Court should therefore deny Lake Cumberland's request for partial summary judgment on the punitive damages claim.

COUNTERSTATEMENT OF MATERIAL FACTS

Chevanna's belief that she would deliver Aubrey via C-section should have alerted Lake Cumberland nurses.

At Chevanna Walker's prenatal visits, Dr. Dale Rutledge, her obstetrician, informed her multiple times that she would require a C-section because Aubrey's position was "always different."[5] Upon arrival at Lake Cumberland on the day of delivery, Chevanna's mother told Malory Burton, Chevanna's main labor and

[5] C. Walker depo. at 29:22-24; 40:15; 41:20-21 (C. Walker excerpts attached at TAB C).

delivery nurse, exactly that.[6] These facts are contested, and the point is not whether Dr. Rutledge did or did not plan a C-section. The point is that Nurse Burton did not take seriously Chevanna's *belief* that she was supposed to deliver Aubrey via C-section, and she made no effort to investigate the reason for such belief. Had she bothered to raise the issue even once with Dr. Rutledge, which she did not do,[7] the concern for a potential breech delivery would have been forefront at the beginning of labor instead of coming as a complete surprise to all care givers only at the end as Aubrey began to emerge from the vaginal canal.

Lake Cumberland nurses and staff choose not to monitor and document Aubrey's progress.

Dr. Rutledge examined Chevanna just three times before delivery, once at around 9:00 a.m., once when she received her epidural around 1:30 p.m. and finally at 4:45 p.m. when he made the decision to deliver Aubrey vaginally.[8] Dr. Rutledge made no note of Aubrey's position during his 1:30 p.m. cervical examination, nor did any Lake Cumberland nurse or staff.[9] The ***only*** entry anywhere in the record (history and physical, delivery note, etc.) of Aubrey's position is the entry "VTX" at 9:00 a.m., an entry that Dr. Rutledge did not make.[10] In addition to the failures to document or potentially establish Aubrey's position (as vertex or breech), at no point did any Lake Cumberland staff responsible for caring for Chevanna ever document

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6 *Id*. at 49

7 *Id*. at 49:10-11.

8 Burton 9/21/16 depo. at 144 (Burton excerpts attached at TAB D).

9 Rutledge depo. at 110 (Rutledge excerpts attached at TAB E).

10 *Id*.

Aubrey's degree of pelvic engagement (station) reflective of Aubrey's descent through the birth canal.[11]

Although Lake Cumberland claims that staff were checking on Aubrey every half hour, it was not until 4:34 p.m. that Nurse Burton noticed decelerations and for that reason– not because Aubrey was about to crown or presenting as breech– called Dr. Rutledge to perform a cervical exam.[12] Despite concerns about decelerations, Nurse Burton chose not to perform a cervical exam herself[13] thus missing another opportunity to have established the breech presentation (this missed opportunity sacrificed eleven minutes of time that could have been used to discuss with Aubrey's parent and set up a C-section). Dr. Rutledge did not arrive until 4:45 p.m., at which point he examined Chevanna and determined that she was fully dilated and that Aubrey was in a breech position.[14] If Lake Cumberland nurses and staff were actively monitoring Chevanna and documenting Aubrey's progress as they claim, there is no way this chain of events should have sneaked up on them.

Lake Cumberland nurses and staff choose not to prepare an operating room for an emergency C-section despite ample time and availability of rooms.

Twenty three minutes passed between Dr. Rutledge's assessment that

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11 *See* MX 19.

12 Burton 5/26/16 depo. at 118.

13 Burton 9/21/16 depo. at 120.

14 Rutledge depo. at 113; 133-134. Of note, Dr. Rutledge claims that he had not determined that Aubrey was breech before 4:45 p.m. (for which there is no supporting documentation), *id.* at 111-112, Chevanna has maintained from the beginning that Dr. Rutledge had told her after Aubrey's birth that earlier that day he had thought Aubrey may be breech, C. Walker depo. at 54.

Aubrey was breech and Aubrey's ultimate delivery.[15] Lake Cumberland says there was not enough time to perform an emergency C-section, yet according to Rachel Manning, Lake Cumberland's corporate representative, an operating room at Lake Cumberland could have been prepared for an emergency C-section within 12 minutes.[16] And according to Dr. Rutledge, he only needed 5-15 minutes to perform an emergency C-section.[17] Either way, multiple operating rooms were available at the time of Aubrey's delivery, and there was more than enough time to perform a C-section. Dr. Rutledge and Lake Cumberland staff chose to proceed instead with a risky vaginal delivery of a breech infant.[18]

Lake Cumberland nurses and staff ignored Lake Cumberland policy and failed to advocate for a C-section.

One of the Lake Cumberland nurses who helped deliver Aubrey, Janet Roberts, knew that vaginal breech deliveries should not be performed.[19] Indeed, Lake Cumberland's formally enacted policy contraindicated such deliveries.[20] Despite this policy, Lake Cumberland nurses never once advocated for a C-section

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15 *See* MX 19.

16 *See* Lake Cumberland 30.02 through Manning depo. at 14 (Manning excerpts attached at TAB F).

17 Rutledge depo. at 185:1. Yet Dr. Rutledge had enough time to leave the room to retrieve Piper forceps (which he needed to do because Lake Cumberland did not have a set on hand in the delivery room). Rutledge depo. at 62-64.

18 *Id*.

19 Roberts depo. at 70 (Roberts excerpts attached as TAB G).

20 *See* MX 25. Dr. Rutledge, despite his many years at Lake Cumberland, professed himself ignorant of this hospital-wide policy. Rutledge depo. at 136:12.

or even questioned Dr. Rutledge's decision to proceed without one.[21] Lake Cumberland had no mechanism to enforce the hospital's policy against vaginal breech deliveries or to ensure that proper decision-making steps were followed in deciding not to perform a C-section.

Lake Cumberland nurses and staff proceed with a risky vaginal breech delivery without arranging for adequate assistance.

Despite the obvious risks and the potential complications that a vaginal breech delivery posed, no Lake Cumberland staff arranged for backup to be present at or after delivery, and no specialists were on hand until critical minutes after Aubrey's delivery.[22]

After Chevanna's initial push and the delivery of Aubrey's legs, trunk and abdomen, Aubrey's head stuck in the birth canal, where it would remain for three to four minutes.[23] Dr. Rutledge admits that he was facing a crisis at this point,[24] but no one from Lake Cumberland ever positioned themselves directly next to Dr. Rutledge to assist with supporting Aubrey's body during delivery,[25] a necessity when delivering a breech baby with Piper forceps. Because Lake Cumberland had no policy or system in place that actually required a skilled assistant or the presence of another physician for breech deliveries, Dr. Rutledge was free to proceed

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21 Burton 5/26/16 depo. at 112:23-113:5.

22 Rutledge depo. at 135-136. Expert testimony establishes that Aubrey's opportunity for effective resuscitation was lost in those minutes.

23 Rutledge depo. at 181:7-8.

24 *Id*. at 181:20.

25 Roberts depo. at 24.

on his own to effectuate a breech delivery of Aubrey. And he did just that.[26]

Lake Cumberland deprives Aubrey of her last chance of surviving with a botched resuscitation.

Aubrey suffered a traumatic delivery at the hands of Dr. Rutledge and Lake Cumberland.[27] His efforts to get her out of the birth canal for that three to four minutes (which must have felt a lifetime) caused Aubrey to suffer numerous fractures of her long bones, a rupture of her umbilical cord, a high cervical spinal cord disruption or fracture, bruising all over her body, including her genitalia, and swelling of her face with a right eye protrusion.[28] She was severely depressed and hypoxic,[29] and she showed little in the way of spontaneous movements following birth[30] (due to the fracture of her spinal cord high in the neck).

Despite the severity of her injuries at birth, there was a small window of time following Aubrey's birth when trained personnel, immediately available and with requisite equipment, might have made a difference in Aubrey's survival with some quality of life.[31] Lake Cumberland thwarted that chance by choosing not to require that any skilled resuscitators be present for the birth.[32] In fact, the first of the emergency responders did not arrive at Aubrey's bedside until more than ten (10)

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26 Rutledge depo. at 138.

27 *See* MX 56; Thompson depo. at 31.

28 *See* MX 56.

29 Roberts depo. at 31-32.

30 Puri depo. at 26 (Puri excerpts attached at TAB H).

31 *See* Hermansen Expert Disclosure (attached at TAB I).

32 Hermansen depo. at 35-37.

minutes after birth.[33] And even when Lake Cumberland staff started the resuscitation, they botched it in several ways—taking too long to get an IV access, giving epinephrine through the wrong route to the point that it was worthless, and failing to give the requested fluids, just to name a few.[34] Simply, "[t]here was almost no one in charge, and the people who were in charge were not skilled and did it poorly."[35] By the time Aubrey was life flighted to University of Kentucky Hospital, the die was cast and Aubrey would be pronounced dead at 4:15 a.m. on August 7, 2014, just under 12 hours after she was born.[36]

ARGUMENT

Lake Cumberland's motion doesn't meet its preliminary burden, so Plaintiffs are excused of any the requirement to come forward with "at least some affirmative evidence" regarding punitive conduct. Had Lake Cumberland met its burden, Plaintiffs could easily meet theirs (Plaintiffs will do so in this Response even though not required). It is at directed verdict stage that the Court must test whether Plaintiffs may present the claim for punitive damages to the jury, not here.

Under Kentucky law, "[a]n instruction on punitive damages is warranted if there is evidence that the defendant … was grossly negligent by acting with wanton or reckless disregard for the lives, safety, or property of others." *Thomas v. Greenview Hospital, Inc.*, 127 S.W.3d 663, 673 (Ky. App. 2004). "A party is entitled

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33 *See* Farooqui depo. at 32, excerpt attached at TAB J.

34 Hermansen depo. at 34-35.

35 Hermansen depo. at 35-36.

36 *See* MX 55.

to have the jury instructed on the issue of punitive damages 'if there [is] *any evidence* to support an award of punitive damages.'" *Horton, supra,* at 389.

I. LAKE CUMBERLAND HAS FAILED TO MEET ITS THRESHOLD SUMMARY JUDGMENT BURDEN, SO PLAINTIFFS NEED NOT PROVIDE ANY AFFIRMATIVE EVIDENCE THAT PUNITIVE DAMAGES ARE WARRANTED

Lake Cumberland gets it right that it is *Lake Cumberland's* burden to show an *absence* of *any* genuine issue of material fact (and there are several here) that would entitle Plaintiffs to a punitive damages award. MIS at 5; *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *Steelvest, Inc. v. Scansteel Serv. Ctr.*, Inc., 807 S.W.2d 476, 480 (Ky. 1991). That is, it is *Lake Cumberland's* burden to show the *complete absence* of evidence in the record on which "a reasonable jury could return a verdict for [Plaintiffs]." *Steelvest, Inc.*, 807 S.W.2d at 480. True, the summary judgment standard is (justifiably) a difficult standard to meet. But it is Lake Cumberland's burden, not Plaintiffs', to meet it. Then, and only then, the burden shifts to Plaintiffs to provide "at least some affirmative evidence" on the issue of punitive damages. *Steelvest*, 807 S.W.2d at 482.

Despite readily acknowledging that it must satisfy this heavy burden before Plaintiffs need go forward at all (Memorandum in Support ["MIS"] at 5), the sum and substance of Lake Cumberland's summary judgment argument goes on to ignore this very point. To wit, Lake Cumberland claims entitlement to summary judgment because Plaintiffs' have (allegedly) "failed to establish" or "failed to provide" instead of meeting *its burden* of showing the *complete absence* of such evidence:

- "Plaintiffs have failed to establish admissible evidence to support an award of punitive damages against Lake Cumberland." (MIS at 6)

- "Plaintiffs cannot provide admissible evidence to support an award for punitive damages against Lake Cumberland." (MIS at 7)
- "The Plaintiffs have failed to provide admissible evidence of gross negligence of the nursing staff or Lake Cumberland." (MIS at 8)
- "Plaintiffs have not provided any evidence to support vicariously imposing punitive damages against Lake Cumberland for the alleged conduct of its nursing staff." (MIS at 10)

None of these *ipsi dixit* arguments establish the absence of disputed facts. It is not Plaintiffs' burden at the summary judgment stage, as the nonmovant, to "establish admissible evidence" of their right to receive punitive damages as a matter of law; to the contrary, it is Lake Cumberland's burden to show by evidentiary reference that they could not possibly do so, based on undisputed facts or admissions in the evidentiary record. Conclusory arguments that Plaintiffs "failed to" or "cannot" or "must now" establish evidence surely fall short of what is first required from Lake Cumberland.

At the end of the day, conclusory statements and self-serving characterizations of deposition testimony are just not good enough to meet Lake Cumberland's summary judgment burden, which requires it to show an absence of *any* genuine issue of material fact (and there are plenty here, *see* Sections III and IV, *infra*) that would entitle Plaintiffs to a punitive damages award. Because Lake Cumberland has not met its threshold burden, no burden shifts to Plaintiffs, and the Court should overrule Lake Cumberland's motion on this ground alone.

II. A SHOWING OF EVEN A "TRACE" OR "SCINTILLA" OF EVIDENCE PRECLUDES SUMMARY JUDGMENT ON PLAINTIFFS' CLAIMS FOR PUNITIVE DAMAGES

If Plaintiffs were required to provide affirmative evidence that a genuine issue of material fact exists, Plaintiffs can easily do so (*see* Arguments III and IV, *infra*). After drastically underselling the summary judgment standard of review in its motion, a standard that overwhelmingly favors Plaintiffs, Lake Cumberland then misstates Kentucky law by arguing that Plaintiffs must show evidence at the summary judgment stage to the standard of "clear and convincing" evidence and argues further that expert testimony is required to prevail on punitive damages. It is wrong on both counts, as the Court's only focus now is on whether Lake Cumberland met its burden, and if so, whether Plaintiffs show enough (and they do, *see* Arguments III and IV, *infra*) to deny this drastic remedy.

A. Kentucky's Summary Judgment Standard Does Not Allow "Testing" of the Evidence Once a Dispute of Material Fact Is Shown.

In the words of Lake Cumberland, "qualitative differences exist between the definitions of negligence and recklessness."[37] Within the context of Kentucky's summary judgment jurisprudence, it is the jury at trial that must evaluate these "qualitative differences," not the trial court at summary judgment. Our Supreme Court has made it plain for decades that the purpose of summary judgment practice is not to "test" the quality or strength of the evidence:

> Summary judgment cannot be used for the purpose of testing the sufficiency of a party's evidence. Where there is a genuine issue on a material fact, and it is properly joined by the pleadings, a trial is the

[37] Internal citations and quotations omitted.

> only battleground. Until the time of trial every litigant must have the opportunity to search for and secure whatever evidence may be necessary to perfect his case, and unless it is manifestly impossible for him to produce it he cannot be forced to a premature showdown in that respect by a motion for summary judgment.

Payne v. Chenault, 343 S.W.2d 129, 132-33 (Ky. 1960) (superseded by statute on unrelated holdings), *West v. Goldstein*, 830 S.W.2d 379 (Ky. 1992)).[38] Because a "qualitative" assessment necessarily requires factual determinations delineating matters of degree and because Kentucky's summary judgment jurisprudence repeatedly instructs that identifying the existence of a genuine dispute of a material fact, "even by a scintilla of evidence," is *the only purpose* of summary judgment, it is simply not the time to evaluate qualitative differences, to debate the strength of the evidence, or to argue who should prevail. *Rowland,* note 39, *supra.*

Without any actual analysis, Lake Cumberland treats it as a given that Plaintiffs have some obligation at this stage to show the dispute of fact "by clear and convincing" evidence. Lake Cumberland cites no case supporting that proposition, and for good reason, since no Kentucky case so holds. Kentucky has expressly rejected that federal approach[39] in *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 482 (Ky. 1991). The Supreme Court in *Steelvest* affirmed its earlier holdings in, *inter alia*, *Payne v. Chenault*, *supra*, and *Roberson v. Lampton, supra,*

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[38] To the same effect, *see Rowland v. Miller's Adm'r,* 307 S.W.2d 3, 9 (Ky. 1956) ("The weight of evidentiary material submitted in support of the motion for a summary judgment is of little, if any, consequence; nor, within reasonable bounds, is its competency important.").

[39] Based on the required showing at summary judgment of "clear and convincing" proof in *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). *Steelvest* firmly rejected this federal jurisprudence five years later.

rejecting the federal practice where summary judgment would be approached pre-trial in the same fashion that directed verdicts are handled during trial. At trial, the sufficiency of the proof to support a verdict under the burdens of proof presented in the instructions is tested. *Steelvest* teaches ***that this is not the summary judgment practice in Kentucky***, where the trial court's job is simply to find disputed facts, not to predict success at directed verdict arguments or to test the sufficiency of proof in advance of trial.

The only task of the trial court when faced with a motion for summary judgment, whether the claim at trial will measured on "what you believe" or on an enhanced burden of proof ("clear and convincing"), is to determine if there is a genuine issue of material fact. *Payne v. Chenault, supra; Steelvest, supra.* Once that determination is made in the affirmative, the job of the trial court is done, and the motion should be rejected. As stated in *Conley v. Hall*, 395 S.W.2d 575, 580 (Ky. 1965), "[t]he burden is on the movant to establish the nonexistence of a material fact issue. He either establishes this beyond question or he does not. If any doubt exists, the motion should be denied." Lake Cumberland has not shown that it is impossible for Plaintiffs to produce proof at trial that would allow them to prevail. In the face of the multiple disputed facts supporting gross negligence by Lake Cumberland directly and also by its employees, this motion for partial summary judgment must fail. *See* Arguments III and IV, *infra.*

B. Expert Testimony Is Allowed But Not Required To Support Punitive Damages.

In describing the test at directed verdict for the character and quality of

evidence offered in support of punitive damages in Kentucky, Lake Cumberland correctly notes that Plaintiffs must show evidence that would allow a jury to conclude that Lake Cumberland's misconduct went beyond ordinary negligence into the territory of gross negligence. But that testing of the degree of evidence does not happen at summary judgment where the sole question is the identification of *the absence of* contested facts. The identification of the absence of a factual dispute does not require (as Lake Cumberland claims) that a plaintiff has an expert's sworn assessment of reckless or grossly negligent behavior in support (although that would certainly serve the purpose, as Lake Cumberland's argument impliedly admits[40]).

1. Expert testimony is not required, even at trial, to support a claim for punitive damages.

While the jury may certainly rely on expert testimony alone to establish reckless conduct or gross negligence, a jury does not need it. Kentucky law is clear that the jury may readily conclude (or even infer) gross negligence from the totality of the evidence. *Horton v. Union, Light, Heat & Power Co.*, 690 S.W.2d 382 (Ky. 1985). Kentucky law does not, as Lake Cumberland contends, *require* an expert to characterize the *degree* to which actions depart from the standard of care (i.e. that a defendant's actions constitute gross negligence) for a plaintiff to withstand

[40] See *Peoples Bank of N. Kentucky, Inc. v. Crowe Chizek & Co., LLC*, 227 S.W.3d 255 (Ky. App. 2008).

summary judgment on punitive damages.[41] None of the cases that Lake Cumberland cites for this proposition say that, either.[42] There is simply no requirement that this evidence come from the mouth of an expert.

Whether Plaintiffs present expert testimony on this issue or not (they have disclosed that they plan to, as required pursuant to civil rule and Court order), Kentucky's punitive damages standard necessarily requires the jury, not the trial court, to be the one "testing" the evidence of negligence to see if it equates to recklessness or gross negligence. Plaintiffs acknowledge that "[u]nder Kentucky law, a plaintiff alleging medical malpractice is generally required to put forth expert testimony to show that the defendant medical provider failed to conform to the standard of care." *Blankenship v. Collier*, 302 S.W.3d 665, 670 (Ky. 2010) (citing *Perkins v. Hausladen*, 828 S.W.2d 652, 655-56 (Ky. 1992)). The standard of care of a professional doesn't change when the focus becomes not just deviation from it, but reckless or gross deviation from it. Plaintiffs have established the standard of care, which Lake Cumberland acknowledges by its failure to move for summary

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[41] It is worth noting that medical defendants often argue that an expert witness's testimony as to whether the deviation from the standard of care constitutes a wanton or reckless disregard for the safety of others is *inadmissible,* claiming that it is an ultimate issue that is reserved for the jury. So, since Plaintiffs' experts did actually use the magic words that Lake Cumberland now claims are missing—"reckless, wanton, or gross negligence"—it will surely file a motion *in limine* to preclude these opinions, proving only Lake Cumberland's ability to argue both sides of any argument.

[42] *Peoples Bank*, *supra*, is the primary case cited for this proposition. The court never once said that "admissible expert proof" was *required* to survive summary judgment on the issue of gross negligence. Instead, it merely held as *sufficient* the expert's testimony that the defendant's conduct was a gross deviation from the standard of care. 227 S.W.3d at 268. This distinction is as clear as day.

judgment on the negligence claim in its motion.

2. Contrary to Lake Cumberland's assertion, Plaintiffs do have sworn testimony from experts of gross negligence.

Even though expert testimony is not required for the jury to be instructed on (and subsequently award) punitive damages, Plaintiffs anticipate that their experts will testify at trial on issues relevant to such damages.[43]

Dr. Landon provided sworn testimony in his deposition incorporating that disclosure as his testimony.[44] As did Nurse Payne. [45] Dr. Hermansen wasn't specifically asked to affirm or adopt his disclosure (TAB B)[46] but he provided sworn testimony that, in over 35 years of practicing medicine, this was the "worst case of trauma" that he'd ever seen.[47] He described what took place as medicine "from the 1950s," not medicine of the modern era.[48] He has many criticisms of Lake Cumberland's resuscitation efforts, but his main criticism was that "their system

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[43] The CR 26.02(4) disclosures of Dr. Landon and Nurse Payne are attached at TABs K and L. *See* also Dr. Hermansen's disclosure at TAB I.

[44] "Q. …And then my last question is with regard to Exhibits 6, your disclosure, and Exhibit 2, your handwritten notes. Do you incorporate those as part of your testimony? A. I do." Landon depo. 100:16-24.

[45] "Q. Do you affirm the disclosure as your testimony? A. Yes." Payne depo. 75:14-16.

[46] Plaintiffs do not accept Lake Cumberland's argument that a CR 26.02(4) disclosure must be sworn to be considered on summary judgment. The federal case law cited by Lake Cumberland does not clearly support the proposition for which it is cited, and moreover is not binding on Kentucky courts given Kentucky's well-established summary judgment jurisprudence.

[47] Hermansen depo. at 71:14-15.

[48] *Id*. at 72:18.

set them up for this."[49] With a system so lacking in procedural safeguards, tragedy was bound to strike—if not to Aubrey, then the next baby, or the one after that. Whether Dr. Hermansen uses the word "reckless" or "gross," or instead describes the reckless conduct, a jury could justifiably find that this actual testimony shows that Lake Cumberland's system, and the many actors within that system, displayed a reckless disregard for human life. Put differently, even if this testimony were all that Plaintiffs introduced at trial on the issue of punitive damages (it won't be), they would be entitled to have the jury so instructed. It follows that this genuine issue of material fact necessarily precludes summary judgment in its own right.

C. Summary Judgment is a Drastic Remedy and is Not Supported by the Evidentiary Record in this Case.

The Kentucky Supreme Court has astutely observed that "the granting of a summary judgment is a **drastic remedy**" that "deprives a party of a trial and results in a final judgment against him." *Conley v. Hall*, 395 S.W.2d 575, 582 (Ky. 1965) (emphasis added). If Lake Cumberland's motion is denied, it will "suffer[] no such consequences and may still obtain a favorable judgment." *Id.* It is for this reason that "the considerations on a motion for summary judgment must be loaded in favor of [Plaintiffs]. . ." *Id.* This drastic remedy "is only proper where the movant shows that the adverse party ***could not prevail under any circumstances.***" *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991) (*citing Paintsville Hospital Co. v. Rose*, 683 S.W.2d 255 (Ky. 1985)) (emphasis added). Consequently, summary judgment must be granted "[o]nly when it appears

[49] *Id.* at 35.

impossible for the nonmoving party to produce evidence at trial warranting a judgment in his favor . . . ." *Huddleston v. Hughes*, 843 S.W.2d 901, 903 (Ky. App. 1992) *(*citing *Steelvest*, *supra*, at 482) (emphasis added).

In practice, summary judgment should almost never be granted—but certainly not in this case, on this issue, where it is *far* from impossible that Plaintiffs can produce *at least some* evidence warranting punitive damages.

III. GENUINE ISSUES OF MATERIAL FACT AS TO LAKE CUMBERLAND'S OWN GROSS NEGLIGENCE PRECLUDE SUMMARY JUDGMENT

Drawing all permissible inferences in Plaintiffs' favor and disregarding all evidence favorable to Lake Cumberland that a "jury would not be required to believe" (as is required on summary judgment), the jury in this case could conclude:[50]

- Lake Cumberland had no system in place to ensure that nurses and staff would adequately monitor or document Aubrey's progress through labor;
- Lake Cumberland chose not to prepare a room for an emergency C-section despite ample time and availability of rooms;
- Lake Cumberland did not require its employees to advocate for a C-section delivery, despite the fact that vaginal breech deliveries were contraindicated by its own policy;
- Lake Cumberland did not keep the proper equipment for a vaginal breech delivery on hand, which required Dr. Rutledge to leave Chevanna to find Piper forceps;
- Lake Cumberland had no policy or system to require backup to be on hand for a vaginal breech delivery, nor did it have a policy or system that would require a skilled resuscitator to be present during such a risky delivery; and
- Lake Cumberland deprived Aubrey of her last chance of survival by its

[50] *See* Counterstatement of Facts Pertinent to Punitive Damages, *supra,* and the Disclosures of Plaintiffs' experts at TAB H, J, and K.

haphazard resuscitation provided by its designated responders.

That is, Lake Cumberland's conduct amounted to a top-to-bottom systems failure, a gross deviation from the standard of care of hospitals. The bottom line is that Lake Cumberland's own conduct would justify an award of punitive damages, and since all of the proof above is of Lake Cumberland's *direct negligence,* KRS 411.184(3) is not implicated. Summary judgment is not warranted.

IV. GENUINE ISSUES OF MATERIAL FACT AS TO THE GROSS NEGLIGENCE OF LAKE CUMBERLAND'S AGENTS AND EMPLOYEES AND WHETHER LAKE CUMBERLAND SHOULD HAVE ANTICIPATED, AUTHORIZED, OR RATIFIED THEIR EMPLOYEES' CONDUCT PRECLUDE SUMMARY JUDGMENT

Drawing all permissible inferences in Plaintiffs' favor and disregarding all evidence favorable to Lake Cumberland's agents and employees[51] that a "jury would not be required to believe" (as is the rule on summary judgment), the jury in this case could conclude:[52]

- Lake Cumberland nurses were grossly negligent in never checking the engagement (station) of Aubrey's descent through the birth canal. This led to her "surprise" crowning at 4:45 pm.
- Lake Cumberland nurses were grossly negligent in never checking the position (breech, vertex, transverse) Aubrey. This led to her "surprise"

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[51] Like Lake Cumberland, Plaintiffs incorporate by reference their Response to Lake Cumberland's motion for partial summary judgment as to whether Dr. Rutledge was an agent of Lake Cumberland. Lake Cumberland simply assumes the Court will conclude now that he is not an agent and has offered no argument that his gross negligence should not be imputed to it (other than another conclusory statement that Plaintiffs can't meet the statutory standard). In sum, Lake Cumberland makes no showing of entitlement to partial summary judgment excusing Lake Cumberland from vicarious liability for Dr. Rutledge's gross negligence.

[52] *See* Counterstatement of Facts Pertinent to Punitive Damages, *supra,* and the Disclosures of Plaintiffs' experts at TAB H, J, and K.

breech presentation at 4:45 pm.

- Lake Cumberland nurses were grossly negligent in ignoring Chevanna's information that something about her pre-natal course required a C-section delivery.
- Lake Cumberland nurses were grossly negligent in not advocating that parental consent for a breech delivery be obtained.
- Lake Cumberland nurses were grossly negligent in not advocating that a C-section be performed.
- Lake Cumberland nurses were grossly negligent in not providing assistance during the forceps breech delivery.
- Lake Cumberland nurses were grossly negligent in not requiring anticipatory attendance of resuscitation team members before delivery.
- Dr. Rutledge was grossly negligent in multiple ways, including failure to timely determine breech presentation, failure to give the choice of breech delivery to Aubrey's parents, failure to provide a C-section delivery, failure to have skilled resuscitation on hand.
- The resuscitation team did not respond appropriately.

In sum, abundant evidence exists regarding the gross negligence of Lake Cumberland employees and staff, and its agents. Although not the case with Lake Cumberland's direct gross negligence, its liability for agents and employees has an additional statutory requirement. KRS 411.184(3) reads:

> (3) In no case shall punitive damages be assessed against a principal or employer for the act of an agent or employee unless such principal or employer authorized or ratified or should have anticipated the conduct in question.

Assuming *arguendo* the constitutionality of KRS 411.184(3),[53] the case law is well-established in Kentucky that anticipation is, by its statutory definition, "should have anticipated," which is an objective standard and does not require actual anticipation; that authorization is shown by actions taken within the scope of

[53] Plaintiffs' preserve the right to assert that KRS 411.184(3) is unconstitutional.

employment; and that ratification does not have to be express but can be implied from the principal's conduct.

A. Anticipation

Lake Cumberland provides no analysis of the statute's use of the phrase "should have anticipated." But this express objective standard requires reference to the circumstances as opposed to actual subjective knowledge of an impending known action. (*See Kentucky Farm Bureau Mut. Ins. Co. v. Troxell*, 959 S.W.2d 82, 86 (Ky. 1997) which allows admission of proof of prior conduct but does not make "prior knowledge" a *sine qua non* of anticipation).

Here, Lake Cumberland knew that it did not equip its nurses with training to support their duty to invoke a chain of command and question Dr. Rutledge and advocate for Aubrey as he proceeded to effectuate a solo preach delivery with no parental consent. Moreover, Lake Cumberland did not provide training in the form of mock drills or other support for the difficult obligation of advocating for patients in the face of a physician's unsafe actions.[54] Lake Cumberland, having failed to train its nurses how to perform such advocacy, should have anticipated, especially in this type of emergency delivery situation, that they would fail to honor their obligation to advocate for Chevanna and Aubrey. Instead, Lake Cumberland's system at the time of Aubrey's death was to "decide on a case-by-case basis" what needs to be done.[55] In the end, their "system [or lack thereof] set them up for this."[56]

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54 *See* Burton 9/21/16 depo. at 76:6-77:20 (TAB D).

55 Hermansen depo. at 36.

56 Hermansen depo. at 35.

Lake Cumberland knew that its labor nurses would not track the fetal engagement or position because it did not require these observations on its Labor and Delivery Record.[57]

Lake Cumberland knew that Dr. Rutledge and its labor nurses were not trained to obtain informed consent before proceeding with a risky vaginal breech delivery in lieu of the safer option—a C-section delivery. Dr. Landon will opine that Dr. Rutledge and Lake Cumberland's labor nurses had at least thirty minutes to prepare an operating room for an emergency C-section, or at the very least, to obtain Chevanna's informed consent.[58] And, according to nursing expert Jane Payne, "LCRH staff knew that Dr. Rutledge needed to discuss with Chevanna the risks and benefits of both a C-section and a forceps-assisted delivery."[59] With even the most minimal risk analysis, Lake Cumberland should have anticipated that nurses would overlook obtaining a second consent immediately before delivery. Lake Cumberland did not have "any method [e.g., form, training, check-off, and the like] to enforce [its] policies and procedures"[60] to ensure that informed consent was actually given. In the end, the collective failure of Lake Cumberland nurses to obtain informed consent—a clear breach of the standard of care—was inevitable and should have been anticipated.

B. Authorization

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57 *See* note 9, *supra*. (TAB E).

58 *See* Dr. Landon's disclosure at TAB K.

59 *See* Jane Payne's disclosure at TAB L.

60 *Id*.

Lake Cumberland cites to *Saint Joseph Healthcare, Inc. v. Thomas*, 487 S.W.3d 864 (Ky. 2016) and to *Beglin*, but again provides no analysis of what constitutes authorization. Neither case requires that authorization be in advance.[61] Actions taken within the course of one's duties or authority would qualify as "authorized," and there is no requirement that Lake Cumberland must have known "the exact undesirable manner" of its nurses' gross negligence. *Patterson v. Tommy Blair, Inc.*, 265 S.W.3d 241, 244 (Ky. App. 2007).

There is no hint in the record that any employee of Lake Cumberland acted outside the scope of their employment, nor does Lake Cumberland establish that Plaintiffs cannot prove at trial that the agents' and employees' actions were all "within the scope of their employment." That being the case, they were "authorized."

Moreover, a Lake Cumberland charge nurse was present during the events leading up to delivery. Janet Roberts, the Lake Cumberland appointed charge nurse on that unit on the day of Aubrey's delivery, was present throughout the delivery.[62] A charge nurse is responsible for that unit, for making assignments, for ensuring adequate staffing, for getting what anyone needs; the charge nurse is also the first organizational employee a staff nurse turns to when she decided to institute the chain of command.[63] Ms. Roberts' presence serves as proof of Lake Cumberland's

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61 *Beglin* simply holds that authorization "connotes" pre-approval, 375 S.W.3d at 793.

62 *See* Burton 9/21/16 depo. at 56 (TAB D).

63 *See* Roberts depo. at 44:16-45:15. TAB G. Ms. Roberts checked in on Chevanna and Aubrey even during the resuscitation, because it was part of her responsibility as charge nurse. *Id.,* at 63:10-64:6. *See also* Burton 9/21/2016 depo. at 70:5-71:9. TAB D.

authorization of Malory Burton's actions and failures to act, and also serves as additional proof of Lake Cumberland's direct organizational responsibility given her role in management since she, too, failed to advocate, failed to obtain informed consent, and the like. Despite admitting that she knew vaginal breech deliveries were disfavored by Lake Cumberland policy,[64] she never once questioned any of Dr. Rutledge's actions, thereby authorizing them herself.

C. Ratification

Lake Cumberland cites to *Saint Joseph Healthcare, Inc. v. Thomas*, but does not mention the important holding in the case, specifically the rejection of "the Hospital's argument that an employer's ratification under KRS 411.184(3) can only be established by the employer's explicit affirmation or endorsement of the wrongful behavior." 487 S.W.3d at 874. The Court further explains:

> Like any other factual issue, ratification of wrongful conduct may be proven upon the application of reasonable inferences drawn from circumstantial evidence sufficient to convince a reasonable juror that the employer approved of the conduct after the fact, even if it had not authorized or anticipated the offensive behavior in advance.

Saint Joseph Healthcare, Inc. v. Thomas, 487 S.W.3d at 874-75.

To the same effect is *MV Transp., Inc. v. Allgeier,* 433 S.W.3d 324, 338–39 (Ky. 2014) where a jury verdict was sustained on "ratified, authorized, or should have anticipated" when the evidence demonstrated laxity in safety training and reasonable anticipation that an employee would follow company policies that put the company's risk management ahead of an injured customer.

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64 *See* note 19, *supra*. (TAB G).

"Ratification" is also proven here. Lake Cumberland had after-the-fact meetings ("huddles"[65]). Those meetings gave Lake Cumberland the requisite after-the-fact awareness of the conduct here. The lack of any consequences is evidence of intent to ratify. *Saint Joseph Healthcare, Inc. v. Thomas*, 487 S.W.3d at 874-75.

Additional evidence of ratification is the non-critical presence of the Lake Cumberland-selected charge nurse during the entire sequence of delivery, as discussed in the preceding section.

* * * * *

As shown above, every action of the nurses was within their anticipated scope of employment. Those actions were taken within the purview of Lake Cumberland-selected management personnel (the charge nurse). Lake Cumberland knew about the actions and expressed acceptance of them by its failure to admonish, discipline or criticize the course of action followed. It is not impossible for Plaintiffs to prove at trial that Lake Cumberland "anticipated," "authorized" OR "ratified" the gross negligence of the nursing staff, of Dr. Rutledge and of the resuscitation team.

In sum, Lake Cumberland's nurses and staff were simply not trained by their employer to handle labor safely nor were they trained to handle a vaginal breech delivery situation. Plaintiffs have established genuine disputes of material fact that Lake Cumberland has committed acts of institutional gross negligence, for which it would be liable for punitive damages, and genuine disputes of material fact that Lake Cumberland should have anticipated, authorized, and/or ratified the gross

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65 *See* Erica Anderson depo. at 36-37 (Anderson Excerpts attached at TAB M).

negligence of its employees and agents, for which it is also liable for punitive damages. Either set of actions, the independent actions or those through employees and/or agents, is sufficient for it to be liable for punitive damages.

CONCLUSION

Lake Cumberland's motion for partial summary judgment has fallen well short of proving that it will be *impossible* for Plaintiffs to produce *any* evidence that would support a punitive damages award at trial. Even if Plaintiffs were required to show at least some affirmative evidence that they are entitled to punitive damages, this Response has provided much more than that minimal requirement. Lake Cumberland's motion for partial summary judgment dismissing all liability for punitive damages should be denied. An appropriate order is tendered herewith.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The above signature certifies that, on January 28, 2021, the foregoing was electronically filed with the Clerk of Court using the KCOJ e-filing system and was served via email in accordance with any notice of electronic service or, in the absence of an electronic notification address, via email or mail as indicated below, to:

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COMMONWEALTH OF KENTUCKY
PULASKI CIRCUIT COURT
DIVISION II
CIVIL ACTION NO. 15-CI-00774
JUDGE JEFFREY T. BURDETTE

CHEVANNA WALKER, et al PLAINTIFFS

vs. **ORDER**

LAKE CUMBERLAND REGIONAL HOSPITAL, LLC D/B/A LAKE CUMBERLAND REGIONAL HOSPITAL, et al. DEFENDANTS

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* * * * * * * *

Defendant Lake Cumberland Regional Hospital, LLC (Lake Cumberland), by counsel, having moved for partial summary judgment on Plaintiff's punitive damages claim against Lake Cumberland (Count V of Plaintiff's Complaint asserted punitive damages claims against all Defendants), and all parties having had the opportunity to present arguments, and the Court being otherwise sufficiently advised,

IT IS HEREBY ORDERED that Lake Cumberland's Motion for Partial Summary Judgment on the above described claims is **DENIED** there being genuine issues of material fact for submission to the jury.

_____
JEFFREY T. BURDETTE, JUDGE
DIVISION II

DATE: _____

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