Rel: September 30, 2021

SUPREME COURT OF ALABAMA

SPECIAL TERM, 2021

1200183

Duchi Alexandra Bednarski and John Bednarski, as administrators of the Estate of Zenon Bednarski, M.D., deceased, and Auburn Urgent Care, Inc.

v.

Cortney Johnson, as administrator of the Estate of Hope Johnson, deceased

Appeal from Lee Circuit Court
(CV-16-9002004)

PER CURIAM.

Dr. Zenon Bednarski and his practice, Auburn Urgent Care, Inc. ("AUC"), appealed from a judgment entered by the Lee Circuit Court ("the trial court") awarding Cortney Johnson ("Cortney"), as the administrator

of the estate of Hope Johnson ("Hope"), deceased, $6.5 million.[1] We affirm.

Background

In October 2014, Hope and her mother visited Dr. Kerri Hensarling for evaluation and the prescription of a birth-control method. Hope's mother informed Dr. Hensarling that she had personally experienced multiple blood clots, and Dr. Hensarling ordered tests to determine if Hope was also at risk of experiencing blood clots. The test results revealed the presence of factor V Leiden, which contributes to the possibility of blood clotting.

However, Dr. Hensarling failed to accurately determine the results of the test, and Hope and her mother were informed that the test results were negative for blood-clotting factors. Dr. Hensarling prescribed hormonal birth-control pills for Hope, the taking of which in combination

[1]Dr. Bednarski died during the pendency of this appeal, and Duchi Alexandra Bednarski and John Bednarski, as the administrators of his estate, were substituted as appellants, and the style of the appeal has been changed accordingly. However, throughout the body of this opinion, we make no further distinction between Dr. Bednarski and his estate.

with the presence of factor V Leiden would increase her risk of experiencing blood clots. Hope began taking the birth-control pills as prescribed, without knowledge of her increased risk for blood clots.

On December 1, 2014, Hope visited the AUC clinic, complaining of shortness of breath, chest pains, coughing, a headache, and a sore throat. Dr. Bednarski diagnosed Hope with bronchitis and prescribed an antibiotic medication. On December 3, 2014, Hope returned to the AUC clinic, complaining of a much worsened condition, with sharp chest pains and extreme shortness of breath. A blood test was conducted, and Hope was diagnosed with leukocytosis and dyspnea and was prescribed an inhaler. The next morning, Hope died of a pulmonary blood clot.

In May 2016, Hope's father, Cortney, as the administrator of her estate, commenced this action in the trial court. In his initial complaint, Cortney named as defendants Dr. Hensarling and her practice, Lee Obstetrics and Gynecology, P.A. ("Lee OBGYN"). Cortney also named as defendants Dr. Bednarski and AUC ("the Bednarski defendants"). Cortney's initial complaint also included several fictitiously named defendants. In an amended complaint, Cortney substituted Dr. David

Willis for fictitiously named defendants. Cortney alleged that Dr. Willis had treated Hope at the AUC clinic on December 3, 2014. Cortney later reached a settlement agreement with Dr. Hensarling and Lee OBGYN.

Cortney's final amended complaint alleged a count of "Breach of the Standard of Care" against the Bednarski defendants and Dr. Willis; a count of "Legal Status: Respondeat Superior/Agency -- Corporate Defendants" against AUC; and a new count -- "Direct Liability" -- against the Bednarski defendants. In summary, count one alleged various negligent and wanton failures by the Bednarski defendants and Dr. Willis in their treatment of Hope, count two alleged that AUC was vicariously liable for the actions and inactions of Dr. Bednarski and Dr. Willis, and count three, the new count, alleged that the Bednarski defendants had been negligent "and/or" wanton in their training and supervision of Dr. Willis.

The Bednarski defendants filed a motion for a summary judgment, and Dr. Willis also later filed a motion for a summary judgment. On September 11, 2018, the trial court entered an order denying the summary-judgment motions. The Bednarski defendants filed a petition

for the writ of mandamus in this Court, seeking an order directing the trial court to dismiss certain of Cortney's claims against them, based on an argument that the claims were barred by the applicable statute of limitations. This Court denied the petition, without an opinion. Ex parte Bednarski (No. 1180076, Apr. 19, 2019), 305 So. 3d 200 (Ala. 2019)(table). Cortney's claims against the Bednarski defendants and Dr. Willis proceeded to trial.

The Bednarski defendants moved for a judgment as a matter of law at the close of Cortney's case-in-chief and at the close of all the evidence, which motions the trial court denied. The jury returned a general verdict in favor of Cortney against the Bednarski defendants and Dr. Willis, awarding Cortney damages in the amount of $9 million. The trial court thereafter entered a judgment on the jury's verdict, awarding Cortney $9 million in punitive damages.

The Bednarski defendants filed a renewed motion for a judgment as a matter of law. In their motion, the Bednarski defendants requested in the alternative various other forms of relief, including a remittitur of the

damages award. On November 12, 2020,[2] the trial court entered a lengthy order regarding the postjudgment motion filed by the Bednarski defendants. The trial court denied all the relief sought by the Bednarski defendants, except for their request for a remittitur, which the trial court granted, and reduced the damages award to $6.5 million. The Bednarski defendants appealed.

Analysis

On appeal, the Bednarski defendants assert several arguments. We address each in turn.

I. Statute of Limitations

The Bednarski defendants first argue that certain of Cortney's claims are barred by § 6-5-410, Ala. Code 1975. Section 6-5-410(d) provides that a wrongful-death claim "must be commenced within two years from and after the death of the testator or intestate." Hope died on December 4, 2014. Cortney filed his initial complaint on May 5, 2016. Therefore, the action was commenced within two years of Hope's death.

[2]The time for ruling on the postjudgment motion was extended several times. See Rule 59.1, Ala. R. Civ. P.

However, Dr. Willis was not added to the case as a named defendant until Cortney filed his first amended complaint on July 18, 2017, substituting Dr. Willis for fictitiously named defendants listed in the initial complaint. Because Dr. Willis was not substituted as a defendant until more than two years after Hope's death, the Bednarski defendants argue, the limitations period in § 6-5-410 expired with respect to any claims predicated on Dr. Willis's conduct before those claims were asserted. Therefore, the Bednarski defendants contend, they are entitled to a judgment as a matter of law concerning Cortney's claims that they negligently "and/or" wantonly trained and supervised Dr. Willis and Cortney's claim that AUC is vicariously liable for Dr. Willis's conduct. The Bednarski defendants further contend that Cortney's failure-to-train/supervise claim was also barred because it was not added until Cortney's final amended complaint, which was also filed after the limitations period had expired. We consider each of the Bednarski defendants' arguments in turn.

A. Ignorance and Due Diligence

The first issue raised by the Bednarski defendants is whether

Cortney's first amendment of his complaint to substitute Dr. Willis for fictitiously named defendants can be properly said to "relate back" to the date Cortney filed his initial complaint, thereby rendering his claims predicated on Dr. Willis's conduct timely for the purposes of § 6-5-410. In Ex parte Nationwide Insurance Co., 991 So. 2d 1287, 1290-91 (Ala. 2008), this Court stated:

> "Fictitious-party pleading is governed by Rule 9(h), Ala. R. Civ. P., which provides:
>
> > " 'When a party is ignorant of the name of an opposing party and so alleges in the party's pleading, the opposing party may be designated by any name, and when that party's true name is discovered, the process and all pleadings and proceedings in the action may be amended by substituting the true name.'
>
> "Rule 15(c)(4), Ala. R. Civ. P., provides that '[a]n amendment of a pleading relates back to the date of the original pleading when ... relation back is permitted by principles applicable to fictitious party practice pursuant to Rule 9(h)[, Ala. R. Civ. P.].'
>
> "This Court has elaborated on the interplay between Rule 9(h) and Rule 15(c)(4), Ala. R. Civ. P., stating that these two rules 'allow a plaintiff to avoid the bar of a statute of limitations by fictitiously naming defendants for which actual parties can later be substituted.' Ex parte Chemical Lime of Alabama, Inc., 916 So. 2d [594,] 597 [(Ala. 2005)](quoting

> Fulmer v. Clark Equip. Co., 654 So. 2d 45, 46 (Ala. 1995)). In order to invoke the relation-back principle and proceed under the fictitious-party rule, the original complaint must 'adequately describe[] the fictitiously named defendant and state[] a claim against such a defendant.' Fulmer, 654 So. 2d at 46 (citing Jones v. Resorcon, Inc., 604 So. 2d 370 (Ala. 1992)). In addition, a party ' " 'must have been ignorant of the true identity of the defendant and must have used due diligence in attempting to discover it.' " ' Pearson v. Brooks, 883 So. 2d 185, 191 (Ala. 2003) (quoting Crowl v. Kayo Oil Co., 848 So. 2d 930, 937 (Ala. 2002), quoting in turn Fulmer, 654 So. 2d at 46 (emphasis omitted))."

The Bednarski defendants argue that Cortney knew Dr. Willis's identity before the limitations period expired. The Bednarski defendants' argument is based on two pieces of evidence that Cortney undisputedly possessed before commencing this action: (1) a CVS Pharmacy Patient Prescription Record ("the CVS record") showing that "Willis David R" prescribed Hope an inhaler on December 3, 2014, and (2) a "triage sheet" that Hope was given during her December 3, 2014, visit to the AUC clinic ("the AUC triage sheet") showing that she was prescribed an inhaler that day. In response to the Bednarski defendants' argument, Cortney argues that he had no knowledge, before the limitations period expired, that Dr. Willis had treated Hope on December 3, 2014. In support of his position,

Cortney points out that the records he obtained from AUC before filing his complaint ("the AUC medical records") indicated that Dr. Bednarski -- not Dr. Willis -- had treated Hope on December 3, 2014.

In its order denying the Bednarski defendants' summary-judgment motion, the trial court rejected the Bednarski defendants' statute-of-limitations argument by reasoning as follows:

> "1. [Cortney] requested from [AUC] a complete copy of the records for [Hope]. The information regarding Dr. ... Willis was not included in [the AUC medical] records. It appears that this is because Dr. ... Willis was not properly trained in how to log-in to the clinic's charting system. Had he been properly trained, his name would have been recorded as a person that provided care to Hope ... on December 3, 2014.
>
> "2. [Cortney] submitted interrogatories to the [Bednarski defendants] requesting the names of any person that may have treated [Hope]. The [Bednarski defendants] did not disclose the name Dr. ... Willis in their answers. Further, they didn't update their interrogatories prior to the disclosure during depositions that Dr. ... Willis may have been a treatment provider.
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> "3. The Court finds that a CVS Pharmacy record that simply lists 'Willis, David' and doesn't indicate that he is a doctor is not sufficient to provide notice to [Cortney] when they asked for the record from [AUC] and there was no indication that Dr. ... Willis was employed there or treated [Hope].
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> "4. Furthermore, the doctor's note from [Hope's] last visit

> to [the AUC clinic] identifies Dr. ... Bednarski and Dr. Edvin Larson as the treating doctors at [the AUC clinic]. Nowhere does the doctor's note indicate the name Dr. ... Willis as a doctor at [the AUC clinic]. The doctor's note from the December 3, 2014, visit is from the same date as the CVS ... record. In examining these documents, one would easily conclude that Dr. ... Bednarski was the treating physician on December 3, 2014.
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> "....
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> "This Court cannot in good conscious grant a Motion for Summary Judgment when the [Bednarski defendants] for months seemed to be totally unaware that Dr. ... Willis treated [Hope]. [Cortney] effectively related back [his] pleadings in following ... Rule 15[, Ala. R. Civ. P.,] and made appropriate use of fictitious parties in [his] pleadings under ... Rule 9(h)[, Ala. R. Civ. P.]. Further, [Cortney] did [his] due diligence in identifying Dr. ... Willis."[3]

Thus, before filing his initial complaint in this action, Cortney had

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[3]In its postjudgment order, the trial court stated:

> "This Court has already denied summary judgment on the statute of limitations issue. ... As to the [Bednarski d]efendants' argument that the claims relating to Dr. Willis are barred by the statute of limitations, [the Bednarski defendants] presented the same argument, the same facts, and the same case law that has already been presented fully to this Court by briefs and oral argument .... In the absence of any new arguments, facts or law, this Court adopts its prior ruling and again denies [the Bednarski defendants]' Motion for Judgment as a Matter of Law."

reason to know, via the CVS record, that "Willis, David R" had prescribed Hope an inhaler on December 3, 2014, and had reason to know, via the AUC triage sheet, that Hope had been prescribed an inhaler on December 3, 2014, at the AUC clinic. However, it is undisputed that the AUC triage sheet nowhere reflected Dr. Willis's name and that, instead, Dr. Bednarski and Dr. Edvin Larson were the only physicians noted on that document as practicing at the AUC clinic. Moreover, it is undisputed that the AUC medical records given to Cortney by AUC nowhere mentioned Dr. Willis's name and, on the contrary, affirmatively and expressly indicated that Dr. Bednarski -- not Dr. Willis -- had treated Hope on December 3, 2014.

Under the circumstances of this case, we cannot conclude that, as a matter of law, Cortney should be deemed to have been aware of Dr. Willis's identity as the doctor who had treated Hope at the AUC clinic on December 3, 2014, based on the various medical records in Cortney's possession before filing his complaint. In short, the records given to Cortney by AUC upon his request identified a different party as the doctor who had treated Hope that day, and none of the medical records in Cortney's possession even identified Dr. Willis as a doctor who had ever

worked at the AUC clinic -- where the allegedly negligent or wanton conduct occurred. These facts distinguish the circumstances of this case from the cases cited by the Bednarski defendants dealing with this issue; the plaintiffs in those cases had access to concrete information demonstrating that the substituted parties were the proper defendants before the pertinent limitations periods lapsed. See Ex parte VEL, LLC, 225 So. 3d 591, 602 (Ala. 2016)("The undisputed evidence indicates that [the plaintiff] was not ignorant of [the proper defendant] at the time that she filed the original complaint. [A] letter [from an employee of the proper defendant's insurer] specifically named [the proper defendant] as the insured on whose behalf [the insurer] was acting. Further, [a] letter [from the plaintiff's counsel] ... specifically identified [the proper defendant]. That evidence indicates that [the plaintiff] actually 'knew, or should have known,' of [the proper defendant]'s identity at the time that she filed the original complaint."); Weber v. Freeman, 3 So. 3d 825, 833 (Ala. 2008)("[The plaintiff] was not 'ignorant' of a relationship that gave rise to a duty. [The plaintiff] knew of the identit[ies] of [the substituted parties] and knew that [the substituted doctor] had interpreted [the decedent]'s

abdominal radiographs (the only diagnostic test performed on [the decedent] during his visit to the emergency room) before she filed her action."(emphasis added)); and Marsh v. Wenzel, 732 So. 2d 985, 990 (Ala. 1998)("[O]ne could not reasonably conclude that [the plaintiff] was ignorant of matters -- such as the name of the pathologist who examined the tissue samples [at issue] -- that clearly were set forth in her medical records." (emphasis added)).

Next, the Bednarski defendants argue that, even if Cortney was, in fact, ignorant of Dr. Willis's identity, Cortney did not exercise due diligence in attempting to ascertain who had treated Hope at the AUC clinic on December 3, 2014.

> "The correct standard for determining whether a party exercised due diligence in attempting to ascertain the identity of the fictitiously named defendant 'is whether the plaintiff knew, or should have known, or was on notice, that the substituted defendants were in fact the parties described fictitiously.' Davis v. Mims, 510 So. 2d 227, 229 (Ala. 1987)."

Ex parte Nationwide Ins. Co., 991 So. 2d at 1291.

The Bednarski defendants specifically argue that, before filing his initial complaint and before the limitations period expired, Cortney should

have asked either CVS or the Bednarski defendants themselves: " 'Who was Willis, David R.?' " The Bednarski defendants' brief at 32. However, the Bednarski defendants' argument in this regard appears somewhat hollow, because, on the next page of their principal appellate brief, they concede that even they did not know, before the limitations period expired, that Dr. Willis had treated Hope on December 3, 2014. This concession is supported by the record, which reflects that Cortney did, in fact, ask the Bednarski defendants who had treated Hope on December 3, 2014, before the limitations period expired and that Dr. Willis's identity was still not uncovered.

In particular, as the trial court noted in its order denying the Bednarski defendants' summary-judgment motion, Cortney submitted the following interrogatories to the Bednarski defendants on October 25, 2016, which was before the limitations period expired:

> "2. State the name, address, and telephone number of each person having any knowledge of relevant facts relating to the occurrences made the basis of this litigation, and give a summary of each person's knowledge. ...
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> "....

> "13. State the name and job title of every person who, on behalf of Defendants Zenon Bednarski and/or Auburn Urgent Care, Inc., spoke to or contacted Hope Johnson, or any family member of Hope Johnson, and:
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> "a. A brief description of the substance of the conversation;
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> "b. The identity of parties to the conversation;
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> "c. The date(s) of any conversation; and
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> "d. Identify any witnesses to the conversation."

In response to interrogatory number 2, the Bednarski defendants stated only: "Dr. Zenon Bednarski, Aubryn Tharp, and Tracey Swader." In response to interrogatory number 13, the Bednarski defendants stated:

> "Hope Johnson would have spoken to someone at the reception desk on December 1, 2014, and December 3, 2014. It is not known who that specific person was on those occasions. It is also unknown the full nature of any discussions. On December 1, 2014, there would also have been conversations with Dr. Bednarski, Aubryn Tharp, and possibly Tracey Swader. On December 3, 2014, there would have been a conversation with the triage nurse, Tracey Swader[,] and possibly Aubryn Tharp."

The Bednarski defendants' ignorance concerning the identity of the doctor who had treated Hope on December 3, 2014, like Cortney's

ignorance in that regard, was also apparently due to the inaccuracies in their own records. Incidentally, these deficiencies formed a part of the conduct made the basis of Cortney's claims against the Bednarski defendants. The Bednarski defendants cite no evidence indicating that CVS would have fared any better in attempting identify Dr. Willis as the doctor who had treated Hope at the AUC clinic on December 3, 2014, had Cortney asked CVS to undertake such an endeavor. In short, the Bednarski defendants appear to be arguing that Cortney should have been able to uncover what they themselves did not, while simultaneously suggesting that all Cortney had to do was ask. We find this contention internally contradictory and inconsistent with the concept of "due diligence."

> " 'Due diligence means ordinary, rather than extraordinary, diligence.' United States v. Walker, 546 F. Supp. 805, 811 (D.C. Hawai'i 1982) (emphasis added); see also State v. Gonzales, 151 Ohio App. 3d 160, 171, 783 N.E.2d 903, 911-12 (2002). Short of what would amount to 'detective work,' the adversarial process renders the [Bednarski defendants'] contentions unrealistic."

Ex parte Nail, 111 So. 3d 125, 131 (Ala. 2012).

The circumstances of the cases cited by the Bednarski defendants

dealing with the concept of "due diligence" are distinguishable from the circumstances of this case because, in those cases, information regarding the identities of the substituted defendants was either already in the plaintiffs' possession or was readily available to them before the limitations periods expired, as opposed to being effectively hidden by the defendants' actions. See Ex parte Integra LifeSciences Corp., 271 So. 3d 814 (Ala. 2018)(concluding that the plaintiff did not exercise due diligence in ascertaining a substituted defendant's identity when a report in the plaintiff's possession before filing her original complaint identified the defendant's product as having been used in the plaintiff's surgical procedure and a simple Internet search would have revealed the defendant as the manufacturer of the product in question); Ex parte American Sweeping, Inc., 272 So. 3d 640 (Ala. 2018)(concluding that the plaintiffs had not exercised due diligence in ascertaining the substituted defendant's identity when, among many other things, one of the plaintiffs had talked on multiple occasions before the original complaint was filed with a witness to the vehicular accident in question about the involvement of the defendant's vehicle in the accident); Ex parte Lucas, 212 So. 3d 921

(Ala. 2016)(concluding that the plaintiff had not exercised due diligence in identifying the substituted defendant when the defendant's identity was disclosed in a second police report that was a public record and the plaintiff had reason to know that the first police report in her possession was incomplete); Ex parte Nicholson Mfg. Ltd., 182 So. 3d 510 (Ala. 2015)(concluding that the plaintiff had failed to exercise due diligence in identifying the substituted defendant when the defendant's identity was disclosed on the product alleged to have caused the plaintiff's injury and in publically available documents); Ex parte General Motors of Canada Ltd., 144 So. 3d 236, 242 (Ala. 2013)("Here, nothing prevented [the plaintiff]'s identification of [the party at issue] as a defendant other than his failure to conduct an inspection of the allegedly defective vehicle." "Because the label on the vehicle, which was required by law, was conspicuous, legible, and in the possession of [the plaintiff]'s agents or his family, he should have readily discovered it, and his failure to do so amounted to a failure to act with due diligence."); McGathey v. Brookwood Health Servs., Inc., 143 So. 3d 95, 108 (Ala. 2013)("Because of the medical records [the plaintiff] obtained, [she] knew [the substituted parties']

names shortly after her surgery and knew that they were involved in her treatment during the surgery. Despite this knowledge, there is no indication that, in the nearly two years between the time [the plaintiff] received the medical records and the time she filed her complaint, [the plaintiff] performed any investigation to determine whether either of those individuals was responsible for her injury. Even after [the plaintiff] filed her complaint in September 2010, it was not until late 2011 that she ascertained the roles of the two individuals in the surgery." (emphasis added)); Ex parte Mobile Infirmary Ass'n, 74 So. 3d 424 (Ala. 2011)(concluding that the plaintiff did not exercise due diligence in ascertaining the identity of the corporation doing business as the medical center where the decedent was treated when the medical records in the plaintiff's possession before the original complaint was filed clearly identified the medical center as the place where the decedent was treated); Ex parte Ismail, 78 So. 3d 399, 409 (Ala. 2011)("The plaintiffs requested and obtained [the injured plaintiff]'s medical records from [the medical center] before filing their original complaint, and those records revealed the names of two treating physicians, one of whom was [the

substituted defendant]. Nonetheless, the plaintiffs did not present any evidence to show that they made any attempt to ascertain the extent of [the substituted defendant]'s participation before they filed the original complaint[, which was four days before the limitations period expired]." (emphasis added)); Ex parte Snow, 764 So. 2d 531 (Ala. 1999)(concluding that the plaintiffs had not diligently investigated their claim when it was undisputed that the plaintiffs had known, within four months of the surgery at issue, that the substituted defendants had performed the procedure); and Ex parte Klemawesch, 549 So. 2d 62, 64-65 (Ala. 1989)(concluding that the plaintiff had not acted diligently to ascertain the identity of the physician who treated the decedent when the plaintiff had not filed a single interrogatory, had failed to initiate any other discovery until more than two years after commencing the action, an unidentified signature in the decedent's medical records was that of the attending physician, and the physician originally sued as the decedent's attending physician had produced an affidavit averring that he was not on duty at the time of the decedent's treatment and death).

We further note that the failure of the Bednarski defendants to shed

any additional light on Dr. Willis's identity as the physician who had treated Hope on December 3, 2014, in response to Cortney's discovery requests renders the circumstances of this case similar to those recently addressed by the Court in Ex parte Russell, 314 So. 3d 192, 202-03 (Ala. 2020)("[T]he trial court could have reasonably concluded that [the plaintiff] had diligently pursued discovery targeted toward identifying [a nurse] but had been hindered by [the hospital]'s failure to timely disclose a requested record that would have clearly revealed a connection between [the nurse] and [the decedent]."); 314 So. 3d at 204 ("Despite th[e plaintiff's] interrogatories and repeated informal requests by [the plaintiff]'s counsel for more specific information ... [an emergency-room secretary] was not identified as an individual who interacted with [the decedent] on December 28, 2013, until five and a half months after the statute of limitations expired.").

In light of the foregoing, we conclude that the Bednarski defendants have failed to demonstrate that the trial court's judgment is due to be reversed based on their argument that Cortney's substitution of Dr. Willis for fictitiously named defendants did not relate back to his original

complaint. Accordingly, the trial court's judgment is affirmed concerning this issue.[4]

B. Negligent "and/or" Wanton Training

Next, the Bednarski defendants argue that the new count added in Cortney's final amended complaint, "Direct Liability," is likewise barred by the applicable statute of limitations because, they say, it cannot properly be said to "relate back" to the date Cortney filed his initial complaint. As noted in the "Background" section above, the new count, in summary, alleged that the Bednarski defendants had been negligent "and/or" wanton in their training and supervision of Dr. Willis. Rule 15(c)(2) provides, in pertinent part:

> "(c) Relation Back of Amendments. An amendment of a pleading relates back to the date of the original pleading when
>
> "....

[4]The Bednarski defendants briefly argue that, because Cortney's claim against Dr. Willis was barred by the applicable statute of limitations, any claim against the Bednarski defendants that is predicated on Dr. Willis's conduct, such as the vicarious-liability claim against AUC, is likewise barred as a matter of law. Because the first argument fails, the second argument also fails.

> "(2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading ...."

This Court set forth the following summary of the applicable law concerning the application of Rule 15(c)(2) in Prior v. Cancer Surgery of Mobile, P.C., 959 So. 2d 1092, 1095 (Ala. 2006):

> "The Alabama Rules of Civil Procedure allow parties to amend their complaints. Rule 15(a), Ala. R. Civ. P. Even if otherwise barred by the applicable statute of limitations, an amendment to a complaint may be allowed if it 'arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading....' Rule 15(c)(2), Ala. R. Civ. P. However, if allowing the plaintiff to amend his or her complaint would prejudice the opposing party, the amendment should be denied. Ex parte Johnston-Tombigbee Furniture Mfg. Co., 937 So. 2d 1035 (Ala. 2005). ...
>
> "An amended complaint relates back to the original complaint under Rule 15(c)(2), Ala. R. Civ. P., when ' "the same substantial facts are pleaded merely in a different form." ' Ex parte Johnston-Tombigbee Furniture, 937 So. 2d at 1038 (quoting Court of Civil Appeals' opinion in Johnston-Tombigbee Furniture Mfg. Co. v. Berry, 937 So. 2d 1029, 1032 (Ala. Civ. App. 2004), quoting other cases)."

(Footnote omitted.)

The Bednarski defendants argue that Cortney's failure-to-train/supervise claim asserted in his final amended complaint did not

relate back to the date of his initial complaint because, they say, it consisted of new and distinct factual allegations rather than pleading the same substantial facts in different form. In his initial complaint, Cortney alleged that the Bednarski defendants had breached the applicable standard of care, as follows:

> "27. On or about December 1 and 3, 2014, Dr. Bednarski, [AUC], and/or one or more fictitious defendants, assumed responsibility to assess and prescribe treatment to Hope Johnson for complaints of worsening chest pain and shortness of breath. Defendants were under the legal duty to possess and exercise that degree of care, skill and diligence commonly possessed and exercised by same or similar healthcare providers in the national medical community, acting under the same or similar circumstances as hereinafter described.
>
> "28. In the course of assessing and treating Hope Johnson, Dr. Bednarski, [AUC], and/or one or more fictitious defendants, negligently and/or wantonly failed to exercise such reasonable care, skill, and diligence that similarly situated health care providers in the national medical community and in the same general line of practice, would have exercised in a like case.
>
> "29. Dr. Bednarski, [AUC], and/or one or more fictitious defendants, negligently and/or wantonly breached the standard of care in their treatment of Hope Johnson on or about December 3, 2014, by: 1) failing to diagnose Hope Johnson with pulmonary emboli; 2) failing to properly assess Hope Johnson's risk for pulmonary emboli and failing to perform, recommend and/or refer her for diagnostic testing,

> further treatment and intervention; 3) failing to perform a physical examination and proper evaluation for worsening symptoms; 4) failing to perform an adequate evaluation of worsening respiratory symptoms and thereby missing the diagnosis of pulmonary emboli; 5) failing to care for and treat Hope Johnson; and 6) failing to possess the medical knowledge and/or skills necessary to provide treatment for Hope Johnson."

As noted, in his final amended complaint, Cortney added a claim of "direct liability" against the Bednarski defendants, which stated, in pertinent part:

> "Defendants Dr. Zenon Bednarski, acting as employee, agent, servant and/or sole owner of [AUC], and [AUC] are directly liable for the following actions and inactions:
>
> "a. Negligently and/or wantonly directing, instructing, allowing, encouraging, sustaining, ratifying, and otherwise permitting Dr. David Willis to bypass the electronic medical record system at [the AUC clinic] on December 3, 2014;
>
> "b. Negligently and/or wantonly failing to train, instruct, require, and otherwise permit Dr. David Willis to bypass the electronic medical record system at [the AUC clinic] on December 3, 2014;
>
> "c. Negligently and/or wantonly failing to provide Dr. David Willis with login credentials on the electronic medical record system at [the AUC clinic] on December 3, 2014, thereby depriving him of access to patient records with information about prior patient visits, including laboratory data, diagnoses, treatments and physical examination

information;

"Thereby leading to incomplete and/or total loss of access to vital medical information necessary for Hope Johnson to be adequately, properly and correctly diagnosed and treated on December 3, 2014, thereby leading to her death on December 4, 2014.

"36. [AUC], by and through its employees, agents and servants, including but not limited to Dr. Zenon Bednarski, senior partner, owner and supervising physician at [the AUC clinic], negligently and/or wantonly failed to properly train and supervise Dr. David Willis on his first day at work for [AUC], by the following actions and inactions, for which [AUC] and Dr. Zenon Bednarski are directly responsible:

"a. Failing to provide Dr. David Willis with login credentials on the electronic medical record system at [the AUC clinic] on December 3, 2014, thereby depriving him of access to patient records with information about prior patient visits, including laboratory data, diagnoses, treatments and physical examination information;

"b. Requiring Dr. David Willis to examine, diagnose and treat 50-90 patients on December 3, 2014, thereby creating the potential for Dr. Willis to deliver inadequate, inappropriate and substandard care and treatment to Hope Johnson;

"c. Failing to instruct, train, and orient Dr. David Willis on the established [AUC clinic] processes, procedures, and protocols that ensured the proper flow of patients seeking medical attention at [the AUC clinic] so that every patient who needed medical attention would be examined, diagnosed and treated by a physician for their immediate medical needs[;]

> "[d]. Allowing prescriptions to be submitted, administered, and/or dispensed without a doctor ever seeing a patient, evaluating a patient's vitals, or taking and/or charting a physical exam[;]
>
> "Thereby contributing and leading to the incorrect, incomplete, improper and/or complete absence of a physical examination and assessment, diagnoses and treatment for Hope Johnson on December 3, 2014, thereby leading to her death on December 4, 2014."

The Bednarski defendants cite Prior, 959 So. 2d at 1092, in support of their argument. In Prior, the personal representative of a deceased cancer patient's estate filed a medical-malpractice and wrongful-death action against Dr. Bradley Scott Davidson and the surgery center that employed Dr. Davidson; Dr. Davidson had performed surgery on the patient and had provided pre- and post-surgical care. The personal representative also asserted a vicarious-liability claim against the surgery center based on Dr. Davidson's actions.

Subsequently, after the applicable limitations period had expired, the personal representative filed an amended complaint seeking to hold the surgery center vicariously liable for the conduct of Dr. Gaylord T. Walker, another employee of the surgery center; Dr. Walker had provided

post-surgical care to the patient on one occasion. Dr. Davidson and Dr. Walker independently had provided care to the patient on different dates. The surgery center filed a motion to dismiss the personal representative's amended complaint, arguing that the claims against the surgery center based on Dr. Walker's conduct did not relate back to the date of the original complaint under Rule 15(c)(2). Accordingly, the surgery center argued, the claims added in the amended complaint were barred by the applicable two-year statute of limitations. The trial court granted the surgery center's motion.

On appeal, this Court affirmed the trial court's decision, concluding that the personal representative

> "seeks to amend her complaint to add new facts and to add the claim that [the] [s]urgery [center] is vicariously liable for the actions of a different doctor on a different day from those actions that formed the basis of the claims asserted in the original complaint .... She is not entitled to add a separate claim of vicarious liability against [the] [s]urgery [center] for the acts of a new party by the expedient of an amendment to the complaint under Rule 15(c)(2)."

Prior, 959 So. 2d at 1097. Significant to this Court's holding was the fact that "the two doctors provided medical care to [the patient] at different

times" and that "the allegedly negligent behavior of the two doctors was different." Prior, 959 So. 2d at 1095.

In considering the personal representative's argument in Prior, this Court considered two analogous cases, Callens v. Jefferson County Nursing Home, 769 So. 2d 273 (Ala. 2000), and Sonnier v. Talley, 806 So. 2d 381 (Ala. 2001). Those cases provide a contrast to the facts presented in Prior and are helpful to our analysis of the issues currently before us. This Court stated in Prior:

> "[The personal representative] relies, in part, on Callens v. Jefferson County Nursing Home, 769 So. 2d 273 (Ala. 2000), to establish that her second amended complaint relates back under Rule 15(c)(2), Ala. R. Civ. P. In Callens, the plaintiff's mother suffered severe injuries allegedly causing her subsequent death when a group of nursing-home employees was attempting to insert a Foley catheter. Callens originally sued the nursing home and others, alleging 'wrongful death, civil conspiracy, breach of contract, and the tort of outrage.' Callens, 769 So. 2d at 278. In her amended complaint, Callens alleged 'negligent hiring, training and supervision that ... resulted in personal injury to [her mother].' Id. This Court held that Callens's amended complaint related back to her original complaint under Rule 15(c)(2), Ala. R. Civ. P. This Court noted that both the original and the amended complaints 'arose out of events of December 11, 1995.' 769 So. 2d at 278. The amended complaint related back to the original complaint because it 'arose out of the same "conduct, transaction, or occurrence" as that alleged in the original

complaint, that is, the December 11, 1995, injury to [Callens's mother].' 769 So. 2d at 278. Both the claims in the original complaint and those in the amended complaint were based on a specific incident that occurred on a specific date. The claims and allegations in [the personal representative's] ... amended complaint, on the other hand, involve different conduct that took place at a different time, and by a different doctor, than that alleged in her earlier complaints.

"Sonnier v. Talley, 806 So. 2d 381 (Ala. 2001), cited by [the personal representative], likewise does not support her position. In Sonnier, Tammy Talley sued Flowers Hospital and Dr. Sonnier and Dr. van der Meer for performing an unnecessary hysterectomy. She alleged general negligence and malpractice 'during the period June 1990 through October 1991' and failure to obtain informed consent and sought damages for an alleged loss of consortium. Sonnier, 806 So. 2d at 383. Talley then filed an amended complaint alleging that the same defendants 'had made misrepresentations of fact related to the surgery, the cancer, and her health during the period from June 1991 through October 1991.' Id. This Court held that Talley's amended complaint related back to her original complaint under Rule 15(c)(2), Ala. R. Civ. P. Even though the amended complaint alleged a new cause of action, it was limited to the same time period and the same parties. This Court held that the reason the amended complaint related back was that the amendment had '"ma[de] more specific what ha[d] already been alleged."' Sonnier, 806 So. 2d at 386-87 (quoting National Distillers & Chem. Corp. v. American Laubscher Corp., 338 So. 2d 1269, 1273 (Ala. 1976)). Talley initially alleged that the doctors had been negligent over a specified time period. Her amended complaint alleged a closely related cause of action against the same defendants stemming from the same operative facts."

959 So. 2d at 1096-97 (emphasis added).

In the present case, Cortney's initial complaint sought to hold the Bednarski defendants liable for conduct that had occurred on December 1 and 3, 2014. Specifically, Cortney alleged in his initial complaint that the Bednarski defendants had breached the applicable standard of care in providing care to Hope. Similarly, the claim added against the Bednarski defendants in Cortney's final amended complaint sought to hold the Bednarski defendants liable for conduct that also had occurred on December 3, 2014, related to the medical care that Hope had received. As a result of the Bednarski defendants' failure to properly train Dr. Willis and provide him with access to AUC's medical-records system, Cortney alleged in his failure-to-train/supervise claim, Dr. Willis, based on Dr. Bednarski's and/or AUC's negligence and/or wantonness, was not able to access Hope's medical records, which would have included "information about prior patient visits, including laboratory data, diagnoses, treatments and physical examination information." This allegation was a further refinement of the allegations in Cortney's initial complaint that the Bednarski defendants had breached the applicable standard of care.

Unlike in Prior, Cortney did not seek to hold a different party liable for conduct that occurred on different dates. Instead, as in Callens and Sonnier, the claim asserted in Cortney's final amended complaint "arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading." Rule 15(c)(2). Cortney sought to hold the Bednarski defendants liable for conduct that arose out of the same occurrence set forth in his initial complaint. In other words, Cortney's final amended complaint related back to the original complaint under Rule 15(c)(2) because " ' "the same substantial facts [we]re pleaded merely in a different form." ' Ex parte Johnston-Tombigbee Furniture, 937 So. 2d at 1038 (quoting Court of Civil Appeals' opinion in Johnston-Tombigbee Furniture Mfg. Co. v. Berry, 937 So. 2d 1029, 1032 (Ala. Civ. App. 2004), quoting other cases)." Prior, 959 So. 2d at 1095.

Cortney's final amended complaint related back to the date on which the initial complaint was filed. The Bednarski defendants have not demonstrated that the trial court erred in holding that the new claim asserted in Cortney's final amended complaint was not barred by the

applicable statute of limitations.[5]

II. "Negligent Hiring"

The Bednarski defendants argue that the trial court improperly permitted Cortney to submit an unpleaded claim to the jury, namely, a claim that the Bednarski defendants "negligently hired" Dr. Willis. In so doing, the Bednarski defendants argue, the trial court violated § 6-5-551, Ala. Code 1975, which provides the following pertinent requirements for medical-malpractice actions:

> "The plaintiff shall include in the complaint filed in the action a detailed specification and factual description of each act and omission alleged by plaintiff to render the health care provider liable to plaintiff and shall include when feasible and ascertainable the date, time, and place of the act or acts. ... Any party shall be prohibited from conducting discovery with regard to any other act or omission or from introducing at trial evidence of any other act or omission."

It is undisputed that Cortney's complaint did not include a claim of

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[5]The Bednarski defendants also cite Weber v. Freeman, 3 So. 3d 825 (Ala. 2008), in support of their argument. Weber is also distinguishable from the present case. As in Prior, the plaintiff in Weber sought to add a claim against a hospital owner for vicarious liability based on the conduct of a new party regarding a different occurrence than was alleged in the original complaint. See Weber, 3 So. 3d at 834-35.

"negligent hiring" against the Bednarski defendants. As Cortney points out, the Bednarski defendants' argument can be summarized as a contention that "evidence was injected improperly into the trial at three points: 1) Dr. Bednarski's testimony; 2) [Cortney]'s closing argument; and 3) the jury instructions." Cortney's brief at 46. We consider each contention in turn.

A. Testimony

With regard to Dr. Bednarski's testimony, the only portions of the testimony with which the Bednarski defendants take issue are statements elicited from Cortney's counsel indicating that Dr. Willis had covered a couple of shifts for Dr. Bednarski at a different medical facility; that Dr. Bednarski knew of Dr. Willis's background; and that Dr. Bednarski was the person who hired Dr. Willis. Dr. Willis also testified in his deposition, a video of which testimony was played at trial, that he had filled out an application and was ultimately hired to work for AUC. The Bednarski defendants cite no authority indicating that the admission of this evidence constituted reversible error as a violation of § 6-5-551. As Cortney notes in his brief, the evidence cited provided background for the claims

asserted in his complaint, namely, that Dr. Willis was an agent of AUC, which was an aspect of Cortney's claim that AUC was vicariously liable for Dr. Willis's conduct.

B. Closing Arguments

The Bednarski defendants also take issue with statements made by Cortney's counsel during closing arguments that, they say, demonstrate that an unpleaded claim of "negligent hiring" was submitted to the jury. Specifically, Cortney's counsel stated the following during closing arguments:

> "So the second way that Dr. Bednarski is liable to the plaintiffs in this case is because he was the medical director of Auburn Urgent Care at the time that all of these things occurred. As the medical director, he, and only he, hired Dr. Willis. He said he had met him a couple times over the years. A couple of times over the years. He hires him. He puts him in his clinic on the first day."

He also stated:

> "It is a completely separate claim for the -- the medical director piece. Was negligent training. Even negligent hiring. Somebody saying he knew the guy for two days and just threw him in there? I mean, what do you know about him? What else did you do? He couldn't give us an explanation. I asked Dr. Willis about it and I asked Dr. Bednarski about it. He didn't have a clue. I mean, for all he knew, he could be an axe

> murderer and he would have never known. He just threw him in there. And then negligent hiring. And then negligent training. Yes. Okay. He is a doctor. I get it. He is a professional. We are not -- you know -- but you have got to know the processes. You have got to know things work. I mean, I still think he is confused frankly about what the process is."

In response to the Bednarski defendants' argument, Cortney does not directly address all the statements quoted above, but he characterizes the final reference to "negligent hiring" as "a blunder or misstatement." Cortney's brief at 47. However, more significantly, Cortney goes on to point out that the Bednarski defendants did not object to the statements quoted above during trial. Cortney cites Baptist Medical Center Montclair v. Whitfield, 950 So. 2d 1121, 1127 (Ala. 2006), for the standard of review applicable to allegedly improper arguments of counsel:

> "Generally, unless there is an objection and it is overruled, 'improper argument of counsel is not ground for new trial.' Southern Life & Health [Ins. Co. v. Smith], 518 So. 2d [77,] 81 [(Ala. 1987)](citing Alabama Power Co. v. Henderson, 342 So. 2d 323, 327 (Ala. 1976), and Hill v. Sherwood, 488 So. 2d 1357, 1359 (Ala. 1986)). However, there is an exception to the requirement that an objection must have been overruled in order for improper argument of counsel to serve as the basis for a new trial. A new trial may be granted based on improper argument of counsel, even where no objection to the statement was made, 'where it can be shown that counsel's remarks were

> so grossly improper and highly prejudicial as to be beyond corrective action by the trial court.' Southern Life & Health, 518 So. 2d at 81. Thus, where the party seeking a new trial does not object to allegedly improper argument by opposing counsel, opposing counsel's statements can still serve as the basis for a new trial if, in the trial court's opinion, those statements are 'grossly improper and highly prejudicial.' Southern Life & Health, 518 So. 2d at 81."

The Bednarski defendants do not address the standard of review applicable to this alleged error in their principal appellate brief. In their reply brief, the Bednarski defendants briefly respond to Cortney's invocation of the foregoing standard of review by contending that, because § 6-5-551 provides a "broad privilege," the statements of Cortney's counsel during closing arguments satisfied the "grossly improper" standard quoted from Whitfield. The Bednarski defendants' reply brief at 23. They cite Baptist Health System, Inc. v. Cantu, 264 So. 3d 41 (Ala. 2018), in support of their argument.

Cantu, however, involved the presentation of evidence that was expressly prohibited under the plain language of § 6-5-551. Cantu did not involve statements of counsel made during closing arguments, and the standard of review set out in the portion of Whitfield quoted above was

not at issue in Cantu. Moreover, even assuming that Cantu is otherwise applicable, the defendant in Cantu objected to the admission of the evidence at issue. See 264 So. 3d at 49 ("[T]he trial court again granted [the defendant] a continuing objection to the admission of each instance of other-claims evidence ....").

Statements made during closing arguments are not evidence. See Allstate Ins. Co. v. Ogletree, [Ms. 1180896, Feb. 5, 2021] ____ So. 3d ____, ____ n.3 (Ala. 2021). The record reflects that the trial court so instructed the jury before Cortney's counsel began his closing argument in this case. Because the Bednarski defendants did not object to the statements of Cortney's counsel during closing arguments and because they have failed to demonstrate that the statements were grossly improper, they have not demonstrated that the trial court's judgment should be reversed based on the statements.

C. Jury Instructions

Next, the Bednarski defendants argue that the trial court's instructions to the jury reveal that a claim of "negligent hiring" was submitted for the jury's consideration. In particular, the Bednarski

defendants note that the trial court stated the following:

> "The standard of care for an Urgent Care medical clinic like Auburn Urgent Care is that level of reasonable care, skill, and diligence or -- as other similarly situated Urgent Care medical clinics in the same general line of practice, usually following the same or similar circumstances. ...
>
> "I think I have probably covered it, but the same -- the same standard of care of -- for Dr. Bednarski and as Medical -- and as Medical Director of Auburn Urgent Care and charged with hiring, supervising physicians of Auburn Urgent Care is that level of reasonable care, skill, and diligence as similarly situated medical directors in hiring and/or supervising physicians and urgent medical cares in the same general line of practice usually following the same or similar circumstances.
>
> "Now, Cortney ... must prove by -- must prove by expert testimony and -- expert testimony the standard that Dr. Bednarski as Medical Director in hiring, supervising position did not follow the standard of care in establishing processes, procedures and protocols to insure patients that needed medical attention would be examined, diagnosed and treated by physicians [and that] the death of Hope ... was probably caused by Dr. Bednarski's failure to follow that standard of care."

In response to the Bednarski defendants' argument, Cortney asserts, among other things, that the Bednarski defendants did not object to the foregoing instructions. Specifically, after the trial court concluded its instructions and before the jury retired to begin its deliberations, the trial

court gave the parties an opportunity to object, and the Bednarski defendants' counsel responded: "Satisfied."

Among other authority, Cortney cites Rule 51, Ala. R. Civ. P., which states, in relevant part:

> "No party may assign as error the giving or failing to give a written instruction, or the giving of an erroneous, misleading, incomplete, or otherwise improper oral charge unless that party objects thereto before the jury retires to consider its verdict, stating the matter objected to and the grounds of the objection."

Thus, Cortney argues, the Bednarski defendants waived any challenge to the trial court's instructions to the jury.

In response to Cortney's argument , the Bednarski defendants argue in their reply brief that they adequately preserved their challenge to the trial court's jury instructions because they challenged the sufficiency of the evidence supporting all of Cortney's claims in their various motions for a judgment as a matter of law. They contend that the inclusion of an unpleaded "negligent hiring" claim in the jury instructions presented a "good count/bad count" situation under § 6-5-551 and Long v. Wade, 980 So. 2d 378 (Ala. 2007), and that, under Long, a challenge to the sufficiency

of the evidence was adequate to preserve their challenge to the jury instructions.

Assuming for argument's sake that a "good count/bad count" situation might have otherwise been presented under the circumstances of this case, the Bednarski defendants overlook the fact that, in Long, the defendants objected to the jury instructions at issue. See 980 So. 2d at 382 ("The defendants objected to these instructions ...."); 980 So. 2d at 387 ("The defendants properly challenged the sufficiency of the evidence as to each of the monitoring/delivery claims. The trial court erred, therefore, in giving the jury -- over the defendants' objections -- the option of basing liability upon an act or omission for which there was not substantial evidence." (emphasis added)). Thus, the Bednarski defendants have failed to demonstrate that their challenge to the trial court's jury instructions was properly preserved for our review. Therefore, we cannot reverse the trial court's judgment on this basis.

III. Expert-Witness Testimony

Next, the Bednarski defendants argue that the testimony of Cortney's expert witness, Dr. Nicholas Bird, did not satisfy the

requirements of § 6-5-548, Ala. Code 1975, which, among other things, places upon plaintiffs in medical-malpractice cases the burden of proving their claims by substantial evidence, which evidence generally must include testimony from a health-care provider who is "similarly situated" to the defendant or defendants. In particular, the Bednarski defendants argue that Cortney failed to present substantial evidence indicating that Dr. Bird had practiced hands-on urgent care "during the year preceding the date that the alleged breach of the standard of care occurred," which, they say, he was required to do. § 6-5-548(c)(4).

Among other things, Cortney argues in response that the Bednarski defendants have waived any challenge to Dr. Bird's qualifications as an expert witness because they did not object to the admission of his testimony at the time it was offered during trial. In its postjudgment order, the trial court stated: "[The Bednarski defendants] did not object to [Cortney's] tendering Dr. Bird as an expert before the jury." See HealthTrust, Inc v. Cantrell, 689 So. 2d 822, 826 (Ala. 1997)("Objections must be 'raised at the point during trial when the offering of improper evidence is clear,' see Charles W. Gamble, McElroy's Alabama Evidence

§ 426.01(3) (5th ed. 1996)."); Youngblood v. Martin, 298 So. 3d 1056, 1060 (Ala. 2020)(" ' "[S]pecific objections or motions are generally necessary before the ruling of the trial judge is subject to review, unless the ground is so obvious that the trial court's failure to act constitutes prejudicial error." ' ")(quoting Ex parte Works, 640 So. 2d 1056, 1058 (Ala. 1994), quoting in turn Lawrence v. State, 409 So. 2d 987, 989 (Ala. Crim. App. 1982))); and Tracker Marine Retail, LLC v. Oakley Land. Co., 190 So. 3d 512, 520 (Ala. 2015)(" 'The trial court is not in error if inadmissible testimony comes in without objection and without a ruling thereon appearing in the record. The testimony is thus generally admissible and not limited as to weight or purpose.' " (quoting Ex parte Neal, 423 So. 2d 850, 852 (Ala. 1982))).

When Cortney's counsel tendered Dr. Bird as an expert witness, the trial court asked the Bednarski defendants' counsel: "Any voir dire or anything? Any objection?" The Bednarski defendants' counsel responded: "I don't have any objection based on what we have heard so far." Thus, it appears that the Bednarski defendants expressly waived any challenge to Dr. Bird's qualifications as an expert witness.

In their reply brief, the Bednarski defendants argue that, by challenging Dr. Bird's qualifications in their various motions for a judgment as a matter of law, they adequately preserved their challenge to Dr. Bird's qualifications. They rely primarily on Youngblood, 298 So. 3d at 1056, and Ex parte Garrett, 608 So. 2d 337 (Ala. 1992), in support of their argument. However, unlike the Bednarski defendants, the pertinent parties in those cases asserted at least some objection to the evidence at issue when it was offered. See Youngblood, 298 So. 3d at 1060 ("Dr. Youngblood objected multiple times to Dr. Doblar's testimony. When Mr. Martin's counsel began to elicit testimony from Dr. Doblar during the trial, Dr. Youngblood specifically argued that Mr. Martin's counsel had not 'laid the right predicate for [Dr. Doblar] to talk about his opinions or concerns under [§] 6-5-548.' "); and Ex parte Garrett, 608 So. 2d at 338 n.2 ("The dissent points out that only the most general objection was made at the time the evidence was offered. ... Because the court ruled on the merits of the objection rather than treating it as untimely or as too general when initially made, we shall do so also." (emphasis added)). Therefore, the Bednarski defendants have failed to demonstrate that they

properly preserved for our review their challenge to Dr. Bird's qualifications as an expert witness, and we cannot reverse the trial court's judgment based on this argument.[6]

IV. Damages

The Bednarski defendants' last argument is that this Court should reduce the trial court's punitive-damages award from $6.5 million to $1 million. In its postjudgment order, the trial court stated: "The jury returned a verdict against Dr. ... Bednarski, [AUC], and Dr. David Willis for $9 [million]. This award was [reached] after considering and subtracting the $1 [million] settlement [Cortney] received from Dr. Hensarling prior to trial." After conducting lengthy and detailed analyses concerning the Bednarski defendants' various postjudgment arguments, the trial court granted their motion for a remittitur and reduced the damages awarded from $9 million to $6.5 million.

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[6]The Bednarski defendants' principal appellate brief includes separate sections arguing that this Court should render a judgment in their favor or, in the alternative, order a new trial based on the arguments addressed thus far. Because the foregoing arguments do not demonstrate reversible error, we do not address the Bednarski defendants' separate arguments concerning the relief they say is warranted.

" 'In reviewing a punitive-damages award, we apply the factors set forth in Green Oil [Co. v. Hornsby, 539 So. 2d 218 (Ala. 1989)], within the framework of the "guideposts" set forth in BMW of North America, Inc. v. Gore, 517 U.S. 559, 116 S. Ct. 1589, 134 L. Ed. 2d 809 (1996), and restated in State Farm Mutual Automobile Insurance Co. v. Campbell, 538 U.S. 408, 418, 123 S. Ct. 1513, 155 L. Ed. 2d 585 (2003). See AutoZone, Inc. v. Leonard, 812 So. 2d 1179, 1187 (Ala. 2001) (Green Oil factors remain valid after Gore).

" 'The Gore guideposts are: "(1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases." Campbell, 538 U.S. at 418, 123 S. Ct. 1513. The Green Oil factors, which are similar, and auxiliary in many respects, to the Gore guideposts, are:

> " ' "(1) the reprehensibility of [the defendant's] conduct; (2) the relationship of the punitive-damages award to the harm that actually occurred, or is likely to occur, from [the defendant's] conduct; (3) [the defendant's] profit from [his] misconduct; (4) [the defendant's] financial position; (5) the cost to [the plaintiff] of the litigation; (6) whether [the defendant] has been subject to

> criminal sanctions for similar conduct; and (7) other civil actions [the defendant] has been involved in arising out of similar conduct."
>
> " 'Shiv-Ram, Inc. v. McCaleb, 892 So. 2d 299, 317 (Ala. 2003)(paraphrasing the Green Oil factors).'
>
> "Ross v. Rosen-Rager, 67 So. 3d 29, 41-42 (Ala. 2010). ...
>
> "....
>
> " ' " '[T]he most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct.' " [State Farm Mut. Auto. Ins. Co. v.] Campbell, 538 U.S. [408] at 419[, 123 S. Ct. 1513, 155 L. Ed. 2d 585 (2003)](quoting Gore, 517 U.S. at 575[, 116 S. Ct. 1589]). ...
>
> " ' "...."
>
> " '....'
>
> "Alabama River [Grp., Inc. v. Conecuh Timber, Inc.], 261 So. 3d [226,] 272 [(Ala. 2017)]."

Merchants FoodService v. Rice, 286 So. 3d 681, 708-09 (Ala. 2019). " 'This Court reviews an award of punitive damages de novo.' Flint Constr. Co. v. Hall, 904 So. 2d 236, 254 (Ala. 2004)." Rice, 286 So. 3d at 695.

On appeal, the Bednarski defendants argue that almost all the

guideposts set out in BMW of North America, Inc. v. Gore, 517 U.S. 559 (1996), and almost all the factors set out in Green Oil Co. v. Hornsby, 539 So. 2d 218 (Ala. 1989), support a further remittitur of the punitive-damages award, but they primarily focus on three: (1) reprehensibility, (2) comparable cases, and (3) their financial position. We consider each in turn.

A. Reprehensibility

The Bednarski defendants argue that "[t]here is no evidence of any reprehensible conduct." The Bednarski defendants' brief at 64. In its postjudgment order, the trial court spent almost five full pages explaining the evidence supporting its conclusion that the Bednarski defendants' conduct in this case was reprehensible. The Bednarski defendants do not directly address the trial court's analysis, but, in summary, they generally contend: (1) that their conduct was less reprehensible than that of Dr. Hensarling and Dr. Willis because, they say, the care Dr. Bednarski rendered to Hope on her first visit to the AUC clinic was adequate and they had no reason to expect any problems with Dr. Willis's care on Hope's second visit; (2) that Dr. Willis could have used Dr. Bednarski's login

credentials to access AUC's electronic medical-records system on December 3, 2014; (3) that Dr. Willis knew on December 3, 2014, that Dr. Bednarski had treated Hope two days earlier; and (4) that what happened with Hope was an isolated incident.

To summarize the trial court's findings, it determined that the conduct of the Bednarski defendants was more reprehensible than the conduct of either Dr. Hensarling or Dr. Willis because Dr. Hensarling's breach of the standard of care could properly be classified as a " 'mere accident' " and Dr. Willis's medical malpractice was the result of being bewildered and overwhelmed on the first day of his job at the AUC clinic, where he was asked to follow the established system or be discharged. By contrast, the trial court found that the Bednarski defendants' conduct contributing to Hope's death was the result of deliberate decisions designed to maximize financial gain.

Specifically, the trial court found that the Bednarski defendants had deliberately implemented a system that assigned only one doctor to the AUC clinic and did not limit the number of patients that doctor could see per shift, often resulting in one doctor seeing between 50 and 90 patients

in one 12-hour shift. The trial court found that this system encouraged doctors to take shortcuts and to make diagnostic guesses. It further found that Dr. Bednarski had taken shortcuts when he had treated Hope on December 1, 2014, by failing to properly document her medical record. The trial court also found that Dr. Bednarski had instructed Dr. Willis not to access the electronic medical-records system and that he had not given Dr. Willis a code to do so because Dr. Bednarski did not want to pay for an additional code. The trial court stated: "Dr. Bednarski created a business model, not a healthcare model. It is a reasonable inference that the business model was reckless and thus endangered the safety of patients."

The trial court further stated:

> "This Court finds from the evidence and all reasonable inferences to be drawn from the evidence that the degree of reprehensibility is quite high. The case arose from a healthcare setting, in which the patient must rely upon the defendant doctor because the patient has no ability to make a diagnosis, determine a treatment plan, and prescribe appropriate medications. On December 1, 2014, Dr. Bednarski told Hope to return to Auburn Urgent Care if she was worse in a few days. [S]he returned, unbeknownst to her, with blood clots in her lungs[,] and still she was not evaluated, diagnosed, and treated. She came back to [the AUC clinic] because she was told to come back for follow-up medical care. What she got was anything but follow-up medical care. If she had been

properly taken care of, she likely would be alive today."

We conclude that the trial court's findings with regard to the reprehensibility of the Bednarski defendants' conduct are supported by the record, and we conclude that, based on those findings, this factor weighs in favor of affirming the damages awarded.

B. Comparable Cases

The Bednarski defendants argue that this Court is "constrained" to view Cortney's $1 million settlement with Dr. Hensarling and Lee OBGYN as a "highly credible benchmark" for the damages that should be assessed against them. See Lance, Inc. v. Ramanauskas, 731 So. 2d 1204, 1220 (Ala. 1999)("We are constrained to observe that the opinions of able counsel in an adversarial system as to the proper measure of damages, as evidenced by the amounts paid in the pro tanto settlements, are highly credible benchmarks upon which to rely in this case in attempting the difficult task of fixing the appropriate amount of punitive damages."). However, the Bednarski defendants' argument in this regard assumes that the reprehensibility of their conduct was comparatively equal to, or less than, that of Dr. Hensarling and Lee OBGYN. See Lance, 731 So. 2d

at 1219-20 ("Lance's codefendants, who entered into pro tanto settlements with the parents, paid a total of $10 million, $3 million less than the $13-million jury verdict against Lance. The motel, the most culpable of the defendants ..., settled for $7 million. Montgomery Coca-Cola, although culpable because it admitted that it knew its machines at many locations shocked people every year, which is more than Lance indicated it knew, paid the substantially lesser sum of $3 million.").

In its postjudgment order, the trial court stated: "Under Lance ... the Alabama Supreme Court seems to hold that defendants of lesser reprehensibility should pay less of the punitive-damages award than those whose conduct is found to be more reprehensible." As noted above, the trial court found that Dr. Hensarling's conduct was "far less reprehensible tha[n] the conduct" of the Bednarski defendants. Near the end of its postjudgment order, the trial court elaborated:

> "This Court finds upon consideration of all the evidence and drawing all reasonable inferences from the evidence, and watching all the witnesses and judging for itself the credibility of each witness and the weight to be given the testimony of each witness, the oral and written arguments of the parties, and review of the applicable case law, that there is a very high degree of reprehensibility of [the Bednarski defendants]'

conduct that led to the death of Hope Johnson."

In light of the disparate conduct involved, the Bednarski defendants have failed to demonstrate that the trial court was, or that this Court is, obligated to view Cortney's $1 million settlement with Dr. Hensarling and Lee OBGYN as a highly credible benchmark for determining the proper amount of damages that should be awarded against the Bednarski defendants.

Next, the Bednarski defendants argue that the $6.5 million in damages awarded to Cortney by the trial court is impermissibly greater than amounts awarded in comparable cases. They argue that the largest wrongful-death judgment this Court has affirmed in a medical-malpractice case since Gore is $4 million, in Boudreaux v. Pettaway, 108 So. 3d 486 (Ala. 2012). They further contend that the largest wrongful-death judgment this Court has affirmed in any case since Gore is $6 million, in Mack Trucks, Inc. v. Witherspoon, 867 So. 2d 307 (Ala. 2003). They assert that this case should not be the one to " 'raise the bar.' " The Bednarski defendants' brief at 68.

In its postjudgment order, the trial court considered the amounts

awarded in comparable cases. In particular, the trial court found that the circumstances of this case were "very similar" to those of Atkins v. Lee, 603 So. 2d 937 (Ala. 1992), in which this Court determined that an award of $6.875 million was not impermissibly excessive. Specifically, the trial court stated:

> "This Court has already made findings of fact that Dr. Bednarski created a health care system at [the] AUC [clinic] that included one doctor for all patients, no orientation of doctors, placement of doctors without training in the busiest clinic setting without access to the [electronic medical records]. This is very similar to Atkins, where doctors with very little training are allowed by the Hospital 'policy of no policy' to handle very complicated patients, or in this case, more patients than Dr. Willis was prepared and oriented to handle. The degree of reprehensibility and the harm caused (death in both cases) as a result the reprehensible conduct in a healthcare delivery system are very similar. The Alabama Supreme Court affirmed the Atkins jury verdict of [$6.875 million]. This Court is persuaded by the similarities between Atkins and this case and the degree of reprehensibility."[7]

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[7]The Bednarski defendants also argue that Atkins is factually distinguishable because, in that case, evidence was presented indicating that one of the defendants was aware of the impropriety of a procedure he had performed and had attempted to conceal it. See Atkins, 603 So. 2d at 948. However, the defendant in Atkins referenced by the Bednarski defendants was one of the doctors in that case. As noted above, in this case, the trial court found that the conduct of the hospital in Atkins was similar to that of the Bednarski defendants because their tortious policies

The Bednarski defendants argue that Atkins is inapplicable because it was decided before the United States Supreme Court's decision in Gore. They cite Robbins v. Sanders, 927 So. 2d 777, 790 (Ala. 2005), in support of this contention. However, the statement they quote from Robbins was not a holding by this Court that all decisions released by this Court before Gore was decided are irrelevant for the purpose of applying the "comparable cases" guidepost. Rather, the portion of Robbins quoted on page 68 of their principal appellate brief was a comment regarding a statement from this Court's previous decision in Central Alabama Electric Cooperative v. Tapley, 546 So. 2d 371, 377 (Ala. 1989), concerning punitive damages, defendants' net worth, and how Gore had impacted those considerations. See Robbins, 927 So. 2d at 790.

The trial court also considered the Bednarski defendants' argument that Atkins was irrelevant to its assessment of comparable cases. It reasoned as follows:

> "[The Bednarski defendants] argue that pre-Gore

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and practices were analogous, not because of similar attempts at concealing tortious conduct.

> decisions should not be considered. However, Gore was not even a wrongful death case, and there is no indication that Gore would have changed the appellate court's decision in Atkins or any other pre-Gore decision including Burlington No. R.R. v. Whitt, 575 So. 2d 1011 (Ala. 1990)(remitting a $15 million-dollar wrongful death verdict to $5 million), and G.M. v. Johnston, 582 So. 2d 1054 (Ala. 1992)(remitting a $15 million wrongful death product liability verdict to $7.5 million). What Gore did was impose the reprehensibility guidepost in the verdict review process. However, Alabama under Green Oil, decided in 1989 before the Gore decision in 1996, was already considering this factor in its verdict review."

The Bednarski defendants have failed to demonstrate that the trial court's judgment should be reversed for considering Atkins in its analysis of cases comparable to this case.[8]

C. Financial Position

The Bednarski defendants next argue that their financial condition "warrants a massive reduction" of the trial court's damages award. The

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[8]On appeal, Cortney includes in his brief a table of cases ranging from 1986 to 2003 and argues that, for the purpose of applying the "comparable cases" guidepost, the awards in those cases should be adjusted for inflation, after which, he says, the $6.5 million award in this case "is absolutely consistent with prior awards." Cortney's brief at 62-63. According to Cortney's calculations, the award in this case would actually be the lowest of the awards noted. Because the Bednarski defendants have failed to demonstrate reversible error by the trial court on this issue, we need not decide whether to adopt Cortney's inflation argument.

Bednarski defendants' brief at 69. They assert that their financial condition "was the subject of extensive post-trial discovery and briefing" and that approximately 6,000 pages of financial documents were filed under seal in the trial court. Id. Those documents are not contained within the record on appeal, but the Bednarski defendants contend that they are "available to this Court," apparently upon direct request to the trial court. Id. According to the Bednarski defendants, their net worth is approximately $1.3 million. They note that they have a $1 million liability-insurance policy. The Bednarski defendants' brief at 69.

The trial court's postjudgment order contains approximately three pages addressing the Bednarski defendants' financial position. After summarizing the evidence presented, the trial court stated:

> "[T]he evidence before the Court is highly disputed, and there seems no way to resolve the dispute. Therefore, after consideration of all this evidence, without better financial reports, the Court is uncertain as to the actual net worth of Dr. Bednarski and [AUC], individually and collectively. The Court is certain that these defendants do not have net worths enough to pay this judgment and probably have less than $5 [million] but more than $1 [million] in net worths. Beyond estimating this range, it is very difficult to make a finding more exact than this."

The Bednarski defendants cite Wilson v. Dukona Corp, N.V., 547 So. 2d 70 (Ala. 1989), for the proposition that " 'any punitive damages award' that results in a negative net worth 'would do nothing to further society's goals of punishment and deterrence.' Id. at 72, 74." The Bednarski defendants' brief at 71. Wilson, however, was not a wrongful-death case; it involved the wrongful cutting of timber. In a medical-malpractice wrongful-death case, this Court has previously affirmed a punitive-damages award that exceeded the defendant's present net worth. See Campbell v. Williams, 638 So. 2d 804, 818 (Ala. 1994)("[A]fter deducting from the $4 million verdict the $1 million settlement between the Hospital and the plaintiff and the $1 million in insurance coverage held by Dr. Campbell, Dr. Campbell would be personally liable for $2 million. Dr. Campbell's financial statements submitted to the court indicated that his net worth in 1992 was over $1 million and that his annual income exceeded $525,000. The trial court, stating in its order that 'the purpose of punitive damages is not to destroy but rather to meet societal goals [of punishment and deterrence],' concluded that the impact of the verdict on Dr. Campbell was not sufficient to overcome the presumption of

correctness in favor of the jury's verdict.").

This Court has indicated that the purpose of a punitive-damages award should generally be to deter, but not financially "destroy," the wrongdoer. Ex parte Vulcan Materials Co., 992 So. 2d 1252, 1260 (Ala. 2008). However, "[a] verdict awarding punitive damages is not considered to be unconstitutionally excessive until the defendant against whom it has been rendered produces evidence that the amount is greater than a sum necessary to accomplish society's goals of punishment and deterrence." Fraser v. Reynolds, 588 So. 2d 448, 452 (Ala. 1991).

> "[O]ur cases have held that a defendant's failure to produce evidence of its net worth effectively negates the benefit to the defendant of the relationship factor. In other words, a defendant cannot argue as a basis for reducing the punitive-damages award that the award 'stings' too much, in the absence of evidence of the defendant's financial status."

Ex parte Vulcan Materials Co., 992 So. 2d at 1261.

Although the Bednarski defendants apparently presented voluminous financial documentation to the trial court, the trial court's postjudgment order indicates that, on the whole, it did not find the evidence presented to be particularly probative in accurately ascertaining

their current financial position. Therefore, it is unclear from the trial court's postjudgment order whether the $6.5 million award will actually financially "destroy" the Bednarski defendants.

Notably, although the trial court appears to have been certain that the Bednarski defendants did not possess assets totaling $6.5 million at the time of the entry of the postjudgment order, the actual value of AUC as a going concern is unclear. See Boudreaux v. Pettaway, 108 So. 3d 486, 505 (Ala. 2012)("[B]oth Boudreaux and Coastal appear to have sufficient assets and/or income to allow them to pay the remitted award." (emphasis added)), overruled on other grounds, Gillis v. Frazier, 214 So. 3d 1127, 1133 (Ala. 2014). In its postjudgment order, the trial court also noted that, at some point, Dr. Bednarski had reported the value of AUC as $10 million in conjunction with a business-loan application, although the Bednarski defendants' accountant had "assessed the value as being much lower." Additionally, the trial court also noted that, after Hope's death, AUC had reported a significant reduction in revenue in 2019 "that was only ever explained to the Court during hearings as being due to increased competition." The trial court further stated that it "did find some of the

raw documents provided helpful."

The burden of clearly establishing their financial position fell on the Bednarski defendants, and we have been presented with no basis to conclude that the trial court erred in its determination that they did not meet that burden. See Ross v. Rosen-Rager, 67 So. 3d 29, 44-45 (Ala. 2010)(stating the following with regard to this factor: "Although Ross values his assets at $1,167,000, his testimony at the ... hearing regarding his financial condition was confusing, at best, and failed to establish anything definitive regarding his status. (Green Oil factor (4).) In that connection, the circuit court stated: 'Ross has not provided this court credible evidence upon which to fully judge his financial condition.' ").

At the conclusion of its postjudgment order, the trial court stated:

> "[T]he Court cannot reduce this verdict below $5 [million] because to do so would give greater weight to the low net worths over the extreme reprehensibility of the [Bednarski defendants]' conduct.
>
> "WHEREFORE, all the evidence and above premises considered, this Court grants the Motions for Remittitur and remits the jury verdict to $6.5 [million]."

(Emphasis in original.) Without a more definitive showing by the

Bednarski defendants that the trial court's punitive-damages award will actually financially "destroy" them, we conclude that a further remittitur of the award is not warranted based on this factor alone, especially in light of the trial court's findings with regard to the reprehensibility of the conduct forming the basis of this action.

D. Other Factors

Finally, the Bednarski defendants argue that other Gore guideposts and Green Oil factors are inapplicable in this case. Specifically, they argue that, because this is a wrongful-death case, any comparison of the ratio between compensatory damages and punitive damages is inapplicable because an award of compensatory damages for a death is impermissible in Alabama. See Tillis Trucking Co. v. Moses, 748 So. 2d 874, 890 (Ala. 1999). They also note that there have been no other civil actions or criminal sanctions for their conduct and that Cortney's costs in litigating this case were $121,621.29, which is obviously far less than the $6.5 million in damages awarded by the trial court.

The Bednarski defendants also argue that they did not profit from their conduct. In so doing, they ignore another finding reached by the

trial court in its postjudgment order:

> "This Court finds that there is a significant financial motive in this business model. Following this business model, instead of doing the math of how many patients per doctor the standard of care dictates, [AUC] profits at least as much as Dr. Willis was paid, or $1,200 for a 12-hour shift. It is also clear that the more patients that can be seen in one day, the more profitable the clinic, assuming the clinic payroll expenses remain steady. Not paying for logins has an additional cost savings.
>
> "The Court also finds that this was not a new business model for [AUC]. This was a business model that continued throughout the time that Dr. Willis worked there. Ultimately, Dr. Willis was fired because he did not fit into that model -- he simply worked too slow. The amount of profit that was made by continuation of the model for that duration is significant -- at least $1,200 per day for the duration of flu season would be just a rough estimate."

In light of the evidence referenced in the trial court's postjudgment order concerning the Gore guideposts and Green Oil factors, we deny the Bednarski defendants' request for a further remittitur of the damages awarded by the trial court from $6.5 million to $1 million.

Conclusion

For the reasons explained above, the trial court's judgment is affirmed. The Bednarski defendants have failed to demonstrate that they

are entitled to a judgment as a matter of law, based on the applicable statute of limitations, with regard to Cortney's claim predicated on Dr. Willis's conduct or his failure-to-train/supervise claim. Moreover, the Bednarski defendants have failed to demonstrate that evidence concerning an unpleaded claim of "negligent hiring" was permitted in violation of § 6-5-551. Regarding the allegedly erroneous statements made by Cortney's counsel during closing arguments and the trial court's allegedly erroneous instructions to the jury, the Bednarski defendants have failed to demonstrate that objections to those alleged errors were adequately preserved for this Court's review on appeal. Likewise, the Bednarski defendants have failed to demonstrate that they adequately preserved for our review their challenge to the qualifications of Cortney's expert witness. Finally, the Bednarski defendants have failed to demonstrate that the $6.5 million in damages awarded by the trial court, after granting a remittitur, remained impermissibly excessive.

AFFIRMED.

Shaw, Bryan, Mendheim, and Stewart, JJ., concur.

Parker, C.J., concurs specially.

Bolin and Mitchell, JJ., concur in part and dissent in part.

Sellers, J., dissents.

PARKER, Chief Justice (concurring specially).

In concurring in the main opinion, I understand the opinion's discussion of "the actual value of AUC as a going concern" as referring to the potential relevance of AUC's present and potential future income, which may or may not have been factored into Dr. Bednarski's and the accountant's reported values. I agree that, for purposes of determining a defendant's financial position, the analysis should not be limited to net worth but should include the defendant's whole financial picture, including present and potential future income.

MITCHELL, Justice (concurring in part and dissenting in part).

I concur in sections I, II, and III of the analysis in the majority opinion, which reject the arguments made by Dr. Zenon Bednarski and Auburn Urgent Care, Inc. ("AUC") (collectively referred to as "the Bednarski defendants"), that they are entitled to judgment as a matter of law or a new trial. But I respectfully dissent from section IV, which denies the Bednarski defendants' request for a further remittitur of the punitive damages awarded by the trial court. In my view, the $6.5 million awarded here is excessive and is inconsistent with our caselaw applying the guideposts prescribed by BMW of North America, Inc. v. Gore, 517 U.S. 559 (1996), and the factors set out in Green Oil Co. v. Hornsby, 539 So. 2d 218 (Ala. 1989), that must be considered when a court reviews an award of punitive damages. Specifically, I believe the trial court erred in its analysis concerning: (1) the reprehensibility of the Bednarski defendants' conduct and (2) the amount of punitive damages awarded in comparable cases.

Reprehensibility

A court reviewing a punitive-damages award is required under both Gore and Green Oil to consider the reprehensibility of the defendant's conduct. Gore, 517 U.S. at 575; Green Oil, 539 So. 2d at 223. Indeed, this Court has recognized that reprehensibility "is the single most important factor in the remittitur analysis." Pensacola Motor Sales, Inc. v. Daphne Auto., LLC, 155 So. 3d 930, 949 (Ala. 2013).

The trial court's consideration of the reprehensibility of the Bednarski defendants' conduct focused almost entirely on evidence indicating that there were too few employees at the AUC clinic relative to the number of patients being treated. Under this view of the evidence, those employees -- including a single physician new to the practice -- were required to attend to too many patients too quickly, increasing the possibility that any single patient would not be properly evaluated, diagnosed, and treated. The trial court reasoned that Dr. Bednarski had created "a business model, not a healthcare model," and that this business model "was reckless and thus endangered the safety of patients." In conclusion, the trial court found "from the evidence and all reasonable

inferences to be drawn from the evidence that the degree of reprehensibility is quite high." I disagree with that characterization.

When assessing reprehensibility under Gore, courts must consider whether: (1) the harm caused was physical as opposed to economic; (2) the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; (3) the target of the conduct was financially vulnerable; (4) the conduct involved repeated actions or was an isolated incident; and (5) the harm was the result of intentional malice, trickery, deceit, or mere accident. State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 419 (2003). And, under Green Oil, a court evaluates reprehensibility by considering: (1) the duration of the conduct; (2) the defendant's awareness of any hazard that conduct has caused or is likely to cause; (3) any concealment or "cover-up" of the hazard; and (4) the existence and frequency of similar past conduct. 539 So. 2d at 223. The overarching principle here is that the reprehensibility of a defendant's conduct is directly related to the defendant's degree of culpability. And punitive damages may increase in accordance with that degree of culpability. See Gore, 517 U.S. at 580 (explaining, at the conclusion of the

reprehensibility analysis, that a "high degree of culpability" is needed to justify "a substantial punitive damages award").

This view is consistent with our longstanding caselaw deciding wrongful-death actions. See, e.g., Patrick v. Mitchell, 242 Ala. 414, 416, 6 So. 2d 889, 890 (1942) (stating that "all damages allowed in cases of this character are punitive and should be measured by the quality of the wrongful act, and the degree of culpability involved"); Parke v. Dennard, 218 Ala. 209, 215, 118 So. 396, 401 (1928) (explaining that in wrongful-death cases "[t]he admeasurement of the recovery must be by reference to the quality of the wrongful act and the degree of culpability involved"); see also Lowe v. General Motors Corp., 624 F.2d 1373, 1382 (5th Cir. 1980) ("The damages recoverable under [Alabama's wrongful-death statute, § 6-5-410, Ala. Code 1975], therefore, depend upon the 'quality of the wrongful act and the degree of culpability involved.' " (citation omitted)).[9]

[9]The link between punitive damages and the defendant's degree of culpability is further evidenced by the fact that, outside wrongful-death actions, punitive damages are available only in tort actions in which the defendant has a heightened degree of culpability. See § 6-11-20, Ala. Code

The trial court here concluded that the Bednarski defendants had acted recklessly:

> "Based on the testimony and all the inferences that can reasonably be drawn, this court finds that [the Bednarski defendants'] conduct, while not rising to the level of intentional malice, was no mere accident, and in fact, displayed reckless disregard for the health and safety of all patients seen at [the] AUC [clinic]."

Thus, the degree of culpability attributed to the Bednarski defendants by the trial court is higher than if they had simply been negligent -- but less than if they had acted with malice or the specific intent to cause injury. In the absence of any evidence of "intentional malice, trickery, or deceit," see Campbell, 538 U.S. at 419 (citing Gore, 517 U.S. at 576-77), I cannot agree with the trial court's conclusion that "the degree of reprehensibility

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1975 (authorizing punitive damages only if it is proven that "the defendant consciously or deliberately engaged in oppression, fraud, wantonness, or malice with regard to the plaintiff"). See also Lafarge North America, Inc. v. Nord, 86 So. 3d 326, 335 (Ala. 2011) ("Punitive damages cannot be awarded on a negligence claim."). Wrongful-death actions are unique because punitive damages may be awarded " 'without regard to the degree of culpability,' " Tillis Trucking Co. v. Moses, 748 So. 2d 874, 899 (Ala. 1999) (citation omitted), but, as explained above, the amount of punitive damages awarded must still be related to the degree of culpability.

is quite high." Such a conclusion should be reserved for the most egregious cases and is unjustified here in light of the Bednarski defendants' degree of culpability.[10] Accordingly, I believe the Bednarski defendants are entitled to a further remittitur of the award entered against them -- if a "quite high" level of reprehensibility merits a $6.5 million award, a lesser level of reprehensibility surely merits a reduced award.

Comparable Cases

In accordance with the third Gore guidepost, a court reviewing a punitive-damages award must also consider "the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases." Campbell, 538 U.S. at 418. This Court has previously explained that this guidepost requires a court to "compare the damages awarded in [the case before it] to damages awarded in

[10]In certain instances, it might be appropriate based on other factors in the reprehensibility analysis to find a higher level of reprehensibility, even without the highest degree of culpability. But that's not the case here. Notably, there is no evidence that the Bednarski defendants' conduct resulted in other deaths or that they were deceitful and tried to conceal their conduct.

similar cases." Lance, Inc. v. Ramanauskas, 731 So. 2d 1204, 1219 (Ala. 1999). The Bednarski defendants make a compelling argument that this guidepost points to further remittitur of the $6.5 million award.

The Bednarski defendants first note that, post-Gore, the largest award of damages this Court has affirmed in a medical-malpractice wrongful-death action is $4 million. See Boudreaux v. Pettaway, 108 So. 3d 486 (Ala. 2012).[11] They further state that the largest award of damages that this Court has affirmed in any wrongful-death action since Gore is $6 million. See Mack Trucks, Inc. v. Witherspoon, 867 So. 2d 307 (Ala. 2003). Finally, they argue that, considering the facts of the case and the Gore guideposts and Green Oil factors, this is not the case that should " 'raise the bar.' " Bednarski defendants' brief at 68.

The appellee Cortney Johnson, as the administrator of the estate of Hope Johnson, does not dispute the Bednarski defendants' presentation

[11]Although this Court affirmed a $4 million award in Boudreaux, it held two years later in Gillis v. Frazier, 214 So. 2d 1127, 1133-34 (Ala. 2014), that its analysis of the Green Oil factor concerning the relationship between the punitive damages awarded and the defendant's financial position in Boudreaux was flawed.

of our post-Gore caselaw. Instead, Cortney includes in his brief a chart of eight wrongful-death cases in which this Court affirmed punitive-damages awards.[12] Cortney's brief at 63. This chart lists the amount of punitive damages awarded in each case, along with the present-day value of that award after being adjusted for inflation.[13] The present-day value of those eight awards ranges from $7 million to $13.9 million; thus, Cortney asserts, the $6.5 million award in this case is "absolutely consistent" with those awards and is due to be affirmed. Id. at 64. I disagree.

The third Gore guidepost requires us to consider the $6.5 million award before us in relation to awards entered in comparable cases. Yet seven of the eight cases Cortney cites predate Gore and the eighth -- Mack

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[12]See Black Belt Wood Co. v. Sessions, 514 So. 2d 1249 (Ala. 1986); Industrial Chem. & Fiberglass Corp. v. Chandler, 547 So. 2d 812 (Ala. 1989); Burlington N. R.R. v. Whitt, 575 So. 2d 1011 (Ala. 1990); General Motors Corp. v. Johnson, 592 So. 2d 1054 (Ala. 1992); Atkins v. Lee, 603 So. 2d 937 (Ala. 1992); Sears, Roebuck & Co. v. Harris, 630 So. 2d 1018 (Ala. 1993); Campbell v. Williams, 638 So. 2d 804 (Ala. 1994); Mack Trucks.

[13]To calculate the inflation-adjusted values, Cortney states that he used a calculator developed for that purpose by the United States Department of Labor, which is currently available to the public at: https://www.bls.gov/data/inflation_calculator.htm.

Trucks -- is not a medical-malpractice case. With regard to those seven pre-Gore cases, this Court has previously questioned the continued relevance of caselaw that "antedates the more definitive pronouncements by the United States Supreme Court concerning considerations that must attend an assessment of the possible excessiveness of punitive damages, beginning with [Gore]." Robbins v. Sanders, 927 So. 2d 777, 790 (Ala. 2005). Nevertheless, the trial court decided to consider pre-Gore decisions when looking at comparable cases, stating that "Gore was not even a wrongful death case, and there is no indication that Gore would have changed the appellate court's decision in Atkins [v. Lee, 603 So. 2d 937 (Ala. 1992),] or any other pre-Gore decision."

This ignores the reality that Gore came about only because punitive-damages awards in Alabama had been increasing both in frequency and magnitude -- out of step with the rest of the country -- in the years preceding that decision. See generally George L. Priest, Punitive Damages Reform: The Case of Alabama, 56 La. L. Rev. 825, 825 (1996) ("[B]eginning in the early 1990s, punitive damages verdicts increased in Alabama both in frequency and magnitude."); Nathan C. Prater, Punitive

Damages in Alabama: A Proposal for Reform, 26 Cumb. L. Rev. 1005 (1996). Indeed, it has been noted that, "[f]rom 1990 to 1994, Alabama juries awarded punitive damages nearly ten times more often than the national average." David E. Hogg, Alabama Adopts De Novo Review for Punitive Damage Appeals: Another Landmark Decision Or Much Ado About Nothing, 54 Ala. L. Rev. 223, 224 (2002).

Five of the eight cases identified by Cortney as comparable cases were decided within that early 1990s period when punitive-damages awards were at their apex in Alabama. After the United States Supreme Court explained in Gore that such awards violated the due-process rights of defendants, it cannot reasonably be disputed that this Court -- applying the framework set forth in Gore -- began to more closely review and rein in excessive awards. See Hogg, Alabama Adopts De Novo Review for Punitive Damage Appeals, 54 Ala. L. Rev. at 227 (noting that "the impact of the Gore decision was soon apparent in Alabama in the magnitude of awards and their remittitur" and that "[t]he first ten cases decided on appeal after Gore (including Gore on remand) proved the Alabama

Supreme Court's readiness to limit damages it considered excessive").[14] Thus, the pre-Gore cases cited by Cortney are, at best, of limited relevance when comparing the $6.5 million award here to awards made in other cases.[15] Rather, our analysis of comparable cases under the third Gore guidepost should be focused on cases decided after Gore that properly apply the framework developed in that case.

Conclusion

The majority today affirms a $6.5 million award of punitive damages, setting a new post-Gore high-water mark for a punitive-damages award in a medical-malpractice wrongful-death case -- or any

[14]The fact that Cortney has chosen to emphasize almost exclusively pre-Gore decisions when discussing the comparable-case guidepost is itself evidence that our jurisprudence has meaningfully evolved post-Gore.

[15]The trial court's emphasis on Atkins v. Lee, 603 So. 2d 937 (Ala. 1992), is particularly problematic. In that 1992 opinion, authored by former Chief Justice Sonny Hornsby, the Court affirmed a $6.875 million award of punitive damages. 603 So. 2d at 939. That decision came squarely within the period when punitive-damage awards in Alabama were at their highest. And there was evidence in Atkins that the physician whose negligent act had injured the victim had later tried to conceal his conduct and that this deception might have been what ultimately led to the victim's eventual death. Id. at 948. By contrast, there was no comparable evidence of deceit or concealment in this case that might justify a higher level of punitive damages. See note 10, supra.

wrongful-death case for that matter. That is more than 60% above the $4 million award affirmed in Boudreaux.[16] In my view, such an award is not justified by the facts of this case, nor is it consistent with the principles articulated in Gore and Green Oil. I would instead remand this case to the trial court with instructions to consider a further remittitur after reevaluating the evidence of reprehensibility and assessing truly comparable cases.

Bolin, J., concurs.

[16]Even adjusting the $4 million award in Boudreaux by using the same inflation calculator used by Cortney, the award being affirmed today is 37% higher than the award affirmed in Boudreaux.