Rel: August 4, 2023

SUPREME COURT OF ALABAMA

SPECIAL TERM, 2023

SC-2022-0719

Springhill Hospitals, Inc., d/b/a Springhill Memorial Hospital

v.

Patricia Bilbrey West, as personal representative of the Estate of John Dewey West, Jr., deceased

Appeal from Mobile Circuit Court
(CV-16-901045)

MENDHEIM, Justice.

This appeal stems from a medical-malpractice wrongful-death action commenced by Patricia Bilbrey West ("Mrs. West"), the personal representative of the estate of her deceased husband, John Dewey West, Jr. ("Mr. West"), against Springhill Hospitals, Inc., d/b/a Springhill Memorial Hospital ("SMH"). Following an 11-day trial, the jury returned a verdict against SMH and awarded $35 million in punitive damages. The Mobile Circuit Court entered a judgment on the jury's verdict finding SMH liable. In a postjudgment order entered following a hearing concerning a remittitur of the punitive-damages award, the trial court reduced the amount of the award to $10 million. We affirm both the judgment entered on the jury's verdict finding SMH liable and the trial court's order reducing the punitive-damages award.

I. Facts

At the time of the events that precipitated this action, Mr. West was 59 years old. Mr. West was a carpenter who owned his own cabinet shop. On June 4, 2014, Mr. West accidentally sliced most of the tip of his left thumb off when he was using a table saw in his shop. Mr. West drove

himself to SMH's hospital emergency room to receive treatment for the injury. Dr. John McAndrew, a board-certified orthopedic surgeon, operated on the thumb. Dr. McAndrew testified that he removed the entire severed portion of the thumb and that the "bone was freshened up. It -- it was not a clean cut, so I freshened it up with the saw." Dr. McAndrew also sutured the exposed wound. The result of the surgery was that Mr. West retained the portion of his left thumb up to the nail bed. Dr. McAndrew stated that the surgery itself "took about 23 minutes" and that Mr. West was in the operating room "52 minutes altogether between when they brought him in the room and when they woke him up from the anesthesia." He further testified that Mr. West tolerated the surgical procedure well. Dr. McAndrew testified that he "wanted to keep [Mr. West] overnight because it was an open wound, and I wanted to give him antibiotics, just to minimize the risk of a bone infection."

Dr. McAndrew issued two pain-medication orders for Mr. West's postsurgical care. One order stated that Mr. West should receive an oral

dose of Percocet, the brand name for the opioid oxycodone. Specifically, that order stated:

> "Oxycodone 10mg/APAP 325 mg Tab
> 1 tablet(s) PO, every 3 hours PRN Pain,
> Every 3-4 hours."[1]

The other order stated that Mr. West should receive

> "Hydromorphone INJ
> (Known as Dilaudid INJ) 4mg (Intravenous), every three hours
> increased pain.
> IF IV, OVER 2-5 MINUTES, UNDILUTED, OR DILUTE WITH 5 ML NS."[2]

(Capitalization in original.)

Dr. McAndrew testified that Dilaudid is the brand name for hydromorphone, which is a concentrated form of morphine that can be

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[1]Dr. McAndrew testified that "PO" means that the medication is administered "[b]y mouth. It's taken by mouth instead of IV." He also explained that "PRN" means "[a]s needed for." Thus, Dr. McAndrew testified, he "had ordered for [Mr. West] a pain pill to be given every three hours as needed for pain …."

[2]Dr. McAndrew testified that "INJ" means "injection" or "intravenous" administration.

administered by IV or by mouth but that "[i]t works, obviously, faster if you give it IV." It is undisputed that Dilaudid is at least seven times more powerful than morphine and that it carries a risk of inducing respiratory depression, sometimes referred to as Opioid Induced Respiratory Depression ("OIRD"), or oversedation, which can be fatal. If a patient has sleep apnea, there is a higher risk that giving the patient Dilaudid could cause OIRD.[3] Dr. McAndrew further explained that "Dilaudid is typically written as an as-needed order, and that's, frankly, the only way I've ever used it is as-needed," not as a "scheduled drug," which is one that is "to be given at a certain time frame on a certain schedule." Dr. McAndrew testified that his intention with the two pain-medication orders was for the nurses to administer Percocet and then for the nurses to

> "assess the patient; they would determine, reasonably, what they think, in their judgment, the patient needed to get control of his pain so how severe it was -- and to give up to 4 milligrams of Dilaudid if it was very severe pain that they didn't feel that the Percocet could handle."

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[3]At trial, the evidence was in conflict regarding whether Mr. West had sleep apnea. That condition was not noted in his medical charts, but, during his stay at the hospital, hospital staff reported hearing Mr. West snoring loudly, which is a symptom caused by sleep apnea.

On cross-examination, with respect to his order for Dilaudid, Dr. McAndrew admitted that "the verbiage on it is somewhat ambiguous" and that it would have been clearer if it had stated that it was PRN, i.e., as needed. See note 1, supra.

Dr. McAndrew assigned Mr. West to the orthopedic floor of the hospital for his overnight care. At 7:19 p.m. on June 4, 2014, Nurse Joann Edwards took Mr. West from the postsurgery area to the orthopedic floor and handed him off to Nurse Jane Elenwa.[4] Mr. West's vital signs were noted to be stable at that time. According to the SMH Medical Administration Record ("the MAR"), at 10:00 p.m. on the night of June 4, 2014, Nurse Elenwa administered a 4-milligram dose of Dilaudid to Mr. West. Nurse Elenwa checked on Mr. West a half-hour later, and he rated his pain as having slightly decreased from before the administration of the Dilaudid. The MAR also indicates that, at

[4]Nurse Elenwa graduated from nursing school in 2012, passed the nursing-board exams in early 2013, and began working for SMH in July 2013.

11:51 p.m., Nurse Elenwa returned to Mr. West's hospital room and administered a second 4-milligram dose of Dilaudid to Mr. West. It is undisputed that this was equivalent to giving Mr. West 56 milligrams of morphine in a span of less than 2 hours.[5] The MAR states that Nurse Elenwa checked on Mr. West a half-hour later and he rated his pain level as having slightly decreased from before the administration of the second dose of the Dilaudid. None of SMH's medical records reflect that Mr. West was ever given Percocet.

In her video deposition that was shown to the jury, Nurse Elenwa flatly denied having given Dilaudid to Mr. West. She insisted that "[t]he medication I gave him was in a pill form, not an IV." Additionally, Nurse Elenwa testified that if she had given Mr. West 8 milligrams of Dilaudid

[5]Mrs. West's causation expert, Dr. Lewis Nelson, testified that a proper starting dose of Dilaudid for Mr. West after the surgery would have been between .2 and .5 milligrams. Mrs. West's expert in opioid/hospital-patient safety, Dr. Kenneth Rothfield, testified that, according to Dilaudid's packaging, ".2 milligrams and up to a maximum of 1 [milligram] would be appropriate" for a single dose of the product.

in less than 2 hours it would have been "egregious and a gross violation of the standard of care."

In its closing arguments at trial as well as in its brief on appeal, SMH admitted that Nurse Elenwa had administered the doses of Dilaudid to Mr. West and that she had not administered any Percocet.[6] SMH's reason for those concessions was that SMH had admitted in its pretrial submissions and pretrial arguments that its medical records were accurate. At the hospital, controlled narcotics, such as opioids, are stored securely in an electronic medication dispenser -- known as the Omnicell Machine -- that can be retrieved only by using a biometric fingerprint and/or a passcode. A report is created upon each retrieval of such drugs, showing the identity of the individual retrieving the medication and the time at which the medication was removed from the dispenser. Those reports show that Nurse Elenwa accessed both

[6]SMH's corporate representative for the trial, Nurse Monique Hawkins, who testified during SMH's portion of the case, confirmed that SMH was admitting that Nurse Elenwa was "not testifying truthfully under oath" when she stated that she did not administer the doses of Dilaudid.

4-milligram doses of Dilaudid, and scans of Mr. West's identification bracelet indicate that Nurse Elenwa administered those doses of the opioid to Mr. West.

At 3:45 a.m. on June 5, a nurse's aide returned to Mr. West's room and discovered that he was not breathing and was unresponsive. The aide called Nurse Elenwa into the room.[7] At 3:58 a.m., an emergency code was called, and an SMH code team arrived to perform CPR in an effort to resuscitate Mr. West. Those efforts failed, and Mr. West was pronounced dead at 4:25 a.m. on June 5, 2014.

SMH maintains a "crash cart" that holds emergency medications that may be needed during emergency-code situations. The crash cart

[7]There is a discrepancy in the evidence regarding whether Nurse Elenwa visited Mr. West's room at any time between 11:51 p.m. and 3:57 a.m. on June 4-5, 2014. The MAR indicates that Nurse Elenwa visited Mr. West's room at 12:21 a.m., and that Mr. West reported that his pain had slightly decreased, and that Nurse Elenwa visited Mr. West's room again at 3:00 a.m., and that Mr. West refused any further pain medication. However, the "Detail Staff Activity Report" for Nurse Elenwa, which is based on an electronic tracker SMH nurses wear, indicates that she was not in Mr. West's room between 11:51 p.m. and 3:57 a.m.

used at the time of Mr. West's code contained five .4-milligram doses of Narcan. Narcan's sole purpose is to counteract an opioid overdose. The SMH physician who responded to the code for Mr. West, Dr. Alan Babcock, and the code team's nursing personnel, documented the medications they administered during the code, and there was no documentation of an administration of Narcan. However, SMH's billing invoice for its care of Mr. West charged his account for the administration of all five doses of Narcan.

Mrs. West originally commenced this action against SMH on May 20, 2016. Mrs. West asserted several allegations of negligence against SMH under the Alabama Medical Liability Act ("the AMLA"), § 6-5-480 et seq. and § 6-5-540 et seq., Ala. Code 1975. Relevant to this appeal, Mrs. West alleged that SMH had "negligently departed from the accepted standard of care applicable to similarly situated healthcare providers which was in effect at the time in one or more of the following respects": by failing to assess and monitor Mr. West; by failing to train Nurse Elenwa concerning the dangers of Dilaudid; by failing to formulate

and implement policies, procedures, and/or protocols in a timely manner following notification from the Joint Commission for Accreditation of Healthcare Organizations ("JCAHO") for SMH's nursing staff to use standardized screening and monitoring tools when administering opioids by IV for pain management; by failing to identify and correct systematic flaws, hazards, and weaknesses that existed at the hospital with regard to the administration to patients of opioids by IV and the monitoring of those patients; by approving Dr. McAndrew's Dilaudid pain-medication order; and by failing to seek clarification of that order. (Emphasis added.) Regarding some of those allegations, Mrs. West sought to hold SMH vicariously liable for the acts and omissions of SMH's Chief Nursing Officer ("CNO") Paul Read and Nurse Elenwa.

Approximately a month before trial, on January 3, 2022, Mrs. West filed a motion for leave to file a third amended complaint. In part, that proposed amendment sought to add allegations that Nurse Elenwa had failed to document in Mr. West's medical records that she gave him Narcan after he was found unresponsive in his hospital room at 3:45 a.m.

on June 5, 2014. On January 13, 2022, the trial court denied the motion to amend the complaint, finding that it was too close to trial to allow such an amendment. On January 14, 2022, SMH filed motions in limine in which it sought -- among other things -- to prohibit Mrs. West, her counsel, and her witnesses from mentioning, referring to, asking questions about, or presenting arguments concerning "the undocumented Narcan dose that [Mrs. West] believes Nurse Elenwa administered to Mr. West after finding him unresponsive." At the outset of the trial, in dealing with preliminary matters, the trial court orally denied SMH's motion in limine pertaining to the Narcan doses, explaining:

> "Well, I don't think -- you know, pleading it, I don't think that they're alleging it violated the standard of care that Narcan was used or that he overdosed on Narcan. I think it's used in support of the claim that it was Dilaudid and that the nurse realized, oh, my God, I've overdosed this guy."

That ruling was confirmed in an order addressing pretrial motions entered on February 6, 2022.

Additionally, Mrs. West filed two motions in limine that concerned witness testimony about the frequency with which hospitals use

continuous pulse oximetry to monitor patients that have been given opioids by IV. During the trial, medical experts explained that continuous pulse oximetry involves the use of a probe that stays on a patient's finger to measure the percentage of oxygen saturation in the patient's blood.

In her first motion in limine, filed on January 22, 2022, Mrs. West sought to prevent SMH from using deposition testimony from Dr. John Downs, an anesthesiologist whom she had retained as a medical-causation expert but whom she had chosen not to call at trial. In his deposition, Dr. Downs testified:

> "I can't say that it would be the standard of care in 2014 -- … to tell the surgeon that I think the patient ought to be on continuous pulse oximetry because I know even in 2014, hospitals giving narcotics to patients postoperatively were not all monitoring patients with pulse oximetry. In fact, a large number of them were not."

He added: "I believe the majority of hospitals in 2014 were not monitoring patients receiving narcotics with continuous pulse oximetry." On February 7, 2022, the trial court granted Mrs. West's first motion in limine, thereby preventing SMH from using that testimony from Dr. Downs at trial.

Mrs. West's second motion in limine, filed on February 7, 2022, sought to prohibit SMH from

> "suggesting or stating … anything to the effect that its expert witness, Gayle C. Nash, RN, at some time in the past, went into every hospital in this Country surveying them and that she knows or purports to know what some or all or a majority of this Country's hospitals were doing relative to the use of continuous pulse oximetry monitoring in 2014."

Nurse Nash did not testify in her pretrial deposition about her personal observations concerning the use of continuous pulse oximetry in the hospitals that she had surveyed. However, the trial court permitted SMH to depose Nurse Nash posttrial for purposes of the hearing for assessing the appropriateness of the punitive-damages award. In that deposition, Nurse Nash testified that in 2014 "a majority of the hospitals [she had] surveyed" did not use continuous pulse oximetry "on the orthopedic floor or the med-surg floor" and did not use continuous pulse oximetry "within the first 24 hours of surgery after being admitted to the floor." Following several arguments both before and during the trial concerning the admissibility of that potential testimony, the trial court granted Mrs. West's motion in limine. The trial court's articulated reason for

granting Mrs. West's motion in limine was that it believed the testimony was too close to standard-of-care testimony and that Nurse Nash had not been qualified in her deposition to provide testimony concerning the standard of care; she had been qualified to testify concerning JCAHO standards. A February 17, 2022, order confirmed the trial court's oral ruling.

The trial began on February 7, 2022. Mrs. West's first witness was Dr. Kenneth Rothfield, an anesthesiologist and hospital medical director, whom Mrs. West presented as an expert in opioid/hospital-patient safety. Dr. Rothfield testified that SMH had failed to have protocols, policies, and guidelines that should have been in place when opioids are administered by IV to hospital patients. Specifically, Dr. Rothfield testified concerning the areas of patient care in which he believed SMH had fallen short with respect to Mr. West.

> "Q. [Counsel for Mrs. West:] Let me ask you on all of these things that I just went over, the failure to educate the nurses, the failure to identify high-risk medication, failure to have any type of opioid policy, failing to have any type of monitoring policy, failing to have any computer alerts, failing to have any dosing guidelines, do you have an opinion on

> whether that meets the standard of care for a hospital with regard to IV opioid safety in June of 2014?
>
> "A. All of those points are below the standard of care.
>
> "Q. Is it a close call, Doctor?
>
> "A. Not at all. I really have never seen a hospital without a medication safety program and awareness of the dangers of opioids until I became involved in this matter."

Additionally, Dr. Rothfield had no doubt that the amount of Dilaudid administered to Mr. West was inappropriate.

> "A. Well, if you were planning on killing somebody, that would be a dose that would be expected to do the job.
>
> "As I said, 8 milligrams in under two hours is an insane amount of opioid, especially to give to a patient you've never even met before. It's hard to imagine that dose even in somebody who has years and years of opioid tolerance. But you would never give that as an initial dose. …"

At trial, SMH ultimately conceded that Mr. West had been given an excessive dose of Dilaudid, but it contended that Mr. West died from a completely unrelated cardiac event. On February 22, 2022, the jury returned a verdict against SMH, awarding $35 million in punitive damages, and the trial court entered a judgment or verdict finding SMH

liable. On March 24, 2022, SMH filed postjudgment motions seeking a new trial or, in the alternative, a reduction in the award of punitive damages. On June 27, 2022, the trial court entered an order on SMH's postjudgment motions in which it declined to grant a new trial. However, the trial court reduced the amount of the punitive-damages award to $10 million because it deemed the jury's award to be "disproportionate to the loss of Mr. West's life" and "out of line" with awards approved by this Court in other wrongful-death actions.

II. Standards of Review

With respect to its arguments for reversal of the judgment on the jury's verdict finding SMH liable, SMH raises several alleged errors in the admission or exclusion of evidence.

> "'[T]he trial court has great discretion in determining whether evidence ... is relevant and whether it should be admitted or excluded.' Sweeney v. Purvis, 665 So. 2d 926, 930 (Ala. 1995). When evidentiary rulings of the trial court are reviewed on appeal, 'rulings on the admissibility of evidence are within the sound discretion of the trial judge and will not be disturbed on appeal absent an abuse of that discretion.' Bama's Best Party Sales, Inc. v. Tupperware, U.S., Inc., 723 So. 2d 29, 32 (Ala. 1998), citing Preferred Risk Mut. Ins. Co. v. Ryan, 589 So. 2d 165 (Ala. 1991)."

Bowers v. Wal-Mart Stores, Inc., 827 So. 2d 63, 71 (Ala. 2001). Additionally,

> "'"'a judgment cannot be reversed on appeal for an error [in the improper admission of evidence] unless ... it should appear that the error complained of has probably injuriously affected substantial rights of the parties.'"' Mock[v. Allen], 783 So. 2d [828,] 835 [(Ala. 2000)] (quoting Wal-Mart Stores[, Inc. v. Thompson], 726 So. 2d [651,] 655 [(Ala. 1998)], quoting in turn Atkins v. Lee, 603 So. 2d 937, 941 (Ala. 1992)). See also Ala. R. App. P. 45. 'The burden of establishing that an erroneous ruling was prejudicial is on the appellant.' Preferred Risk Mut. Ins. Co. v. Ryan, 589 So. 2d 165, 167 (Ala. 1991)."

Middleton v. Lightfoot, 885 So. 2d 111, 113-14 (Ala. 2003).

SMH also contends that there is a good count/bad count problem with the verdict.

> "'When a jury returns a general verdict upon two or more claims, … it is not possible for this Court to determine which of the claims the jury found to be meritorious. Therefore, when the trial court submits to the jury a "good count" -- one that is supported by the evidence -- and a "bad count" -- one that is not supported by the evidence -- and the jury returns a general verdict, this Court cannot presume that the verdict was returned on the good count. In such a case, a judgment entered upon the verdict must be reversed.'"

Larrimore v. Dubose, 827 So. 2d 60, 63 (Ala. 2001) (quoting Alfa Mut. Ins. Co. v. Roush, 723 So. 2d 1250, 1257 (Ala. 1998)). In this instance, SMH

argues that the same claim -- negligence -- was based on different acts or omissions and that Mrs. West failed to present substantial evidence regarding one or more of those acts or omissions.

Finally, SMH contends that a further remittitur of the jury's punitive-damages award is warranted under the guideposts set forth by the United States Supreme Court in BMW of North America, Inc. v. Gore, 517 U.S. 559 (1996), and the factors set out by this Court in Hammond v. City of Gadsden, 493 So. 2d 1374 (Ala. 1986), and Green Oil Co. v. Hornsby, 539 So. 2d 218 (Ala. 1989).

> "In reviewing damages, this Court reviews an award of punitive damages de novo and with no presumption of correctness to 'ensure that all punitive damage awards comply with applicable procedural, evidentiary, and constitutional requirements, and to order remittitur where appropriate.' § 6-11-21(i), Ala. Code 1975. See also §§ 6-11-23(a) and 6-11-24(a), Ala. Code 1975; Schaeffer v. Poellnitz, 154 So. 3d 979, 986 (Ala. 2014)."

Alabama River Grp., Inc. v. Conecuh Timber, Inc., 261 So. 3d 226, 241 (Ala. 2017).

III. Analysis

SMH presents two sets of arguments in its appeal. The first set of arguments asserts that the trial court committed legal errors that require a reversal of the judgment on the jury's verdict finding SMH liable and a new trial. The second set of arguments seeks a further reduction in the punitive-damages award. In Part A of this analysis, we evaluate SMH's arguments for reversal of the judgment on the jury's verdict finding SMH liable. In part B, we examine SMH's arguments seeking a further reduction in the punitive-damages award.

A. SMH's Arguments for Reversal of the Judgment

1. Did Dr. Rothfield Testify About Alleged Breaches of the Nursing Standard of Care?

SMH contends that Dr. Rothfield was impermissibly allowed to testify about the nursing standard of care even though he was not a similarly situated health-care provider, i.e., even though he is not a nurse and he was not qualified to testify as an expert in nursing care. Thus, SMH asserts that Dr. Rothfield's testimony violated § 6-5-548(e), Ala. Code 1975, which, in pertinent part, provides that "[a] health care

provider may testify as an expert witness in any action for injury or damages against another health care provider based on a breach of the standard of care only if he or she is a 'similarly situated health care provider' …."

In context, the relevant testimony from Dr. Rothfield about which SMH complains is the following:

> "Q. [Mrs. West's Counsel:] All right. Let me walk back through that a little bit.
>
> "You talked about there was a little confusion with Dr. McAndrew, the order there. If appropriate systems were in place at the hospital, dosing guidelines and things that we talked about, would any confusion of that order be cleared up before it got to the floor?
>
> "A. Sure.
>
> "After a doctor writes an order, the orders go to the pharmacy and the pharmacist has to review them to make sure they're appropriate. Because, as I said, people make mistakes. Even doctors will make a dosing error and they need to be checked by a pharmacist.
>
> "And I mentioned that the 4 milligrams of Dilaudid is completely inappropriate. We looked at the package insert that showed that .2 milligrams and up to a maximum of 1 [milligram] would be appropriate and this is four times

greater than even the maximum dose. And it's an obvious dangerous dose.

"Also, the way the order was written, normally pain medications are not given every X hours. They're given only if the patient needs it. So, if you're not complaining of pain, you don't need any intravenous pain medications because, at that point, all you're going to get is side effects.

"But this order was written and it kind of read for every three hours for increasing pain. Normally, you would write it every three hours as needed for a certain level of pain. So it was not a well-written order.

"And I would expect a competent pharmacist from looking at that --

"[SMH's Counsel]: I'm going to object. He -- that's beyond his area of expertise. I object.

"THE COURT: Overruled.

"[Dr. Rothfield]: I would expect a competent pharmacist to call time out, call the doctor and say, hey, Dr. McAndrew, I'm looking at your order here. Four milligrams seems pretty high. And do you want this as a standing order or just as needed because I can't tell. So you need to give me a better order.

"But that didn't happen. That order went right through the pharmacy to the nursing staff. And I would expect a nurse to also recognize the --

> "[SMH's Counsel]: Same objection. He's not been qualified for nursing.
>
> "THE COURT: Overruled.
>
> "[Dr. Rothfield]: I would expect a nurse to recognize that 4 milligrams of Dilaudid is an enormous dose that would never be appropriate and that it was confusing. And I would expect a nurse in that situation to call the doctor and say, hey, Dr. McAndrew, this is Nurse Elenwa. I've got Mr. West here and he's complaining of pain. I'm looking at your order. You don't really want to give him 4 milligrams of Dilaudid, do you, every three hours? But that didn't happen either.
>
> "And not only did Nurse Elenwa give this huge dose of Dilaudid, she gave another dose over an hour earlier than the doctor had even prescribed it.
>
> "So, to me, it was really this is the most egregious overdose of Dilaudid I've ever seen in my career. I can't imagine how this could happen in a hospital."

(Emphasis added.)

SMH contends that Dr. Rothfield's above-quoted testimony concerning what he would have expected a nurse to do constituted clearly impermissible commentary about the nursing standard of care because it was undisputed that Dr. Rothfield was not a licensed, trained, or

practicing nurse.[8] SMH argues that Dr. Rothfield's testimony was plainly prejudicial "because the jury was likely to construe a doctor's testimony as more persuasive than a nurse's concerning matters involving medical issues." SMH's brief, p. 23.

SMH's contention overlooks two important points. First, Dr. Rothfield was offered as "an expert in IV opioid/hospital patient safety" and as "an IV-opioid hospital-subject-matter expert [who is] familiar with the standard of care of what … hospitals should do with regard to IV opioid safety." SMH conceded that Dr. Rothfield was an expert in that regard. Thus, the nature of Dr. Rothfield's testimony was to speak about the policies and procedures that hospitals should have in

[8]Based on the above-quoted testimony from Dr. Rothfield, SMH also contends that Dr. Rothfield's testimony violated § 6-5-548(e), Ala. Code 1975, because he was permitted to testify about a pharmacist's standard of care. However, Mrs. West decided not to seek liability based on the actions or inactions of SMH pharmacists, and the jury was instructed that "Ms. West does not claim that the pharmacist at [SMH] breached the standard of care in this case. So there is no claim that the pharmacist did that." In light of Mrs. West's decision and the jury instruction, we find Dr. Rothfield's testimony concerning pharmacists to be, at most, harmless error.

place to protect patients when opioids are prescribed and administered and the roles various hospital personnel -- doctors, pharmacists, and nurses -- play in ensuring patient safety with respect to opioid administration. Dr. Rothfield criticized the performance of the doctor, the pharmacist, and the nurses in this situation regarding what they should have done in their roles. Indeed, SMH attempted to use Dr. Rothfield's criticism of Dr. McAndrew's Dilaudid order to its advantage at trial (and does so in this appeal[9]), but then, at the same time, it contends that Dr. Rothfield was unqualified to address the role a nurse should play in opioid/hospital-patient safety despite accepting Dr. Rothfield's expertise in the subject area of opioid/hospital-patient safety. In short, Dr. Rothfield was not testifying about a nurse's standard of care but, rather, about roles hospital personnel play in ensuring patient safety when opioids are prescribed and administered by IV to patients. That is

[9]See SMH's brief, p. 9.

the basis on which the trial court overruled SMH's objection, and we find no fault with the trial court's reasoning.

The second important point is that Mrs. West presented testimony from multiple nurses addressing a nurse's standard of care. To begin with, Mrs. West's nursing expert, Barbara Levin, R.N., unequivocally testified that Nurse Elenwa "[a]bsolutely" should have questioned Dr. McAndrew's order for 4 milligrams of Dilaudid. SMH did not challenge Nurse Levin's qualifications as a nursing expert. Mrs. West also elicited admissions from SMH's director of clinical education, Janice Banks, R.N., that a nurse is supposed to call a doctor to get clarification about a medication order that is unclear or seems incorrect because a nurse has an independent duty to protect a patient. SMH's own nursing expert, Brandy Mobley, R.N., agreed that "[n]urses don't blindly follow the orders of anyone" and that "[n]urses are the first line of defense for a patient's safety," and she admitted that Nurse Elenwa made a "medical error" because she gave the second dose of Dilaudid to Mr. West "too early." Additionally, Mrs. West elicited testimony from Nurse Joann

Edwards[10] that nurses call doctors "all the time" "if a patient needs certain medications," that it is important for nurses "to know what appropriate dose ranges are" for the medications they are administering, and that "if you had an order for any drug that you were giving and it was out of whack for what you as a nurse know, you would have a responsibility to question that order." SMH's corporate representative, Monique Hawkins, R.N., admitted that she personally would have questioned a doctor's order providing for "more than .4 to .5 milligrams of Dilaudid." Finally, Nurse Elenwa herself testified that it would have been a "gross" and "egregious" violation of the nursing standard of care if she had given Mr. West the amount of Dilaudid recorded in the MAR. She also stated that "if you see anything that can affect the patient adversely based on the -- your assessment of the patient, … you can call the doctor or call the pharmacist and talk it through, because I've ha[d] to do that several times." Given all the foregoing testimony, it is clear

[10]Nurse Edwards treated Mr. West preoperatively and in the postanesthesia care unit.

that Mrs. West overwhelmingly established the nursing standard of care through the testimony of qualified nurse witnesses.[11] Thus, even assuming that Dr. Rothfield did testify concerning the nursing standard of care, the trial court's error in allowing such testimony was harmless. See Rule 45, Ala. R. App. P.

SMH, citing Mihelic v. Sullivan, 686 So. 2d 1130 (Ala. 1996), protests that "a new trial is the proper remedy if the jury hears evidence from an expert who is not similarly situated as Section 6-5-548 requires."

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[11]We also note that SMH's argument that "this Court recognized in [Springhill Hospitals, Inc. v.] Larrimore, [5 So. 3d 513 (Ala. 2008), that] medicine dosing is outside the scope of matters on which a nonphysician -- such as Nurse Elenwa -- would be competent," SMH's brief, p. 43, ignores the fact that Larrimore plainly did not address the duties that nurses owe to patients; it concerned whether pharmacists owe a duty of care to patients based on their interactions with a physician with respect to medication dosing. A nurse's role in patient care is obviously different than that of a pharmacist, because a nurse implements the dosing instructions of a doctor, a role that necessarily requires interaction with, and careful assessment of, the patient, while a pharmacist dispenses drugs to a patient according to a doctor's prescription. Moreover, whether a doctor alone has the authority and responsibility to prescribe the proper doses of medication is distinct from whether a nurse has a duty to seek clarification about the content of a doctor's medication order to protect the safety of a patient.

SMH's reply brief, p. 8. In Mihelic, the Court reversed a judgment for the plaintiffs because their medical expert had testified concerning a standard of care that the plaintiffs admitted he was not qualified to address. See Mihelic, 686 So. 2d at 1131. However, there was no indication in Mihelic that the plaintiffs had offered any other expert testimony for the relevant standard of care. Indeed, the same is true for all the cases SMH cites for the proposition that "[t]his Court routinely reverses judgments when a trial court fails to enforce the similarly-situated-health-care-provider requirement in admitting expert testimony." SMH's brief, p. 21. See, e.g., Nall v. Arabi, [Ms. 1210312, Aug. 19, 2022] ___ So. 3d ___ (Ala. 2022); Youngblood v. Martin, 298 So. 3d 1056, 1061 (Ala. 2020); and Chapman v. Smith, 893 So. 2d 293, 299 (Ala. 2004). In short, SMH failed -- in its briefs and in oral argument -- to offer a single case in which this Court reversed a judgment entered on a jury's verdict for the plaintiff based on § 6-5-548(e) when the plaintiff had offered unobjected-to medical-expert testimony from a similarly situated health-care provider.

> 2. Did the Trial Court Commit Reversible Error by Admitting Evidence Concerning an Undocumented Administration of Narcan?
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> SMH contends that the judgment should be reversed because
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> "the trial court admitted evidence that Nurse Elenwa failed to document the administration of Narcan to Mr. West, … even though [Mrs. West] had not mentioned that omission in her complaint. … Section 6-5-551[, Ala. Code 1975,] expressly prohibits admission of evidence of such an unpleaded omission, and the improper evidence prejudiced [SMH's] substantial rights."

SMH's brief, p. 25.

Part I of this opinion recounted the parties' trial-court disputes over Mrs. West's Narcan evidence. The parties repeat those arguments in this appeal. Namely, SMH contends: (1) that § 6-5-551, Ala. Code 1975, prohibits the admission of any other acts or omissions outside of those specifically pleaded in the complaint; (2) that an undocumented administration of Narcan was not pleaded in Mrs. West's second amended complaint; and (3) that the trial court erred by allowing any suggestion from Mrs. West that Nurse Elenwa had administered Narcan to Mr. West.

Mrs. West responds that her evidence pertaining to the administration of Narcan did not concern an act or omission that would render SMH liable and, therefore, that the admission of such evidence did not violate § 6-5-551. As Mrs. West puts it:

> "Mrs. West and her expert witnesses contended at trial that administering Narcan was the one thing Nurse Elenwa did right. Once she figured out she had overdosed Mr. West on Dilaudid, she did what she should have done in administering Narcan to try to reverse the respiratory depressive effect of the Dilaudid."

Mrs. West's brief, p. 29 n.24.

In part, § 6-5-551 provides that, in any action "against a health care provider for breach of the standard of care,"

> "[t]he 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 …. 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."

In the trial court, SMH noted that in Ex parte Anderson, 789 So. 2d 190, 195 (Ala. 2000), a plurality of this Court concluded that § 6-5-551's "meaning could not be clearer. If all conditions of the statute are met,

then any other acts or omissions of the defendant health-care provider are exempt from discovery, and the discovering party is prohibited from introducing evidence of them at trial." The Anderson plurality further observed that the plaintiff in that case had argued "that under § 6-5-551 she should not be precluded from obtaining discovery regarding other similar incidents …." but, rather, that she was "precluded only from obtaining information regarding any other incidents of malpractice completely unrelated to those alleged in her complaint." Id. The Anderson plurality rejected that argument as contrary to the statute's prohibition on "'introducing at trial evidence of any other act or omission.'" Id. (emphasis omitted). SMH contends that Anderson shows that evidence concerning the undocumented administration of Narcan should have been precluded by the trial court.

However, Anderson clearly concerned a plaintiff's attempt to introduce evidence of acts of medical negligence by the defendant other than the acts alleged by the plaintiff to render the defendant liable to the plaintiff, i.e., the plaintiff sought to introduce evidence of similar

previous acts by the defendant committed against persons other than the plaintiff. Mrs. West did not allege that Mr. West died from the administration of Narcan or that Nurse Elenwa did anything wrong by administering Narcan; rather, evidence indicating that Narcan was administered constituted circumstantial evidence in support of Mrs. West's theory of causation -- specifically, that Mr. West died from receiving an excessive dose of Dilaudid -- because Narcan's only purpose is to reverse the effects of an opioid overdose. Thus, the trial court concluded, evidence of the administration of Narcan did not violate § 6-5-551 because it supported Mrs. West's allegations as to the cause of Mr. West's death.[12] This Court has stated that § 6-5-551 "prohibits the admission into evidence at trial of acts or omissions by a health-care provider that are not related to the acts or omissions giving rise to the complaint." Baptist Health Sys., Inc. v. Cantu, 264 So. 3d 41, 45 (Ala.

[12]It should be kept in mind that, at the time the trial court denied SMH's motion in limine regarding evidence indicating that Narcan had been administered to Mr. West, SMH had not yet conceded that Nurse Elenwa had given Mr. West an excessive dose of Dilaudid; that admission did not occur until Mrs. West had rested her case.

2018) (emphasis added). The administration of Narcan was related to the administration of an excessive dose of Dilaudid; the evidence did not implicate another act of alleged medical negligence by SMH. Thus, we agree with the trial court that § 6-5-551 did not require the exclusion of Mrs. West's evidence concerning the alleged administration of Narcan to Mr. West.

3. Did the Trial Court Erroneously Exclude Evidence of Other Hospitals' Contemporaneous Practices Concerning the Use of Continuous Pulse Oximetry?

SMH argues that the trial court committed reversible error by excluding "factual evidence that most hospitals in the country in 2014 were not using continuous pulse oximetry to monitor post-operative patients receiving IV opioids." SMH's brief, pp. 27-28. SMH refers to testimony from two witnesses: Dr. John Downs and Nurse Gayle Nash. As we noted in Part I of this opinion, Dr. Downs is an anesthesiologist Mrs. West retained as a medical-causation expert, but whom she chose not to call at trial, and Nurse Nash was SMH's proffered expert on JCAHO standards. SMH contends that the testimony from both

Dr. Downs and Nurse Nash concerning the use of continuous pulse oximetry at hospitals in 2014 was "plainly admissible" because

> "[a] key theme of [Mrs. West's] case was that [SMH] breached the standard of care by not using continuous-pulse-oximetry monitoring in June 2014. Evidence of other hospitals' policies and practices -- including that most hospitals were not using continuous pulse oximetry at that time -- was thus highly relevant."

SMH's brief, p. 29.

SMH characterizes the trial court's ruling with respect to Dr. Downs's testimony as "agree[ing] with [Mrs. West's] argument that her own expert -- Dr. Downs -- was not qualified to offer expert standard-of-care opinions." SMH's brief, pp. 29-30. That description fails to give a full picture of the trial court's ruling. Dr. Downs was retained by Mrs. West as an expert on cause of death. Mrs. West never proffered Dr. Downs as being qualified to testify concerning the standard of care for postoperative patients who are being administered opioids by IV. Notably, SMH never attempted to establish before the trial court that Dr. Downs was qualified to testify concerning the care of patients receiving opioids by IV -- nor does it do so on appeal. Instead, SMH simply

argues that his testimony was "factual evidence" based on his own observations. But Dr. Downs stated that he was addressing "the standard of care in 2014," not just his own observations as a "factual witness." SMH points to nothing in Dr. Downs's deposition that established his credentials as a standard-of-care expert with respect to the care of patients receiving opioids by IV. See, e.g., Prowell v. Children's Hosp. of Alabama, 949 So. 2d 117, 132, 133 (Ala. 2006) ("Because [Kimberly Denise] Prowell has pointed us to nothing in Dr. [Raeford] Brown's deposition testimony to indicate that he is a licensed physician, that he is board-certified in the same specialty as Dr. [Kathryn] Brock, or that he has practiced as an anesthesiologist within the 12-month period preceding [Keiterica Deshae] Holley's surgery, we presume his deposition testimony does not address these credentials"; therefore, "[t]he trial court properly excluded the reading of Dr. Brown's testimony at trial."). Therefore, the exclusion of Dr. Downs's testimony was within the trial court's discretion.

SMH's argument with respect to Nurse Nash's testimony similarly contends that her testimony "did not constitute expert opinions on the standard of care." SMH's brief, p. 30. Instead, SMH says, Nurse Nash "sought to testify as a purely factual matter that, based on [her] personal observations, continuous-pulse-oximetry monitoring was not occurring in most other hospitals throughout the country." SMH's brief, p. 31. However, that argument does not account for the fact that Mrs. West's counsel specifically asked Nurse Nash in her pretrial deposition about the subjects on which she was offering expert testimony, and she expressly testified that she was testifying only about JCAHO standards, not typical hospital practices for the care of patients receiving opioids by IV. Despite that testimony, SMH sought to have Nurse Nash testify at trial with respect to what "the majority of hospitals" were doing concerning the use of continuous pulse oximetry for patients receiving opioids by IV in 2014 by labeling it "factual testimony." The trial court ruled that Nurse Nash's testimony on this subject was "just a little bit too close to [expert] opinion testimony," rather than factual-observation

testimony. SMH offers no persuasive argument as to why that determination was not within the trial court's discretion, especially given that Nurse Nash plainly was not offered as an expert on the subject of the care of patients receiving opioids by IV. Moreover, Nurse Nash did not have the experience to be able to make a "factual" claim that "a majority" of hospitals in 2014 did not use continuous pulse oximetry in monitoring patients receiving opioids by IV. Nurse Nash admitted in her posttrial deposition that, between 2012 and 2014, she surveyed approximately 50 hospitals for JCAHO. As Mrs. West's counsel observed in a posttrial hearing, that amounted to "only .55 percent to 1.1 percent of 4,000 hospitals that are accredited by [JCAHO]." In short, the trial court did not exceed its discretion in excluding Nurse Nash's testimony concerning her observations about the use of continuous pulse oximetry for patients receiving opioids by IV in the hospitals she visited.

4. Does the Good Count/Bad Count Rule Require a New Trial?

SMH contends that Mrs. West failed to present substantial evidence with respect to "two of the bases for her negligence claim."

SMH's brief, p. 35. Those two bases were the alleged negligent training of Nurse Elenwa and the alleged negligent failure to question dosing by Nurse Elenwa. SMH argues that "[i]f a jury returns a general verdict, a plaintiff's failure of proof on one basis for a negligence claim requires a new trial under the good count/bad count rule." Id.

However, a fundamental problem underlies SMH's specific arguments that Mrs. West lacked substantial evidence regarding aspects of her negligence claim: the cases SMH cites in support of applying the good count/bad count rule were ones in which separate "claims" of negligence were submitted to the jury, but the jury returned a general verdict. See Long v. Wade, 980 So. 2d 378, 382, 387 (Ala. 2007) (quoting the jury charge regarding separate negligence claims and observing that "[t]he defendants properly challenged the sufficiency of the evidence as to each of the monitoring/delivery claims"); Mobile OB-GYN, P.C. v. Baggett, 25 So. 3d 1129, 1132-33, 1140 (Ala. 2009) (quoting the jury charge and observing that, "[a]fter all the evidence was presented, the

jury in this case was given a charge alleging five counts of negligence").

As the Court noted in Long:

> "'[W]hen the trial court submits to the jury a "good count" -- one that is supported by the evidence -- and a "bad count" -- one that is not supported by the evidence -- and the jury returns a general verdict, this Court cannot presume that the verdict was returned on the good count. In such a case, a judgment entered upon the verdict must be reversed.'"

980 So. 2d at 385 (quoting Larrimore, 827 So. 2d at 63, quoting in turn Roush, 723 So. 2d at 1257) (emphasis omitted and emphasis added).

However, in the present case, the trial court did not submit separate claims based on distinct acts of negligence to the jury. Instead, in pertinent part, the trial court charged the jury:

> "Now, ladies and gentlemen, in this case, the plaintiff, Patricia West, says that the defendant, Springhill Hospitals, Inc., doing business as Springhill Memorial Hospital, was a hospital and that her husband, Mr. John West, Jr., was a patient of Springhill on June 4 and 5, 2014.
>
> "Ms. West also says that the defendant, Springhill, caused Mr. West's death as a result of its failure to follow the standard of care.
>
> "Springhill denies the claim.

> "To recover damages on this claim, Ms. West must prove to your reasonable satisfaction by substantial evidence all of [the] following three elements:
>
> "First, she must prove the standard of care that should have been followed by Springhill Memorial Hospital and its employees during the time they were responsible for Mr. West's medical care;
>
> "Second, they must show that Springhill Memorial Hospital did not follow the standard of care in providing medical care and treatment to Mr. West;
>
> "And, third and finally, that Mr. West's death was probably caused by Springhill's failure to follow the standard of care.
>
> "If the plaintiff, Patricia West, proves to a reasonable satisfaction by substantial evidence each of these three elements, then you should find in her favor.
>
> "However, if Ms. West does not, then you should find in favor of the defendant, Springhill Memorial Hospital."

In short, as Mrs. West notes in her brief, "[t]he circuit court never defined [to the jury] the [discrete] alternative theories of liability concerning SMH, CNO Read, or Nurse Elenwa. In other words, the circuit court submitted only a single, undifferentiated count of medical negligence, so no 'bad count' was ever specified in the instruction." Mrs. West's brief,

p. 46. Moreover, SMH did not object to any of the instructions provided to the jury. Thus, no good count/bad count problem exists in this case.

B. SMH's Arguments for Further Reduction of the Punitive-Damages Award

SMH also presents a set of arguments that seek a further reduction in the punitive-damages award. As we recounted in Part I of this opinion, in its June 27, 2022, postjudgment order, the trial court reduced the jury's award of punitive damages from $35 million to $10 million. Mrs. West has not contested that reduction. However, SMH presents multiple arguments for why it believes a further reduction in the award is warranted.

SMH first contends that this Court should revive the statutory cap on punitive damages in medical-malpractice cases contained in § 6-5-547, Ala. Code 1975. In the alternative, SMH contends that the punitive-damages award should be further reduced when the factors established in BMW of North America, Inc. v. Gore, 517 U.S. 559 (1996), Green Oil Co. v. Hornsby, 539 So. 2d 218 (Ala. 1989), and Hammond v. City of Gadsden, 493 So. 2d 1374 (Ala. 1986), are properly evaluated.

1. Should the Statutory Cap on Punitive Damages in § 6-5-547 be Revived?

SMH contends that the former cap on punitive damages in medical-malpractice wrongful-death actions, contained in § 6-5-547, should be revived by this Court. Section 6-5-547 placed a cap of $1 million on punitive damages in AMLA cases that allege wrongful death, though it also included a proviso tying that cap amount to the annual Consumer Price Index. SMH states that if § 6-5-547 was applied in this case, the amount of punitive damages allowed, with the Consumer Price Index adjustment, would be $2,547,216. SMH's brief, p. 49.

Section 6-5-547 was enacted in 1987, but it was declared unconstitutional in Smith v. Schulte, 671 So. 2d 1334 (Ala. 1995). SMH contends that "subsequent decisions have fatally undermined the bases supporting the Schulte decision." SMH's brief, p. 45. Two possible bases for § 6-5-547's unconstitutionality were identified in Schulte: (1) that "§ 6-5-547 violates the equal protection guarantee of the Constitution of Alabama," 671 So. 2d at 1342, and (2) that "§ 6-5-547 violates the right to trial by jury as guaranteed by § 11 of the Constitution of Alabama"

because, according to the main opinion, the right to trial by jury included "the right to have the jury determine the amount of damages." Id. at 1343. SMH notes that, in Ex parte Melof, 735 So. 2d 1172, 1181-86 (Ala. 1999), this Court explained that there is no equal-protection clause in the Alabama Constitution and that, in Ex parte Apicella, 809 So. 2d 865, 874 (Ala. 2001), a plurality of this Court stated that Schulte was "wrongly decided" to the extent that it held that the right to trial by jury includes a right to impose punishment.

However, SMH's argument faces the stark problem that, in all the years between our decision in Ex parte Apicella and now, this Court has never chosen to "revive" § 6-5-547, and that choice has not been for a lack of parties asking that we do so. In Mobile Infirmary Ass'n v. Tyler, 981 So. 2d 1077, 1104-05 (Ala. 2007), this Court addressed the exact same arguments SMH raises in this case for reviving § 6-5-547:

> "The Infirmary argues that this Court should revive § 6-5-547, Ala. Code 1975, which limited a judgment against a health-care provider to $1,000,000. Section 6-5-547 was declared unconstitutional in Smith v. Schulte, 671 So. 2d 1334, 1343-44 (Ala. 1995). In support of its argument for the

revival of the statute, the Infirmary cites this Court's decision in Ex parte Apicella, 809 So. 2d 865, 874 (Ala. 2001).

"In Mobile Infirmary Medical Center v. Hodgen, [884 So. 2d 801 (Ala. 2003)], this Court rejected a similar argument to revive the damages limitation imposed by § 6-5-544, Ala. Code 1975, a companion statute to § 6-5-547. This Court explained in Hodgen:

> "'Mobile Infirmary next invites this Court to revive § 6-5-544(b), Ala. Code 1975, which, at one time, placed a $400,000 cap on the noneconomic damages that could be awarded in a medical-malpractice case. In Moore v. Mobile Infirmary Association, 592 So. 2d 156 (Ala. 1991), we declared § 6-5-544(b), Ala. Code 1975, unconstitutional, holding that the cap violated the right to a trial by jury and the equal-protection guarantees under the Alabama Constitution. Mobile Infirmary argues that because this Court has since acknowledged that a cap on punitive damages does not violate the right to a trial by jury under the Alabama Constitution, see Ex parte Apicella, 809 So. 2d 865 (Ala. 2001), and because this Court has acknowledged that the Alabama Constitution contains no equal-protection clause, see Ex parte Melof, 735 So. 2d 1172 (Ala. 1999), this Court should overrule Moore, supra, reinstate the $400,000 cap and apply the cap to Hodgen's punitive-damages award in this case. We decline Mobile Infirmary's invitation to revive § 6-5-544(b), Ala. Code 1975, because, since we decided Moore, the Legislature has explicitly addressed this issue.

"'The Legislature, when it enacts legislation, is presumed to have knowledge of existing law and of the judicial construction of existing statutes. See Ex parte Fontaine Trailer Co., 854 So. 2d 71 (Ala. 2003). Thus, with the knowledge that § 6-5-544(b), Ala. Code 1975, had been declared unconstitutional in 1991 and that § 6-11-21, Ala. Code 1975, which provided a general cap on punitive-damages awards, had been declared unconstitutional in 1993, see Henderson v. Alabama Power Co., 627 So. 2d 878 (Ala. 1993), the Legislature in 1999 rewrote § 6-11-21, Ala. Code 1975, to provide caps on punitive-damages awards to apply "in all civil actions," except in class actions, wrongful-death actions, and actions alleging the intentional infliction of physical injury. Section 6-11-21(a), (b), (d), (h), and (j), Ala. Code 1975. Section 6-11-21, Ala. Code 1975, as so amended, has been recognized as a complete replacement of the old statutory restrictions on punitive damages. See Morris v. Laster, 821 So. 2d 923, 927 (Ala. 2001).

"'The fundamental principle of statutory construction is that words in a statute must be given their plain meaning. See Simcala, Inc. v. American Coal Trade, Inc., 821 So. 2d 197, 202 (Ala. 2001) (citing Ex parte Smallwood, 811 So. 2d 537, 539 (Ala. 2001); Ex parte Krothapalli, 762 So. 2d 836, 838 (Ala. 2000); and IMED Corp. v. Systems Eng'g Assocs. Corp., 602 So. 2d 344, 346 (Ala. 1992)); Archer Daniels Midland Co. v. Seven Up Bottling Co. of Jasper, Inc., 746 So. 2d 966, 969 (Ala. 1999) (citing John Deere Co. v. Gamble, 523

So. 2d 95 (Ala. 1988)). Section 6-11-21(d), Ala. Code 1975, provides:

> "'"(d) Except as provided in subsection (j), in all civil actions for physical injury wherein entitlement to punitive damages shall have been established under applicable laws, no award of punitive damages shall exceed three times the compensatory damages of the party claiming punitive damages or one million five hundred thousand dollars ($1,500,000), whichever is greater."

"'(Emphasis added.) As noted above, the only exclusions from this cap on punitive-damages awards for claims alleging physical injury are class actions, wrongful-death actions, and actions alleging the intentional infliction of physical injury. The wording of this statute, i.e., that it applies to "all civil actions," clearly encompasses actions alleging physical injury caused by medical malpractice. Although the Legislature excluded from this statute certain types of claims, the statute makes no mention of excluding actions brought pursuant to the [AMLA]. Because the Legislature, with knowledge of this Court's holding as to § 6-5-544(b), Ala. Code 1975, enacted a new statutory cap on punitive damages that clearly encompasses claims brought pursuant to the [AMLA], we decline Mobile Infirmary's invitation to revisit the Moore decision, despite the

> erosion of its holdings, and to reinstate § 6-5-544(b), Ala. Code 1975.'
>
> "884 So. 2d at 813-14.
>
> "Although relied on extensively by Robert in his brief to this Court, see Robert's brief, pp. 66-69, the Infirmary has not addressed this Court's decision in Hodgen. Thus, the Infirmary has not responded to Robert's argument that the reasoning in Hodgen applies to preclude the Infirmary's attempt to revive § 6-5-547 in this case. Consequently, we decline the Infirmary's invitation to revive the damages limitation of § 6-5-547.[27]
>
> "_____
>
> "[27]Unlike Hodgen, which involved only claims arising out of nonfatal injuries a patient suffered as a result of medical malpractice, this case involves a wrongful-death claim. Therefore, § 6-11-21(j), Ala. Code 1975, rather than § 6-11-21(d), would apply to this case. Section 6-11-21(j) states that '[t]his section shall not apply to actions for wrongful death or for intentional infliction of physical injury.' Even so, Hodgen noted that '[s]ection 6-11-21, Ala. Code 1975, as so amended, has been recognized as a complete replacement of the old statutory restrictions on punitive damages.' 884 So. 2d at 814 (citing Morris v. Laster, 821 So. 2d 923, 927 (Ala. 2001) (emphasis added))."

981 So. 2d at 1104-06 (footnote 26 omitted).

The Court was again asked to revive § 6-5-547 in Gillis v. Frazier, 214 So. 3d 1127, 1134 (Ala. 2014), and it again declined to do so, deeming its discussion in Tyler to have been sufficient in addressing the issue:

> "Dr. Gillis urges this Court to revive § 6-5-547, Ala. Code 1975, which limited a judgment in a medical-malpractice action against a health-care provider to $1,000,000, and to overrule Smith v. Schulte, 671 So. 2d 1334 (Ala. 1995), which held that the cap on damages in § 6-5-547, Ala. Code 1975, was unconstitutional. In support of his argument, Dr. Gillis cites Ex parte Apicella, 809 So. 2d 865 (Ala. 2001), and Ex parte Melof, 735 So. 2d 1172 (Ala. 1999).
>
> "This Court revisited the Schulte decision in Mobile Infirmary Ass'n v. Tyler, 981 So. 2d 1077 (Ala. 2007), and declined to revive § 6-5-547. After considering Schulte and its progeny and the cases cited by Dr. Gillis, we are not persuaded to overrule Schulte."[13]

We have not been persuaded by those previous requests to revive § 6-5-547 because the legislature enacted a new statutory scheme with

[13]A review of the appellant's briefs in Gillis reveals that the Court was presented with the exact same arguments for reviving § 6-5-547 that SMH presents here. See, e.g., SMM Gulf Coast, LLC v. Dade Cap. Corp., 311 So. 3d 736, 745 n.2 (Ala. 2020) (observing that "'this Court may take judicial notice of its own records in another proceeding when a party refers to the proceeding'" (quoting Kennedy v. Boles Invs., Inc., 53 So. 3d 60, 66 n.2 (Ala. 2010))).

respect to punitive damages in 1999. As the Court noted in Mobile Infirmary Medical Center v. Hodgen, 884 So. 2d 801, 814 (Ala. 2003): "[T]he Legislature in 1999 rewrote § 6-11-21, Ala. Code 1975, to provide caps on punitive-damages awards to apply 'in all civil actions,' except in class actions, wrongful-death actions, and actions alleging the intentional infliction of physical injury." Specifically, § 6-11-21, Ala. Code 1975, in pertinent part, now provides:

> "(a) Except as provided in subsections (b), (d), and (j), in all civil actions where an entitlement to punitive damages shall have been established under applicable laws, no award of punitive damages shall exceed three times the compensatory damages of the party claiming punitive damages or five hundred thousand dollars ($500,000), whichever is greater.
>
> "….
>
> "(j) This section shall not apply to actions for wrongful death or for intentional infliction of physical injury."

Thus, after the previous statutory caps on punitive damages had been declared unconstitutional, the legislature "enacted a new statutory cap on punitive damages that clearly encompasses claims brought pursuant to the AMLA," Hodgen, 884 So. 2d at 814, and it did not reenact

§ 6-5-547. Given that "'[s]ection 6-11-21, Ala. Code 1975, as so amended, has been recognized as a complete replacement of the old statutory restrictions on punitive damages,'" Tyler, 981 So. 2d at 1105 n.27 (quoting Hodgen, 884 So. 2d at 814), revival is not even available. See Shiv-Ram, Inc. v. McCaleb, 892 So. 2d 299, 311-13 (Ala. 2003) (explaining that the legislature's replacement of the old version of § 6-11-21 was done with the understanding of this Court's previous judicial construction on statutory punitive-damages caps and that, even if the Court overruled a previous decision that had declared such caps unconstitutional, the previous statute would not be revived).[14] Therefore, we reject SMH's

[14]We also note that in Alabama Power Co. v. Turner, 575 So. 2d 551, 556 (Ala. 1991), this Court observed that "[t]he exception of wrongful death actions from legislation imposing caps on the amount of punitive damages that can be awarded in civil actions" exists because "the legislature has undoubtably recognized that no arbitrary cap can be placed on the value of human life and is 'attempt[ing] to preserve human life by making homicide expensive.'" (Quoting Louis Pizitz Dry Goods Co. v. Yeldell, 274 U.S. 112, 116 (1927).) The Court in Boudreaux v. Pettaway, 108 So. 3d 486, 497 (Ala. 2012) -- specifically referencing that conclusion from Turner -- stated: "Nothing before us indicates that our holding in Turner was either incorrect or is due to be revisited." (Boudreaux was overruled on other grounds by Gillis v. Frazier, 214 So. 3d 1127 (Ala. 2014).) Thus, nothing in Alabama law supports the

argument that the punitive-damages award should be reduced by the application of § 6-5-547.

> 2. Do the guideposts contained in Gore and the factors contained in Hammond and Green Oil weigh in favor of a further reduction in the punitive-damages award?

SMH contends that the Gore guideposts governing a court's review of a punitive-damages award and the Hammond and Green Oil factors a court should consider in determining whether a punitive-damages award is excessive "compel the conclusion that the $10 million award is excessive." SMH's brief, p. 51.

> "'Generally, "the purpose of punitive damages is not to compensate the plaintiff but to punish the wrongdoer and to deter the wrongdoer and others from committing similar wrongs in the future." Green Oil Co. v. Hornsby, 539 So. 2d 218, 222 (Ala. 1989). Therefore, punitive damages "must not exceed an amount that will accomplish society's goals of punishment and deterrence." Id. ...'
>
> "Alabama River Grp., Inc. v. Conecuh Timber, Inc., 261 So. 3d 226, 271 (Ala. 2017).

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notion that there is supposed to be a cap on punitive damages in any wrongful-death actions -- including those pursued under the AMLA.

"'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)."

Merchants FoodService v. Rice, 286 So. 3d 681, 708 (Ala. 2019).

SMH first provides its view of the facts as they pertain to the Gore guideposts, arguing that those guideposts "require a substantial reduction of the punitive damages." SMH's brief, p. 51.

a) Gore Guidepost 1: Degree of Reprehensibility

> "'"'[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]). When analyzing this first Gore factor, Campbell counsels courts to consider whether
>
> > "'"the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a

> reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident."
>
> "'538 U.S. at 419[, 123 S.Ct. 1513].'
>
> "Alabama River Group[, Inc. v. Conecuh Timber, Inc.], 261 So. 3d [226] at 272 [(Ala. 2017)]."

Merchants FoodService, 286 So. 3d at 708-09.

In its analysis of the degree of reprehensibility in the June 27, 2022, postjudgment order, the trial court first observed that "[v]irtually every expert testified Mr. West received an extremely high dose of Dilaudid (8 milligrams within one hour and fifty-one minutes)." That observation is borne out by the record: witnesses for both parties testified that the doses given were "egregious," "extremely high," and "excessive." Nurse Elenwa herself described the Dilaudid doses listed in the MAR as "ridiculous," "not appropriate," "unacceptable," and a "gross violation" of the standard of care.

SMH responds by arguing that Dr. Rothfield "conceded that a dose of 4 milligrams was exactly what [Dr. McAndrew] prescribed and that Nurse Elenwa lacked authority to alter it." SMH's brief, p. 53. As the summaries of both Dr. Rothfield's and Dr. McAndrew's testimony in Part I of this opinion make clear, however, that simply is not true. First, Dr. McAndrew issued an order prescribing Percocet as the first pain reliever to be used, an order that was ignored by Nurse Elenwa. Second, a proper starting dose of Dilaudid was .2 milligrams to 1 milligram, and Dr. Rothfield and several nurses testified that Nurse Elenwa should have been aware of that fact. Third, Dr. McAndrew's Dilaudid order, even if construed in a light most favorable to SMH, stated that 4 milligrams of the drug were to be given every 3 hours for increased pain. Nurse Elenwa ignored the timing in that order, and she gave the second 4-milligram dose despite the fact that her own documentation indicated that Mr. West was experiencing decreased pain after the administration of the first dose. Fourth, Dr. Rothfield never testified that Nurse Elenwa properly followed Dr. McAndrew's Dilaudid order or that Nurse Elenwa could not

ask for clarification regarding that order. Indeed, Dr. Rothfield testified the exact opposite. Thus, SMH's contention that "it is not highly reprehensible for the nurse to carry out the doctor's orders, especially when she lacks the authority to alter the dose," SMH's brief, pp. 53-54, relies upon an inaccurate assessment of the evidence,[15] and, as we explained in Part III.A.1 of this opinion, it also misstates the nursing standard of care testified to by nurse witnesses in this case -- including SMH's own nurses.

SMH also argues that it was unfair of the trial court to place "significant emphasis on Nurse Elenwa's lack of truthfulness at her deposition when she denied that she had administered any Dilaudid to Mr. West" because, "when Nurse Elenwa gave her erroneous deposition

[15]The same is true of SMH's description of Nurse Elenwa's actions as a "regrettable" but "isolated mistake late at night." SMH's brief, p. 54. The facts show that Nurse Elenwa committed several errors, not just one, and the fact that those errors occurred "late at night" is irrelevant given that it was Nurse Elenwa's regular work shift. There was no evidence indicating that Nurse Elenwa was overworked or tired.

testimony, she was a former employee living in a different state."[16] SMH's brief, p. 55. SMH cites no authority in support of that argument. Moreover, SMH ignores the fact that, as the trial court observed, SMH did not concede that its medical records were accurate until just before the trial. Up to that point, SMH wanted to maintain the option of being able to argue to the jury that Nurse Elenwa was telling the truth. In fact, even in closing arguments at trial, SMH's counsel attempted to excuse Nurse Elenwa's testimony by contending that she was remembering the medication she had given to another patient. Moreover, the trial court noted SMH's lack of documentation for giving Narcan to Mr. West even though his estate was billed for five missing doses of Narcan. Finally, it is undisputed that SMH inexplicably failed to order a forensic-pathology autopsy that would include a finding as to Mr. West's cause of death despite the fact that SMH had a policy that, in sudden and unexpected

[16]The trial court mentioned Nurse Elenwa's adamant denials that she had administered any Dilaudid in discussing evidence of "concealment, cover up, [and] deceit" with respect to determining the degree of reprehensibility.

death situations, ordering such an autopsy from a medical examiner was required.[17] Thus, several pieces of evidence supported the trial court's inference that SMH attempted to cover up the mistakes that led to Mr. West's death. We do not believe that it was inappropriate for the trial court to consider that evidence in determining the degree of reprehensibility.

Concerning reprehensibility, the trial court also noted:

> "SMH admitted at the time of Mr. West's death it had been aware of opioid induced respiratory depression for years, including the emphasis on creating a safety program and policies and procedures to address the issue, and that it did not create those programs and policies. SMH employees testified that the failure to do so was 'not acceptable,' and agreed that in retrospect there should have been a policy for continuous pulse oximetry monitoring for high risk patients receiving opioids."

SMH does not deny the truth of those statements. Instead, it complains that the trial court ignored evidence indicating that its practices "corresponded to what many hospitals in the country were

[17]A forensic-pathology autopsy would have included a toxicology screening assessing the drugs that were in Mr. West's bloodstream at the time of his death.

doing at the time of Mr. West's death." SMH's brief, p. 56. But the evidence SMH cites was either not admitted at trial (in the case of testimony from Dr. Downs) or it did not establish what "many" hospitals were doing (in the case of testimony from Nurse Nash). In contrast, Mrs. West elicited testimony from a number of witnesses concerning SMH's failure to have policies and procedures with respect to the well-known dangers that accompany the administration of opioids by IV. For example, Mrs. West's CNO expert, Kim Arnold, testified that, in June 2014, SMH had no policies regarding opioid administration by IV, no training for nurses in IV opioid/hospital-patient safety, no dosing guidelines, and no monitoring policies in place. Thus, Arnold's testimony -- and that of other witnesses -- supports the trial court's finding of a high degree of reprehensibility.

b) Gore Guidepost 2: Disparity Between Harm that Occurred and Punitive-Damages Award

Only punitive damages are awarded in wrongful-death actions. Consequently, a ratio between compensatory and punitive damages is not available. In Tillis Trucking Co. v. Moses, 748 So. 2d 874, 890 (Ala. 1999),

this Court observed that, if this factor is to be applied at all, it would be "in the sense of proportionality between the punitive-damages award and the harm that was caused or was likely to be caused by the defendants' conduct." If this factor is applied in any way, Mr. West's death is a great harm, and numerous witnesses testified that the likelihood of death for a patient who is given 8 milligrams of Dilaudid in less than 2 hours is very high. Moreover, as the trial court observed in its June 27, 2022, postjudgment order, SMH admitted being aware of the risks of opioid-induced respiratory depression "for quite some time [before Mr. West's death], including in 2012 when Sentinel Alert 49 was issued."[18] Thus, the likelihood of death without having such policies was higher than it would have been if SMH had taken more caution.

c) Gore Guidepost 3: Similar Criminal or Civil Penalties

[18]JAHCO Sentinel Event Alert number 49 was issued August 8, 2012. Dr. Rothfield testified that "[a] Sentinel Event is when you have a patient who dies in the hospital who never would have been expected to die given the situation." Sentinel Event Alert number 49 sought to provide recommended guidelines to hospitals for the safe administration of opioids.

Neither party has cited to us criminal or civil penalties in Alabama law that could be imposed upon SMH for similar misconduct. However, this Court previously has observed with respect to this factor that, "under BMW v. Gore, we must compare the damages awarded in this case to damages awarded in similar cases." Lance, Inc. v. Ramanauskas, 731 So. 2d 1204, 1219 (Ala. 1999). At the same time, we must be careful not to overemphasize award comparisons given that they are "necessarily 'of limited utility' because each award is fact-specific …."[19] Chisholm v.

[19]See, e.g., Laura J. Hines & N. William Hines, Constitutional Constraints on Punitive Damages: Clarity, Consistency, and the Outlier Dilemma, 66 Hastings L.J. 1257, 1309 (2015) (observing that "the third guidepost has diminished greatly in importance since it was first announced in Gore"); N. William Hines, Marching to A Different Drummer: Are Lower Courts Faithfully Implementing the Evolving Due Process Guideposts to Catch and Correct Excessive Punitive Damages Awards?, 62 Cath. U. L. Rev. 371, 394 (2013) (noting that "[t]he relative lack of utility of the third guidepost is reflected in the fact that comparable penalties are generally considered only after the application of the first two guideposts" and that "the third guidepost is the least useful to reviewing courts in evaluating claims of excessiveness …."). But see Hillel J. Bavli, The Logic of Comparable-Case Guidance in the Determination of Awards for Pain and Suffering and Punitive Damages, 85 Univ. Cin. L. Rev. 1, 5 (2017) (arguing that certain methods of comparative case analysis "not only reduce unpredictability but improve the accuracy of awards for pain and suffering and punitive damages

Memorial Sloan-Kettering Cancer Ctr., 824 F. Supp. 2d 573, 580 (S.D. N.Y. 2011).

SMH argues that it "did not have fair notice of the potential of a $10 million award," referencing Gore's statement that "[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." SMH's brief, p. 60; Gore, 517 U.S. at 574. SMH states that, "[w]ith respect to prior civil awards in medical-liability wrongful-death cases, the highest post-BMW punitive award that had been affirmed by this Court at the time of Mr. West's death in 2014 was $4 million. See Boudreaux v. Pettaway, 108 So. 3d 486 (Ala. 2012)."[20] SMH's brief, pp. 61-62.

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generally by allowing for the sharing of relevant information across cases").

[20]In Boudreaux, this Court upheld a punitive-damages award that was remitted from $20 million to $4 million.

SMH embeds three presuppositions in the foregoing argument. First, that "comparative" wrongful-death cases must involve allegations of medical malpractice rather than other types of negligent conduct that lead to wrongful death. Second, an insistence that punitive-damages awards in pre-Gore cases should not be used for comparison purposes. Third, that "fair notice" means considering only judgments affirmed before the conduct that precipitated this action, i.e., that only judgments affirmed before June 2014 may be used to establish a benchmark for what constitutes an appropriate punitive-damages award. None of the foregoing presuppositions is supported by our previous cases.

First, when we have compared punitive-damages awards in previous wrongful-death cases, such comparisons have not been limited to previous cases that involved conduct implicating similar allegations under the same legal theory of liability. See Tillis Trucking Co., 748 So. 2d at 890 (noting that, in assessing the third Gore guidepost, this Court has "'considered how the award of punitive damages in this case compares with awards affirmed in other wrongful death cases this Court

has reviewed'" (quoting Cherokee Elec. Coop. v. Cochran, 706 So. 2d 1188, 1194 (Ala. 1997)) (emphasis added). This is because "in Alabama there is but one cause of action for wrongful death, i.e., [Ala.] Code 1975, § 6-5-410." Alabama Power Co. v. White, 377 So. 2d 930, 933 (Ala. 1979). Allegations in a wrongful-death action that specify different types of conduct leading to the wrongful death are "'"mere variations of legal theory"' underlying [a plaintiff's] single wrongful-death claim." Sledge v. IC Corp., 47 So. 3d 243, 247 (Ala. 2010) (quoting Scrushy v. Tucker, 955 So. 2d 988, 998 (Ala. 2006), quoting in turn Stearns v. Consolidated Mgmt., Inc., 747 F.2d 1105, 1109 (7th Cir. 1984)). Consequently, it is unsurprising that in McKowan v. Bentley, 773 So. 2d 990, 999 (Ala. 1999), a medical-malpractice wrongful-death action, this Court compared the awards affirmed in Cherokee Electric Cooperative v. Cochran, 706 So. 2d 1188 (Ala. 1997), General Motors Corp. v. Johnston, 592 So. 2d 1054 (Ala. 1992), and Burlington Northern R.R. v. Whitt, 575 So. 2d 1011 (Ala. 1990). None of those cases involved allegations of medical

malpractice.[21] Conversely, in Lance, an action brought under the Alabama Extended Manufacturer's Liability Doctrine ("the AEMLD") concerning a child who was electrocuted by a vending machine, one of the cases the Court used for award-comparison purposes was Atkins v. Lee, 603 So. 2d 937 (Ala. 1992), a medical-malpractice wrongful-death action against a hospital and a doctor. See 731 So. 2d at 1219. Similarly, in Tillis Trucking, a case in which the alleged wrongful death occurred because a logging truck collided with the decedent's vehicle, the Court compared the awards in numerous wrongful-death actions that involved negligent conduct in several different contexts, including Campbell v. Williams, 638 So. 2d 804 (Ala. 1994), a medical-malpractice wrongful-death action. See 748 So. 2d at 888. Thus, award comparisons in this case are not solely

[21]Cochran was a negligence action against an electric cooperative arising from a fireman's electrocution through alleged contact with a fallen electric-distribution line. In Johnston, which concerned a car accident, the plaintiff asserted allegations under the Alabama Extended Manufacturer's Liability Doctrine. In Whitt, the decedent was killed when the tractor-trailer truck he was driving was hit by a train at a railroad crossing; the plaintiff alleged that the railroad company had negligently or wantonly failed to inspect and maintain its railroad crossing.

limited to punitive-damages awards affirmed in previous medical-malpractice actions.

Second, in comparing awards from other wrongful-death actions, this Court has repeatedly reviewed awards from both before and after the Gore decision. For example, in Rice, 286 So. 3d at 711, we reviewed for comparison purposes "decisions from as far back as 1992." In Boudreaux v. Pettaway, 108 So. 3d 486, 504 (Ala. 2012), the Court used for comparison the award affirmed in Campbell. In McKowan, 773 So. 2d at 999, the Court compared awards from one post-Gore case and two pre-Gore cases. In Tillis Trucking, the Court compared awards from one post-Gore case and eight pre-Gore cases. See 748 So. 2d at 888. In Cochran, 706 So. 2d at 1194-95, the Court used for comparison the awards affirmed in three pre-Gore cases. Moreover, in Bednarski v. Johnson, 351 So. 3d 1036 (Ala. 2021), a medical-malpractice wrongful-death action in which we upheld a punitive-damages award of $6.5 million, the defendants similarly argued that pre-Gore cases should not be used in making a comparison, but the Court disagreed, explaining:

> "[The defendants] 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."

351 So. 3d at 1059. The Court went on to quote with approval the Bednarski trial court's observation that

> "'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 …. 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.'"

Id. (quoting trial court's order). In short, when applying the third Gore guidepost, the Court is not limited to reviewing comparative cases decided after Gore.

Third, SMH does not provide any authority for its assertion that "fair notice" requires examining only judgments affirmed before the

defendant's relevant conduct occurred, and a review of our previous decisions does not support its view. For example, in Lance, 731 So. 2d at 1219, the Court considered the award affirmed in Tillis Trucking for comparison purposes even though that award was affirmed the same year Lance was decided. In Cochran, 706 So. 2d at 1194, the Court considered the award affirmed in General Motors Corp. v. Johnston, 592 So. 2d 1054 (Ala. 1992), even though the conduct at issue in Cochran occurred in 1991. In McKowan, 773 So. 2d at 999, the Court compared the wrongful-death award in that case to the award affirmed in Cochran, which was affirmed in the same year the McKowan case was tried; the conduct at issue in McKowan occurred in 1993.

Based on the foregoing case history, and contrary to SMH's contention in oral argument, the Court's affirmance of a $6.5 million punitive-damages award in Bednarski may be considered for comparison purposes. Likewise, the Court's affirmance of a $6,875,000 punitive-damages award in Atkins, the remitted award of $7.5 million in Johnston, and the remitted award of $6 million in Mack Trucks, Inc. v.

Witherspoon, 867 So. 2d 307 (Ala. 2003),[22] are also appropriate for comparison purposes. SMH itself has mentioned the Boudreaux Court's affirmance of a $4 million award. The Court also affirmed a $4 million punitive-damages award against a doctor in Campbell.

In relation to the comparable-cases factor, SMH takes issue with the fact that the trial court considered the impact of inflation when it reviewed previous punitive-damages awards. The trial court stated:

> "Finally, [Mrs. West] argues the Court should consider the impact of inflation on these prior verdicts and awards and offered the testimony of Dr. Robert W. McLeod, an economist at the University of Alabama in support of this theory. The Court finds these arguments persuasive, especially the general argument that the value of a prior award, whether entered in 1999 or another year prior to this date, must be adjusted to some degree if it is to compare with an award entered today."

SMH complains that it "lacked fair notice that inflation would be factored into comparator awards." SMH's brief, p. 64.

[22]Witherspoon concerned a tractor-trailer accident that implicated the AEMLD.

However, this Court in Bednarski expressly noted that the plaintiff in that case had argued that, "for the purpose of applying the 'comparable cases' guidepost, the awards in those cases should be adjusted for inflation," but the Court concluded that, "[b]ecause the Bednarski defendants have failed to demonstrate reversible error by the trial court on this issue [of comparable cases], we need not decide whether to adopt [the plaintiff's] inflation argument." Bednarski, 351 So. 3d at 1059 n.8. Thus, this Court has previously mentioned the possibility of considering inflation in comparing previous awards. The Court also has more generally observed that "[t]he State has interests in ensuring … that a punishment assessed against a civil defendant is not diluted by inflation and the passage of time." Life Ins. Co. of Georgia v. Johnson, 725 So. 2d 934, 943 (Ala. 1998).[23]

[23]We also note that federal courts of appeals have assumed that inflation should be factored into punitive-damages-award comparisons. See, e.g., Jennings v. Yurkiw, 18 F.4th 383, 393 (2d Cir. 2021); Kidis v. Reid, 976 F.3d 708, 717 (6th Cir. 2020); Burke v. Regalado, 935 F.3d 960, 1039 (10th Cir. 2019).

Moreover, we find it notable that § 6-11-21(f), Ala. Code 1975, provides that, in the types of cases in which caps on punitive damages are imposed, the legislature has required that "all the fixed sums for punitive damage limitations set out herein ... shall be adjusted ... at three-year intervals ..., at an annual rate in accordance with the Consumer Price Index rate." It would make little logical sense to require inflation adjustment of punitive-damages awards in the types of cases in which caps are imposed, but not to account for inflation when comparing past wrongful-death awards to present ones given that wrongful-death actions constitute an area in which "the legislature has undoubtably recognized that no arbitrary cap can be placed on the value of human life and is 'attempt[ing] to preserve human life by making homicide expensive.'" Alabama Power Co. v. Turner, 575 So. 2d 551, 556 (Ala. 1991) (quoting Louis Pizitz Dry Goods Co. v. Yeldell, 274 U.S. 112, 116 (1927)).

Finally, SMH offered no testimony to refute Professor Robert McLeod's inflation analysis in the postjudgment hearing, particularly his

point that if "inflation is not considered in performing such a comparative analysis, … the economic impact of a punitive damage award [would] diminish over time." That observation is important given our repeated admonition that "the purpose of punitive damages is … to punish the wrongdoer and to deter the wrongdoer and others from committing similar wrongs in the future." Green Oil, 539 So. 2d at 222. In other words, a punitive-damages amount that might have served as both a punishment and a deterrent in 1999 possibly would not serve those goals in 2022. Indeed, on appeal SMH has not attempted to refute the straightforward logic that inflation affects the real monetary value of a damages award. Professor McLeod testified that the Atkins award of $6,875,000 would be $13,843,488.29 in February 2022 dollars and $14,262,136.27 in May 2022 dollars. He testified that the $7.5 million award in Johnston would be $15,408,182.18 in February 2022 dollars and $15,874.149.17 in May 2022 dollars. He testified that the $6 million award in Witherspoon would be $9,276,817.44 in February 2022 dollars. He testified that the $4 million award in Lance would be $6,877,963.64

in February 2022 dollars. In short, the remitted award in the instant case is not an unusually large amount in comparison with awards affirmed in other wrongful-death cases, particularly in light of inflation.

SMH also argues that the separate Green Oil factors that do not duplicate the Gore guideposts require a significant remittitur of the punitive-damages award. SMH is correct that there is no evidence indicating that it profited from its misconduct, which weighs in favor of a remittitur. Conversely, Mrs. West is correct that SMH has attempted to discount its financial position as a factor on the ground that it "is not relying on the financial-position factor." SMH's brief, p. 67 n.22. However, because SMH does not assert that it would be financially burdened by the amount of the remitted award of $10 million, we must conclude that SMH has the available assets and liability insurance to pay the remitted award, even though that likely would not be the case for an individual medical provider. Moreover, because one purpose of a punitive-damages award is to punish the wrongdoer, the size of the award matters in relation to the particular defendant's financial position.

See, e.g., Orkin Exterminating Co. v. Jeter, 832 So. 2d 25, 42 (Ala. 2001) ("This Court has made clear that a punitive-damages award should sting, but should not destroy a defendant."); Central Alabama Elec. Coop. v. Tapley, 546 So. 2d 371, 377 (Ala. 1989) ("Punitive damages should not exceed an amount necessary to accomplish society's goals of punishment and deterrence. But the degree of punishment necessary to achieve those goals changes with each case." (disapproved of on other grounds by Robbins v. Sanders, 927 So. 2d 777 (Ala. 2005))). Additionally, this Court is expressly charged by the legislature with "independently reassess[ing] the … economic impact of such an award and reduc[ing] or increas[ing] the award if appropriate in light of all the evidence." § 6-11-24(b), Ala. Code 1975. In that regard, it is notable that SMH has not contended that the level of services it provides to the community surrounding it would be reduced to any extent by having to pay the remitted amount of $10 million. Therefore, the goal of punishment and the factor of economic impact both weigh against further remittitur of the award.

The Green Oil factor the parties clash about the most is the cost incurred by Mrs. West to prosecute this litigation. It is undisputed that Mrs. West's counsel expended $323,438.95 to prosecute this case. SMH argues that this is "an amount equal to just 3.25% of the punitive-damages award. An award of this magnitude is thus not necessary to incentivize the suit to be brought." SMH's brief, p. 68. However, the point is that the cost of prosecuting the case was considerable. As the trial court stated:

> "This amount is extremely high, and outweighs any amount incurred in a medical liability case to the undersigned's knowledge. It is well-accepted within the legal community that it is very difficult to prevail as a plaintiff in a medical liability case. They are notoriously expensive to pursue and, to the undersigned's personal knowledge, they are zealously defended, almost exclusively by seasoned and capable trial counsel. In this case, both sides vigorously and skillfully represented their clients over six years of litigation. Trial lasted eleven days. Over twenty expert witnesses were retained by the Parties. Both sides employed multiple attorneys and innumerable support staff.
>
> "The Alabama Supreme Court has agreed that '[a] fair and reasonable inference is that medical negligence wrongful death verdicts must be left relatively sizeable if competent and qualified attorneys are to remain motivated' to continue to take them. Boudreaux [v. Pettaway], 108 So. 3d [486,] 503

> [(Ala. 2012)]. Because of the sums spent, the time invested, the high stakes risk involved, and the need to encourage others to bring similar suits, this guidepost weighs against remittitur."

SMH does not dispute any of the foregoing points from the trial court's order. Therefore, the expense of the litigation weighs against further remittitur.

In sum, given the degree of reprehensibility of SMH's conduct; the fact that Mr. West lost his life as a result of that conduct; the amounts of previously affirmed awards in other wrongful-death cases, including the reality of inflation in considering those awards; the goal of punishing the defendant in conjunction with the apparent lack of an economic impact of the current amount of the award upon SMH; and the cost incurred by Mrs. West after six years of litigation, we agree with the trial court that the remitted punitive-damages award of $10 million was reasonable.

IV. Conclusion

Based on the foregoing, we conclude that the trial court correctly denied SMH's request for a new trial, and we find that the trial court's

remittitur of the punitive-damages award was appropriate. Accordingly, the judgment is due to be affirmed.

AFFIRMED.

Shaw, J., concurs specially, with opinion, which Wise, Mendheim, and Stewart, JJ., join.

Bryan, J., concurs specially, with opinion, which Wise and Stewart, JJ., join.

Parker, C.J., concurs in part and concurs in the result, with opinion.

Sellers, Mitchell, and Cook, JJ., concur in part and dissent in part, with opinions.

SHAW, Justice (concurring specially).

I concur in the main opinion. I write specially to make several observations. In Bednarski v. Johnson, 351 So. 3d 1036 (Ala. 2021), and Boudreaux v. Pettaway, 108 So. 3d 486 (Ala. 2012) (the latter of which I authored), this Court issued its most recent and relevant opinions addressing damages awards in medical-malpractice wrongful-death cases. Neither of those opinions established limits for such awards. In each case, this Court affirmed the trial court's remitted damages award, holding that the award was not unconstitutionally excessive; this Court did not reduce the award to what it concluded was a maximum permissible amount of damages in this type of case, nor did it in any way indicate that the award was to be considered as such. A potential constitutional limit on such damages awards lies somewhere beyond those awards, depending on an assessment of factors deemed relevant by this Court and the United States Supreme Court. See Bednarski, 351 So. 3d at 1055-56 (explaining the relevant guideposts and factors found in

BMW of North America, Inc. v. Gore, 517 U.S. 559 (1996), and Green Oil Co. v. Hornsby, 539 So. 2d 218 (Ala. 1989)).

As noted in the main opinion, there is clear evidence in this case of systemic conduct that amounted to serious deviations from the standards of care applicable to both Springhill Hospitals, Inc., d/b/a Springhill Memorial Hospital, and its employee, Nurse Jane Elenwa, which led directly and unnecessarily to a person's death. The conduct at issue in this case cannot be said to be less serious than that in Bednarski, our most recent decision. Although a damages award that exceeds past awards will certainly have to be examined carefully, all such awards in these kinds of cases ultimately are based on an assessment of numerous unique and changing variables. Given the nature of juries and the power given to them within our system of justice to assess punishment in wrongful-death cases, different juries will almost never agree on whether a certain kind of conduct is deserving of more or less punishment. This Court must then review awards, like those in Boudreaux, Bednarski, and this case. There is no precise formula for determining whether a

punitive-damages award exceeds constitutional boundaries. In the absence of any limits set by the legislature based on public-policy concerns, the best this Court can do is to carefully examine our constitutional guideposts and try to avoid subjectivity. My goal in these kinds of cases has always been to show respect for a jury's decision and at the same time try to act as a "circuit breaker" when it is clear to me that a jury's award, given the findings that the jury was entitled to make from the evidence, cannot be reasonably or constitutionally sustained. That is not always an easy call to make. It is not difficult to call a foul on the jury's $35 million award in this case, and the trial court did so. It is far more difficult to conclude, given this Court's affirmance of the remitted punitive damages award in Bednarski, that the remitted amount here unconstitutionally reaches over a line existing beyond the award in that decision. There will inevitably be future awards in these kinds of cases that must be reduced by this Court to satisfy due-process concerns. In my view, this is not one of those cases.

Wise, Mendheim, and Stewart, JJ., concur.

BRYAN, Justice (concurring specially).

I concur in the main opinion, and I agree with the observations made by Justice Shaw in his special writing. Notably, under Alabama law, there is no exact formula for determining whether the punitive damages awarded in a case of this type are excessive. The legislature has not enacted such a formula for us to apply (and the parties have not advocated that this Court adopt any formula on its own). Here, the circuit court reduced the jury's punitive-damages award from $35 million to $10 million. I find the circuit court's order reducing the damages to be thorough and well reasoned. In light of that order and the extremely troublesome facts of this case, I must conclude that the circuit court's reduction of the award from $35 million to $10 million is not unreasonable. I agree with the circuit court that the level of reprehensibility in this case is high, and I struggle to see how any reasonable person would disagree with the circuit court's conclusion in this regard. Further, as the main opinion notes, Springhill Hospitals, Inc., d/b/a Springhill Memorial Hospital does not argue how it would be

financially affected by the $10 million award, and we must assume that Springhill is capable of paying the award. As the circuit court observed, Springhill did not argue to that court that it would have been unable to pay the original $35 million award. In assessing whether an award is excessive, each case must be determined on its own facts. Given the facts in this case, I conclude that the circuit court's award of $10 million is not unreasonable and, thus, is permissible.

Wise and Stewart, JJ., concur.

PARKER, Chief Justice (concurring in part and concurring in the result).

I concur in the main opinion, except that I concur only in the result as to Part III.A.1's analysis of whether Dr. Kenneth Rothfield was testifying about the nursing standard of care. He testified:

> "I would expect a nurse to recognize that 4 milligrams of Dilaudid is an enormous dose that would never be appropriate and that it was confusing. And I would expect a nurse in that situation to call the doctor and say, hey, Dr. McAndrew, this is Nurse Elenwa. I've got Mr. West here and he's complaining of pain. I'm looking at your order. You don't really want to give him 4 milligrams of Dilaudid, do you, every three hours?"

(Emphasis added.) Although Dr. Rothfield did not use any "magic words" about a nursing standard of care, that was the import of his testimony. In context, he was not testifying that hospitals have a duty to implement a policy requiring nurses to seek clarification of any prescription that seems incorrect; he was testifying about a duty of nurses themselves. Nevertheless, I concur that Dr. Rothfield's testimony was harmless for the reasons explained by the main opinion.

I emphasize my agreement with Part III.A.4, which concludes that no good-count/bad-count problem exists here because the circuit court

gave a single, undifferentiated jury instruction regarding negligence and Springhill Hospitals, Inc., d/b/a Springhill Memorial Hospital, did not object to that instruction. In my view, to preserve a good-count/bad-count error, the defendant must do more than move for a judgment as a matter of law ("JML") as to the "bad count" (a particular asserted theory of recovery). The defendant must also request jury instructions that separate the unsupported theory of recovery from other theories[24] and request a special-verdict form so that it will be discernible from the verdict whether the jury found the unsupported theory proved. Cf. Gajewski v. Pavelo, 229 Conn. 829, 836, 643 A.2d 1276, 1279 (1994) (" '[I]f a jury renders a general verdict for one party, and no party requests interrogatories, an appellate court will presume that the jury found every issue in favor of the prevailing party.' Thus, ... if any ground for the verdict is proper, the verdict must stand; only if every ground is improper

[24]In many of our prior cases, there was no issue of a party's failure to preserve a good-count/bad-count issue by failing to request differentiated jury instructions because, as the main opinion points out, in those cases differentiated instructions were given.

does the verdict fall." (citation omitted)). If we do not require defendants to take these last two steps -- requesting differentiated instructions and a special-verdict form -- we are implicitly placing the burden on the plaintiff to prevent reversal of the judgment by affirmatively requesting differentiation among the theories of recovery within the jury instructions and verdict form, or on the trial judge to do so sua sponte. Such a burden is completely inconsistent with principles of preservation in civil cases, which dictate that the burden of taking preservative action is almost always on the party that will be harmed by the error, not on the party that will benefit from the error or on the trial court. See Puckett v. United States, 556 U.S. 129, 134 (2009) ("If a litigant believes that an error has occurred (to his detriment) ..., he must object in order to preserve the issue. ... [¶] … [T]he contemporaneous-objection rule prevents a litigant from '"sandbagging"' the court -- remaining silent about his objection and belatedly raising the error only if the case does not conclude in his favor." (citation omitted)); cf. Ed R. Haden et al., Preventing Waiver of Arguments on Appeal, 81 Ala. Law. 50, 57 (2020)

("The appellant generally has the obligation to show in the record that an issue was preserved ....").

Moreover, jury verdicts are generally presumed legally proper unless the losing party demonstrates otherwise. Cf. Thrasher v. Darnell, 275 Ala. 570, 571, 156 So. 2d 922, 923 (1963) ("The jury returned a general verdict. ... [T]he verdict will be referred to either of the counts that is supported by proof."); 5 Am. Jur. 2d Appellate Review § 736 (2018) ("[W]hen a jury returns a general verdict in a case involving two or more issues or defenses, and the verdict is supported as to at least one issue or defense that has been presented to the jury free from error, the verdict will not be reversed ...."); 89 C.J.S. Trial § 1033 (2012) (explaining same rule). Thus, the fact that a general verdict is a "black box," incapable of differentiation, should cut against the defendant that has failed to preemptively prepare it for examination by requesting differentiated jury instructions and a special-verdict form. Any absence of insight into the jury's rationale should not cut against the plaintiff, which generally stands to lose nothing at the trial-court level from a verdict in its favor.

The defendant must do the unboxing. See Barth v. Khubani, 748 So. 2d 260, 261 (Fla. 1999) ("'[W]here there is no proper objection to the use of a general verdict, reversal is improper where no error is found as to one of two issues submitted to the jury on the basis that the appellant is unable to establish that he has been prejudiced.' ... [T]he rule is an economical tool that limits appellate review to issues that actually affect the case[,] and ... litigants may avoid application of the rule by simply requesting a special verdict that would illuminate the jury's decision making process and the [effect] of any alleged error: 'It should be remembered ... that the remedy is always in the hands of counsel.'" (citations omitted)).

Therefore, I believe that, to the extent that our cases have held that preservation of a good-count/bad-count issue requires only a JML motion by the defendant, those cases were wrongly decided and should be overruled. See, e.g., John Deere Indus. Equip. Co. v. Keller, 431 So. 2d 1155, 1157 (Ala. 1983); Larrimore v. Dubose, 827 So. 2d 60, 62-63 (Ala.

2001); Ferguson v. Baptist Health Sys., Inc., 910 So. 2d 85, 95-96 (Ala. 2005). Today's decision is the first step in that course correction.

Finally, I agree with Justice Shaw's cogent comments on the application of the comparator-cases guidepost for reviewing punitive-damages awards.

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

I concur with the main opinion's analysis and conclusions with respect to the liability aspect of this case (Part III.A). I respectfully dissent from the decision to affirm the damages award, which is excessive based on a comparison with prior cases (Part III.B.2). See BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 574 (1996) ("Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose."). The defendant here could not have anticipated a punitive-damages award in this amount or predicted a punishment of this magnitude.

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

I concur in Parts I-III.A of the main opinion, but I respectfully dissent from Part III.B and from the Court's judgment because I do not share the main opinion's view of the damages question. For many of the reasons laid out in Justice Cook's special writing, I believe that Hammond v. City of Gadsden, 493 So.2d 1374 (Ala. 1986), and BMW of North America, Inc. v. Gore, 517 U.S. 559 (1996), require a reduction in the award of punitive damages to an amount below $10 million.

I write separately to explain my view on a different question raised in this appeal: whether the cap on punitive damages provided in § 6-5-547, Ala. Code 1975, remains in force. For the reasons given below, I suspect that the answer to this question is most likely "yes." Two lines of this Court's precedents, however, stand in the way of reaching that result in this case. And while Springhill Hospitals, Inc., d/b/a/ Springhill Memorial Hospital, has asked us to overrule the constitutional precedent, Smith v. Schulte, 671 So. 2d 1334 (Ala. 1995), it has not argued that we should overrule a separate line of statutory precedents -- consisting of

Mobile Infirmary Ass'n v. Tyler, 981 So. 2d 1077 (Ala. 2007), and Gillis v. Frazier, 214 So. 3d 1127 (Ala. 2014) -- which adopt an independent rationale for disregarding § 6-5-547. Accordingly, Springhill has failed to properly present the issue of § 6-5-547's applicability for our review. In an appropriate future case, in which a party asks us to overrule both lines of precedent and provides full briefing in support of that request, I would be open to doing so. In the meantime, I explain below my concerns regarding these lines of precedent. I also briefly sketch out how the Legislature could, if it chooses, either confirm or alter the statutory regime for punitive-damages awards in future medical-malpractice wrongful-death cases.

* * *

In 1987, the Legislature adopted several tort-reform measures designed to curb what it viewed as excessive monetary awards in personal-injury cases. One of those measures, Ala. Acts 1987, Act No. 87-185 (codified at § 6-11-21 through -27, Ala. Code 1975), set out a general cap of $250,000 on punitive damages in most civil actions, but expressly

exempted wrongful-death actions from that limitation. The Legislature then separately enacted a cap that does apply to wrongful-death actions in Ala. Acts 1987, Act No. 87-189 (codified at § 6-5-547, Ala. Code 1975), which -- among its other provisions -- limits punitive damages in wrongful-death actions against a health-care provider based on a breach of the standard of care to $1 million with a built-in annual inflation adjustment.

These and similar damages caps were hardly able to take effect, however, because this Court quickly declared them to be "unconstitutional" and, as such, refused to enforce them. For example, this Court held that a $400,000 cap on noneconomic damages violated the plaintiff's right to a trial by jury and to equal protection of the laws, see Moore v. Mobile Infirmary Ass'n, 592 So. 2d 156 (Ala. 1991), and that the general $250,000 cap contained in the then-operative version of § 6-11-21 also violated the constitutional right to trial by jury, see Henderson v. Alabama Power Co., 627 So. 2d 878 (Ala. 1993). Then, as relevant to this appeal, a five-justice majority determined in Smith v. Schulte, 671 So. 2d

1334 (Ala. 1995), that the $1 million cap on wrongful-death damages codified in § 6-5-547 was likewise unconstitutional, this time based on the majority's view that the cap violated either the right to a trial by jury or the right to equal protection of the laws contained in the Alabama Constitution of 1901. All these holdings were, to put it gently, misguided.

As Justice Houston explained in his Schulte dissent, that case and its predecessors represented a high watermark of judicial activism in this State -- an era in which several members of Alabama's judiciary believed themselves to have "almost limitless discretion in striking down duly enacted laws" by recasting their own policy preferences as "constitutional right[s]." 671 So. 2d at 1349 (Houston, J., dissenting). And, as is often the case with results-driven judicial opinions, the constitutional justifications offered in support of the result in Schulte do not withstand even passing scrutiny.

To start, as this Court recognized in Ex parte Melof, 735 So. 2d 1172, 1186 (Ala. 1999), the Constitution of 1901 does not contain an

equal-protection clause.[25] Such a clause is contained in the Fourteenth Amendment to the United States Constitution -- and similar clauses have appeared in earlier versions of our State's constitution -- but no such

[25]West argues that Melof was a plurality opinion and therefore could not have undermined the equal-protection-clause basis for the holding in Schulte; but she is mistaken. The main opinion in Melof expressly held -- contrary to Schulte -- that "'there is no equal protection clause in the Constitution of 1901,'" id. at 1186 (citation omitted), and a majority of the justices concurred specially with that opinion: Chief Justice Hooper and Justices Maddox, Houston (the main opinion's author), See, and Brown. A special concurrence is generally understood to signify a concurrence in the main opinion's reasoning, and -- in keeping with that understanding -- each of the concurring justices expressed agreement with the core holding in Justice Houston's main opinion, though some of them expressed their view that other provisions of our Constitution protect the same interests as traditional equal-protection principles. See id. at 1187 (Hooper, C.J., concurring specially) ("Finding no explicit equal-protection clause in the Alabama Constitution of 1901, and looking at the history behind the Constitutional Convention of 1901, I cannot say that there presently exists an equal-protection clause in our constitution."); id. at 1188 (Maddox, J., concurring specially) ("I recognize that the framers of the Constitution did not include an equal-protection clause in the 1901 Constitution"); id. at 1194 (See, J., concurring specially, joined by Brown, J.) ("the main opinion correctly states that there is no single, express equal-protection provision in the Constitution of Alabama of 1901").

provision appears in the Alabama Constitution of 1901 (or in the Alabama Constitution of 2022). See id. at 1349 (Houston, J., dissenting).

Even if it is the case -- as Patricia Bilbrey West, as personal representative of the estate of her deceased husband, John Dewey West, Jr., now argues -- that various other provisions of our Constitution "combine" to generate something equivalent to the "equal-protection guarantee" applied by the Schulte Court, that fact still could not justify the result the Court reached. According to Schulte, our Constitution protects against "unreasonable '"class legislation arbitrarily discriminatory against some and favoring others in like circumstances."'" Schulte, 671 So. 2d at 1337 (quoting Moore, 592 So. 2d at 165). The Court said that classifications may be unreasonable "depend[ing] on whether they are reasonably related to the stated objective, and on whether the benefit sought to be bestowed upon society outweighs the detriment to private rights occasioned by the statute." Id. at 1338 (quoting Moore, 592 So. 2d at 170). The Court then subjected § 6-5-547 to heightened scrutiny on the grounds that it interfered with a

"fundamental right not to be deprived of liberty and life as a consequence of fatal malpractice." Id. But, as Justice Houston recognized, "there is [no] fundamental right to recover damages in wrongful death actions." Id. at 1351 (Houston, J., dissenting). Indeed, it is difficult to find any right, fundamental or otherwise, abridged by the cap in § 6-5-547. The Court plainly manufactured a "fundamental liberty interest" out of thin air in an attempt to justify heightened constitutional scrutiny of § 6-5-547. Id. at 1342. At most, under Schulte's own principles, the statute should have been subjected to rational-basis review. Id. at 1351 (Houston, J., dissenting). And § 6-5-547 is undoubtedly rational. The "equal-protection" analysis in Schulte is thus without merit.

The Schulte Court's holding that § 6-5-547 violates the right to a jury trial fares little better. While Alabama's Constitution actually does contain a jury-trial clause, that provision does nothing to scuttle § 6-5-547. The "right of trial by jury" protected by Art. I, § 11, of the Alabama Constitution preserves the right of citizens to have a jury decide "the facts" in those situations in which citizens would have a right to jury trial

at common law, but it does not enshrine a right to have a jury decide questions of law or punishment, as our Court now recognizes. See Ex parte Apicella, 809 So. 2d 865, 872 (Ala. 2001).[26]

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[26]While it's true, as West emphasizes, that the portion of Apicella discussing § 11 of our Constitution was a plurality opinion (only four justices joined that portion of the main opinion), Justice Lyons's opinion concurring in the result as to that portion of the main opinion agreed that the right to a trial by jury is limited to fact-finding and does not guarantee any jury "role in sentencing" or in "matters dealing with punishment." Id. at 875 (Lyons, J., concurring in part and concurring in the result in part). Since five justices agreed that § 11 does not require the jury to play any role beyond fact-finding, that portion of the main opinion's holding is precedential. See Ghee v. USAble Mut. Ins. Co., [Ms. 1200485, Mar. 31, 2023] ___ So. 3d ___, ___ (Ala. 2023) ("'[I]f, in [a] prior case, a particular rationale supporting the result was agreed with by [a] majority of judges, even in separate opinions, the zone of their agreement constitutes binding precedent ….'" (citation omitted)).

Even leaving aside the question of Apicella's precedential value, the plurality's and Justice Lyons's core assessments of § 11 were correct. Section 11, at most, preserves the right to a jury trial "as [it] existed at common law and [at] the time of Alabama's first state constitution." Crowe v. State, 485 So. 2d 351, 364 (Ala. Crim. App. 1984) (collecting authorities), reversed on other grounds, 485 So. 2d 373 (Ala. 1986); accord Schulte, 671 So. 2d at 1353 (Houston, J., dissenting). In other words, it protects only the core "traditional jury function of determining guilt or innocence," Crowe, 485 So. 2d at 364, but does not prevent the Legislature from delineating the "extent of the punishment" imposed based on that determination, Apicella, 809 So. 2d at 873. If the rule were otherwise, it would be difficult to see how any mandatory sentencing

Schulte's infirmities are so obvious that none of the written submissions in this case -- not West's appellate briefing, not the trial court below, and not the main opinion today -- attempt to defend that decision on its merits. Accordingly, if Schulte were the only precedent standing in the way of applying § 6-5-547's cap to the jury verdict in this case, then resolving this appeal would be easy. But Schulte, it turns out, is not the end of the story.

In 1999 -- four years after Schulte -- the Legislature enacted another package of tort-reform legislation, which included the present version of § 6-11-21. The 1999 amendments to § 6-11-21 imposed a new set of caps on punitive damages in civil actions, and that statute now provides, in relevant part:

> "(a) Except as provided in subsections (b), (d), and (j), in all civil actions where an entitlement to punitive damages shall have been established under applicable laws, no award of punitive damages shall exceed three times the compensatory damages of the party claiming punitive

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range or damages limitation could pass constitutional muster, because every such law -- by definition -- constrains the jury's ability to punish as it sees fit.

> damages or five hundred thousand dollars ($500,000), whichever is greater.
>
> "....
>
> "(j) This section shall not apply to actions for wrongful death or for intentional infliction of physical injury."

(Emphasis added.)

In other words, the amended version of § 6-11-21 -- like the original -- caps punitive damages in a variety of civil actions but expressly excludes wrongful-death actions from its purview. It might therefore seem obvious that, as soon as Schulte is overruled, the wrongful-death cap contained in § 6-5-547 would instantly become entitled to immediate enforcement. After all, the Legislature never repealed § 6-5-547, and the text of the amended § 6-11-21 (like the text of the original) seems compatible with the cap contained in § 6-5-547. But our Court has held otherwise. Specifically, in Mobile Infirmary Ass'n v. Tyler, 981 So. 2d 1077, 1105 (Ala. 2007), this Court determined that the 1999 amendments to § 6-11-21 were intended to serve as a "'complete replacement of the old

statutory restrictions on punitive damages,'" including the caps on damages in wrongful-death actions contained in § 6-5-547.[27]

The Court later doubled down on that reasoning in Gillis v. Frazier, 214 So. 3d 1127, 1134 (Ala. 2014), which treated as definitive the Tyler Court's refusal to "revive § 6-5-547." In other words, this Court in Tyler and Gillis interpreted the 1999 amendments to § 6-11-21 (a statute governing punitive damages in non-wrongful-death actions) as implicitly

[27]The main opinion in Tyler quoted Mobile Infirmary Med. Ctr. v. Hodgen, 884 So. 2d 801, 814 (Ala. 2003), in support of this proposition, but in doing so it seems to have misunderstood the basis of the Hodgen decision. Hodgen involved a different statute, § 6-5-544, Ala. Code 1975, which contained a punitive-damages cap applicable to certain non-wrongful-death actions. The main opinion in Hodgen rested on the Court's observation that the 1999 amendments to § 6-11-21 applied to "all civil actions" apart from certain expressly enumerated exceptions, and that the cap in § 6-5-544 concerned civil actions that were not covered by an expressly enumerated exception in § 6-11-21. Accordingly, the Court in Hodgen held that the plain text of § 6-11-21 explicitly repealed § 6-5-544. See 884 So. 2d at 814. Since Hodgen was a case about express repeal, rather than implied repeal, the rationale in Hodgen does not support the result in Tyler. Accordingly, the Hodgen Court's statement that the 1999 amendments to § 6-11-21 were intended to serve as a "complete replacement of the old statutory restrictions on punitive damages," 884 So. 2d at 814, is -- at most -- dictum as far as § 6-5-547 is concerned.

repealing § 6-5-547 (a statute governing punitive damages in certain wrongful-death actions). If that holding is correct, then overruling Schulte would do nothing to reinstate the damages cap contained in § 6-5-547 -- because § 6-5-547 has already been repealed.

Because Springhill's opening brief does not ask us to overrule Tyler or Gillis -- and because this Court generally does not overrule precedent unless asked to do so at the outset by a party -- I would not overrule those decisions at this time. Nevertheless, I have doubts about the reasoning in those cases and would be willing to reconsider them in the future.[28]

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[28]I respectfully disagree with Justice Cook's view that either the doctrine of stare decisis or general appeals to reliance interests permit courts to insulate obviously wrong statutory-interpretation decisions from reconsideration. While it's true that the "judicial power" vested in courts by the Alabama Constitution, see Art. VI § 139, grants us the power to adhere to common-law principles of stare decisis, the version of stare decisis recognized at common law was much narrower than the version favored by modern courts. At common law, principles of stare decisis allowed courts to adhere to their prior decisions only so long as those decisions were well-reasoned on their face and had not been shown to be "demonstrably erroneous." Gamble v. United States, 587 U.S. ___, ___, 139 S. Ct. 1960, 1983 (2019) (Thomas, J., concurring). But once a prior decision was shown to be objectively mistaken, courts were obligated to correct the mistake and had no authority to entertain "[c]onsiderations beyond the correct legal meaning, including reliance,

In my view, every justification that has been offered thus far in support of Tyler and Gillis seems flawed. The primary justification seems to be premised on a misreading of statutory text. Namely, the Court in Tyler and Gillis -- like West in her brief on appeal -- appears to have interpreted the language in § 6-11-21(j) as categorically "preclud[ing] caps on wrongful death damages." West's brief at 67. But the text of § 6-11-21(j) does not say anything like "wrongful-death damages shall not be subject to a cap." Instead, it says "[t]his section shall not apply to actions for wrongful death …." § 6-11-21(j) (emphasis added). "This section" is § 6-11-21. And the cap on punitive damages in medical-malpractice wrongful-death actions is contained in § 6-5-547 -- a different section of

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workability, and whether a precedent 'has become well embedded in national culture' …." Id. at 1986 (citation omitted; emphasis added). That "principle applies when interpreting statutes and other sources of law," not only when interpreting constitutional provisions. Id. at 1985. Accordingly, I believe courts have an obligation to correct clearly erroneous decisions when properly asked to do so by a party, even if the erroneous decision involves interpretation of statutory provisions rather than constitutional ones.

Title 6. In other words, § 6-5-547's cap on punitive damages is expressly unaffected by amended § 6-11-21.

West alternatively insists that another statute, § 6-11-29, Ala. Code 1975, also precludes caps on wrongful-death damages, see West's brief at 67, but this theory appears to have a similar flaw. The text of § 6-11-29 states: "This article shall not pertain to or affect any civil actions for wrongful death." (Emphasis added.) Here, the phrase "[t]his article" refers to Article 2 of Chapter 11 of Title 6. But the cap on punitive damages contained in § 6-5-547 is part of a different article (and a different chapter) of Title 6 -- Chapter 5, Article 29, to be precise. So, again, § 6-5-547's cap on punitive damages is expressly outside § 6-11-29's scope.

Another possible justification for the result in Tyler and Gillis can be found in West's argument that § 6-5-547 was repealed by legislative inaction. See West's brief at 62-63 (noting that the "Legislature has had annual opportunities" to amend or recodify § 6-5-547 "but it has elected each year not to do so" (emphasis omitted)); see also Tyler, 981 So. 2d at

1104-05 (suggesting that because the Legislature is "'presumed to have knowledge of … the judicial construction of existing statutes,'" the Legislature's failure to amend § 6-5-547 to cure the purported deficiencies identified in Schulte indicates that the Legislature did not want § 6-5-547 to remain in force). That argument also seems to be without merit. As our Constitution makes clear, and as this Court has long recognized, legislative inaction is not lawmaking. See Art. V, § 125, Ala. Const. 2022 (specifying that statutory text must survive the bicameralism-and-presentment process before it becomes law); Ex parte Christopher, 145 So. 3d 60, 69 (Ala. 2013) ("The argument for ratification by silence, though logically dubious, ultimately fails because of its unconstitutionality. The assertion that the [L]egislature has adopted a judicial interpretation by failing explicitly to reject it creates a method of amending a statute the Alabama Constitution does not permit." (footnote omitted)). Under our Constitution, the Legislature cannot repeal a law simply by failing to amend or recodify it, or even by subjectively wishing

it away; rather, any repeal must be enacted through the normal process of bicameralism and presentment.

A separate problem with the repeal-by-silence arguments offered in defense of Tyler and Gillis is that they appear to reflect a basic misunderstanding of what judicial review entails. The main opinions in Tyler and Gillis seem to have been premised on the view that the Court's decision in Schulte wiped § 6-5-547 out of existence and that the only question going forward is whether the Court should choose, in its discretion, to "revive" or "reinstate" it. Tyler, 981 So. 2d at 1105; see also Gillis, 214 So. 3d at 1134 (emphasizing the Court's (perceived) power to "decline[] to revive § 6-5-547"). That's the wrong way of thinking. Section 6-5-547 was duly enacted by the Legislature and therefore remains the law of this State unless or until the Legislature repeals it. See Art. V, § 125, Ala. Const. 2022. Courts have a constitutional obligation to apply the law when asked to do so by a party, unless the law in question conflicts with a higher law, such as the United States or Alabama Constitutions. When a court holds -- as the Schulte Court did -- that a

duly enacted statute cannot be applied because its application would offend the Constitution, that determination may prevent the reviewing court (and any lower courts) from enforcing the statute, but it does not erase the statute from the code books or render it "void."

That's because judicial review does not entail the power to "veto," "nullify," or "strike down" laws; it is, instead, a "judicially imposed non-enforcement policy," which springs from basic conflict-of-laws analysis, and which lasts only as long as the courts continue to adhere to the constitutional objections that originally persuaded them to thwart the statute's enforcement in the first place. Jonathan F. Mitchell, The Writ-of-Erasure Fallacy, 104 Va. L. Rev. 933, 942-44 (2018). In other contexts, this Court has recognized the fundamental truth of that proposition. See Christopher, 145 So. 3d at 68 ("'"Courts do not and cannot change the law by overruling or modifying former opinions. They only declare it by correcting an imperfect or erroneous view. The law itself remains the same…."'" (citations omitted)).

The Legislature and the People of this State have acknowledged that truth as well. For instance, the Legislature went out of its way to enact the Human Life Protection Act -- a law restricting abortion -- when Roe v. Wade, 410 U.S. 113 (1973), was in effect, even though it knew no court would enforce the statute at the time. See § 26-23H-3 et seq., Ala. Code 1975. The Legislature correctly anticipated that courts would eventually abandon the erroneous precedents standing in the way of the law's enforcement, see Dobbs v. Jackson Women's Health Org., 597 U.S. ___, 142 S. Ct. 2228 (2022) (overruling Roe v. Wade and Planned Parenthood of Se. Pennsylvania v. Casey, 505 U.S. 833 (1992)), and also correctly understood that, as soon as courts abandoned those precedents, the Human Life Protection Act would be entitled to immediate and full enforcement.

That same logic drove the People of Alabama to amend our Constitution just a few months ago. See Ala. Acts 2022, Act No. 2022-111 (ratified Nov. 8, 2022). The 2022 amendments removed several racist provisions from the Alabama Constitution of 1901, even though those

provisions had long been held unenforceable because they conflict with the Fourteenth Amendment to the United States Constitution. As Alabamians recognized, neither the Fourteenth Amendment nor the cases applying it erased the racist language from our Constitution. Doing that required an amendment, so an amendment is exactly what the Legislature proposed and the People adopted.

Perhaps there is some other justification that would support Tyler and Gillis's conclusion that § 6-5-547 is no longer operative. And while I am willing to withhold ultimate judgment on this question until a party asks us to overrule the Tyler-Gillis line of cases (and in doing so provides our Court with the benefit of full adversarial briefing), I question whether our precedents refusing to apply § 6-5-547 are correct. In a future case in which the issue has been fully presented and argued by the parties, I would consider overruling both Tyler and Gillis, in addition to Schulte.

In the interim, the Legislature could take independent action that would remove any room for doubt about the status of § 6-5-547. It could, for example, repeal § 6-5-547 outright (which would unambiguously

establish that there is no cap on punitive damages in medical-malpractice wrongful-death actions), or it could affirmatively reenact the statute in its current form (a step that is, in my view, unnecessary for the reasons explained above, but which would have the advantage of definitively foreclosing repeal-by-silence arguments of the sort offered in this case), or it could amend the statute to change the amount at which damages are capped. But whether the Legislature amends the law or not, the bottom line is the same: the law's enacted text is what matters. Our analysis should be governed by that text, not by our own assumptions about legislators' unexpressed intentions or desires.

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

I concur fully with the main opinion's thorough analysis regarding the liability of Springhill Hospitals, Inc., d/b/a Springhill Memorial Hospital ("SMH"), in this case (Part III.A). The facts are tragic and the evidence is overwhelming. However, I respectfully dissent as to the affirmance of the award of punitive damages in the amount of $10 million (Part III.B.2).

In BMW of North America, Inc. v. Gore, 517 U.S. 559, 575 (1996), the United States Supreme Court reversed a judgment of this Court and instructed us to consider three guideposts when reviewing punitive-damages awards: (1) the degree of reprehensibility of the defendant's misconduct ("the reprehensibility guidepost"); (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award ("the ratio guidepost"); and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases ("the comparable-cases guidepost").

In doing so, the Supreme Court also "mandated appellate courts to conduct de novo review of a trial court's application of [the Gore guideposts] to [a] jury's award." State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 418 (2003) (citing Cooper Indus. Inc. v. Leatherman Tool Grp., Inc., 532 U.S. 424, 436 (2001)). Such an "[e]xacting appellate review ensures that an award of punitive damages is based upon an '"application of law, rather than a decisionmaker's caprice."'" Id. (quoting Cooper Indus., 532 U.S. at 436, quoting in turn Gore, 517 U.S. at 587 (Breyer, J., concurring, joined by O'Connor and Souter, JJ.)) (emphasis added). As noted in the main opinion, this Court has been expressly charged by the Legislature with the job of "independently reassess[ing] the … economic impact of such an award and reduc[ing] or increas[ing] the award if appropriate in light of all the evidence." § 6-11-24(b), Ala. Code 1975.

Although I believe the main opinion provides a thorough discussion of the reprehensibility guidepost, I write separately to address the main opinion's diminishment of the comparable-cases guidepost and to fully

apply that guidepost. According to the main opinion, "we must be careful not to overemphasize award comparisons given that they are 'necessarily "of limited utility" because each award is fact-specific.'" ____ So. 3d at ____ (emphasis added). In support of this contention, the main opinion cites a series of law-review articles from other states, all of which generally observe that "'the third guidepost has diminished greatly in importance since it was first announced in Gore.'" ____ So. 3d at ____, n.19 (quoting Laura J. Hines & N. William Hines, Constitutional Constraints on Punitive Damages: Clarity, Consistency, and the Outlier Dilemma, 66 Hastings L.J. 1257, 1309 (2015)) (emphasis added).

I believe this position is mistaken, particularly in a wrongful-death case like the one now before us. In Gore, the Supreme Court noted that one of the most common indicia of excessiveness of a punitive-damages award was the ratio between the plaintiff's compensatory damages and the amount of the punitive-damages award. 517 U.S. at 560. However, the ratio guidepost is unavailable when reviewing judgments in wrongful-death cases in Alabama because there are no compensatory

damages to compare for such a ratio. Alabama's wrongful-death statute -- § 6-5-410, Ala. Code 1975 -- provides only for punitive damages, unlike any other state.[29] Further, our wrongful-death statute does not provide any objective, numerical factors for the jury (or our appellate courts) to use in determining the appropriate amount of a punitive-damages award. See § 6-5-410(a) (providing that a wrongful-death plaintiff "may… recover such damages as the jury may assess ….").

With the complete elimination of one of the three guideposts, the comparable-cases guidepost deserves more attention -- not less -- in wrongful-death cases in this state. In addition, the only other applicable Gore guidepost -- the reprehensibility guidepost -- has no method by

[29]See Gillis v. Frazier, 214 So. 3d 1127, 1143 (Ala. 2014) (Murdock, J., concurring specially as to case no. 1120292) ("Alabama stands alone among all the states in the union in telling its juries in wrongful-death actions that they may award only what are referred to as 'punitive damages.'" (first emphasis added)).

which to quantify its impact, and Gore has directly instructed us that this guidepost (by itself) is insufficient.[30]

Another reason why comparing similar cases is so important is so that we can provide the bench, the Bar, and Alabama citizens with predictable outcomes. As the United States Supreme Court stated in Gore, "[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." 517 U.S. at 574.

Applying the comparable-cases guidepost, the largest medical-malpractice award ever affirmed by this Court post-Gore is the award in

[30]The point of the Gore decision by the United States Supreme Court was that the Alabama framework for punitive-damages awards was not sufficient by itself (even though we already considered reprehensibility). Gore, 517 U.S. at 566 (observing that this Court had applied the factors set forth in Green Oil Co. v. Hornsby, 539 So. 2d 218 (Ala. 1989) and determined that the conduct was "reprehensible"); id. at 587 (Breyer, J., concurring, joined by O'Connor and Souter, JJ.) ("This is because the standards, as the Alabama Supreme Court authoritatively interpreted them here, provided no significant constraints or protection against arbitrary results." (emphasis added)).

Bednarski v. Johnson, 351 So. 3d 1036 (Ala. 2021), which was $6.5 million (inflation-adjusted to $7.15 million currently). Before Bednarski, the largest medical-malpractice award affirmed by this court post-Gore was $4 million (inflation-adjusted to $5.2 million currently). Boudreaux v. Pettaway, 108 So.3d 486 (Ala. 2012). The largest medical-malpractice award that we have ever affirmed is the award in Atkins v. Lee, 603 So. 2d 937 (Ala. 1992) which was $6.875 million (inflation-adjusted to $14.7125 million currently). However, that decision is over 30 years old and is decidedly pre-Gore.[31]

Affirming the trial court's $10 million punitive-damages award in this case will raise the highest medical-malpractice punitive-damages

[31]I agree with the main opinion that we cannot simply ignore Atkins because it is pre-Gore; however, the usefulness of a pre-Gore decision is considerably diminished because it would have been decided without the benefit of the Gore analysis to guide the amount of punitive damages awarded in that case. Further, there was no effort by the parties to compare the facts in Atkins to those here. The same is true with regard to General Motors Corp. v. Johnston, 592 So. 2d 1054 (Ala. 1992) -- another 30-year-old, non-medical-malpractice, pre-Gore decision cited in the main opinion. Again, there was no effort by the parties to compare the facts in General Motors to the facts in this case.

award ever affirmed in Alabama from $6.5 million to $10 million. This is a 54% increase (before considering inflation) over our highest award ever (at least post-Gore and for over 30 years). And, less than two years ago, we affirmed the award in Bednarski, which was a 60% increase over the previous highest award ever in a medical-malpractice case. In other words, in less than two years, we will have moved the highest medical-malpractice award ever upheld by this Court from $4 million to $10 million -- an increase of a total of 150%.

Some might object to this math and argue (I think correctly) that inflation must be considered; however, even considering inflation, this award is still significantly higher than the award in Bednarski. For example, if we adjust the $6.5 million award in Bednarski for inflation, the increased award would be $7.15 million.[32] A $10 million award in this case would still represent an increase of 40%. And, comparing the

[32]In making these calculations, I used the inflation calculator from the website of the Bureau of Labor Statistics that was used by both parties in their briefing in this case. See https://www.bls.gov/data/inflation_calculator.htm.

inflation-adjusted highest award before September 2021 (Boudreaux -- $5.2 million) to a $10 million award in this case still produces an increase of 92% in less than two years.

I believe comparing this case to Bednarski is critical to our resolution of the issue regarding the propriety of the punitive-damages award in this case because Bednarski is (1) the highwater mark post-Gore, (2) a very recent decision of this court (less than two years old), and (3) a medical-malpractice case. Further, although comparing numbers is useful, it is not enough to simply compare numbers; the facts and holdings of each case must be compared to satisfy this Gore guidepost.

During oral argument, I asked the parties to explain how the facts in this case differed from those in Bednarski, thereby warranting an award that was either higher or lower than the one we had affirmed in that case. Neither party provided adequate explanations as to how this case was similar to or different from Bednarski. In addition, no party (or

amici) briefed how this case was similar to, or different from, Bednarski.[33]

After considering all of this, I am not convinced that the facts relevant to the punitive-damages award here can be sufficiently distinguished from the facts in Bednarski. Without adequately distinguishing Bednarski, I cannot agree that such a substantial increase over such a short period is predictable, fair, or constitutional. To be clear, I am not stating that I believe that the award in Bednarski (even inflation-adjusted) is a cap for punitive-damages awards in medical-malpractice wrongful-death cases (or for other punitive-damages awards). I agree that every case will be different, but the cases and their facts must be compared carefully.

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[33]For example, SMH cited Bednarski four times in its brief for an unrelated issue (in other words, it did not compare the facts of that case to the facts of this case). In her brief, West also cited Bednarski four times. Three of those citations were for unrelated issues, and the fourth citation was in a quote from the trial court's order regarding how the facts in this case were the same as those in Bednarski: "As in Bednarski, supra, this case arose in a healthcare setting, in which the patient was completely reliant on the provider to care for him." And, SMH's reply brief cited Bednarski on three pages for unrelated issues.

Given Alabama's wrongful-death statute and the instructions from the United States Supreme Court in State Farm mandating that we provide an "[e]xacting appellate review" to ensure that an award of punitive damages is based upon an """application of law, rather than a decisionmaker's caprice,""" State Farm, 538 U.S. at 418, we are left to reason from our prior cases (like common-law courts have done for all of history). Bednarski is precedent and the parties must explain how this case is the same as, or different from, that precedent. Reasoning from precedent is how we provide justice and predictability for the bench, the Bar, and Alabama's citizens.[34] It is for these reasons that I believe

[34]Without deciding the question, I note that predictability also counsels in favor of not reviving the statutory cap on punitive damages in medical-malpractice wrongful-death cases in § 6-5-547, Ala. Code 1975, for the reasons explained in the main opinion (Part III.B.1). It would surprise virtually every interested party in our state if we now revived this statute -- which has been dead for many more years than it had been alive. It is true that Justice Mitchell makes a compelling case in his special writing that the constitutional grounds for invalidating this cap in this Court's prior decision in Smith v. Schulte, 671 So. 2d 1334 (Ala. 1995), are weak at best and that Schulte is ripe for overruling. However, in the years since Schulte was decided, this Court has refused on more than one occasion to revive that statute, and I read those subsequent cases as statutory-construction cases that are more difficult

affirming the trial court's remitted punitive-damages award of $10 million is improper in this case.

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to overrule, especially when they have stood for many years. See, e.g., Mobile Infirmary Ass'n v. Tyler, 981 So. 2d 1077 (Ala. 2007); Gillis v. Frazier, 214 So. 3d 1127, 1134 (Ala. 2014); Bryan A. Garner et al., The Law of Judicial Precedent at 333 (Thomson Reuters 2016) ("Stare decisis applies with special force to questions of statutory construction. Although courts have power to overrule their decisions and change their interpretations, they do so only for the most compelling reasons -- but almost never when the previous decision has been repeatedly followed, has long been acquiesced in, or has become a rule of property." (emphasis added)); but, compare id. at 352 (easier to overrule constitutional precedent).

Thus, if the medical community believes that there needs to be a cap on damages in medical-malpractice cases, it should consider going to the Legislature.