IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

MARINER HEALTH CARE, INC., MARINER HEALTH CARE MANAGEMENT COMPANY, AND NATIONAL HERITAGE REALTY, INC.	)	
Plaintiffs.	)	**No. 09-2613**
v.	)	
TONY SHERROD, ERNEST SHERROD, LINDA PARHAM, ODESSA ROBINSON, YVONNE KING, ROY SHERROD, Individually, and as heirs and on behalf of the ESTATE OF VONCIL SHERROD, and MARKS BALETTE & GIESSEL, PC,	)	
Defendants.	)	

ORDER GRANTING DEFENDANT MARKS BALETTE & GIESSEL'S MOTION TO DISMISS AND GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

This action arises from Plaintiffs' September 18, 2009 Complaint for Declaratory Judgment against Defendants asking the Court to vacate an arbitration award. Plaintiffs argue that the award should be vacated because: (1) there was "evident partiality or corruption in the arbitrators"; and (2) "the arbitrators clearly exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the

subject matter submitted could not be made." (Compl., Dkt. No.1, ¶ 37.) Before the Court are Defendant Marks Balette & Giessel's ("Marks") Motion to Dismiss and the parties' cross-motions for summary judgment. Marks filed a Motion to Dismiss on October 23, 2009; Plaintiffs responded in opposition on November 13, 2009; and Marks filed a reply on December 18, 2009. Defendants Tony Sherrod, Ernest Sherrod, Linda Parham, Odessa Robinson, Yvonne King, and Roy Sherrod (collectively "Defendants") filed a Motion for Summary Judgment on February 3, 2010. Plaintiffs Mariner Health Care, Inc., Mariner Health Care Management Company, and National Heritage Realty, Inc. ("Plaintiffs") responded in opposition on March 29, 2010, and on the same day filed a cross-motion for summary judgment. Defendants responded in opposition on April 26, 2010; Plaintiffs replied on May 10, 2010; Defendants filed a sur-reply on May 26, 2010; and Plaintiffs filed a sur-sur-reply on June 4, 2010. For the following reasons, Marks' Motion to Dismiss is GRANTED and Defendants' Motion for Summary Judgment is GRANTED.

I. Background

On July 27, 2005, Defendant filed a Complaint alleging injuries suffered by Voncil Sherrod while she was a resident at High Pointe Health and Rehabilitation Center in Memphis, Tennessee. The original Complaint was filed in the Circuit Court of Tennessee for the Thirtieth Judicial District at

Memphis. On July 18, 2008, the parties agreed to submit the dispute to arbitration according to the terms set out in an arbitration agreement. On October 9, 2008, the trial court entered a Consent Order to Stay Lawsuit and Submit to Binding Arbitration.

Pursuant to the arbitration agreement, a panel of three arbitrators was selected: one by each side in the dispute and the third by the two arbitrators selected by the parties. Plaintiffs chose the Honorable Alice Olive-Parrot, Defendants chose Brian P. Johnson, and these two arbitrators chose the Honorable Lee Duggan, Jr., to be the presiding arbitrator (together, the "Panel"). Each of the arbitrators has more than twenty-five years of litigation experience, and neither Plaintiffs nor Defendants challenge the qualifications or the selection of the Panel.

The arbitration hearing took place from June 2-12, 2009. Evidence was presented by both sides. By agreement, the general rules of the American Arbitration Association with guidance from the Tennessee Rules of Civil Procedure controlled the procedural aspects of the arbitration, and Tennessee substantive law governed. After hearing and weighing the evidence, the Panel found that Plaintiffs were negligent, committed medical malpractice, and violated the Tennessee Adult Protection Act, Tenn. Code Ann. §§ 71-6-101 et seq. ("TAPA"), and that

Plaintiffs' conduct was a cause of the injuries Voncil Sherrod sustained. (See Findings of the Arbitration Panel, Dkt. 1, Exh. 2.) ("Findings") The Panel further found that the Plaintiffs' conduct was intentional, fraudulent, or malicious and warranted the assessment of punitive damages in the amount of $1.5 million. (Id.) The Findings of the Arbitration Panel were rendered on August 25, 2009, and sent to all parties by email and U.S mail on that date.

Plaintiffs commenced this action on September 18, 2009, requesting a declaratory judgment vacating the arbitration award pursuant to 9 U.S.C. § 10(a). Plaintiffs named as Defendants all parties to the underlying case: Tony Sherrod, Ernest Sherrod, Linda Parham, Odessa Robinson, Yvonne King, and Roy Sherrod. Plaintiffs also named Defendants' counsel in the underlying case, Marks Balette & Giessel, P.C. Defendants and Marks filed a counterclaim on October 20, 2009, requesting that the Court affirm the Findings of the Panel.

Defendants' Motion for Summary Judgment argues that Plaintiffs have not met the high standard necessary to vacate an arbitration award because they have not and cannot show that the Panel exceeded its authority or disregarded the law and that Plaintiffs have presented no evidence of partiality or corruption in the arbitrators. (Defendants' Memorandum in Support of Motion for Summary Judgment, Dkt. No. 33, at 3-4)

("Defs.' Memo") Plaintiffs' Motion for Summary Judgment argues that the award should be vacated because (1) no damages should have been awarded under TAPA; (2) any damages awarded pursuant to TAPA were duplicative of those awarded for medical malpractice in violation of Tennessee law; (3) experts not qualified under Tennessee's locality rule were allowed to testify; and (4) the punitive damages award was unconstitutional.[1] (Plaintiffs' Memorandum in Support of Motion for Summary Judgment, Dkt. No. 40, at 2-14) ("Pls.' Memo"). Plaintiffs raise an additional ground for vacating the award in their reply, where they argue that punitive damages were not appropriate here pursuant to the innocent successor doctrine and Tennessee public policy. (Pls.' Reply at 16-18) ("Pls.' Reply").

II. Jurisdiction and Choice of Law

This Court has jurisdiction pursuant to 28 U.S.C. § 1332. Plaintiffs Mariner Health Care, Inc. and Mariner Health Care Management Company are Delaware corporations with their

[1] Although Plaintiffs seek to vacate the award because the Panel was biased and because it exceeded its power, Plaintiffs provide no examples of any bias or corruption by the Panel. Rather, they argue that the Panel so clearly exceeded its powers that this excess is evidence of bias or corruption. (See Plaintiffs' Reply to Defendants Response to Plaintiffs' Motion for Summary Judgment at 6) ("Pls.' Reply") ("While there is no direct evidence of 'partiality' on the part of the panel, [Plaintiffs] submit that by issuing an award that violates due process, ignores Tennessee substantive law, and is internally inconsistent, the panel demonstrated is [sic] partiality toward Marks and the Sherrods."). Therefore, when reviewing the parties' arguments, the Court need only address Plaintiffs' assertion that the Panel clearly exceeded its powers or so imperfectly executed them that a final award cannot stand.

principal places of business in Georgia. Plaintiff National Heritage Realty, Inc. is a Louisiana corporation with its principal place of business in Georgia. Defendant Marks denies that its principal place of business is at the Houston, Texas address listed in the Complaint and does not provide the address of its principal place of business, but it does not challenge Plaintiffs' assertion that complete diversity exists. All other Defendants are Tennessee residents. The amount in controversy exceeds $75,000.

To the extent Plaintiffs have sought relief under Tennessee common law, all parties assume that Tennessee law governs Plaintiffs' claims. See Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938)(directing federal courts to apply state law for state law claims.) Therefore, the Court will apply Tennessee law to those claims.

III. Standard of Review

A. Motion to Dismiss

In addressing a motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6), the Court must construe the complaint in the light most favorable to the plaintiff and accept all well-pled factual allegations as true. League of United Latin Am. Citizens v. Bredesen, 500 F.3d 523, 527 (6th Cir. 2007). A plaintiff can support a claim "by showing any set of facts consistent with the allegations in the

complaint." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 563 (2007). This standard requires more than bare assertions of legal conclusions. Bovee v. Coopers & Lybrand C.P.A., 272 F.3d 356, 361 (6th Cir. 2001). "[A] formulaic recitation of the elements of a cause of action will not do." Twombly, 550 U.S. at 555. Any claim for relief must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Erickson v. Pardus, 551 U.S. 89, 93 (2007) (per curiam). "Specific facts are not necessary; the statement need only 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" Id. (citing Twombly, 550 U.S. at 555.) Nonetheless, a complaint must contain sufficient facts "to state a claim to relief that is plausible on its face" to survive a motion to dismiss. Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009). "This plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." Id. (quoting Twombly, 550 U.S. at 556). To survive a motion to dismiss, a complaint ultimately must demonstrate "facial plausibility," defined as "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. (citation omitted).

B. Review of Arbitration Agreement

The Federal Arbitration Act ("FAA") provides, in part:

> (a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration –
>
> (1) where the award was procured by corruption, fraud, or undue means;
>
> (2) where there was evident partiality or corruption in the arbitrators, or either of them;
>
> (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
>
> (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C. § 10(a). The threshold necessary to vacate an arbitration award is high because a district court's review of an award is "extremely narrow." NCR Corp. v. Sac-Co, Inc., 43 F.3d 1076, 1079 (6th Cir. 1995). "[T]hat a court is convinced [the Panel] committed serious error does not suffice to overturn [its] decision." Id. (citation omitted).

IV. Analysis

A. Motion to Dismiss

Marks' Motion to Dismiss argues that Plaintiffs have failed to state a claim against it because Marks was not a party to the underlying arbitration and Plaintiffs have failed to allege any facts that would make Marks an interested party. (Marks Balette

& Giessel, P.C.'s Memorandum in Support of Motion to Dismiss at 3.) ("Marks' Memo") Plaintiffs respond that Marks is properly a party because the Panel awarded it $400,000 in statutory attorneys' fees. (Plaintiffs' Response to Marks' Motion to Dismiss at 2.) ("Pls.' Resp.")

"Federal courts are empowered to entertain declaratory judgment actions only when a party alleges facts that show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality." Found. for Interior Design Educ. Research v. Savannah College of Art & Design, 244 F.3d 521, 526 (6th Cir. 2001) (internal quotation marks and citation omitted). "It is generally held that all persons who have an interest in an 'actual controversy' which is the subject matter of a complaint for declaratory judgment may be joined as parties defendant thereto." Reardon v. Penn. - NY Cent. Transp. Co., 323 F. Supp. 598, 599 (N.D. Ohio 1971) (citation omitted).

Here, the actual controversy is whether the arbitration award should be vacated. Marks was not a party to the arbitration, but represented Defendants in the underlying litigation. The Complaint does not make any allegations that would characterize Marks as a necessary or permissive party or that demonstrate that Marks has any interest in the actual controversy. Rather, the Complaint seeks a declaratory judgment

stating that the Panel's award should be vacated because the Panel was biased or exceeded its powers. (Compl. ¶¶ 29-37.)

Plaintiffs argue that Marks was awarded $400,000 in statutory attorneys' fees in the underlying arbitration and, therefore, has a $400,000 interest in the validity of the award. That is the only ground on which Plaintiffs seek to include Marks in the pending suit. Plaintiffs' argument is not persuasive. The Panel awarded Defendants $400,000 in attorneys' fees. (See Findings at 14 (finding $400,000 to be "the reasonable amount of attorneys' fees that Plaintiffs [i.e., Defendants in the pending action] are entitled to recover").) It did not confer any rights on Marks. Thus, Plaintiffs' argument is without merit and does not establish that Marks has a "$400,000 interest" in the outcome of this litigation.[2]

Plaintiffs also argue that "[w]hether or not Marks also stands to recover some additional amount as part of a contingency contract between Marks and the Sherrod family will be an additional question of fact before this court." (Pls.' Resp. 2.) That is not correct. The only issue before this Court is whether the arbitration award should be vacated pursuant to 9 U.S.C. § 10. The Complaint does not allege that Marks conspired with the Panel. Any contract between Marks and

[2] Plaintiffs also argue that Marks stands to lose $400,000 if the award is vacated. As stated, the $400,000 was awarded to Defendants. Any attorneys' fees that Marks may collect from the arbitration award arise from a contract between Marks and its clients. That contract is not at issue.

Defendants is irrelevant to whether the Panel was biased or exceeded its authority and would not be a question before the Court.

Plaintiffs have failed to allege any facts that would make Marks an interested party. See Reardon, 323 F. Supp. at 599. Therefore, Plaintiffs' Complaint against Marks Balette & Giessel, P.C. is DISMISSED.

B. Cross-motions for Summary Judgment

1. Damages were appropriate under TAPA

Plaintiffs argue that the panel exceeded its powers in awarding any damages under TAPA because the case was a medical negligence action controlled by the Tennessee Medical Malpractice Act, Tennessee Code Annotated §§ 29-26-115 et seq. ("TMMA"). Plaintiffs' memorandum discusses Voncil Sherrod's medical condition and attempts to establish that her claims sounded only in malpractice, making the Panel's award of damages under both TAPA and TMMA duplicative and inappropriate. (Pls.' Memo 6-8.) However, the review permitted this Court is narrow. As long as the Panel was arguably acting within the scope of its authority, it would be improper for this Court to vacate the award. See NCR Corp, 43 F.3d at 1079.

Although in Conley v. Live Care Centers of America, Inc. the Tennessee Court of Appeals held that TAPA "expressly provides that the damages an elderly person or disabled adult

may be entitled to recover under TAPA do not apply to a cause of action within the scope of the Medical Malpractice Act," 236 S.W.3d 713, 726 (Tenn. Ct. App. 2007), more recent Tennessee authority has read TAPA and Conley to allow "hybrid claims," where the claims fall under TAPA and TMMA. Thus, damages have been awarded for injuries that result from malpractice and for injuries that are the result of negligence and are violations of TAPA. See Smartt v. NHC Healthcare/McMinnville, LLC, No. M2007-02026-COA-R3-CV, 2009 WL 482475, at *24-25 (Tenn. Ct. App. Feb. 24, 2009); see also Draper v. Westerfield, 181 S.W.3d 283, 290 (Tenn. 2005). In Smartt, the court upheld an award of $2,000,000 in damages for pain and suffering from medical malpractice, finding that "defendants' malpractice during Mr. Myers' residency caused him to suffer from a number of medical problems, including the contractures, pressure sores, hip fracture, and urinary tract infection." 2009 WL 482475, at *24. The court went on to uphold a separate award of $450,000 for negligence, finding that, "[d]ue to [plaintiff's] physical condition, he was dependent upon the defendants for a number of ordinary tasks, such as bathing, feeding, grooming, and mobility" and "that the defendants' failure to fulfill these obligations resulted in continuous and substantial suffering that [plaintiff] endured during his residency" in the nursing home. Id. at *25.

The Panel here made a similar distinction and awarded $250,000 for pain and suffering and mental anguish due to Plaintiffs' TAPA violation and $600,000 for physical pain and suffering and mental anguish resulting from injuries sustained as a result of Plaintiffs' medical malpractice. (Findings at 10-11.)

Plaintiffs argue that the Panel could not properly award damages under both TAPA and TMMA because, "until very recently, Tennessee seemed to have a fairly clear rule on this issue." (Pls.' Memo at 3.) Although Plaintiffs acknowledge that "the bright line that seemed to delineate this rule has admittedly dimmed" and "there can now apparently be hybrid claims," Plaintiffs assert that "the present case is clearly not such a case." (Id. at 2.) Plaintiffs have acknowledged that both TAPA and TMMA damages can be awarded in the same case, but disagree with the Panel's conclusion that this case is an appropriate one. (Id.) Plaintiffs' argument invites the Court to exceed the narrow review permitted by the FAA and is far from establishing the grounds necessary to vacate an award. See NCR Corp., 43 F.3d at 1079.

There is Tennessee precedent permitting simultaneous recovery under both TAPA and TMMA; the Panel acknowledged that allocating money for the same injuries would be improper and duplicative; and the Panel distinguished the awards given under

TAPA and TMMA, making it clear that they were separate awards given for different injuries. (Findings at 10-11.) "The burden of proving that the arbitrators exceeded their authority is very great." Nationwide Mut. Ins. Co. v. Home Ins. Co., 330 F.3d 843, 846 (6th Cir. 2003) (citation omitted). The Panel acted within the scope of its authority, and this Court has no basis to vacate its award.[3]

2. The expert testimony does not warrant vacating award

Plaintiffs assert that allowing the testimony of Dr. James Sexson and nurse Ellen Lewis during the Panel's hearing violated the Tennessee locality rule and, thus, that the Panel exceeded its powers. (Pls.' Memo at 9-12.) Defendants respond that Plaintiffs did not properly plead this issue, that the Panel was not bound by the rules of evidence, and, notwithstanding these challenges, that the Panel properly ruled that Sexson and Lewis were qualified. (Defs.' Resp. at 12.)

[3] Plaintiffs also argue that the Panel erred by granting an award pursuant to TAPA and TMMA because such an award violates the election of remedies doctrine. (Pls.' Memo at 8.) As noted by Plaintiffs, the election of remedies principle is "implicated when two inconsistent and irreconcilable remedies are available to the plaintiff to redress a single wrongful act." Concrete Spaces, Inc. v. Sender, 2 S.W.3d 901, 906 (Tenn. 1999). That is not the situation here. The TAPA and TMMA claims redress not a single act, but multiple acts resulting in distinct injuries. The Panel was clear in its allocation of damages, awarding separate amounts for the medical malpractice claims and for the TAPA claims, and those awards were clearly intended to redress more than a single wrongful act. (Findings at 10-11.) Thus, the election of remedies doctrine is not implicated here.

Regardless of whether this issue is appropriately before the Court or relevant, the Panel's decision to allow the testimony of Sexson and Lewis does not establish that it exceeded its power. To comply with the locality rule, a plaintiff's expert "must have knowledge of the standard of professional care in the defendant's applicable community or knowledge of the standard of professional care in a community that is shown to be similar to the defendant's community." Stovall v. Clarke, 113 S.W.3d 715, 722 (Tenn. 2003) (citation omitted; emphasis in original). To meet this burden, "a plaintiff's expert can establish that a community with which he or she is familiar is similar to that of the one in which the defendant practices based on a comparison of information such as the size, location, and presence of teaching hospitals in the two communities." Badgett v. Adventist Health Sys. Sunbelt, Inc., No. M2007-02192-COA-R3-CV, 2009 WL 2365567, at *8 (Tenn. Ct. App. July 31, 2009).

Sexson testified that he practices in Atlanta, Georgia, and that Atlanta and Memphis are similar medical communities. (Testimony of James Sexson, M.D., Dkt. No. 46, Exh. 4, p. 4.) To support this assertion, Sexson testified to having compared demographic information, the relative population of the two communities, the medical resources in terms of acute care hospitals and other specialized facilities, and the presence of

nursing schools. (Id. at 13-14.) He testified to having reviewed the applicable Tennessee Code of Regulations, TAPA, the applicable resident rights from the State of Tennessee, nursing home charts from other facilities in Memphis, and the policies and procedures in effect during Voncil Sherrod's residency. (Id. at 10-12.) Sexson testified to his familiarity with federal and Tennessee rules and regulations. (Id. at 10-12, 15-16.) He further testified to knowing, interacting with, and attending conferences with physicians who specialize in internal medicine in Memphis, Tennessee. (Id. at 16-17.) Therefore, the Panel's determination that Sexson's testimony was consistent with the locality rule is not evidence of the Panel's exceeding its powers.

Ellen Lewis also testified to practicing in and knowing the standard of care for medical communities similar to Memphis, Tennessee. (Testimony of Ellen Lewis, Dkt. No. 46, Exh. 3, p. 111.) In support of her statement, Lewis testified to comparing: the population of communities where she has worked with the population of the Memphis community; the educational makeup of the communities; the hospitals and nursing homes in the communities; the range of physician services available in the communities; and the general demographics. (Id. at 109-11.) Lewis reviewed the federal regulations, the applicable Tennessee standards, the applicable resident rights statutes in Tennessee,

and TAPA. (Id. at 108-09.) Lewis also testified that she had reviewed the records from other nursing homes in Memphis, Tennessee, as well as the records of the nursing home at issue. (Id. at 109-10.) Thus, the Panel's decision to allow Lewis' testimony does not establish that it exceeded its power. The Court finds no ground to vacate the Panel's award based on the expert testimony of Sexson and Lewis. See 9 U.S.C. § 10(a).

3. The punitive damages awarded by the Panel were not unconstitutional

The final argument in Plaintiffs' Motion for Summary Judgment is that the punitive damages awarded were unconstitutional. (Pls.' Memo at 13.) In support of that argument, Plaintiffs assert that (1) the testimony of expert Brad Rush violates Tennessee law and due process; (2) the ratio of compensatory to punitive damages is too high; and (3) the award represents too great a percentage of Plaintiffs' net worth. (Id. at 13-15.)

Punitive damages may be awarded in Tennessee if a defendant has acted (1) intentionally, (2) fraudulently, (3) maliciously, or (4) recklessly. Hodges v. S.C. Toof & Co., 833 S.W.2d 896, 901 (Tenn. 1992). The Panel acknowledged this standard and determined that Plaintiffs' "violation [of TAPA] was the result of intentional, fraudulent or malicious conduct." (Findings at 5.) Although Plaintiffs concede that the Panel properly

followed Tennessee law in determining whether punitive damages were appropriate, they argue that the amount awarded was inappropriate because the Panel considered the amount Plaintiffs' businesses would be worth if they were sold. (Pls.' Memo at 13.) Because expert Brad Rush explained to the Panel what he believed to be the value of Plaintiffs' businesses if they were sold, Plaintiffs argue that the Panel inappropriately applied the standard for awarding punitive damages as set out by the Tennessee Supreme Court in Hodges. (Id.) This argument is without merit. The first factor to be considered under Hodges is "defendant's financial affairs, financial condition, and net worth." Hodges, 833 S.W.2d at 901. Although business valuation is not a requirement under Hodges, the fact that Rush discussed the value of Plaintiffs' businesses does not meet the high standard necessary to find the Panel exceeded its powers or so imperfectly executed them that a mutual, final, and definite award was not made. See Nationwide Mut. Ins. Co.., 330 F.3d at 846. To the contrary, it is appropriate to consider the fair market value of a business in assessing its "financial affairs" and "financial condition."

Plaintiffs next argue that the ratio of punitive to compensatory damages violates their due process rights. (Pls.' Memo at 19.) According to Plaintiffs, "[a] punitive award with a greater than a 1:1 ration between compensatory and punitive

damages and which represents more than 14% of Mariner Health Care, Inc.'s total net worth is simply unconstitutional under both the Tennessee and United States Constitutions and those cases interpreting those all important documents." (Id. at 14.)

When examining the ratio of punitive to compensatory damages under due process principles, Tennessee adheres to the standard established by State Farm Mutual Automobile Insurance Company v. Campbell, 538 U.S. 408 (2003). See Flax v. DaimlerChrysler Corp., 272 S.W.3d 521, 538-39 (Tenn. 2008). In Campbell, the Supreme Court held that "[s]ingle-digit multipliers are more likely to comport with due process, while still achieving the State's goals of deterrence and retribution, than awards with ratios in [the] range of 500 to 1, or, in this case, of 145 to 1." Campbell, 538 U.S. at 428. Thus, the Tennessee Supreme Court in Flax found that a single digit ratio of 1:5.35 "is not clearly impermissible," but cautioned that "the United States Supreme Court has suggested that a ratio of more than 1 to 4 approaches the outer limits of constitutionality." Flax, 272 S.W.3d at 539 (citations omitted). "None of these ratios, however, present 'rigid benchmarks.'" Id. The ratio here is not greater than 1:4, and does not violate due process or provide grounds for the Court to vacate the award.

Plaintiffs argue that the award should be invalidated because it represents more than 14 percent of Mariner Health Care Inc.'s total net worth. (Pls.' Memo at 14.) Plaintiffs provide no support for this argument. They simply state that the given award is unconstitutional and that "by rendering such an award, the panel in question here exceeded its powers." (Id. at 14-15.) As discussed, an award with a greater than 1:1 ratio is not "clearly impermissible" or unconstitutional. See Campbell, 538 U.S. at 419; Flax, 272 S.W.3d at 539. Because the Panel appropriately found and awarded punitive damages pursuant to Tennessee law, there is no ground for this Court to vacate that award.

4. Innocent Successor

In their reply, Plaintiffs argue that the punitive damages awarded by the Panel were inappropriate because the ownership of Mariner Health Care, Inc. ("Mariner") changed between the time Voncil Sherrod was treated and the time of the underlying suit. (Pls.' Reply 15.) Plaintiffs maintain that, because its structure changed, Mariner today is a different company from its predecessor, and, thus, that punitive damages would be inappropriate and would violate public policy. (Id. at 16-17.); see Hodges, 833 S.W.2d at 900 ("The contemporary 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." (citation omitted).)

The innocent successor doctrine seeks to avoid punishing a successor company that is wholly innocent of any wrongdoing for the sins of a company it has acquired. Culbreath v. First Tenn. Bank Nat'l Ass'n, 44 S.W.3d 518, 527 (Tenn. 2001). The court in Culbreath concluded, however, that an entity is not a separate, innocent entity when it assumes all of the liabilities of an entity with which it merges. Id. Mariner Health Care, Inc. is the "Surviving Corporation" of a merger with National Senior Care, Inc. ("NSC"), and assumed all liabilities of NSC. (Agreement and Plan of Merger, Dkt. No. 50, Exh. 1, § 1.1.) Mariner existed before, during, and after Voncil Sherrod sustained injuries. Section 2.1 of the merger agreement provides, "[T]he certificate of incorporation of the Company [Mariner Health Care, Inc.] in effect at the Effective Time shall be the certificate of incorporation of the Surviving Corporation." (Id. at A-1-5.); see also Tenn. Code Ann. § 48-21-108(a)(3) ("All liabilities of each corporation or limited partnership that is a party to the merger shall be vested in the surviving corporation or limited partnership"). Therefore, all liabilities of Mariner and NSC vested in Mariner. The innocent successor doctrine does not apply here to relieve Mariner of

liability for the punitive damages awarded by the Panel. See Culbreath, 44 S.W.3d at 527.

Plaintiffs assert that their argument against punitive damages is broader than the innocent successor doctrine and that assessing punitive damages against a revamped company violates public policy. (Plaintiffs' Sur-sur-reply at 4-6.) The Court in Sterling v. Velsicol Chemical Corp. cautioned against applying punitive damages where the successor corporation was a new and different entity. 855 F.2d 1188, 1215 n.27 (6th Cir. 1988) (applying Tennessee law). Even if Mariner were a new and different entity, such a cautionary word, issued before Culbreath, where there is a legal argument supporting the Panel's position, would not be grounds for vacating the award.[4] See Culbreath, 44 S.W.3d at 527 (rejecting defendant's argument that punitive damages should not be applied to it because of a merger where all wrongful activity occurred before the merger). Therefore, a legal argument supports the Panel's punitive damages award, and this Court has no ground to vacate it pursuant to the innocent successor doctrine or public policy.

[4] The court in Sterling also states that, where there is "no evidence of such beneficial changes in either [the Corporation's] practices or management," there is nothing to merit the alleviation of such an award. Sterling, 855 F.2d at 1215 n.27. Plaintiffs make no argument that they presented such evidence to the Panel. Rather, they argue that they have raised and argued the issue before this Court. Therefore, even if the doctrine were applicable, because Plaintiffs have made no argument that the Panel heard evidence on this issue and reached an improper conclusion, there is no basis for the Court to vacate the punitive damage award because of changes made to the surviving corporation.

V. Conclusion

For the foregoing reasons, Marks' Motion to Dismiss is GRANTED, and Defendants' Motion for Summary Judgment is GRANTED. Because there are no grounds to vacate the award pursuant to 9 U.S.C. § 10(a), the arbitration award is confirmed.

So ordered this 8th day of July, 2010.

s/ Samuel H. Mays, Jr.
SAMUEL H. MAYS, JR.
UNITED STATES DISTRICT JUDGE