THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Casey L Manning, Circuit Court Judge

Case No 2009-CP-40-1477

Vernon Sulton and Willie Mae Scott, Respondents,

v

HealthSouth Corporation d/b/a HealthSouth of SC, Inc d/b/a HealthSouth Rehabilitation Hospital, Kathy Hoover, RN, Lisa Page RN, Sharon Miller, RN, Kim Harris, RN, Betty Casteal, RN, and Norine Corbin, RN, Appellants

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FINAL REPLY BRIEF OF APPELLANTS

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Reply Statement of Facts

On December 15, 2005, Respondent Vernon Sulton ("Sulton") was the unfortunate victim of a crime that is unrelated to this lawsuit and in which he suffered multiple gunshot wounds, leaving him a paraplegic with no feeling from the chest down and limited use of his arms (Am Compl ¶4, R 37, 212) Sulton was hospitalized at Palmetto Richland from December 15, 2005 until February 2, 2006, at which time he was transferred to HealthSouth Rehabilitation Hospital ("HealthSouth") (Am Compl ¶4, R 37, 189) ***Prior*** to his arrival at HealthSouth, Sulton developed a Stage 2 decubitus ulcer on his lower back, and this condition was immediately diagnosed by HealthSouth (Am Compl ¶ 6, 37, 113-115) In addition to his paralysis, Sulton suffered from various medical conditions which were contributing factors to the development of a decubitus ulcer [1] (R 70-71, 387-389) Respondents' expert witness, Nurse Ann Muers, testified that depending on the circumstances, even with reasonable care, a pressure ulcer can develop through all four stages (R 123-124) Appellant's expert, Dr Kurt Gambla, testified that, at the time Sulton came to HealthSouth, his pre-existing ulcer was likely to escalate, even with optimal care (R 389-390)

Numerous measures were taken to treat Sulton's ulcer during his brief hospitalization with HealthSouth In addition to repositioning of the patient, HealthSouth initially treated Sulton's pressure ulcer through the application of comfeel dressings and the immediate use of a Rim Air mattress (R 120-121, 301, 302-303, 304, 320-321, 349, 352, 377, 389) By February 7, 2006, upon noting that the ulcer

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[1] These other conditions included obesity, high blood pressure, heart problems, and mini-strokes (R 70-71, 163, 164-165, 196)

was continuing to worsen, Sulton was provided a more sophisticated Power Turn Elite bed, which is more effective in providing a constant repositioning of the patient (R 86-87, 118, 351-353, 378, 380-381, 389) By February 9, 2006, the comfeel dressing was upgraded to silvadene dressings (R 332-333, 350-351, 379) HealthSouth also sought to address the pressure ulcer though physical therapy, nutrition, and on February 10, 2006 arranged for a consultation with a plastic surgeon to take place later that month (R 351-352, 354-355, 386)

The record at trial established that HealthSouth had proper policies and procedures in place regarding the prevention and treatment of pressure ulcers and that these policies were not faulty (R 55, 127) The issue was whether the nursing staff had followed those policies and procedures (R 127)

On February 13, 2006, Sulton was transferred back to Palmetto Richland because of a possible heart attack (R 94) After arriving at Palmetto Richland, Sulton's ulcer was diagnosed as having increased to Stage 4 (R 96) The ulcer was completely healed by the summer of 2006 (R 181-182, 216) On February 6, 2010, Sulton died from causes unrelated to the ulcer or his care at HealthSouth (Death Certificate of Vernon Sulton, R 751) (identifying Mr Sulton's cause of death on February 6, 2010, as sepsis caused by a urinary tract infection)

Argument

I The Trial Court's Instruction to the Jury that Appellants Owed a "Heightened" Duty of Care Constitutes Reversible Error

Respondents contend that Appellants failed to preserve the issue of the Trial Court's erroneous "heightened duty" charge[2] because Appellants did not specifically state the charge was "a misstatement of the law of South Carolina " (Resp Brief p 24) Respondents also attempt to limit the objections made at trial by Appellants to an objection that the charge would be confusing (Resp Brief p 26) The record refutes these contentions and establishes that this issue was fully preserved and that this error warrants a new trial

During the conference on the proposed jury instructions, Appellants specifically objected to the inclusion of Respondents' Request to Charge No 15 (the "heightened duty" charge) (R 414-415) During this objection Appellants' counsel argued

> MR SAMMATARO We [object] to it on the basis that Your Honor is already going to charge the law regarding eggshell plaintiffs Your Honor's going to charge [that] the standard in this case is reasonable care I don't think that there's been really any discussion that would warrant that charge plus I think it's already covered in the charges Your Honor claims to give

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[2] The "heightened duty" charge given by the Trial Court was as follows

> " it is the general law applicable to all persons that if there is a great degree of danger present, then there is a greater duty of care to prevent injury to other persons **A similar rule applies to physicians or healthcare providers in their treatment of their patients** When there is a risk of substantial danger present and the symptoms of the patient are consistent with such a risk then the healthcare provider has a duty to respond in proportion to the risk **The greater the risk of the condition to the patient the greater the duty of the healthcare provider** to respond appropriately and to provide the appropriate treatment "

(R 501) (emphasis added)

THE COURT Okay

MR SAMMATARO I think it's going to confuse the jury and they're going to believe that there was some higher duty that applied to the defendants in this case other than what the medical malpractice standard actually is

(R 414-415) (emphasis added) Thus, Appellants counsel argued that the actual standard of care that applied was "reasonable care" and that the inclusion of the "heightened duty" charge was not the duty the law actually imposed (R 414-415) Following the completion of the jury charges, Appellants renewed their objection to the "heightened duty" charge (R 506-507)

Appellants' objections were the equivalent of stating that the heightened duty charge is a misstatement of law There is no need to explicitly use the words "misstatement of law" where it is clear from the context of the objection what is at issue See State v Brannon, 388 S C 498, 502, 697 S E 2d 593, 595-96 (2010) (holding that use of the exact name of a legal doctrine is not necessary for preservation and that a litigant is only required to fairly raise the issue to the trial court, thereby giving it an opportunity to rule on the issue), State v Dunbar, 356 S C 138, 142, 587 S E 2d 691, 694 (2003) (holding that the exact name of a legal doctrine need not be used where it is clear the argument has been presented on that ground), Carroll v Palmetto Bank (In re Estate of Patterson), 374 S C 116, 120, 646 S E 2d 885, 888 (Ct App 2007) (holding that a party need not use the exact name of a legal doctrine to preserve an issue for appellate review), State v Russell, 345 S C 128, 132, 546 S E 2d 202, 204 (Ct App 2001) (explaining that even though exact words are not used to argue an issue, if it is clear from the argument presented in the record that the

motion was made on a particular ground, the argument will be considered raised to the trial court and will be preserved for review) It was clear from Appellants' objection that the heightened duty charge would improperly go beyond the applicable standard of care of "reasonable care " Thus, this issue was fully preserved for appeal

As explained in Section I of Appellants' Initial Brief, the "heightened duty" charge given by the Trial Court was expressly rejected by the South Carolina Supreme Court in Pittman v Stevens, 364 S C 337, 613 S E 2d 378 (2005) In Pittman, the Supreme Court upheld a trial court's refusal to provide a charge ***identical*** to the one at issue in this matter, on nearly identical facts (i e , plaintiff suffered pressure-point ulcer) Id at 341, 613 S E 2d at 380 In support of this ruling, the Pittman Court held there was no South Carolina law supporting the use of this charge and that "this instruction is ***even more inappropriate in a medical malpractice case***" because "[e]very medical decision encompasses varying degrees of danger " Id at 342-43, 613 S E 2d at 380-81 (emphasis added)

Respondents attempt to draw a distinction between the fact that Pittman addressed a trial court's *refusal* to give the charge at issue as opposed to a claim of error where the charge was actually given (Resp Brief p 25) Assuming this distinction, it makes no difference The Pittman Court made it clear that this instruction was not supported by South Carolina law and was ***particularly inappropriate in medical malpractice cases*** The issue decided in Pittman was whether the "heightened duty" charge was appropriate in a medical malpractice action, and the clear holding was that it was not

Respondents' next contention is that Appellants were not prejudiced by this improper charge The basis for this contention is that under the "holistic approach" to jury instructions any error with the "heightened duty" charge must be considered along with the charges as a whole (Resp Brief pp 26-29) The mere fact that other parts of the charge were correct does not absolve the trial court of its error in giving an erroneous instruction Cole v Raut, 378 S C 398, 404, 663 S E 2d 30, 33 (2008) (holding that an erroneous jury charge is grounds for reversal where the appellant can demonstrate error and prejudice) The purpose of Appellate Courts viewing the charges as a whole is to prevent statements in charges from being taken out of their complete context It does not excuse a clearly erroneous instruction just because a contradictory but correct instruction on the same subject is given elsewhere In such circumstances, unless cured by the trial court, an erroneous charge would still cause prejudice and jury confusion In this case, while Respondents point to various instructions elsewhere in the overall charge that were correct statements of the law, they fail to show that the erroneous "heightened duty" charge was in any way corrected by, or even contradicted by, other instructions The fact that the correct law was charged as to other unrelated aspects of the case did not remedy the error regarding the existence of a supposed "heightened" duty

The "greater duty" instruction went to the key issue of whether there was a breach of a duty By improperly elevating the duty owed, this instruction made it more likely that the jury would find that otherwise reasonable conduct breached the "heightened" duty Whether the Appellants breached their duty was the *essential* determination made by the jury in this case Therefore, this improper instruction was

highly prejudicial to the Defendants and a new trial should be granted Baker v Weaver, 279 S C 479, 483, 309 S E 2d 770, 772 (Ct App 1983) (finding the trial court's erroneous charge to be prejudicial where the requested instruction involved a substantial feature of the case)

II The Verdict Form Was Fatally Flawed Requiring a New Trial

The verdict form submitted to the jury in this case was fatally flawed in a variety of respects For example, the verdict form directed the jury to find "for" the Respondents Sulton and Scott and "against" HealthSouth and the Nurse Appellants (Verdict Form ¶¶ 1-2, R 4-5) Additionally, while the verdict form allowed the jury to select individual Nurse Appellants it could find "against" or allowed a finding of "NONE OF THE ABOVE," aside from the "NONE OF THE ABOVE" option, there was no mechanism for the jury to find "for" HealthSouth on either of the unidentified claims (Verdict Form ¶¶ 1-2, R 4-5) Finally, the verdict form's provisions for finding proximate cause and reckless willful and wanton conduct by clear and convincing evidence were limited to HealthSouth and did not provide for any individual findings on these issues as to the Nurse Appellants (Verdict Form ¶ 3, R 5)

Respondents contend that the only issue preserved by Appellants with respect to the verdict form is the form's failure to include individual findings as to the Nurse Appellants on the issue of proximate cause (Resp Brief p 32) This is incorrect All of the issues raised in this appeal as to the verdict form were fully preserved

The Appellants' proposed verdict form would have allowed the jury to make *separate* determinations as to *each individual defendant* on the issues of (a) negligence, (b) proximate cause, and (c) the establishment by clear and convincing evidence of

reckless, willful, and wanton conduct (Appellants' Proposed Verdict Form, R 654) In addition to proposing a verdict form which addressed these issues, Appellants objection to Respondents' verdict form included the following

> THE COURT Okay And what else? And you object to the Plaintiff's verdict form - the verdict form I'm going to adopt and some particulars I think
>
> MR SAMMATARO Yes sir Moving on to plaintiff's verdict [form] we have several objections First of all, I think the question should be segregated out on the elements of their claims, in other words, there should be a separate question of finding regarding negligence There should be a separate question regarding finding or proximate cause as to the [specific] defendants I believe that the way this verdict form was worded is a little confusing To have all of the defendants listed separately because that's the way they were listed in the complaint

(R 416)(emphasis added) Thus, Appellants specifically noted that the verdict form was confusing and failed to properly separate the issues as to the separate defendants (R 416-418, 506-507) The Trial Court rejected Appellants' proposed form and instead used the Respondents' form, over Appellants' objections (R 416-418, 502-504, 506-507)

Respondents incorrectly attempt to minimize the extent of Appellants' objection by ignoring its context When the entire context of Appellants' objection is considered, including Appellants' proposed verdict form, it is clear that Appellants requested that the verdict form require the jury to make a clear determination as to each element of the claims for each individual defendant Appellants' objection, coupled with their proposed verdict form, raised these issues in a timely manner and with sufficient specificity S C Dept of Transp v First Carolina Corp of S C , 372 S C 295, 302, 641 S E 2d 903, 907 (2007) (holding that a party's objection to a verdict form was preserved despite fact that the party did not phrase its objection in the exact terms used

in the issues on appeal) Thus, Appellants' objection adequately preserved all of the verdict form issues raised in this appeal

The result of this error was jury confusion and clear prejudice to the Appellants There was no identification of the claims or their elements for jury determination There was also no clear method to find *for* HealthSouth on either cause of action Additionally, the absence of any individual determinations of proximate cause or reckless, willful or wanton conduct as to the individual Nurse Appellants improperly suggested that no such findings were needed

The confusing effect and impropriety of the verdict form is evidenced by the jury's responses to paragraph 2 where they selected "NONE OF THE ABOVE " (Verdict Form ¶2, R 5) If this determination is considered to be a verdict "against" HealthSouth but not against the individual Nurse Appellants (as Respondents argue), it is improper because such would mean there was never an option for a verdict on this claim in HealthSouth's favor Stevens v Allen, 342 S C 47, 52 n 4, 536 S E 2d 663, 665 n 4 (2000) (noting that inconsistent verdicts from the jury were exacerbated by a verdict form which failed to separately inquire as to the defendants' liability on each cause of action and encouraging members of the bar to submit verdict forms that are more specifically tailored to the facts of the case) Therefore, Appellants should be granted a new trial if this verdict is so interpreted

III The Only Reasonable Interpretation of the Jury's Verdict on the Loss of Consortium Claim is a Total Defense Verdict

Using the verdict form submitted over Appellants' objection, the jury selected "NONE OF THE ABOVE" for their liability determination as to the loss of consortium

claim The only reasonable interpretation of this verdict is that it was a verdict in favor of ***all*** of the Appellants The "NONE OF THE ABOVE" option selected by the jury was the final option for the jury on the verdict form It is an all-inclusive phrase and includes all of the parties listed above it HealthSouth as well as the six individual Nurse Appellants were listed in some manner above this selection Thus, the only reasonable conclusion is that the jury's "NONE OF THE ABOVE" selection was a verdict in favor of all of the Appellants

Respondents contend, however, that "the jury viewed 'NONE OF THE ABOVE' as referencing only the list of nurses immediately above that option " (Resp Brief p 40) Respondents attempt to support this assertion by claiming that the language of the verdict form stated that the jury found against HealthSouth and "gave the option of checking each individual nurse or none of the above " (Resp Brief p 40) Respondents' argument illustrates the fatal flaw with the verdict form If Respondents' interpretation of the verdict form is accepted, the jury was improperly ***instructed, through the verdict form,*** to find *against* HealthSouth and the jury was completely denied the ability to find *for* HealthSouth Such a result is untenable Either, the jury's selection of "NONE OF THE ABOVE" included HealthSouth as well as all of the Nurses Appellants and represents a total defense verdict, or the verdict form was fatally flawed by requiring a verdict against HealthSouth and a new trial must be ordered

Respondents assert that the jury's inclusion of a dollar amount for Respondent Scott's non-economic damages establishes that the jury intended to find HealthSouth liable (Resp Brief p 40) This overlooks the fact that damages are entirely

dependent upon liability, and a jury's determination that Scott suffered non-economic damages does not require that some party be held liable for those damages Appellants' position is that the verdict of "NONE OF THE ABOVE" was a total defense verdict on the loss of consortium claim, and the inclusion of a damages amount raised no issue as to liability Thus, because the Form 4 Order subsequently entered by the Trial Court did not clarify this issue, Appellants asked for judgment as to that claim to be entered in their favor in their post-trial motions (Defendants' Post-Trial Motions and Supporting Memorandum, R 657, 711) If, as Respondents apparently contend, the damages amount created an ambiguity in the verdict, it was incumbent upon Respondents to raise the issue prior to the dismissal of the jury See Dykema v Carolina Emergency Physicians, P C , 348 S C 549, 554, 560 S E 2d 894, 896 (2002) (holding that where jury returned a verdict for punitive damages but no actual damages, the defendant waived the issue by not raising the inconsistency prior to the dismissal of the jury)

Respondents' assertions as to how the jury viewed the verdict form and as to meaning of the jury's inclusion of an economic damages award are impermissible speculation If, due to the flaw in the verdict form, the "NONE OF THE ABOVE" verdict was ambiguous, it is improper to speculate as to the jury's intention Where there is an ambiguous verdict, "[t]he court cannot construe the verdict of the jury, nor can it 'correct' the verdict " Stevens v Allen, 336 S C 439, 451, 520 S E 2d 625, 631 (Ct App 1999) Rather, where the verdict is ambiguous, the remedy is for the trial court to resubmit the case to the jury, not act as a substitute for the jury Id , Johnson v Phillips, 315 S C 407, 417 n 7, 433 S E 2d 895, 902 n 7 (Ct App 1993) Where the ambiguity is not resolved by resubmitting it to the jury, the only avenue for

amending or correcting the jury's verdict is through a motion for a new trial Camden v Hilton, 360 S C 164, 173, 600 S E 2d 88, 93 (Ct App 2004)

It was erroneous for the Trial Court to speculate as to the jury's intention in its selection of "NONE OF THE ABOVE" on the loss of consortium claim, and it remains improper for Respondents to urge this Court to do the same Thus, either HealthSouth is entitled to have judgment entered in its favor on the loss of consortium claim, or a new trial is required due to the ambiguity in the jury's verdict and the fatal flaw in the verdict form

IV The Lack of Evidentiary Support for Any Loss of Consortium Verdict Warrants Granting HealthSouth Either JNOV or a New Trial as to That Claim

Even if the jury's verdict on the loss of consortium claim could be interpreted as a verdict against HealthSouth, the $4,000,000 damages award is unsupportable based on the damages properly recoverable for such a claim and the evidence at trial Respondents incorrectly seek to draw a distinction between loss of consortium under the common law, and their asserted "modern view" of this claim as codified in S C Code Ann § 15-75-20 (Resp Brief p 41) Specifically, Respondents assert that the common law limitations on the types of damages recoverable under loss of consortium were completely removed by the statement in section 15-75-20 that "[a]ny person may maintain an action for damages arising from an intentional or tortious violation of the right of companionship, aid, society and services of his or her spouse " S C Code Ann § 15-75-20 Respondents cite no authority for this assertion

Contrary to Respondents' assertion, the codification of the common law claim of loss of consortium did nothing to change the longstanding limitations on the types of

damages recoverable for this claim [3] It is a central cannon of statutory construction that "[t]he common law remains in full force and effect in South Carolina unless changed by ***clear and unambiguous*** legislative enactment " Singleton v State, 313 S C 75, 83, 437 S E 2d 53, 58 (1993) (emphasis added) Additionally, "it is presumed that ***no change in common law is intended*** unless the Legislature ***explicitly indicates such an intention*** by language in the statute " State v Prince, 316 S C 57, 66, 447 S E 2d 177, 182 (1993) (emphasis added), citing Nuckolls v Great Atlantic & Pacific Tea Co , 192 S C 156, 5 S E 2d 862 (1939) (holding that "it is not presumed that the Legislature intended to abrogate or modify a rule of the common law by the enactment of a statute upon the same subject, that it is rather to be presumed that no change in the common law was intended unless the language employed clearly indicates such an intention, that the rules of the common law are not to be changed by doubtful implication, or overturned except by clear and unambiguous language ")

Respondents assert that, because the word "damages" in section 15-75-20 is undefined, this general codification of the common law claim of loss of consortium opens the door of recoverable damages to include *all types* of damages This view is incorrect and directly conflicts with South Carolina's law on the proper interpretation of

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[3] Under the common law, the only damages recoverable for loss of consortium are those which compensate the claiming spouse for the loss of the injured spouse's services, society, and companionship Gosnell v Dorchester School District No 2, 301 S C 21, 23-24, 389 S E 2d 865, 866 (1990) These damages has been described as the spouse's right to the services of the injured spouse and for expenses incurred Hughey v Ausborn, 249 S C 470, 477, 154 S E 2d 839, 842 (1967) Thus, damages such as emotional distress or punitive damages, which extend beyond the lost services of the spouse, are not recoverable Gosnell, 301 S C at 23-34, 389 S E 2d at 866 (holding that the damages awarded for loss of consortium are actual damages), Hughey, at 478, 154 S E 2d at 843 (limiting damages to the loss of spouses services and expenses incurred and holding that punitive damages are not recoverable)

codifications of common law South Carolina common law does not allow for the recovery of emotional distress or punitive damages for loss of consortium Gosnell, 301 S C at 23-34, 389 S E 2d at 866 (holding that the damages awarded for loss of consortium are actual damages), Hughey, 249 S C at 478, 154 S E 2d at 843 (limiting damages to the loss of spouses services and expenses incurred and holding that punitive damages are not recoverable)

The fact that "damages" is not defined or limited in section 15-75-20 does not change the common law limitations Rather, the opposite is true - without an express statement that the common law rule is being ***changed***, it is presumed that the common law limitations remain in full force and effect The use of the word "damages" without further definition is not a "clear an unambiguous" ***change*** of the existing law Nor does the used of the word "damages" constitute an "explicit indication" that the Legislature intended to change the existing common law rule Thus, the longstanding limitations on the damages recoverable for loss of consortium have remained the law of South Carolina, including after the enactment of section 15-75-20

As was illustrated in Section IV of Appellants' Initial Brief, the award of $4,000,000 in non-economic damages is unsupported by the evidence in the record and is wholly out of proportion to any injury associated with the loss of consortium claim (Appellants' Initial Brief pp 25-28) In support of the $4,000,000 award, Respondents assert that there was evidence at trial that (1) Sulton was a good husband, (2) Sulton was a good provider, (3) Sulton and Scott had a good relationship, and (4) Sulton looked after his grandchildren (Resp Brief p 46)

This evidence does not support a $4,000,000 damages award Respondent Scott was only entitled to damages relating to the loss of companionship and services which *resulted from the temporary decubitus ulcer* Sulton's permanent physical limitations were caused by the prior gunshot wound and his resulting paralysis, and were essentially unchanged by the temporary existence of the ulcer The evidence at trial illustrated that despite developing the ulcer, Sulton remained in good spirits, and was able to communicate with his wife (R 199, 213-214) Thus, the loss of companionship and services Ms Scott suffered were attributable to Sulton's prior injury, and were only minimally increased, if at all, by the temporary ulcer

Under these circumstances, a non-economic damages award of $4,000,000 is unsupportable, and is so grossly excessive as to show that it was motivated or actuated by passion, caprice, prejudice, or other considerations not found in the evidence Thus, due to the lack of evidence of damages supporting the loss of consortium claim, and, alternatively, due to the lack of any evidentiary support for a $4,000,000 in non-economic damages, HealthSouth is entitled to JNOV or, failing that, a new trial as to this claim

V The Punitive Damages Award was Improper

A The Punitive Damages Award Does Not Apply to the Nurse Appellants and is Unsupportable as to HealthSouth Alone

In their brief, Respondents cite nothing in the record to refute Appellants' assertion that the punitive damages award ***does not apply*** to the individual Nurse Appellants As discussed in section V A of Appellant's Initial Brief, Respondents did not seek a punitive damages award as to the Nurse Appellants, and the jury's verdict,

which limited its finding of willful, wanton or reckless conduct by clear and convincing evidence to HealthSouth alone, cannot support a punitive damages verdict as to the individual Nurse Appellants

The Form 4 Order entered following the verdict in this matter provided no explanation as to the meaning of the verdict and provided no statement as to what, if any, judgment was rendered as to each of the individual Appellants (Form 4 Order entered 8/2/10, R 2) Therefore, as no punitive damages verdict was sought against the Nurse Appellants, and there was no finding by the jury that could support such a punitive damages award against them, this Court should clarify this issue and reverse the punitive damages award to the extent it applies to the Nurse Appellants

Respondents also cite nothing in the record rebutting Appellant HealthSouth's assertion that there was insufficient evidence at trial to support the jury's finding of willful, wanton of reckless conduct This assertion is based on the evidence establishing that HealthSouth had in place, and its nursing staff was aware of, proper policies and procedures to prevent pressure ulcers which were required and expected to be followed (R 55, 127, 229-230, 252, 263, 270-273, 343) It is also based on the fact that HealthSouth's liability is entirely premised upon the theories of *respondeat superior* and agency, and there was no specific finding by clear and convincing evidence that any of the individual Nurse Appellants engaged in wanton, willful or reckless conduct Finally, it is based on the "complicity rule" which prevents the "vicarious" imposition of punitive damages upon a corporation in the absence of corporate, as opposed to employee, wrongdoing Having failed to present any evidence

that HealthSouth's actions were reckless, willful or wanton, the punitive damages award should be reversed

B Respondents' Reference to HealthSouth's "Net Revenue," as Opposed to its "Net Worth," Was Unsupported by Any Evidence and Was Improper Under South Carolina Law

Respondents cite no authority rebutting Appellants' assertion that it was clear error for Respondents' counsel to state in his punitive damages argument that HealthSouth's revenue in 2009 was $1,911,100,000 00 Over Appellants' objection, the Trial Court permitted Respondents' counsel to present the jury with the $1 9111 billion revenue figure (R 519-521, 524-525, 531) [4] The Trial Court mistakenly characterized this amount as "the bottom line," which in accounting terms means either net income (with respect to the income statement) or net worth (with respect to the balance sheet) (R 519) The allowance of this revenue figure in Respondents' argument was error for two reasons

First, it was error to allow Respondents to present the jury with a $1 9111 billion revenue figure that was unsupported by any evidence at trial O'Leary-Payne v R R Hilton Head, II, Inc , 371 S C 340, 352, 638 S E 2d 96, 102 (Ct App 2007) (holding that closing arguments must be confined to the evidence in the record) This

[4] The issue of punitive damages was bifurcated from the liability and actual damages determinations At the start of the punitive damages phase of the trial, Respondents initially sought to admit HealthSouth's Form 10-K to support this statement as to HealthSouth's finances (Tr p 860, Court Exhibit No 5, R 519, 649) Appellants objected to the admission of this complex financial document, noting that without an expert witness to explain this document, it would likely cause confusion and prejudice (R 519-520) The Trial Court then ruled that it would permit Respondents' counsel to present the jury with the $1 9111 billion revenue figure in his punitive damages ***argument*** without admitting the Form 10-K or any other evidence on the issue (R 520-521) Significantly, the punitive damages phase only involved additional ***argument*** from counsel **No evidence whatsoever was entered into the record** (R 518-526)

error alone warrants reversal of the punitive damages award Harper v Bolton, 239 S C 541, 550-51, 124 S E 2d 54, 59 (1962) (holding a new trial is warranted where attorney argument on the calculation of damages is unsupported by the evidence)

Second, the $1 9111 Billion figure represented HealthSouth's ***"net operating revenue"*** and **not** its ***"net worth,"*** and only evidence of ***net worth*** may be properly considered for the purposes of assessing punitive damages Branham v Ford Motor Co , 390 S C 203, 240, 701 S E 2d 5, 25 (2010) (holding that a punitive damages analysis must be confined to evidence of defendant's net worth) "[N]et worth is calculated by subtracting total liabilities from total assets " Broaddus v U S Corps of Eng'rs, 380 F 3d 162, 167 (4th Cir) (using generally accepted accounting principles to determine net worth), see also Black's Law Dictionary 1062 (7th ed 1999) (stating that "net worth" is "calculated as the excess of total assets over total liabilities") The $1 9111 Billion figure was neither HealthSouth's "net worth," nor the "bottom line" on HealthSouth's Form 10-K Rather, it was the "top line" of the income statement representing the total revenue that came in to HealthSouth ***before*** any of HealthSouth's liabilities were taken into account (HealthSouth's Form 10-K, Court Exhibit No 5, R 649)

The real "bottom line" for net worth is unsurprisingly found at the very bottom of the Form 10-K, in the section titled "Balance Sheet Data " (Id) This section shows that HealthSouth's "total assets" ($1,681,500,000) are almost completely eclipsed by its long-term debt ($1,662,500,000), and that in 2009 there was actually a ***negative*** shareholder deficit of almost $1 000 Billion (Id) This point was specifically argued to the Trial Court by Appellant's counsel during his objection to the use of the $1 9111

Billion figure (R 520) (arguing that the Form 10-K "also shows a negative shareholder equity in the company")

The $1 9111 Billion "revenue" figure was clearly not HealthSouth's "net worth " Rather, it was the largest number available on the Form 10-K By permitting Respondents' counsel to use this figure in its punitive damages argument, the Trial Court committed reversible error, and then exacerbated the error by referring to the $1 9111 Billion number as the "bottom line" These errors by the trial judge permitted Respondent's counsel to mislead the jury regarding HealthSouth's true net worth The South Carolina Supreme Court has clearly held that ***only*** a consideration of a defendant's ***net worth*** is proper for purposes of determining its ability to pay a punitive damages award Branham, 390 S C at 240, 701 S E 2d at 25

C **The Punitive Damages Award is Unconstitutional**

Under the test articulated in Mitchell v Fortis Ins Co , 385 S C 570, 686 S E 2d 176 (2009), in conducting a post-judgment constitutional review of a punitive damage award, courts should first consider "the degree of reprehensibility of the defendant's conduct " Id Second, courts should consider "the disparity between the actual or potential harm suffered by the plaintiff and the amount of the punitive damages award," known as the ratio Id at 587-88, 686 S E 2d at 186 Finally, courts "should consider the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases " Id When this analysis is applied to this case, the jury's $8,000,000 punitive damages award is constitutionally unsustainable

1 The Evidence at Trial Failed to Establish a Degree of Reprehensibility Sufficient to Support $8,000,000 in Punitive Damages

In support of the reprehensibility prong, Respondents cite the physical nature of Sulton's injuries, HealthSouth's status as a rehabilitation hospital, Sulton's "physical" vulnerability, and the assertion that this was not an isolated incident (Resp Brief pp 47-49) The evidence in the record, however, fails to support a finding of reprehensibility sufficient to support an $8 Million punitive damages award

With regard to whether the harm caused was physical as opposed to economic, the damages awarded by the jury were solely for *economic loss* occasioned by the treatment of the pressure ulcer and not for non-economic harm or injury to Sulton (Verdict Form ¶1, R 3) The record also establishes that HealthSouth's *corporate conduct* did not exhibit an indifference to or reckless disregard for the health or safety of others As noted in Respondents' brief, HealthSouth had in place policies and procedures designed to address the treatment and prevention of pressure ulcers, and its nursing staff were well aware of the policies and the requirement that they be followed (R 55, 127, 229-230, 252, 263, 270-272, 343)

Respondents' claim that the "vulnerability" factor is established by Sulton's paralysis is misplaced (Resp Brief p 49) The reprehensibility analysis focuses on "financial" vulnerability, rather than "physical" vulnerability To the extent that Sulton was financially vulnerable, the evidence established that, due to his prior injuries, he was dependent on Social Security disability, and this was not exacerbated by the pressure ulcer (R 163, 164-165, 167, 188, 196, 211)

Respondents also misconstrue the "repeated conduct vs isolated incidents" sub-factor in the reprehensibility analysis Specifically, the Respondents assert that this case involved repeated conduct based solely on facts related to Sultan alone (Resp Brief p 49) This is not the proper application of this factor "The repeated conduct factor require[s] that the similar reprehensible conduct be committed against various different parties rather than repeated reprehensible acts within the single transaction with the plaintiff " Bridgeport Music, Inc v Justin Combs Publ'g, 507 F 3d 470, 487 (6th Cir 2007) (internal quotation omitted) There was no evidence in the record of any other similar incidents involving other patients of HealthSouth Therefore, HealthSouth's conduct in this matter is not properly characterized as reprehensible, and certainly did not rise to a level of reprehensibility sufficient to warrant an award of $8,000,000 in punitive damages

2 Punitive Damages Are Not Supported by Respondent Scott's Loss of Consortium Claim and Only the Harm to Respondent Sulton May be Considered in Determining the Ratio

The second factor in the Mitchell analysis, referred to as the "ratio," requires the Court to "consider the disparity between the actual or potential harm suffered by the plaintiff and the amount of the punitive damages award " Mitchell, at 587-88, 686 S E 2d at 185 Respondents ***incorrectly*** state that the ratio in this case is 1 86 to 1 (Resp Brief p 49) This erroneous calculation is premised on two misstatements of law First, Respondents incorrectly contend that Respondent Scott could recover punitive damages on her loss of consortium claim (Resp Brief pp 53-57) Second, Respondents failed to base the ratio calculation upon ***only*** the harm to Respondent Sulton (Resp Brief pp 49, 52-53)

As previously discussed in Section IV of this Reply Brief, Respondents assert that the codification of the common law claim of loss of consortium into S C Code Ann § 15-75-20 removed the longstanding limitations on the types of damages recoverable on that claim Respondents freely admit that under Hughey v Ausborn, 249 S C 470, 154 S E 2d 839 (1967), South Carolina adopted the rule that punitive damages are **not** recoverable in a loss of consortium claim (Resp Brief p 55) However, Respondents claim that the subsequent enactment of section 15-75-20 changed this rule because the word "damages" is not defined or limited in that statute Respondents are mistaken and their view ignores South Carolina law regarding codification of the common law as explained earlier

Respondents' 1 86 to 1 ratio is entirely dependent upon including the $4,000,000 in actual damages arguably awarded in Scott's loss of consortium claim in the equation Yet, Scott's claim does not support punitive damages Additionally, consideration of any harm to Scott in the ratio analysis is wholly improper The rule set forth in Mitchell specifically provides that a "punitive damages award "**must be related to *the plaintiff's* injury or damage** " Mitchell, at 586, 686 S E 2d at 184 (emphasis added), citing State Farm v Campbell, 538 U S 408, 421-22 (2003) Respondents' assertion that the ratio analysis should involve harm to persons *other than* the plaintiff was specifically rejected by the Mitchell Court, which held that "a punitive damages award that is based on evidence of harm to persons other than the plaintiff or plaintiffs will violate due process " Mitchell, at 586, 686 S E 2d at 184 (emphasis added), citing Phillip Morris USA v Williams, 549 U S at 354-57

The only claim in this case which permitted punitive damages was Sulton's negligence claim Thus, the "ratio" is properly calculated by comparing the $306,693 25 in actual damages awarded to Sulton to the $8,000,000 punitive damages award - resulting in a ratio of ***26 1 to 1*** As was outlined in Appellants' initial brief, this ratio is constitutionally unsustainable (Appellants' Initial Brief pp 41-42)

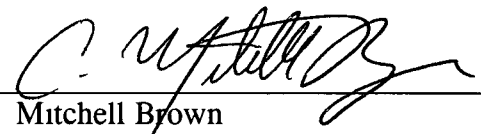
3 Respondents Improperly Compare the Punitive Damages Award to Criminal, rather than Civil, Penalties

The final consideration in a Mitchell analysis is the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases " Mitchell, 385 S C at 587-88, 686 S E 2d at 186 In their brief, Respondents attempt to compare the monetary punitive damages award to the criminal penalties for neglect of a vulnerable adult (Resp Brief p 51) This is improper In Mitchell, the South Carolina Supreme Court limited this comparison to "***civil*** penalties " Mitchell at 587-88, 686 S E 2d at 186 (emphasis added) Thus, criminal penalties are not to be compared Under a proper analysis of the Mitchell test, the $8,000,000 punitive damages award is not constitutionally permissible, and should be reversed or reduced accordingly

Conclusion

For the foregoing reasons, this Court should reverse the Trial Court, enter judgment in favor of Appellants on the loss of consortium claim, and order a new trial on the negligence claim Failing that, this Court should grant Appellants a new trial as to all claims Failing that, this Court should vacate the punitive damages award Finally, failing all of the above, this Court should reduce the punitive damages award to a constitutionally permissible amount

Respectfully Submitted,

By 

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Jan. 18, 2012

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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Casey L Manning, Circuit Court Judge

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Vernon Sulton and Willie Mae Scott, Respondents,

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the Final Reply Brief complies with Supreme Court Order dated August 13, 2007, regarding personal identifiers and sensitive information

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PROOF OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Appellants, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es)

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