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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Alison Renee Lee, Circuit Court Judge

Case No. 2016-CP-40-04463
Appellate Case No. 2023-000556

Jean Watkins, as Personal
Representative of the
Estate of Mildred
Watkins, Respondent,

v.

Sterling Healthcare, Inc., Appellants.
Country Wood Nursing
Center, LLC, and
Guardian Resources, LLC,

RECORD ON APPEAL

VOLUME VI

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RELEVANT PROCEDURAL HISTORY

Plaintiff originally filed her Complaint against Country Wood in 2014.¹ She alleged wrongful death and survival claims related to her mother Mildred Watkins's residency at a Country Wood nursing home facility in Richland County, South Carolina in 2011.² During the course of the litigation, the Court struck Country Wood's Answer.³

The Court ultimately held a damages hearing on November 10, 2022. During the hearing, Plaintiff entered witness testimony and documentary evidence in support of her request for judgment. Plaintiff ultimately asked the Court to enter judgment in the amount of \$7,000,000 against Country Wood.⁴

A few months after the hearing, the Court entered a 29-page Order Awarding Damages to Plaintiff totaling \$29,515,245.68.⁵ The Court ultimately awarded damages on the survival tort action for a total of \$19,515,245.68, comprised of economic damages of \$398,270.32, pain and suffering of \$2,389,621.92, and punitive damages of \$16,727,353.44.⁶ On Plaintiff's wrongful death claim, the Court awarded a total verdict of \$10,000,000—compensatory damages of \$7,500,000 and punitive damages of \$2,500,000.⁷ The Court further determined that all Defendants would be jointly and severally liable for the judgment.⁸

¹ See Compl., Civil Action No. 2014-CP-40-05160, Aug. 22, 2014. The case was dismissed according to Rule 40(j) of the South Carolina Rules of Civil Procedure and later restored to the docket under the current case number. See Consent Order for 40(j), Civil Action No. 2014-CP-40-05160, Aug. 14, 2015.

² See Compl., Civil Action No. 2014-CP-40-05160, Aug. 22, 2014.

³ See Order Striking Answers of All Defs., Apr. 19, 2018.

⁴ See Pl.'s Br. in Supp. of Award of Damages, Nov. 28, 2022.

⁵ Order Awarding Damages to Plaintiff, Jan. 31, 2023.

⁶ Order Awarding Damages to Plaintiff, Jan. 31, 2023.

⁷ Order Awarding Damages to Plaintiff, Jan. 31, 2023.

⁸ Order Awarding Damages to Plaintiff, Jan. 31, 2023.

ARGUMENT

I. The Order relies on improper hearsay and lay opinion testimony to establish the conclusions necessary to award punitive damages, avoid damage caps, and apply joint and several liability.

Country Wood respectfully asks this Court to reconsider the propriety and amount of its damages award. The most relevant inquiries rest on factors delineated by statute and focus on considerations of intent.⁹ The record, though, does not contain evidence of Country Wood's intent to harm Watkins sufficient to support a punitive damages award, disregard statutory caps, and establish joint and several liability.

A. The Order relies upon inadmissible evidence regarding the cause of Watkins's thumb injury to establish intent to harm.

The Order relies on inadmissible hearsay and lay opinion testimony related to Watkins's thumb injury to establish, at least in part, the requisite intent to prove the appropriateness and amount of punitive damages.¹⁰ Specifically, the Order finds "the Defendant's account of Mrs. Watkins's thumb injury is implausible."¹¹ This finding was based on Plaintiff's testimony that an emergency room physician told Plaintiff that Country Wood's explanation of Watkins's thumb injury "did not seem plausible, particularly given the location of her injury, and the injury was more consistent [*sic*] her thumb being pulled down and/or out with force."¹² According to the Order, this is evidence Country Wood abused Watkins.¹³

In this case, though, admissible record evidence does not support the findings in the Order with respect to Watkins's thumb dislocation. Medical records of Watkins's hospital admission do not document any discussion or finding whatsoever regarding the cause of Watkins's injury.¹⁴ And

⁹ See S.C. Code Ann. §§ 15-32-220(E); 15-32-530; 15-38-15.

¹⁰ See generally Order Awarding Damages to Plaintiff, Jan. 31, 2023.

¹¹ Order Awarding Damages to Plaintiff, Jan. 31, 2023, at 19.

¹² Order Awarding Damages to Plaintiff, Jan. 31, 2023, at 9. Country Wood has ordered a copy of the transcript from the hearing and is currently awaiting its preparation.

¹³ See Order Awarding Damages to Plaintiff, Jan. 31, 2023, at 26–27.

¹⁴ See Pl.'s Ex. 6.

Plaintiff did not call the doctor as a witness at trial. The only evidence supporting Plaintiff's speculative theory about the cause of Watkins's thumb injury is Plaintiff's testimony.

The Order should not find as fact Plaintiff's unsupported testimony regarding an emergency room physician's undocumented conclusion about the cause of Watkins's thumb injury. First, this Watkins's testimony is hearsay within hearsay not subject to the necessary exceptions or exclusions.¹⁵ Second, this testimony lacks an appropriate foundation; namely, the record contains no information about the facts underlying the unidentified ER physician's specialty, qualifications, or conclusions.¹⁶ Third, Plaintiff, as a lay witness, cannot properly offer a causation opinion like this one.¹⁷

B. Plaintiff's claimed evidence of actual fraud related to skin audits should not have been imputed to Country Wood.

The Court's Order also improperly found evidence of fraud related to skin audits to support its award of punitive damages and disregard statutory caps.¹⁸ Specifically, the Order finds—against Country Wood—that four weekly skin audits completed by Watkins's healthcare providers from August and October 2011 were falsified and established actual fraud; Watkins was absent from the nursing home and in the hospital on the days the audits were supposedly completed.¹⁹ According to the record evidence, each of the four audits in question was completed by a single LPN (licensed practical nurse) at the nursing home.²⁰ But no individual healthcare providers were named as defendants in this case.²¹ And Plaintiff's Complaint did not allege (and therefore Country Wood did not admit by virtue of its stricken Answer) Country Wood's vicarious liability for any employee's conduct.²²

¹⁵ See SCRE 802, 803.

¹⁶ See SCRE 702.

¹⁷ See SCRE 701.

¹⁸ See generally Order Awarding Damages to Plaintiff, Jan. 31, 2023.

¹⁹ See Order Awarding Damages to Plaintiff, Jan. 31, 2023, at 14–15.

²⁰ See Pl.'s Ex. 20.

²¹ See Compl., Civil Action No. 2014-CP-40-05160, Aug. 22, 2014.

²² See Compl., Civil Action No. 2014-CP-40-05160, Aug. 22, 2014.

“Courts have widely rejected the notion that simple ministerial employees of a corporation could impute knowledge to the corporation.”²³ Without evidence that management knew, sanctioned, approved, or directed the LPN’s conduct with respect to documentation of skin audits, the skin audits do not support a finding of intent or fraud against Country Wood. Here, the record contains no such evidence. Further, and more specifically, the record contains no evidence the records were created “with the purpose of avoiding a claim or liability to the claimant.”²⁴ Ultimately, the documented but not completed weekly skin audits cannot support a finding of intent or fraud against Country Wood.

C. Plaintiff presented no expert testimony in support of her new standard-of-care claims.

The Order also makes unsupported findings with respect to the standard of care. Specifically, the Order makes findings about the requisite regularity of skin checks²⁵, the preventability of Watkins’s urinary tract infections²⁶, safety concerns related to the removal of Watkins’s bedrail²⁷, safety concerns related to the presence of Watkins’s bedrail²⁸, the appropriate provision of nutrition and preventative care²⁹, and the causes of Watkins’s bruises, scratches, and wounds.³⁰ These conclusions were not alleged in Plaintiff’s Complaint (and therefore not admitted by Country Wood by virtue of its default), and Plaintiff offered no expert support for them. They simply should not form the basis for this Court’s damages award against Country Wood.

²³ *Mauldin Furniture Galleries, Inc. v. Branch Banking & Trust Co.*, No. 6:10-240-TMC-2012 U.S. Dist. LEXIS 121140, at *23 (D.S.C. Aug. 27, 2012) (applying South Carolina law).

²⁴ See S.C. Code Ann. § 15-32-220(E).

²⁵ See Order Awarding Damages to Plaintiff, Jan. 31, 2023, at 14.

²⁶ See Order Awarding Damages to Plaintiff, Jan. 31, 2023, at 17.

²⁷ See Order Awarding Damages to Plaintiff, Jan. 31, 2023, at 18.

²⁸ See Order Awarding Damages to Plaintiff, Jan. 31, 2023, at 19 (“However, even if there is no intentional abuse, and assuming the Defendants’ account of the thumb injury is correct, the Defendants were grossly negligent in not preventing Mrs. Watkins’s injury when they admittedly had actual knowledge that Mrs. Watkins would regularly hit her hand on the bedrail.”).

²⁹ See Order Awarding Damages to Plaintiff, Jan. 31, 2023, at 19.

³⁰ See Order Awarding Damages to Plaintiff, Jan. 31, 2023, at 27.

II. The Court's damages award is too high.

The Court's award of damages—more than four times the \$7,000,000 verdict requested by Plaintiff's counsel—is altogether inappropriate, too high, and violates Country Wood's due process rights. Additionally, the Court has not analyzed its punitive damages awards under the appropriate framework.

The Court has wide discretion to reduce the amount of an excessive verdict by granting either a new trial *nisi remittitur* or a new trial absolute.³¹ When a verdict results from “passion, caprice, prejudice, or some other influence outside the evidence,” trial courts must grant a new trial absolute.³² When a verdict is merely excessive and not motivated by improper considerations, the trial court can instead grant a new trial *nisi remittitur*.³³ With respect to punitive damages awards, South Carolina appellate courts review their constitutionality using a *de novo* standard. *Mitchell v. Fortis Ins. Co.*, 385 S.C. 570, 583–84 (2009).

As an initial matter, the Order used the improper framework to analyze the factors relevant to an award of punitive damages. Specifically, the Order relies on factors set forth in *Gamble v. Stevenson*, 305 S.C. 104 (1991) but does not analyze the evidence under the guideposts set forth in *BMW of North America v. Gore*, 517 U.S. 559 (1996). But in 2009 in *Mitchell*, the South Carolina Supreme Court abandoned its prior holdings that trial courts consider both the *Gamble* and *Gore* factors; instead, trial courts must consider only the *Gore* guideposts. *Mitchell*, 385 S.C. at 587. Indeed, the *Mitchell* Court reasoned that a *Gamble* analysis is only relevant “insofar as it adds substance to the *Gore* guideposts.” *Id.*

The Order does not analyze the evidence using the *Gore* guideposts. According to *Gore*, trial courts must consider (1) the degree of reprehensibility of the defendant's conduct; (2) the disparity between the actual and 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

³¹ *Welch v. Epstein*, 342 S.C. 279, 303 (Ct. App. 2000).

³² *Id.*

³³ *Id.*

authorized or imposed in comparable cases. *Gore*, 517 U.S. at 574–75. While several of the *Gamble* factors analyzed in the Order may be relevant to reprehensibility, the Court made no findings with respect to the second and third *Gore* guideposts.

An award of punitive damages—much less an award of this magnitude—should be justified by extremely egregious conduct coupled with a culpable mental state. *Compare Welch v. Epstein*, 342 S.C. 279 (Ct. App. 2000) (upholding appropriateness and amount of \$3,900,000 punitive damages award in medical malpractice and wrongful death case against physician who used a Fentanyl patch to treat a post-operative patient despite his knowledge the patch was contraindicated to manage pain after surgery). But here, as discussed above, the record simply lacks the requisite evidence of mental state to support punitive damages, especially in the amount of the judgment.

The fact that the verdict exceeded Plaintiff’s requested judgment by almost \$23,000,000 is, alone, enough to cast doubt on the amount of the award. Country Wood respectfully asks this Court to reconsider and reduce the award based on the *Gore* framework.

CONCLUSION

Based on the authority in this Motion, Country Wood respectfully asks this Court to grant a new trial. In the alternative, Country Wood asks this Court to reconsider its January 31, 2023 Order Awarding Damages to Plaintiff.

Respectfully submitted this 10th day of February 2023.

LEWIS BRISBOIS BISGAARD & SMITH LLP

/s/ Taylor J. Stewart

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nursing home facility in Richland County, South Carolina in 2011.² During the course of the litigation, the Court struck Country Wood's Answer.³

The Court ultimately held a damages hearing on November 10, 2022. A few months after the hearing, the Court entered an Order Awarding Damages to Plaintiff totaling \$29,515,245.68.⁴ The Court also issued an accompanying Order compelling the production of certain information in the Order and as follows:

The Court **HEREBY ORDERS** that all Defendants be required to produce any and all policies of insurance: liability, excess, umbrella, commercial, general and/or otherwise, for each Defendant and all of their owners, members, shareholders, key employees, etc., including but not limited to Robert Hagan. This includes, but is not limited to the production of all declarations pages, full and complete policies, endorsements, exclusions, and the identities of the individuals and/or entities insured, etc. The Defendants and their owners shall also produce documents related to assets held by the Defendant companies and their owners, members, and shareholders, including but not limited to Robert Hagan. This request includes, but is not limited to the production of tax returns, personal financial statements, yearly financial statements, etc.⁵

ARGUMENT

I. The Order prematurely compels the production of post-judgment discovery documents and irrelevant, sensitive documents related to non-party financial information.

A. Post-judgment discovery cannot yet be completed.

With the exception of information regarding Country Wood's insurance policies, the Court's Order requires production of documents that were not previously ordered to be produced in discovery.⁶ Specifically, though the Court's Order previously compelled Country Wood to produce

² See Compl., Civil Action No. 2014-CP-40-05160, Aug. 22, 2014.

³ See Order Striking Answers of All Defs., Apr. 19, 2018.

⁴ Order Awarding Damages to Plaintiff, Jan. 31, 2023.

⁵ See Order Compelling Production of Insurance and Financial Information, Jan. 31, 2023.

⁶ See Order Compelling Production of Insurance and Financial Information, Jan. 31, 2023; Order Granting Pl.'s Mot. to Compel Against All Defs., Dec. 8, 2016.

documentation related to insurance⁷, it did not compel the production of information related to corporate and individual assets and incomes.⁸

The Court's Order essentially compels post-judgment discovery, which is premature in this case. In South Carolina, the issuance of a writ of execution or the initiation of supplementary proceedings are prerequisites to beginning post-judgment discovery. *See* SCRCF 69; *Ex parte Wilson*, 367 S.C. 7, 14–16. Here, a writ of execution has not been issued and supplementary proceedings have not been initiated. South Carolina law therefore dictates that post-judgment discovery is not yet appropriate. *See Wilson*, 367 S.C. at 14–16.

B. Ordering non-parties to produce sensitive personal financial information about their assets and income would be improper.

1. *The Court should not compel the production of documents from non-parties who have not been served.*

This Court should not compel the production of documents—much less sensitive financial documents—from individuals and entities not before the Court. Plaintiff has alleged no claim against any individual or entity other than the three corporate entity defendants.⁹ Without being properly named or served, the Court simply does not have jurisdiction over non-parties.

Further, Country Wood's admissions by virtue of its default cannot be imputed to non-party individuals or entities. South Carolina law is clear: only the defaulting party admits the well-pleaded allegations of a complaint.¹⁰ Country Wood's "owners, members, shareholders, [and] key employees" have admitted nothing and are therefore not bound by Country Wood's default.

⁷ Counsel's understanding is that all available insurance information related to Country Wood has already been produced.

⁸ *See* Order Granting Pl.'s Mot. to Compel Against All Defs., Dec. 8, 2016.

⁹ *See* Compl., Civil Action No. 2014-CP-40-05160, Aug. 22, 2014.

¹⁰ *State ex rel. Medlock v. Love Shop, Ltd.*, 286 S.C. 486, 488 (Ct. App. 1985) (finding that "entry of an order of default is an admission by the defaulting party of the well-pleaded allegations of the complaint").

2. *The corporate veil has not been pierced.*

Additionally, sensitive financial documents and information related to non-party owners, members, shareholders, and employees are irrelevant and should not be discoverable prior to a finding that Plaintiff can pierce the corporate veil. South Carolina applies a two-prong test when a party seeks to pierce the corporate veil.¹¹

The first prong analyzes the shareholder's relationship to the corporation by evaluating eight factors. The second prong requires the plaintiff to demonstrate that "fundamental unfairness" would result from recognition of the corporate entity.¹²

This doctrine "is not to be applied without substantial reflection."¹³ The party seeking to pierce the corporate veil has the burden of proof.¹⁴

Notably, Plaintiff's Complaint alleged no claim for piercing the corporate veil.¹⁵ Therefore, Country Wood's default does not operate to admit a piercing claim and cannot support a resulting order or judgment.

II. Portions of the Order are ambiguous and require clarification.

The Court's Order ambiguously compels the production of "all insurance and financial documents related to corporate and individual assets of the Defendants, their owners, members, shareholders, and key employees, including by [*sic*] not limited to Robert Hagan." While the Order details *some* of the information it requests, including insurance documents and tax returns, it does not define the meaning of many of its terms and phrases, including, for example, the identities of people who qualify as "key employees", "documents related to assets held by the Defendant companies and their owners, members, and shareholders, including Robert Hagan", and "all insurance and financial documents." Further, the Order contains no temporal limitations.¹⁶

¹¹ See *Drury Dev. Corp. v. Found. Ins. Co.*, 380 S.C. 97, 102 (2008).

¹² *Id.*

¹³ *Id.* at 101.

¹⁴ *Id.*

¹⁵ See Compl., Civil Action No. 2014-CP-40-05160, Aug. 22, 2014.

¹⁶ See Order Compelling Production of Insurance and Financial Information, Jan. 31, 2023.

Without a more specific Order defining these unclear terms and their parameters, Country Wood has no way to identify and produce the documents Plaintiff seeks.¹⁷ And under South Carolina law, “before a person may be held in contempt [for noncompliance with a court order], the record must be clear and specific as to acts or conduct upon which the contempt is based.”¹⁸ Country Wood therefore asks this Court to reconsider and clarify the language in its Order to specify the types of documents to which it refers and the identities of the parties subject to it.

CONCLUSION

Country Wood respectfully requests reconsideration of the Court’s January 31, 2023 Order compelling the production of certain financial information as the Order is premature and ambiguous.

Respectfully submitted this 10th day of February 2023.

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¹⁷ Country Wood does not contend the Court’s Order to produce insurance information related to the Country Wood entities is ambiguous.

¹⁸ *Smith v. Smith*, 359 S.C. 393, 396 (Ct. App. 2004) (refusing to hold husband in contempt for disobeying an alimony order when the order was ambiguous).

on July 31, 2015, pursuant to a Rule 40(j) Consent Order. The case was restored to the docket July 25, 2016.

At the time the Plaintiff filed her Motion to Compel on July 29, 2015, she remained without complete responses to her discovery requests. In particular, Plaintiff had been provided with only two documents from both Defendant Sterling and Defendant Guardian (the Articles of Incorporation and a “Consulting Agreement” with Country Wood). The Defendants failed to provide any additional documents or responses during this time period.

The Honorable Edgar Dickson heard the Plaintiff’s Motion to Compel on February 24, 2016 and verbally ruled in Plaintiff’s favor the same day. The formal Order was signed on November 30, 2016 by Judge Dickson, granting Plaintiff’s Motion to Compel Against All Defendants. The Defendants were directed to produce the information specified within twenty (20) days of the date of the Order. The time period specified in the Order expired on December 20, 2016.

No information or documents were produced by the Defendants by the December 20, 2016 deadline, despite the fact that the Defendants knew at hearing in February that Judge Dickson had ruled in Plaintiff’s favor. On December 29, 2016, Plaintiff’s counsel sent a letter to counsel for Defendants asking for production of all documents and information specified in the Order no later than January 6, 2017. Plaintiff’s counsel was thereafter contacted by Defendants’ attorneys regarding the missed Order deadline.² Defense counsel requested an extension of one additional week to produce the information specified in the Order. Plaintiff’s counsel agreed to

² On January 3, 2017 and January 5, 2017, Plaintiff’s counsel received emails from defense counsel advising that they “inadvertently did not calendar the date” but were gathering the information. They also stated that they had been unable to communicate with their client about the discovery production ordered by Judge Dickson until that week.

withhold the filing of a Rule to Show Cause Motion if she received full and complete production of documents and information by January 13, 2017. As of January 13, 2017, Plaintiff's counsel had received no information from the Defendants.

On January 19, 2017, Plaintiff's counsel received a document entitled Defendants' Supplemental Responses to Plaintiff's Interrogatories and Requests for Production Pursuant to the Order of Judge Dickson. The materials produced therein, did not comply with the Order of Judge Dickson in timeliness nor in content.³ Plaintiff filed a Motion for Rule to Show Cause and Motion for Sanctions on January 23, 2017. In the six (6) month period that Plaintiff's counsel awaited a hearing date, no further documents or information were produced by any Defendant, until just days prior to the hearing.

The case appeared on the July 31, 2017 trial docket, at which time the Plaintiff was still without the complete discovery responses, despite Judge Dickson's Order. Plaintiff remained unable to schedule critical depositions necessary to prepare for trial which would now have to be postponed for a second time.⁴

The hearing on Plaintiff's Motion for Rule to Show Cause and Sanctions was held by the Honorable Alison Renee Lee on July 27, 2017. Judge Lee heard the arguments of counsel for both parties, reviewed the written materials submitted, asked questions of counsel for both

³ Many of Defendants' responses indicated: "[Defendant] is still in the process of collecting information responsive to this request and will fully respond to the same as soon as such information is located." Other examples of noncompliance included responses referring Plaintiff's counsel to government agencies for answers despite Judge Dickson's Order which *specifically stated* that such a response is insufficient.

⁴ This case was previously removed from the roster July 31, 2015, pursuant to Rule 40(j) with a Consent Order, due to incomplete discovery. The case was restored July 25, 2016. At the time the case was restored, no additional information had been produced to the Plaintiff by the Defendants during the year the case was removed from the docket. The 40(j) Order allowed for on-going discovery during this period.

parties, and ultimately took the matter under advisement. Additionally, at the hearing, Judge Lee ordered that counsel for Defendants produce a list of documents with their Bates stamped reference numbers, which Defendants' counsel had compiled and had in her possession, to Plaintiff's counsel *prior to leaving the courthouse*. The document was not produced by the Defendants to Plaintiff's counsel that day, *nor has it been produced as of the date of the filing of this Memorandum*.

While awaiting a ruling from Judge Lee, the trial of the case had to be continued several times and was ultimately pushed back by a Scheduling Order. On April 19, 2018, Judge Lee issued a ruling striking the Answers of All Defendants, due to the failure of the Defendants to comply with Judge Dickson's Order, and Ordered that the matter be set for a damages hearing.

Defendants appealed this ruling to the South Carolina Court of Appeals (2018-000924). Thereafter, the Court of Appeals AFFIRMED Judge Lee's Order on September 8, 2021. The case was remanded back to the circuit court for a damages hearing.

As of the filing of this Memorandum, over eight (8) years after discovery was served, Plaintiff remains without critical information which would have enabled her to advance her case, particularly with regard to punitive damages. Additionally, Plaintiff remains without information required by standard discovery rules, including liability and excess / umbrella insurance coverage amounts and policies for all Defendants.

The Honorable Frank R. Addy, Jr. presided over the damages hearing on November 10, 2022. The Plaintiff was represented by Jennifer Randolph Purdy, Esq. and the Defendants were represented by Chase Parker, Esq. The Plaintiff offered two witnesses at the damages trial: Jean Watkins, daughter of Mildred Watkins and the Personal Representative of Mildred Watkins' Estate; and Kim Watkins, daughter of Mildred Watkins. Exhibits were also offered into

evidence by the Plaintiff, which were admitted without objection. Mildred Watkins' other living children were present in the courtroom for the trial. Post Trial Briefs were submitted by both parties in support of their positions regarding damages.

On January 31, 2023, Judge Addy issued an Order awarding the Plaintiff the sum of \$19,515,245.68 for the Survival Action and \$10,000,000.00 for the Wrongful Death Action, for a total award of \$29,515,245.68 against all Defendants, jointly and severally.

Defendants filed this Motion for New Trial or, in the Alternative, to Reconsider Order Awarding Damages to Plaintiff on February 10, 2023. Plaintiff files this Memorandum in Opposition thereto.

II. STANDARD OF REVIEW

Defendants failed to state the standard of review for a new trial under S.C.R.C.P 59(a) or to alter or amend the Judgment under S.C.R.C.P. 59(e) in their Motion, likely because applying these standards would certainly result in the denial of their Motions.

Rule 59(a)(2) states that in non-jury actions a new trial may be granted “for any of the reasons for which rehearings have heretofore been granted in the courts of the state.” S.C.R.C.P.

59(a)(2) The South Carolina rule is substantially the federal rule⁵. Our courts have held that a trial court may set aside the verdict and order a new trial only if “(1) the verdict is against the clear weight of the evidence, or (2) is based upon evidence which is false, or (3) will result in a miscarriage of justice even though there may be substantial evidence which would prevent the direction of a verdict.” *Castles v. Tricam Indus.*, Civil Action 3:18-cv-00525-JMC (D.S.C. Nov. 22, 2021) quoting, *Atlas Food Sys. & Servs. Inc. v. Crane Nat'l Vendors, Inc.*, 99 F.3d 587, 594

⁵ A new trial may be granted “for any reason for which a new trial has heretofore been granted in an action at law in federal court.” Fed.R.Civ.P. 59(a)(1)(B).

(4th Cir. 1996). In evaluating a motion for a new trial, the court has the discretion to “weigh the evidence and consider the credibility of witnesses.” *Knussman v. Maryland*, 272 F.3d 625, 647 (4th Cir. 2001); *Swentek v. USAIR, Inc.*, 830 F.2d 552, 559 (4th Cir. 1987). In a non-jury trial following default, the findings and conclusions of the judge “are equivalent to a jury’s findings in a law action.” *Wilder v. Blue Ribbon Taxicab Corp.*, 396 S.C. 139 (Ct. App. 2011) The credibility and weight given to evidence is solely for the fact finder to determine.” *Hanna v. Palmetto Homes, Inc.*, 300 S.C. 535 (Ct. App. 1990)

Rule 59(e) states that “A motion to alter or amend the judgment shall be served not later than 10 days after receipt of written notice of the entry of the order.” S.C.R.C.P. 59(e) Again, the state rule is substantively similar to the federal rule.⁶ Under this Rule, our courts have held, that a court may “alter or amend the judgment if the movant shows either (1) an intervening change in the controlling law, (2) new evidence that was not available at trial, or (3) that there has been a clear error of law or a manifest injustice.” *Robinson v. Wix Filtration Corp.*, 599 F.3d 403, 407 (4th Cir. 2010); *see also Collison v. Int’l Chem. Workers Union*, 34 F.3d 233, 235 (4th Cir. 1994). The moving party, here the Defendants, have the burden to establish one of these three grounds for altering the judgment. *Loren Data Corp. v. GXS, Inc.*, 501 Fed.Appx. 275, 285 (4th Cir. 2012).

“The decision whether to reconsider an order under Rule 59(e) is within the sound discretion of the district court.” *Castles v. Tricam Indus.*, Civil Action 3:18-cv-00525-JMC, 4, (D.S.C. Nov. 22, 2021) *quoting, Hughes v. Bedsole*, 48 F.3d 1376, 1382 (4th Cir. 1995).

Furthermore, our courts have held that a motion to reconsider should not be a “vehicle for rearguing the law, raising new arguments, or petitioning a court to change its mind.” *Lyles v.*

⁶ “A motion to alter or amend a judgment must be filed no later than 28 days after the entry of the judgment.” Fed. R. Civ. P. 59(e)

Reynolds, C/A No. 4:14-1063-TMC, 2016 WL 1427324, at *1 (D.S.C. Apr. 12, 2016) (citing *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 485 n.5 (2008)).

III. ARGUMENT

Defendants have failed to meet their burden of proof to grant a new trial or alter or amend the judgment and their Motion should be denied.

A. TESTIMONY BY JEAN WATKINS WAS NOT HEARSAY

1. ALLEGATIONS OF THE COMPLAINT WHICH ARE DEEMED ADMITTED UPON THE STRIKING OF THE DEFENDANTS' ANSWERS ARE ADMISSIONS BY A PARTY-OPPONENT AND TESTIMONY RELATED THERETO IS NOT HEARSAY.

Rule 801 (d)(2) states that statements offered against a party which are “(A) the party’s own statement in either an individual or a representative capacity, or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party’s agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship” S.C.R. Evid. 801(d)(2) Our courts have held that “a statement made by a party and offered against that party is not hearsay.” *United States v. Jones* (4th Cir. 2019) *See*, S.C.R. Evid. 801(d) and Fed. R. Evid. 801(d)(2)(A)⁷.

The specific allegations of Plaintiff’s Complaint repeatedly state that all three Defendants were negligent, grossly negligent, careless, reckless, willful, wanton, and acted in violation of the duties owed to Ms. Watkins in committing acts and omissions which were departures from the standard of care, including, “causing . . . Mildred Watkins to sustain a severe dislocation /

⁷ The federal rule is similar in content to the state rule.

fracture to her thumb which required surgery”, and in “causing” Ms. Watkins to be “assaulted, battered, bruised, scratched and harmed by Defendant’s employees . . .”. *Complaint*, ¶¶ 27(y), (dd); ¶32(y), dd); ¶37(y), (dd). **Defendants’ Answers were stricken and the allegations of the Complaint are therefore admitted.** Defendants cannot now assert that testimony related to those very allegations is hearsay. Jean Watkins is allowed to testify regarding her inference as to how her mother’s thumb was injured because those allegations of assault and battery and causation have been already been admitted by the Defendants, via their stricken Answers to her Complaint.

Furthermore, most of Plaintiff’s testimony regarding her mother’s thumb and communications at the hospital was related to Defendants’ own statements to her about how her mother’s hand had become injured. Such statements from the Defendants’ employees to Jean Watkins about how Mildred Watkins’ hand became injured were not only admissible by virtue of the stricken Answer, but also by Rule 801(d)(2). The purpose of Ms. Watkins’ testimony related to her understanding of her mother’s thumb injuries and the potential mechanism of injury was not made to prove the truth of the matter asserted, though again, the abuse was deemed admitted by the stricken Answers, it was to convey the statements of the Defendants as to the mechanism of injury, which was inconsistent with the condition of her mother. The testimony was admissible under Rule 801(d)(2) and is not hearsay.

2. TESTIMONY ABOUT MATTERS ADMITTED INTO EVIDENCE IS NOT HEARSAY

Jean Watkins testified that Defendants told her that her mother’s thumb was injured because she had been repeatedly hitting her hand on the bed rail. This is clearly admissible under Rule 801(1)(d)(2) as discussed above. She also appropriately testified that her mother was right handed she believed that if she had banged her hand repeatedly on her bed rail, her pinky finger would have been the finger injured, not her thumb. Testimony by Jean Watkins about her

mother's thumb injury reflected her understanding of what her mother's injuries were in comparison to what the Defendant's told her about how her mother was injured. Rule 704 is clear that testimony related to an opinion or inference is not objectionable because it embraces an ultimate issue to be decided by the trier of fact. *S.C.R. Evid. 704*

In *State v. Williams*, 321 S.C. 455, 469 S.E.2d 49 (S.C. 1996) the Court held:

"A witness may not testify to a matter unless evidence is introduced sufficient to support a finding the witness has personal knowledge of the matter. *Rule 602, SCRE*. The opinion or inference of a lay witness is admissible if it is a) rationally based on the perception of the witness, b) helpful to the determination of a fact in issue, and c) does not require special knowledge. *Rule 701, SCRE*. See also 31 *A Am.Jur.2d Expert and Opinion Evidence* § 30; 23 *C.J.S. Criminal Law* § 1050. Conclusions or opinions of laymen should be rejected only when they are superfluous in the sense that they will be of no value to the jury. *State v. McClinton*, 265 S.C. 171, 217 S.E.2d 584 (1975). The terms "fact" and "opinion" denote merely a difference of degree of concreteness[321 S.C. 464] of description. *McCormick on Evidence*, § 12 (3rd Ed.1984). Some statements are not mere opinions but are impressions drawn from collected, observed facts. *Lafon v. Commonwealth*, 17 Va.App. 411, 438 S.E.2d 279 (1993). A natural inference based on stated facts is not opinion evidence. *State v. Revere*, 572 So.2d 117 (La.App.1990). Where the distinction between fact and opinion is blurred, it is often best to leave the matter to the discretion of the trial judge. See e.g. 31 *A Am.Jur.2d Expert and Opinion Evidence* § 9.

Furthermore, in *King v. Rumsfeld*, 328 F.3d 145 (4th Cir. 2003), the Court held:

"[A] lay witness in a federal court proceeding is permitted under Fed.R.Evid. 701 to offer an opinion on the basis of relevant historical or narrative facts that the witness has perceived." *MCI Telecommunications Corp. v. Wanzer*, 897 F.2d 703, 706 (4th Cir.1990)(quoting *Teen-Ed, Inc. v. Kimball International, Inc.*, 620 F.2d 399, 403 (3d Cir.1980)). Although lay opinion testimony was once disfavored and presumed excludable, "The modern trend favors the admission of opinion testimony, provided that it is well-founded on personal knowledge [as distinguished from hypothetical facts] and susceptible to specific cross-examination." *Id.* (alteration in original) (quoting 3 J. Weinstein, *Evidence* ¶ 701[02] at 701-9 and 701-17 (1978)). However, the testimony of such a witness is limited to those opinions or inferences which are: 1) rationally based upon the perception of the witness; 2) helpful to a clear understanding of the testimony or the determination of a fact in issue; and 3) not based upon knowledge within the scope of Rule

702. *Fed.R.Evid.* 701. Additionally, we must be on guard to prevent lay opinion testimony when it involves "meaningless assertions which amount to little more than choosing up sides." *Mattison v. Dallas Carrier Corp.*, 947 F.2d 95, 110-11 (4th Cir.1991) (quoting *Fed.R.Evid.* 701, Advisory Committee Note).

It is also unsupported by the medical records, that Mildred Watkins who weighed less than 100 pounds would have the physical strength to do the type of damage that was done to her thumb simply by hitting it on a bedrail. In furtherance of that position, Plaintiff submitted hospital records related to Mildred Watkins' thumb injury. All were admitted without objection.

As indicated by the Prisma Hospital record of October 8, 2011, Mildred Watkins' right thumb was described as follows: "collateral ligament is disrupted with approximately 50 degrees with stress", "diffuse swelling over the thumb and she is tender to palpate", and "grossly unstable and opened ulnarly approximately 45 degrees as well as radially to approximately 30 degrees compared to the left hand". See *Exhibit 6 to Plaintiff's Post Trial Brief - Prisma records 10.8.2011, p. 211*. A closed reduction was attempted but was unsuccessful and it was noted that if a closed reduction were to be performed, her thumb, "would fall off as well as in an ulnar direction." *Id.*

Contrary to Defendants' assertion its Memorandum, the operative report from Prisma, which was admitted into evidence without objection, does support Plaintiff's theory of the injury and is a damaging to the Defendants' hearsay, and punitive damages, arguments. The operative report confirms that the medical evidence does not align with Defendants' version of events. Jean Watkins' testimony is not hearsay, as it only confirms facts admitted into evidence. The operative note states: "Radiographs demonstrate a nearly fully dislocated thumb **MCP joint volarly.**" See *Plaintiff's Post Trial Brief Exhibit 12 – Prisma Operative Report emphasis added*. Volar dislocations of the metacarpophalangeal (MCP) are hyperflexion or force injuries to the

thumb. They are also very rare. It is not hearsay for Jean Watkins to testify about matters which are in evidence or to testify about contradictory statements made by the Defendants.

Also admitted into evidence without objection were Plaintiff's Complaints to the Ombudsman and DHEC related to her mother's injuries. *See Plaintiff's Post Trial Brief Exhibit 10 – Ombudsman and DHEC Complaints*. Statements made by the Plaintiff in those complaints which referenced her understanding of the mechanism of injury to her mother's thumb are the same as those made at trial. Each exhibit was provided to counsel at the trial before the Jean Watkins questioned regarding the exhibit and before the item was offered into evidence. No objections were made as to the admissibility. Therefore, because those complaints contain the same statements as those made by Jean Watkins at trial, they are not hearsay.

The Defendants had the opportunity to contest the merits of the Plaintiff's case, causation, and the extent and mechanisms of her injuries by cooperating in discovery. They failed to do so and had their Answers stricken as a result. They cannot now use back-door tactics such as post trial hearsay arguments to try to limit their liability.

Finally, this was a bench trial; not a jury trial. The Court has vast experience in identifying and ruling on matters of hearsay. Even if Jean Watkins' statements were hearsay, which they were not, this Honorable Court certainly has the experience, skill, and deference to disregard any improper statements in review of this matter. In *Okatie River v. Southeastern Site Prep*, 353 S.C. 327, 577 S.E.2d 468 (S.C. App. 2003)S.C. 2021), the Court held that “[c]redibility determinations regarding testimony are a matter for the finder of fact, who has the opportunity to observe the witnesses, and those determinations are entitled to great deference”. *South Carolina Dep't of Soc. Serv. v. Cummings*, 345 S.C. 288, 293, 547 S.E.2d 506, 509 (Ct.App.2001); *Dorchester County Dep't of Soc. Serv. v. Miller*, 324 S.C. 445, 452, 477 S.E.2d

476, 480 (Ct.App.1996); *South Carolina Dep't of Soc. Serv. v. Forrester*, 282 S.C. 512, 516, 320 S.E.2d 39, 42 (Ct.App.1984).

In *State v. Griffin*, 339 S.C. 74, 528 S.E.2d 668 (S.C. 2000) the Court ruled that even evidence that is hearsay: “may be admissible if corroborated by facts circumstances or other evidence. ‘There is no reversible error in the admission of evidence that is cumulative to other evidence properly admitted.’” *quoting State v. Williams*, 321 S.C. 455, 469 S.E.2d 49 (1996). Here, there is no hearsay, but assuming *arguendo* that Jean Watkins’ statements were hearsay, they would still be admissible due to the cumulative and corroborative nature of her testimony in relation to the other evidence admitted at trial.

Furthermore, nothing contained in the record states that Judge Addy relied on Jean Watkins’ statements about what a doctor told her. Instead, the record is more than adequate to draw an independent conclusion that the Defendants’ grossly negligent and abusive behavior, which was admitted by their stricken Answer, together with the Prisma records, resulted in the injuries to Mildred Watkins’ thumb in a manner consistent with force and hyperflexion. Defendants’ Motions should be Denied.

**B. THE EVIDENCE OF FRAUD IS PROPER AND IS
IMPUTED TO ALL DEFENDANTS**

The Defendants assert that the Court “improperly found evidence of fraud related to skin audits to support its award of punitive damages and disregard statutory caps.” *Defendants’ Memo* p. 4 The Memorandum goes on to state that “the Order finds—against Country Wood—that four weekly skin audits . . . were falsified and established actual fraud. *Id.* First, there is no limitation to the Order as it relates to fraud solely to County Wood. All Defendants were owners, managers, agents, and/or otherwise operating the facility and there is no limitation whatsoever in the Order to fraud solely against Country Wood.

The Defendants' assert that because *they* allege only one licensed practical nurse completed the fraudulent forms, and because that individual was not specifically named in the Complaint, that this allows the Defendants to avoid liability for the fraud. This argument is without merit. The Defendants cite absolutely no case law in support of their position that the Plaintiff is required to name every CNA, LPN, RN, nutritionist, or other caregiver at a facility for every negligent or fraudulent act. This is not the standard required in South Carolina and there is no legal precedent requiring this absurd action. In fact, it is not even the standard in Georgia, where defense counsel practices: A plaintiff need not name each physician or employee whose acts or omissions form the basis for a claim of vicarious liability against the medical practice. *Atlanta Women's Specialists, LLC v. Trabue*, 310 Ga. 331, (2020)

Furthermore, it appears that the Defendants did not read Plaintiff's Complaint prior to submitting their Memorandum, as it is replete with references to the Defendants' control of and the responsibilities for the acts and omissions of their "agents, servants and employees":

Upon information and belief, at all times relevant hereto, Defendant Sterling had the right and power to direct and control its agents, servants and employees in the performance and manner in which they operated their business at Country Wood. Complaint, ¶2

Upon information and belief, at all times relevant hereto, Defendant Country Wood had the right and power to direct and control its agents, servants and employees in the performance and manner in which they operated the business of providing nursing care services at Country Wood." Complaint ¶3

Upon information and belief, at all times relevant hereto, Defendant Guardian had the right and power to direct and control its agents, servants and employees in the performance and manner in which they operated the business at Country Wood. Complaint ¶4

The Plaintiff is informed and believes that, at all times material to this Complaint, the agents, servants and/or employees of the Defendants, including those agents, servants and/or employees working at Country Wood, were acting in the course and scope of their employment with Defendants in making decisions, and acting and/or failing to act regarding the care of Plaintiff's

decedent, Mildred Watkins. Complaint ¶7

That the injuries and damages herein described were the direct, foreseeable and proximate result of the grossly negligent, negligent, careless, reckless, willful, and wanton acts and omissions of the Defendants, jointly and severally, their agents, servants and employees. Complaint ¶24

Upon information and belief, Defendant Sterling [Countywood, Guardian], by and through its association with Country Wood, its agents, servants and employees, did undertake the duty to render various services to Country Wood, including those services which would facilitate the ability to provide care to patients of Country Wood, including Mildred Watkins, in accordance with the prevailing professional standards of care for nursing home providers in the state and the national community. Complaint ¶¶26; 31, 36

In failing to properly train, educate, supervise and monitor its employees, servants and agents, including, but not limited to the physicians, nurses, nursing assistants, medical personnel, staff and employees at Country Wood and entrusting these agents, servants and employees with the care of residents who are unable to care for themselves, including Mildred Watkins; Complaint ¶¶27, 32, 37 (n)

In hiring and retaining as employees at Country Wood, doctors, nurses, nursing assistants, medical personnel, staff and employees who were not properly qualified, not competent, and not adequately educated, and then entrusting these agents, servants and employees with the care of residents who are unable to care for themselves, including Mildred Watkins; Complaint ¶¶27, 32, 37 (o)

Next, the Defendants equate Licensed Practical Nurses with “simple ministerial employees” such as typists or low-level clerical workers. Ministerial employees are those who typically have solely clerical duties. No specific education or training would even be required. In stark contrast, LPNs are nurses who must pass strict government mandated educational, examination, and licensure requirements. The case cited by the Defendants involved office workers who literally “rubber stamped” checks for deposit in an embezzlement case. One cannot equate an office worker’s involvement with an LPN whose specific job it is to perform skin audits and other health care functions. An LPN is performing the specific work that these

Defendants' hired them to perform, not an unrelated task. LPNs and other nursing staff perform skin audits and these are the very documents which were falsified. Likewise, in the nursing home setting, unlike the privately owned furniture company in Defendants' case example, CMS, DHEC and other regulatory agencies require supervision of nursing staff and monitoring and maintenance of accurate medical records in order to protect patient safety.

Furthermore, Plaintiff has no idea how many additional instances of fraud exist because of the Defendants' failure to cooperate in discovery. Multiple employees of the Defendants could have been involved and the Defendants are liable for their actions. It remains Plaintiff's position that management and owners were aware of the abhorrent record keeping at County Wood. The skin audits were intentionally completed on more than one occasion for time periods when Mildred Watkins was in the hospital and placed in her file. This shows a pattern of intentional fraud by the Defendants that is supportive of the rulings of this Court. These documents are authored by the Defendants and are clear and convincing evidence of fraud. Defendants' Motion should be Denied.

C. PLAINTIFF'S CLAIMS OF BREACH OF THE STANDARD OF CARE ARE INCLUDED IN THE COMPLAINT

Again, it appears that counsel did not read Plaintiff's Complaint prior to authoring this Memorandum, as the allegations of the items missing from the Complaint are clearly stated within. The Defendants assert that Plaintiff stated "new standard of care claims" related to skin checks, urinary tract infections (UTIs), the removal of the bedrail, nutrition, preventative care, bruises, scratches, and wounds. *Defs' Memo* p. 5 The Defendants further state that these conclusions "were not alleged in Plaintiff's Complaint" and thus,

they were not admitted when the answer was stricken. For the sake of brevity, Plaintiff will simply cite the standard of care claim and then list the paragraph of the Complaint in which the language is found:

1. Skin checks: ¶13, 15, 17, 21, 23, 27(a)(b)(c)(e)(f)(g)(j)(k)(u)(aa)(dd), 29, 32(a)(b)(c)(e)(f)(g)(j)(k)(u)(aa)(dd), 34, 37(a)(b)(c)(e)(f)(g)(j)(k)(u)(aa)(dd), 39
2. UTIs: ¶13, 14, 19, 22, 23, 27(c)(h)(t), 29, 32(c)(h)(t), 34, 37(c)(h)(t), 39
3. Bedrail: ¶27(z)(aa), 32(z)(aa), 37(z)(aa)
4. Nutrition / Preventative Care: ¶21, 27(c)(k)(l)(m)(x)(bb), 29, 32(c)(k)(l)(m)(x)(bb), 34, 37(c)(k)(l)(m)(x)(bb), 39
5. Bruises, scratches: ¶27(dd), 32(dd), 37(dd)
6. Wounds (decubitus ulcers): ¶13, 17, 21, 23, 27(c)(k)(u), 29, 32(c)(k)(u), 34, 37(c)(k)(u), 39

Plaintiff's Complaint was filed August 22, 2014 and the standard of care allegations were included at that time; they are hardly new. Plaintiff also filed an Expert Affidavit related to standard of care, as is required by statute in order to initiate this action. Because standard of care allegations were included in the Complaint, they are deemed admitted as a result of Defendants' Answers being stricken.

D. AWARD OF DAMAGES IS APPROPRIATE

The Defendants have argued that an award in excess of an amount requested at a trial is inappropriate or violates due process, but failed to cite a single case in support of this specific allegation. Plaintiff also points out that the Defendants have misstated her request and refer them to her Brief in Support of Damages, which clearly states that the amount requested is “**no less than** \$7,000,000.00”. *Plaintiff's Post Trial Brief p. 26, emphasis added*. This is a minimum requested, not a cap on Plaintiff's recovery. Furthermore, amounts suggested to a jury or judge

are just that; suggestions as to the *minimum* sum the Plaintiff believes the evidence supports. There is certainly no prohibition on a jury or judge exceeding that minimum suggestion and doing so is not inappropriate or a violation of due process.

With regard to a request for a new trial, the Defendants argue that a new trial should be granted when the verdict results from “passion, caprice, prejudice, or some other influence outside the evidence.” *Welch v. Epstein*, 342 S.C. 303 (Ct. App. 2000) However, Defendants fail to specify a single fact which supports their argument that Judge Addy was inappropriately influenced by any of those factors when determining the award in this case. This was a damages hearing in front of an experienced and well respected judge. There is no evidence whatsoever of any of the improper considerations listed above which would warrant a new trial, and the Motion must be denied.

Likewise, there are no grounds for a new trial *nisi remittitur*, which would require the Defendants to show that the verdict is excessive. *Id. at 303* The *Welch* Court acknowledged that a jury or judge’s “determination of damages is entitled to substantial deference. *Id.* The *Welch* Court acknowledged that “the trial court alone has the power to reduce the verdict by the granting of a new trial *nisi remittitur*.” *Id.* 303. After considering the evidence of pecuniary and non-pecuniary losses, the *Welch* court determined that the damages awarded were appropriate. *Id.* 304 Ms. Watkins’ pecuniary and non-pecuniary losses were well established at the hearing, and were reiterated in Judge Addy’s Order, which is incorporated into this Memorandum by reference.

Other than merely alleging that the judgment is excessive, the Defendants provide no specific facts, state no errors of law, and cite no cases in support of their position that the award for actual damages for either the survival action or the wrongful death action is excessive in light

of the evidence presented. As such, Defendants' right to challenge actual damages should be deemed waived and their Motion should be denied.

The sole issue discussed in Defendants' memorandum with regard to the size of the award relates to only punitive damages. The trial judge is vested with considerable discretion over the amount of a punitive damage award. *Austin v. SPECIALTY TRANSP. SERVICES*, 358 S.C. 298, 594 S.E.2d 867 (S.C. App. 2004) See *Kuznik v. Bees Ferry Assocs.*, 342 S.C. 579, 538 S.E.2d 15 (Ct.App.2000). This Court's review of the amount of punitive damages is limited to correction of errors of law. *South Carolina Farm Bureau Mut. Ins. Co. v. Love Chevrolet, Inc.*, 324 S.C. 149, 478 S.E.2d 57 (1996).

The Defendants assert that Judge Addy used an "improper framework to analyze the factors relevant to an award of punitive damages." *Def's Memo p. 6* They further assert, without justification, that Judge Addy did not "analyze the evidence under the guideposts set forth in *BMW of North America v. Gore*, 517 U.S. 559 (1996)" *Id.* The Defendants also reference *Mitchell v. Fortis Ins. Co.*, 385 S.C. 570 (2009) in its efforts to criticize what they assumed to be Judge Addy's insufficient analysis of punitive damages.

First, the trial court or judge at a damages hearing, is not required to cite every case he/she considered when a ruling is issued. To do so would bring the judicial system to a halt with the excessive burden of requiring every ruling to be accompanied by a lengthy Order detailing every possible rule, regulation, and case considered in reaching that particular Order. Particularly at damages hearings, where many judges rule instantly from the bench or issue Form Orders or other brief Orders awarding damages, the lengths that Judge Addy took to ensure a proper explanation of the award in this case are commendable. Both parties were asked to submit Briefs in support of their positions on damages post trial, before any ruling was made. At that

time, the Defendants had the opportunity to address any issue regarding damages with the Court. Shortly over two months after the hearing, Judge Addy issued a thorough and detailed Order.

The Defendants argue that Judge Addy did not properly consider *BMW of North America Inc. v. Gore*, 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996) in his analysis of the damages award. Simply because Judge Addy did not specifically reference a particular case in his Order, does not mean that relevant law was not considered. The Defendants have no legitimate grounds to support their argument that Judge Addy failed to consider *Gore*, or any applicable case or law. Likewise, in Defendants' Post Trial Brief, they specifically requested that if Judge Addy intended to award punitive damages, that the Court state its "findings and conclusions *showing the Court has performed the necessary Due Process analysis outlined in Gamble* and considered the limitations on punitive damages set forth in S.C. Code Ann. §15-32-530 et seq. If the Court finds that these caps do not apply or applies a higher cap under this statutory scheme, Defendants ask the Court to make such findings of fact and law in writing in its judgment." *Def's Post Trial Brief §B. emphasis added.* After Briefs were filed by the parties post-hearing, Judge Addy issued a detailed twenty nine (29) page Order detailing the particulars of his ruling, and included the *Gamble* analysis specifically requested by the Defendants in their Post Trial Brief. Now, the Defendants suggest that because Judge Addy discussed *Gamble*, his analysis was improper. The Court was under no obligation to detail any portion of its Order, but did so, in extremely thorough fashion, and even addressed the specific issues requested by the Defendants. It is disingenuous for the Defendants to accuse Judge Addy of analyzing *Gamble* improperly, when he did so at their request, and then criticize him for failing to include a discussion of his analysis under *Gore*. Interestingly, the Defendants never mentioned *Gore* in their own Post Trial Brief and did not request a detailed analysis from the Court related to *Gore*

in the Order, only *Gamble*. Regardless, Judge Addy's thorough analysis in the Order more than supports an award of punitive damages under the *Gore*.

The evidence in this case clearly supports an award of punitive damages under the *Gore* "guideposts". According to *Gore*, factors to consider are 1) the degree of reprehensibility of the defendant's conduct; 2) the disparity between the actual and potential harm suffered by the plaintiff and the punitive award; and 3) the difference between the punitive damages awarded and the civil penalties authorized or imposed in comparable cases. *BMW of North America Inc. v. Gore*, 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996)

1. Reprehensibility

The damages hearing was filled with testimony and evidence regarding the reprehensible conduct of the Defendants, which is considered to be the most important indicum of the reasonableness of a punitive damages award. *Id.* at 575. The Order specifically references trial testimony and exhibits offered into evidence related to the treatment of Mildred Watkins at Defendants' nursing facility. The mere allegations of the Complaint, which are admitted by virtue of the Answer being stricken, are sufficient evidence alone to show reprehensible conduct of the Defendants. Ms. Watkins was hospitalized numerous times for UTIs which were not prevented or properly treated by the defendants. She had numerous decubitus ulcers, wounds, and skin abnormalities which were caused by the complete lack of care of the Defendants, their agents and employees. Ms. Watkins' sustained a severe laceration to her leg on a jagged piece of metal from a bedrail that was removed by the Defendants in a grossly negligent manner. She was allowed to sit, slumped and drooling, for an unknown period of time, without anyone contacting an ambulance, and when Jean Watkins requested one, she was told there was no need to call an ambulance for her mother because she was "not going to get any better". According to the

records in evidence, Ms. Watkins was in septic shock from yet another untreated and undiagnosed UTI on Defendants' watch. She had multiple ulcers, bruises, and abrasions. She had a dislocated thumb which the medical records reflect was consistent with hyperflexion and for which the Defendants had an implausible explanation. And, there are multiple falsified records for treatment the Defendants' allege Ms. Watkins received when she was in fact, in the hospital on those occasions for one of the many injuries they caused. These are just a small sample of the evidence presented at trial, and included in Judge Addy's Order, which prove the reprehensibility of the Defendants. It was also noted in the Order that because the Defendants failed to cooperate in discovery, they denied the Plaintiff and the Court from additional documentation which would support a claim for punitive damages. The injuries suffered by the Plaintiff was real, incredibly painful, and ultimately resulted in her death. Clearly the first *Gore* "guidepost" is met.

2. Disparity Between Actual / Potential Harm Suffered by the Plaintiff and the Punitive Damages Award

The Order lays out an explanation for the damages awarded by Judge Addy and reflects that there is no disparity between the harm suffered by the Plaintiff and the award rendered.

With regard to the Survival Action, Judge Addy found economic damages in the amount of \$398,270.32 were warranted. Non-economic damages (pain and suffering, etc.) were calculated at six (6) times the economic damages, totaling \$2,389,621.92, (determining that §15-32-220 did not apply). As the Coroner's Report reflected, there was almost no area on Ms. Watkins' tiny 5 foot body which did not have a wound at the time of her death. The photographs included with the Coroner's Report illustrate that Ms. Watkins was undernourished and had lived what can only be considered a tortuous existence in the Defendants' facility. Her pain and

suffering was tremendous and this award is appropriate. As to punitive damages, Judge Addy stated that 15-32-530(B)(1) applied and thereafter used the same calculations of six (6) times the total economic and non-economic damages to award punitive damages in the amount of \$16,727,353.44. The combined total of the economic and noneconomic damages for the Survival Action was \$19,515,245.68.

As to the Wrongful Death Action, Judge Addy applied Ms. Watkins' life expectancy of 14.31 years and awarded \$1,500,000.00 to each of the five claimants. This calculated to approximately \$287 per day of her expected remaining life to compensate each of the five claimants for their loss. As to punitive damages, each claimant was awarded \$500,000.00 for a total of \$2,500,000.00 in punitive damages on the Wrongful Death action, for a total award of \$10,000,000.00. The total combined damages for all causes of action totaled \$29,515,245.68.

Based on the damages awarded, the ratio between the punitive damages awards and the compensatory awards is 1.86:1. There is clearly no disparity between the actual harm suffered by the Plaintiff and the Punitive Damages awarded in this case. The second *Gore* "guidepost" is met under the clear analysis contained in Judge Addy's Order.

3. Difference Between Punitive Damages Awarded and Penalties Imposed in Comparable Cases

The court may consider the type of harm suffered by the plaintiff, the reprehensibility of the defendant's conduct, the ratio of actual or potential harm to the punitive damages award, the size of the award, and any other factors the court may deem relevant when considering comparable cases. *Garrison v. Target Corp.*, 429 S.C. 324, 355, 838 S.E.2d 18 (S.C. App. 2020). Cases cited in Defendants' own Motion illustrate cases with punitive damages verdicts comparable to the present matter.

In *Welch v. Epstein*, 342 S.C. 279, 536 S.E.2d 408 (S.C. App. 2000), the Court upheld an award of \$28,353.88 in survival action damages, \$3,000,000.00 in wrongful death damages, and \$3,900,000.00 in punitive damages on a case involving the death of a patient who was improperly prescribed pain medication in the following surgery. *Id.* Multiple defendants were sued, and some had settled with the Plaintiff prior to trial. The Court upheld the awards against Defendant Epstein stating that in light of the damages presented at trial and under a review of *Gamble* and *Gore* factors, the judge did not abuse his discretion in refusing to grant Defendant's new trial motion based on the size of the actual and punitive damages awards. *Id.* at 304 and 307. The *Welch* Court also referenced other cases with similar results which were upheld as reasonable: *Knoke v. South Carolina Dep't of Parks, Recreation and Tourism*, 324 S.C. 136, 478 S.E.2d 256 (1996); (wrongful death verdict of \$3,000,000 for death of twelve year old was not an excessive verdict); *Scott v. Porter*, 340 S.C. 158, 530 S.E.2d 389 (Ct.App.2000); (wrongful death verdict of \$1,500,000 for death of nineteen month old child was not excessive). *Id.* at 304-305. The award granted in this case is clearly in line with similar awards which have been upheld in our state.

Judge Addy's Order detailed the reasoning and calculations behind both the actual and punitive damage awards. Based on the evidence and testimony, the awards are not excessive, and the punitive damages award was clearly considered by Judge Addy in light of the requirements of *Gamble* and *Gore*. Defendants' Motion should be denied.

IV. CONCLUSION

The Defendants have failed to meet their burden of proof in showing that the judgment against them is (1) against the clear weight of the evidence, (2) is based upon evidence which is

false, or (3) will result in a miscarriage of justice. As such, their Motion for a New Trial must be denied.

Likewise, Defendants have failed to meet their burden of proof that there has been (1) an intervening change in the controlling law, (2) new evidence that was not available at trial, or (3) that there has been a clear error of law or a manifest injustice. Thus, their request to alter or amend the judgment should be denied.

Viewing the matter in the light most favorable to Plaintiff, Defendants have failed to meet their burdens of proof on all matters requested in their Motion and Defendants' Motions should be DENIED.

RESPECTFULLY SUBMITTED,

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February 28, 2023

on July 31, 2015, pursuant to a Rule 40(j) Consent Order. The case was restored to the docket July 25, 2016.

At the time the Plaintiff filed her Motion to Compel on July 29, 2015, she remained without complete responses to her discovery requests. In particular, Plaintiff had been provided with only two documents from both Defendant Sterling and Defendant Guardian (the Articles of Incorporation and a “Consulting Agreement” with Country Wood). The Defendants failed to provide any additional documents or responses during this time period.

The Honorable Edgar Dickson heard the Plaintiff’s Motion to Compel on February 24, 2016 and verbally ruled in Plaintiff’s favor the same day. The formal Order was signed on November 30, 2016 by Judge Dickson, granting Plaintiff’s Motion to Compel Against All Defendants. The Defendants were directed to produce the information specified within twenty (20) days of the date of the Order. The time period specified in the Order expired on December 20, 2016.

No information or documents were produced by the Defendants by the December 20, 2016 deadline, despite the fact that the Defendants knew at hearing in February that Judge Dickson had ruled in Plaintiff’s favor. On December 29, 2016, Plaintiff’s counsel sent a letter to counsel for Defendants asking for production of all documents and information specified in the Order no later than January 6, 2017. Plaintiff’s counsel was thereafter contacted by Defendants’ attorneys regarding the missed Order deadline.² Defense counsel requested an extension of one additional week to produce the information specified in the Order. Plaintiff’s counsel agreed to

² On January 3, 2017 and January 5, 2017, Plaintiff’s counsel received emails from defense counsel advising that they “inadvertently did not calendar the date” but were gathering the information. They also stated that they had been unable to communicate with their client about the discovery production ordered by Judge Dickson until that week.

withhold the filing of a Rule to Show Cause Motion if she received full and complete production of documents and information by January 13, 2017. As of January 13, 2017, Plaintiff's counsel had received no information from the Defendants.

On January 19, 2017, Plaintiff's counsel received a document entitled Defendants' Supplemental Responses to Plaintiff's Interrogatories and Requests for Production Pursuant to the Order of Judge Dickson. The materials produced therein, did not comply with the Order of Judge Dickson in timeliness nor in content.³ Plaintiff filed a Motion for Rule to Show Cause and Motion for Sanctions on January 23, 2017. In the six (6) month period that Plaintiff's counsel awaited a hearing date, no further documents or information were produced by any Defendant, until just days prior to the hearing.

The case appeared on the July 31, 2017 trial docket, at which time the Plaintiff was still without the complete discovery responses, despite Judge Dickson's Order. Plaintiff remained unable to schedule critical depositions necessary to prepare for trial which would now have to be postponed for a second time.⁴

The hearing on Plaintiff's Motion for Rule to Show Cause and Sanctions was held by the Honorable Alison Renee Lee on July 27, 2017. Judge Lee heard the arguments of counsel for both parties, reviewed the written materials submitted, asked questions of counsel for both

³ Many of Defendants' responses indicated: "[Defendant] is still in the process of collecting information responsive to this request and will fully respond to the same as soon as such information is located." Other examples of noncompliance included responses referring Plaintiff's counsel to government agencies for answers despite Judge Dickson's Order which *specifically stated* that such a response is insufficient.

⁴ This case was previously removed from the roster July 31, 2015, pursuant to Rule 40(j) with a Consent Order, due to incomplete discovery. The case was restored July 25, 2016. At the time the case was restored, no additional information had been produced to the Plaintiff by the Defendants during the year the case was removed from the docket. The 40(j) Order allowed for on-going discovery during this period.

parties, and ultimately took the matter under advisement. Additionally, at the hearing, Judge Lee ordered that counsel for Defendants produce a list of documents with their Bates stamped reference numbers, which Defendants' counsel had compiled and had in her possession, to Plaintiff's counsel *prior to leaving the courthouse*. The document was not produced by the Defendants to Plaintiff's counsel that day, *nor has it been produced as of the date of the filing of this Memorandum*.

While awaiting a ruling from Judge Lee, the trial of the case had to be continued several times and was ultimately pushed back by a Scheduling Order. On April 19, 2018, Judge Lee issued a ruling striking the Answers of All Defendants, due to the failure of the Defendants to comply with Judge Dickson's Order, and Ordered that the matter be set for a damages hearing.

Defendants appealed this ruling to the South Carolina Court of Appeals (2018-000924). Thereafter, the Court of Appeals AFFIRMED Judge Lee's Order on September 8, 2021. The case was remanded back to the circuit court for a damages hearing.

As of the filing of this Memorandum, over eight (8) years after discovery was served, Plaintiff remains without critical information which would have enabled her to advance her case, particularly with regard to punitive damages. Additionally, Plaintiff remains without information required by standard discovery rules, including liability and excess / umbrella insurance coverage amounts and policies for all Defendants.

The Honorable Frank R. Addy, Jr. presided over the damages hearing on November 10, 2022. The Plaintiff was represented by Jennifer Randolph Purdy, Esq. and the Defendants were represented by Chase Parker, Esq. The Plaintiff offered two witnesses at the damages trial: Jean Watkins, daughter of Mildred Watkins and the Personal Representative of Mildred Watkins' Estate; and Kim Watkins, daughter of Mildred Watkins. Exhibits were also offered into

evidence by the Plaintiff, which were admitted without objection. Mildred Watkins' other living children were present in the courtroom for the trial. Post Trial Briefs were submitted by both parties in support of their positions regarding damages.

On January 31, 2023, Judge Addy issued an Order awarding the Plaintiff the sum of \$19,515,245.68 for the Survival Action and \$10,000,000.00 for the Wrongful Death Action, for a total award of \$29,515,245.68 against all Defendants, jointly and severally. An Order was also filed on the same date compelling the Defendants to produce insurance and financial information that continued to be withheld from the Plaintiff.

Defendants filed this Motion to Reconsider Order Compelling Production of Insurance and Financial Information on February 10, 2023. Plaintiff files this Memorandum in Opposition thereto.

II. STANDARD OF REVIEW

The decision to reconsider an order is within the sound discretion of the court. *Hughes v. Bedsole*, 48 F.3d 1376, 1382 (4th Cir. 1995). Furthermore, our courts have held that a motion to reconsider should not be a “vehicle for rearguing the law, raising new arguments, or petitioning a court to change its mind.” *Lyles v. Reynolds*, C/A No. 4:14-1063-TMC, 2016 WL 1427324, at *1 (D.S.C. Apr. 12, 2016) (citing *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 485 n.5 (2008)).

III. ARGUMENT

The Defendants' Motion essentially argues that it should continue to be allowed to thumb its nose at the prior rulings of the Court and refuse to produce even the most basic of information, even insurance information required by every party in a civil action. Defendants' Motion also reflects that they either did not bother to read the prior Orders of Judge Dickson or Judge Lee, which provided the basis for their Answers being stricken, or they are knowingly

making false statements to the Court. In either scenario, this Motion is made in bad faith.

Contrary to their claims, all Defendants have previously been Ordered by the Court to produce insurance and other financial documents for each company, and its owners, including but not limited to Robert Hagan.

Judge Dickson's Order Compelling Discovery clearly states in paragraphs 6, 17, 21, 29, 33, 42, 43, 45, 52, and 54, among others, that the Defendants are compelled to produce the same financial and insurance information that Defendants deny in this Motion that they have ever being compelled to produce. *Dickson Order, Lee Order, and Interrogatories and Requests for Production to Defendants* Judge Dickson's Order was signed November 30, 2016, over six (6) years ago. These discovery items were requested August 24, 2014, over eight (8) years ago. Yet, the Defendants continue to ignore the Court's Orders and refuse to produce the information.

The Plaintiff asks the Court to deny Defendants' Motion and their attempts to continue to delay, stonewall, and blatantly ignore the Orders of this Court. Rest assured, supplemental proceedings and litigation to pierce the corporate veil are forthcoming. However, those forthcoming proceedings do not negate the obligation of these Defendants to comply with valid and longstanding Orders of this Court.

IV. CONCLUSION

Defendants' Motion is made in bad faith, asserts statements which are false, and is being used solely as a tool to relitigate a position they lost over (6) years ago. Defendants' Motion should be denied and the Defendants should be compelled to respond immediately as Ordered by this Court, and previously by Judges Dickson and Lee.

RESPECTFULLY SUBMITTED,

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February 28, 2023

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Frank R. Addy, Jr., Circuit Court Judge

Case No. 2016-CP-40-04463

Jean Watkins, as Personal
Representative of the Estate of
Mildred Watkins,

Respondent,

v.

Sterling Healthcare, Inc., Country
Wood Nursing Center, LLC, and
Guardian Resources, LLC,

Appellants.

NOTICE OF APPEAL

Sterling Healthcare, Inc., Country Wood Nursing Center, LLC, and Guardian Resources, LLC appeal the Orders of the Honorable Frank R. Addy, Jr. dated January 31, 2023 (awarding damages), January 31, 2023 (compelling defendants to produce insurance and financial information), March 10, 2023 (denying defendants' motion for a new trial or, alternatively, to reconsider the award of damages to plaintiff) and March 10, 2023 (denying defendants' motion to reconsider order compelling defendants to produce insurance and financial information). Appellants received written notice of denial of their motions to reconsider on March 10, 2023.

April 5, 2023

s/ Taylor J. Stewart
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CERTIFICATE OF APPELLANTS

The undersigned hereby certifies that the Record on Appeal contains all material proposed to be included by any of the parties and does not include any other material.

September 25, 2023

/s/ Taylor J. Stewart

Taylor J. Stewart

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