

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM WILLIAMSBURG COUNTY
Court of Common Pleas

Clifton B. Newman, Circuit Court Judge

Case No. 2003-CP-45-207

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S.C. Supreme Court

Cody P., by and through his Conservator Kelly H.
Kelley, and his natural and legal guardian Elizabeth
Powell, ...

Respondent,

v.

Bank of America, N.A., Karen P. Unrue, and Travis
Powell, ...

Defendants,

Of Whom Bank of America, N.A. is, ...

Petitioner.

APPENDIX - VOLUME III

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Appellant.

FINAL BRIEF OF APPELLANT

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STATEMENT OF THE ISSUES

1. Did the trial court err in denying BOA's motion for JNOV on Plaintiffs' negligence claim where the conservator's theft of the minor's funds was an unforeseeable intervening act?
2. In the alternative, did the trial court err in denying BOA's motion for a new trial where it abused its discretion by allowing Plaintiffs to admit irrelevant and prejudicial testimony regarding BOA's size?
3. In the alternative, did the trial court err in denying BOA's motion for JNOV as to punitive damages where Plaintiffs did not prove by clear and convincing evidence that BOA and/or its employees acted in a manner that was reckless, willful, or in conscious disregard of the minor's rights?
4. In the alternative, did the trial court err in failing to find that the punitive damages verdict is unreasonable, arbitrary, excessive, not based on proper evidence, and in violation of BOA's due process rights?

STATEMENT OF THE CASE

Plaintiffs filed their amended complaint in this case on February 8, 2005, alleging claims against the co-conservators and Bank of America, N.A. ("BOA"), arising out of the theft of the minor Plaintiff's funds by one of his conservators. (Amended Complaint, R. 61-98.) BOA filed its answer denying the allegations against it. (Amended Answer, R. 99-109.) Following prior disposition of some claims which are not the subject of this appeal, Plaintiffs presented the following claims in the trial below: (1) conversion, constructive trust, and negligence against Travis Powell; and (2) breach of fiduciary duty and negligence against BOA.¹

Plaintiffs tried their case before a jury October 6-9, 2008. (R. 110.) The trial court granted BOA's motion for a directed verdict as to the breach of fiduciary duty claim, (r. 622), and denied it as to the negligence claim, (r. 618-19). As to punitive damages, the trial court denied BOA's motion for a directed verdict on the issue of whether the conduct was willful, wanton, or in reckless disregard, but the court granted the motion on the issue of whether punitive damages exist under negligence per se for alleged violations of S.C. Code § 62-5-423 (1986), which the trial court found does not apply here. (R. 585-87, 631; Ct's Exs. 3-5, R. 886-94.) The trial court granted Travis Powell's motion for a directed verdict as to all claims against him. (R. 584-85, 620, 621.) Thus, the trial court submitted Plaintiffs' claims for negligence and punitive damages against BOA to the jury, which returned a verdict in favor of Plaintiffs for

¹ Elizabeth Powell is also a plaintiff, as the minor's mother and legal guardian, along with the current conservator. She became a defendant when she intervened in this case for purposes of claims that no longer exist by virtue of a prior appeal. Neither Elizabeth Powell nor Karen Unrue participated as defendants in the trial below.

\$205,735.37 in actual damages (an amount stipulated by the parties) and \$1,583,000 in punitive damages. (Verdict Form & Judgment, R. 24-25.)

BOA timely filed post-trial motions, which the trial court denied on February 18, 2009. (BOA's Post-Trial Motion, R. 901-15; Order, R. 1-23.) BOA timely appealed.

STATEMENT OF THE FACTS

This case involves a series of unfortunate events beginning with the death of Steven Powell, followed by his sister's implementation of a criminal scheme to steal the funds Steven left for his only child Cody, and her disappearance with her nephew's money. At the time of trial, her whereabouts remained unknown, and an outstanding arrest warrant existed against her for the theft. (R. 182-84, 219-21, 235-36.)

Steven Powell's son Cody received approximately \$252,000.00 in insurance and workers' compensation benefits, following Steven's work-related death. (Pl. Exs. 1, 5-12, R. 784-88, 793-800; R. 209-10.) Karen Powell Unrue, Steven Powell's sister, approached Cody's mother, Elizabeth Powell, seeking to serve as the conservator over Cody's funds, and she agreed. (R. 172-75.) Mrs. Unrue also convinced Mrs. Powell to ask the probate court to waive the bond requirement associated with the appointment. (R. 172-75.) Mrs. Unrue previously helped Elizabeth and Steven with finances, and they trusted her. (R. 169-79.) Mrs. Unrue was the only member of the Powell family who attended college and later worked for several attorneys as a paralegal, where she gained experience in estate matters with the probate court. (R. 171-74, 190.) At the time of her appointment, she owned a bookkeeping business. (R. 181-82.)

On March 13, 2001, the probate court of Williamsburg County conducted a hearing and appointed Karen Powell² and Travis Powell, Steven's brother, as co-conservators for Cody P. (Pl. Exs. 1-4, R. 784-92; R. 186-87.) The court agreed to waive the bond requirement. (Pl. Exs. 1-2, R. 784-90; R. 172-75.) Although the appointment documents do not delineate roles of each conservator, the purpose of Travis Powell's appointment was to serve as a "father figure" to Cody, but not to manage his funds. (R. 186-99.) Mrs. Unrue was to handle the money. (R. 169-79, 189-92.) The probate court's order required her to deposit the minor's funds in a restricted account and further ordered that no funds could be withdrawn or transferred except by written order of the court. (Pl. Exs. 2-4, R. 789-92.)

When Mrs. Unrue received the insurance proceeds on Cody's behalf, she did not inform Travis, did not discuss the handling of the funds with him, and never told him where she deposited the funds. (R. 161-80, 190-91, 195-99.) Instead, she forged Travis's name on the three checks that were made jointly payable to them, and he never saw the checks. (R. 161-62, 164-65, 177-81, 190-91, 195-99, 235; Pl. Exs. 5, 10, 11, R. 793, 798-99.) During her tenure as conservator, Mrs. Unrue failed to provide either Travis or Elizabeth with monthly bank statements. (R. 202-03.)

On April 26, 2001, Mrs. Unrue went to the Pawley's Island branch of BOA with seven insurance checks totaling \$252,447.51, and placed the funds in a certificate of deposit ("CD"), titled "Karen M. Unrue, Guardian Cody P." (Pl. Ex. 32, R. 880; R. 254.) Lee Ann Yourko, a personal banker, opened the account. (R. 250, 273; Pl. Ex. 12, R. 800.) Mrs. Unrue was a known customer of the Pawley's Island branch,

² Karen Powell later married and became Karen Unrue. She is referred to herein as Mrs. Unrue.

where she had both personal and business accounts. (R. 271-72, 283; Pl. Exs. 16-28, 32, R. 805-838, 880.) Mrs. Unrue did not present the conservator documents to Ms. Yourko and did not request a conservator account, as she was required to do by court order. (R. 262-63, 315, 323, 330, 334-35, 490.) Ms. Yourko mistakenly opened a CD minor custodian account, as Mrs. Unrue requested, not realizing that the designation on the checks made the funds subject to a conservatorship and conservator account.³ (Pl. Ex. 32, R. 880; R. 254, 273, 290, 325, 330, 413-14, 422-24, 430, 437, 457-58.)

Custodian accounts and conservator accounts are two different types of minor bank accounts. (R. 457.) A conservator is a "[c]ourt-appointed individual who: [c]ares for and/or manages the property and affairs of a minor" and "[i]s also referred to as: Guardian or Curator." (Pl. Ex. 31, R. 843.) A conservator account, also called a "Guardianship Account (court order)," is "[e]stablished by a court-appointed guardian, conservator, or curator to manage the funds of a ward." (Pl. Ex. 31, R. 844.) A court-ordered conservator/guardian account may include restrictions, and "[i]f a court order is required for withdrawals," the account should "include 'Court Restricted Account' in the title." (Pl. Ex. 31, R. 845.) In order to open this type of account, the employee must obtain the original or certified copy of the court's appointment order, use the ward's tax identification number ("TIN"), and complete a personal signature card signed by the conservator. (Pl. Ex. 31, R. 845-50.)

On the other hand, a custodian is an "[i]ndividual who deposits/manages funds for the exclusive benefit of a minor." (Pl. Ex. 31, R. 844.) A custodian may create a

³ Of the 7 checks, 5 contained "conservator" on the payee line and 2 contained the letters "co-cn." (Pl. Exs. 5-11, 15, R. 793-99, 804.) There was testimony that Mrs. Unrue may have presented the checks with the two "co-cn" checks placed on top, which may have contributed to Ms. Yourko's oversight. (R. 430-33, 477-84.)

Uniform Transfers to Minors Act account (UTMA) or a Uniform Gifts to Minors Act account (UGMA). (Pl. Ex. 31-B, R. 855-61.) Further, a guardian may open a "Guardianship-Natural" account, which is "[e]stablished without a court order by natural or adoptive parents (guardians) to manage the funds of their child." (Pl. Ex. 31, R. 844.) A custodian/natural guardian account is not a restricted account, and the depositor has unrestricted access to manage the funds. (R. 258-59.) Although the minor's TIN is supposed to be used for UGMA accounts, when opening the account, the computer system "defaults to the customer's name and [TIN]." (Pl. Ex. 31-B, R. 856-57.) In order to certify the minor's TIN for tax reporting and to correct the titling (for South Carolina, Arizona, and Nevada), the employee must go into the system and change the tax information. (*Id.*) A certificate of deposit is an authorized product for a custodian account. (R. 489, 561-62.)

On May 2, 2001, Mrs. Unrue went back to the Pawley's Island branch with a check payable to the minor in the amount of \$253.67, which also contained the conservator designation. (Pl. Exs. 14-16, R. 802-07.) She dealt with the branch manager, Meredith Lawrence. (R. 346, 351.) Mrs. Unrue did not present Ms. Lawrence with the conservatorship documents and did not request a conservator account. (R. 384, 387-90.) Ms. Lawrence opened a UGMA savings account, naming Mrs. Unrue as the custodian and Cody as the minor. (Pl. Exs. 14-16, R. 802-07; R. 355, 451, 457-58, 489.) Ms. Lawrence compiled all of the documents that BOA required for a custodian account. (R. 552, 562.) The term "minor" appeared on all eight checks that Mrs. Unrue took to Ms. Yourko and Ms. Lawrence. (Pl. Exs. 14-16,

R. 802-07.) Custodian accounts are the most common type of minor bank account. (R. 372, 457-58, 488.)

When the CD matured on June 25, 2001, Mrs. Unrue went to the Garden City branch of BOA, where she was not a known customer, and withdrew 100% of the funds from the CD, totaling \$253,991.50. (Pl. Exs. 13, 32, R. 801, 880; R. 255-57, 489-90.) The same day, she traveled to the Pawley's Island branch and deposited those funds into the custodian account she previously opened with Ms. Lawrence.⁴ (Pl. Exs. 13, 17, 32, R. 801, 808-10, 880; R. 489-90.) Through seven online transfers, beginning on July 11, 2001, Mrs. Unrue transferred \$258,500.00 from Cody's UGMA account into her individual account.⁵ (Pl. Exs. 17-21, 25, R. 808-17, 823-24.) On November 26, 2001, she drew a check on her individual account in the amount of \$200,000.00 payable to a bank in Colorado.⁶ (Pl. Ex. 29, R. 839.)

At the time Ms. Yourko opened the account, she was a personal banker and had been on the job for approximately six months. (R. 250, 273, 465; Pl. Ex. 12, R. 800.) She had no previous banking experience. (R. 270.) BOA provided her with three months of training before she assumed her duties, including on-site training with the personal banker she was replacing, training in Charlotte, and training through individual instruction, group instruction, and manuals. (R. 275-76, 422.) Ms. Yourko knew Mrs. Unrue as a client, had no reason to be suspicious of Mrs. Unrue, and

⁴ The credit slip for the deposit is dated 6/25/01, but the monthly statement shows a posting date of 6/26/01, because Mrs. Unrue made that deposit after 2:00 p.m. The CD debit slip reflects that she redeemed it at 16:34. (Pl. Exs. 13, 17, R. 801, 808-10.)

⁵ Mrs. Unrue transferred \$1,000 on 7/11/01; \$3,500 on 7/30/01; and \$4,000 on 8/27/01. She then made three separate transfers, all on 11/15/01, for \$99,000; \$75,000; and \$26,000. Her last transfer was on 12/10/01 for \$50,000. (Pl. Exs. 17-21, 25, R. 808-17, 823-24.)

⁶ Her bank statements reflect charges in Colorado beginning 8/03/01. (Pl. Ex. 26, R. 825-31.)

learned from another bank employee that Mrs. Unrue was taking care of Cody, as a result of his father's death. (R. 271-72, 283, 319-20.) Ms. Yourko worked at BOA for a year and left on good terms. (R. 273, 328-29.) Neither she nor BOA was aware of her mistake in opening this account as a custodian rather than as a conservator account during her employment, and there was no evidence that she made any other mistakes during her employment with BOA. (R. 328-29, 332.)

Ms. Lawrence assumed her duties as branch manager in the spring of 2001, after six months of training, and thus, was new to that role when she opened the account on May 2. (R. 337-40, 368, 371, 465.) She left employment with BOA in August of 2001 on good terms. (R. 337.) Neither she nor BOA knew of her mistake in opening this account or any other mistake during her employment with the bank. (R. 386.)

Testimony and evidence was introduced establishing that BOA employed numerous safeguards to guard against the mistakes made in opening these two accounts: BOA implemented policies and procedures which specifically governed the opening of accounts, including conservator and custodian types; BOA trained its employees as to these policies and procedures before they began their duties; and BOA provided its employees with numerous resources to answer questions related to opening accounts (*i.e.*, a help-line, a quick reference guide, and other employees within the branch). (R. 265, 275-76, 398-402, 406-10, 422, 526-27; Pl. Ex. 31, R. 843-47.)

Elizabeth Reeves, BOA's corporate representative, testified that BOA employs policies and procedures to guard against fraud at many levels (*i.e.*, when opening a conservator account, the computer system instructs the employee to obtain the court

papers from the customer; if the customer does not have the required documents, the employee cannot proceed with opening the account; if the court documents reflect restrictions, they are noted on the account in the system). (R. 392, 398-402, 430, 455; Pl. Ex. 31, R. 843-47.) However, she explained that an employee would obviously have no reason to consult the directives in place for conservator accounts unless the employee first recognized that a conservator account was needed. (R. 407-10, 413-14, 422-24, 430, 437.) Ms. Reeves also testified that BOA did not make fifteen mistakes, as Plaintiffs claimed, but instead, that Ms. Yourko's initial mistake in failing to realize the account should have been a conservator account, rather than a custodian account, set off a chain of events. (R. 456-57, 486-88.)

Prior to trial, the current conservator recovered a portion of the stolen funds, which Mrs. Unrue paid through her attorney. (R. 218-20, 231.) At trial, the parties stipulated to actual damages in the amount of \$205,735.37. (R. 597.)

ARGUMENT

I. The Trial Court Erred in Failing to Grant BOA Judgment Notwithstanding the Verdict Because the Conservator's Unforeseeable Intervening Act Proximately Caused the Minor's Loss.

Karen Unrue's criminal scheme to steal the minor's money, which she was appointed by the probate court to protect, was the intervening, superseding, and proximate cause of the minor's loss. In order for Plaintiffs to recover in negligence against BOA for the minor's misappropriated funds, Plaintiffs were required to prove: (1) that BOA owed the minor a duty of care, (2) that BOA breached that duty, and (3) that BOA's breach proximately caused his damage. Parks v. Characters Night Club, 345 S.C. 484, 491, 548 S.E.2d 605, 608 (Ct. App. 2001).

Plaintiffs' evidence related solely to the issues of BOA's alleged breach of a duty as to the minor's funds. If these were the only elements of negligence, Plaintiffs might stand on better ground. However, assuming *arguendo*, that BOA breached a duty owed to the minor, Plaintiffs failed to prove that the breach proximately caused his loss, as the law defines causation in the context of this case.

Proximate cause is the "efficient or direct" and "immediate" cause of an injury. Mellen v. Lane, 377 S.C. 261, 278, 659 S.E.2d 236, 245 (Ct. App. 2008) (quoting McNair v. Rainsford, 330 S.C. 332, 349, 499 S.E.2d 488, 497 (Ct. App. 1998) and State v. Clary, 222 S.C. 549, 551, 73 S.E.2d 681, 682 (1952)). An act does not constitute the proximate cause of the injury unless "the injury would not have resulted to as great an extent and . . . any other efficient cause is not attributable to the person injured." Id. (quoting S.C. Ins. Co. v. James C. Greene & Co., 290 S.C. 171, 176, 348 S.E.2d 617, 620 (1986)). "To prove causation, a plaintiff must demonstrate both causation in fact and legal cause." Parks, 345 S.C. at 491, 548 S.E.2d at 609. Causation in fact requires proof that the injury would not have occurred "but for" BOA's alleged negligence. Id. Legal cause requires proof that the loss was foreseeable, which is consistently defined as the probable and/or natural consequences of the alleged breach. Id.

When negligent or criminal conduct of a third party intervenes between the defendant's alleged misconduct and the plaintiff's injury, the question becomes whether the plaintiff proved that the defendant's misconduct proximately caused his injury or whether causation is attributable to the third party. An intervening act that interrupts the foreseeable chain of events breaks the causal connection between the defendant's

negligence and the injury, and the defendant cannot be charged with proximately causing the injury, despite his breach of a duty owed to the plaintiff. Mellen, 377 S.C. at 281, 659 S.E.2d at 246-47.

“[W]hen the [conduct] appears merely to have brought about a condition of affairs, or a situation in which another and entirely independent and efficient agency intervenes to cause the injury, the latter is to be deemed the direct or proximate cause, and the former only the indirect or remote cause.”

Id. at 281, 659 S.E.2d at 247 (quoting Locklear v. Se. Stages, 193 S.C. 309, 318, 8 S.E.2d 321, 325 (1940)) (second alteration in original).

Thus, in traditional proximate cause cases where an intervening act is not at issue, the court considers only one consequence, the plaintiff's injury, in determining whether the defendant's conduct was such that it would probably cause injury. Young v. Tide Craft, Inc., 270 S.C. 453, 463, 242 S.E.2d 671, 676 (1978). However, where an intervening act interrupts the foreseeable chain of events, the courts must consider two consequences, the plaintiff's injury and the conduct of the intervening actor, in determining whether the defendant's conduct proximately caused the injury. Id.

Courts apply the intervening act rule in the context of intervening causes, intervening negligent acts, and intervening criminal acts.

“The general rule of law is that when, between [an act] and the occurrence of an injury, there intervenes a willful, malicious, and criminal act of a third person producing the injury, but that such was not intended by the [original actor] and could not have been foreseen by him, the causal chain between the [original act] and the accident is broken.”

Mellen, 377 S.C. at 285, 659 S.E.2d at 248-49 (quoting Stone v. Bethea, 251 S.C. 157, 162, 161 S.E.2d 171, 173-74 (1968)) (alterations in original).

In determining whether the intervening criminal act proximately caused the injury, the applicable test remains one of foreseeability under the attendant circumstances that existed at the time of the acts, not from the benefit of hindsight. Id. at 280-83, 659 S.E.2d at 246-48. Unless the plaintiff proves that the defendant should have foreseen that his negligence would *probably* result in injury or that the injury was the *natural* consequence of defendant's negligence alone, the defendant is insulated from liability by the intervening cause. Id. at 283, 659 S.E.2d at 247-48.

While the plaintiff is not required to prove that the defendant should have contemplated the exact events which transpired, the plaintiff must prove that injury was a *probable* consequence, and not a mere possibility. Young, 270 S.C. at 463, 242 S.E.2d at 675-76; see also Mellen, 377 S.C. at 284-86, 659 S.E.2d at 248-49. The defendant cannot be charged with probability of intervening acts that it should not have "expected to happen." Young, 270 S.C. at 463, 242 S.E.2d at 676 (emphasis added); see also Mellen, 377 S.C. at 284, 659 S.E.2d at 248. If the intervening act was not a "probable" consequence, the plaintiff must prove the injury was a natural consequence, which can only be found where the defendant's actions *alone* would have caused the loss in the natural course. Young, 270 S.C. at 463-64, 242 S.E.2d at 676; see also Mellen, 377 S.C. at 284, 659 S.E.2d at 248.

Numerous South Carolina cases demonstrate that under the facts of this case, there is simply no basis to find that BOA should have known that the minor's funds would "probably" be misappropriated because an account was mistakenly opened as a custodian account, instead of a conservator account. Fraud, stealing, and misappropriation of funds are *always* a possibility in the context of banking. However,

there is no evidence about the attendant circumstances here to support a finding that the fraud was a "probability" or that BOA should have "expected" it to happen. Further, the loss was clearly not a natural consequence of the mistake.

In Stone, the defendant left his car keys in the ignition, while unloading items from his car into his business. A thief stole his car and then collided with the plaintiff's car, causing him injuries. Stone, 251 S.C. at 159, 161 S.E.2d at 172. The court found that the defendant's negligence was superseded by the intervening criminal act of the third party who stole the car. Id. at 161-62, 161 S.E.2d at 173-74. The court cited cases from other jurisdictions under similar facts, including cases in which the defendant's negligent act of leaving keys in an unattended vehicle violated a statute. Id. at 162-64, 161 S.E.2d at 174. The court noted that the defendant's negligence was not a proximate cause of the injury, but rather, "was merely a condition or circumstance which did not operate to cause any injury to the plaintiff except for the intervening independent negligence of the thief." Id. at 163, 161 S.E.2d at 174. The court further explained that, while the defendant's negligent act "afforded *an* opportunity for the theft, it was merely a circumstance and not the proximate cause" of the plaintiff's injuries. Id. (emphasis added). Viewing the attendant circumstances of the defendant's conduct, the court noted this had never happened prior to this incident and nothing about the surroundings caused the defendant to be suspicious. Id. at 164, 161 S.E.2d at 174.

In Young, the court again applied the intervening act rule to find that the defendant's alleged negligence did not proximately cause the death of the plaintiff's husband. There, the decedent purchased a Tide Craft bass boat with a cable pulley

steering system. Young, 270 S.C. at 458, 242 S.E.2d at 673. At the time, Tide Craft only partially installed the cable pulley system and left the dealer to perform the remaining installation after the purchaser selected the motor. Id. at 459, 242 S.E.2d at 674. The steering system began to give the decedent problems, and he took it to a repairman for rewiring. Id. at 459-60, 242 S.E.2d at 674. Because the decedent wanted to use the boat over the weekend, the repairman spliced the cable as a temporary solution, which is known to be dangerous in the industry. Id. at 460, 242 S.E.2d at 674. The second weekend the decedent used the boat with the spliced cable, the steering cable disengaged, threw decedent from his seat, causing the boat to circle with the decedent's head in the water and one foot tangled in the lines of the trolling motor. Id. at 458-60, 242 S.E.2d at 673-74. The plaintiff alleged, *inter alia*, that Tide Craft was liable for the splicing and resulting disengagement of the steering cable, improper design, allowing dealers to complete installation of the cable, and failure to warn. Id. at 461-62, 242 S.E.2d at 675.

The court reversed the jury verdict, finding Tide Craft insulated from liability for its alleged negligence because the intervening acts of the repairman proximately caused the injury. The court first found that the repairman's rewiring of the cable due to defective design of the steering system was a probable consequence, but the repairman's splicing of the cable was not. Id. at 463-65, 242 S.E.2d at 676-77. The court also found that, absent the repairman's actions, Tide Craft's negligence would have, at most, caused constriction in the steering system and an inability to manipulate the steering stick, but not a parting of the cable and complete loss of steering. Id. at

465-66, 242 S.E.2d at 677. Thus, the court found that the injury would not have occurred in the natural course without the repairman's splicing. Id.

In Woody v. South Carolina Power Co., 202 S.C. 73, 24 S.E.2d 121 (1943), the plaintiff was injured by direct contact with a live wire. The wire was sagging across the highway because a truck driver careened off the road and struck an electric pole, knocking the wire loose. Id. at 78, 24 S.E.2d at 122-23. The plaintiff sought to recover from the power company, alleging that it was negligent in violating a Public Service Commission rule regarding the length of the crossing span. Id. at 79, 24 S.E.2d at 123. The court found that the power company was not liable for the injury caused by the intervening act of the truck driver because the power company's negligence "was a remote and not a proximate cause of [the injury]; *it merely brought about a condition and was not a concurrent proximate cause of the injuries.*" Id. at 86, 24 S.E.2d at 126 (emphasis added).

In Parks, this Court addressed whether a defendant's alleged negligence in failing to provide security to patrol its grounds proximately caused the injuries she received when a third party struck her in the head with a billiard ball in the parking lot. 345 S.C. at 491, 548 S.E.2d at 609. Reversing the lower court, this Court found insufficient evidence that the defendant's failure to break up the fight proximately caused her injury. Id. at 500, 548 S.E.2d at 614. This Court reasoned that the nightclub took reasonable security precautions and no evidence established that the nightclub had actual or constructive notice of a problem. Id. at 499, 548 S.E.2d at 613.

This Court's decision in Mellen provides a clear, recent explanation of the proof required for a plaintiff to overcome the intervening criminal act as the true proximate cause of injury. When leaving a bar as it was closing at 2 a.m., the defendant made rude comments to the plaintiff, grabbed at his girlfriend, and shoved him in the back, instigating a fracas during which a third party hit the plaintiff on the head with a bottle, fracturing his skull. Mellen, 377 S.C. at 269-73, 659 S.E.2d at 241-43. In affirming the defendant's liability, this court found that "[b]ut for [the defendant's] action, there would have been no brawl and no injury. . . . [Thus,] the altercation and actions therein were the natural and probable consequences of [the defendant's] *initiation of the fight* under the attendant circumstances." Id. at 286, 659 S.E.2d at 249 (emphasis added). The defendant was not insulated from liability because "[t]he intervention of someone hitting [the plaintiff] with the bottle did not break the sequence or causal connection between [the defendant's] *instigation* of the bout and [the plaintiff's] injury." Id.

Although South Carolina courts have not addressed the intervening act rule under the specific facts of this case, the cases above establish that BOA is not liable for Mrs. Unrue's theft because it was neither a probable nor a natural consequence of the error in opening the accounts. Additionally, other jurisdictions have applied the intervening criminal act rule under similar facts and found that the intervening act, not the defendant's misconduct, proximately caused the injury.

In Dolan Title & Guaranty Corp. v. Hartford Accident & Indemnity, 395 So. 2d 296 (Fla. Dist. Ct. App. 1981), a title company was supposed to issue its check for a real estate closing as payable one-half to the guardian individually and one-half to him, as guardian for his incompetent spouse. Instead, the title company mistakenly issued

the check payable to the guardian in his name only, and he deposited the funds in his own account and misappropriated them for his own purposes. Id. at 297. The plaintiff, as surety for the bonds, sought to recover from the title company, alleging that its negligence in handling the disbursement check caused the loss of the money. Id. at 297-98.

The court held that the guardian's act of stealing was not foreseeable as a matter of law and did not proximately cause the loss. "A foreseeable consequence is one which a prudent man would anticipate as *likely to result* from an act [T]hose consequences that happen so frequently that they may be expected to happen again and are, therefore, probable consequences. . . . Foreseeable consequences are *not* "what might possibly occur." " Id. at 299 (quoting Firestone Tire & Rubber Co. v. Lippincott, 383 So. 2d 1181, 1182 (Fla. Dist. Ct. App. 1980)) (emphasis added). The court found that the probate court obviously deemed the guardian worthy of appointment, and by virtue of the court order, the law entrusted the guardian with the property of the incompetent spouse and presumed he would fulfill his role properly. Id. There was also insufficient evidence to put anyone on notice that the guardian would conduct himself in a manner other than what was required of him as court-appointed guardian. Id.

Under these circumstances, the court held that "[the guardian's] misappropriation of funds was not reasonably foreseeable; . . . his acts were merely possible and not probable." Id. "The 'probable' is that a guardian will live up to his oath." Id. at 300. Thus, the court reversed the judgment against the title company, finding it insulated from liability due to the intervening criminal act of the guardian.

Id.; see also Land Title of Cent. Fla., LLC v. Jimenez, 946 So. 2d 90, 93 (Fl. Dist. Ct. App. 2006) (finding that buyer could not recover lost profits because of title company's mistake in failing to include a mineral rights reservation in the deed description because the loss was not "likely to result" from the mistake, and foreseeability does not encompass consequences that "might possibly occur"); Pacelli v. Kloppenberg, 382 N.E.2d 570, 571 (Ill. App. Ct. 1978) (finding closing attorney not liable for its alleged negligence in allowing real estate company to hold the closing funds, which the owner of the company fraudulently converted for his own use, because the defendant had no reason to question his honesty and the fiduciary's criminal act was not "likely to happen").

In re Application of Knox, 476 N.Y.S.2d 664 (N.Y. App. Div. 1984), aff'd, 477 N.E.2d 448 (N.Y. 1985), also addressed a similar issue. There, the successor guardian filed suit against the bank, alleging that it was liable for misappropriation of the minor's funds. Id. at 665. The former guardian, who was also the minor's father, deposited a check payable to "Paul E. Tyler, Sr., guardian of property of Robert Daniel Tyler" into his personal account, and not a trust account. Id. The father subsequently used the funds for his own purposes. Id. Although the bank employees failed to examine the minor's letters of guardianship, which required the funds be deposited in a joint account, the court held that the bank's mistake did not provide a basis for liability. Id.

When dealing with a fiduciary, a bank "is not bound to inquire whether the fiduciary is applying the fund to the purposes of the trust, unless the bank has some notice of threatened misappropriation, and, with that notice, aids in the misappropriation." In the absence of

such notice, the bank has a right to presume that the fiduciary will apply the funds to a proper purpose.

Id. (quoting Clarke v. Pub. Nat'l Bank & Trust Co., 181 N.E. 574, 575 (N.Y. 1932)) (internal citations omitted). Thus, the court reversed the judgment against the bank. Id. at 665-66; see also Brown v. Flushing Fed. Sav. & Loan Ass'n, 491 N.Y.S.2d 411, 411-12 (N.Y. App. Div. 1985) (finding that the bank was not liable for the executor's misappropriation of estate funds because no evidence showed that the bank had notice of the diversion and had a right to presume the executor would apply the checks to their proper purpose).⁷

In Woudenberg Leasing Co. v. ITT Corp., 767 P.2d 733 (Ariz. Ct. App. 1988), the court considered whether the facilitator in a car sale was liable to the car's owner for a third party's theft of the sale proceeds. Id. at 734. Hovey, the president of a classic car company, sold a Bentley to Woudenberg Leasing Co., which leased the car back to Hovey. Id. at 733-34. Hovey obtained permission to sell the car through an intermediary, ITT Corporation. Id. at 734. Woudenberg provided its authorization and required price in a writing. Because no auction offer met the reserve price, Hovey separately arranged to sell the car to the highest bidder for less than he was authorized to sell it. ITT completed the paperwork and received a commission for the sale. Id. Hovey, who had been in business for some time and had no history of prior misbehavior, subsequently embezzled the sale proceeds. Id.

⁷See also First Am. Bank v. Dole, 763 F.2d 644, 650 (4th Cir. 1985) (holding that the duty of a Virginia depository bank is limited as follows: "Every time the word trustee, agent, or executor appears upon a check or draft, it is not the duty of the bank to make inquiry. To place the burden of supervising all such accounts upon a bank of deposit would be unreasonable. . . . When the bank has no actual or constructive notice of fraud or misdoing on the part of the fiduciary, who is one of its depositors, if the bank, acting in good faith, merely credits the personal account of the fiduciary with the checks, this does not make the bank liable if the fiduciary afterwards misappropriates the deposit.") (quoting 3A Michie's Jurisprudence Banks & Banking § 58 (1976)).

Woudenberg sought to recover the misappropriated funds from ITT, alleging that it was negligent in handling the sale without possession of the certificate of title as required by statute and in completing the sale for less than the amount authorized by the letter. Id. The court held that, even assuming ITT saw the letter and was charged with knowledge of the sales restriction, ITT was not liable because Hovey's misappropriation of the funds was not foreseeable:

If we were to hold that theft is foreseeable simply because it sometimes occurs, we would be imposing a duty to insure on those giving money to persons for transmittal to the owner. Something more than the possibility of misappropriation is necessary; there must be facts from which a substantial risk is created.

Id. at 734-35 (citing Dolan Title & Guar. Corp., 395 So. 2d at 296).

In Reagin, the North Carolina District Court granted the defendants' request for judgment notwithstanding the verdict, finding they did not proximately cause the plaintiff's injuries. Reagin v. Terry, 675 F. Supp. 297, 302-03 (M.D.N.C. 1986), aff'd, 829 F.2d 36 (4th Cir. 1987). There, the plaintiff was robbed at gunpoint outside a Shell service station. Id. at 299, 302. In analyzing foreseeability and proximate cause, the court noted evidence of the following acts which the jury could reasonably conclude constituted breaches of a duty: (1) the presence of a single attendant at night when the station had a history of prior crimes; (2) the station had a missing flood light; and (3) the view in and out of the building was partially obstructed by displays at the windows. Id. at 300-02.

However, the court found that the defendants' conduct did not proximately cause the plaintiff's injury, reasoning: "It cannot be said on the basis of evidence presented at trial that Defendants' conduct actually caused Plaintiff's injuries as a

matter of fact; *neither can it be said that those injuries would not have been sustained without Defendant's conduct or failure to act.*" Id. at 302 (emphasis added). The court noted that the assailant was a criminal who had predetermined that he wanted to rob someone prior to arriving at the station. Id. Thus, "to determine that the assailant would have been deterred or thwarted by two attendants, or by additional lighting, *is to speculate about mere possibilities, rather than to find reasonable probability.*" Id. (emphasis added). The court acknowledged the plaintiff's status as "an undeniably sympathetic victim," but held that "by insisting on reasonable probability rather than mere possibility to support a verdict, the court recognizes its duty not to ignore current legal standards simply because the Plaintiff presents a sympathetic case." Id. at 303.

Applying the law to the evidence presented in this case allows for only one conclusion—Plaintiffs failed to establish either causation in fact or legal cause, both required to hold BOA liable for the loss.

As to cause in fact, Plaintiffs failed to prove that Mrs. Unrue would not have stolen the money "but for" BOA's error in the type of account created. Parks, 345 S.C. at 491, 548 S.E.2d at 609. In fact, the evidence shows the opposite—that Mrs. Unrue initiated her scheme and intended to defraud her nephew well before she walked through the doors of the BOA branch in Pawley's Island to open the first account. The following events all occurred prior to the mistakes in opening the accounts:

- Mrs. Unrue approached her sister-in-law, seeking to serve as conservator over her son's anticipated funds; it was Mrs. Unrue's idea for her to manage his money. (R. 172-75.)
- Mrs. Unrue convinced her sister-in-law to waive the bond requirement and to make this request to the probate judge. (R. 174-75.)

- Mrs. Unrue made promises to her family, her nephew, and the probate court that she would protect his money. (R. 172.)
- Although Mrs. Unrue's brother, Travis, was appointed co-conservator, she did not inform him when she received their nephew's insurance proceeds, and she forged his name on the checks on which he was a joint payee. (R. 161-62, 164-65, 177-181, 190-91, 195-99, 235; Pl. Exs. 5, 10, 11, R. 793, 798-99.)
- Mrs. Unrue did not identify her role or authority to the BOA employees and never presented any BOA employee with any of the three court documents which identified her role and authority, contrary to clear instructions she received from the probate court. (R. 262-63, 315, 323, 330, 334-35, 384, 387-90, 490.)

The only reasonable inference from these facts is that Mrs. Unrue, not BOA, initiated the events which led to and resulted in her theft of the funds. In addition, although Mrs. Unrue opened both accounts at the Pawley's Island branch, where she was known, she went to the Garden City branch to withdraw the CD funds, and then went back to the Pawley's Island branch *the same day* to deposit those funds into the custodian account. (R. 250, 254-57, 271-73, 283, 489-90; Pl. Exs. 12-13, 17, 32, R. 800-01, 808-10, 880.)

If the type of account had not given her unrestricted access to the funds, Plaintiffs did not prove, and the trial court and jury could not speculate, that she would not have elevated the level of her predetermined scheme to misappropriate the funds. See Reagin, 675 F. Supp. at 302 (holding that "it would be sheer speculation for the finder of fact to determine either that a second attendant would have deterred the robber, or would have been able to prevent him from carrying out his unlawful acts"). A critical factor here is Mrs. Unrue's status as conservator, which means *she* would be handling these funds regardless of the type of account. Even with restrictions on withdrawals in place, the money would still pass through her hands. A person

managing a minor's funds with an intent to steal them will surely find a way around the restrictions, whether through fictitious court orders approving the withdrawal, or obtaining court approval to disperse the funds to a sham payee, or by other fraudulent means. Her willingness to forge documents to carry out her criminal scheme is evidenced by her forgery of her brother's name on some of the checks. These facts simply do not demonstrate that Mrs. Unrue would not have stolen the money "but for" BOA's error in setting up the accounts. (R. 455-56, 458.)

The most that can be said of BOA's mistake is that it created a condition or circumstance presenting *an* opportunity for her to carry out her scheme, but not proximately causing the loss. See Stone, 251 S.C. at 163, 161 S.E.2d at 174 (finding defendant not liable even though its conduct "afforded *an* opportunity for the theft, [because] it was merely a circumstance and not the proximate cause") (emphasis added). Under these circumstances, the law of proximate cause holds that BOA's mistake is considered the indirect or remote cause and Mrs. Unrue's theft is the direct or proximate cause of the loss. See Mellen, 377 S.C. at 281-85, 659 S.E.2d at 247-48 (where an unintended and unforeseen criminal act of a third party occurs after the original act, the chain of causation is broken).

Although Plaintiffs' expert, Mr. Hubbs, testified that if employees follow BOA procedures, "this won't happen," (r. 566), his testimony is purely speculative and cannot satisfy Plaintiffs' burden of proof. See Young, 270 S.C. at 466, 242 S.E.2d at 677 (holding that liability cannot be premised on mere possibility, speculation, or conjecture); Dumont v. United States, 80 F. Supp. 2d 576, 580 (D.S.C. 2000) (noting that "proof of causation cannot rest on conjecture, and the mere possibility of such

causation is not enough to sustain the plaintiff's burden of proof"). Mr. Hubbs does not know Mrs. Unrue and never spoke with her, and she did not testify at trial. His testimony assumed that she would have abandoned her criminal scheme if the accounts had been set up properly, but his guess is overreaching and unsupported, especially given Mrs. Unrue's conduct prior to entering the bank. (R. 566-67, 571.) He also conceded as true that "people commit fraud against the banks all the time despite policies and procedures being in place." (R. 566.)

The evidence presented clearly indicates Mrs. Unrue's predisposition to steal the funds well before BOA's misconduct occurred. This record does not support a reasonable inference that the mistakes made by BOA employees gave rise to or instigated her scheme, such that it would not have occurred "but for" BOA's mistakes. The only reasonable inference to be drawn from Mrs. Unrue's conduct is that *she* set these events in motion.⁸ Thus, Plaintiffs failed to carry their burden of proving cause in fact, which is a required element of causation. On this basis alone, the Court should reverse the jury verdict and enter judgment for BOA.

Assuming, *arguendo*, this Court finds sufficient evidence of cause in fact, BOA is still not liable because it was not the "legal cause" of the loss, *i.e.*, the intervening criminal act was not foreseeable under the facts here. Plaintiffs' evidence fails, as a matter of law, to prove that Mrs. Unrue's theft of the minor's funds was either a *probable* or *natural* consequence of the employees' mistakes under the attendant circumstances.

⁸ The trial judge even noted that he "believe[d] the original wrongdoer was Ms. Unrue." (R. 632.)

First, Mrs. Unrue's theft of her nephew's funds was not a *probable* consequence of BOA's mistakes in creating custodian accounts, instead of conservator accounts. General knowledge that fraud occurs in the banking system and that sometimes people steal money from the bank and others is not legally sufficient to charge the bank with the notice required to avoid the intervening act rule. Plaintiffs were required to prove that BOA should have foreseen the misappropriation under the circumstances attendant here, not that it anticipates fraud generally.

In determining foreseeability, South Carolina courts rely upon evidence, or lack thereof, which shows the specific behavior of the third party and the nature of the surroundings at the time of the events. Nothing in the attendant circumstances of the events in this case supports a finding of foreseeability. There is no evidence of any conduct by Mrs. Unrue that would have alerted BOA employees of her scheme or given them reason to be suspicious. (R. 283, 319-20.) She was a known customer at the Pawley's Island branch, and there was no evidence that she had ever written a bad check or engaged in any other improper banking conduct. (R. 271-72, 283.) There is also no evidence of prior mistakes by these or any other BOA employees in opening conservator accounts. By all accounts, this was an isolated incident, and thus, did not occur in an environment where the bank should have been suspicious that Mrs. Unrue may try to steal from her blood relative, minor nephew.

The bank's reasonableness in not foreseeing her criminal conduct is corroborated by the trust the minor's own mother placed in Mrs. Unrue, by petitioning the court to appoint her as conservator and requesting waiver of the bond requirement. The probate court also found Mrs. Unrue trustworthy and qualified to serve as the

conservator over the minor's substantial sum of money, without imposing a bond requirement and without requiring her to verify the existence of a conservator banking account. (Pl. Exs. 1-4, R. 784-92; Def. Ex. 1, R. 884-85; R. 492-94, 570-71.) Both the probate court and the mother chose to assume the risks associated with waiving the bond requirement. See Young, 270 S.C. at 464, 242 S.E.2d at 676 (rejecting foreseeability in part because the plaintiff agreed to allow the third party to splice the cable, knowing the risks).

There is simply no evidence to suggest that BOA or anyone involved could have foreseen that Mrs. Unrue had calculated a scheme to steal the money her deceased brother left for his only child, flee across the country, and become a fugitive from the law. Under the attendant circumstances, these events were not a probable consequence of BOA employees opening a custodian account, instead of a conservator account.

Finally, the loss of the minor's funds was unquestionably not a natural consequence of the bank employees' error because the loss would not occur in the natural course of BOA's error alone. Absent Mrs. Unrue's criminal behavior, the funds would have merely resided in the custodian accounts, with no adverse consequence to the minor. For these reasons, the trial court erroneously denied BOA's motions for directed verdict and JNOV.

II. The Trial Court Erred in Failing to Grant BOA's Motion for a New Trial Due to Improper Admission of Evidence Regarding BOA's Size.

The trial court abused its discretion in allowing Plaintiffs to refer continuously throughout the trial to BOA as one of the largest banks in the world and the largest in the United States. (Motion in Limine, R. 897-900; R. 127-30, 148, 241, 266-67, 403-04, 545, 599, 656; Post-Trial Motion at 9, R. 910; R. 773, 780-82; Order, R. 22.)

Plaintiffs' continued reference to BOA's size bore no relevance to any issues in the case and was designed to appeal to the jury's passion and create a bias against BOA. BOA's international, gross, pretax earnings were also admitted by the trial judge into evidence. The trial court abused its discretion in allowing Plaintiffs to interject this label into the trial, and it unfairly prejudiced BOA, requiring a new trial. See Howard v. State Farm Mut. Auto. Ins. Co., 316 S.C. 445, 449-50, 450 S.E.2d 582, 584-85 (1994) (in addressing a challenge to the plaintiff's jury argument that the defendant was represented "by [the] biggest, baddest law firm in the State," the court "caution[ed] the bar that such arguments . . . should be avoided and may constitute grounds for a new trial").

III. The Trial Court Erred in Failing to Grant BOA's Motions Regarding Punitive Damages.

A. Plaintiffs failed to present clear and convincing evidence of any conduct by BOA or its employees that was reckless, willful, or in conscious disregard of the rights of others.

If this Court rejects the arguments above, this Court should still reverse the verdict as to punitive damages. Plaintiffs failed to present evidence sufficient to meet the clear and convincing threshold required to recover punitive damages. S.C. Code Ann. § 15-33-135 (Supp. 2003). Punitive damages exist to punish a defendant for conduct which is clearly "willful, wanton, or undertaken in reckless disregard of plaintiff's rights." Kuznik v. Bees Ferry Assoc., 342 S.C. 579, 611, 538 S.E.2d 15, 32 (Ct. App. 2000).

Conduct is willful, wanton, or reckless when it is committed with a *deliberate intention* under such circumstances that a person of ordinary prudence would be *conscious* of it as an invasion of another's rights. It is

the *present consciousness of wrongdoing* that justifies the assessment of punitive damages against the tortfeasor.

Cohen v. Allendale Coca-Cola Bottling Co., 291 S.C. 35, 40, 351 S.E.2d 897, 900 (Ct. App. 1986) (citation omitted) (emphasis added).

Punitive damages are not proper when the evidence demonstrates ordinary or gross negligence. See Lengel v. Tom Jenkins Realty, Inc., 286 S.C. 515, 519-20, 334 S.E.2d 834, 837 (Ct. App. 1985) (reversing an award of punitive damages, where real estate agent failed to disclose material facts to plaintiffs because the evidence showed errors of judgment, not reprehensible conduct). "Simple negligence affords no basis for an award of punitive damages." Cohen, 291 S.C. at 40, 351 S.E.2d at 900 (reversing punitive damage award against bottler where plaintiff drank entire bottled drink and then found insect in the bottom because there was "no proof of a present consciousness of wrongdoing on Allendale's part"); F.P. Hubbard & R.L. Felix, The South Carolina Law of Torts 595 (3d ed. 2004) (noting that "punitive damages are not awarded for negligence, whether simple or 'gross'").

In this case, Plaintiffs presented evidence of unintentional mistakes that occurred in an environment where BOA took numerous, adequate precautions. Based upon the evidence, the most that can be said of the employees' conduct is that they inadvertently overlooked the language on the checks, mistakenly opened custodian instead of conservator accounts, and thus, followed the procedures for opening a custodian account. The reasonableness of the employees' conduct is exemplified by Plaintiffs' own expert mistakenly using the term custodian when he meant conservator. (R. 561 (addressing whether a CD is a qualified product for a conservator account, Mr. Hubbs

testified "But you don't have that. You have a check payable to the *custodian*." (emphasis added).⁹

A "mistake" is not an intentional act, but rather, occurs through "unconsciousness, ignorance, or . . . forgetfulness, or it may be a belief of the existence of some fact, past or present, which did not or does not now exist and on which the party acted." Nat'l Bank of Newberry v. Boyd, 35 S.C. 233, 243, 14 S.E.2d 496, 497 (1892); see also Rose Lee Mfg., Inc. v. Chem. Bank, 588 N.Y.S.2d 408, 410 (N.Y. App. Div. 1992) (recognizing that "'Mistake' has been defined as 'that result of ignorance of law or of fact which has misled a person to commit that which, if he had not been in error, he would not have done, and as some unintentional act or omission or error, arising from ignorance, surprise, imposture or misplaced confidence'" (quoting 77 N.Y. Jur. 2d, Mistake, Accident, Surprise, at 332)).

"When one, without thinking, just carelessly does an act which results in an injury to another, then ordinary negligence is established. On the other hand, when a person with the thought that his negligent act may produce an injury to another proceeds to do the act, such circumstances evidence a conscious failure to observe due care."

⁹ Plaintiffs also demonstrated the reasonableness of BOA's actions, when Plaintiffs' counsel confused the legal standard for ordinary negligence with that for punitive damages on more than one occasion. First, in closing arguments, Plaintiffs presented the jury with a slide, titled "Negligence," instructing the jury that they must prove: "The defendant was negligent or careless and or reckless, willful or wanton in one or more of the alleged acts of wrongful conduct in the complaint." (Ct. Ex. 7, R. 895; R. 639-43.) The slide repeated this misstatement of the law in two places. (*Id.*). Plaintiffs' counsel confused the standard again at the post-trial hearing, by arguing that the conduct was "*grossly—just careless*, conscious disregard on how many different things these employees did wrong." (R. 769 (emphasis added).) This further illustrates mistakes that are made, such as here, which do not rise to the level of warranting punitive damages.

Weeks v. Carolina Power & Light Co., 156 S.C. 158, 169, 153 S.E. 119, 123 (1930) (quoting Wannamaker v. Traywick, 136 S.C. 21, 24, 134 S.E. 234, 235 (1926)) (emphasis added).

The trial court failed to exercise its gate-keeping responsibilities as to punitive damages because the evidence clearly showed that the BOA employees made unintentional mistakes and acted in good faith, believing they were opening the accounts properly.

[I]f defendant acts in good faith on the honest belief his act is lawful, defendant is not liable for punitive damages albeit he may be mistaken as to the legality of his act. Demonstration of a simple good faith ignorance or mistake as to the wrongfulness of the act charged, constitutes a defense to the award of punitive damages.

Ozark Wood Indus. v. First Nat'l Bank of Doniphan, 625 S.W.2d 651, 654-55 (Mo. Ct. App. 1981) (internal citations omitted) (denying punitive damages where the bank mistakenly repossessed equipment that did not belong to the defaulting borrower and stored it in a building from which it was stolen, because the bank's mistake was the "result of a good faith error or [occurred] through ignorance sans any wantonness or bad motivation at the time the taking was effected"); see also Signer v. First Nat'l Bank & Trust Co., 455 F.2d 382 (6th Cir. 1972) (holding that where a bank improperly released money to a third party, punitive damages were not appropriate because the actions were committed in good faith and did not constitute wanton, reckless, or malicious behavior); Moon v. Tower Grove Bank & Trust Co., 691 S.W.2d 399 (Mo. Ct. App. 1985) (upholding the trial court's refusal to submit the issue of punitive damages to the jury where a bank, through its attorney, garnished property based on a void default judgment and stated that "demonstration of a simple good faith mistake or

ignorance as to the wrongfulness of the act constitutes a defense to the award of punitive damages").

There is no evidence that BOA's employees engaged in a conspiracy with Mrs. Unrue; that they intended to harm the minor or anyone else; or that they had any awareness of their mistake. Neither Ms. Yourko nor Ms. Lawrence realized that the accounts should have been opened as conservator accounts until this lawsuit. There is also no evidence of complicity between BOA corporate officers and the actions of the local bank branch employees who made the mistakes. In fact, all of Plaintiffs' evidence demonstrates that BOA had all of the proper instructions in place to open this account and numerous available resources. However, in order for the bank employees to consult the manual for the requirements of a conservatorship account, or seek assistance from others within the bank, or call the help line or the legal department, they would first have to recognize that the funds were subject to a conservatorship. Plaintiffs' theory is akin to expecting a driver to stop and ask for directions when he has no idea he missed his turn and is on the wrong course. The evidence clearly shows that these employees either overlooked the word conservator on the checks bearing the title or simply confused the terms conservator and custodian in an environment where custodian accounts are common, but conservator accounts are not. In any event, Plaintiffs did not present any evidence rising to the level required to recover punitive damages.

The only reasonable inference from the evidence also shows that Mrs. Unrue acted intentionally to conceal her role and authority from BOA's employees. Although she was obligated under her appointment to provide the court documents to the bank

when she opened the conservator account, there is no evidence that she provided the documents to the bank. Thus, Plaintiffs did not present any evidence of a conscious disregard for the minor's rights on the part of BOA. See Carter v. R.L. Jordan Oil Co., 301 S.C. 84, 87, 390 S.E.2d 367, 368 (Ct. App. 1990) (reversing punitive damage award for injuries caused when a wheel came off defendant's truck, finding that, although evidence supported the conclusion that the driver did not check the cotter pins, which caused the wheel to separate, there was no evidence he acted in conscious disregard for the safety of others, and at most, his omission was simple negligence).

Numerous cases from other jurisdictions also establish that punitive damages are not proper under the facts of this case. For example, in Defenbaugh & Co. of Leland, Inc. v. Rogers, 543 So.2d 1164 (Miss. 1989), the court reversed a punitive damages award because the loan officer's conduct did not rise to the level of willful conduct. Rogers involved a loan made to an individual who had been adjudged incompetent ("N.C.M."). Id. at 1165. The loan officer was aware of the N.C.M. adjudication because the title opinion demonstrated that a guardianship existed. Id. When the loan officer asked the defendant about the N.C.M. determination, he replied that the guardianship had been removed. Id. Additionally, the defendant showed the loan officer a court order, purportedly releasing the guardianship. Id. However, when the loan company initiated foreclosure proceedings on the defendant's house, his attorney presented evidence that the N.C.M. determination still existed as to property. Id. at 1166.

On appeal, the court concluded that "Defenbaugh's actions in reviewing the appellee's loan application and granting the loan were negligent but do not rise to the

level of willful disregard for the appellee's rights and do not justify punitive damages." Id.; see also Lindsey v. Miami County Nat'l Bank, 984 P.2d 719, 721 (Kan. 1999) (holding that bank was not liable in punitive damages for repossessing the wrong car where the branch manager failed to check the VIN number as required by bank policy because his conduct did not rise to the level of wanton behavior required to recover punitive damages); Warden v. Bank of Mingo, 341 S.E.2d 679 (W. Va. 1986) (reversing punitive damages award, finding bank's mistake in issuing more disability insurance to cover loan payments than it was authorized to provide did not rise to the level necessary to recover punitive damages because a "wrongful act done under a bona fide claim of right and without malice in any form constitutes no basis for punitive damages"); Edgar v. Bank of Am. Nat'l Trust & Sav. Ass'n, 123 P.2d 885, 889 (Cal. Ct. App. 1942) (holding that where a bank mistakenly sold trust property, it was not liable for punitive damages); Schwartz v. Chatham & Phoenix Nat'l Bank of N.Y., 172 N.Y.S. 762 (N.Y. App. Div. 1918) (holding that punitive damages were not available where the bank mistakenly returned checks stamped forgery).

In Gaffney v. Community Federal Savings & Loan Ass'n, 706 S.W.2d 530 (Mo. Ct. App. 1986), the court reversed the jury's punitive damages award, finding it not supported by the evidence. The plaintiffs in Gaffney opened a trust account with defendant bank. Id. at 532. Subsequently, thirteen withdrawals appeared on the account statement, which the plaintiffs informed the bank they did not make. Id. After conducting an investigation, the bank concluded that no unauthorized transactions existed and refused to re-credit the account. Id. at 533. The plaintiffs sued the bank for the unauthorized transfers of the trust funds. Id.

In reviewing the punitive damages award, the court held that "if the defendant acted in good faith on the honest belief his act was lawful, he is not liable for punitive damages, even though he may have been mistaken as to the legality of his act." Id. at 535. The evidence revealed that the defendant charged the plaintiffs' account based on its belief that the transactions were authorized and failed to re-credit the account because it did not find any evidence of unauthorized transactions. Id. Thus, the court concluded that "[t]here was nothing in the record to indicate that defendant knew its charging of the account was wrongful when it performed this act It was later determined that defendant's actions regarding plaintiffs' account were wrongful but at the time defendant acted it did so with the belief its actions were lawful." Id.; see also Rose Lee Mfg., Inc., 588 N.Y.S.2d at 410 (finding punitive damages not justified because the bank's mistaken act of crediting another's account did not rise to the level of reckless, wanton conduct); Walker v. Gateway Nat'l Bank, 799 S.W.2d 614, 617 (Mo. Ct. App. 1990) (holding punitive damages not warranted where defendant bank, based on an incorrect understanding of the law, converted funds from a CD to cover an overdraft).

For these reasons, Plaintiffs did not, under any standard, and certainly not under the requisite clear and convincing standard, present evidence of conduct by BOA that was reckless, willful, or in conscious disregard for the rights of the minor. The trial court erred as a matter of law in submitting punitive damages to the jury and in finding the punitive award supported by the evidence. (R. 585-87; Order, R. 5-6.) This Court should reverse and vacate the punitive damages award in its entirety.

- B. Even if this Court finds some evidence of conduct by a BOA employee that was reckless, willful, or in conscious disregard for the rights of others, this Court should still vacate the punitive damages award against BOA because of its lack of complicity with their alleged conduct.

Even if this Court found some evidence that the employees' conduct rose to the level required for punitive damages, this Court should not hold BOA liable for punitive damages under these facts. A corporate defendant should not be held liable for punitive damages based on an employee's wrong unless: (1) the principle authorized the employee's wrongdoing; (2) the employee was unfit for service and the principle was reckless in employing him; (3) the employee was employed in a managerial capacity and acting within the scope of employment; or (4) the principle ratified the employee's actions after they occurred. Restatement (Second) of Torts § 909 (1979). This test is often referred to as the complicity rule or complicity doctrine. Briner v. Hyslop, 337 N.W.2d 858, 861 (Iowa 1983).

BOA did not engage in any wrongdoing that would warrant imposition of punitive damages against it under the Restatement test. First, BOA clearly did not authorize the employees to open the accounts in the manner that they did because the bank manuals instructed otherwise, and Plaintiffs maintained throughout the trial that the employees should have opened the accounts *in accordance with the bank's manual*. (R. 455-56, 460, 566.) Plaintiffs did not present any evidence that BOA as a corporation or any BOA manager was negligent in promulgating precautions, policies, or procedures. To the contrary, the evidence proved that BOA provided adequate policies and procedures, but the employees did not consult them or seek assistance from BOA's other available resources.

Second, Plaintiffs did not present any evidence that BOA was reckless in employing Ms. Yourko or Ms. Lawrence. Although this case involves mistakes they made in handling this transaction, Plaintiffs did not present any evidence that either of these employees made this mistake in handling any other transaction or that they had a history of failing to follow the bank's procedures. Plaintiffs' evidence also showed that both employees were new to their position at the time of these events and that both received training prior to assuming their duties. (R. 465.)

Third, neither employee was employed in a managerial capacity as that term is defined for purposes of applying the Restatement's complicity sections. Managerial agent refers to individuals who manage the corporation as a whole, and does *not* include persons who merely have managerial responsibilities, like the branch manager. See Mr. Furniture Warehouse, Inc. v. Barclays Am. Comm., Inc., 919 F.2d 1517, 1524 (11th Cir. 1990) (holding that an assistant vice-president was not a managing agent because he was one of twenty assistant vice-presidents, was subordinate to thirty vice-presidents and senior vice-presidents, and did not participate in the formation of company policy). Finally, there is no evidence that BOA ratified the actions of these bank employees in any way.

Application of the complicity rule to the facts of this case demonstrates a complete absence of wrongdoing by BOA as a corporation. Plaintiffs did not present evidence of anything specific that BOA should change as a result of this case.

In rejecting application of the complicity rule, the trial court incorrectly labeled it a minority view¹⁰ and relied upon four dated cases, ranging from 1931 to 1951.¹¹ (Order, R. 14-15 (citing West v. Serv. Life & Health Ins. Co., 220 S.C. 198, 66 S.E.2d 816 (1951); Kirby v. Gulf Ref. Co., 173 S.C. 224, 175 S.E. 535 (1934); Hooper v. Hutto, 160 S.C. 404, 158 S.E. 726 (1931); Williams v. Commercial Cas. Ins. Co., 159 S.C. 301, 156 S.E. 871 (1931).) Although South Carolina has not expressly adopted the complicity rule, the policy reasons underlying the rule are the same policies that punitive damages aim to serve under South Carolina law.

The purposes of punitive damages in South Carolina are two-fold; namely, to “punish the wrongdoer” and to deter “similar reckless, willful, wanton, or malicious conduct in the future.” Clark v. Cantrell, 339 S.C. 369, 378, 529 S.E.2d 528, 533 (2000). Allowing punitive damages against a corporation, absent any showing of wrongdoing, defies these stated purposes because it punishes an innocent party, and not the wrongdoer. See Restatement (Second) of Torts § 909 (noting that it would be “improper ordinarily to award punitive damages against one who is personally

¹⁰ Twenty-four jurisdictions apply a version of the Restatement (Second) of Torts § 909. See Christopher R. Green, Punishing Corporations: The Food-Chain Schizophrenia in Punitive Damages & Criminal Law, 87 Neb. L. Rev. 197, 208 (2008). Alaska, California, and Minnesota, North Carolina and Florida have adopted statutes similar to the Restatement. Id. “Cases from another seventeen jurisdictions (Colorado, Delaware, Guam, Idaho, Illinois, Iowa, New Jersey, New Mexico, New York, Nevada, South Dakota, Texas, Utah, Vermont, Virgin Islands, West Virginia, and Wyoming) follow the Restatements.” Id.

¹¹ The trial court also incorrectly noted that BOA did not preserve this issue. BOA did not refer to the complicity rule by name, but it moved for a directed verdict on the grounds that Plaintiffs failed to present sufficient evidence to sustain an award of punitive damages against BOA. (R. 573-75, 579-84.) Further, following BOA’s directed verdict motion as to punitive damages, the trial court denied the motion, reasoning, “As to [BOA], of course, the bank functions through its employees acting within the scope of their employment. So the conduct of the bank as a whole as well as the bank through the actions of its employees must be evaluated on this issue.” (R. 585.) Thus, BOA’s directed verdict motion clearly preserved this issue, by arguing against punitive damages under these facts and by the trial court’s holding that BOA could be held liable for punitive damages arising from its employees’ acts.

innocent"). If the corporation did not commit a wrong, there is nothing to deter by an award of punitive damages.

Thus, if an employer is only vicariously liable and could have done nothing to prevent the misconduct of its employee, it seems of little value to award punitive damages against the employer. In many instances there is probably little that an employer can do to prevent the employee from committing outrageous torts.

Briner, 337 N.W.2d at 865 (adopting the complicity rule).

The South Carolina District Court applied the complicity rule in Scott v. Ameritex Yarn, 72 F. Supp. 2d 587, 590 (D.S.C. 1999), where the plaintiff sued her employer for sexual harassment and constructive discharge by the plant supervisor. In deciding that the employer could not be held liable for punitive damages under the facts there, the court quoted the Restatement four-prong test contained in section 217C as providing the determinative factors. Id. at 597 (citing Restatement (Second) of Agency § 217C (1957)).¹² The court recognized that allowing punitive damages against an employer which did not engage in any wrongdoing under section 217C runs afoul of "the very principles underlying common law limitations on vicarious liability for punitive damages—that it is "improper ordinarily to award punitive damages against one who himself is personally innocent and therefore liable only vicariously.""" Id. (quoting Kolstad v. Am. Dental Ass'n, 527 U.S. 526, 544 (1999) (quoting Restatement (Second) of Torts § 909 cmt. b (1979)));¹³ see also Bryant v. Aiken Reg'l Med. Ctr.,

¹² This section is identical to the Restatement (Second) of Torts § 909.

¹³ The trial court rejected the complicity rule, citing Hill v. USA Truck, Inc., 2007 U.S. Dist. LEXIS 39197 (D.S.C. May 30, 2007). Hill is an unpublished case in which the district court noted that South Carolina has not adopted the complicity rule and that the defendant there did not point to state cases showing a trend towards the rule. As shown above, the purposes underlying punitive damages in South Carolina support application of the rule to the punitive damages award here.

Inc., 333 F.3d 536, 548-49 (4th Cir. 2003) (reversing a punitive damages award against an employer for the same reasons).

For these reasons, this Court should find that BOA did not engage in any wrongdoing sufficient to warrant an imposition of punitive damages for the mistakes of its employees, and therefore, should vacate the punitive damages award.

C. The trial court erred in finding the punitive award reasonable and rational under the evidence presented and applicable case law.

1. The required Gamble analysis does not support the award.

The punitive damages award here violates BOA's due process rights because it is "grossly disproportionate to the severity of the [conduct]" at issue, and thus, excessive. Gamble v. Stevenson, 305 S.C. 104, 112, 406 S.E.2d 350, 354 (1991). Under Gamble, the trial court was required to conduct a post-trial review and consider the following: (1) BOA's degree of culpability; (2) duration of the conduct; (3) BOA's awareness or concealment of the conduct; (4) the existence of similar past conduct; (5) likelihood the award will deter BOA or others from similar conduct; (6) whether the award is reasonably related to the harm likely to result from such conduct; (7) BOA's ability to pay; and (8) any other factors deemed appropriate. Id. at 111-12, 406 S.E.2d at 354. The trial court erred as a matter of law in applying these factors to the evidence here and concluding that they support the jury's punitive damages award.

First, as to BOA's degree of culpability, the trial court listed fourteen errors¹⁴ by the BOA employees presented at trial. (Order, R. 8.) However, as explained above,

¹⁴ As part of the fourteen errors, the trial court listed BOA's error in not keeping on record copies of the signature card associated with the CD account. The evidence does not show that the personal banker did not obtain a signature card; rather, it shows that at the time of discovery in this case, BOA did not have it. (R. 252-53 (Ms. Denning testified that "there should be a signature card for the CD when it was

the errors almost completely stem from and naturally flow from the initial, single mistake each employee made in opening the accounts. The trial court erred as a matter of law in compounding the results of the initial mistake by including the subsequent events into separate and distinct mistakes because each subsequent mistake related back to the initial determination to open a custodian account.

Ample evidence was introduced to demonstrate that BOA had more than adequate safeguards in place—training, policy and procedure manuals, computers with prompts for required information, telephone help-line, legal department, and other personnel in the branch, but no system is failsafe. Plaintiffs actually reiterated throughout the trial that BOA employed numerous precautions to safeguard against mistakes. Culpability stems from an *absence* of these safeguards, *not* a *presence* of them. On this record, the trial court erred as a matter of law in finding that culpability supported the punitive damages award.

Second, as to duration, the trial court correctly noted that the first transaction occurred on April 27, 2001, and the second occurred on May 2, 2001. The trial court then stated: "These were separate transactions with two different high-ranking employees in the Pawleys Island branch bank." (Order, R. 8.) The trial court made no determination that duration supported the punitive award. Further, Plaintiffs' theory of punitive damages was based on their argument that it would have taken a total of one

first opened" because the system automatically generates it anytime you open a CD); 425, 444-45.) In any event, this error is inconsequential. Whether a signature card existed or not bore no relation to the type of account opened and Mrs. Unrue's access to the funds.

The trial court also listed BOA's failure "to have safeguards in the review of new accounts opened to identify that additional information was needed on both of these accounts." (Order, R. 8.) The trial court's finding is not supported by any evidence because no witness testified as to any policy, procedure, or other safeguard that exists in the banking industry which BOA failed to have in place to guard against this type of mistake.

hour to open the accounts properly. (R. 672.) The trial court also noted that the "economic harm was done to the Plaintiff over a span of a total of one hour of the Bank's time." (Order, R. 12.) Thus, duration does not support the punitive award.

Third, as to awareness or concealment, the trial court concluded that the employees were "aware" that a conservator account was required because the checks contained words indicating a conservatorship. (Order, R. 8-9.) The evidence in this case is not susceptible to any reasonable inference other than the conclusion that these employees made a mistake in opening the two accounts. Plaintiffs' counsel even conceded at the post-trial hearing that no evidence exists of awareness or concealment. (R. 764 (Plaintiffs' counsel admitted they "don't have . . . anything specifically where the defendants were intentional in ignoring the words conservator on the account").) No evidence shows actual awareness or concealment, and this factor does not support the punitive damage award.

Fourth, the trial court correctly recognized that Plaintiffs did not present any evidence of similar past conduct, (Order, R. 10), and Plaintiffs' counsel conceded this fact at the post-trial hearing, (R. 765 (Plaintiffs' counsel admitted that they "do not dispute that there was no evidence presented of any other conservatorship accounts being set up improperly like this one"))). The trial court noted that one BOA representative testified that she sees restricted accounts a lot in South Carolina, and another representative testified that conservator accounts are rare. This testimony bears no relation to analysis of similar past conduct. Whether BOA houses ten thousand, one thousand, one hundred, or ten restricted accounts in South Carolina is immaterial because, whatever the number, the evidence shows only this one incident of mistakenly

placing a minor's funds in a custodian, instead of conservator, account. Thus, the punitive damages award is not supported by any similar past conduct.¹⁵

Fifth, in reviewing whether the punitive damages award will deter the defendant or others from like conduct, the trial court found that awarding one hour of pretax income was reasonably related to deterring the conduct at issue by sending BOA a "message." (Order, R. 11.) However, the trial court specifically noted that BOA provided these employees with "weeks of training in Charlotte and other locations, . . . manuals, computers, phone hot lines, constant legal support, and other individuals in their branch to ask questions." (*Id.*) Importantly, the trial court did not point to any evidence of actions that BOA should have taken or should adopt to avoid this mistake, other than directing all employees to "pay attention and be careful in following specific bank policies and procedures when dealing with court-appointed conservators holding children's money." (*Id.*) No amount of money will ensure perfection. There is also no evidence that BOA ignored any prior conduct by employees that would warrant a directive to "pay attention and be careful" beyond what is provided in training and is inherent in any job. Of the 5,900 BOA branches, there is no evidence of any other incident of creating the wrong type of account for conservator funds.

¹⁵ The trial court cited GTR Rental, LLC v. DalCanton, 547 F. Supp. 2d 510 (D.S.C. 2008); James v. Horace Mann Ins. Co., 371 S.C. 187, 194, 638 S.E.2d 667, 671 (2006); Jordan v. Holt, 362 S.C. 201, 206, 608 S.E.2d 129, 131 (2005); and Mackela v. Bentley, 365 S.C. 44, 49-50, 614 S.E.2d 648, 651 (Cl. App. 2005), none of which supports the punitive damages award under the facts here. In Mackela, the defendant repossessed a car *with knowledge at the time of repossession* that the car was not listed on the floor plan agreement. Mackela, 365 S.C. at 49-50, 614 S.E.2d at 651. James is distinguishable because the case involved attempts to conceal the wrongful acts and repeated misrepresentations, even throughout the trial. James, 371 S.C. at 194, 638 S.E.2d at 671. Jordan is also distinguishable because it involved an award of punitive damages where the defendant had ignored requests for financial information, engaged in self-dealing, sold property of the LLC without proper permission, and used LLC money to pay personal debts, among other intentional actions. Jordan, 362 S.C. at 206, 608 S.E.2d at 131. Finally, in DalCanton, the court affirmed an award of punitive damages where the defendants had intentionally engaged in a scheme to convert their employer's money. DalCanton, 547 F. Supp. 2d at 518.

If BOA is liable, deterrence exists from the actual damages alone—payment back to Cody of the money his aunt stole, which she should be repaying. BOA did not benefit from the receipt of the minor's funds, and neither did the BOA employees.¹⁶ On these facts, deterrence does not support the punitive damages award.

Sixth, the trial court found the award reasonably related to harm likely to result from these mistakes because the award was a one hour penalty for the one hour it would have taken BOA to open the accounts properly. (R. 600-02 (Oliver Wood testified that BOA earns \$1,538,250 per hour in total pretax income).) One hour of BOA's total pretax earnings, including its international banking operations, is arbitrary and bears no relation to the mistake made in opening the accounts at the Pawley's Island branch or the harm suffered by the minor. See Webb v. CSX Transp., Inc., 364 S.C. 639, 656-57, 615 S.E.2d 440, 450 (2005) (finding that the punitive damages award was not related to the harm suffered and granting a new trial because "improper admission of a single piece of unrelated evidence" requires reversal, and the trial court improperly allowed consideration of acts in other jurisdictions); see also Durham v. Vinson, 360 S.C. 639, 652-53, 602 S.E.2d 760, 766-67 (2004) (granting a new trial on punitive damages based on the prejudicial effect of unrelated evidence). The trial court erred in finding that BOA's international earnings figure is reasonably related to the time BOA would have spent opening accounts in Pawley's Island, South Carolina. See State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 418 (2003) (holding that due process concerns are "heightened when the decisionmaker is presented . . . with

¹⁶ Although Plaintiffs presented testimony that BOA had policies that provided employees with certain financial incentives for new business, no evidence established that any BOA employee received any bonus compensation for the transactions at issue. (Order, R. 22.)

evidence that has little bearing as to the amount of punitive damages that should be awarded”).

Seventh, the trial court found that the evidence demonstrated BOA’s ability to pay based upon Dr. Wood’s testimony of the bank’s earnings as of the end of the second quarter of 2008. (R. 600-02; Order, R. 13.) The trial court erred as a matter of law in considering BOA’s entire pretax income, which includes earnings from its international operations, as supporting the punitive damages award. Instead, the court should have limited consideration to South Carolina banking operations.

Finally, the trial court erred in finding that the harm suffered here is difficult to detect and easy to conceal, relying upon “the conflicting evidence on the number of conservatorship accounts that it has in South Carolina.” (Order, R. 13.) The quantity of restricted accounts bears no relation to the court’s inquiry, which is whether the *injury* is difficult to detect and easy to conceal. See Campbell, 538 U.S. at 425 (“positing that a higher ratio *might* be necessary where ‘the *injury* is hard to detect’” (quoting BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 582 (1996) (second emphasis added))). The loss of the minor’s funds through theft is not difficult to detect. There is also no evidence to suggest that BOA attempted to conceal the error in the accounts.¹⁷

For these reasons, this Court should find that the trial court erred as a matter of law in finding the punitive damages award supported by the Gamble factors.

¹⁷ The trial court also found that “the relatively low size of compensatory damages that would exist in most Uniform Gifts to Minors Act and other beneficiary-type restrictive accounts is low enough that compensatory damages alone would often be insufficient to making suing for compensatory damages practical.” (Order, R. 13.) The trial court’s finding is hypothetical and an improper basis to support punitive damages in this case because the compensatory damages award here is not low, but instead, is substantial. The trial court is also wrong to refer to UGMA as a beneficiary-type restrictive account because those accounts are not restricted. (R. 550-51.)

2. The required analysis under United States Supreme Court precedent does not support the award.

The trial court also erred as a matter of law in finding the punitive damages award fits within the constitutional parameters set by the United States Supreme Court in Campbell, Gore, and Haslip. See Campbell, 538 U.S. at 408; Gore, 517 U.S. at 559; Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1 (1991). South Carolina follows the analysis set forth in these cases when determining whether a punitive damages award violates a defendant's due process rights. Atkinson v. Orkin Exterminating Co., 361 S.C. 156, 164-71, 604 S.E.2d 385, 389-93 (2004).

This Court must conduct "[e]xacting appellate review [to] ensure[] that [the] award of punitive damages is based upon an 'application of law, rather than a decisionmaker's caprice.'" Campbell, 538 U.S. at 418 (quoting Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 436 (2001)). Under a *de novo* standard of review, this Court must consider the following three guideposts in determining whether the punitive damages award is constitutional: "(1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases." Id.

First, the degree of reprehensibility is the most important factor in the due process review of punitive damages. Gore, 517 U.S. at 575. Applying the indicia of reprehensibility set forth in Campbell to the facts of this case demonstrates that BOA did not engage in any reprehensible conduct: (1) the minor suffered purely economic loss, and not physical harm; (2) BOA's conduct did not exhibit an indifference to or

reckless disregard for the health or safety of others; (3) there was no evidence of the minor's financial vulnerability; (4) the mistake in placing this minor's funds in the wrong type of account was an isolated incident, and there was no evidence that BOA had ever made this mistake as to conservator funds of any other ward; and (5) the minor's harm was the result of a mere accident, and not intentional malice, trickery, or deceit. See Campbell, 538 U.S. at 419; see also Atkinson, 361 S.C. at 167, 604 S.E.2d at 391 (applying these considerations to the court's determination of the degree of reprehensibility under South Carolina law).

The trial court found that reprehensibility supported the punitive damages award, referring to its analysis of culpability under Gamble. (Order, R. 15.) For the reasons outlined above under the Gamble analysis and the Campbell considerations, BOA's conduct was neither culpable nor reprehensible under these facts.¹⁸

Second, in reviewing the disparity between the actual damages suffered and the punitive damages imposed, the trial court erroneously found that the ratio of 7.69:1 is not grossly excessive under the facts of this case.¹⁹ (Order, R. 17.) Although the United States Supreme Court does not impose a bright-line ratio or mathematical

¹⁸ The trial court also noted that the jury could have interpreted BOA's position at trial as disingenuous because the corporate representative "admitted their employees made a mistake, and apologized to the Plaintiff from the stand; however, she never admitted liability." (Order, R. 16.) The unwillingness of the corporate representative to admit *liability* for the mistake does not suggest reprehensibility of any kind in a case where the loss was proximately caused by the minor's aunt and conservator, who calculated and successfully implemented a scheme to steal his funds. Additionally, neither the testimony by the personal banker and branch manager that they did not remember these transactions five years later nor BOA's argument that its employees were confused or misled by the payee line on the checks supports a finding of reprehensibility.

¹⁹ The trial court also upheld the ratio based on its conclusion that the "jury reasonably calculated the time it would have taken to process this child's transaction correctly" and "penalized this Defendant with that amount of its pretax income." (Order, R. 17.) The trial court erred in allowing the jury to impose this punishment, as explained above under the Gamble analysis.

formula to limit the constitutional boundaries for punitive damages, the Court continues to recognize “that an award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety.” Campbell, 538 U.S. at 425 (citing Haslip, 499 U.S. at 23-24, and Gore, 517 U.S. at 581). Furthermore, when actual damages are substantial, as they are in this case, “then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee.” Id.; see also Exxon Shipping Co. v. Baker, 128 S. Ct. 2605 (2008) (reversing punitive damages awarded in a maritime case, relying upon the analysis set forth in Gore and Campbell, as well as other authorities, and holding that a 1:1 ratio would be the “fair upper limit in such maritime cases”).

Third, as the trial court found, the punitive damages award is not justified by comparing it to any civil or criminal penalties for similar conduct because BOA is not subject to any penalty for a single act of setting up an account improperly. (Order, R. 18.) Thus, none of the guideposts supports the constitutionality of the punitive damages award in this case.

The trial court also erred in relying upon South Carolina cases that uphold punitive damages awards because all are distinguishable from the facts of this case, and thus, do not support the award here as rational, reasonable, or constitutional.²⁰

²⁰ The following cases involved intentional actions: Frazier v. Badger, 361 S.C. 94, 98-99, 603 S.E.2d 587, 589 (2004) (upholding punitive damages in a case involving intentional conduct, retaliation, and sexual harassment); RRR, Inc. v. Toggas, 378 S.C. 174, 179, 662 S.E.2d 438, 440 (Ct. App. 2008) (upholding punitive damages based on intentional conduct designed to interfere with the plaintiff's business as well as harassment), aff'd, 381 S.C. 490, 674 S.E.2d 170 (2009); Collins Entm't Corp. v. Coats & Coats Rental Amusement, 355 S.C. 125, 141, 584 S.E.2d 120, 128 (Ct. App. 2003) (upholding punitive damages where there was intentional, “calculated” interference with the contract), aff'd, 368 S.C. 410, 629 S.E.2d 635 (2006); Lister v. NationsBank of Del., 329 S.C. 133, 151, 494 S.E.2d 449, 459 (Ct. App. 1998) (upholding punitive damages for breach of contract accompanied by a fraudulent act where intentional conduct was involved). Mackela, Jordan, and James are distinguishable, as explained

Finally, and based on the above, if this Court determines that the trial court's submission of punitive damages to the jury was proper, this Court should still grant a new trial, finding the punitive damages award excessive, unreasonable, arbitrary, based on inappropriate evidence, and in violation of due process guarantees. Alternatively, and at minimum, this Court should reduce the award to a ratio of 1:1.

CONCLUSION

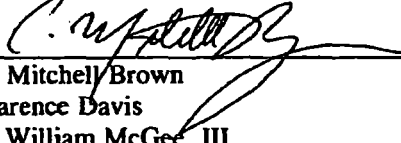
For the foregoing reasons, this Court should reverse and enter judgment for BOA. Alternatively, this Court should reverse and grant a new trial. If this Court disagrees with the above, the Court should still vacate the punitive award in its entirety, finding it unsupported by the evidence presented and applicable law. If the Court finds punitive damages warranted, this Court should find the award excessive and grant a new trial or reduce the award to a ratio of 1:1.

[Signature page attached.]

^{supra} in note 15. Additionally, the trial court cited Holroyd v. Requa, 361 S.C. 43, 67, 603 S.E.2d 417, 429 (Ct. App. 2004), but that case involved an award which was only 0.5 times the actual damages.

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October 8, 2009

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM WILLIAMSBURG COUNTY
Court of Common Pleas

RECEIVED

Clifton B. Newman, Circuit Court Judge

SC Court of Appeals

Case No. 2003-CP-45-207

Cody P., by and through his Conservator
Kelly H. Kelley, and his natural and legal guardian
Elizabeth Powell, ... Respondents,

v.

Bank of America, N.A., Karen P. Unrue, and Travis
Powell, ... Defendants.

Of Whom Bank of America, N.A. is Appellant.

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the Final Brief complies with Supreme
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Powell, ...

Respondents,

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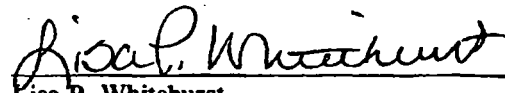
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STATEMENT OF THE ISSUES

I. Did the Co-Conservator's subsequent misappropriation of the child's funds from his accounts break the chain of proximate causation thus insulating Bank of America from liability for its grossly negligent conduct?

II. Did the Trial Court err in failing to order a new trial due to a reference to the size of Bank of America?

III. Was clear and convincing evidence presented by the plaintiff to justify the trial court's submission of punitive damages to the jury?

IV. Does the punitive damages award rendered by the jury pass the required constitutional and state law review standards?

STATEMENT OF THE CASE

The Respondent concurs with the Appellant's Statement of the Case and would add that the Plaintiff-Respondent filed the subject action on May 2, 2003, (Complaint) alleging claims against the co-conservators and Bank of America, N.A. ("the Bank") arising from the mishandling of Cody F 's funds. A portion of the case was severed upon motion of the Bank and heard in 2005. The severed action was the subject of an appeal, Powell v. Bank of Am., 379 S.C. 437, 665 S.E.2d 237 (Ct. App. 2008), which stayed the trial of the issues argued herein. Upon dismissal of that appeal, the trial was commenced on October 6-9, 2008, before a jury. Co-Defendant Karen Unrue Powell was in default, and the judgment against her was obtained at a later date. (R. p. 716, lines 15-22).

STATEMENT OF FACTS

On November 19, 2000, Steven Powell died tragically when he fell while at work at the Nucor Plant in Georgetown. (R. p. 185, line 21-R. p. 186, line 3). He left behind a young wife, Elizabeth and one child -- his five-year-old son Cody P . (R. p. 153, lines 13-15; R. p. 185, lines 13-14; R. p. 187, lines 12-14). The Powells resided in the Andrews area of Williamsburg County. (R. p. 784). After her husband's death, Elizabeth Powell relied heavily on her sister-in-law Karen Michelle Powell, now known as Karen Unrue, for financial advice as the

entire family had done in the past. (R. p. 189, lines 18-25). Travis Powell, the decedent's younger brother, took an active role in being a substitute "father" to Cody. (R. p. 189, lines 7-10).

Due to Steven Powell's untimely death, Cody became entitled to substantial life insurance. (R. p. 784; R. pp. 793-800). Because he was a minor, the insurance companies required that he have a conservator appointed through the Probate Court to manage his assets. (R. pp. 784-788). Because Elizabeth Powell was emotionally distraught and had no skills at managing money, she consented to her sister-in-law and brother-in-law serving as Co-Conservators for her son Cody. (R. pp. 784-788; R. p. 208, line 23-R. p. 209, line 3). The informal "agreement" was that Karen Powell would be the conservator managing the assets of the child and that Travis Powell would be responsible for acting as a "father figure" for Cody. (R. p. 186, line 17-R. p. 187, line 11; R. p. 191, lines 5-9). On March 13, 2001, Karen Michelle Powell and Travis Powell petitioned the Probate Court for Williamsburg County to be appointed as Co-Conservators for the minor Cody. (R. pp. 784-788).

An attorney, Donna V. Sands represented the petitioners, and a guardian ad litem, Beatrice Whitten, was appointed for Cody. (R. pp. 784-788; R. pp. 789-790). A hearing was held before the Williamsburg County Probate Judge Rudell M. Gamble on March 13, 2001, at which time the petitioners requested that bond be waived, and the Court granted their request on the stipulation that no withdrawals would be made without court order. (R. pp. 789-790).

In an attempt to insure that no withdrawals would be made without court order, Judge Gamble included language in the Probate Court Order, and on both the Certificate of Appointment and Fiduciary Letters clearly stating "No withdrawals without court order." (R. pp. 789-790; R. p. 791; R. p. 792). Karen Powell then obtained seven checks totaling \$252,447.51, representing life insurance benefits payable to the child Cody. (R. pp. 793-799). Each of the checks presented read as follows:

Date	Payee	Amount
April 13, 2001	Karen and Travis Powell, Co-Cn For Minor Cody P	\$99,000.00
April 12, 2001	KAREN POWELL, AS CONSERVATOR OF CODY P, A MINOR	\$4,819.73
April 13, 2001	KAREN POWELL, AS CONSERVATOR OF CODY P, A MINOR	\$253.67
April 20, 2001	KAREN POWELL, AS CONSERVATOR OF CODY P, A MINOR	\$253.67
April 11, 2001	KAREN POWELL, AS CONSERVATOR OF CODY P, A MINOR	\$253.67
April 13, 2001	Karen and Travis Powell, Co-Cn For Minor Cody P	\$33,000.00
April 16, 2001	T. POWELL AND K. POWELL CO-CONSERVATORS FOR CODY P, A MINOR	\$114,866.77

Karen Powell Unrue, without Travis Powell, then took these seven checks to the Pawleys Island branch of Bank of America. Travis Powell testified that he never saw the checks, endorsed the checks or went to Bank of America to deal with the checks. (R. p. 161, line 23-R. p. 162, line 1; R. p. 164, line 5-R. p. 165, line 10). Bank of America employee, Lee Ann Yourko, was the Personal Banker in charge of opening new accounts who used these seven checks to open an unrestricted Certificate of Deposit titled "Karen M. Unrue, Guardian Cody P" (R. p. 800; R. p. 880). Travis Powell's name was not on this account, and the tax ID number used on this CD was Ms. Unrue's. (Id.) Ms. Yourko, who also made loans, had her own office and did not do teller work. (R. p. 274, line 18-R. p. 275, line 8). Ms. Yourko testified that she opened "the account that she asked for," which apparently was a Certificate of Deposit, with the funds given her by Karen Powell Unrue. (R. p. 800; R. p. 273, lines 14-R. p. 274, line 1). She stated that she did what the customer asked her to do. (R. p. 302, lines 19-22). Ms. Yourko was familiar with the term "conservator" when she was a bank employee, and also she understood that although the bank could not accept checks for deposit that were not endorsed properly, she did not consider it to be her responsibility to make sure the checks were endorsed properly or by the appropriate individuals. (R. p. 284, lines 7-19; R. p. 304, lines 14-18; R. p. 309, line 1-R. p. 310, line 5; R. p. 313, lines 24-25). She stated clearly that she would

not have opened this Certificate of Deposit if Karen Unrue Powell had told her that she was a conservator and was to open a restricted account. (R. p. 330, lines 14-19). Although she could not state whether or not she actually received a commission for opening this particular account, a \$250,000.00 deposit, if it were a new account, it would have gotten her some points¹. (R. p. 282, line 10-R. p. 283, line 3).

Just one week later, on April 27, 2001, Karen Unrue took another check in the amount of \$253.67 made payable to Karen M. Powell as Conservator for Cody. P . . . endorsed it, and then used it to open another account for Cody at the Pawleys Island Branch. (R. p. 804). This time, Karen Unrue dealt with Branch Manager, Meredith Lawrence, who was Ms. Yourko's supervisor. (R. p. 279, lines 7-9; R. p. 339, lines 11-16). Ms. Lawrence set up an unrestricted savings account titled "Karen M. Unrue-Cust. Cody P -UGMA" and used Karen Unrue's social security number for the tax ID number. (R. pp. 802-803). This account also did not have Travis Powell's name on it and had no restrictions. (R. pp. 802-803). Ms. Lawrence, the Branch Manager, testified that "when a customer comes in, you listen to the customer. So unless she specifically told me that I am conservator for this account and that means something special, I would have proceeded as if it was a regular check." (R. p. 354, lines 3- 7). When asked about bank procedures, she stated "Well, I mean, first of all, the procedures are only as good as what the customers ask you for in the first place. So, depending on what the customer comes in and wants to do with their money, you then proceed, you know, through the appropriate tasks. I don't know what happens if you don't do it correctly." (R. p. 363, line 16- R. p. 364, line 2). She also testified that it takes generally about thirty minutes to set up a new account and go through the necessary paperwork. (R. p. 362, lines 20-23). Both of the these employees testified that they had bank manuals available to them, a computer system that prompted them

¹ BOA employee Yourko testified that there was an incentive program whereby the employees received commissions based on a "point" system, and points could be acquired through new accounts.(R. p. 281, lines 1-23.)

through the process of opening accounts, a help-line, and other employees they could call for assistance. (R. p. 285, lines 3-22; R. p. 286, line 11-R. p. 287, line 5; R. p. 290, line 8-R. p. 291, line 19; R. p. 301, lines 2-18; R. p. 342, line 11-R. p. 343, line 21).

No question exists that the checks were not handled properly, and that neither of the accounts was opened properly. One of the Bank's designated representatives testified that both the Personal Banker and the Branch Manager made a "huge mistake." (R. p. 463, lines 1-2). The Plaintiff's expert witness Robert Hubbs, a retired BB&T executive, testified extensively regarding the multitude of errors committed by these two front line employees. He testified to a reasonable degree of banking certainty based upon his review of the Bank of America Platform Assistance Manual, a "book" to which each of its front line employees readily had access, Travis Powell should have been present to negotiate the checks containing his name, and the authority of both Karen Powell and Travis Powell as "conservators" would have to be verified before accepting the checks. The endorsements on the back of the checks would have to match the payee on the front of the checks, and the differing payee designations on the checks would have to be resolved. The bank would have to see an original certified copy of the court order appointing the conservators and retain a copy. Regarding setting up each account, each of the accounts would have to be eligible accounts for restricted conservatorship accounts, and certificates of deposit were not. A signature card would be generated and signed for each account, and one has not been presented here for the certificate of deposit. (R. p. 252, line 2-R. p. 253, line 10). The accounts would have been titled as a restricted conservatorship account, would have used the minor's tax identification number for income reporting, and would have had remarks noted on the computer screen that restrictions on such an account exist. (R. pp. 530, line 10- p. 542, line 7; R. pp. 843-847; R. pp. 848-861; R. pp. 862-868; R. pp. 869-879).

Both of the Bank's two designated representatives Floretta Denning and Elizabeth Reeves, concurred with the Plaintiff's expert Robert Hubbs that the accounts had not been set up

properly. (R. p. 263, lines 1-R. p. 265, line 18; R. p. 461, line 4-R. p. 467, line 4). Mrs. Denning testified that there was nothing on the checks that would not indicate to the Bank employee that they were made out to conservators. She specifically stated "They were made out to conservators. There's nothing that was misconstrued here. It's obvious who they were made out to." (R. p. 253, lines 11-23). She also testified to all of the safeguards in place to make sure that account is not opened incorrectly that failed. "You have the manuals that are right at their fingertips. You have some personnel, a person directly in the bank, and you have a direct line to the legal support unit that can assist them with any legal document they have right then." (R. p. 265, lines 11-15).

Mrs. Reeves testified that the bank's responsibility is to protect people's money. (R. p. 396, line 18-R. p. 397, line 5). She confirmed that people expect that their money will be protected and taken care of in a bank stating that the Bank has vaults, security cameras, locks, security systems, and policies and procedures to protect people's money. (R. p. 397, line 12-R. p. 398, line 22). She testified that the Bank's customers pay for that protection in effect when the money goes in and that it is perfectly foreseeable to a bank that people are going to steal and take advantage of your depositors if they can. She testified further that the bank's duty and obligation to protect their customers, and that when children are involved the Bank has a higher level of awareness and protections built in. (R. p. 399, line 3-R. p. 400, line 2). She stated that it would be an oversight of a duty owed to a customer for the bank employee to ignore what was written on a check and ignore the bank's policies and procedures. (R. p. 423, line 2-R. p. 424, line 2). She also stated that it would have taken about thirty minutes to set up an account correctly. (R. p. 501, line 24-R. p. 502, line 2).

Karen Powell Unrue made the deposit of \$252,447.51 of Cody's money in the Certificate of Deposit at Bank of America on April 26, 2001. (R. p. 800). On June 25, 2001, she closed the Certificate of Deposit and transferred the entire balance of \$253,991.50 to an existing account

8085 entitled Karen M. Unrue, Cust. Cody Pr – UGMA, which was the account set up by BOA employee Meredith Lawrence. (R. p. 801; R. p. 802).

Once the funds arrived at the UGMA account, they were then accessed by Karen Unrue on several occasions by transfers to account 9281. This account (9281) was entitled Karen M. Unrue d/b/a Carolina Bookkeeping and the authorized signatories were Karen Unrue and Jay Unrue. (R. pp. 823-824). Cody's money flowed from Account 8085 to Account 9281 on a variety of dates, and then to a bank in Colorado, all the while being used by Karen Unrue for her own distinct purposes unrelated to Cody Pr. (R. pp. 805-822; R. pp. 825-839).

Some of Cody's funds were recovered. Powell v. Bank of Am., 379 S.C. 437, 665 S.E.2d 237 (Ct. App. 2008). The funds recovered offset against his remaining actual damages resulted in net actual damages in the amount of \$205,735.37, to which the parties stipulated at trial. (R. p. 597, lines 11-16). The Plaintiff's expert Oliver Wood, PhD, economist, testified as to the Bank's pretax income based on the June 30, 2008, balance sheet as published. (R. p. 597, line 23-R. p. 602, line 17). He testified that their hourly pretax income as \$1,538,250.00. (R. p. 602, lines 8-11). The jury returned a verdict in Cody Pr.'s favor for actual damages in the amount of \$205,735.37, and punitive damages in the amount of \$1,583,000.00. (R. pp. 24-25).

ARGUMENT

I. Standard of Review

The issues before this Court have differing standards of review. On review of a denial of a motion for judgment notwithstanding the verdict, the court must view the evidence, and all its reasonable inferences, in the light most favorable to Cody Pr., the party resisting the motion, and most strongly against the Bank. This court does not weigh the evidence or decide matters of credibility. It must also eliminate from its consideration all evidence contrary to or in conflict with the evidence favorable to Cody Pr. and give him the benefit of every favorable inference the facts reasonably suggest. Collins & Sons Fine Jewelry, Inc. v. Carolina Safety

Systems, Inc., 296 S.C. 219, 371 S.E.2d 539 (Ct. App. 1988).

The standard of review on a denial of a motion for mistrial is the decision of the trial judge will not be reversed on appeal absent an abuse of discretion. Mishoe v. OHG of Lake City, Inc., 366 S.C. 195, 201, 621 S.E.2d 363, 366 (Ct. App. 2005). The movant must show not only error but resulting prejudice. Id.

The standard of review for this Honorable Court regarding the punitive damages award is also deferential to the trial judge. Because the trial judge and jury were able to hear all of the evidence and were more familiar with the evidentiary atmosphere at trial, the award of punitive damages is left almost completely to the discretion of the jury and trial judge. Mazloom v. Mazloom, 382 S.C. 307, 675 S.E.2d 746 (Ct. App. 2009) citing Jordan v. Holt, 362 S.C. 201, 608 S.E.2d 129 (2005). If punitive damages are awarded, the trial court must review the award as required by Gamble v. Stevenson, 305 S.C. 104, 406 S.E.2d 350 (1991). However, the amount of actual and punitive damages remains largely within the discretion of the finder of fact, as reviewed by the trial judge. Id.; Mishoe, 366 S.C. at 201, 621 S.E.2d at 366 (Ct. App. 2005). This Court's review is limited to correction of errors of law. Id. citing Welch v. Epstein, 342 S.C. 279, 536 S.E.2d 408 (Ct.App. 2000). The trial court's punitive damages finding must be affirmed if any evidence reasonably supports the court's factual findings. Id. citing Austin v. Specialty Transp. Servs., Inc., 358 S.C. 298, 314, 594 S.E.2d 867, 875 (Ct. App. 2004).

II. The Conservator's Subsequent Acts of Misappropriation of the Child's Funds From His Accounts Does Not Break the Chain of Proximate Causation and Insulate Bank of America From Liability For Its Wrongful Conduct.

Proximate cause is nearly always a question of fact for determination by the jury. It may be decided as a matter of law only in rare or exceptional cases. Collins & Sons, 296 S.C. at 226, 371 S.E.2d at 543; Mellen v. Lane, 377 S.C. 261, 279, 659 S.E.2d 236, 245 (Ct. App. 2008) (holding that "trial judge's sole function regarding [proximate/intervening/superseding cause] is to inquire whether particular conclusions are the only reasonable inferences that can be drawn

from the evidence"). Whether an intervening act breaks a causal connection is a question of fact for the jury which "will not be disturbed on appeal unless found to be without evidence which reasonably supports the finding." Mellen, 377 S.C. at 281, 659 S.E.2d at 247. This case is not a rare or exceptional case. The trial court did not err in submitting proximate cause to the jury and denying the Bank's motion for judgment notwithstanding the verdict.

Cody P funds came from life insurance and workers compensation proceeds designed to provide care and support for him after his father's death. Use of the funds was restricted by the court to protect him against known risks of misappropriation of a vulnerable minor's funds in such circumstances. The Bank claims the trial court should have held as a matter of law that its fault was not a proximate cause of the child's loss because it merely brought about the condition of affairs permitting Cody's court-appointed conservator to misappropriate his property. It claims misappropriation of Cody's property by his conservator was an unforeseeable, criminal, intervening, superseding cause cutting off its liability for breach of its duties to Cody. This argument, however, ignores both evidence in Cody's favor and considerable law on intervening and superseding causes to the contrary.

The most succinct statement of the law contrary to the Bank's arguments is found in the Restatement (Second) of Torts and its comments:

§ 302B Risk of Intentional or Criminal Conduct

An act or an omission may be negligent if the actor realizes or should realize that it involves an unreasonable risk of harm to another through the conduct of the other or a third person which is intended to cause harm, even though such conduct is criminal.

§ 448 Intentionally Tortious or Criminal Acts Done Under Opportunity Afforded by Actor's Negligence - Comment: ...

b. When special grounds for anticipating criminal action by third person. There are certain situations which are commonly recognized as affording temptations to which a recognizable percentage of humanity is likely to yield. So too, there are situations which create temptations to which no considerable percentage of ordinary mankind is likely to yield but which, if they are created at a place where persons of peculiarly vicious type are likely to be, should be recognized as likely to lead to the commission of fairly definite types of crime. If the situation which the actor should realize that his negligent conduct might create is of either of these

two sorts, an intentionally criminal or tortious act of the third person is not a superseding cause which relieves the actor from liability. ...

c. When actor's negligence consists in creating risk of criminal action by third person. The actor's conduct may be negligent solely because he should have recognized that it would expose the person, land, or chattels, of another to an unreasonable risk of criminal aggression. If so, it necessarily follows that the fact that the harm is done by such criminal aggression cannot relieve the actor from liability (see § 449). However, it is not necessary that the conduct should be negligent solely because of its tendency to afford an opportunity for a third person to commit the crime. It is enough that the actor should have realized the likelihood that his conduct would create a temptation which would be likely to lead to its commission.

This is true although the likelihood that such a crime would be committed might not be of itself enough to make the actor's conduct negligent, and the negligent character of the act arises from the fact that it involves other risks which of themselves are enough to make it unreasonable, or from such risks together with the possibility of crime.

§ 449 Tortious or Criminal Acts the Probability of Which Makes Actor's Conduct Negligent

If the likelihood that a third person may act in a particular manner is the hazard or one of the hazards which makes the actor negligent, such an act whether innocent, negligent, intentionally tortious, or criminal does not prevent the actor from being liable for harm caused thereby.

A defendant may be held liable for anything appearing to be a natural and probable consequence of his conduct. Mellen, 377 S.C. at 246, 659 S.E.2d at 279.

To exculpate a ... defendant, the intervening cause must be one which breaks the sequence or causal connection between the defendant's [fault] and the injury alleged. The superseding act must so intervene as to exclude the [fault] of the defendant as one of the proximate causes of the injury.

Id. 377 S.C. at 247, 659 S.E.2d at 281. A defendant need not have contemplated or anticipated the particular event which occurred. To break the causal link, an intervening act must be unforeseeable in light of the attendant circumstances.

Any number of causes and effects may intervene between the first wrongful cause and the final injurious consequence; and if they are such as might, with reasonable diligence have been foreseen, the last result, as well as the first, and every intermediate result is to be considered in law as the proximate result of the first wrongful cause.

Id. 377 S.C. at 248, 659 S.E.2d at 283. As long as a defendant's conduct is a substantial factor in

the harm to the plaintiff, "the fact that he neither foresaw nor should have foreseen the extent of harm or the manner in which it occurred does not negative his liability." *Id.*, 377 S.C. 261, 659 S.E.2d 236. In order for the criminal act of a third person to cut off the defendant's liability, all four of the following criteria must be satisfied: 1) the act of the third person must have been willful, malicious and criminal, 2) the act of the third person must produce the injury, 3) the defendant must not have intended the intervening criminal act to occur, *and* 4) the intervening criminal act *must have been unforeseeable* by a person acting with reasonable diligence. *Id.*

The actions of Cody's conservator, Karen Unrue, do not cut off the Bank's liability for its employees' wrongful conduct. The misappropriation or loss of a ward's property is a foreseeable consequence of the absence of the security procedures which should have been put in place by the bank to prevent such losses where there was a court-ordered conservatorship, and the court order placed restrictions on withdrawal or use of the ward's funds.

When the initial CD deposits were made, although no signature card has been produced, the account was titled "Karen M. Unrue, *Guardian* Cody P .." (R. p. 880; R. p. 254, lines 17-19). All seven checks contained designations in the name of the payee indicating these funds were subject to a court-ordered conservatorship. (R. pp. 793-799). A week later, an eighth check which also contained the conservatorship designation in the payee line was used to open a second account with a title listing Mrs. Unrue as custodian for the funds of Cody Powell, a minor. (R. pp. 802-807; R. p. 355, lines 16-17). Two different Bank employees opening accounts into which Cody's funds were deposited ignored the conservatorship designation on eight checks and the fact that Mrs. Unrue was a court-appointed conservator/guardian when opening these accounts.

The presence of the word "guardian" in the title to the CD account indicates, or at least

supports a reasonable inference; the Bank employee knew Mrs. Unrue was a court-appointed guardian and not an unappointed custodian. Moreover, the Bank's official representative Floretta Denning testified that the words "guardian" or "conservator," per the Bank's manual, indicate the individual was appointed by a court for a person who is a minor or is incapable of managing his own financial affairs and that specific guidelines for setting up an account should be followed. (R. p. 242, lines 9-23; R. pp. 843-847). If the Bank did not know Mrs. Unrue was a court-appointed guardian, these facts demonstrate it certainly should have known had it handled these transactions with the care a reasonable bank would have exercised.

The Bank's own procedures clearly state to open a conservatorship/court appointed guardian account, its employee must obtain the original or a certified copy of the court order, the ward's tax id number and a proper signature card signed by the conservator. (R. pp. 843-847). While a customer might offer this information in some cases, BOA's employees have a duty to ask for this information in order to open the account. Two BOA employees failed to obtain any of these things on two separate occasions in setting up these accounts. These things were necessary protections designed to protect Cody P's funds from those who might take advantage of him, especially the court-appointed conservator who had possession of the checks representing his funds.

The conservatorship designations on the checks and the procedures that should have been followed when Karen Unrue identified herself as Cody's guardian and requested an account in her name as Cody's guardian are in essence a security system². This "security system" was put in place specifically for the purpose of making sure funds deposited by a conservator or guardian are protected by all the measures the court deemed necessary in appointing a guardian or

² Ms. Denning, the Bank's representative, testified that these procedures were safeguards and that none of them kicked in on this account. (R. p. 265, lines 3-7, 16-18).

conservator for the child's funds and requiring court approval for any withdrawals. They are similar to the alarm systems in Collins & Sons and Accordini v. Security Cent., Inc., 283 S.C. 16, 320 S.E.2d 713 (Ct. App. 1984), specifically installed to reduce the risk of loss of a person's property by criminal theft or misappropriation by a third party. Like the alarm system, if they had been working properly, they would have prevented the theft or misappropriation as intended. Like the alarm systems in Collins & Sons and Accordini, the nonfunctional state of the security system as a result of the bank's fault subjected the plaintiff to an increased risk of loss which would not have occurred but for the bank's fault. Thus, the fault which disabled the functioning of the security system that should have prevented the loss was foreseeable and was a proximate cause of Cody P's loss. No intervening or superseding cause cut off BOA's liability.

BOA cites several cases from other jurisdictions which it alleges support its contention that Unrue's conduct was not foreseeable and was an intervening superseding cause cutting off its liability. However, it fails to cite numerous other cases closer to the facts before this court which are consistent with Collins & Son and Accordini and demonstrate for proximate cause purposes that her conduct was foreseeable enough to support BOA's liability.

Melley v. Pioneer Bank, N.A., 2003 PA Super 389, 834 A.2d 1191 (2003) *app. den.* 2004 Pa. LEXIS 507 (Pa., Mar. 16, 2004), is almost identical to the present case. The mother's and minor daughters' claims for the father's wrongful death were settled for approximately \$200,000. The bank permitted the mother to open a new account in her name only and to deposit checks made out to her as parent and natural guardian of her daughters. Later the bank permitted her to deposit additional checks made out to the mother as parent and natural guardian of the daughters with references to court proceedings. The court found the bank acted in bad faith when it allowed the mother to deposit these checks in her personal account. In allowing checks with such

information on them to be deposited into the mother's personal account, the bank ignored irregularities which placed it on notice of improper conduct on the mother's part. In such circumstances, the failure to require a restricted account was found to amount to bad faith sufficient to vitiate the bank's general privilege under uniform laws not to inquire into and to presume a fiduciary is acting within his powers in depositing checks drawn on a fiduciary account into the fiduciary's personal account or in endorsing and depositing checks made out to him as a fiduciary. Compelling circumstances and the fact that both the mother and the bank should have known the deposits were for the daughters' benefit made the daughters third-party beneficiaries of the deposit contract. Id.

As in the present case, the bank employee claimed she did not have the "slightest inkling" the checks may have been intended for deposit in a restricted account. Nevertheless, with the references on all four checks to the mother as natural guardian of the children and references to court proceedings on two checks, the transactions were so irregular they put the bank on notice that deposit into mother's personal account was improper. The court said it could be conceivable, despite the bank's experience and practice with restricted accounts, its officers might have treated the checks made out to the mother as natural guardian as unrestricted. However, receipt of the later two checks with references to court proceedings put the bank fully on notice of the restrictions and required it to treat the funds with the care required for restricted accounts and to undertake any steps necessary to correct the improper treatment of the previous deposits and to recover funds withdrawn by mother. In these circumstances, the court found the bank acted in bad faith and willfully ignored the facts. These circumstances went beyond negligent conduct. Id. On the issue of proximate cause, Melley held in "order for another's act to be an intervening, superseding cause, the other's acts must be unforeseeable." Where the

irregularity of the transaction put the bank on notice of mother's improper conduct, her misappropriation was foreseeable. Id.

The facts of Bullis v. Security Pac. Nat'l Bank, 21 Cal. 3d 801, 582 P.2d 109, 148 Cal. Rptr. 22 (1978), are also close to the facts of the present case. The bank made errors in not following its own procedures in opening an estate account for an estate with co-executors. These errors allowed one of the co-executors to steal funds from the estate. When one of the co-executors went to the bank to open the estate account, he signed a signature card for the account. A second signature card was mailed to the co-executor and returned to the bank. The co-executor who went to the bank did not discuss with any bank official whether one or both signatures would be necessary to make withdrawals. Although the word co-executor was written on one of the cards and the cards were stapled together, the procedures in the manual for estates with co-executors were not followed. The bank's operations manual specifically required the signatures of both executors for any withdrawal from an estate account where there were co-executors. Such accounts were to be "flagged" by placing a stamp on each signature card indicating more than one signature was needed. The requirement of both signatures could be changed only with the approval of the bank's legal department. The manual also required all new accounts to be reviewed by a supervisory officer to assure that the correct procedure had been followed.

Despite these requirements in the bank's manual, no cautionary notation was placed on the signature cards for this estate to alert bank officials that both signatures were necessary. The legal department was not consulted. Over a four year period, the co-executor who opened the account withdrew hundreds of thousands of dollars from the estate account with checks bearing only his signature. He personally invested almost \$250,000 of the misappropriated funds in a

mining venture and improperly distributed another \$34,000 to one of the decedent's heirs without prior court approval. The other co-executor did not discover these misappropriations because the bank sent the cancelled checks and statements only to the one who opened the account. At trial, the bank was found liable for each improper withdrawal from the estate account, as the bank had breached its common law duty to use reasonable care in its conduct with its depositors. The appellate court held

[a] bank is immune from liability [in allowing withdrawals in conformity with the signature card] only if it acted properly in opening the account. However, appellant was negligent in failing to indicate in some effective manner that withdrawals would not be honored unless signed by both co-executors. Therefore, permitting withdrawals in accordance with the signature cards does not free appellant from liability.

While [the co-executor's] intentionally tortious conduct caused the estate's loss, his actions cannot insulate appellant from liability for its negligent conduct. "If the likelihood that a third person may act in a particular manner is the hazard or one of the hazards which makes the actor negligent, such an act whether innocent, negligent, intentionally tortious, or criminal does not prevent the actor from being liable for harm caused thereby." The risk that one co-executor would act alone and make unauthorized withdrawals was significant in establishing the standard of care. The deviation from this standard allowed that very risk to become a reality in this case. Therefore, the occurrence of this foreseeable act does not break the chain of legal causation which holds appellant liable for the estate's loss. ... [T]he trial court merely reaffirmed the obvious proposition that appellant owed a duty of due care to its depositors. Appellant was held liable for the estate's loss because its conduct, in opening and maintaining the estate's account, did not meet the standard of reasonable care expected of a bank. Its negligent conduct resulted in a reasonably foreseeable injury. Thus, liability was based on appellant's own negligence, not on a breach of any duty to control [the co-executor who stole the funds]. (internal citations omitted)

Bullis, 21 Cal. 3d at 812-813.

In New Jersey Bank, N.A. v. Bradford Sec. Operations, Inc., 690 F.2d 339 (3d. Cir. N.J. 1982), a bank which accepted forged securities as loan collateral sued a securities firm claiming it was negligent in allowing its blank securities certificates to be stolen. The defendant challenged the trial court's finding on proximate cause arguing the intervening criminal acts of the forger prevented the bank from being able to prove proximate cause. The Third Circuit

affirmed saying

[b]ut we find that the district court correctly applied New Jersey law in holding that a third person's intervening criminal act does not interrupt the causal chain if the defendant reasonably could foresee the possibility of that intervening criminal conduct. See, e.g., Atamian v. Supermarkets General Corp., 146 N.J. Super. 149, 369 A.2d 38, 42 (1976). Thus, we hardly can call clearly erroneous the trial court's determination that BSOI reasonably could have foreseen a theft and forgery resulting from inadequate security measures.

690 F.2d at 347-348.

These cases are clearly consistent with Collins & Sons and Accordini on the issue of foreseeability. For proximate cause purposes, a theft made possible by faulty security measures or the failure to use security measures designed to reduce the risk of theft or misappropriation of property, especially property which is vulnerable to theft or misappropriation, does not break the chain of causation or exonerate defendants at fault for the problem with the security measures. Numerous other jurisdictions demonstrate this is not only the South Carolina rule, but also the majority rule. See e.g., Thropp v. Bache Halsey Stuart Shields, Inc., 650 F.2d 817 (6th Cir. 1981) (finding that the husband's forgery was not an intervening cause. Brokerage firm's lack of diligence in not enforcing its own rules was a cause in fact and a substantial legal cause of the client's loss, as husband could not have misappropriated the funds if the employee had checked the authenticity of the power of attorney as he should have. Loss was foreseeable as the purpose of the rule was to prevent fraud and to protect customers.); Lerner v. Fleet Bank, 459 F.3d 273 (2nd Cir. 2006) (finding circumstances which would cause a reasonably prudent person to suspect trust funds are being misappropriated triggered a duty of the bank "to make reasonable inquiry and endeavor to prevent a diversion." Bank failed to put the funds in a properly coded account where the name of the account indicated the bank knew or should have known the funds were fiduciary funds.)

Contrary to the Bank's arguments, substantial evidence showed if it had acted prudently, Unrue could not have misappropriated the money. The probate court placed language in the certificate of appointment, fiduciary letters, and the court order clearly setting out the restriction that the co-conservators had no authority to withdraw or use any of Cody's funds without a court order. (R. pp. 789-792). Cody's current conservator testified as to what was required in setting up his current restricted bank accounts and how those accounts function to ensure all withdrawals are court approved. (R. p. 210, line 5-R. p. 213, line 1). She testified to an incident in which the bank where the child's funds are presently located refused to honor a check written on Cody's account where the check arrived at one branch for payment before the court order, which had been dropped off at another branch, authorizing the disbursement got to the branch that stopped payment. (R. p. 211, line 19- R. p. 212, line 17). She testified unequivocally that the steps she goes through would have been the same exact steps that the earlier conservators, Karen Unrue and Travis Powell, would have had to go through (R. p. 215, lines 16-21), and stated when asked

Q. Do you believe that if the bank had set this account up properly, Karen Unrue would have been able to do what she did?

A. No. I don't think she would have been.

Q. Do you have any question about that?

A. No.

(R. p. 223, lines 18-23).

Ms. Denning, the BOA representative, testified that the procedure for BOA's restricted conservatorship accounts was similar.³ (R. pp. 244, line 8-R. p. 249, line 25). The testimony of the current conservator, coupled with the Bank representative's testimony, shows that expert Bob Hubbs' opinion that the proper use of basic security procedures would have prevented Unrue's misappropriations is not speculative. Mr. Hubbs testified that banks foresee and expect people to

³ Ms. Denning stated "when they [the restricted accounts] are going to be touched, of course, that's when a

try to take other people's money. (R. p. 527, lines 13-15). He stated the bank is responsible for providing protection for that customer-- "protection from individuals who are out to steal, or if they're given an opportunity, they might not steal, but if they're given an opportunity, it changes their character and they will steal." (R. p. 527, lines 7-10). Here, the jury was properly charged on both proximate cause and intervening acts. (R. p. 713, line 10-R. p. 716, line 14). Sufficient evidence existed for a reasonable jury to find Mrs. Unrue's conduct to be foreseeable and to find that Cody's loss was proximately caused by the failure of the bank to use proper safety precautions specifically designed to prevent such loss.

III. Bank of America's Arguments Concerning References to Its Size Do Not Warrant a New Trial.

The Bank refers to several transcript pages as supporting its argument that the trial court abused its discretion in failing to grant a new trial because of Plaintiffs' repeated references to the size of the Bank. However, what these pages actually show is that some of the references were made outside the hearing of the jury⁴, the Bank failed to make contemporaneous objections to most of the references⁵, and even the Bank's own corporate representative volunteered it was the third largest bank in the world in response to a question which did not refer to its size.⁶

court order comes in to tell us to release a certain dollar amount. (R. p. 246, lines 1-3).

⁴R. p. 127, line 16-R. p.130, line 22 are part of the argument on the motion in limine while the jury was out. The reference at R. p. 545, line 18-24 was made by the Bank's counsel in arguments on an objection while the jury was out. (R. p. 542, line 2-R. p. 549, line 3).

⁵No contemporaneous objection was made to a reference to the level of fraud protection procedures which could be expected of a large bank in Plaintiffs' counsel's opening argument (R.p. 148). See also R. p. 402, line 25-R. p. 404, line 23 (no contemporaneous objection to Plaintiffs' counsel's references to the Bank's size in questions to BOA's 30(b)(6) designee regarding its 2001 logo proclaiming it was the bank with higher standards, asking about procedures to catch and correct mistakes in account openings that could be expected of both large and small banks, and asking if the Bank could be expected to follow the same federal banking regulations as other banks; R. p. 599, lines 3-24 (no contemporaneous objection to Plaintiffs' expert's statement that Bank of America is the largest bank in America in the context of explaining its financial reports); R. p. 656, line 9 (no contemporaneous objection to Plaintiffs' counsel's use of the words "big bank" in closing arguments); R. p. 692, lines 1-2 (no contemporaneous objection to Plaintiffs' counsel's use of the words "largest bank in the United states of America").

⁶It was the Bank's 30(b)(6) designee, not Plaintiffs' counsel, who said Bank of America was the third largest bank in the world. (R. p. 241, lines 19-25; R. p. 266, line 16-R. p. 267, line 15).

Although the Bank filed a pre-trial motion in limine which was overruled⁷, it failed to obtain a final ruling on the issue of its size⁸ and never sought a curative instruction or a mistrial⁹ in relation to statements about its size.

"A ruling in limine is not final; unless an objection is made at the time the evidence is offered and a final ruling is procured, the issue is not preserved for review." A contemporaneous objection when the testimony is offered at trial is required to properly preserve error based on admission of evidence for appellate review. State v. White, 353 S.C. 566, 574-575, 578 S.E.2d 728, 732-733 (Ct. App. 2003) quoting State v. Smith, 337 S.C. 27, 32, 522 S.E.2d 598, 600 (1999) and citing State v. Peay, 321 S.C. 405, 413, 468 S.E.2d 669, 674 (Ct. App. 1996).

A party must also make a contemporaneous objection to improper argument of counsel, make a record of the specific language objected to and ask the court for a specific ruling on that language in order to avoid waiving the objection. Varnadore v. Nationwide Mut. Ins. Co., 289 S.C. 155, 345 S.E.2d 711 (1986).

When objection is timely made to improper remarks of counsel, the judge should rule on the objection, give a curative charge to the jury, and instruct offending counsel to desist from improper remarks. Madden v. Cox, 284 S.C. 574, 328 S.E.2d 108 (Ct. App. 1985). If the judge takes these steps, and the initial objecting party is not satisfied with the instruction, a further objection and a request for a further instruction should be made at that time. See Gulf, Colorado & Santa Fe Railroad Company v. Parmer, 389 S.W.2d 558 (Tex. Civ. App. 1965); see also City of Shelbyville v. Morton, 138 Ind. App. 460, 208 N.E. (2d) 705 (1965); Birmingham News Company v. Payne, 230 Ala. 524, 162 So. 116 (1935). If the objecting party fails to make this additional objection, the asserted misconduct of counsel is not preserved for review on appeal. See City of Shelbyville v. Morton, *supra*.

McElveen v. Ferre, 299 S.C. 377, 381, 385 S.E.2d 39 (Ct. App. 1989); see also Mishoe v. QHG of Lake City, Inc., 366 S.C. 195, 202, 621 S.E.2d 363, 367 (Ct. App. 2005). If a party objects,

⁷R. p. 130, lines 5-6.

⁸R. p. 267, lines 6-15.

⁹R. p. 148; R. p. 241, lines 22-25; R. p. 266, line 14-R. p. 267, line 15; R. pp. 403-404; R. p. 545, lines 18-24;

and the objection is sustained, but he does not move for a curative instruction or request a mistrial, he cannot raise the issue on appeal. See McKissick v. J.F. Cleckley & Co., 325 S.C. 327, 479 S.E.2d 67 (Ct. App. 1996); see also State v. Patterson, 324 S.C. 5, 482 S.E.2d 760 (1997). Where the objecting party does not contemporaneously challenge the sufficiency of a curative instruction given by the court or move for mistrial, the issue is not preserved for appeal. See State v. George, 323 S.C. 496, 476 S.E.2d 903 (1996). The Bank did not follow these requirements for preserving its argument that references to its size were not relevant or were too prejudicial to be admitted under S.C.R.E. 403.

Even if the issue had been properly preserved for appeal, there was no abuse of discretion in the trial court's ruling. "The admissibility of evidence lies within the sound discretion of the trial court whose decision will not be overturned on appeal absent a clear abuse of that discretion." Watson v. Chapman, 343 S.C. 471, 478, 540 S.E.2d 484, 487 (Ct. App. 2000) citing Gamble v. Int'l Paper Realty Corp., 323 S.C. 367, 474 S.E.2d 438 (1996); Washington v. Whitaker, 317 S.C. 108, 451 S.E.2d 894 (1994); and Carlyle v. Tuomey Hosp., 305 S.C. 187, 407 S.E.2d 630 (1991). "An abuse of discretion occurs when the ruling is based on an error of law or a factual conclusion that is without evidentiary support." Fields v. Reg'l Med. Ctr., 363 S.C. 19, 25, 609 S.E.2d 506, 509 (2005) citing Carlyle, 305 S.C. at 193, 407 S.E.2d at 633 (1991) and Fontaine v. Peitz, 291 S.C. 536, 538, 354 S.E.2d 565, 566 (1987).

A trial judge's decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in "exceptional circumstances." United States v. Green, 887 F.2d 25, 27 (1st Cir. 1989). See also State v. Slocumb, 336 S.C. 619, 633, 521 S.E.2d 507, 514 (Ct. App. 1999) ... We review a trial court's decision regarding Rule 403 pursuant to the abuse of discretion standard and are obligated to give great deference to the trial court's judgment. See Green, 887 F.2d at 27. See also State v. Aleksey, 343 S.C. 20, 538 S.E.2d 248 (2000) ... A trial judge's balancing decision under Rule 403 should not be reversed simply because an appellate court believes it would have decided the matter otherwise

R. p. 599, lines 3-24; R. p. 656, line 9.

because of a differing view of the highly subjective factors of the probative value or the prejudice presented by the evidence. United States v. Long, 574 F.2d 761 (3d Cir. 1978). If judicial self-restraint is ever desirable, it is when a Rule 403 analysis of a trial court is reviewed by an appellate tribunal. Id.

State v. Lyles, 379 S.C. 328, 665 S.E.2d 201 (Ct. App. 2008) quoting State v. Hamilton, 344 S.C. 344, 353, 543 S.E.2d 586, 591 (Ct. App. 2001). Moreover,

[t]o warrant reversal based on the admission or exclusion of evidence, the appellant must prove both the error of the ruling and the resulting prejudice, i.e., that there is a reasonable probability the jury's verdict was influenced by the challenged evidence or the lack thereof.

Fields, 363 S.C. at 25, citing Hanahan v. Simpson, 326 S.C. 140, 156, 485 S.E.2d 903, 911 (1997); Timmons v. S.C. Tricentennial Commn., 254 S.C. 378, 405, 175 S.E.2d 805, 819 (1970); Powers v. Temple, 250 S.C. 149, 160, 156 S.E.2d 759, 764 (1967).

The Bank of America does not argue the statements concerning its size are factually incorrect. It disagrees with the trial court's weighing of prejudice and relevance. However, the trial court did weigh both the relevance and potential prejudice under SCRE 403. (R. p. 267, lines 6-15). The trial court found the testimony as to BOA's size was not prejudicial in light of the questioning of some of the earlier witnesses as to the size of the bank that the current conservator is dealing with and the testimony comparing and contrasting what bank officials should know and the size of the bank and the type of services being offered. Id. Implicit in this finding is that the testimony is relevant and assists the trier in fact in evaluating the protections and procedures the Bank should have had or taken in this case. Id. There was no abuse of discretion.

IV. Clear and Convincing Evidence Existed to Submit the Question of Punitive Damages to the Jury.

Punitive damages may be awarded where there is clear and convincing evidence the defendant's misconduct was willful, wanton, or in reckless disregard of the plaintiff's rights. S.C.

Code Ann. § 15-33-135 (Supp. 1999); Taylor v. Medenica, 324 S.C. 200, 479 S.E.2d 35 (1996); Welch v. Epstein, 342 S.C. 279, 536 S.E.2d 408 (Ct. App. 2000). Punitive damages must be submitted to the jury if more than one reasonable inference can be drawn from the evidence as to whether the defendant's behavior was reckless, willful, or wanton. Welch 342 S.C. at 299-302; Graham v. Whitaker, 282 S.C. 393, 321 S.E.2d 40 (1984); Hawkins v. Pathology Assocs. of Greenville, 330 S.C. 92, 498 S.E.2d 395 (Ct. App. 1998).

A tort is characterized as reckless, willful or wanton if it was committed in such a manner or under such circumstances that a person of ordinary reason and prudence would have been conscious of it as an invasion of the plaintiff's rights. Taylor, 324 S.C. at 221, 479 S.E.2d at 46. "Reckless disregard' ... cannot be fully encompassed in one infallible definition." Anderson v. Augusta Chronicle, 355 S.C. 461, 478, 585 S.E.2d 506, 515 (Ct. App. 2003) quoting St. Amant v. Thompson, 390 U.S. 727, 730-731 (1968). When there is evidence that a defendant is aware of dangerous or risky situation and does not follow the proper course of conduct to avoid or minimize the danger or risk, there is sufficient evidence to create a jury issue as to whether there is clear and convincing evidence of willfulness. Welch, 342 S.C. at 299-302 (failure to heed warning on Fentanyl patch); McGee v. Bruce Hosp. Sys., 321 S.C. 340, 468 S.E.2d 633 (1996) (package inserts for catheters introduced to support a punitive damages award by showing doctor's awareness of the conditions which may be caused by improper placement of catheter).

In Scott v. Porter, 340 S.C. 158, 166-168, 530 S.E.2d 389, 394-5 (Ct. App. 2000), the court held where the totality of the evidence suggested the defendant "had a disinterested attitude" in a situation where there was cause for concern, there was evidence from which a jury could conclude the defendant recklessly failed to recognize the danger and take appropriate action. The court pointed out such action is "highly culpable" and sufficient to support punitive

damages.

The insurers who were paying out benefits to Cody P on the life insurance and worker's compensation insurance as a result of his father's death refused to release Cody's funds until he had a court appointed conservator. (R. p. 207, lines 4-9). The court was sufficiently concerned about Cody's vulnerability to misappropriation of his funds that it placed restrictions in its order appointing his co-conservators. (R. pp. 789-792). All of the appointment documents required his funds to be placed in a restricted account with no withdrawals being allowed without a specific court order. (R. p. 154, line 11-R. p.156, line 21; R. pp. 789-792).

At least eight checks representing over a quarter of a million dollars of Cody's funds were presented to and accepted by the Bank on two different occasions by high ranking employees. All eight checks contained some designation in the payee line indicating the funds were subject to a court ordered conservatorship. Six of the eight checks spelled out the word "conservator." Three checks specifically listed the names of two conservators indicating the court had appointed co-conservators. All the checks specified the last name of all conservators was Powell. There was no reference to anyone named Unrue. (R. p. 161, line 6-R. p.164, line 19; R. pp. 793-799; R. p. 804). When Ms. Denning, the BOA representative was questioned

Q. Is there anything on those checks that you believe that would not indicate to the platform worker¹⁰ that they were made out to conservators?

A. They were made out to conservators. There's nothing that was misconstrued here. It's obvious who they were made out to.
(R. p. 253, lines 18-23).

She stated further, "from the beginning, she had the checks and on the checks it told her who the conservator was and the minor. It stated that on the checks. When she got ready to open the account, these were court ordered. There were other documents that she needed to see."

¹⁰ Ms. Denning explained that when she used the term "platform worker," that meant the employees on the floor that greet you to assist you. (R. p. 244, lines 2-7).

(R. p. 257, lines 11-15).

Ms. Denning, who is also their custodian of records, testified Bank of America has a large number of court restricted accounts, especially in South Carolina. (R. p. 245, lines 19-20). This testimony was contradicted by the other Bank representative who testified that these accounts were very rare. (R. p. 413, line 24-R. p.414, line 5). Even if an employee may not see a lot of conservatorship accounts, such accounts are very similar to estate accounts, and Ms. Reeves, the other BOA representative testified that estate accounts with certificates of appointments are very common. (R. p. 418, line 21-R. p.419, line 1). Ms. Denning testified the Bank's manual clearly states that both guardians and conservators are appointed by a court. (R. p. 242, lines 15-17). The manual contains at least five pages of specific instructions employees must follow in opening an account when a court has appointed a conservator or guardian. (R. p. 242, lines 21-23; R. pp. 843-847). These instructions require employees opening a conservator or guardianship account to ask for and obtain the original or a certified copy of the court order appointing the conservator or guardian, naming the ward and stating the conservator or guardian's authority over the ward's property. (R. pp. 843-847; R. p. 244, line 12-R. p.245, line 3). The manual also requires the word "guardian" or "conservator" to be put in the account title. (R. p.845). It also instructs the employee to inquire and determine whether the court has restricted use of the funds. (R. pp. 845-847). If the court restricted use of the funds, the employee is supposed to also put "Court Restricted" in the title of the account. (R. p. 845). BOA corporate representative Denning voluntarily admitted the seven checks Karen presented when Ms. Yourko opened the unrestricted CD account are very obviously made out to co-conservators and that there is nothing about the checks that could be misconstrued in terms of the conservatorship. (R. p. 253, lines 18-23). BOA's other corporate representative admitted the

check presented to Ms. Lawrence was obviously made out for Cody P. to his conservator. (R. p. 447, lines 7-15; R. p. 804).

Both BOA representatives admitted when the person opens an account, she should look at the payee lines of the checks presented. (R. p. 245, lines 4-10; R. pp. 415-417). Both said the payee designations on these checks were obvious and obviously should have alerted Ms. Yourko that the funds being used to open the account were conservatorship funds. (R. p. 253, lines 18-23; R. p. 416, lines 14-18). Regardless of what type of account is being opened for the benefit of a minor, BOA's manual clearly instructs the employee to obtain the minor's social security or tax identification number and use it on the account. (R. p. 845).

Regardless of how small the branch might be or how inexperienced an employee might be, any employee opening a BOA account has access to the resources of the largest bank in America and the third largest bank in the world to answer any questions and help make sure it is done right. (R. p. 342, line 11-R. p. 343, line 21). In addition to the manuals which are in every branch, there is a phone number which is always staffed with someone available who can answer banking group support or legal support questions. (R. p. 249, line 21-R. p. 250, line 5; R. p. 409, lines 9-22). Both Ms. Yourko and Ms. Lawrence had access to both general banking customer support and legal support assistance through this line to explain anything appearing on the checks or in any documents presented to them if they were not completely sure of its meaning. (R. p. 301, lines 2-15; R. p. 343, lines 9-15). These resources would also have been available to tell them all the things they needed to ask for when these checks were presented to open accounts. (R. p. 249, line 21-R. p. 250, line 5; R. p. 265, lines 3-7).

Despite these facts, the personal banker Lee Ann Yourko who opened the CD account on April 26, 2001 testified that in opening accounts, she titled accounts in the manner requested by

the customer -- regardless of what appeared on the payee line of the checks presented to open the account. Ms. Yourko testified she had the manual which told her a conservator or guardian was a court-appointed person who manages the property of a minor, incapacitated adult or missing person. She acknowledged that opening an account for a minor was sufficiently different from the regular day-to-day business that she would always have to go to the manual or to her manager for assistance in opening any accounts involving minors. (R. p. 287, line 6-R. p.291, line 19). Interestingly, although none of the seven checks had the word "guardian" on them, she used the word "guardian" in the title to the CD clearly indicating that she was told that Karen was a guardian for Cody, and that Karen was acting in her role as an appointed representative in opening a CD that would contain Cody's money. Despite this clear evidence of her knowledge of Karen's court appointed status, Ms. Yourko testified that she did not follow the instructions in her manual for opening a guardianship or conservator account. She opened a CD account which her manual told her was not an available product for a guardianship or conservator account. She did not ask for Cody's social security number. She put Karen's social security number on the account even though the minor's tax ID number should be put on any type of account containing a minor's funds. (R. p. 254, line 10-R. p. 255, line 5).

Ms. Yourko testified she knew Cody's father had died and that Karen was helping out with Cody's business since his father's death. (R. p. 319, lines 22-25). She said she looked at the check to see whose name was on it when opening an account, but did not check the endorsements. (R. p. 318; lines 4-6). She admitted the information on the checks clearly indicated the money belonged to Cody, not Karen. (R. p. 325, lines 7-8). Nevertheless Ms. Yourko did not consult the manual or ask Karen for any documentation of her authority to handle Cody's money. Despite admitting the money was Cody's, Ms. Yourko disregarded all the

information indicating the money was not Karen's and treated it as if it belonged to Karen. She testified when someone comes in and tells her the names they want on an account, then that is what she puts on the account. (R. p. 324, lines 3-6). She said she follows the instructions of the person in front of her as to what to put on the account regardless of what the checks or the manual says. Even though the checks had the designation "conservator" on them, if Karen asked for a CD instead of a conservator account, that is what Ms. Yourko would set up for her. She set up the kind of account Karen asked for without even requiring her to present any evidence of her authority as a conservator just because that is what Karen asked for, disregarding any mention of Cody on the checks. (R. p. 313, line 1-R. p.314, line 23). Her testimony was that she set the account up where Karen had full access to the funds, despite the fact that the money belonged to Cody, ignoring whatever was on the checks and in the manual, because that is what the customer asked her to do. (R. p. 324, line 3-R. p. 325, line 1). Yourko did not treat the money Karen deposited as belonging to Cody. She disregarded everything indicating the money was Cody's and treated the money as if it belonged to Karen. (R. p. 273, line 22-R. p.274, line 17). She testified the checks were made out to Karen Powell as conservator of Cody P., but she made out the deposit ticket solely in Karen's name with no mention of Cody. (R. p. 322, lines 22-25; R. p. 800). She said that even though she knew what a conservator was, it was enough for her that Karen endorsed the check without getting any evidence of her authority as Cody's conservator to sign the checks. (R. p. 317). As far as she was concerned, Karen was her customer not Cody. (R. p. 274, lines 2-5; R. p. 283, lines 13-16; R. p. 311, lines 16-18; R. p. 800; R. p. 324, line 11-R. p.325, line 19; R. p. 335, lines 10-15).

Ms. Yourko repeatedly took the attitude that it wasn't her responsibility to look at what was on the face of the checks in determining what she could and couldn't do to assist Karen in

opening the account. (R. p. 303, line 24-R. p.310, line 16; R. p. 317, line 8-R. p.318, line 11; R. p. 322, lines 2-16). Ms. Yourko's attitude expressed throughout her testimony was as if she said, "I can't be bothered to look at the checks. I just do what the person in front of me asks for and take it to the teller. It isn't my responsibility to pay enough attention to ask questions and follow the right procedures set out in the manual if the customer doesn't ask for the right kind of account in the first place." (R. p. 290, line 8-R. p.328, line 10; R. p. 335, lines 2-15). When questioned further

Q. If you took [the teller] a check that was payable to these two individuals and their signatures were on it, how would the head teller know that you needed additional information?

A. I mean, I don't know. The tellers are the ones that are trained to take checks or, you know, whatever, process the checks, *whatever it is that they do with them. I mean, I didn't - I didn't handle moneys at the bank.*

(R. p. 322, lines 6-13 emphasis added).

BOA's corporate representative Denning testified that Ms. Yourko failed to ask Karen the questions she should have asked and failed to obtain the documents she should have required Karen to produce. She also testified she did not disagree with the report of Plaintiff's banking expert, Mr. Hubbs. (R. p. 262, line 18-R. p.265, line 18).

A week later, Ms. Lawrence, the BOA branch manager, accepted a conservatorship check for Cody from Karen and used it to open a Uniform Gift to Minors Act (UGMA) account with Karen as custodian with unrestricted full access to the funds. Lawrence acknowledged that the check she accepted to open an account on May 4, 2001, was made out to "Karen M. Powell as conservator for Cody P. a Minor," and the money belonged to Cody. Lawrence said, as Ms. Yourko did, she would have disregarded what was on the check and listened to and done what the person who came in to open the account said she wanted even though she had learned as a bank employee that an account can only be opened in the name of the payee on the check. (R. p. 353, line 9-R. p.355, line 23). According to the manual, the signature card should

match the payee on the check used to open an account. This requirement means for the account Lawrence opened, the signature card should have indicated the account was titled in name of Karen Powell as conservator for Cody P. . . But Lawrence did not follow policies and procedures and allowed Karen to open an account that did not match the payee of the check. Karen's name didn't even match. She signed "Karen Unrue" when the payee was "Karen Powell as conservator of Cody P. ." (R. p. 449, line 7-R. p. 451, line 22). In fact neither of the accounts set up by these two employees matched the payee designation on any of the eight checks presented to open the accounts. (R. p. 800; R. pp. 802-803; R. p. 820). Furthermore, the manual dictated that in handling a check with a representative payee such as a conservator, the employee must verify the authority of the payee. If Ms. Lawrence had verified the authority of the payee, she would have discovered that there were actually two conservators instead of the one listed on the check presented.

Lawrence also expressed the attitude that the bank could not learn anything from the face of a check and how the payee was phrased that would require the employee to ask the customer for anything in opening up an account. Her testimony revealed the passive attitude that the customer would have to know what kinds of accounts were available for a conservatorship and what documents needed to be presented to the bank to demonstrate her authority without the bank ever asking the customer for anything. Even though the section of the bank manual on endorsing checks said that if the check was made out to a conservator it had to be endorsed with the ward's or estate's name and the conservator's title and signature, and the bank employee must verify the payee's authority before accepting the check, Lawrence testified she would not have verified the conservator's authority unless the customer in front of her asked her to open a restricted conservator's account and voluntarily offered the documentation. (R. p. 354, line 3-R.

p.355, line 7; R. p. 373, line 2-R. p.376, line 13; R.pp. 379-384; R. pp. 843-847; R. pp. 848-861; R. pp. 862-868, R. pp. 869-879).

The Bank admitted through its corporate representatives that Cody was its customer. It admitted it is foreseeable to a bank that people will steal from and take advantage of the bank's customers. (R. p. 399, lines 10-13). The Bank's business is selling the service of protecting their customer's money from such risks. It admitted that children and incompetent customers need a higher level of protection from the bank. Id. It further admitted that that higher level of protection is why there are special procedures in handling certain customers' money. In short, BOA's corporate representatives agreed with Powell's expert that banks and Bank of America foresee and expect that unscrupulous people will try to take their customers' money. (Id.; R. p. 527, lines 7-15). They further admitted that they get paid to protect the money of their customers like Cody P. Id. They also testified a personal banker or manager should have a conversation with a customer who comes in to open an account and look at the check(s) they want to deposit to determine what the customer's goals are and what types of accounts are appropriate for that customer. The employees opening the accounts "absolutely should have looked" at the payee on the checks where they would have found the word "conservator" spelled out in full on five of the checks, "T. Powell as co-conservator" on several checks, no checks containing the name Karen Unrue and Cody's name on all the checks in a way indicating that ultimately the money belongs to Cody. They also admitted Ms. Yourko had to look at each check to total them for the total amount of the CD. Once the word "conservator" came up, both employees should have obtained help on how to open a conservatorship account which would have made it clear both were required to ask for conservatorship court papers. Once an employee is put on notice of a conservatorship, the bank employee has a responsibility to ask for

the court papers; the employee cannot just rely on customer to offer such papers. Both Yourko and Lawrence ignored that part of their jobs, abdicating any responsibility for looking at the check, finding out what is suitable for the customer who owns the money, and participating in selecting the right kind of account. (R. p. 412, line 23-R. p.413, line 16; R. p. 416, lines 23-R. p.418, line 15; R. p. 431, line 8-R. p.434, line 21; R. p. 436, line 1-R. p. 438, line 9).

Ms. Yourko testified the Home Office would have reviewed how she opened the CD account to determine if she had done it correctly. (R. p. 330, line 24-R. p.331, line 6; R. p. 333, lines 3-6). That account title had the word "Guardian" in it indicating there was a court appointed representative for a minor, and the funds belonged to the minor. If the Home Office did review the opening of the CD account, they disregarded the words in the title indicating a guardian of a minor child had opened an account with a product their manual said was not available for guardianships. They also disregarded the absence of documentation required by their own manual.

After it was discovered that Karen had taken Cody's money, Bank of America did not even send someone to talk to the employees about how these accounts were opened or investigate why this series of events was allowed to take place at the Pawleys Island branch. (R. p. 384, line 12-R. p. 386, line 4). This fact could have been interpreted by the jury as indicating corporate approval of these employees' passive attitudes of doing whatever the customer asks for instead of following the bank's manual. Furthermore, the Bank took the position at trial through its corporate representative Elizabeth Reeves that the order in which the seven checks comprising the initial CD deposit were entered into the banking system explained how Ms. Yourko "missed" the word "conservator" because the designation "Co-Cn" on the first check entered into the banking system "meant nothing to her." (R. p. 479, line 15-R. p.481, line 15).

This position could have been interpreted by the jury as indicating corporate approval of a passive attitude to ignore unfamiliar designations of authority on checks. (R. p. 500, line 20-R. p. 501, line 12; R. p. 676, lines 13-16).

Thus, there was more than sufficient evidence for the jury to find based on an objective standard that it was incredulous for the jury to believe that Ms. Yourko and Ms. Lawrence did not both know that Karen was a court appointed conservator for Cody P. . Further, there was more than sufficient evidence for the jury to find that there were copious resources for these employees to consult in dealing with a conservator. The evidence was uncontradicted that the Bank's policies and procedures in its manual for dealing with conservatorship or guardianship accounts were not followed. Thus the jury's conclusion that the Bank through its top-level employees at the Pawleys Island branch of Bank of America consciously decided not to consult the manual or follow those procedures is well supported by the evidence. Moreover, this evidence was sufficient for a jury to determine that neither Ms. Yourko nor Ms. Lawrence could have been unaware of the fact that these accounts involved a court appointed guardianship without consciously and recklessly disregarding the information on the checks presented to them. As the Bank was a corporation acting through its employees, Ms. Yourko and Ms. Lawrence, the jury could draw the inference from this evidence that Bank of America consciously or recklessly disregarded Cody P. 's rights. The view of the evidence presented in the Bank's brief was certainly not the only interpretation the jury could have drawn from the evidence.

In ruling on the post trial motions, the trial court based its decision that there was sufficient evidence to submit punitive damages to the jury on the totality of the evidence. Although the trial court did not use the phrase "disinterested attitude," the evidence pointed out in ruling on this point clearly shows a jury could reasonable conclude from the evidence that the

Bank employees were aware that the funds being deposited belonged to a vulnerable minor under the protection of a court guardianship or conservatorship. (R. pp. 1-23). This situation clearly should have given rise to cause for concern in protecting the vulnerable minor from a known risk of loss of his funds to those who would take advantage of his vulnerability. Yet there was no evidence of the exercise of any concern for Cody's rights on the part of the Bank employees who set up the accounts which should have protected his funds. The attitude of not just one, but two top-level Bank of America employees at this branch, specifically entrusted with handling accounts requiring such precautions, on at least two different occasions, was so disinterested in regard to the rights of the vulnerable minor that they did not look at, or ignored, the payee on a total of eight different checks, on two separate occasions; failed to ask for the minor's TIN on both occasions; and ignored multiple procedures and provisions in their training and the Bank manual.

An inference that this disinterested attitude went deeper into the institutional structure of BOA than just these two employees at the Pawleys Island Branch could be drawn from several pieces of evidence. For example, the Bank at trial and even now, takes the position that its computer system, which defaults to the guardian/conservator/custodian's tax identification number (TIN) which must be manually caught by the employee opening the account and changed to the minor's TIN, explains how its employees failed to put the minor's TIN on accounts holding the minor's funds. (Appellant's Brief p.6). Its disregard of the rights of minors is so entrenched it does not even see this point as a security hole in a system which should protect the rights of the minors who own the funds. Nowhere in the trial transcript or in the Appellant's brief does one find even the slightest recognition of the financial vulnerability of Cody Pr or other minors. The Supreme Court, however, lists financial vulnerability of the

victim as one of the factors which makes a defendant's conduct more reprehensible (i.e., more reckless or wanton). BMW of North America, Inc. v. Gore, 517 U.S. 559, 116 S. Ct. 1589, 134 L. Ed. 2d 809 (1996).

The Bank's argument against submission of punitive damages to the jury boils down to an argument that no case can go to the jury on punitive damages unless the defendant (or its employees through whom it acted) admit a deliberate intention to harm the plaintiff or admit conscious awareness at the time of action that their actions were wrong or admit they were aware of the plaintiff's rights and consciously ignored those rights. However, such arguments ignore the law recognizing that plaintiffs will rarely be able to present evidence "from the mouth of a defendant himself" of the states of mind relevant to punitive damages, and that such states of mind are usually proved by circumstantial evidence. Anderson v. Augusta Chronicle, 365 S.C. 589, 619 S.E.2d 428 (2005) citing Herbert v. Lando, 441 U.S. 153, 171-72 (1979), St. Amant v. Thompson, 390 U.S. 727, 732 (1968) and Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657, 688 (1989). Moreover, a jury is not required to believe the protestations of lack of awareness and good faith by BOA's employees. A jury issue exists, and a jury or court may find clear and convincing evidence of willfulness, when evidence exists suggesting a defendant is aware of a dangerous condition or risk and does not take action to minimize or avoid the danger or risk. Mishoe, 366 S.C. at 201, 621 S.E.2d at 366. The number, magnitude and seriousness of the errors made weigh heavily in favor of a finding of reckless disregard. The more serious the error, the less believable a defendant's protests of complete unawareness are and the stronger the inference that the defendant must have been aware of and disregarded the plaintiff's rights. See In re MicroStrategy, Inc. Sec. Litig., 115 F. Supp. 2d 620, 637, n. 33 (E.D. Va. 2000); Rehm v. Eagle Finance Corp., 954 F. Supp. 1246, 1255-56 (N. D. 1997).

Contrary to BOA's argument, the only reasonable inference is not that Karen Unrue acted intentionally to conceal her role and authority to BOA's employees. It would have been well within reason for a jury to conclude that an employee's testimony that she was unaware she was setting up an account for a court created guardianship or conservatorship was unbelievable, incredulous, or at the very least an admission of reckless disregard of Cody P's rights when she opened an account titled "Karen M. Unrue, *Guardian* Cody P." with seven checks totaling over a quarter of a million dollars -- all of which containing the word conservator or an abbreviation of that term, and none of which contained the name Unrue anywhere on them. How could the word "guardian" have become part of the title to the first CD account unless Karen told BOA's employee she was Cody's guardian or the employee noticed the conservatorship designation on the checks? There was no testimony that Mrs. Unrue in any way concealed the face of the checks or how they were made out. Nor was there any testimony that Mrs. Unrue knew she should have offered the conservatorship papers to BOA's employees without being asked. However, BOA's own practices and procedures and manuals demonstrate that it is responsibility of its employees to ask for and obtain a copy of these documents before opening an account for a conservatorship. No evidence exists that these employees asked for documents and were refused. For them to be aware they needed more documentation, a cursory review of the payee on the front of any of these checks would have raised questions. This cursory review had to take place to verify the amount of the checks and to total the amount of the deposit. When a second employee ignored the fact that the check was made out to Karen as Cody's *conservator* a week later, it was even more reasonable for the jury to conclude their testimony that they were unaware of the court ordered conservatorship was not believable. The evidence of conscious or reckless disregard continues to mount when the additional facts are

considered that neither the employees opening the accounts nor the tellers to whom the checks were handed required Karen to have endorsements on the checks which matched the payees as required by BOA's procedures manual and that they testified they would do whatever the customer in front of them asked for despite what the manual and procedures said. The fact that BOA's witnesses couldn't even agree on how common such accounts were in South Carolina would have further undermined the credibility of its claims of simple negligent oversight.

A. The evidence supports assessing punitive damages against Bank of America for the acts of its Pawleys Island branch employees.

Relying on the Restatement (Second) of Torts §909, Bank of America argues that it cannot be held liable for punitive damages for the acts of its employees. The Bank cites no South Carolina case adopting the Restatement (Second) of Torts § 909. Moreover, Hill v. United States Truck, Inc., 2007 U.S. Dist. LEXIS 39197, *3-4 (D.S.C. May 30, 2007) states:

Defendant contends that Restatement (Second) of Torts § 909 (1979) prohibits vicarious liability for punitive damages of an agent unless there is a showing of managerial knowledge of the acts. Furthermore, the defendant argues that an award of punitive damages based solely on vicarious liability is unconstitutional.

The rule on vicarious liability for punitive damages is not as universal as Defendant would have the Court believe. 22 Am. Jur. 2d Damages § 590 (2006) acknowledges that [t]here is a split of authority on the issue of an employer's vicarious liability for punitive damages. Some jurisdictions have adopted the Restatement Second, Torts formulation. Other authority takes a wider view of the vicarious liability of an employer, declining to require some act on the part of the employer -- such as direct participation, knowledge in advance, or ratification -- to fairly connect the employer with the employee's act.

South Carolina courts have adopted the latter view and do not require knowledge on the part of the employer to impose punitive damages for the acts of the employee. Brown v. American Tel. & Tel. Co., 82 S.C. 173, 63 S.E. 744 (1909); West v. Service Life & Health Ins. Co., 220 S.C. 198, 202, 66 S.E.2d 816, 817 (1951). Austin v. Specialty Transp. Servs., 358 S.C. 298, 318, 594 S.E.2d 867, 877 (2004).

In Austin, the South Carolina Supreme Court upheld a punitive damages award of approximately \$2.5 million dollars against the employer of a truck driver who had been dismissed from the

action based on the non-managerial employee's recklessness in running a stop sign and hitting the plaintiffs' car.

The U.S. Supreme Court has expressly declined to rule on this issue stating very recently that it is evenly divided on the issue. Exxon Shipping Co. v. Baker, 128 S. Ct. 2605, 2616, 171 L. Ed. 2d 570, 580 (U.S. 2008). However, Exxon recognized that the Restatement position is the minority position. The overwhelming majority of states follows the *respondeat superior* rule and allow punitive damages against an employer for the conduct of any employee. Id. Austin is controlling on this issue and clearly demonstrates it is without merit. Moreover, the trial court correctly held that Bank of America did not properly preserve this issue for review.

B. The Trial Court's constitutional and Gamble review supports affirming the punitive damages award:

If a jury awards punitive damages, the trial court must review the award to make sure it comports with due process under both state and federal law. This review is guided by Gamble v. Stevenson and its progeny, and by BMW of North America, Inc. v. Gore and its progeny. James v. Horace Mann Ins. Co., 371 S.C. 187, 193-194, 638 S.E.2d 667, 670 (2006).

Due process is only violated when a punitive damages award is a grossly excessive punishment of the tortfeasor. Id.; BMW, 517 U.S. at 568. Due process does not prohibit punishment of a tortfeasor or punitive damages. It only requires that the punishment not be grossly excessive to the tort. Id. Punitive damages serve two purposes: (1) punishing the wrongdoers and deterring them and others from engaging in similar reckless, willful, wanton, or malicious conduct; and (2) vindicating a private right of the injured party by requiring the wrongdoers to pay money to that party. Mazloom v. Mazloom, 675 S.E.2d 746 (Ct. App. 2009) citing Clark v. Cantrell, 339 S.C. 369, 378-79, 529 S.E.2d 528, 533 (2000).

Under Gamble, a trial court's post-verdict review of a punitive damages award

may consider the following: (1) defendant's degree of culpability; (2) duration of the conduct; (3) defendant's awareness or concealment; (4) the existence of similar past conduct; (5) likelihood the award will deter the defendant or others from like conduct; (6) whether the award is reasonably related to the harm likely to result from such conduct; (7) defendant's ability to pay; and finally, (8) as noted in Haslip, "other factors" deemed appropriate.

BMW and its progeny also require the trial court to review the award in light of the following guideposts: (1) the degree of reprehensibility of the defendant's misconduct; (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 authorized or imposed in comparable cases. James 371 S.C. at 194-197, 638 S.E.2d at 671-672.

The Bank first argues, without citing any authority, that the trial court erred as a matter in law in assessing the degree of its culpability because it considered the evidence as supporting a finding of fourteen errors whereas the Bank argues that all the listed errors almost completely stem from the initial single mistake each employee made in opening the account by not realizing that a conservatorship account should have been opened. However, this characterization is simply not the case. There were multiple procedures and rules in the Bank of America's manual which were violated by each employee. Many were not procedures applicable only to conservatorship accounts. They were applicable to all accounts and all checks. If the rules had been properly followed they would have reinforced conscious awareness that the funds involved were conservatorship funds and were subject to the procedures for conservatorship accounts.

For example, the failure to verify endorsements does not depend in any way upon recognizing a conservatorship account was required. The manual requires bank employees to verify endorsements on all checks, to make sure the endorsement matches the payee language on the check, and to verify authority to endorse for all checks with representative payees. This section of the manual is separate from the section on opening accounts. If the employees had

bothered to check the endorsements, it would have drawn their attention to differences between the endorsement and the payee language which would have highlighted the conservatorship language on the front of the check. If they had checked the manual sections on endorsements for any of the checks, the endorsement section would have pointed out that separate and apart from the rules on opening accounts, bank employees were required to obtain documentation verifying the authority of a representative payee before accepting their endorsements. (R. p. 379, line 7-R. p.384, line 11). Regardless of the mistakes made in opening accounts, if the endorsement rules had been followed, both employees would have learned of the court restriction on withdrawals.

Similarly, the failure to use the proper tax identification number on the accounts did not flow from a failure to recognize a conservatorship account. Both the bank manager and the personal banker testified they recognized a minor's funds were involved. Both testified they knew that regardless of which type of account was used, they knew a minor's tax ID should be used on a minor's account including a UGMA account. Nevertheless, both employees failed to use Cody's tax ID on an account they knew contained his funds. Instead they used Karen's tax ID. The Bank's own brief states its system was set up to default to Karen's tax ID, and its employees would have had to manually override this system default to get Cody's tax ID on the accounts containing his money. (Appellant's Brief p. 6). The failure to put Cody's tax ID on his money flowed from the separate mistake of disregarding whose money was being deposited regardless of whether it was in a conservatorship or not.

Failing to keep signature cards or similar documentation on the CD account also was completely unrelated to the conservatorship nature of the account. Most importantly of all, while BOA does acknowledge two employees made mistakes, it fails to acknowledge the two highest level branch employees making very similar multiple mistakes on two separate occasions a week apart is indicative of greater culpability than a single innocent mistake. It also glosses over the

fact that the number of different documents containing plain language ignored by the personal banker is evidence from which an inference of greater culpability can be drawn.

The Bank argues culpability stems from the absence of safeguards, not the presence of them. Therefore, it argues the existence of the procedures which were not followed weighs against culpability. To the contrary, culpability flows from the disregard of safeguards which would have prevented the loss of Cody's property if they had been followed. Both Ms. Yourko and Ms. Lawrence essentially testified it didn't matter to them what the checks or the bank procedures in the manual said. They were going to do what the person in front of them said she wanted. No security system can accomplish its goals if the employees in charge of using it refuse to follow it and instead insist they are going to follow the instructions of the people the system is intended to guard against. A security system designed to guard against a risk is useless if it is faulty or not used. See Collins & Sons and Accordini

Contrary to BOA's argument, the trial court made a finding on duration as supporting punitive damages. It found what occurred was not a single isolated incident. It was repeated conduct occurring on two different occasions a week apart involving two different employees. The hour of time it would have taken to avoid the situation is also relevant to the duration issue. The fact that a problem which could have been prevented by a half hour of attention is repeated by a second person on a totally separate occasion a week later shows both the conduct is likely to reoccur and it is not an isolated innocent mistake. Both support a need to deliver a message to the bank that it is worthwhile to take the modest time investment per account to protect vulnerable wards from a problem that is not an isolated occurrence.

On the matter of awareness or concealment, the lack of a direct admission of awareness by the employees committing the tort does not weigh against awarding punitive damages. Plaintiffs' counsel's comment in the post trial hearing was merely an acknowledgment of the

lack of direct evidence that the Bank employees intentionally ignored the word "conservator" on the multiple checks. However, as pointed out above, the law recognizes plaintiffs will rarely be able to present evidence "from the mouth of a defendant himself" of the states of mind relevant to punitive damages, and that such states of mind are usually proved by circumstantial evidence. Anderson v. Augusta Chronicle, 365 S.C. 589, 619 S.E.2d 428, 431-432 (S.C. 2005) citing Herbert v. Lando, 441 U.S. 153, 171-72 (1979), St. Amant v. Thompson, 390 U.S. 727, 732 (1968) and Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657, 688 (1989). Moreover, a jury is not required to believe the protestations of lack of awareness and good faith by BOA. Its own corporate designees acknowledged the word "conservator" was open and obvious on several checks in the first transaction, and the sole check in the second transaction. Moreover, Ms. Yourko testified she knew Karen was Cody's guardian, and she put the word guardian in the title to the CD account. This testimony coupled with the jury's own view of the checks themselves permit the jury to draw a reasonable inference the branch manager and personal banker were "aware" of the fact these checks were payable to a conservator and that a conservator was a person appointed by a court to handle the affairs of a minor or person unable to handle his own business affairs. (R. p. 253, lines 11-23; R. p. 447, line 1-R. p.448, line 23; R. pp. 793-799; R. p. 804).

While one of the Gamble factors is the existence of similar past conduct, it is only one of the eight factors which a court may consider in evaluating punitive damages. There are numerous South Carolina cases upholding single digit multiplier punitive damages awards where the compensatory damages are all economic, and there is no evidence of past similar conduct. See e.g., GTR Rental, LLC v. DalCanton, 547 F. Supp. 2d 510 (D.S.C. 2008), James v. Horace Mann Ins. Co., 371 S.C. 187, 638 S.E.2d 667 (2006), Jordan v. Holt, 362 S.C. 201, 608 S.E.2d

129 (2005); Mackela v. Bentley, 365 S.C. 44, 614 S.E.2d 648 (Ct. App. 2005)¹¹ Frazier v. Badger, 361 S.C. 94, 603 S.E.2d 587 (2004) held:

As part of its holding in Gamble, this Court opined, "the trial court shall conduct a post-trial review and may consider the following..." Id. (emphasis added). The word "may" signifies that the Gamble factors are to provide guidance, not "hard and fast" requirements.

Frazier then went on to find that an ability to pay (one of the eight Gamble factors) did not necessarily have to be present to justify a substantial punitive damages award. Similarly, neither personal injury nor past similar conduct is necessary for a finding of reprehensibility where other factors are present.

The U.S. Supreme Court has listed several other factors as indicative of reprehensibility including the tortious conduct itself evincing an indifference to or a reckless disregard of the health or safety of others; the financial vulnerability of the victim; or the conduct in the case at hand involving more than one isolated incident. State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 419, 123 S. Ct. 1513, 155 L. Ed. 2d 585 (2003). Gamble also includes other reprehensibility factors which can also substitute for non-economic harm and past similar conduct, including (1) duration of the conduct and (2) other factors deemed appropriate.

Moreover, after Philip Morris USA v. Williams, 549 U.S. 346 (2007), it is clear prior incidents of similar conduct must be confined to a very limited role when this type of evidence is presented to the jury at all in a punitive damages case. The jury may consider prior similar conduct as one factor in the reprehensibility of a defendant's conduct, but if such evidence is presented to the jury, the jury must be carefully instructed to make sure the jury's punitive damage award is not based on punishing the defendant for past wrongs or wrongs to people not

¹¹ BOA attempts to distinguish these cases on other points on which they are dissimilar to the present case. But similarity on specific factual patterns was not why the court cited these cases. They are similar on the point of punitive damage awards which are single digit multipliers of compensatory damages which were all economic damages and where there was no evidence of past similar conduct. Those were the similar factors which make them

party to the litigation. When evidence of past similar conduct is not presented to the jury, it is much clearer that the jury's award is based solely on the legitimate goals of punishing the defendant for what was done to this plaintiff and deterring similar conduct in the future which are both legitimate goals of punitive damages.

In the present case, numerous factors support the reprehensibility or culpability factor under State Farm v Campbell and Gamble. The victim of the Bank's misconduct was a small boy who had just lost his father and was dependent on the conservatorship funds to replace his father's support. The Bank's conduct was not limited to a single incident of allowing the conservator to mishandle the child's funds. It allowed her to execute several transactions and move the money to several accounts in her own name. The duration of the conduct Bank of America's actions permitted spanned more than a year and several transactions and accounts. The Bank's inability to easily identify conservatorship/trustee/other beneficiary or restrictive type accounts and thus to apply even the most basic care to abide by restrictions on such accounts is likely to result in future harm. This situation needs to be deterred from occurring again in light of the vulnerability of the victims/wards. Bank of America knew or should have known its inability to identify restrictive accounts and implement basic procedures to provide at least some minimum oversight to ensure it was complying with the restrictive terms of the account/court orders would likely result in loss of funds to financially vulnerable wards through mishandling of funds. All these factors demonstrate the Bank's conduct was not just accidental, but was instead quite reprehensible.

This award complies with the second and third Campbell factors and the fifth through eighth Gamble factors because it is within single digits and within the range of multipliers approved by South Carolina courts for wrongful conversion, misappropriation, and tortious

relevant for the reason the trial court cited them.

breach of contract. South Carolina has an interest in having banks that hold funds from South Carolina conservatorships abide by the restrictions its courts endorse on conservatorship letters to protect those South Carolina residents whom its courts have determined are in need of the protection of a conservatorship. It has an interest in punishing those banks who accept such funds for deposit blindly without any fear of recourse for failing to inquire and document the conservator's authority. It has an interest in punishing banks who fail to follow procedures to comply with court ordered, properly documented restrictions and without adopting and using procedures to review the actions of its employees who open such accounts. Thus, the award must be sufficiently high to deter the type of conduct that caused harm to this plaintiff. Therefore, it must be sufficiently high for Bank of America to find it unprofitable to ignore S.C. Code Ann. §§ 62-5-423 and 62-5-426¹² and thus find it cost effective to adopt procedures to review compliance with these statutes and to investigate incidents such as this one when they happen.

Awarding punitive damages equivalent to one hour of profits based on the last six months of reported profits prior to trial, which had been a historically low period for bank profits, is related to drawing attention to and deterring precisely the kind of conduct that caused this loss in the future. Cody P asked the jury not to round the amount of punitive damages off to a figure unrelated to what occurred. He asked the jury to award an amount which would cause Bank of America executives to think about where the number came from, and therefore to take a closer look at this case and pay attention to what happened here. That message is precisely what the jury intended to convey. The jury awarded an amount of punitive damages designed to draw

¹² These statutes address the effect of restrictions placed on a conservator by the Probate Court. Section 62-5-423, S.C. Code of Laws Ann. states that a person knowingly dealing with a conservator is not required to inquire into the existence of a power or the propriety of its exercise except that restrictions on powers of conservators which are endorsed on letters as provided in §62-5-426 are effective as to third persons. Section 62-5-426 allows the Probate Court to limit a conservator's power and states that such limitations shall be endorsed on the letters of appointment and upon any certificate evidencing his appointment. The Trial Judge denied Cody P's request to charge this statute and negligence per se to the jury and stated that he believed "the statute is instructive to the extent

the Bank executives' close attention to this particular case and see the damage caused by its two employees' paying more attention to the person in front of them at their desks than to the vulnerable customer who really owned the money and needed protection.

Contrary to the Bank's arguments in its brief, the amount of compensatory damages stipulated to by the parties in this case would not have had that effect. Although Bank of America argued at trial that it was willing to make Cody whole and that this case was only about extracting punitive damages from it, it litigated this case for more than five years without ever offering to make Cody whole. Liability was never admitted by the Bank. It continued through jury instructions, post trial motions, and even this appeal to argue that it should not be required to pay Cody even the stipulated amount of his actual damages because it claims Karen's criminal conduct was an intervening cause that eliminates its fault as a proximate cause of Cody's loss. A couple of hundred thousand dollars is a large amount of money when it comes to supporting a minor like Cody who has lost his father. It is an infinitesimal, insignificant, and unnoticeable sum of money for a company the size of Bank of America that made over a million and a half dollars every hour of every day of the year.¹³

Also contrary to the Bank's arguments, it did benefit from receipt of Cody's funds. There was testimony that funds the Bank receives from deposits are necessary to fund the loans it makes to other customers from which it earns the fees and interest that make up its profits. Cody's funds were a large deposit, well over the maximum amount for which an individual's

that it points out the legislative concern for those who deal in conservatorship funds." (R. p. 576, line 6-R. p.579, line 11; R. p. 587, lines 3-9; R. p. 625, line 16-R. p.631, line 10).

¹³BOA's argument that the latest data it has made publicly available on its profits is not relevant to punitive damages awarded only a few months later completely misses the mark on what is relevant. Relevant evidence is anything making it more likely that a fact is true than if the evidence did not exist. S.C.R.E. 104. What BOA has published as its most recently available financial data certainly makes it more likely that a jury's award will be reasonably related to its net worth, wealth and ability to pay than if that data were not available to the jury. If it wishes to attack the credibility of that evidence, it is certainly entitled to present evidence to the contrary. But the fact that financial information continues to change does not make the most recently published financial data unreliable or irrelevant.

funds in a bank are insured by federal deposit insurance. Such deposits and the loans they fund are sufficiently important to the Bank's making of profits that it rewards its employees with additional compensation bonuses based on types and amounts of new deposits and loans which they secure for Bank of America. Getting Cody's account was more important to the Bank than reviewing new accounts to make sure the proper paperwork and authority was secured on accounts with the word "guardian" in their titles or reviewing checks for several thousands of dollars to make sure they complied with its endorsement policies and procedures.

The Supreme Court has held the wealth of a defendant is a factor to be considered in determining whether a punitive damages award in a case is rationally related to the case and the amount required to deter similar conduct in the future. Today's multijurisdictional banking corporations do not make decisions based on profits in a single branch or even a single state. They run their complex businesses paying attention to much broader areas. Their stockholders come from everywhere, and they are concerned about overall profits to all their stockholders. To get their attention, an award must be rationally related to their size and wealth and the amount of money to which they will pay attention. In order to make them realize their actions nearly wiped out the funds to support a young special needs boy who had lost his father for his most vulnerable years, the award must be sufficient in relation to their time/profit ratio to cause enough effect to make them realize their actions caused major significant harm to this child. A gnat bite will not accomplish that purpose.

When Bank of America reports its business, income and profits to its shareholders, the Securities and Exchange Commission and the I.R.S., it does not limit its reports to its South Carolina income. It does not report to its South Carolina shareholders only the income it earns in South Carolina. When its Board makes policy decisions, it does not adopt policies solely for its South Carolina branches. It acts on a company-wide basis. Therefore to affect its actions, all its

wealth and profits are relevant. While U.S. Supreme Court case law does speak of not punishing a corporation for what it does in other states which may not be contrary to the laws of those other states, nothing in U.S. Supreme Court or South Carolina case law on punitive damages limits the consideration of a defendant's net worth or other wealth evidence to only the income derived from a single state or property held in a single state. No one would argue an individual who runs a stop sign while drunk on vacation and hits a school bus killing a group of children in another state from where he works, lives and owns real property should be excused from paying punitive damages based on his total net worth because he does not earn income or own real property in the state where his recklessness killed children. It logically follows a corporation which earns income in multiple jurisdictions and owns property in multiple jurisdictions has no right to limit punitive damages awards against it based on the income it earns in a particular jurisdiction. The jurisdictional issues are related to the wrongful conduct a state has a rational reason for punishing, not to where a defendant accumulated its wealth. Wealth is relevant because of its effect on the whole defendant, not because of where the defendant committed the tort or hurt the victim.

Because there do not appear to be any particular civil penalties for violating state statutes §§62-5-423 and 62-5-426, a comparison on this point provides no guidance on the reasonableness of the punitive damages award. James v. Horace Mann Ins. Co., 371 S.C. 187, 638 S.E.2d 667 (2006) relying on BMW. Two plus factors identified by BMW and State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. at 419, as justifying higher punitive damages awards are also present in this case. BMW holds that where the injury is one that is difficult to detect and easy to conceal, higher punitive damages awards may be appropriate. Contrary to the Bank's argument, it is not the absolute quantity of conservatorship accounts in South Carolina which was relevant to the trial court's analysis on this factor. It was the fact that the Bank's

designated corporate representative who testified that she was the custodian of records responsible for records on conservatorship account but could not give the court some idea of how many of these accounts BOA has, which led the court to draw the inference that it is difficult to find these accounts and supervise them sufficiently to detect and avoid this type of problem. If the person responsible for the records does not have such knowledge, then it supports a reasonable inference by the court that Bank of America is unlikely to detect and prevent such injuries in other cases.

Bullis v. Security Pac. Nat'l Bank, 21 Cal. 3d 801, 582 P.2d 109, 148 Cal. Rptr. 22 (1978), demonstrates that contrary to the Bank's arguments, losses in a fiduciary account may be difficult to detect especially when the defendant's actions have the effect of putting only one co-fiduciary on the account where a court has appointed two fiduciaries. It means the bank does not send information to the other co-fiduciary. No one but Karen and Bank of America had access to information on Karen's personal accounts, so no one else could see that she was putting Cody's money in her accounts. The Bank did not put the Co-conservator Travis Powell's name or address on the accounts, so he got no statements or other paperwork. BOA also did not put Cody's tax ID number on the account, so nothing went to Cody's address or his mother's address because of his social security number being on the account. If anyone had asked BOA about Cody's money and given them his social security number, his accounts would not have been retrieved by their system.

Second, the relatively low size of compensatory damages that would exist in most UGMA and other beneficiary-type restrictive accounts is low enough that compensatory damages alone would often be insufficient to making suing for compensatory damages practical. See BMW ("[L]ow awards of compensatory damages may properly support a higher ratio . . . if, for example, a particularly egregious act has resulted in only a small amount of economic

damages"). The award has to be big enough to have a deterrent effect on an institution the size of BOA. It has to be big enough for it not to be more profitable to do nothing than to implement basic procedures to identify restrictive accounts and try to abide by the account terms. Making the award reasonably related to the cost to identify restrictive accounts and implement basic provisions to abide by the contract terms and court orders on obviously restrictive accounts (conservatorships, trust accounts, representative payee accounts) also shows the award is related to the potential harm likely to be caused by the wrongful conduct.

While the Bank cites Exxon Shipping Co. v. Baker, 128 S. Ct. 2605, 171 L. Ed. 2d 570, (2008) as casting doubt on the reasonableness of any award where punitive damages exceed compensatory damages by more than 1:1, such an argument is misplaced. The Supreme Court in Exxon was very clear in holding the decision was not based on due process grounds and is limited in the maritime cases on which it is binding. Its holding is narrowly confined to federal maritime tort cases governed by federal common law where Congress has not passed any statutes on punitive damages. The Supreme Court made it clear Exxon was setting these standards well inside the constitutional due process limits according to what it felt was necessary to achieve punishment and deterrence. Exxon is of no precedential value in the present case.

CONCLUSION

Each of the Bank's issues raised in this appeal seeks to take a jury issue out of the jury's hands. Each of its arguments depends upon viewing the evidence in the light most favorable to Bank of America, disregarding all the evidence in Cody P. 's favor, and finding that inferences Bank of America draws from its view of the evidence are the only reasonable inferences which can be drawn from the evidence. This turns the law on its head.

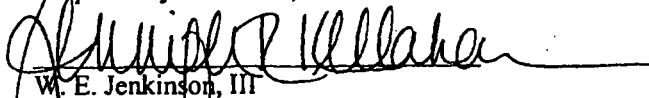
The Bank's arguments ring hollow. Counsel for both parties argued in their closing arguments that they trusted the jury to mete out justice in this case. The Bank, however, argued

to the trial court and this court now that the jury's verdict could be overturned because no reasonable jury could find them liable to Cody P. for a dime. Similarly, Bank of America told the jury at the outset that it has wanted to make Cody P. whole from the beginning of this litigation (R. p. 149, lines 9-11, 18-20)¹⁴-- all the while adamantly denying liability and arguing to the trial court and this court that it should not be required to pay one dime toward making him whole.

Considerable evidence exists to support the jury's finding that the actions of Cody's aunt were foreseeable in this situation. Two of the Bank's employees testified that they would open accounts for Karen Unrue with Cody's money that would give her unrestricted access to it solely because it was what Karen Unrue asked them to do. They disclaimed any responsibility for asking any questions, for making even a cursory examination of the checks presented, for ascertaining what authority Karen Unrue had to handle Cody's checks, or for determining what types of accounts were appropriate to open for Cody. In short, the Bank asks this court to find its employees could not recklessly disregard Cody's rights as a matter of law as long as they ignored all information available to them and did not expressly admit they intentionally intended to help Karen Unrue steal his money. However, that is not the law of South Carolina. Moreover, neither South Carolina law nor U.S. Supreme Court case law supports Bank of America's contention that it can avoid punitive damages for its cavalier failure to recognize and protect Cody's rights simply because several of its employees testified they did not intend harm to Cody and did not see or understand the obvious payee on checks totaling over a quarter of a million dollars. For these reasons, the jury's verdict should be affirmed.

¹⁴ "We've been willing to do it from day-one. . . . We can make -- and will make the child whole for \$205 -- something - odd." (R. p. 149, lines 9-11, 18-20).

Respectfully submitted,



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October 7, 2009

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM WILLIAMSBURG COUNTY
Court of Common Pleas
Clifton B. Newman, Circuit Court Judge

Case No.: 2003-CP-45-207

Cody P., by and through his Conservator Kelly H. Kelley, and his natural and legal guardian Elizabeth Powell, ...Respondent,

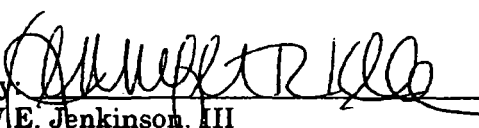
v.

Bank of America, N.A., Karen P. Unrue, and Travis Powell, ... Defendants,
of whom

Bank of America, N.A., is Appellant.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Final Brief complies with Rule 211(b) SCACR.

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October 8, 2009

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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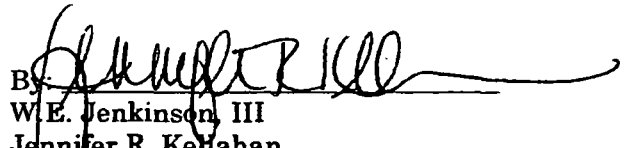
v.

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of whom

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the Respondent's Final Brief complies with the Supreme Court's Order, dated August 13, 2007, pertaining to personal data identifiers and other sensitive information.

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In the Court of Appeals

APPEAL FROM WILLIAMSBURG COUNTY
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v.

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Bank of America, N.A., is Appellant.

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October 9, 2009


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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM WILLIAMSBURG COUNTY
Court of Common Pleas

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SC Court of Appeals

Clifton B. Newman, Circuit Court Judge

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Elizabeth Powell, ... Respondents,

v.

Bank of America, N.A., Karen P. Unrue, and Travis
Powell, ... Defendants.

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REPLY STATEMENT OF THE FACTS

Plaintiffs incorrectly state that Mrs. Unrue and Travis Powell petitioned the probate court to serve as co-conservators and requested that the court waive the bond requirement. To the contrary, the minor's mother, Elizabeth Powell, petitioned the court requesting the appointment of Mrs. Unrue and Travis as co-conservators. Mrs. Unrue approached Elizabeth seeking to serve as conservator to manage Cody's funds, and she suggested that Elizabeth ask the probate court to waive the bond requirement. Elizabeth acquiesced in this plan, and the probate court granted her request. (Pl. Exs. 1-2, R. 784-90; 172-75.)

Plaintiffs mistakenly assume, throughout their brief, that "guardian" automatically denotes a court-appointed person. To the contrary, a guardian may open a minor account without a court order, the account is not restricted, and the depositor has unrestricted access to manage the funds. (R. 258-59, 290; Pl. Ex. 31, R. 843-47.) Ms. Denning testified that a guardian is a court-appointed individual in response to Plaintiffs' counsel questioning her specifically about conservator accounts, and a guardian over a conservatorship is court-appointed. (R. 242.) She did not deny that non-court-appointed guardians also open other types of non-restricted, minor accounts.

Plaintiffs' reference to BOA's incentive program for employees is irrelevant to this appeal because the trial court found "no evidence that the Bank employees received bonus compensation for these particular transactions." (Order, R. 22.)

Other errors in Plaintiffs' facts are noted below, as they are relevant to BOA's arguments.

For purposes of this appeal, the most relevant facts are those that the parties do not dispute and those that are capable of only one reasonable interpretation on this record, including the following:

- BOA's employees mistakenly opened guardian/custodian accounts, instead of the restricted conservator account, required by the checks. (Pl. Exs. 14-16, 32, R. 802-07, 880; 254, 273, 290, 325, 330, 355, 413-14, 422-24, 430, 437, 451, 457-58, 489, 552, 562.)
- BOA had numerous and adequate policies, procedures, manuals, and resources in place to guard against this loss. (R. 265, 398-402, 406-10, 526-27; Pl. Ex. 31, R. 843-47; 775.)
- BOA trained its employees, including those that made the mistakes in this case, before they assumed their duties, and their training included the proper procedures for opening conservator accounts. (R. 275-76, 337-40, 368, 371, 422, 763.)
- There was no evidence presented that the BOA employees who made the mistakes here had any prior history of making mistakes of this or any other nature, and Plaintiffs did not claim that they were negligently hired, retained, or trained. (R. 328-29, 332, 337, 386.)
- There was no evidence that BOA or its employees had any reason to be suspicious of Mrs. Unrue or realize her criminal scheme. (R. 271-72, 283, 319-20.)
- There was no evidence that BOA had ever made a similar mistake in opening conservator accounts in this or any other branch, prior to this incident. (R. 776.)

ARGUMENT

- I. **This Court Should Reverse the Judgment Against BOA Because the Conservator's Unforeseeable Intervening Acts Proximately Caused the Minor's Loss, and the Trial Court Clearly Erred in Finding Otherwise.**

The record in this matter is "without evidence which reasonably supports the finding" of proximate cause. Mellen v. Lane, 377 S.C. 261, 281, 659 S.E.2d 236, 247 (Ct. App. 2008). BOA does not dispute that the question of proximate cause is often a

question for the jury where the evidence is capable of a reasonable conclusion that the defendant proximately caused the injury. However, that is not the case on this record.

Acts that are merely possible, as opposed to probable or likely, do not establish foreseeability under governing South Carolina law. The evidence presented in this case is not capable of any reasonable inference that it was probable that the conservator, entrusted by her family and the court to manage her minor nephew's funds without a bond requirement, would steal his funds. The trial court's contrary finding ignored and redefined the legal definition of foreseeability.

In addition to the numerous cases cited in BOA's opening brief, this Court's decision in Thomas v. South Carolina Department of Highways & Public Transportation, 320 S.C. 400, 465 S.E.2d 578 (Ct. App. 1995), is also instructive. There, the state failed to confiscate the license and car registration of an uninsured driver, as required by statute, and the driver subsequently ran over plaintiff causing him severe injuries. This Court held that the plaintiff failed to prove causation in fact, as a matter of law.

There is no evidence at all that even if the Department had taken Green's license tag and car registration, Green, who had a valid driver's license, would not have been negligently operating either the uninsured vehicle or some other vehicle at the time he ran over Thomas. We can only speculate about what he would or would not have done had the Department recovered his license tag and car registration.

Id. at 402, 465 S.E.2d at 580. Plaintiffs' case requires the same kind of speculation.¹

Another instructive case is Holifield v. BancorpSouth, Inc., 891 So.2d 241 (Miss. Ct. App. 2004). There, investors sued defendant bank, alleging negligence in its failure to prevent a fraudulent investment scheme. Id. at 243. The investors claimed that the bank breached a duty owed to them by accepting checks made payable to "James D. Harrell, IV, in Trust" with improper endorsements and by allowing Harrell to deposit some of the checks, totaling approximately 1.9 million, in his own operating account, as opposed to his trust account. Id. at 244. Harrell did not endorse some of the checks, he endorsed some individually without noting his role as trustee, and he endorsed others as a trustee. Id. at 244-45.

The court held that the bank did not owe a duty to the investors for these varying endorsements because Harrell was a proper person authorized to negotiate the checks. Id. at 248. The court also held that the bank did not owe the investors a duty to prevent Harrell from depositing the funds into his operating account unless "the bank had actual knowledge of the trustee's fraudulent actions at the time of the transaction." Id. at 249. Actual knowledge is defined as an "'awareness at the moment of the transaction that the fiduciary is defrauding the principal. It means express factual information that funds are being used for private purposes in violation of the fiduciary relationship.'" Id. (quoting Collier v. Trustmark Nat'l Bank, 678 So.2d 693, 697 (Miss. 1996)). Even though the face of the check designated a trust as payee, the bank

¹ Plaintiffs erroneously contend that "[t]he most succinct statement of the law contrary to the Bank's arguments" is found in select portions of Restatement provisions they quote. (Respondents' Brief at 10-11.) Reference to these provisions is not helpful or persuasive where ample South Carolina case law exists defining the test for foreseeability in the context of proximate cause and intervening acts. (BOA's Opening Brief at 9-16, 22-26.)

owed no duty to the investors to ensure that the funds were deposited in the proper type of account because no evidence existed that the bank had actual knowledge of Harrell's wrongdoings. Id. Similarly, as the minor's conservator, Mrs. Unrue had the power and right to negotiate the checks, but she abused her powers by misapplying his funds.

Plaintiffs erroneously describe the restricted account as a "security system" in an effort to analogize this case to the alarm cases, which are not persuasive here. See Collins & Sons Fine Jewelry, Inc. v. Carolina Safety Sys., Inc., 296 S.C. 219, 371 S.E.2d 539 (Ct. App. 1988) (rejecting intervening cause where the plaintiff previously discussed the defects in the system with the defendant and the defendant was aware of the problems); Accordini v. Sec. Cent., Inc., 283 S.C. 16, 320 S.E.2d 713 (Ct. App. 1984) (merely reversing the grant of a demurrer and not finding that plaintiff proved proximate cause). In the alarm cases, the intervening third party was a burglar who had no connection to the defendant or the stolen property, and the assumption was that disabling the alarm provided their only access to the goods. In contrast, the intervening third party in this case had special access to the funds she stole by virtue of her appointment as a conservator, as requested by the minor's mother.

Melley v. Pioneer Bank, N.A., 834 A.2d 1191 (Pa. 2003), cited by Plaintiffs, is also distinguishable because the court held the bank liable under the Uniform Fiduciaries Act, finding the bank had actual knowledge of the mother's breach of her fiduciary duty and acted in bad faith within the meaning of the Act. Therefore, the court's intervening cause analysis in Melley is not applicable here.

Plaintiffs' reliance on New Jersey Bank, N.A. v. Bradford Securities Operations, Inc., 690 F.2d 339 (3rd Cir. 1982), is also not persuasive because the court

applied the New Jersey test of foreseeability, which allows “possible” to prove foreseeable. South Carolina courts define foreseeable as that which is “probable.”

The court’s reasoning in Thropp v. Bache Halsey Stuart Shields, Inc., 650 F.2d 817 (6th Cir. 1981), is also distinguishable because that suit arose from mismanagement of securities, and thus, involved a more stringent legal standard than applies in this matter. Under Ohio law, a stockbroker is an agent or bailee who acts as a fiduciary and stands in a special relationship to the client. Id. at 819. In that context, the law holds the fiduciary defendant to a higher standard of care than that applicable to an ordinary negligence claim. In re Donahue Sec., Inc., 318 B.R. 667 (Bkrctcy. S.D. Ohio 2004) (recognizing that “[a] claim of breach of a fiduciary duty is basically a claim of negligence, albeit involving a higher standard of care” (citation omitted)), aff’d, Lutz v. Chitwood, 337 B.R. 160 (S.D. Ohio 2005).

BOA is not a fiduciary in the present case; and therefore, ordinary negligence principles apply. The trial court granted BOA’s motion for a directed verdict as to Plaintiffs’ breach of fiduciary duty claim, and Plaintiffs did not appeal that ruling. (R. 622-23 (granting directed verdict, finding “absent the establishment of the fiduciary relationship through something more than a depositor . . . there . . . can be no breach of fiduciary duty since there is no fiduciary relationship”).) Therefore, Thropp is not persuasive in the context of this case.

The egregious facts and procedural posture of Lerner v. Fleet Bank, N.A., 459 F.3d 273 (2nd Cir. 2006), also render that case distinguishable and unpersuasive here. The court in Lerner merely reversed in part the district court’s grant of a motion to dismiss, and thus, the court assumed all of plaintiffs’ allegations to be true.

Significantly, the allegations included claims that the defendant banks knowingly and willingly participated in the third party criminal's scheme, which caused a loss of \$82 Million to investors. The plaintiffs alleged that bank executives intentionally made exceptions to bank policies in order to cover the criminal's financial problems, lied to inquiring payors to protect the criminal's activities, and engaged in numerous knowing and aiding acts. The Lerner court's ruling that the intervening act rule did not protect the bank under these allegations is not remotely similar to the facts before this Court.

Plaintiffs also cite Bullis v. Security Pacific National Bank, 582 P.2d 109 (Cal. 1978), as support for their argument that BOA proximately caused the loss here. Bullis is distinguishable because the defendant bank had actual knowledge that the two names on the account were both court-appointed co-executors of an estate, the bank had possession of the required court documents, and the bank set up the proper type of estate account. Id. at 110-11. However, the bank violated the probate court statutes and bank policies in administering the estate account. Id. at 113-14. Bullis is not persuasive on the record here because there is no evidence that BOA ever received the court documents, and thus, did not have actual knowledge of the restrictions. Moreover, the trial court did not find that BOA's conduct violated any statute.

Hence, the trial court erred in denying BOA's motion for JNOV. This Court should reverse and enter judgment for BOA.

II. This Court Should Reverse the Punitive Damages Award Entirely and Find that the Trial Court Erred in Submitting Punitive Damages to the Jury.

A. Plaintiffs failed to prove by clear and convincing evidence that BOA or its employees acted with willful, wanton, or reckless disregard for the rights of others.

BOA's employees made honest mistakes that did not proximately cause the minor's loss. If this Court disagrees, at worst, their actions constituted simple negligence, which cannot support a punitive damage award as a matter of law. See Longshore v. Saber Sec. Servs., Inc., 365 S.C. 554, 619 S.E.2d 5 (Ct. App. 2005) (reversing a punitive damage award because insufficient evidence existed of willful, wanton, or reckless disregard of the rights of others, where the defendant violated internal policies, but the incident was a one time occurrence, and at most, amounted to negligence); see also Atkinson v. Orkin Exterminating Co., 361 S.C. 156, 170 n.8, 604 S.E.2d 385, 392 n.8 (2004) (recognizing that punitive damages cannot be awarded for simple negligence).

Plaintiffs contend that the trial court properly submitted punitive damages to the jury, arguing that BOA was aware of a dangerous or risky situation and did not follow the proper course of conduct, citing Welch v. Epstein, 342 S.C. 279, 536 S.E.2d 408 (Ct. App. 2000) and McGee v. Bruce Hospital System, 321 S.C. 340, 468 S.E.2d 633 (1996). Neither case supports Plaintiffs' position here. Welch involved a physician's alleged misuse of a medication, which caused the patient's death. The court found that clear and convincing evidence of the physician's reckless culpability existed where the physician testified he was aware of the manufacturer's express warning against using the medication in a post-operative setting, but chose to prescribe it anyway.

Similarly, in McGee, also a wrongful death medical malpractice case, the physician testified that he was aware of the express warnings on the package inserts regarding the conditions that may result from improper placement of the catheter, but made a conscious decision to leave it in place as it was. Hence, McGee is inapplicable.

Plaintiffs also claim that Scott v. Porter, 340 S.C. 158, 530 S.E.2d 389 (Ct. App. 2000), supports their theory that the BOA employees exhibited "a disinterested attitude" in a situation where there was cause for concern, and thus, acted recklessly. Scott is another wrongful death medical malpractice case in which the court upheld the punitive damages award, finding that the physician exhibited a "disinterested attitude," recklessly failed to realize the urgency of her one year old patient's condition, and failed to act quickly to save his life by simply turning off his IV. The court noted that her conduct was highly culpable and that she was aware of her actions and the risks. Hence, the Scott case does not support the punitive award here.

Plaintiffs then devote many pages of their brief to the argument that the BOA employees acted recklessly, even claiming BOA's employees were aware that Mrs. Unrue was a court-appointed conservator and consciously decided not to consult the manual or follow those procedures. (Respondents' Brief at 24-36.) The evidence in this case is not reasonably capable of any such inference, and the trial court clearly erred in submitting punitive damages to the jury. (See BOA's Opening Brief at 27-34.)

In a transparent effort to convince this Court that BOA acted recklessly, Plaintiffs make many assumptions, over-generalizations, and misstatements that are not supported by the record. BOA explained some of these errors above under the Reply Statement of Facts. Additionally, Plaintiffs argue that even if BOA's employees did not

open conservator accounts frequently, those accounts are similar to estate accounts, implying that the employees should be familiar with appointment documents. The record in this case does not support Plaintiffs' analogy. The mistakes that occurred here arose from opening the wrong type of minor account, confusing the terms "conservator" and "custodian." Custodian accounts are the most common type of minor account, and they do not involve appointment documents, restrictions, or court involvement. (R. 372, 457-58, 488.) Thus, for purposes of evaluating BOA's conduct and the issues on appeal, the relevant comparison is between the different types of minor accounts, and not between conservator and estate accounts.

Plaintiffs also argue that BOA acted recklessly in allowing the deposit of these funds into a certificate of deposit because no one in the bank noticed that conservator funds are not eligible for a certificate of deposit. Plaintiffs completely ignore the evidence that a certificate of deposit is an authorized product for a custodian account, (r. 489, 561-62), and that the "guardian" designation on the account title simply indicates that it is a minor account, but does *not* automatically denote a guardian *conservatorship* account, (r. 258-59, 290; Pl. Ex. 31, R. 843-47).

Plaintiffs also state, "Ms. Yourko testified she knew . . . that Karen was helping out with Cody's business since his father's death. (R. 319)." (Respondents' Brief at 27-28.) Actually, Ms. Yourko testified that she learned from another bank employee that Cody's "father was killed in some type of accident and that Karen was *taking care of his son*." (R. 319-20 (emphasis added)). This is the only statement in the record as to what Ms. Yourko knew about their relationship.

Plaintiffs incorrectly state that Ms. Denning agreed with Mr. Hubbs' report, which was not an exhibit at trial and not part of this record, in any event. When handed the report for the first time in her deposition, Ms. Denning testified that she agreed that the BOA employees made a mistake in opening the accounts, but also explained that BOA did not have the court documents that Mr. Hubbs relied upon in forming his opinions. (R. 262-63.)

Plaintiffs also seek to infer recklessness from the fact that the checks were payable to Karen M. Powell and some of the accounts were titled with her married name, Karen M. Unrue. This is a red herring. Plaintiffs' trial exhibits demonstrate that BOA held accounts for Karen under both her maiden and married names. Therefore, BOA knew Karen Powell and Karen Unrue to be the same person, by virtue of the social security number. (Pl. Ex. 25, R. 823-24 (signature card of a regular checking account for Karen M. Powell and Thomas Jay Unrue Jr. dated 6/10/99); Pl. Ex. 12, R. 800 (deposit slip for the certificate of deposit Ms. Yourko opened in the name Karen M. Powell dated 4/26/01); Pl. Ex. 14, R. 802-03 (signature card for the custodian account Ms. Lawrence opened in the name Karen M. Unrue dated 5/4/01 and bearing the same SSN as Pl. Ex. 25).)

Finally, Plaintiffs mischaracterize Ms. Yourko's testimony by paraphrasing it as: "I can't be bothered to look at the checks" because "[i]t isn't my responsibility to pay enough attention to ask questions and follow the right procedures set out in the manual if the customer doesn't ask for the right kind of account in the first place." (Respondents' Brief at 29.) Ms. Yourko never testified to the disregard for bank policy or the minor's rights, as Plaintiffs suggest. (R. 295 ("I always looked—if someone

came in and said they wanted to open that specific account [conservator], then that's the specific page that I go to in the manual"), 329 ("If [Ms. Unrue] had provided you with a court order indicating that she was to open a conservator account, would you have opened a CD account? No."), 332 (she did her best to follow bank procedures, was careful to try to avoid mistakes, and cared about all of her customers, who she treated the same).)

Ms. Yourko testified that she did not open a conservator account because Mrs. Unrue did not ask for that type of minor account or provide her with court documents. All parties agree that the checks provided her with that information, but Ms. Yourko made a mistake and did not catch the distinction on the checks. Instead, she stated that she obviously followed Mrs. Unrue's request and placed the funds in a certificate of deposit with Mrs. Unrue as the guardian.² Although she was mistaken, no reasonable reading of Ms. Yourko's testimony allows for an inference of reckless disregard for the minor's rights or bank policies.

On this record, the trial court clearly erred in submitting punitive damages to the jury, and the Court should reverse and vacate the punitive damages award.

B. Plaintiffs failed to prove that BOA acted in complicity with its employees, and this Court should not allow punitive damages under these circumstances.

Plaintiffs argue that Austin v. Specialty Transportation Services, Inc., 358 S.C. 298, 594 S.E.2d 867 (Ct. App. 2004), is controlling on this issue. To the contrary, this Court did not even address an argument in favor of the complicity doctrine in Austin. There, this court upheld the propriety of the trial court's punitive damages

² Plaintiffs also fail to acknowledge that throughout her deposition, Ms. Yourko stated that she did not remember this transaction, (r. 273, 303, 307), which occurred almost four years earlier, (r. 268).

award, entered as part of default proceedings. The defendant argued that the trial court erred in awarding damages based on the actions of its driver because he was previously dismissed as a party. Id. at 319, 594 S.E.2d at 878. This Court merely noted the general rule that where the plaintiff sues both the principal and agent together, the principal is not liable for punitive damages under respondeat superior if the agent was exonerated from liability. The Court then distinguished the agent's dismissal from an exoneration and rejected defendant's argument. Id.

Plaintiffs also misrepresent Exxon Shipping Co. v. Baker, 128 S. Ct. 2605 (2008), as recognizing that the "overwhelming majority of states follow the respondeat superior rule and allow punitive damages against an employer for the conduct of any employee." (Respondents' Brief at 37.) The *plaintiff* in Exxon, *not* the Supreme Court, described the modern common law rule in the manner that Plaintiffs cite in their brief. Exxon Shipping Co., 128 S. Ct. at 2615-16 (noting "Baker [the plaintiff] argues that . . . a majority of States allow punitive damages for the conduct of any employee, and most others follow the Restatement, imposing liability for managerial agents).

For these reasons, and those expressed in BOA's opening brief, this Court should vacate the punitive award and find that BOA did not engage in any wrongdoing sufficient to impose punitive damages against it for its employees' mistakes.

III. The Punitive Damages Award Violates BOA's Due Process Rights, and This Court Should Grant a New Trial, or Alternatively, Reduce the Award to a 1:1 Ratio.

A. Constitutional Guideposts

The punitive award in this case fails the constitutional examination required by United States Supreme Court precedent, and thus, violates BOA's due process rights.

See Atkinson, 361 S.C. at 164-71, 604 S.E.2d at 389-93 (holding that South Carolina follows the analysis set forth by the Supreme Court when determining whether a punitive damages award violates a defendant's due process rights). BOA did not have notice that punitive damages in excess of \$1.5 Million could be awarded based on its employees' first time, unintentional, honest mistakes, of which it was not aware, and regarding which, it had training and policies to prevent. See State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 417 (2003) (noting that "[p]unitive damages are a powerful weapon" and when "[i]mposed indiscriminately, . . . they have a devastating potential for harm" (citation omitted)); BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 573 (1996) (holding that "[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose").

Application of the three constitutional "guideposts" reveals that none supports the punitive award here.³

1. **BOA's conduct does not exhibit a degree of reprehensibility sufficient to justify punitive damages.**

"It should be presumed a plaintiff has been made whole for his injuries by compensatory damages, so punitive damages should only be awarded if the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence." Campbell, 538 U.S. at 419. This Court should consider the following factors to determine BOA's

³ Plaintiffs misstate this Court's standard of reviewing the punitive damage award, which is *de novo*. See Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 436 (2001); James v. Horace Mann Ins. Co., 371 S.C. 187, 638 S.E.2d 667 (2006).

degree of reprehensibility, if any: (1) whether the harm caused was physical as opposed to economic; (2) whether the tortious conduct evinced an indifference to or a reckless disregard for the health or safety of others; (3) whether the target of the conduct was financially vulnerable; (4) whether the conduct involved repeated actions or was an isolated incident; and (5) whether the harm was the result of intentional malice, trickery, deceit, or mere accident. Campbell, 538 U.S. at 419.

First, the minor suffered purely economic harm in this case. Second, the mistakes in opening the wrong type of account did not involve a disregard for the minor's health or safety. Third, there was no evidence presented to establish that the minor was financially vulnerable, as contemplated by this factor. (R. 769.) Fourth, Plaintiffs did not present any evidence that BOA has persisted in an improper course of pervasive conduct with regard to opening conservator accounts. There was no evidence presented that any BOA employee had ever placed any other minor's funds in the wrong type of account in the Pawley's Island branch or any of the total 5,900 branches of BOA.

Without citing any authority for their proposition, Plaintiffs erroneously argue that BOA's "repeated" mistakes involving this minor plaintiff's funds establish this fourth factor. (Respondents' Brief at 39-41, 43.) The trial court and Plaintiffs' reliance on multiple acts only related to this minor plaintiff constitutes a misinterpretation of this sub-factor, as set forth in Gore and Campbell. See Bridgeport Music, Inc. v. Justin Combs Pub., 507 F.3d 470 (6th Cir. 2007) (holding that the "repeated conduct" factor under the reprehensibility analysis does not refer to repeated acts within the transaction with the plaintiff); see also Campbell, 538 U.S. at 424

(declining to find repeated conduct under its reprehensibility review because “[t]he Campbells have identified scant evidence of repeated misconduct of the sort that injured them”). Thus, under the applicable reprehensibility analysis, BOA’s mishandling of this minor’s funds was an “isolated incident.”

Fifth, BOA’s employees did not act with any intentional malice, trickery, or deceit. Instead, they committed honest mistakes and opened the wrong type of account with the minor’s funds. Accordingly, none of the reprehensibility factors applies to BOA’s conduct in this case, and “the absence of all of them renders any award suspect.” Campbell, 538 U.S. at 419.

Plaintiffs argue that BOA’s conduct was “quite reprehensible” because:

BOA knew or should have known its inability to identify restrictive accounts and implement basic procedures to provide at least some minimum oversight to ensure it was complying with the restrictive terms of the account/court orders would likely result in loss of funds to financially vulnerable wards through mishandling of funds.

(Respondents’ Brief at 44.) Nothing in this record supports a conclusion that BOA knew or should have known, prior to this incident, of any “inability to identify restrictive accounts.” No evidence exists in the record that anyone, in any branch, ever committed mistakes in opening a restrictive account, prior to this incident. There is also no evidence in this record to support a conclusion that BOA failed to “implement basic procedures” to guard against this loss. In fact, throughout the trial, Plaintiffs reiterated the numerous, adequate policies and procedures that BOA had in place to guard against this very occurrence. Plaintiffs never argued to the jury any theory grounded in BOA’s alleged failure to promulgate internal policies or failure to train its

employees, and there is no evidence to support either inference. Thus, BOA's conduct was not "reprehensible" as a matter of law.

2. The disparity between the actual harm the minor suffered and the punitive damages award weighs against the award.

Where "compensatory damages are substantial," as they are here, "a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." Campbell, 538 U.S. at 425. Plaintiffs acknowledge, as they must, that the actual damage amount is large. (Respondents' Brief at 46.) The Supreme Court recently recognized again that the "constitutional outer limit may well be 1:1" where compensatory damages are substantial. Exxon Shipping Co., 128 S. Ct. at 2634 n.28. The ratio here of 7.69:1 is constitutionally out of line with the unintentional mistakes made by BOA's employees. See Gore, 517 U.S. at 575 (noting that punitive damages imposed against a defendant should reflect the enormity of its offense).

3. The difference between the punitive damages award and the lack of any civil penalties for the conduct at issue weighs against the award.

As the trial court properly found, BOA is not subject to any civil penalties for comparable mistakes, which weighs in favor of BOA and against an award of punitive damages on these facts. (Order, R. 18.) There are also no comparable South Carolina cases imposing punitive damages against a bank for negligently opening the wrong type of minor account.

Demonstrating the difficulty in justifying the punitive award here, Plaintiffs argue that punitive damages are necessary to punish BOA for "ignoring" South

Carolina Code Sections 62-5-423 and 62-5-426. The trial court granted a directed verdict on Plaintiffs' claim that BOA committed negligence per se by violating these statutes, and Plaintiffs did not appeal that ruling. (R. 631 (finding the statute does not apply on these facts).) Thus, these inapplicable statutes are not relevant to this appeal and certainly cannot provide support for the punitive award against BOA. For these reasons, this Court should find that the punitive damages award violates BOA's due process rights.

B. Gamble Factors

Neither the trial court's post-trial review nor Plaintiffs' arguments supports the punitive damages award on this record, as a matter of law, under Gamble v. Stevenson, 305 S.C. 104, 112, 406 S.E.2d 350, 354 (1991).

1. Degree of culpability

The Court's analysis of culpability is similar to the reprehensibility analysis, and the absence of both on this record is explained above in Argument III.A.1., as well as in BOA's opening brief.⁴

2. Duration of the conduct

Plaintiffs now assert in support of this factor that BOA's conduct "spanned more than a year and several transactions and accounts." (Respondents' Brief at 43.) However, the trial court's finding as to duration of conduct states, "The evidence showed that the first transaction occurred on April 27, 2001, with the Personal Banker.

⁴ In arguing that BOA's conduct was culpable, Plaintiffs fail to cite to any case law to support a finding of culpability for the type of mistakes made here. (Respondents' Brief at 39-41.) The only two cases that they cite are Collins and Accordini, which are distinguishable as explained in Argument I., and more importantly for purposes of this factor, do not involve any award of punitive damages or assessment of culpability.

The second transaction occurred on May 2, 2001, with the Branch Manager.” (Order, R. 8; proposed order, R. 925.) Moreover, Plaintiffs contend, and the trial court found, that the BOA employees could have opened the accounts properly in one hour. (Order, R. 3.) Thus, the duration of BOA’s mistakes occurred, *at most*, over a period of one week, which cannot support the punitive damages awarded.

3. Awareness or concealment of the conduct

Plaintiffs argue that BOA was “aware” of its mistakes because words indicating a conservatorship appeared on the checks its two employees handled and because Ms. Yourko knew Mrs. Unrue was Cody’s guardian.⁵ Plaintiffs do not cite to any South Carolina authority interpreting this Gamble factor to mean “should have known” or satisfied by evidence of constructive notice. This Court’s due process analysis of punitive damages awards examines “whether the harm was the result of intentional malice, trickery, deceit, or mere accident.” Campbell, 538 U.S. at 419. Under either the Gamble terms (“awareness or concealment”) or the Campbell terms (“intentional malice, trickery, or deceit”), the evidence in this case satisfies none of the intentional elements intended by this factor, as Plaintiffs’ counsel appropriately conceded at the post-trial hearing. (R. 764.) This Court’s *de novo* review should reveal that BOA’s conduct was clearly an unintentional “accident,” which does not support the punitive award here.

⁵ As explained above, Ms. Yourko did not testify that she knew Mrs. Unrue was a *court-appointed* guardian. (R. 319.)

4. The existence of similar past conduct

The trial court found no evidence of similar past conduct, and Plaintiffs do not dispute this finding. (Order, R. 10; 765; Respondents' Brief at 42-43.) Accordingly, the absence of this factor weighs against the punitive damages award.⁶

5. Likelihood that the award will deter the defendant or others from similar conduct

United States Supreme Court cases decided since Gamble clearly instruct that the deterrence component of punitive damages can only aim to deter *this defendant's* conduct that caused the injury to *this plaintiff*. See Gore, 517 U.S. at 568 (holding that the State's only interest is in "punishing BMW and deterring *it* from future misconduct") (emphasis added); Campbell, 538 U.S. at 422-23 (recognizing that "[d]ue process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant"); Philip Morris USA v. Williams, 549 U.S. 346, 354 (2007) (noting, "we have made clear" that the court's analysis of punitive damages must focus solely on the harm to *the plaintiff*).

Plaintiffs' counsel improperly asked the jury to award \$1,538,000 to prevent harm to others. Plaintiffs' counsel argued to the jury at trial:

Think about it, any time somebody gets old—Alheimers and they've got a bunch of money. Guess who has to be appointed for them? Conservators. Any time a child is involved in a car accident and comes in to a sizeable amount of money, guess who's got to be appointed for them? Conservators. Any time a person's parent dies and they inherit a certain amount of money or a certain amount of property, guess who's in

⁶ The trial court and Plaintiffs cite South Carolina cases involving punitive damages awards without evidence of similar past conduct. BOA distinguished those cases in its opening brief at note 15. Plaintiffs wrongly assert that BOA's distinctions are not relevant because they distinguish the "specific factual patterns" of those cases. (Respondents' Brief at n.11.) This is simply not true. BOA's note explains that those cases all involved intentional, egregious misconduct. Therefore, the absence of similar past conduct in those cases is not persuasive here, where there is no evidence of intentional misconduct.

charge of them? And if you for a minute think that the biggest bank in the United States of America is not familiar with these situations, you've got another thought coming.

(R. 703-04.) This was improper.

Further, the court should only allow punitive damages where compensatory damages are not sufficient "to achieve punishment or deterrence." Campbell, 538 U.S. at 419. Here, there is no additional need to punish and deter BOA from making the mistakes that occurred here because, if negligent, BOA must replace the funds that the minor's aunt stole. Independent of punitive damages, BOA has no incentive to allow these mistakes and every reason to prevent them.

6. Whether the award is reasonably related to the harm likely to result from such conduct

The trial court clearly erred in allowing the jury to award a punitive damages amount equal to one hour of BOA's international, pretax earnings, which Dr. Wood testified was \$1,538,000. This figure reflects earnings from BOA's activities almost entirely outside of South Carolina and bears no relationship to mistakes in setting up the minor's accounts or his loss. Plaintiffs' counsel presented these figures to the jury for the sole, improper purpose of inflaming the jury to return an award based on passion, caprice, and prejudice. See Campbell, 538 U.S. at 417 (noting that plaintiffs' counsel deliberately set out to play on the jury's natural "biases against big business, particularly those without strong local presences").

Plaintiffs' counsel made numerous improper arguments to the jury in an attempt to appeal to their prejudice against a large corporation:

- "How do we make a bank that is making billions of dollars every year and send them a message that somebody in Charlotte is going to listen to?" (R. 668-69.)

- “And you say, my gosh, that’s a huge sum of money to us. How much money is it to the Bank of America? Nothing. One hour. One hour out of a whole year.” (R. 669.)
- This figure will “punish it based upon what a person has and for what they have done wrong and to send a message.” (R. 669-70.)
- This amount will send a message “to take care of children, to make sure your people at Pawleys Island and these branch banks, 5,900 and more of them do it right.” (R. 671.)
- “I want you to understand that if this was some little bank across the street, we wouldn’t be—you, because it’s got to send a message. And a very rich person or a very big bank doesn’t understand a message.” (R. 671.)
- “Each one of these figures will represent a message from Williamsburg County to the upper room at Bank of America” (R. 703.)

The Plaintiffs used BOA’s “financial position” improperly to “provide[] an open-ended basis for inflating [the] award[] where the defendant is wealthy.” Gore, 517 U.S. at 591 (Breyer, J., concurring).

Both the trial court and Plaintiffs fail to understand the relevant inquiry under this factor: What harm is likely to result from opening the wrong type of account? See Gore, 517 U.S. at 567 (holding that the court’s consideration of potential harm must be that which is “likely to occur”). As explained in Argument I., misappropriation is a *possible* occurrence when a bank opens a conservator account improperly, but it is certainly not “likely” or probable that a conservator will steal. Further, where misappropriation does occur and the bank is held liable, the plaintiff harmed is “likely” to be made whole, as in this case.⁷

⁷ The minor’s recoupment of some of the stolen funds from Mrs. Unrue further demonstrates that the punitive damages award is not reasonably related to the actual harm suffered. See Gore, 517 U.S. at 581-82 (recognizing that the proper inquiry is whether the punitive damages awarded are reasonably related to the harm that is likely to occur from the defendant’s conduct as well as the harm that actually occurred).

7. The defendant's ability to pay

"The wealth of a defendant cannot justify an otherwise unconstitutional punitive damage award." Campbell, 538 U.S. at 427. Plaintiffs' argument that BOA's wealth supports the punitive damages award is improper, as explained above under factors five and six. The trial court also erred in considering the entire pretax income of Bank of America Corporation, which includes its international operations, because the defendant here is Bank of America, North America.

8. Other factors deemed appropriate

Contrary to Plaintiffs' assertion, BOA's decision to stipulate to the amount of Cody's damages, but not to its liability, cannot support the punitive award. (Respondents' Brief at 45-46.) BOA has every right to defend itself—it too was a victim of Mrs. Unrue's fraudulent scheme.

The trial court and Plaintiffs make the illogical quantum leap that a witness's testimony that she does not know the quantity of BOA's "restricted accounts," (r. 245-46), translates into a reasonable inference that it is difficult for BOA "to find [conservator] accounts and supervise them sufficiently to detect and avoid this type of problem." (Respondents' Brief at 48; Order, R. 13.) Any proposed fault for Ms. Denning not knowing the conservator statistic more appropriately lies with Plaintiffs, who did not define the scope of her deposition as a 30(b)(6) witness and did not list that topic. (R. 118.)

Plaintiffs curiously cite the California court's decision in Bullis as supporting their proposition that the punitive award is justified because the loss here is difficult to detect and easy to conceal. (Respondents' Brief at 48-49.) Bullis does not involve an

award of punitive damages, and thus, provides no analysis of this factor as mentioned in Gore and Campbell. The Bullis court also never mentions any difficulty in detecting such losses. See Bullis, 582 P.2d at 109.

Because the punitive damages award violates BOA's due process rights, this Court should grant a new trial, or alternatively, reduce the award to a 1:1 ratio.

IV. Alternatively, This Court Should Grant a New Trial Because the Jury's Verdict Was the Result of Passion, Caprice, and Prejudice Against the Largest Bank in the Country.

Throughout the trial, Plaintiffs' counsel repeatedly emphasized that BOA is the third largest bank in the world, the largest in the country, and abundantly wealthy. Counsel clearly paraded this fact before the jury for the improper purpose of inciting a verdict influenced by passion for the minor and prejudice against BOA. The amount of the jury's punitive award alone proves that Plaintiffs were successful. See Nelson v. Charleston & W. Carolina Ry. Co., 231 S.C. 351, 98 S.E.2d 798, 802-03 (1957) (holding that "[t]he size of the verdict alone may show that it must have been the result of passion or prejudice"). Allowing the jury to consider the defendant's size is improper for the same reasons a defendant's wealth is not a sufficient basis for punitive damages—it imposes punishment based “on status rather than conduct.” Mathias v. Accor Econ. Lodging, Inc., 347 F.3d 672, 677 (7th Cir. 2003).⁸ Hence, the punitive damages award must be reversed.

⁸ Plaintiffs mistakenly claim that BOA failed to preserve its objection. BOA properly placed its objection on the record the first time Plaintiffs presented witness testimony regarding its size. (R. 241, 266-67; see also Motion in Limine, R. 896-900; 127-28, 130; Post-Trial Motion, R. 910; 773, 775-76, 780-82; Order, R. 22-23.) BOA was not required to continue objecting throughout the trial. See Staubes v. City of Folly Beach, 339 S.C. 406, 415, 529 S.E.2d 543, 547 (2000) (noting that parties are not required “to engage in futile actions in order to preserve issues for appellate review”); State v. Bryant, 316 S.C. 216, 220, 447 S.E.2d 852, 855 (1994) (finding that it would have been futile to move to strike testimony that the trial court had already ruled was proper); State v. Ross, 272 S.C. 56, 60-61, 249 S.E.2d 159, 161-62

CONCLUSION

For the foregoing reasons, this Court should reverse and enter judgment for BOA. Alternatively, the Court should vacate the punitive damages award in its entirety, finding it not supported by the evidence presented and applicable law. If the Court finds punitive damages warranted, this Court should find the award excessive and grant a new trial or reduce the award to a ratio of 1:1. Alternatively, this Court should reverse and grant a new trial for the additional reason that the verdict was the result of passion for the minor and prejudice against BOA, based upon evidence improperly admitted as to BOA's size.

[Signature page attached.]

(1978) (holding that once the court rules on an objection, counsel need not continue repeating the objection). In any event, a verdict based on passion, caprice, or prejudice cannot stand as a matter of law, regardless of whether BOA preserved this specific objection.

Respectfully submitted,

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM WILLIAMSBURG COUNTY
Court of Common Pleas

Clifton B. Newman, Circuit Court Judge

Case No. 2003-CP-45-207

RECEIVED

SC Court of Appeals

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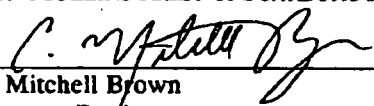
Of Whom Bank of America, N.A. is Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Reply Brief complies with Rule 211(b),
SCACR.

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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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Of Whom Bank of America, N.A. is, ...

Defendants,

Appellant.

PROOF OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson
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certify that I have served all counsel in this action with a copy of the pleading(s)
hereinbelow specified via U.S. Mail, postage prepaid to the following address(es):

Pleadings:

Final Reply Brief of Appellant

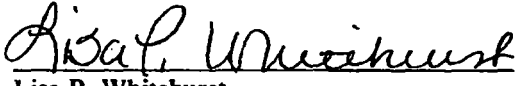
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December 7, 2010

Hand Delivered

The Honorable Tanya A. Gee
Clerk of Court
South Carolina Court of Appeals
1015 Sumter Street - 5th Floor
Columbia, SC 29201

RE: Cody Steven P., et al. v. Bank of America, et al.
C/A No. 03-CP-45-207
SC Court of Appeals Case Tracking No. 2009118326
LMN No. THOD-5MJHY4
Our File No. 05100/01756

Dear Ms. Gee:

Pursuant to SCACR 208(b)(7), Appellant Bank of America hereby notifies the Clerk of Court of a pertinent and significant authority decided by the South Carolina Supreme Court on August 16, 2010, since briefing was completed in the above-referenced case:

Branham v. Ford Motor Co., 701 S.E.2d 5 (2010).

Appellant respectfully requests that the Supreme Court's decision in Branham supplement Appellant's Final Brief at pp. 26-27, 43-44, and its Reply Brief at pp. 20-24, because it is relevant to the issues of whether the jury's verdict was the result of passion, caprice, and prejudice against Appellant and whether the punitive damages award violates Appellant's due process rights.

With twelve office locations in the District of Columbia, Florida, Georgia, Massachusetts, North Carolina, South Carolina, and West Virginia

The Honorable Tanya A. Gee
December 7, 2010
Page 2

With kind regards, I remain

Sincerely yours,

A handwritten signature in black ink, appearing to read "C. Mitchell Brown". The signature is fluid and cursive, with the first name "C." being small and the last name "Brown" being larger and more prominent.

C. Mitchell Brown

CMB:dha

Enclosure

cc: W.E. Jenkinson, III, Esquire (via Facsimile and U.S. Mail)
Harry C. Wilson, Jr., Esquire (via Facsimile and U.S. Mail)
Helen T. McFadden, Esquire (via Facsimile and U.S. Mail)
Ronnie A. Sabb, Esquire (via Facsimile and U.S. Mail)

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(Cite as: 701 S.E.2d 5)

H

Supreme Court of South Carolina.
Jesse BRANHAM, Jr., as Guardian ad Litem for Jesse
Branham, III, and Jesse Branham, Jr., Respondent,
v.
FORD MOTOR COMPANY and Cheryl Jane Hale,
Defendants,
Of Whom Ford Motor Company is the Appellant.
No. 26860.

Heard April 9, 2009.
Decided Aug. 16, 2010.
Rehearing Denied Nov. 17, 2010.

Background: Passenger brought products liability action against vehicle manufacturer, seeking damages for injuries allegedly sustained in vehicle roll-over accident. The Circuit Court, Hampton County, R. Markley Dennis, Jr., J., entered judgment on jury verdict for passenger. Manufacturer appealed.

Holdings: The Supreme Court, Kittredge, J., held that:

- (1) passenger's failure to establish that seatbelt sleeve was in a defective condition unreasonably dangerous to user was fatal to his seatbelt sleeve negligence claim;
- (2) issue of whether stability system was unreasonably dangerous in its design was for jury;
- (3) issue of whether alternative design was feasible was for jury;
- (4) exclusive test in design defects case is risk-utility test;
- (5) error in admitting post-manufacture evidence was not harmless error, warranting new trial;
- (6) closing argument of passenger's counsel denied fair trial to manufacturer, warranting new trial; and
- (7) error in admitting evidence of manufacturer's financial condition beyond net worth was prejudicial error.

Affirmed in part, reversed in part, and remanded.

Pleicones, J., concurred in part and dissented in part and filed opinion in which Waller, J., joined.

West Headnotes

[1] Products Liability 313A ⚡119**313A Products Liability****313AII Elements and Concepts**

313Ak118 Nature of Product and Existence of Defect or Danger

313Ak119 k. In general. Most Cited Cases

Products Liability 313A ⚡145**313A Products Liability****313AII Elements and Concepts**

313Ak145 k. Inspection or test. Most Cited Cases

Products Liability 313A ⚡209**313A Products Liability****313AIII Particular Products****313Ak202** Automobiles

313Ak209 k. Seat belts and occupant restraint systems. Most Cited Cases

Passenger's failure to establish that vehicle's seatbelt sleeve was in defective condition unreasonably dangerous to user was fatal to passenger's strict liability claim against manufacturer for injuries allegedly sustained by passenger in vehicle roll-over accident, as well as to passenger's negligence claim that manufacturer failed to adequately test the seatbelt sleeve; being in a defective condition unreasonably dangerous to the user at the time of manufacture was a common element to both the strict liability and negligence claims.

[2] Products Liability 313A ⚡114**313A Products Liability****313AII Elements and Concepts**

313Ak114 k. Negligence or fault. Most Cited Cases

A negligence theory in a products liability action imposes the additional burden on a plaintiff of demonstrating the defendant seller or manufacturer failed to exercise due care in some respect, and, unlike strict liability, the focus is on the conduct of the seller or manufacturer, and liability is determined according

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to fault.

[3] Products Liability 313A ⚡203

313A Products Liability

313AIII Particular Products

313Ak202 Automobiles

313Ak203 k. In general. Most Cited Cases

Products Liability 313A ⚡406

313A Products Liability

313AIV Actions

313AIV(D) Questions of Law or Fact

313Ak406 k. Design defect. Most Cited

Cases

Issue of whether design of vehicle's handling and stability system was so defective as to render vehicle unreasonably dangerous to user, was for jury in passenger's products liability action against vehicle manufacturer arising out of injuries allegedly sustained by passenger in vehicle roll-over accident.

[4] Products Liability 313A ⚡127

313A Products Liability

313AII Elements and Concepts

313Ak126 Design

313Ak127 k. In general. Most Cited Cases

For a plaintiff to successfully advance a design defect claim, he must show that the design of the product caused it to be unreasonably dangerous.

[5] Products Liability 313A ⚡203

313A Products Liability

313AIII Particular Products

313Ak202 Automobiles

313Ak203 k. In general. Most Cited Cases

Products Liability 313A ⚡406

313A Products Liability

313AIV Actions

313AIV(D) Questions of Law or Fact

313Ak406 k. Design defect. Most Cited

Cases

Issue of whether evidence of alternative design of vehicle suspension was feasible and reasonable and

would have prevented vehicle from being unreasonably dangerous, under risk-utility balancing test, was for jury, in passenger's products liability action against vehicle manufacturer arising out of injuries allegedly sustained by passenger in vehicle roll-over accident.

[6] Products Liability 313A ⚡129

313A Products Liability

313AII Elements and Concepts

313Ak126 Design

313Ak129 k. Risk-utility test. Most Cited

Cases

The exclusive test in a products liability design case is the risk-utility balancing test with its requirement of showing a feasible, reasonable alternative design.

[7] Products Liability 313A ⚡127

313A Products Liability

313AII Elements and Concepts

313Ak126 Design

313Ak127 k. In general. Most Cited Cases

A product is not in a defectively-designed condition that is unreasonably dangerous to a user merely because it can be made more safe.

[8] Products Liability 313A ⚡128

313A Products Liability

313AII Elements and Concepts

313Ak126 Design

313Ak128 k. Alternative design, in general.

Most Cited Cases

Products Liability 313A ⚡346

313A Products Liability

313AIV Actions

313AIV(C) Evidence

313AIV(C)2 Presumptions and Burden of Proof

313Ak346 k. Design defect. Most Cited

Cases

The plaintiff in a products liability action based on a design defect theory will be required to point to a design flaw in the product and show how his alternative design would have prevented the product from being unreasonably dangerous; this presentation of an alternative design must include consideration of the

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costs, safety and functionality associated with the alternative design.

[9] Products Liability 313A ⚡119

313A Products Liability

313AII Elements and Concepts

313Ak118 Nature of Product and Existence of Defect or Danger

313Ak119 k. In general. Most Cited Cases

In order for a plaintiff to prove his case in a product liability action, he must show that the product was in a defective condition at the time that it left the hands of the particular seller; unless evidence can be produced which will support the conclusion that it was then defective, the burden is not sustained.

[10] Products Liability 313A ⚡203

313A Products Liability

313AIII Particular Products

313Ak202 Automobiles

313Ak203 k. In general. Most Cited Cases

Products Liability 313A ⚡366

313A Products Liability

313AIV Actions

313AIV(C) Evidence

313AIV(C)3 Admissibility of Evidence

313Ak366 k. Design defect. Most Cited

Cases

Post-manufacture evidence regarding vehicle's handling and suspension system, including evidence of manufacturer's handling of post-manufacture safety issues, was inadmissible on issue of liability in passenger's design defect products liability action against vehicle manufacturer arising out of injuries allegedly sustained by passenger in vehicle roll-over accident.

[11] Products Liability 313A ⚡366

313A Products Liability

313AIV Actions

313AIV(C) Evidence

313AIV(C)3 Admissibility of Evidence

313Ak366 k. Design defect. Most Cited

Cases

"Post-distribution evidence" in a products liability action based on a design defect theory is evidence of

facts neither known nor available at the time of distribution.

[12] Products Liability 313A ⚡127

313A Products Liability

313AII Elements and Concepts

313Ak126 Design

313Ak127 k. In general. Most Cited Cases

When assessing liability in a design defect claim against a manufacturer, the judgment and ultimate decision of the manufacturer must be evaluated based on what was known or reasonably attainable at the time of manufacture.

[13] Products Liability 313A ⚡366

313A Products Liability

313AIV Actions

313AIV(C) Evidence

313AIV(C)3 Admissibility of Evidence

313Ak366 k. Design defect. Most Cited

Cases

The use of post-distribution evidence, in a products liability action, to evaluate a product's design through the lens of hindsight is improper.

[14] Appeal and Error 30 ⚡1050.1(10)

30 Appeal and Error

30XVI Review

30XVI(J) Harmless Error

30XVI(J)10 Admission of Evidence

30k1050 Prejudicial Effect in General

30k1050.1 Evidence in General

30k1050.1(8) Particular Types of

Evidence

30k1050.1(10) k. Admissions,

declarations, and hearsay. Most Cited Cases

Trial court's error in admitting post-manufacture evidence regarding vehicle's handling and suspension system on issue of liability in passenger's design defect products liability action against vehicle manufacturer arising out of injuries allegedly sustained by passenger in vehicle roll-over accident, prejudiced vehicle manufacturer and was not harmless error, and thus warranted new trial; policy of limiting determination of whether design was unreasonably dangerous to manufacture date would encourage manufacturers to improve product safety and function.

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[15] Evidence 157 ➡ 141

157 Evidence

157IV Admissibility in General

157IV(C) Similar Facts and Transactions

157k141 k. Other injuries or accidents from same or similar causes. Most Cited Cases

Post-manufacture roll-over data regarding similar incidents was not admissible on issue of liability in passenger's products liability action against vehicle manufacturer arising out of injuries allegedly sustained by passenger in vehicle roll-over accident, regardless of whether incidents were substantially similar to passenger's accident.

[16] New Trial 275 ➡ 29

275 New Trial

275II Grounds

275II(B) Misconduct of Parties, Counsel, or Witnesses

275k29 k. Conduct of counsel. Most Cited Cases

Closing argument of counsel for passenger, regarding injuries sustained by nonparties in accidents involving manufacturer's vehicle, was designed to inflame and prejudice jury, thus denying fair trial to vehicle manufacturer, so as to warrant new trial in passenger's products liability action against vehicle manufacturer arising out of injuries allegedly sustained by passenger in vehicle roll-over accident; argument relied heavily on inadmissible evidence, and invited jury to punish manufacturer for harm to passenger and other non-parties.

[17] Trial 388 ➡ 125(1)

388 Trial

388V Arguments and Conduct of Counsel

388k113 Statements as to Facts, Comments, and Arguments

388k125 Appeals to Sympathy or Prejudice

388k125(1) k. In general. Most Cited Cases

Cases

It is improper for counsel to make a closing argument to the jury calculated to arouse passion or prejudice.

[18] Trial 388 ➡ 251(8)

388 Trial

388VII Instructions to Jury

388VII(D) Applicability to Pleadings and Evidence

388k249 Application of Instructions to Case

388k251 Pleadings and Issues

388k251(8) k. Actions for personal injuries. Most Cited Cases

Jury instruction requiring jury to apportion liability between vehicle manufacturer and vehicle's driver was not warranted in passenger's products liability action against manufacturer and driver; case involved multiple tortfeasors that were jointly and severally responsible for all damages.

[19] Appeal and Error 30 ➡ 1004(5)

30 Appeal and Error

30XVI Review

30XVI(I) Questions of Fact, Verdicts, and Findings

30XVI(I)2 Verdicts

30k1004 Amount of Recovery

30k1004(5) k. Mistake, passion or prejudice; shocking conscience or sense of justice. Most Cited Cases

New Trial 275 ➡ 77(2)

275 New Trial

275II Grounds

275II(F) Verdict or Findings Contrary to Law or Evidence

275k77 Mistake, Passion, or Prejudice of Jurors

275k77(2) k. Excessive damages in general. Most Cited Cases

When a verdict is grossly excessive and the amount awarded is so shockingly disproportionate to the injuries as to indicate that the jury acted out of passion, caprice, prejudice, or other consideration not founded on the evidence, it becomes the duty of the Supreme Court, as well as the trial court, to set aside the verdict.

[20] Damages 115 ➡ 94.3

115 Damages

115V Exemplary Damages

115k94 Measure and Amount of Exemplary Damages

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115k94.3 k. Wealth of defendant. Most Cited Cases

The wealth of a defendant is a relevant factor in assessing punitive damages.

[21] Damages 115 ➡ 181

115 Damages

115X Evidence

115k164 Admissibility

115k181 k. Pecuniary condition of defendant. Most Cited Cases

Evidence of vehicle manufacturer's financial condition beyond net worth, including income, revenues, cash flow, and salaries of corporate officers, was inadmissible for purpose of determining appropriate level of punitive damages in passenger's products liability action against vehicle manufacturer arising out of injuries allegedly sustained by passenger in vehicle roll-over accident.

[22] Appeal and Error 30 ➡ 1050.1(6)

30 Appeal and Error

30XVI Review

30XVI(J) Harmless Error

30XVI(J)10 Admission of Evidence

30k1050 Prejudicial Effect in General

30k1050.1 Evidence in General

30k1050.1(3) Particular Actions

or Issues, Evidence Relating to

30k1050.1(6) k. Damages.

Most Cited Cases

Constitutional Law 92 ➡ 4427

92 Constitutional Law

92XXVII Due Process

92XXVII(G) Particular Issues and Applications

92XXVII(G)19 Tort or Financial Liabilities

92k4427 k. Punitive damages. Most

Cited Cases

Trial court's error in admitting evidence of vehicle manufacturer's financial condition beyond net worth, including income, revenues, cash flow, and salaries of corporate officers, for purpose of determining appropriate level of punitive damages in passenger's products liability action against vehicle manufacturer arising out of injuries allegedly sustained by passenger

in vehicle roll-over accident, was prejudicial error and violated manufacturer's due process rights; evidence introduced arbitrary factor in jury's consideration. U.S.C.A. Const.Amend. 14.

[23] Appeal and Error 30 ➡ 949

30 Appeal and Error

30XVI Review

30XVI(H) Discretion of Lower Court

30k949 k. Allowance of remedy and matters of procedure in general. Most Cited Cases

Parties 287 ➡ 64

287 Parties

287IV New Parties and Change of Parties

287k64 k. Change of position as plaintiff or defendant. Most Cited Cases

Trial judges have the authority to realign parties at any stage of the action; such a decision will not be disturbed on appeal absent a showing of an abuse of discretion and resulting prejudice. Rules Civ.Proc., Rule 21.

*7 C. Mitchell Brown, William C. Wood, Jr., Beth Burke Richardson, and A. Mattison Bogan, all of Nelson Mullins Riley & Scarborough, of Columbia, Elbert S. Dorn and Nicholas W. Gladd, both of Turner, Padgett, Graham & Laney, PA, of Columbia, for Appellant.

John R. Hetrick and Robert J. Bonds, both of Hetrick, Harvin & Bonds, of Walterboro, Ronnie L. Crosby, John E. Parker, Grahame E. Holmes, all of Peters, Murdaugh, Parker, Eltzroth & Detrick, PA, of Hampton, for Respondent.

Justice KITTREDGE.

This is a direct appeal in a product liability case tried to a jury in Hampton County. The jury awarded the plaintiff \$16,000,000 in actual damages and \$15,000,000 in punitive damages. We affirm in part, reverse in part and remand for a new trial.

I.

This product liability action involves a 1987 Ford Bronco II 4x2, manufactured in 1986. Cheryl Hale (or her husband) purchased the 1987 Ford Bronco in June

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of 1999 for a *8 nominal sum.^{FN1} At the time of sale, the Bronco had 137,500 miles on it.

FN1. A document referenced during Hale's testimony indicates a purchase price of \$150.

On June 17, 2001, Hale was driving her Bronco along Cromwell Road in Colleton County. Hale was driving several children to her house. Hale's daughter was seated in the front passenger seat. Plaintiff Jesse Branham, III, was riding in the backseat. Hale recalled that the children were "all excited." No one was wearing a seatbelt.

The weather was clear and, according to Hale, she was not speeding. Hale admittedly took her eyes off the road and turned to the backseat to ask the children to quiet down. When she took her eyes off the road, the Bronco veered towards the shoulder of the road, and the rear right wheel left the roadway. When Hale realized that her inattention resulted in the vehicle leaving the roadway, she responded by overcorrecting to the left. Hale's overcorrection led to the vehicle "shaking." The vehicle rolled over. Branham was thrown from the vehicle and was injured.

Branham filed this lawsuit against Ford Motor Company and Hale in Hampton County. At trial,^{FN2} Branham did not seriously pursue the claim against Hale. The case against Ford was based on two product liability claims, one a defective seatbelt sleeve claim and the other, a "handling and stability" design defect claim related to the vehicle's tendency to rollover. Both of these claims were pursued in negligence and strict liability.^{FN3} Ford denied liability and, among other things, asserted Hale's negligence caused the accident. The jury, in a general verdict,^{FN4} found both Ford and Hale responsible and awarded Branham \$16,000,000 in actual damages and \$15,000,000 in punitive damages. Only Ford appeals. The direct appeal is before us pursuant to Rule 204(b), SCACR certification.

FN2. This was the second trial of this case. The first trial ended in a mistrial when it was discovered that one or more jurors had been represented by the law firm representing one of the parties.

FN3. Branham also alleged warranty claims in his complaint but did not pursue these

claims at trial, and the jury was not asked to consider these claims.

FN4. The unusual verdict form is discussed in detail in Part III.D, *infra*. Ford's request that the jury answer specific interrogatories related to the multiple claims was denied.

II.

A.

The Seatbelt Sleeve Negligence Claim

[1] Branham alleged Ford was negligent "[i]n selling the Bronco II with a defective rear occupant restraint system." The amended complaint contains no specifications of Ford's purported negligence. At trial, Branham claimed Ford was negligent in failing to adequately test the seatbelt sleeve, but he did not challenge the seatbelt sleeve design. Branham filed a companion strict liability claim concerning the seatbelt sleeve. Ford successfully moved for a directed verdict on the strict liability seatbelt sleeve claim.

The trial court dismissed the strict liability claim on the ground that the seatbelt sleeve was not as a matter of law in a defective condition unreasonably dangerous to the user at the time of manufacture. Based on this premise, Ford contends the companion negligence claim must fail, for all products liability actions, regardless of the stated theory, have common elements. Madden v. Cox, 284 S.C. 574, 579, 328 S.E.2d 108, 112 (Cl.App.1985) ("In a products liability action the plaintiff must establish three things, regardless of the theory on which he seeks recovery: (1) that he was injured by the product; (2) that the product, at the time of the accident, was in essentially the same condition as when it left the hands of the defendant; and (3) that the injury occurred because the product was in a defective condition unreasonably dangerous to the user."). Ford, therefore, concludes that the negligence claim (which required Branham to prove that the seatbelt sleeve was in a defective condition unreasonably dangerous to the user) should have been dismissed. We agree. When an element common to multiple claims is not established, all related claims must fail.

*9 [2] A negligence theory imposes the additional

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burden on a plaintiff "of demonstrating the defendant (seller or manufacturer) failed to exercise due care in some respect, and, unlike strict liability, the focus is on the conduct of the seller or manufacturer, and liability is determined according to fault." Bragg v. Hi-Ranger, Inc., 319 S.C. 531, 539, 462 S.E.2d 321, 326 (Ct.App.1995). The fault-based element is of no moment where, as here, there is no showing in the first instance of a product in a defective condition unreasonably dangerous to the user.

In addition, Ford asserts there is no separate "failure to test claim" apart from the duty to design and manufacture a product that is not defective and unreasonably dangerous. We agree, for if a product is not in a defective condition unreasonably dangerous to the user, an alleged failure to test cannot be the proximate cause of an injury. The failure to establish that the seatbelt sleeve was in a defective condition unreasonably dangerous to the user for purposes of the strict liability claim requires the dismissal of the companion negligence claim.

Relying on Bragg, the trial court determined it appropriate to grant a directed verdict on the strict liability claim, while at the same time allowing the negligence claim to go forward. We find the trial court's reliance on Bragg misplaced.

In Bragg, the trial court directed a verdict in favor of the manufacturer with respect to the strict liability claim, but refused to grant a directed verdict on the negligence claims. 319 S.C. at 538, 462 S.E.2d at 325. Bragg alleged two negligence claims: negligence "in failing to place appropriate warnings" on the product and another negligence claim "in supplying [a product] that was defective[ly] [designed]." Id. at 537-38, 462 S.E.2d at 325. The jury returned a verdict against Bragg on the negligence claims.

Bragg appealed the dismissal of the strict liability claim, "contend[ing] the court's decision to grant the motion for directed verdict on strict liability, while denying the motion for directed verdict on negligence, was logically inconsistent and reversible error because those claims are virtually identical and require the same proof." Id. at 538, 462 S.E.2d at 325. The court of appeals in Bragg affirmed the trial court and noted that "[s]trict liability and negligence are not mutually exclusive theories of recovery; that is, an injury may give rise to claims that can be established either under

principles of strict liability or negligence, and failure to prove one theory does not preclude proving the other." Id. at 539, 462 S.E.2d at 326.

While we agree that strict liability and negligence are not mutually exclusive theories of recovery, we caution against a broad reading of Bragg in this regard. An analytical framework that turns solely on whether strict liability and negligence are mutually exclusive theories of recovery may miss the mark. As noted, the negligence claim must have a fault-based element, which is not required for a strict liability claim. Where one claim is dismissed and a question arises as to the continuing viability of the companion claim, the critical inquiry is to ascertain the basis for the dismissal. If one claim is dismissed and the basis of the dismissal rests on a common element shared by the companion claim, the companion claim must also be dismissed.

In the present case, because the strict liability claim was dismissed due to the absence of an element shared by the companion negligence claim, the negligence claim should have been dismissed as well.

The trial court determined as a matter of law that the seatbelt sleeve was not in a defective condition unreasonably dangerous to the user. Consequently, the absence of this common, shared element required the dismissal of the strict liability claim and the companion negligence claim.^{FN5} The trial court erred in failing to direct a verdict as to the negligence seatbelt sleeve claim.^{FN6}

^{FN5}. The converse of the situation before us is more easily understood, that is, where the negligence claim is dismissed and the strict liability survives, as questions of fact are presented as to elements common to both claims yet the plaintiff fails to present evidence of the absence of due care.

^{FN6}. On appeal, Branham seeks to challenge the trial court's dismissal of the strict liability seatbelt claim. Issue preservation rules aside, we have reviewed the evidence concerning the seatbelt claim and conclude the trial court properly directed a verdict.

*10 B.

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The "Handling and Stability" Design Defect Claim

[3] The "handling and stability" design defect claim (strict liability and negligence) is the gravamen of Branham's case. Branham alleged a design defect related to the rollover propensity of the Bronco. Ford appeals from the denial of its motions to dismiss the strict liability and negligence design defect claims. Viewing the evidence in a light most favorable to Branham, we find no error in the submission of these design defect claims to the jury. Pye v. Estate of Fox, 369 S.C. 555, 564, 633 S.E.2d 505, 509 (2006) (stating that on appeal from the denial of a directed verdict motion, the evidence must be viewed in a light most favorable to the nonmovant).

We begin with an overview of the technical information involved in the design defect claims. Ford uses the term "stability index" to describe the overall stability of a vehicle. The stability index is a comparison of the height and width of the vehicle, expressed in a numerical term. A closely connected term is the center of gravity. A vehicle's center of gravity relates to what one usually thinks of as "top heavy" or "stable." The lower the center of gravity in a vehicle, the more stable it is. Conversely, the higher the center of gravity (top heavy), the less stable the vehicle is.

The stability of a vehicle is related in part to its suspension. According to Branham's expert, Dr. Melvin Richardson, a vehicle with a stable suspension is able to make a turn in the road, and "as the vehicle goes around the curve, it leans over some and ... the tires stay the same distance apart where they touch the ground." A vehicle with an unstable suspension will cause the tires to "scrub" the ground during a turn, which "cuts down friction, [and] increases tire wear," causing the vehicle to handle poorly. When a vehicle is turning and the tires begin to scrub, "you lose some of [the tire's] capabilities to keep the vehicle going in the right direction and lose some of the ability to control the vehicle."

Ford primarily employed two engineering tests as a means of determining whether the Bronco II was ready for manufacturing. The first test is called a "J" turn. In this test, as described by Dr. Richardson, the vehicle is driven down a roadway, and "as quickly as possible the driver turns [the wheel] to a predetermined angle and just holds it there" for the remainder of the turn.

The second test is called an accident avoidance maneuver test. This is where the vehicle is turned in an abrupt fashion one way, like in the "J" turn, but with the added maneuver of an immediate turn back in the opposite direction. With these engineering concepts in mind, we turn to the design defect evidence presented.

Thomas Feaheny, a former vice president at Ford, testified for Branham. Feaheny described the marketing forces and engineering insights that led to the development of the Bronco II. The genesis of the Bronco II spawned from the YUMA Program, which came into being in the late 1970s. YUMA was Ford's code name for the study of small trucks, which eventually resulted in the Ford Ranger, and later the Bronco II. The YUMA prototypes initially had a MacPherson front suspension, which, according to Feaheny, is a "type of independent front suspension that is used on a lot of small cars and trucks." Ford's engineers requested the MacPherson front suspension for the Bronco II when communicating with management on how best to address the Bronco II's handling and stability concerns raised during the prototype stage.

Feaheny opined that the MacPherson strut was the "best, most feasible suspension from a functional standpoint and also from a cost and weight standpoint." However, there was a divergence in viewpoints between corporate executives and engineers, as Ford's engineers advocated the use of the MacPherson strut for the small truck program. Since the mid-1960s Ford had employed a Twin I-Beam suspension on its bigger trucks. Feaheny testified that "there was a belief *11 that [Ford] should adapt [the] Twin I-Beam suspension to the new small trucks."

The engineers at Ford believed the MacPherson suspension the better choice and "opposed [the Twin I-Beam suspension] because it was directionally wrong from the standpoint of steering, handling and rollover propensity and other characteristics." Because the Twin I-Beam suspension was physically larger than the MacPherson suspension, using it required the entire vehicle to be lifted higher. This had a cascading effect on the composite makeup of the vehicle, which detrimentally moved the center of gravity higher off the ground. To make room for the Twin I-Beam suspension, the engine had to be raised "two to three" inches. With the engine raised a few inches,

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the transmission had to be raised, which caused the hood to be raised, which then caused the seating to be raised. The net effect of this was a higher center of gravity, "which add[ed] a rollover propensity."

Feaheny also noted that the Twin I-Beam had a tendency for "jacking." Feaheny stated that jacking is a term used to describe an occurrence when the "vehicle will slide out in a severe handling maneuver. The outboard wheel would tend to dig into ... the suspension arm, which was strong and stiff, [and it] would have to move with that wheel and the inner pivot would go up in the air." When a vehicle jacks, there is an instantaneous raising of the center of gravity, which further "increase[s] the propensity for rollover."

Use of the Twin I-Beam and its attendant safety concerns came to a head in the late 1970s. A group of engineers approached Feaheny and recommended that Ford use either the MacPherson suspension or the SLA (short long arm) suspension for the YUMA prototypes. The engineers made it clear that they were "very concerned" with the Twin I-Beam. Feaheny directed the engineers to one of his colleagues, Jim Capalongo, and Feaheny later met with Capalongo to discuss the engineers' concerns. After this meeting, alternative suspension designs were discussed and tested for "about a year" but the Twin I-Beam was still selected.

The reason the Twin I-Beam was selected in the face of engineering concerns was that it served a "major marketing advantage," as Ford had promoted this form of suspension on its full size trucks since the mid-1960s. In the minds of the marketing executives, the Twin I-Beam was part and parcel of a tough truck, and it made business sense to carry that suspension into the smaller trucks.

The testimony of Dr. Richardson buttressed the evidence supplied by Feaheny and Ford's internal documents. Dr. Richardson opined that the use of the Twin I-Beam suspension led to the Bronco II being unreasonably dangerous. Dr. Richardson described three common suspension systems referenced above: (1) the SLA; (2) the MacPherson; and (3) the Twin I-Beam. It was through Dr. Richardson that Branham introduced many of Ford's internal documents showing the competing concerns and interests of the engineers and management over the proper suspension.

The Bronco II was designed from the existing "bones" of the Ford Ranger. Dr. Richardson opined that using the Ranger as the design platform was an appropriate engineering decision, and that it gave Ford the advantage of using components that had already been made.

Dr. Richardson testified to a Ford document dated February 5, 1981, and titled "Revised Stability Index for Utility." The stated objective of the document was to "review alternatives to increase stability index." Reading from the document, he stated that, "a study of methods to improve the stability index for the Bronco II has resulted in several design alternatives to achieve an improvement ... from 1.85 to maximum achievable of 2.25 without a totally new concept vehicle."

The document made a general assessment about improving the stability index. "In order to improve stability index substantially, the following are required: widen track width, and lower center of gravity achieved by raising the wheel center lines with respect to body with trade-offs in ground clearance and vehicle package." The document also made five proposals to achieve a higher stability index. The first two proposals did not jeopardize the target release date for the Bronco II, but the latter three did. Only one *12 of the proposals would have achieved a stability index of 2.25 for the Bronco II, but it was not selected.

Ford selected what is referred to as "proposal two," and it had a target stability index of 2.02. Dr. Richardson pointed out that proposal two saved Ford money. None of the proposals on this document argued for a change in the suspension system. But Dr. Richardson opined that had Ford opted to use an SLA or a MacPherson suspension system, then it could have achieved a stability index of 2.25. At that point, however, Ford had already decided to employ the Twin I-Beam suspension notwithstanding its engineers' criticisms.

Dr. Richardson testified to Plaintiff's exhibit 31, dated March 17, 1982, which discussed "J" turn testing for the Bronco II. In relevant part, the document stated the following:

Engineering sign-off for the Bronco II is scheduled for 7/9/82. Minimal development DVP&R ^{ENT} testing has been completed because the suspension and steering system designs have not been finalized

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for improved roll characteristics during the "J" turn maneuver.

FN7. This acronym stands for Design Verification Plan and Report. In general terms, it is a type of testing to verify the product works as designed.

A decision is required to solidify the steering and suspension designs. Development recommends pursuing items 1, 2, and 3 below if a *small* improvement in roll characteristics during a "J" turn maneuver is deemed acceptable, or pursuing item 4 below if a *major* improvement is required. Incorporation of item 4 would most likely cause a delay in Job # 1 [the release date of the Bronco II].

(emphasis in original). Dr. Richardson testified that to his knowledge none of the recommendations set out in the document were adopted.

Dr. Richardson testified to a Ford document dated May 4, 1982. The document identified the current stability index of the Bronco II at 2.03. Dr. Richardson noted that any change to the Bronco II after the date of this document "had to be very small if [Ford] w[as] going to still put [the Bronco II] on the market in the beginning of [1983]." He went on to testify that in the state the Bronco II was then in, with a stability index of 2.03 the vehicle would be "dangerously unstable."

Branham introduced a Ford document from September 14, 1982, with the following stated purpose: "To identify advanced engineering projects that will be undertaken to provide for continued improvement, Bronco II handling, during its cycle life." Dr. Richardson responded to the document as follows:

The vehicle should have been made reasonably safe when it was first designed and built. There was time to do that, the discussions in the engineering documents, to me as an engineer, show me that the engineers knew how to do that, could have done it, and that should have been done. To release it without it being reasonably safe then subjects those people who buy it to risk. Now, if it is released in that configuration, it certainly should be improved as time goes along because it shouldn't be left that way.

Following up on his expert's opinion, Branham asked whether improvements were ever made to correct the problems in the Bronco II when it was released. Dr.

Richardson responded, "there were no improvements made that would correct this defect."

The rollover propensity in the Bronco II 4x4, as reflected in the stability index and elevated center of gravity, was increased in the Bronco II 4x2. The two-wheel drive Bronco was lighter than its four-wheel version, resulting in reduced stability and an even higher center of gravity. The Bronco II involved in this litigation is a 4x2.

The foregoing is not an exhaustive review of the evidence presented by Branham, but it serves to support the able trial judge's determination that Branham presented sufficient evidence of a design defect known to Ford at or prior to the date of manufacture to withstand a directed verdict motion. We make this determination without having to rely on the further body of evidence of the Bronco *13 II's rollover tendencies found in the substantial post-distribution evidence which the trial court allowed.^{FN8}

FN8. We discuss this issue in detail in Part III.A, *infra*.

C.

We next address Ford's two-fold argument that: (1) Branham failed to prove a reasonable alternative design pursuant to the risk-utility test; and (2) South Carolina law requires a risk-utility test in design defect cases to the exclusion of the consumer expectations test.

[4] For a plaintiff to successfully advance a design defect claim, he must show that the design of the product caused it to be "unreasonably dangerous." Madden v. Cox, 284 S.C. 574, 579-80, 328 S.E.2d 108, 112 (Ct.App.1985). In South Carolina, we have traditionally employed two tests to determine whether a product was unreasonably dangerous as a result of a design defect: (1) the consumer expectations test and (2) the risk-utility test.

In Claytor v. General Motors Corp., this Court phrased the consumer expectations test as follows: "The test of whether a product is or is not defective is whether the product is unreasonably dangerous to the consumer or user given the conditions and circumstances that foreseeably attend use of the product." 277

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S.C. 259, 262, 286 S.E.2d 129, 131 (1982).

The *Claytor* Court articulated the risk-utility test in the following manner: "[N]umerous factors must be considered [when determining whether a product is unreasonably dangerous], including the usefulness and desirability of the product, the cost involved for added safety, the likelihood and potential seriousness of injury, and the obviousness of danger." *Id.* at 265, 286 S.E.2d at 132.

Later, in *Bragg v. Hi-Ranger, Inc.*, our court of appeals phrased the risk-utility test as follows: "[A] product is unreasonably dangerous and defective if the danger associated with the use of the product outweighs the utility of the product." 319 S.C. 531, 543, 462 S.E.2d 321, 328 (Ct.App.1995). The *Bragg* court went on to list the above factors set forth in *Claytor* as the relevant inquiry when weighing the danger of the product versus its utility. *Id.* at 543-44, 462 S.E.2d at 328.

Ford contends Branham failed to present evidence of a feasible alternative design. Implicit in Ford's argument is the contention that a product may only be shown to be defective and unreasonably dangerous by way of a risk-utility test, for by its very nature, the risk-utility test requires a showing of a reasonable alternative design.^{FN9} Branham counters, arguing that under *Claytor* he may prove a design defect by resort to the consumer expectations test or the risk-utility test. Branham also argues that regardless of which test is required, he has met both, including evidence of a feasible alternative design. We agree with Branham's contention that he produced evidence of a feasible alternative design. Branham additionally points out that the jury was charged on the consumer expectations test *and* the risk-utility test.

^{FN9} One commentator has noted that, "one simply cannot talk meaningfully about a risk-[utility] defect in a product design until and unless one has identified some design alternative (including any design omission) that can serve as the basis for a risk-[utility] analysis." Gary T. Schwartz, *Foreword: Understanding Products Liability*, 67 CAL.L.REV. 435, 468 (1979).

[5] As discussed above, Branham challenged the design of the Ford Bronco II by pointing to the Mac-

Pherson suspension as a reasonable alternative design. A former Ford vice president, Thomas Feaheny, testified that the MacPherson suspension system would have significantly increased the handling and stability of the Bronco II, making it less prone to rollovers. Branham's expert, Dr. Richardson, also noted that the MacPherson suspension system would have enhanced vehicle stability by lowering the vehicle center of gravity. There was further evidence that the desired sport utility features of the Bronco II would not have been compromised by using the MacPherson suspension. Moreover, there is evidence that use of the MacPherson suspension would not have increased costs. Whether this evidence satisfies the risk-utility test is ultimately a *14 jury question. But it is evidence of a feasible alternative design, sufficient to survive a directed verdict motion.

[6] While the consumer expectations test fits well in manufacturing defect cases, we do agree with Ford that the test is ill-suited in design defect cases. We hold today that the exclusive test in a products liability design case is the risk-utility test with its requirement of showing a feasible alternative design. In doing so, we recognize our Legislature's presence in the area of strict liability for products liability.

In 1974, our Legislature adopted the *Restatement (Second) of Torts* § 402A (1965), and identified its comments as legislative intent. S.C.Code Ann. §§ 15-73-10-30 (2005). The comments in section 402A are pointed to as the basis for the consumer expectations test.^{FN10} Since the adoption of section 402A, the American Law Institute published the *Restatement (Third) of Torts: Products Liability* (1998). The third edition effectively moved away from the consumer expectations test for design defects, and towards a risk-utility test. We believe the Legislature's foresight in looking to the American Law Institute for guidance in this area is instructive.

^{FN10} E.g., *Young v. Tide Craft, Inc.*, 270 S.C. 453, 471, 242 S.E.2d 671, 680 (1978) (quoting from comment i. to express the consumer expectations test); see also Jerry J. Philips, *Consumer Expectations*, 53 S.C.L.REV. 1047, 1047 (2002) (noting that comments g. & i. form the consumer expectations test).

The Legislature has expressed no intention to forec-

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lose court consideration of developments in products liability law. For example, this Court's approval of the risk-utility test in *Claytor* yielded no legislative response. We thus believe the adoption of the risk-utility test in design defect cases in no manner infringes on the Legislature's presence in this area.

Some form of a risk-utility test is employed by an overwhelming majority of the jurisdictions in this country.^{FN11} Some of these jurisdictions exclusively employ a risk-utility test,^{FN12} while others do so with a hybrid of the risk-utility and the consumer expectations test, or an explicit either-or option.^{FN13} States *15 that exclusively employ the consumer expectations test are a decided minority.^{FN14}

FN11. By our count 35 of the 46 states that recognize strict products liability utilize some form of risk-utility analysis in their approach to determine whether a product is defectively designed. Four states do not recognize strict liability claims at all. Those four states are Delaware, Massachusetts, North Carolina, and Virginia. *Cline v. Prowler Indus. of Md., Inc.*, 418 A.2d 968, 980 (Del.1980); *Back v. Wickes Corp.*, 375 Mass. 633, 378 N.E.2d 964, 968-69 (1978); *Smith v. Fiber Controls Corp.*, 300 N.C. 669, 268 S.E.2d 504, 509-10 (1980); *Sensenbrenner v. Rust, Orling & Neale, Architects, Inc.*, 236 Va. 419, 374 S.E.2d 55, 57 n. 4 (1988). Another state, Missouri, rejects altogether any test in the form of a jury charge to determine whether a product is unreasonably dangerous, leaving that determination instead to the "collective intelligence and experience" of the jury. *Rodriguez v. Suzuki Motor Corp.*, 996 S.W.2d 47, 64-65 (Mo.1999) (quoting *Newman v. Ford Motor Co.*, 975 S.W.2d 147, 154 (Mo.1998)).

FN12. *Gen. Motors Corp. v. Jernigan*, 883 So.2d 646, 662-63 (Ala.2003); *Armentrout v. FMC Corp.*, 842 P.2d 175, 183-84 (Colo.1992); *Banks v. ICI Ams., Inc.*, 264 Ga. 732, 450 S.E.2d 671, 674-75 (1994); *Wright v. Brooke Group Ltd.*, 652 N.W.2d 159, 169 (Iowa 2002); *Toyota Motor Corp. v. Gregory*, 136 S.W.3d 35, 42 (Ky.2004); *Jenkins v. Int'l Paper Co.*, 945 So.2d 144, 150-51 (La.Ct.App.2006); *St. Germain v. Husqvarna*

Corp., 544 A.2d 1283, 1285-86 (Me.1988); *Gregory v. Cincinnati Inc.*, 450 Mich. 1, 538 N.W.2d 325, 329-30 (1995); *Kallio v. Ford Motor Co.*, 407 N.W.2d 92, 96-97 (Minn.1987); *Williams v. Bennett*, 921 So.2d 1269, 1273-75 (Miss.2006); *Rix v. Gen. Motors Corp.*, 222 Mont. 318, 723 P.2d 195, 201-02 (1986); *Cavanaugh v. Skil Corp.*, 164 N.J. 1, 751 A.2d 518, 522 (2000); *Brooks v. Beech Aircraft Corp.*, 120 N.M. 372, 902 P.2d 54, 61-62 (1995); *Denny v. Ford Motor Co.*, 87 N.Y.2d 248, 639 N.Y.S.2d 250, 662 N.E.2d 730, 735-36 (N.Y.1995); *Azzarello v. Black Bros. Co.*, 480 Pa. 547, 391 A.2d 1020, 1026-27 (1978); *Uniroyal Goodrich Tire Co. v. Martinez*, 977 S.W.2d 328, 335 (Tex.1998); *Morningstar v. Black & Decker Mfg. Co.*, 162 W.Va. 857, 253 S.E.2d 666, 682-84 (1979).

FN13. *Gen. Motors Corp. v. Farnsworth*, 965 P.2d 1209, 1220 (Alaska 1998); *Dart v. Wiebe Mfg., Inc.*, 147 Ariz. 242, 709 P.2d 876, 879-80 (1985); *Lee v. Martin*, 74 Ark. App. 193, 45 S.W.3d 860, 864 (2001); *Merrill v. Navegar, Inc.*, 26 Cal.4th 465, 110 Cal.Rptr.2d 370, 28 P.3d 116, 125 (2001); *Potter v. Chicago Pneumatic Tool Co.*, 241 Conn. 199, 694 A.2d 1319, 1333-34 (1997); *Liggett Group, Inc. v. Davis*, 973 So.2d 467, 475-76 (Fla.Dist.Ct.App.2007); *Tabieros v. Clark Equip. Co.*, 85 Hawai'i 336, 944 P.2d 1279, 1311 (1997); *Mikolajczyk v. Ford Motor Co.*, 231 Ill.2d 516, 327 Ill.Dec. 1, 901 N.E.2d 329, 352 (2008); *Halliday v. Shurm, Ruger & Co.*, 368 Md. 186, 792 A.2d 1145, 1152-54 (2002); *Kelleher v. Marvin Lumber & Cedar Co.*, 152 N.H. 813, 891 A.2d 477, 492 (2005); *Endresen v. Scheels Hardware & Sports Shop, Inc.*, 560 N.W.2d 225, 233-34 (N.D.1997); *Perkins v. Wilkinson Sword, Inc.*, 83 Ohio St.3d 507, 700 N.E.2d 1247, 1248-49 (1998); *McCathern v. Toyota Motor Corp.*, 332 Or. 59, 23 P.3d 320, 331-32 (2001); *First Premier Bank v. Kolcraft Enters., Inc.*, 686 N.W.2d 430, 444-45 (S.D.2004), superseded by rule change on unrelated grounds 2006 S.D. Sess. Laws Ch. 341 as recognized in *In re Estate of Duebendorfer*, 721 N.W.2d 438, 444 (S.D.2006); *Ray ex rel. Holman v. BIC Corp.*, 925 S.W.2d 527, 533 (Tenn.1996);

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Dimick v. OHC Liquidation Trust, 157 P.3d 347, 349-50 (Utah Ct.App.2007); Soproni v. Polygon Apartment Partners, 137 Wash.2d 319, 971 P.2d 500, 505 (1999).

FN14. Rojas v. Lindsay Mfg. Co., 108 Idaho 590, 701 P.2d 210, 211-12 (Idaho 1985) but see Puckett v. Oakfabco, Inc., 132 Idaho 816, 979 P.2d 1174, 1181 (1999) (noting absence of reasonable alternative design as a basis for affirming summary judgment); Baker v. Heye-Am., 799 N.E.2d 1135, 1140 (Ind.Ct.App.2003); Delaney v. Deere & Co., 268 Kan. 769, 999 P.2d 930, 946 (2000); Rahmig v. Mosley Mach. Co., 226 Neb. 423, 412 N.W.2d 56, 81-82 (1987); Stackiewicz v. Nissan Motor Corp. in U.S.A., 100 Nev. 443, 686 P.2d 925, 928 (1984) but see McCourt v. J.C. Penney Co., Inc., 103 Nev. 101, 734 P.2d 696, 697-98 (1987) (recognizing alternative design is a factor for determining whether a product is unreasonably dangerous); Woods v. Fruehauf Trailer Corp., 765 P.2d 770, 774 (Okla.1988); Castrignano v. E.R. Squibb & Sons, Inc., 546 A.2d 775, 779 (R.I.1988) but see Buonanno v. Colmar Belting Co., 733 A.2d 712, 718 (R.I.1999) (discussing relevancy of alternative design in context of whether a product is defectively designed); Farnham v. Bombardier, Inc., 161 Vt. 619, 640 A.2d 47, 48 (1994); Green v. Smith & Nephew AHP, Inc., 245 Wis.2d 772, 629 N.W.2d 727, 739-41 (2001); Sims v. Gen. Motors Corp., 751 P.2d 357, 364-65 (Wyo.1988).

We believe that in design defect cases the risk-utility test provides the best means for analyzing whether a product is designed defectively. Unlike the consumer expectations test, the focus of a risk-utility test centers upon the alleged defectively designed product. The risk-utility test provides objective factors for a trier of fact to analyze when presented with a challenge to a manufacturer's design. Conversely, we find the consumer expectations test and its focus on the consumer ill-suited to determine whether a product's design is unreasonably dangerous. FN15

FN15. The consumer expectations test is best suited for a manufacturing defect claim.

We believe the rule we announce today in design defect cases adheres to the approach the trial and appellate courts in this state have been following. In reported design defect cases, our trial and appellate courts have placed their imprimatur on the importance of showing a feasible alternative design. See Claytor v. Gen. Motors Corp., 277 S.C. 259, 265, 286 S.E.2d 129, 132 (1982) (adopting the risk-utility test); Kennedy v. Custom Ice Equip. Co., 271 S.C. 171, 176, 246 S.E.2d 176, 178 (1978) (affirming verdict in favor of plaintiff by noting that plaintiff presented evidence of a design alternative); Mickle v. Blackmon, 252 S.C. 202, 234-35, 166 S.E.2d 173, 187-88 (1969) (discussing a manufacturer's decision to use one type of inferior material as a component part one year, but a superior material the following year—that is, a design alternative); Bragg v. Hi-Ranger, Inc., 319 S.C. 531, 546, 462 S.E.2d 321, 330 (Ct.App.1995) (affirming defense verdict and noting that plaintiff failed to present evidence of a feasible alternative design); Survillas Homeowners Ass'n v. Square D Co., 301 S.C. 330, 334, 391 S.E.2d 868, 870 (Ct.App.1990) (affirming a defense directed verdict and noting that plaintiff's expert failed to discuss design alternatives); Gasque v. Heublein, Inc., 281 S.C. 278, 283, 315 S.E.2d 556, 559 (Ct.App.1984) (affirming a plaintiff's verdict and noting in detail existence of alternative design evidence).

In Kennedy v. Custom Ice Equipment Co., this Court specifically pointed to evidence that the challenged industrial ice machine would have been safer had the manufacturer installed a protective cover. 271 S.C. at 176, 246 S.E.2d at 178. In Gasque v. Heublein, Inc., our court of appeals acknowledged the importance of a reasonable alternative design in a product liability design defect case wherein it noted evidence of alternative designs in an opinion affirming an award for the plaintiff. 281 S.C. at 283, 315 S.E.2d at 559. In like manner is the case of Survillas Homeowners Ass'n v. Square D Co., where the court of appeals upheld a directed verdict in favor of a manufacturer, noting that plaintiffs did not produce any evidence of design alternatives. 301 S.C. at 334, 391 S.E.2d at 870. And more recently, in Bragg, our court of appeals again noted the absence of alternative design evidence in affirming a defense verdict. 319 S.C. at 546, 462 S.E.2d at 330. The very nature of feasible alternative design evidence entails the manufacturer's decision to employ one design over another. This weighing of costs and benefits attendant to that decision is the essence of the risk-utility test.

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This approach is in accord with the current edition of the Restatement of Torts:

A product ... is defective in design when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the alternative design renders the product not reasonably safe.

RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2(b) (1998). Concerning the framework for the risk-utility test, we agree with Professor David G. Owen, who observed:

[T]he basic liability test should be congruent with the basic issue that in most cases must be proved. In design defect litigation, that basic issue involves the following fundamental ... question: whether the manufacturer's failure to adopt a particular design feature proposed by the plaintiff was, on balance, right or wrong. A congruence between this central issue and the liability test requires that the test focus squarely on the issue of what, in particular, allegedly was wrong with the manufacturer's design decision. More specifically, this inquiry asks whether the increased costs (lost dollars, lost utility, and lost safety) of altering the design in the particular manner the plaintiff claims was reasonably necessary to the product's safety would have been worth the resulting safety benefits.

David G. Owen, *Toward a Proper Test for Design Defectiveness*:

<http://www.westlaw.com/Find/Default.wl?rs=FLPR1.0&vr=2.0&DB=1251&FindType=Y&ReferencePosition=1687> "Micro-Balancing" Costs and Benefits, 75 TEX.L.REV. 1661, 1687 (1997).

[7] In every design defect case the central recurring fact will be a product that failed causing damage to a person or his property. Consequently, the focus will be whether the product was made safe enough. This inquiry is the core of the risk-utility balancing test in design defect cases, yet we do not suggest a jury question is created merely because a product can be

made safer. We adhere to our longstanding approval of the principle that a product is not in a defective condition unreasonably dangerous merely because it "can be made more safe." As we observed in *Marchant v. Mitchell Distributing Co.*:

Most any product can be made more safe. Automobiles would be more safe with disc brakes and steel-belted radial tires than with ordinary brakes and ordinary tires, but this does not mean that an automobile dealer would be held to have sold a defective product merely because the most safe equipment is not installed. By a like token, a bicycle is more safe if equipped with lights and a bell, but the fact that one is not so equipped does not create the inference that the bicycle is defective and unreasonably dangerous.

....

There is, of course, some danger incident to the use of any product.

270 S.C. 29, 35-36, 36, 240 S.E.2d 511, 513, 514 (1977).

[8] In sum, in a product liability design defect action, the plaintiff must present evidence of a reasonable alternative design. The plaintiff will be required to point to a design flaw in the product and show how his alternative design would have prevented the product from being unreasonably dangerous. This presentation of an alternative design must include consideration of the costs, safety and functionality associated with the alternative design. ^{FN16} On retrial, Branham's design*17 defect claim will proceed pursuant to the risk-utility test and not the consumer expectations test.

^{FN16} The analysis asks the trier of fact to determine whether the potential increased price of the product (if any), the potential decrease in the functioning (or utility) of the product (if any), and the potential increase in other safety concerns (if any) associated with the proffered alternative design are worth the benefits that will inhere in the proposed alternative design. *Claytor*, 277 S.C. at 265, 286 S.E.2d at 132 (recognizing that any product "can be made more safe" and that "numerous factors must be considered, including the usefulness and desirability of the

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product [and] the cost involved for added safety").

III.

Notwithstanding the existence of ample evidence to withstand a directed verdict motion on the handling and stability design defect claim, we reverse and remand for a new trial. There are three reasons we reverse and remand the finding of liability and award of actual damages. First, this case implicates two evidentiary rules related to products liability cases. The first rule provides that whether a product is defective must be measured against information known at the time the product was placed into the stream of commerce. When a claim is asserted against a manufacturer, post-manufacture evidence is generally not admissible. The second rule provides that evidence of similar incidents is admissible where there is a substantial similarity between the other incidents and the accident in dispute tending to prove or disprove some fact in controversy. Evidence was introduced that violated both of these rules. Third, Branham's closing argument was a direct appeal to the passion and prejudice of the jury. And although not a standalone ground for reversal, we find that because Ford and Hale were joint tortfeasors, it was error to require the jury to apportion responsibility between the defendants.

A.

Post-distribution evidence

[9] In order for a plaintiff to prove his case in a product liability action, he must show that the "product was in a defective condition at the time that it left the hands of the particular seller ... and unless evidence can be produced which will support the conclusion that it was then defective, the burden is not sustained." Claytor v. Gen. Motors Corp., 277 S.C. 259, 264, 286 S.E.2d 129, 131-32 (1982) (emphasis added) (quoting RESTATEMENT (SECOND) OF TORTS § 402A, cmt. g. (1965) adopted as legislative intent via S.C.Code Ann. § 15-73-30 (2005)); see also Bragg v. Hi-Ranger, Inc., 319 S.C. 531, 548-49, 462 S.E.2d 321, 331 (Cl.App.1995) (recognizing that the "product must be 'measured against a standard existing at the time of sale' " and that " 'hindsight opinions by [...] experts suggesting that more should have been done ... are insufficient to discredit the conclusion that the

manufacturer met the standard of care' ") (quoting Sexton ex rel. Sexton v. Bell Helmets, Inc., 926 F.2d 331, 337 (4th Cir.1991) and Doe v. Miles Labs., Inc., Cutter Labs. Div., 927 F.2d 187, 193 (4th Cir.1991)); RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2, cmt. a. (1998) ("[F]or the liability system to be fair and efficient, the balancing of risks and benefits in judging product design ... must be done in light of the knowledge of risks and risk-avoidance techniques reasonably attainable at the time of distribution."). Because the claim here is against the manufacturer, the "time of distribution" is the time of manufacture.

[10] While we find Branham presented sufficient evidence to create a jury question on his design defect claim, we further find Ford was prejudiced by Branham's unrelenting pursuit of post-distribution evidence on the issue of liability. Given the extent of the improper post-distribution evidence introduced, the error cannot be considered harmless.

[11][12][13] We first clarify what is post-distribution evidence. Simply defined, post-distribution evidence is evidence of facts neither known nor available at the time of distribution. When assessing liability in a design defect claim against a manufacturer, the judgment and ultimate decision of the manufacturer must be evaluated based on what was known or "reasonably attainable" at the time of manufacture.^{FN17} See *18RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2, cmt. a. (1998). The use of post-distribution evidence to evaluate a product's design through the lens of hindsight is improper. See Gregory v. Cincinnati, Inc., 450 Mich. 1, 538 N.W.2d 325, 326 (1995) ("Evidence of conduct after the date of manufacture improperly shifts the focus from the premanufacturing decision and has the potential to taint any finding of liability.").

FN17. The dissent asserts that our opinion "may be read as barring any evidence created after the date of manufacture." We do not intend our holding to reach that far. As defined above, post-distribution evidence is "evidence of facts neither known nor available at the time of distribution." THE RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2, cmt. a speaks in terms of "reasonably attainable" knowledge at the time of distribution. If informa-

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tion on a product is reasonably attainable, then a manufacturer is charged with such knowledge at the time of manufacture. The rule prohibiting the introduction of post-distribution evidence does not permit a manufacturer to turn a blind eye to reasonably available information regarding the safety or danger of its product.

Hale's Ford Bronco II 4x2 was manufactured in 1986. The following is a sampling of the post-manufacture (or post-distribution) evidence.

Branham introduced a memorandum dated April 14, 1989, dealing with a meeting that three Ford engineers had with "six people from Consumers Report." The memorandum stated that:

Our objective was to "give it our best shot" at diffusing a very negative story on the Bronco II in the June issue.... The magazine has done a comparative test of the Chevy S-10 Blazer, Geo Tracker, Dodge Raider and Bronco II. As the result of several calls from a Consumer Report writer, we were led to believe that the story could be nearly as negative as last summer's Suzuki Samurai story. Plus, NHTSA is currently conducting an engineering analysis of the Bronco II which creates a negative cloud. And, FARS [Fatal Analysis Reporting System] data shows Bronco II to have a higher fatal rollover rate relative to certain competitors.

The memorandum went on to note the following: "Our data are not terribly favorable. Our rollover rate is three times higher than the Chevy S-10 Blazer." This evidence of the Bronco II's rollover rate is post-manufacture evidence.

Later in the same 1989 memorandum, as the engineers discuss how they thought they did, this comment is made: "We think, however, that we have clouded their minds, loosened some conclusions they may have reached prior to our meeting and sent them off to search for additional information that could work to our advantage." The "clouded their mind" comment became a mantra for Branham on the issue of liability and otherwise.

Through Branham's expert, Dr. Richardson, a 1989 film was introduced. Counsel emphasized this film, taped in 1989, comparing the S-10 Blazer and the

Bronco II. As reflected in Plaintiff's exhibit 54A, which is the corresponding report to the videotape, Ford requested "additional 'J' turn tests" on May 17, 1989 for various vehicles, including a 1989 Bronco II 4x4. The tape (post-manufacture evidence) revealed that the 1989 Bronco II did not handle as well as the S-10 Blazer.

Dr. Richardson also testified to a document, Plaintiff's exhibit 168, referencing post-manufacture evidence that compared a 1989 Bronco II (referred to in the document as BII) to the UN46 prototype, now known as the Ford Explorer. This exhibit shows the additional evidence of the rollover tendency of the Bronco II that came to light after 1986:

Current "strategies" for development of utility vehicle stability have changed over the past few years due (sic) the increased availability of rollover accident data and analyses. Previous strategies were partially driven by the Insurance Institute tests of the Jeep CJ7 in the early 80's which emphasized risk from rollovers caused by extreme (rate and magnitude) steering inputs in emergency maneuvers. Independent DOT, GM and Ford studies have confirmed that rollovers directly induced by extreme steering inputs are rare for any Utility vehicle (including the CJ7). The following quote from GM's recent SAE Paper (Reconstruction of Rollover Collisions, SAE 890857) summarizes current wisdom. "A common pre-rollover maneuver is an off-road path by the car, followed by heavy steer correction back *19 towards the road leading to a side slide, and, ultimately, a trip followed by the rollover." Based on this new information, the UN46 was developed using a handling philosophy notably different from the BII.^{FN18}

^{FN18}. Plaintiff's exhibit 168 refers to General Motors' "recent" Society of Automotive Engineers (SAE) paper concerning rollovers. The GM SAE paper was published in February of 1989.

This post-distribution exhibit concludes:

Based on an analysis of FARS accident summaries and BII & Competitive handling characteristics, it is impossible to identify any type of vehicle "defect" that could explain the BII FARS performance. It is most likely that the handling strategy used

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during the development of the BII, which fully exploited the vehicles (sic) inherent quickness (due to its short wheelbase), encourages aggressive driving and makes the vehicle more sensitive to the large steering wheel "over-corrections" that seem to be part of most rollover scenarios. This sensitivity is aggravated by the fact the (sic) most operators in rollover accidents are either inexperienced drivers, under the influence of alcohol or both. The UN46, designed with the benefit of the FARS experience for all utility vehicles, has been intentionally developed to resolve these issues.

Yet another example of post-distribution evidence is found in a March 3, 1989 memorandum addressing an accident caused while testing a prototype anti-lock braking system (ABS) at the Dearborn Proving Grounds (DPG). The memorandum revealed that on February 28, 1989, a "demonstration was conducted on an ice pad located on the DPG East-West runway" and that the "accident involved a Kelly-Wayes Company owned 1989 Bronco II with prototype ABS." The goal was to test the efficacy of the ABS system when running partially on ice and partially on dry ground. During the test procedure the Bronco II rolled over. The rollover occurred on ice.

[14] There are other examples of post-manufacture evidence, but the few examples cited illustrate the inherent prejudice that flows from post-distribution evidence. It is good when a manufacturer continues to test and evaluate its product after initial manufacture. As additional information is learned, changes may be made that improve product safety and function. As a matter of policy, the law should encourage the design and manufacture of safe, functional products. In holding manufacturers accountable for unreasonably dangerous products pursuant to a fair system, products liability law serves that goal. Moreover, the law should encourage manufacturers to continue to improve their products in terms of utility and safety free from prior design decisions judged through the lens of hindsight.

Whether the 1987 Ford Bronco II was defectively designed and in a defective condition unreasonably dangerous must be determined as of the 1986 manufacture date of the vehicle. Ford's 1986 design and manufacture decision should be assessed on the evidence available at that time, not the increased evidence of additional rollover data that came to light

after 1986.

B.

Other Similar Incidents

[15] In *Whaley v. CSX Transportation Inc.*, this Court recognized that similar accidents are admissible if they "tend[] to prove or disprove some fact in dispute." 362 S.C. 456, 483, 609 S.E.2d 286, 300 (2005). The Court also recognized that this type of evidence has the potential to be "highly prejudicial." ^{FN19} *Id.* at 483, 609 S.E.2d at 300. Accordingly, it set forth a stringent standard for admissibility: " '[A] plaintiff must present a factual foundation for the court to determine that the other accidents were substantially similar to the accident at issue.' " *Id.* at 483, 609 S.E.2d at 300 (quoting *Buckman v. Bombardier Corp.*, 893 F.Supp. 547, 552 (E.D.N.C.1995)); see also *Atkinson v. Orkin Exterminating Co.*, 361 S.C. 156, 604 S.E.2d 385 (2004) (recognizing that "unless Orkin's *20 past conduct is 'similar' to the conduct directed at the [plaintiffs], it is inadmissible").

^{FN19} In *Nissan Motor Co. v. Armstrong*, the Texas Supreme Court made a similar observation, noting that: "[P]rolonged proof of what happened in other accidents cannot be used to distract a jury's attention from what happened in the case at hand." 145 S.W.3d 131, 138 (Tex.2004).

Before addressing the "substantially similar" test, we resolve Ford's twin challenge to the post-manufacture evidence of supposed similar incidents. Even assuming a plaintiff satisfies the *Whaley* "substantially similar" test, such evidence must not run afoul of the rule in products liability cases that prohibits post-distribution evidence to establish liability. *Whaley* is instructive in this regard.

Whaley was employed by CSX Transportation. Whaley became ill, allegedly due to work conditions, with heat-related symptoms first reported on May 24, 2000. Whaley introduced evidence that "between 1984 and 2000, CSX had received ninety-seven employee complaints about heat. In addition, the trial judge permitted Whaley to introduce evidence that, between 1993 and 2000, eighteen CSX employees had suffered heat stroke." *Whaley*, 362 S.C. at 483, 609 S.E.2d at 300. Because "Whaley did not establish that

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the reported complaints and injuries stemmed from the same or similar circumstances as his injuries [,]" it was error to admit the evidence. *Id.* at 483-84, 609 S.E.2d at 300. Yet Whaley never attempted to introduce evidence of other incidents that occurred after the 2000 injury date.

On the issue of liability, Branham presented voluminous evidence of post-manufacture rollover data. The post-manufacture evidence of purported similar incidents was error, even if the "substantially similar" threshold was met. ^{FN20} Post-manufacture evidence of similar incidents is not admissible to prove liability.

FN20. Branham's evidence concerning the February 28, 1989 rollover, discussed above in Part III.A., is an example of evidence that violates both rules. First, it is post-manufacture evidence. Second, the purpose was to test a prototype braking system (the anti-lock braking system) on ice. According to Plaintiff's exhibit 275, "[s]everal brake application maneuvers were performed on the ice surface." The 1989 Bronco rolled over during the testing. A rollover under these circumstances is so patently dissimilar to the circumstances of Hale's June 17, 2001 accident that no discussion is warranted.

This Court recently revisited *Whaley* in a products liability setting, *Watson v. Ford Motor Co.*, — S.C. —, — S.E.2d — (2010) (Shearouse Adv. Sh. No. 10 at 37). In *Watson*, we repeated that "[e]vidence of similar accidents, transactions, or happenings is admissible in South Carolina where there is some special relation between the accidents tending to prove or disprove some fact in dispute." *Id.* at 50. In imposing a burden on plaintiffs to demonstrate "that the other accidents were substantially similar to the accident at issue[,]" the Court "set forth factors to support a claim that the present accident was caused by the same defect: (1) the products are similar; (2) the alleged defect is similar; (3) causation related to the defect in the other incidents; and (4) exclusion of all reasonable secondary explanations for the cause of the other accidents." *Id.* at 51 (citing *Buckman v. Bombardier*, 893 F.Supp. at 552).

We turn now to the evidence of pre-manufacture rollover data. Branham introduced evidence of rollover

accidents involving the Bronco II and other vehicles in the same class that was known at or prior to the 1986 manufacture of Hale's Bronco II. Ford claims the pre-manufacture comparative evidence of rollover accidents violates the *Whaley-Watson* "substantially similar" test because there was no showing that the cause of the other accidents was similar to the cause of the rollover accident at issue.

In commenting on this evidentiary dispute, we must be careful not to foreclose the discretion of the trial court in ruling on objections during the course of the retrial. This is especially true with "other similar incidents" evidence because of its potential to be "highly prejudicial," thereby implicating Rule 403, SCRE. Our discussion, therefore, is intended as a general guideline, as we recognize a host of factors can arise during the course of a trial that impact a trial court's decision to admit or exclude evidence.

With that caveat, on the record before us, we disagree with Ford. Admittedly, a showing of comparative rollover accident rates does not establish the manner in which any particular accident occurred. But Ford misconstrues the essence of Branham's design defect claim. To the extent Branham is able *21 to establish (at or prior to the manufacture date of the subject vehicle) the rate or number of rollover accidents of the Bronco II was greater as compared to other vehicles in its class, such evidence may well be relevant on whether the Bronco II was unreasonably dangerous.

We do agree with Ford that if the cause of an accident is known and the cause is not substantially similar to the accident at issue, evidence of the other accident should be excluded. Yet, where the precise cause of an accident is not known, Bronco II rollover accident data has relevance when compared to rollover accident data of other vehicles in class. This relevance is linked directly to Branham's claim that the design of the Bronco II caused it to have an unreasonably dangerous tendency to rollover.

Like the trial court, we are persuaded by neither Ford's general argument that many accidents may be attributable to inexperienced or impaired drivers, nor its specific reference to Hale's inattention as the cause of the June 17, 2001 accident.

First, as referenced in a Ford document (Plaintiff's exhibit 168), Ford recognized the tendency of the

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Bronco II to roll over, describing it as driving "sensitivity" which is "aggravated by the fact [that] most operators in rollover accidents are either inexperienced drivers, under the influence of alcohol or both." Assuming a number of rollover accidents are caused by inexperienced or impaired drivers, there is no suggestion in this record that inexperienced or impaired drivers disproportionately favored the Bronco II, thus skewing the comparative rollover accident data. It is inferable that rollover accidents caused by inexperienced or impaired drivers are shared by all vehicles in the class, not just the Bronco II. While Ford's position may have appeal as a jury argument, it is of little moment on the admissibility question in the record before us.

Second, there may be little or no doubt as to Hale's negligence, but that misses the point in terms of the admissibility of comparative rollover accident data. A car manufacturer must design and produce vehicles that are not in a defective condition unreasonably dangerous to the user. Cars are designed with utility and safety in mind, and careless driving is a foreseeable reality. The general nature of the alleged negligent driving on the part of Hale was (or should have been) part of the evaluative process that culminated in the ultimate decision of Ford to design, manufacture and market the Bronco II to the driving public. Ford had a duty to design and manufacture the Bronco II as a reasonably safe vehicle.

We believe our consideration of the admissibility of the pre-manufacture rollover accident data necessarily flows from the risk-utility test for products liability design defect cases.

C.

Closing Argument

[16][17] It is improper for counsel to make a "closing argument to the jury ... calculated to arouse passion or prejudice." Gathers v. Harris Teeter Supermarket, Inc., 282 S.C. 220, 231, 317 S.E.2d 748, 755 (Cl.App.1984). The closing argument of Branham's counsel was designed to inflame and prejudice the jury. Closing argument excerpts include:

1. "This is how Ford looks at this. That little bit of thirty people being killed every year didn't matter. Those thirty people, those thirty extra people getting

killed in a year didn't matter to them because it was just a little bitty number."

2. "It does matter about those people getting killed. Those thirty people do count. Those thirty people-that's thirty more people that got killed that year. If you expect these vehicles to last about twenty years, that's six hundred more people getting killed using this vehicle as opposed to a Chevy S-10 Blazer. That's serious."

3. "And that doesn't count the paralyzed people, the quadriplegics, the people with serious injuries, the thousands of people that have been in these events because of this rollover propensity of this vehicle that they knew about, and they knew it since day one but they *22 chose profit over safety every time because they looked at it as numbers. They didn't look at it as lives, as people."

4. "I submit to you that the evidence is that they did it because they thought it was a little, small number.... [T]hey did not look at it as thirty lives a year[, they didn't look at it as six hundred lives. That's how they should have looked at it, but that was not how they did it."

5. "They got together at the highest levels of Ford Motor Company and they made a judgment that rather than delaying and improving the Bronco II, they were going to sell the vehicle as it was and that they were going to risk people's lives and they were going to risk serious injuries like we have here today. They were going to risk people's brains."

6. "Jesse Branham is here today with a brain injury and six hundred other people, or however many it is, lost their lives, and numerous others have brain injuries or are paralyzed, quadriplegic, have extremely serious injuries. We believe that you should tell Ford Motor Company what you think about this kind of thing."

It is unmistakable that the closing argument relied heavily on inadmissible evidence. In addition, as will be discussed below, much of the prejudice resulting from the improper evidence was merged in closing argument with Branham's pursuit of punitive damages in requesting that the jury punish Ford for harm to Branham and others. The closing argument invited the jury to base its verdict on passion rather than rea-

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son. The closing argument denied Ford a fair trial. Scoggins v. McClellion, 321 S.C. 264, 269, 468 S.E.2d 12, 15 (Ct.App.1996) ("The test for granting a new trial on the basis of improper closing argument by opposing counsel is whether the complaining party was prejudiced to the extent that he or she was denied a fair trial.").

D.

The Verdict Form

[18] Over Ford's objection, the trial court required the jury to apportion liability between Ford and Hale. This was error. S.C. Dep't of Transp. v. First Carolina Corp. of S.C., 372 S.C. 295, 303, 641 S.E.2d 903, 907-08 (2007) ("[A] special verdict question may be so defective in its formulation that its submission results in a prejudicial effect which constitutes reversible error."). Whether Ford was prejudiced by the improper verdict form is speculation, but we address the issue in light of the remand for a new trial.

Ford and Hale were alleged joint tortfeasors. The accident occurred in 2001. In 2001, multiple tortfeasors were jointly and severally responsible for all damages. Concerning a plaintiff's ability to collect on a judgment, there could be no apportionment of fault among joint tortfeasors.^{FN21} The trial court used a verdict form that is standard in comparative negligence cases where a defendant alleges the plaintiff's own negligence caused the accident and resulting injuries. Question five of the verdict form asked the following:

FN21. The cross-claim between Ford and Hale was severed from the underlying trial. The current version of the Contribution Among Tortfeasors Act became effective for cases arising after July 1, 2005. The 2005 amendment to the Act provides that a "less than fifty percent" at-fault defendant "shall only be liable for that percentage of the indivisible damages determined by the jury." S.C.Code Ann. § 15-38-15(A) (Supp.2008). A provision applicable in 2001 provided that "[i]n determining the pro rata shares of tortfeasors in the entire liability ... [,] their relative degrees of fault shall not be considered." S.C.Code Ann. § 15-38-30 (2005).

Taking the combined negligence that proximately caused the parties' injuries as one hundred percent (100%), what percentage of that negligence is attributable to Defendant Ford Motor Company and what percentage is attributable to the Defendant Cheryl Jane Hale?

The jury apportioned fault 55% Ford and 45% Hale. Allocating fault between Ford and Hale served no legitimate purpose. Our comparative system for allocating liability between a plaintiff and a defendant is in no manner implicated where fault lies, if at all, *23 among multiple defendants. Since the Nelson v. Concrete Supply^{FN22} decision adopting comparative negligence (between a plaintiff and a defendant), this Court has reaffirmed the applicability of joint and several liability among joint tortfeasors. Summer v. Carpenter, 328 S.C. 36, 48, 492 S.E.2d 55, 61 (1997); Am. Fed. Bank, FSB v. No. One Main Joint Venture, 321 S.C. 169, 175-76, 467 S.E.2d 439, 443 (1996); see also Fernanders v. Marks Constr. of S.C., Inc., 330 S.C. 470, 478, 499 S.E.2d 509, 513 (Ct.App.1998).

FN22. Nelson v. Concrete Supply Co., 303 S.C. 243, 399 S.E.2d 783 (1991).

The trial court justified the apportionment question on the basis of a need to ensure that any punitive damage award was supported by a negligence cause of action, and not the strict liability claim. The trial court's reasoning is not persuasive. If there were genuine concern regarding the basis of a plaintiff's verdict, the easy solution was a verdict form tailored to that concern, just as Ford requested.

A detailed verdict form would have specified whether a finding of negligence against Ford was based on the seatbelt sleeve claim or the design defect claim, or both. A proper verdict form would have avoided the confusion caused by having the jury apportion blame between jointly and severally liable defendants. More to the point, Ford's requested special verdict form would have avoided the very real risk that the jury (unaware of joint and several liability principles) would take the cue from the apportionment question and inflate the actual damage award to ensure Branhams received a full recovery from the one deep-pocket defendant. The actual damage award causes genuine concern as to the effect on the jury of the improper verdict form.

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IV.

Ford challenges the jury's award of \$16,000,000 actual damages and \$15,000,000 punitive damages. Because of our directive for a new trial, we decline to address Ford's contentions that these awards are excessive.

A.

Actual Damages

[19] Ford contends the \$16,000,000 actual damage award is grossly excessive. "When a verdict is 'grossly excessive and the amount awarded is so shockingly disproportionate to the injuries as to indicate that the jury acted out of passion, caprice, prejudice, or other consideration not founded on the evidence, it becomes the duty of this Court, as well as the trial court, to set aside the verdict.'" Sanders v. Prince, 304 S.C. 236, 238, 403 S.E.2d 640, 642 (1991) (quoting Small v. Springs Indus., Inc., 292 S.C. 481, 487, 357 S.E.2d 452, 455 (1987)). In light of the remand for a new trial, it is unnecessary to resolve Ford's claim that the actual damage award is grossly excessive.

B.

Punitive damages

The issue of punitive damages was properly submitted to the jury. Ford, however, contends that the \$15,000,000 punitive damage award cannot withstand constitutional scrutiny. We agree. Because of the necessity of a new trial, we address two issues: Branham's reliance on "harm to others" and the evidence of compensation of Ford's executives.

The pervasive prejudice resulting from the improper post-manufacture evidence on the issue of liability was compounded in Branham's pursuit of punitive damages. Perhaps the manifestation of this error is most easily seen in counsel's request that the jury punish Ford for harming others beyond Branham. See Durham v. Vinson, 360 S.C. 639, 653, 602 S.E.2d 760, 767 (2004) (reversing an award of punitive damages because the trial court allowed the jury to "punish" the defendant for a "bad act unrelated" to the defendant's action toward the plaintiff); see also Philip Morris USA v. Williams, 549 U.S. 346, 350, 353, 127 S.Ct.

1057, 166 L.Ed.2d 940 (2007) (reversing a punitive damages award where plaintiff's counsel asked the jury to "think about how many other Jesse Williams in the last 40 years in the State of Oregon there have been," and holding that "the Constitution's Due Process Clause forbids a State to *24 use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent, i.e., injury that it inflicts upon those who are, essentially, strangers to the litigation").

As outlined above, punishing Ford in this case for harming all Bronco II rollover victims was a central theme in counsel's closing argument. ^{FN23} The trial court charged the jury not to punish Ford for other "conduct." The charge violated the "harm to others" prohibition set forth in Durham v. Vinson and Philip Morris USA v. Williams. By focusing on conduct, as opposed to harm to Branham, the charge invited the jury to punish Ford for all Bronco rollover deaths and injuries—the very harm Durham and Philip Morris forbid.

^{FN23} For example, "If you expect these vehicles to last about twenty years, that's six hundred more people getting killed using this vehicle as opposed to a Chevy S-10 Blazer. That's serious.... And that doesn't count the paralyzed people, the quadriplegics, the people with serious injuries, the thousands of people that have been in these events.... Jesse Branham is here today with a brain injury and six hundred other people, or however many it is, lost their lives, and numerous others have brain injuries or are paralyzed, quadriplegic, have extremely serious injuries. We believe you should tell Ford Motor Company what you think about this kind of thing." (Excerpts from Plaintiff's counsel's closing argument.) Ford has been told in other litigation that the Bronco II was defectively designed. Ford Motor Co. v. Ammerman, 705 N.E.2d 539 (Ind.Ct.App.1999); Ford Motor Co. v. Cammack, 999 S.W.2d 1 (Tex.App.1998). Due process forbids punishing a tortfeasor multiple times for the same injury.

[20] We next examine the admission of financial data regarding Ford. Unless the United States Supreme Court holds otherwise under the Due Process Clause, we adhere to South Carolina law that "the wealth of a

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defendant is a relevant factor in assessing punitive damages." Welch v. Epstein, 342 S.C. 279, 307, 536 S.E.2d 408, 423 (Ct.App.2000). This is frequently described as the "ability to pay" factor. But this factor is not without boundaries. "Punitive damages pose an acute danger of arbitrary deprivation of property. Jury instructions typically leave the jury with wide discretion in choosing amounts, and the presentation of evidence of a defendant's net worth creates the potential that juries will use their verdicts to express biases against big businesses, particularly those without strong local presences." Honda Motor Co. v. Oberg, 512 U.S. 415, 432, 114 S.Ct. 2331, 129 L.Ed.2d 336 (1994); see also State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 427, 123 S.Ct. 1513, 155 L.Ed.2d 585 (2003) ("[R]eference to [the defendant's] assets ... ha[s] little to do with the actual harm sustained by the [plaintiff]. The wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award.").

[21] Branham presented evidence of Ford's net worth, income, revenues and cash flow. In 2005, Ford's net worth was \$12,597,000,000. Also in 2005, Ford had \$1,986,000,000 in income, \$177,000,000,000 in revenue and \$21,000,000,000 in cash flow. Branham extrapolated these figures to "per week," "per day," and "per hour." For example, concerning Ford's cash flow, "[t]hat's \$416 Billion per week,^{FN24} \$59 Million per day, [and] \$2.474 Million per hour."

FN24. The \$416 Billion per week figure is in the record, though the figure is clearly a miscalculation given annual cash flow of \$21 Billion.

This Court has approved the use of a defendant's net worth as a proper guide in assessing the "ability to pay" factor. Hicks v. Herring, 246 S.C. 429, 437, 144 S.E.2d 151, 154 (1965) (noting that "the wealth of a defendant is a relevant factor in assessing punitive damages"). This Court has not, however, addressed the propriety of extrapolating financial data in the manner introduced at trial. Our court of appeals has directly addressed this issue and found no abuse of discretion in the admission of per day earnings of a defendant, Orangeburg Sausage Co. v. Cincinnati Ins. Co., 316 S.C. 331, 344, 450 S.E.2d 66, 73-74 (Ct.App.1994), nor has it found an abuse of discretion in admitting the per day operating revenue or per day net income. Bryant v. Waste Mgmt., Inc., 342 S.C.

159, 169-70, 536 S.E.2d 380, 385-86 (Ct.App.2000). These court of appeals decisions have not been tested since the 2003 *25 Supreme Court opinion of State Farm v. Campbell.

Because the United States Supreme Court has discovered that a state court's punitive damages award implicates federal substantive due process, this Court is not the final arbiter of determining what financial evidence is proper in assessing punitive damages. Evidence concerning net worth appears the safest harbor. Honda Motor speaks directly to "net worth." 512 U.S. at 432, 114 S.Ct. 2331. Consideration of a defendant's net worth is well-rooted in the common law of punitive damages. State Farm v. Campbell's cautionary observation that "reference to [the defendant's] assets ... ha[s] little to do with the actual harm sustained by the [plaintiff]" militates against venturing beyond net worth and extrapolations from net worth. State Farm, 538 U.S. at 427, 123 S.Ct. 1513. The retrial shall be confined to such evidence.

While the United States Supreme Court's foray into punitive damages law is, to be sure, confusing, there can be no serious doubt concerning financial evidence of the salaries and compensation of a defendant corporation's officers. Such evidence introduces an arbitrary factor in a jury's consideration and assessment of punitive damages.

[22] Branham went far beyond the pale in submitting evidence of Ford's senior management compensation, including the following: In 2005, the Ford Chairman and Chief Executive Officer was compensated by stock options worth \$5,300,000; the Ford President and Chief Operating Officer received a salary \$1,458,000 in 2005; the Ford Executive Vice President received a salary of \$972,000 in 2005; the Ford Chief Financial Officer received a salary of \$916,000 in 2005; a former Ford chairman received \$880,000 in 2005. Additional testimony revealed that "[i]n 2005, they didn't pay bonuses. In 2004, they did pay bonuses: \$2 Million, \$1 Million, \$1 Million and \$1 Million plus stock and other compensation. This gives you a picture of Ford Motor Company's financial condition." The admission of this evidence was error and highly prejudicial.

V.

Alignment of Parties

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We reach Ford's final challenge assigning error to the trial court's failure to realign defendant Hale as a plaintiff. Ford requested realignment of Hale as a plaintiff so that Ford would not have to share its allotment of preemptory jury strikes ^{FN25} with Hale. ^{FN26} We find the issue not preserved for review, but we address this issue in the hope that our speaking to the matter will aid the bench and bar. This is a novel issue in our modern jurisprudence.

FN25. In South Carolina, in a civil action, each side receives four preemptory strikes and the strikes are made on a side-to-side basis until 12 jurors are seated. See S.C.Code Ann. § 14-7-1050 (1976). Therefore, Branham had four strikes and Ford and Hale each had two.

FN26. It appears Ford's motion to realign Hale was filed prior to jury selection and initially handled off the record. During jury selection, Ford's counsel referred to his earlier motion concerning the "alignment of the parties ... [and] the issue of the number of strikes." Ford's counsel reiterated his concern by noting that Hale's counsel "is sitting over there with the plaintiff."

Hale and her counsel sat on the plaintiff's side throughout the trial, beginning with jury selection. We recognize that Hale filed a cross-claim against Ford, but that claim was severed from this trial. Hale's counsel declined to cross-examine any witness called by Branham but one. The one witness Hale cross-examined was Branham's economic expert. The question: "[H]ow many millions are in a billion?"

The only *bona fide* defendant in this case was Ford. The following is the totality of Branham's closing argument concerning Hale:

I want to first talk with you just a minute about what occurred in the wreck.... Ms. Hale was going down Cromwell Road at a relatively slow speed, 35 miles an hour, she looked in the back, went to the edge of the road, she made-went to the right, made a steer to the left.

Nobody knows what that steering was because

nobody has a picture of it. We could argue about that from now to eternity*26 and nobody would know, because nobody can know. But she was driving ordinary, she wasn't doing anything-she wasn't out there doing any reckless driving out there that day.

....

Here, Ms. Hale looked in the backseat; there's no question about that, she took her eyes off the road. But did she do something that was wrong. She did what all reasonable drivers would do, which was she tried to get back on the road. She made the turn to do it and the vehicle rolled over, at 35 miles an hour, under those circumstances.

[23] Trial judges in South Carolina have the authority to realign parties. Beyond a court's inherent authority to manage and conduct a trial, our Rule 21, SCRPC, regarding joinder of parties is identical to the federal rule, Rule 21, FRCP.

Misjoinder of parties is not ground for dismissal of an action. Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just. Any claim against a party may be severed and proceeded with separately.

Rule 21, SCRPC.

Federal courts rely on Rule 21 as authority to realign parties. See In-Tech Mktg. Inc. v. Hasbro, Inc., 685 F.Supp. 436, 442 n. 19 (D.N.J.1988) (noting that Rule 21 "permits [the District] Court, *sua sponte* to re-align any party at any time"); First Nat'l Bank of Shawnee Mission v. Roeland Park State Bank & Trust Co., 357 F.Supp. 708, 711 (D.Kan.1973) (noting that the District Court "may order a realignment of the parties 'on such terms as are just' " pursuant to Rule 21). Our sister state of Georgia relies on Rule 21 in recognizing that "a trial court does have the discretion, 'at any stage of the action and on such terms as are just,' ... to realign the parties." Cawthon v. Waco Fire & Cas. Ins. Co., 259 Ga. 632, 386 S.E.2d 32, 33 (1989) (citing its codified version of Rule 21).

The Cawthon decision is instructive. At trial, the Cawthons made a motion to have a co-defendant rea-

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ligned as a plaintiff. The "Cawthons were concerned that they would be forced to share jury strikes with the [codefendant whose interests were aligned with the plaintiffs]." *Id.* at 33. The trial court recognized the unfairness of the present alignment, "but [stated] that it had no authority to realign the parties." *Id.* Relying on its own version of Rule 21, the Georgia Supreme Court found the trial court erred in "concluding it did not have discretion to realign the parties," and affirmatively held that trial courts have the right to realign parties in the interests of justice. *Id.*

We adopt the reasoning of *Cawthon*, including the authority of a trial court to realign parties "at any stage of the action." *Id.* The decision whether to realign the parties lies within the sound discretion of the trial court and will not be disturbed on appeal absent a showing of an abuse of discretion and resulting prejudice.

VI.

The judgment of the trial court is affirmed in part, reversed in part and the case is remanded for a new trial.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.

TOAL, C.J., and BEATTY, J., concur.

PLEICONES, J., concurring in part and dissenting in part in a separate opinion, in which WALLER, J., concurs.

Justice PLEICONES.

I concur in part and dissent in part. While I agree that the risk-utility test is the appropriate test for design defect cases, I do not believe this Court has the power to simply discard the consumer expectations test, expressly adopted by the General Assembly in S.C.Code Ann. §§ 15-73-10 through 30. Furthermore, in my opinion, much of the evidence the majority views as improper "post-manufacture" evidence was properly admissible to prove (1) the foreseeable risk of harm posed by the Bronco II as produced, (2) that the proposed alternative designs could have reduced or avoided the foreseeable risk, and (3) that the Bronco II, absent *27 the alternative designs, was not reasonably safe.

I. Risk-Utility Test

As the majority notes, the General Assembly adopted the Restatement (Second) of Torts § 402A in 1974. See S.C.Code Ann. §§ 15-73-10 through 30. The comments to § 402A, which form the basis for the consumer expectations test, were expressly adopted as legislative intent. S.C.Code Ann. § 15-73-30. The majority then notes that the American Law Institute has, in the Restatement (Third) of Torts, moved away from the consumer expectations test for design defects in favor of the risk-utility test and proposes that this Court do the same. While I agree with the majority that the risk-utility test is the appropriate test for design defect cases, I do not believe that this Court has the authority to simply reject the General Assembly's chosen test, even if we believe that body would approve of the change. See *Benat v. State Farm Mut. Ins. Co.*, 286 S.C. 132, 333 S.E.2d 57 (Cl.App.1985) ("It is the duty of this court to interpret the law. We have no legislative authority and cannot vary a statutory scheme and this is true no matter how logical the basis of the variance.").

However, I believe that this Court may effect the same result under the existing statute by interpreting the consumer expectations test in the specific context of design defect cases. S.C.Code Ann. § 15-73-10 provides that "[o]ne who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability...." Comments to § 402A explain that a product is in a "defective condition unreasonably dangerous to the user or consumer or to his property" when the product is in "a condition not contemplated by the ultimate consumer, which will be unreasonably dangerous to him." Restatement (Second) of Torts § 402A cmt. g. A product is unreasonably dangerous when it is "dangerous to an extent beyond that which would be contemplated by the ordinary consumer." Restatement (Second) of Torts § 402A cmt. i. These comments form the basis for the consumer expectations test.

In my view, given the complexity of many modern products, a consumer's expectations are not directed to any specific characteristic of the design, but rather to the manufacturer's design decision. The ordinary consumer expects that the manufacturer will weigh the foreseeable risks against the benefits and only offer a product for sale to the general public if the latter outweighs the former. See 60 S.C.L.Rev. 1101.

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Accordingly, I concur in the majority's decision to apply risk-utility principles to design defect claims. However, in my view, such change must be achieved within the framework of existing statutory provisions.

II. Post-Manufacture Evidence

I respectfully disagree with the majority's stance on "post-manufacture" evidence. The majority reverses the jury verdict based, in part, on its finding that "Ford was prejudiced by Branham's unrelenting pursuit of post-manufacture evidence on the issue of liability." The opinion defines "post-manufacture evidence" as "evidence of facts neither known nor available at the time of manufacture." Such evidence is, in the majority's view, inadmissible because "[w]hen assessing liability in a design defect claim, the judgment and ultimate decision of the manufacturer must be evaluated based on what was known at the time of manufacture." I believe the majority's rule sweeps too broadly and absorbs within its ambit evidence which is properly admissible in a design defect case.

I note at the outset that the majority opinion may be read as barring any evidence *created* after the date of manufacture. If this is the majority's view, I strongly disagree. In my view, such a rule would deprive the fact finder of relevant evidence regarding what the manufacturer knew or should have known, design alternatives, and the risk inherent in the manufacturer's design.

In a products liability action, the plaintiff must prove (1) that he was injured by the product; (2) that the injury occurred because the product was in a defective condition, unreasonably dangerous to the user; and (3) that the product at the time of the accident was in essentially the same condition as when it left the hands of the defendant. See Bragg v. Hi-Ranger, Inc., 319 S.C. 531, 539, 462 S.E.2d 321, 326 (Ct.App.1995). Under the risk-utility test for design defect cases, a plaintiff must prove the second element, product defect, by showing that "the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller ... and the omission of the alternative design renders the product not reasonably safe." Restatement (Third) of Torts: Products Liability § 2(b) (1998).

In seeking to meet his burden, the plaintiff introduced

the following evidence which the majority finds objectionable:

(1) A memo dated April 14, 1989, dealing with a meeting that three Ford engineers had with representatives from Consumer Reports, discussing a comparative test of the Bronco II and other similar cars, showing the Bronco II to have a higher fatal rollover rate than the other cars.

(2) A film, taped in 1989, showing "J-tests" comparing the Chevy Blazer and Bronco II, and demonstrating that the Bronco II did not handle as well as the Blazer.

(3) A document that compared a 1989 Bronco II to a prototype of the Ford Explorer, showing that the handling strategy of the Bronco II makes the vehicle more sensitive to steering over-corrections that seem to be part of most rollover scenarios.

In finding the above evidence improper and inadmissible, the majority notes that:

Whether the 1987 Ford Bronco II was defectively designed and in a defective condition unreasonably dangerous must be determined as of the 1986 manufacture date of the vehicle. Ford's 1986 design and manufacture decision should be assessed on the evidence available at that time, not the increased evidence of additional rollover data that came to light after 1986.

While I agree in general with the majority's proposition, I note that *when* the reports were generated or tests conducted is of little consequence, since testimony established that the vehicles tested were substantially the same as the model involved in the accident, the testing methods were available to Ford prior to the date of manufacture, and the rollover risk was known to Ford prior to the date of manufacture. In short, the date on which the evidence was created is of little utility in determining the relevance of the evidence and a broad rule barring evidence created "post manufacture" actually serves to defeat the goals of the risk-utility test.

First, I believe the evidence was admissible to show foreseeable risk. The risk-utility test, as set forth in the Restatement (Third) of Torts, speaks not in terms of

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evidence of risk of which the manufacturer was *actually* aware, but in terms of *foreseeable* risk. No party disputes that Ford had the ability to test the 1987 Bronco II in the same way as was done in the disputed evidence mentioned above. In fact, Ford conducted such tests, the results of which led some Ford engineers to conclude that the wheel base design was flawed. ^{FN27} Consequently, in my view, the memo, film, and document were properly admissible to show foreseeable risk, an essential element of the plaintiff's burden of proof in a design defect case. ^{FN28}

FN27. Even if the risk-utility test considered only the manufacturer's *actual* knowledge of the risk, introduction of the memo, film, and document would not be prejudicial to Ford as this testimony demonstrates that Ford was aware of the stability problems demonstrated in the "post-manufacture" evidence.

FN28. I note that a rule barring any evidence created after the date of manufacture would bar nearly all evidence created by a party other than the defendant manufacturer, as it is the only party with access to the vehicle prior to the date of manufacture.

Second, I believe the video was admissible to show the viability of the proposed reasonable alternative design. To satisfy the risk-utility test, the plaintiff must prove, in most instances, that the foreseeable risk could have been avoided by the adoption of a reasonable alternative design. Restatement (Third) of Torts: Products Liability, § 2 cmt. d. The alternative design must be one that could have been practically adopted at the time of the sale. *Id.*

*29 The plaintiff proposed reasonable alternative designs that were available at the time of manufacture, i.e. the MacPherson Strut suspension system and SLA suspension system, and he was entitled to an opportunity to show that the alternative designs could have reduced or avoided the foreseeable risk. Testimony at trial established that the Blazer used the SLA suspension system and the video demonstrated that the SLA system remedied the alleged rollover propensity of vehicles using the Twin I-Beam suspension system. The video was therefore, in my view, properly admitted.

Finally, I believe the memo, film, and document were

properly admissible to aid the plaintiff in proving the final element of the risk-utility test: that "the omission of the alternative design renders the product not reasonably safe." Though the "post-manufacture" evidence dealt with Bronco II vehicles manufactured between 1987 and 1989, testimony at trial established that there were no major changes to the Bronco II after 1987. The vehicles' rollover propensities are therefore relevant to the issue of the reasonableness of Ford's choice of the Twin I-Beam suspension system over the SLA or MacPherson system.

For the reasons stated above, I concur in part and dissent in part.

WALLER, J., concurs.
S.C., 2010.

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**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

Cody P., by and through his
Conservator Kelly H. Kelley,
and his natural and legal
guardian Elizabeth Powell, Respondents,

v.

Bank of America, N.A., Karen
P. Unrue, and Travis Powell, Defendants,
of whom Bank of America,
N.A. is the Appellant.

Appeal From Williamsburg County
Clifton B. Newman, Circuit Court Judge

Opinion No. 4875
Heard December 8, 2010 – Filed August 23, 2011

AFFIRMED

C. Mitchell Brown, Clarence Davis, T. William
McGee, III, and A. Mattison Bogan, all of Columbia,
for Appellant.

W.E. Jenkinson, III, Jennifer R. Kellahan, and
Ronnie A. Sabb, all of Kingstree, for Respondent.

LOCKEMY, J.: In this negligence action, a jury found Bank of America, North America (BOA) liable for negligence and awarded Cody P. by and through his Conservator, Kelly H. Kelley, and his natural and legal guardian Elizabeth Powell (collectively Powell) \$205,735.37 in actual damages and \$1,583,000 in punitive damages. BOA appeals arguing the trial court erred in denying its (1) motions for judgment notwithstanding the verdict (JNOV) as to negligence and punitive damages and (2) motion for a new trial based on the admission of evidence regarding its size. BOA also contends the trial court erred in finding the award of punitive damages was constitutionally proper. We affirm.

FACTS

Steven Powell died in a tragic accident at work entitling his minor son, Cody, to approximately \$252,000 in life insurance proceeds. Karen Unrue, Steven's sister, approached Elizabeth Powell, Steven's widow, and offered to manage the insurance proceeds for Cody. Unrue was a trusted family member who had occasionally assisted the Powells with managing their personal finances in the past. Powell agreed to allow Unrue to serve as conservator over the insurance proceeds. Unrue also suggested Steven's brother, Travis Powell, serve as co-conservator.

Powell petitioned the probate court to appoint Unrue and Travis as co-conservators, and after a hearing, the court appointed Unrue and Travis as co-conservators. The probate court also waived the bond requirement and ordered "that the funds of the minor child, [Cody], be deposited in a restricted account and that no funds be withdrawn or transferred from such account without written [o]rder of [the probate court]." The certificate of appointment and fiduciary letter included the following restriction: "No withdrawals without court order."

On Cody's behalf, Unrue received seven checks totaling \$252,447.51. Three of the checks were made payable to her and Travis jointly and included

the designation "Co-conservators For [Cody], A Minor" or "Co-Cn For Minor, [Cody]."¹ The other four checks were made payable to Unrue and included the designation "As Conservator Of [Cody], A Minor." Unrue endorsed the checks without including her title as co-conservator. Unbeknownst to Travis, Unrue forged his name on the three checks made payable to her and Travis as co-conservators and took all the checks to the Pawleys Island BOA. Unrue met with Lee Ann Yourko, a personal banker, and requested she open a certificate of deposit (CD) account. Yourko opened a CD account titled "Karen M. Unrue Guardian [Cody]." Yourko collected the checks and took them to a teller who processed the checks and deposited the proceeds into the CD account Yourko created. Neither Yourko nor the teller questioned the significance of the conservator designation in the payee line of the checks.

A few days later, Unrue returned to the Pawleys Island BOA with a single check for \$253.67 made payable to her "As Conservator For Cody A Minor." Unrue met with branch manager Meredith Lawrence and requested she open a Uniform Gift to Minors Act (UGMA) account.² Lawrence opened a savings account titled "Karen M. Unrue – cust [Cody] – UMGA [sic]." Lawrence did not question the significance of the conservator title on the payee line of the check. Lawrence also failed to notice Unrue endorsed the check without including her title.

Approximately a month later, after the CD matured, Unrue entered the Garden City BOA and withdrew 100% of the funds, \$253,991.50, from the CD account. Unrue took the funds to the Pawleys Island BOA and deposited them in the UGMA savings account. Over the next several months, Unrue made seven online transfers totaling \$258,500 from the UGMA savings account to her personal checking account.

Powell initiated this action for negligence alleging BOA breached its duty to honor the restrictions set forth in the probate court's order, certificate

¹ The checks were made to payable to Karen Powell, Unrue's maiden name. The order appointing Unrue as co-conservator, the certificate of appointment, and the fiduciary letter were also in Unrue's maiden name.

² S.C. Code Ann. § 63-5-500 to -600 (2010).

of appointment, and fiduciary letter. Powell also sought actual and punitive damages. After a trial, the jury found in favor of Powell and awarded actual damages in the amount of \$205,735.37 as stipulated by the parties. The jury also found BOA's conduct was willful, wanton, or reckless and awarded punitive damages in the amount of \$1,583,000.

BOA sought a post-trial review of the punitive damages award alleging it was improper under Gamble v. Stevenson, 305 S.C. 104, 406 S.E.2d 350 (1991), and State Farm Mutual Automobile Insurance Co. v. Campbell, 538 U.S. 408 (2003). BOA moved for JNOV as to Powell's negligence claim and the award of punitive damages. BOA also moved for a new trial arguing the trial court erred in allowing the admission of evidence regarding its size. After a hearing, the trial court denied BOA's post-trial motions and determined the award of punitive damages was constitutionally proper. This appeal followed.

LAW/ANALYSIS

I. Judgment Notwithstanding the Verdict: Negligence

BOA argues the trial court erred in denying its motion for JNOV on Powell's negligence claim because Unrue's actions were unforeseeable intervening acts that proximately caused Powell's loss.³ We disagree.

In ruling on a motion for JNOV, the trial court must view the evidence, and the inferences that can reasonably be drawn from the evidence, in a light most favorable to the party opposing the motion. McMillan v. Oconee Mem'l Hosp., Inc., 367 S.C. 559, 564, 626 S.E.2d 884, 886 (2006). The trial court should deny a motion for JNOV when the evidence yields more than one inference or its inferences are in doubt. Id. "This [c]ourt will reverse the trial court's rulings on [a motion for JNOV] only where there is no evidence to

³ BOA also argues Powell failed to prove it was the cause-in-fact of the injury. However, BOA failed to raise this issue in its directed verdict motion; accordingly, it is unpreserved for our review. In re McCracken, 346 S.C. 87, 92-93, 551 S.E.2d 235, 238 (2001) (finding only grounds raised in a directed verdict motion can be raised in a JNOV motion).

support the rulings or where the rulings are controlled by an error of law." Hinkle v. Nat'l Cas. Ins. Co., 354 S.C. 92, 96, 579 S.E.2d 616, 618 (2003).

Generally, the elements of negligence are (1) duty, (2) breach, (3) proximate cause, and (4) injury. Shipes v. Piggly Wiggly St. Andrews, Inc., 269 S.C. 479, 482-83, 238 S.E.2d 167, 168 (1977). To show the defendant was the proximate cause of the injury, the plaintiff must establish the defendant was both the cause-in-fact and the legal cause of the injury. Mellen v. Lane, 377 S.C. 261, 278, 659 S.E.2d 236, 245 (Ct. App. 2008). The cause-in-fact requirement is proved by showing the injury would not have occurred but for the defendant's negligence. Id. The legal cause requirement is proved by establishing the plaintiff's injury was foreseeable. Id. at 278-79, 659 S.E.2d at 245.

Generally, an injury is foreseeable if it is the natural and probable consequence of the defendant's conduct in light of the attendant circumstances. See Young v. Tide Craft, Inc., 270 S.C. 453, 462-63, 242 S.E.2d 671, 675-76 (1978); Mellen, 377 S.C. at 279-80, 659 S.E.2d at 246. However, "[a] special case is presented if the injury is independently caused by the intervening act of a third party." Shepard v. S.C. Dep't of Corr., 299 S.C. 370, 375, 385 S.E.2d 35, 37 (Ct. App. 1989). In that case, the general rule is "that when, between negligence and the occurrence of an injury, there intervenes a willful, malicious, and criminal act of a third person producing the injury, but that such was not intended by the negligent person and could not have been foreseen by him, the causal chain between the negligence and the accident is broken." Stone v. Bethea, 251 S.C. 157, 162, 161 S.E.2d 171, 173-74 (1968). In other words, "[t]he test is whether the intervening act and the injury resulting therefrom are of such a character that the author of the primary negligence should have reasonably anticipated them in light of the attendant circumstances." Shepard, 299 S.C. at 375, 385 S.E.2d at 38-39; see Young, 270 S.C. at 463, 242 S.E.2d at 676 ("Where there is a contention that an intervening agency interrupts the foreseeable chain of events, there are two consequences to be tested: (1) the injury complained of, and (2) the acts of the intervening agency.").

"The law requires only reasonable foresight, and when the injury complained of is not reasonably foreseeable, in the exercise of due care, there

is no liability." Stone, 251 S.C. at 161, 161 S.E.2d at 173. "One is not charged with foreseeing that which is unpredictable or that which could not be expected to happen." Id. at 161-62, 161 S.E.2d at 173. However, "it is not necessary that the actor should have contemplated the particular chain of events that occurred, but only that the injury at the hand of the intervening party was within the general range of consequences which any reasonable person might foresee as a natural and probable consequence of the negligent act." Shepard, 299 S.C. at 375, 385 S.E.2d at 38.

Foreseeability is determined from the defendant's perspective at the time of the negligent act allegedly causing the plaintiff's injury. Mellen, 377 S.C. at 280, 659 S.E.2d at 246; Shepard, 299 S.C. at 375, 385 S.E.2d at 38 (noting "[f]oreseeability is to be judged from the perspective of the actor at the time of the negligent act, not after the injury has occurred"). Ordinarily, legal cause is a question of fact for the jury. Oliver v. S.C. Dep't of Highways & Pub. Transp., 309 S.C. 313, 317, 422 S.E.2d 128, 131 (1992). "Only in rare or exceptional cases may the question of proximate cause be decided as a matter of law." Ballou v. Sigma Nu General Fraternity, 291 S.C. 140, 147, 352 S.E.2d 488, 493 (Ct. App. 1986). "The particular facts and circumstances of each case determine whether the question of proximate cause is for the court or for the jury." Id. "If there may be a fair difference of opinion regarding whose act proximately caused the injury, then the question of proximate cause must be submitted to the jury. Id. at 147-48, 352 S.E.2d at 493. "Only when the evidence is susceptible to only one inference does it become a matter of law for the court." Oliver, 309 S.C. at 317, 422 S.E.2d at 131.

We find the trial court properly denied BOA's motion for JNOV on Powell's negligence claim. Here, Robert Hubbs, an expert in banking and banking operations, testified banks anticipate theft. Hubbs explained banks implement and follow standard policies and procedures for establishing accounts and negotiating checks that are designed to prevent theft. BOA's designated representative, Elizabeth Reeves, also explained that banks anticipate theft and implement safeguards to prevent the misappropriation of customer's funds. According to Reeves, when an individual is managing funds for another, additional safeguards are used by banks to protect the funds of the minor or incapacitated person.

BOA implemented policies and procedures designed to avoid fraud and loss situations. For instance, when creating an account for an individual who is appointed by the court to manage the funds of another, such as a conservatorship account, BOA is required to obtain an original or certified copy of the court order appointing the individual. If a court order is required for withdrawals, "Court Restricted Account" must be placed in the title of the account. If the court order contains restrictions, the employee creating the account is required to contact BOA Banking Group Support-Legal Support. When negotiating a check made payable to a payee with a title such as a conservator, BOA's Teller Operations Manual requires the employee to verify the authority of the payee. Individuals named on the "payable to" line of a check must endorse the check exactly as it is payable. Individuals with a title such as conservator or guardian must use the title when endorsing a check. In fact, BOA's Teller Operations Manual and Platform Manual conspicuously indicate the best way for employee's to avoid a fraud or loss situation is to "KNOW YOUR ENDORSER."

Furthermore, Unrue presented eight checks to BOA indicating she was a conservator or co-conservator. The conservator title indicated to Yourko and Lawrence that Unrue was court appointed and court documents existed that they were required to request and review. However, Unrue never offered the court documents or otherwise alerted Yourko or Lawrence to her status as a court appointed conservator. Although BOA policy required Unrue to include her title when endorsing the checks, she endorsed the checks without including her title as conservator. Finally, Travis Powell was not present to negotiate the checks that listed him as co-conservator, even though BOA policy required his presence to negotiate the checks payable to him and Unrue jointly as co-conservators.

Reviewing the evidence in a light most favorable to Powell, we find the evidence presented at trial yields more than one inference regarding whether BOA should have reasonably foreseen Unrue's actions and the theft of Cody's funds in light of the attendant circumstances. Accordingly, we find the trial court properly denied BOA's motion for JNOV as to Powell's negligence claim.

II. New Trial Motion: BOA's Size

BOA argues the trial court abused its discretion in denying its motion for a new trial because allowing Powell to refer to its size during trial unfairly prejudiced BOA. We disagree.

"The grant or denial of new trial motions rests within the discretion of the trial [court] and . . . will not be disturbed on appeal unless [the trial court's] findings are wholly unsupported by the evidence or the conclusions reached are controlled by [an] error of law." Vinson v. Hartley, 324 S.C. 389, 405, 477 S.E.2d 715, 723 (Ct. App. 1996). "In deciding whether to assess error to a court's denial of a motion for a new trial, we must consider the testimony and reasonable inferences to be drawn therefrom in the light most favorable to the nonmoving party." Id. This court "reviews Rule 403[, SCRE,] rulings pursuant to an abuse of discretion standard and gives great deference to the trial court." Lee v. Bunch, 373 S.C. 654, 658, 647 S.E.2d 197, 199 (2007). "A trial [court's] decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in exceptional circumstances." Johnson v. Horry Cnty. Solid Waste Auth., 389 S.C. 528, 534, 698 S.E.2d 835, 838 (Ct. App. 2010) (quoting State v. Adams, 354 S.C. 361, 378, 580 S.E.2d 785, 794 (Ct. App. 2003)) (internal quotation marks omitted).

Initially, Powell argues this issue is unpreserved because BOA failed to contemporaneously object to testimony regarding BOA's size. BOA moved in limine to exclude the deposition testimony of its designated representative, Floretta Denning. Specifically, BOA objected to Denning's statement that BOA is the "third largest bank in the world." The trial court denied BOA's motion. BOA contemporaneously objected to Denning's testimony when it was introduced at trial. A bench conference was held and the trial court overruled BOA's objection. Later, during a recess BOA requested the trial court state the grounds for overruling its objection on the record. The trial court explained it found the statement was not prejudicial in light of earlier testimony regarding the size of the bank where Cody's funds are currently deposited and its policies and procedures. During the remainder of trial, several references to BOA's size occurred in the jury's presence. We find this issue is preserved for our review. BOA was not required to continue

objecting to preserve this issue for appeal. See Staubes v. City of Folly Beach, 339 S.C. 406, 415, 529 S.E.2d 543, 546-47 (2000) (concluding parties are not required "to engage in futile actions in order to preserve issues for appellate review").

Turning to the merits, we find BOA's argument is misplaced. At trial, BOA was referred to as "big," "the largest" bank in America, and the "third largest bank in the world" on several occasions in the jury's presence. These references were brief and isolated and occurred only a few times over the course of a four-day trial. We find no prejudice in merely referring to BOA as what it is; a big bank. Accordingly, the trial court properly denied BOA's motion for a new trial on this ground.

III. Punitive Damages

A. JNOV

BOA argues the trial court erred in denying its motion for JNOV on punitive damages because Powell failed to present clear and convincing evidence BOA's actions were willful, wanton, or undertaken in reckless disregard of Powell's rights. We disagree.

In order to recover punitive damages, the plaintiff must present clear and convincing evidence that the defendant's conduct was willful, wanton, or in reckless disregard of the plaintiff's rights. S.C. Code Ann. § 15-33-135 (2005) ("In any civil action where punitive damages are claimed, the plaintiff has the burden of proving such damages by clear and convincing evidence."); Taylor v. Medenica, 324 S.C. 200, 221, 479 S.E.2d 35, 46 (1996). "The test by which a tort is to be characterized as reckless, wil[l]ful or wanton is whether it has been committed in such a manner or under such circumstances that a person of ordinary reason or prudence would then have been conscious of it as an invasion of the plaintiff's rights." Rogers v. Florence Printing Co., 233 S.C. 567, 577-78, 106 S.E.2d 258, 263 (1958); see also Berberich v. Jack, 392 S.C. 278, 287, 709 S.E.2d 607, 612 (2011) (quoting Rogers). "It is this present consciousness of wrongdoing that justifies the assessment of punitive damages against the tort-feasor" Rogers, 233 S.C. at 578, 106 S.E.2d at 263. In other words, "at the time of his act or omission to act the

tort-feasor [must] be conscious, or chargeable with consciousness, of his wrongdoing." Id. at 578, 106 S.E.2d at 264.

We find the trial court properly denied BOA's motion for JNOV on punitive damages. Here, Yourko received training as a personal banker in Charlotte, North Carolina on three separate occasions for one week at a time. Yourko explained she was trained to employ the policies and procedures outlined in BOA's Platform Manual. Yourko also received on-the-job training in BOA's policies and procedures from the personal banker she replaced. Lawrence received six months training as branch manager. This training included working as a teller, personal banker, and training in a banking center manager role. Lawrence explained each BOA branch had a Platform Manual available for its employees. BOA also had a computer system that provided prompts based upon the Platform Manual for its employees to use in conducting business. Furthermore, BOA employees had access to a helpline to assist with issues regarding BOA's policies and procedures.

BOA's Platform Manual defines a conservator as a "[c]ourt-appointed individual who: [c]ares for and/or manages the property and affairs of a minor or an incapacitated (physically or mentally) adult" and notes a conservator may also be referred to as a guardian or curator. A conservatorship account is defined as one "[e]stablished by a court-appointed guardian, conservator, or curator to manage the funds of a ward." The definitions of guardian, conservator, and curator and guardianship account, conservatorship account, and a curatorship are substantively similar. Opening a conservatorship account requires an original or certified copy of the court order appointing the conservator that contains the name of the conservator, the name of the ward, a signature of a court official, a certified seal or filing stamp, and a statement indicating the conservator is guardian over the estate or property of the ward. If the court order indicates an order of the court is required for withdrawals, "Court Restricted Account" must be included in the title of the account. When a court order contains restrictions, the personal banker is required to contact BOA Banking Group Support-Legal Support.

When a customer presents a check including a payee designation with a title such as guardian, conservator, or curator, BOA's Teller Operations Manual requires that the payee's authority be verified before the check is cashed. The endorsement must also include the payee's title. The Teller Operations Manual and the Platform Manual both include the warning that "When negotiating items, the best way to avoid fraud or a loss situation is to 'KNOW YOUR ENDORSER.'" Based on their training and experience, we find Yourko and Lawrence are chargeable with knowledge of BOA's policies and procedures for establishing a court restricted conservatorship account and negotiating checks.

The court order appointing Unrue and Travis Powell as co-conservators required Cody's funds to be deposited in a restricted account that required a court order for withdrawals. Unrue received eight checks from two insurance companies on behalf of Cody. Unrue presented seven checks to Yourko. Two checks designated "Karen and Travis Powell, Co-Cn For Minor Cody P." as the payee. (emphasis added). One check designated "T. Powell & K. Powell Co-Conservators For Cody P., A Minor" as payee. (emphasis added). Four checks designated "Karen Powell, As Conservator Of Cody P. A Minor" as payee. (emphasis added). Despite the payee designations, Yourko opened a CD account titled "Karen M. Unrue Guardian [Cody]" without requesting an original or certified copy of the court order appointing Unrue as conservator. Assuming Yourko misunderstood the conservator title on the checks, the Platform Manual provides that a guardian is a court appointed individual who cares for and manages the property of a minor or incapacitated adult. Further, establishing a guardianship account also required Yourko to request an original or certified copy of the court order appointing Unrue.

Unrue also presented one check to Lawrence that listed the payee as "Karen M. Powell, As Conservator For Cody P. A Minor." (emphasis added). Lawrence opened a Uniform Gift to Minors Act savings account titled "Karen M. Unrue - cust [Cody] UMGA [sic]" also without requesting an original or certified copy of the court order appointing Unrue as conservator.

Denning, BOA's designated representative, testified the payee designations were clear: "They were made out to conservators. There's

nothing that was misconstrued here. It's obvious who they were made out to." Denning also explained the payee designation on the checks indicated the existence of a court order: "[F]rom the beginning she had the checks and on the checks it told her who the conservator was and the minor. It stated that on the checks. When she got ready to open the account, these were court ordered. There were other documents that she needed to see." Furthermore, BOA's designated representative Reeves explained Yourko and Lawrence should have requested the court order when presented with checks payable to a payee with the title conservator. Finally, Hubbs, Powell's expert in banking and banking operations, explained the conservator payee designation should have alerted Yourko and Lawrence to the existence of court documents that BOA's policies and procedures required to open the accounts and negotiate the checks.

We find the evidence presented at trial was sufficient to warrant submitting the punitive damages issue to the jury. Considering the evidence in a light most favorable to Powell, a person of ordinary reason and prudence in Yourko's and Lawrence's position would have known he or she was opening the accounts without the safeguards mandated by the court order and in contravention to BOA's policies and procedures. Accordingly, the trial court properly denied BOA's motion for JNOV on this ground.⁴

B. Mitchell v. Fortis Analysis

Because the jury found Unrue's conduct was reasonably foreseeable in light of the attendant circumstances and Powell proved BOA's conduct was willful, wanton or reckless by clear and convincing evidence, we must

⁴ BOA submits if we find Powell proved punitive damages by clear and convincing evidence, we should not find it liable for punitive damages under the facts of this case because it lacked complicity with the actions of its employees. In short, BOA asks us to adopt the complicity doctrine set forth in the Restatement (Second) of Torts § 909 (1965). We find this issue is unpreserved for our review because BOA failed to raise it in its motion for a directed verdict on punitive damages. In re McCracken, 346 S.C. 87, 92-93, 551 S.E.2d 235, 238 (2001) (finding only grounds raised in a directed verdict motion can be raised in a JNOV motion).

determine whether the jury's award of punitive damages was constitutionally proper using the test articulated by our supreme court in Mitchell v. Fortis Insurance Co., 385 S.C. 570, 686 S.E.2d 176 (2009). Applying the Mitchell test, we conclude that it is.

"Because punitive damages are quasi-criminal in nature, the process of assessing punitive damages is subject to the protections of the Due Process Clause of the Fourteenth Amendment of the United States Constitution." James v. Horace Mann Ins. Co., 371 S.C. 187, 194, 638 S.E.2d 667, 670 (2006). The trial court must review

the constitutionality of a punitive damages award by determining whether the award was reasonable under the following guideposts: (1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual and potential harm suffered by the plaintiff and the amount of the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.

Austin v. Stokes-Craven Holding Corp., 387 S.C. 22, 52, 691 S.E.2d 135, 151 (2010) (citing Mitchell, 385 S.C. at 587-88, 686 S.E.2d at 185-86). This court conducts a de novo review in evaluating the constitutionality of a punitive damages award. Mitchell, 385 S.C. at 583, 686 S.E.2d at 183.

First, in examining the reprehensibility of defendant's conduct, we "should consider whether: (i) the harm caused was physical as opposed to economic; (ii) the tortious conduct evinced an indifference to or a reckless disregard for the health or safety of others; (iii) the target of the conduct had financial vulnerability; (iv) the conduct involved repeated actions or was an isolated incident; and (v) the harm was the result of intentional malice, trickery, or deceit, rather than mere accident." Id. at 587, 686 S.E.2d at 185. Considering these factors, we find BOA's conduct evinces a high degree of reprehensibility. Although, the harm Cody suffered was economic and not physical, the evidence established Cody was financially vulnerable. The

misappropriated funds were life insurance proceeds meant to compensate Cody for the loss of his father's support. Based upon Yourko's admission she knew Unrue was helping take care of Cody after his father was killed and the conservator designation on the payee line of the checks, BOA was aware of Cody's financial vulnerability. Furthermore, Cody is a special needs child who suffers from seizures and uses the funds to pay for medical expenses, school supplies, and necessities.

Despite Cody's financial vulnerability and BOA's awareness thereof, it failed to set up Cody's accounts with the proper safeguards to protect his funds. While BOA's conduct did not evince an indifference to or a reckless disregard for Cody's health or safety, it exposed Cody to the possibility he might not be able to afford his medical expenses. Although the harm Cody suffered was not the result of intentional malice, trickery, or deceit on BOA's part, we are surprised by the ease with which Unrue was able to circumvent BOA's safeguards and defeat the mandate of the court order requiring her to deposit Cody's funds in a restricted account. BOA blindly followed Unrue's request to open a CD and a UGMA account when presented with checks indicating the existence of court process and triggering its obligation to request a copy of the court order appointing Unrue. We are also surprised by BOA's failure to recognize the significance of the conservator designation on the payee line of the checks. For instance, both Yourko and Lawrence failed to recognize the significance of the conservator designation despite their training in BOA's policies and procedures. Neither requested a copy of the court order appointing Unrue. When Yourko handed the checks to the teller to process, the teller failed to verify Unrue's authority before cashing the checks. The teller also failed to require Unrue to endorse the checks with her title. Furthermore, per BOA's Platform Manual a CD is not an eligible product for a conservatorship or guardianship account. BOA's "operations area" that reviews the activity of the tellers and personal bankers for compliance with BOA's safeguards failed to catch the discrepancy between the conservator designation on the payee line of the checks and CD account Yourko opened. The operations area also allowed the checks to be negotiated without the proper endorsements. BOA's conduct involved repeated failures to employ the safeguards prescribed to protect Cody's funds. Accordingly, we conclude BOA's conduct was sufficiently reprehensible to support a punitive damages award.

Next, we examine the ratio between actual and punitive damages. Id. at 587-88, 686 S.E.2d at 185. While there is no concrete constitutional limit on the ratio between actual and punitive damages, "few awards exceeding a single-digit ratio between punitive and compensatory damages will satisfy due process." State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 410 (2003). In determining the reasonableness of the ratio we may consider (1) the likelihood that the award will deter the defendant from like conduct; (2) whether the award is reasonably related to the harm likely to result from such conduct; and (3) the defendant's ability to pay. Mitchell, 385 S.C. at 588, 686 S.E.2d at 185. In short, this court "must ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered." Campbell, 538 U.S. at 426.

Here, the ratio of punitive to actual damages is 7.69 to 1, at the high end of the single-digit spectrum. However, it is probable that a \$1.5 million punitive damages award will deter BOA from like conduct and encourage BOA to better train its employees and implement more effective safeguards to protect customer's funds. Furthermore, BOA has the ability to pay the punitive damage award. The net worth of its shareholder equity as of June 30, 2008, four months before trial, was \$163 billion.

Furthermore, the award should be reasonably related to the harm likely to result from BOA's conduct. Here, the evidence established that correctly setting up a conservator account takes approximately one hour. Powell introduced evidence of BOA's weekly, daily, and hourly earnings. For instance, Dr. Wood, Powell's expert economist, testified BOA earned approximately \$258 million per week, \$36.9 million per day, and \$1,538,250 per hour. During closing argument, Powell asked the jury to punish BOA for the harm caused by BOA's failure to properly protect Cody's funds by awarding punitive damages in the amount BOA earns in one hour—the amount of time it would have taken to set up Cody's accounts with the appropriate safeguards. Powell also argued a \$1,538,250 award would send a message to BOA that it needed to ensure the appropriate safeguards are employed to protect their customers' funds. The jury awarded Powell 1,583,000 in punitive damages. The consistency between BOA's one hour earnings figure and the jury's punitive damages award leads us to the

conclusion that the punitive damages award is reasonably related to the harm Cody suffered as a result of BOA's failure to set up his accounts with the appropriate safeguards.

We are mindful that our supreme court recently questioned the "propriety of extrapolating financial data" regarding a defendant's per week, per day, and per hour income, revenue, and cash flow for determining a defendant's ability to pay. Branham v. Ford Motor Co., 390 S.C. 203, 239-40, 701 S.E.2d 5, 24-25 (2010). In Branham, the plaintiff introduced extrapolated per week, per day, and per hour figures of Ford's net worth, income, revenues, and cash flow. Id. at 239, 701 S.E.2d at 24. The Branham court noted this court has found no abuse of discretion in the admission of per day earnings, operating revenue, and net income. Id. at 240, 701 S.E.2d at 24; Bryant v. Waste Mgmt., Inc., 342 S.C. 159, 170, 536 S.E.2d 380, 386 (Ct. App. 2000) (finding the trial court properly admitted evidence of the defendant's per day operating revenue and net income); Orangeburg Sausage Co. v. Cincinnati Ins. Co., 316 S.C. 331, 344, 450 S.E.2d 66, 74 (Ct. App. 1994) (finding the trial court did not abuse its discretion in admitting evidence of the defendant's per day earnings). However, although the court questioned whether Bryant and Orangeburg Sausage would pass constitutional muster after Campbell, it did not overrule either case. Branham, 390 S.C. at 239-40, 701 S.E.2d at 24-25. In light of the foregoing, we rely on such evidence here only in finding the jury's award of punitive damages was reasonably related to the harm Cody suffered.

Finally, we consider "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 588-89, 686 S.E.2d at 186. No authorized civil penalties are applicable here. An examination of cases with punitive to actual damages ratios at the high end of the single-digit spectrum reveals conduct by the defendant that is highly reprehensible. See, e.g., Austin, 387 S.C. at 55, 691 S.E.2d at 152 (upholding a punitive to actual damage ratio of 8.21 to 1 when defendant's misrepresentations regarding the physical condition of the vehicle purchased by the plaintiff evinced a reckless disregard for the health and safety of the plaintiff and the general public); Mitchell, 385 S.C. at 594, 686 S.E.2d at 188 (finding an punitive to actual damage ratio of 9.2 to 1 satisfied due process, even though plaintiff's harm

was economic, because defendant's actions exposed plaintiff to great risk of physical danger); James, 371 S.C. at 197, 638 S.E.2d at 672 (upholding a punitive to actual damage ratio of 6.82 to 1 when defendant's insurance adjuster made repeated false representations that led to the denial of plaintiff's insurance claim and plaintiff being sued by a third party who was bitten by plaintiff's dog); Collins Entm't Corp. v. Coats & Coats Rental Amusement, 355 S.C. 125, 143, 584 S.E.2d 120, 130 (Ct. App. 2003) (finding a 9.9 to 1 punitive to actual damage ratio was proper based upon defendant's tortious interference with contract); Lister v. Nations Bank of Del., N. Am., 329 S.C. 133, 152-53, 494 S.E.2d 449, 460 (Ct. App. 1997) (finding a 23 to 1 punitive to actual damages ratio was proper when the defendant's licensee made an unauthorized charge of \$7,696.63 on plaintiff's credit card). We find BOA's conduct here is equally reprehensible to the conduct in the above cited cases and conclude the jury's award of punitive damages is in accord with punitive damage awards in comparable cases.

In short, BOA's failure to protect Cody's funds with the proper safeguards was highly reprehensible. Although the ratio between actual and punitive damages is at the high end of the single-digit spectrum, a review of comparable cases reveals conduct of a similar degree of reprehensibility to BOA's conduct here. The award is reasonable and proportionate to the harm Cody suffered and the general damages recovered. Finally, BOA has the ability to pay the punitive damage award, which represents less than one percent of its net worth. Based on our review of the guideposts outlined in Mitchell, we conclude the punitive damages award is constitutionally proper.

CONCLUSION

For the foregoing reasons, the decision of the trial court is

AFFIRMED.

HUFF and KONDUROS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED

APPEAL FROM WILLIAMSBURG COUNTY
Court of Common Pleas

SEP 22 2011

SC Court of Appeals

Clifton B. Newman, Circuit Court Judge

Case No. 2003-CP-45-207

Cody P., by and through his Conservator
Kelly H. Kelley, and his natural and legal guardian
Elizabeth Powell, ... Respondents,

v.

Bank of America, N.A., Karen P. Unrue, and Travis
Powell, ... Defendants.

Of Whom Bank of America, N.A. is Appellant.

PETITION FOR REHEARING AND SUGGESTION FOR REHEARING *EN BANC*

Pursuant to Rules 219 and 221(a) of the South Carolina Appellate Court Rules, Appellant Bank of America, N.A. ("BOA") hereby files this petition for rehearing and suggestion for rehearing *en banc*. BOA respectfully submits that rehearing and/or issuance of a new opinion reversing the trial court's decision is warranted. The grounds for this petition are that the Panel's opinion in this matter overlooked or misapprehended several matters of fact and law. Additionally, this matter is of exceptional importance and is deserving of rehearing and *en banc* review as the Panel's opinion represents a significant departure from the South Carolina Supreme Court's

established jurisprudence regarding the applicability and constitutional review of punitive damages awards.

INTRODUCTION

In Opinion No. 4875 filed August 23, 2011, a Panel of this Court affirmed the trial court's order denying BOA's motions for judgment notwithstanding the verdict and a new trial, and challenging the constitutionality of the punitive damages award. The Panel overlooked or misapprehended several matters of law and fact in rendering this opinion.

First, as to its due process analysis of the punitive damages award, the Panel misapprehended the facts and misapplied the test for determining reprehensibility by overlooking the facts in the record and substituting, respectfully, speculative conclusions. The Panel also misapprehended the proper analysis respecting whether the punitive damages award was reasonably related to the actual or potential harm resulting from BOA's conduct, and its misinterpretation of this test is in conflict with South Carolina's punitive damages jurisprudence. Additionally, the Panel overlooked or misinterpreted the South Carolina Supreme Court's limitation on considering financial extrapolations beyond net worth and based its decision affirming the punitive damages award on impermissible grounds.

Second, the Panel misapprehended the intervening act rule in determining that BOA's isolated mistakes, rather than the intervening criminal actions of Karen Unrue, were the proximate cause of Respondent's harm. Third, the Panel overlooked and misinterpreted the evidence in concluding that BOA and its employees acted in a willful, wanton, or reckless manner sufficient to support a punitive damages award.

Fourth, the Panel misapprehended the prejudicial effect of Respondent's repeated references at trial to its size. Finally, the Panel incorrectly concluded that BOA failed to preserve the issues of whether its actions were the cause-in-fact of Respondent's injury and whether the punitive damages award was proper where Respondent failed to establish that BOA acted in complicity with its employees. As a result, this Court should grant rehearing and/or rehearing *en banc* in this matter.

I. The Panel misapprehended the test set forth in Mitchell v. Fortis Insurance Company regarding the constitutional review of punitive damages.

In Mitchell v. Fortis Insurance Company, 385 S.C. 570, 686 S.E.2d 176 (2009), the South Carolina Supreme Court set forth the proper manner in which a constitutional review of a punitive damages award should be conducted. The first consideration in this analysis is the degree of reprehensibility of the defendant's conduct. Id. at 587, 686 S.E.2d at 185. The second consideration is the disparity between the actual or potential harm suffered and the amount of the punitive damages. Id. at 587-88, 686 S.E.2d at 185. The final consideration is the difference between the punitive damages award and any comparable civil penalties. Id. at 588, 686 S.E.2d at 186. The punitive damages award of \$1,583,000, when compared to the evidence at trial and the actual damages award of \$205,735.37, violates due process when these factors are properly considered. The Panel misapplied the test for determining reprehensibility by overlooking the evidence actually in the record and speculating as to facts that were not only unsupported by the evidence, but which were directly contradicted. The Panel also misapprehended and misapplied the proper test for evaluating the ratio by basing its reasoning not on the actual or potential harm suffered,

but rather on an extrapolation of BOA's global pre-tax earnings. Finally, the Panel misinterpreted the holding of Branham v. Ford Motor Company, 390 S.C. 203, 701 S.E.2d 5 (2010), which specifically prohibits the consideration of the financial extrapolations introduced here in a punitive damages determination.

A. The Panel misapprehended the test for determining reprehensibility and its conclusions are directly contradicted by the evidence in the record.

In addressing the reprehensibility prong of the Mitchell analysis, the Panel misapprehended the five factors to be considered. Those five factors are whether: "(i) the harm caused was physical as opposed to economic; (ii) the tortious conduct evinced an indifference to or a reckless disregard for the health or safety of others; (iii) the target of the conduct had financial vulnerability; (iv) the conduct involved repeated actions or was an isolated incident; and (v) the harm was the result of intentional malice, trickery, or deceit, rather than mere accident." Mitchell, 385 S.C. at 587, 686 S.E.2d at 185. The Panel acknowledged that most of these factors were not present¹, but then incorrectly based its determination on the unsupported conclusion that Respondent was financially vulnerable and that the conduct was not an isolated incident. Op. No. 4875 at pp. 13-14.

The Panel concluded that "the evidence established [Respondent] was financially vulnerable, reasoning that BOA's conduct "exposed [Respondent] to the possibility he might not be able to afford his medical expenses." Id. at pp. 13-14. This

¹ The opinion finds in favor of BOA on three of the five factors, stating that "the harm [Respondent] suffered was economic and not physical," "BOA's conduct did not evince an indifference to or reckless disregard for [Respondent]'s health and safety," and "the harm [Respondent] suffered was not the result of intentional malice, trickery, or deceit on BOA's part". Op. No. 4875 at pp. 13-14.

determination, however, overlooked the evidence and admissions in the record which directly contradict this finding. Specifically, at the hearing on the post-trial motions, Respondent's counsel admitted that "there wasn't any evidence in the record about this child being financially vulnerable." (R. 769) (emphasis added). To the contrary, the evidence at trial established that, aside from the funds deposited with BOA, Respondent received \$1,000 each month in worker's compensation benefits in addition to an unspecified amount of social security benefits. (R. 209-10, 230). Additionally, the conservator specifically testified that she had always been able to take care of any of Respondent's needs, including any special needs, from those funds. (R. 230). Thus, the Panel's finding of financial vulnerability and overemphasis of this factor in its reprehensibility determination was the result of speculation and its overlooking the evidence and admissions in the record.

The Panel also misapprehended the "repeated conduct vs. isolated incidents" sub-factor in its reprehensibility analysis. Specifically, the Panel concluded that "BOA's conduct involved repeated failures to employ the safeguards prescribed to protect [Respondent]'s funds." Op. No. 4875 at p. 14. In doing so, the Panel misapplied this sub-factor so as to allow multiple actions relating *only to* Respondent to meet this factor. This is not the proper application. "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 by BOA or its employees.

When the Panel's opinion in this matter is compared to the recent opinion by a separate panel of this Court in Hollis v. Stonington Development, Op. No. 4869 (S.C. Ct. App. Aug. 17, 2011), inconsistencies are plainly evident in the manner in which reprehensibility was determined. In conducting the reprehensibility analysis in Hollis, the Panel emphasized that the defendant engaged in deceitful conduct which lasted for over four years, yet this supported a finding that the defendant was "*moderately reprehensible*." Hollis, at 18 (emphasis added). However, in this case, the Panel acknowledged that: (a) the harm suffered was economic and not physical; (b) BOA's conduct did not evince an indifference to or reckless disregard for health and safety; and (c) BOA's conduct did not involve intentional malice, trickery, or deceit. Op. No. 4875 at pp. 13-14. Despite these findings, the Panel in this matter found that BOA's conduct "evinces a *high degree of reprehensibility*." Id. at 13 (emphasis added). The Panel's misapplication of the reprehensibility factors, and the inconsistency between this Opinion and that in Hollis, warrants rehearing and/or rehearing *en banc*.

B. The Panel misapprehended the test for determining whether the punitive damages award was reasonably related to the harm likely to result from BOA's conduct and incorrectly based its decision upon an extrapolation of BOA's global hourly revenue rather than any actual or potential harm to Respondent.

The Panel also misapprehended the proper method for evaluating the disparity between the actual or potential harm suffered by Respondent and the amount of the punitive damages award – commonly called "the ratio." "[W]hen determining the reasonableness of a particular ratio of actual or potential harm to a punitive damages award, [a court] may consider: the likelihood that the award will deter the defendant from like conduct; whether the award is reasonably related to the harm likely to result

from such conduct; and the defendant's ability to pay." Mitchell, 385 S.C. at 588, 686 S.E.2d at 185.

In finding that a 7.69 to 1 ratio was constitutionally permissible, the Panel misapplied the second factor of this test – which is the consideration of whether the award is reasonably related to the harm likely to result from the conduct. The Panel reasoned that setting up a conservator account would take approximately one-hour, and that BOA's global hourly pre-tax income was approximately \$1,538,250.00.² Op. No. 4875 at p. 15. The Panel then concluded that "[t]he consistency between BOA's one-hour income figure and the jury's punitive damages award leads us to the conclusion that the punitive damages award is reasonably related to the harm [Respondent] suffered." Id. at pp. 15-16. This conclusion misapprehends the proper application of the "reasonably related" test and constitutes a drastic departure from the well-established law on this issue.

The Mitchell ratio test required the Panel to compare the punitive damages award *to the actual or potential harm suffered*. The Panel did not make this comparison. Instead, the Panel compared the punitive damages award *to an extrapolation of BOA's global income*. There is absolutely no correlation between the actual or potential harm in this case and BOA's hourly global pre-tax income. The actual or potential harm suffered by Respondent was limited to the loss of the funds deposited with BOA – an amount which directly corresponds to the actual damages award of \$205,735.37. In effect, by using the hourly extrapolation of BOA's global

² As discussed in Section I.C. of this Petition, consideration of the hourly extrapolation of BOA's global earnings was improper and in direct violation of the South Carolina Supreme Court's guidance on this subject in Branham v. Ford Motor Company, 390 S.C. 203, 701 S.E.2d 5 (2010).

pre-tax income to justify the "reasonably related" requirement, the Panel applied the defendant's ability to pay factor *twice* and completely avoided any meaningful analysis relating the award *to the actual or potential harm* from BOA's conduct.

Additionally, the Panel's misapplication of the "reasonably related" test is based on faulty logic. For example, if the time it took to open a conservator account was actually five hours instead of one, under the Panel's reasoning this would support a punitive damages award of approximately \$7,700,000.00 (which, with actual damages of \$205,000 would result in a ratio of 37.6 to 1). Similarly, if the actual amount of funds stolen by Karen Unrue (and, thus, the amount of actual damages) had been only \$50,000, under the Panel's reasoning, this would have no effect on the propriety of a \$1,500,000 punitive damages award (a 30 to 1 ratio). Obviously, the punitive damages award in either of these possible scenarios would be constitutionally impermissible. State Farm v. Campbell, 538 U.S. 408, 425 (2003) (holding that few awards exceeding a single-digit ratio between punitive and compensatory damages will satisfy due process). Another example also reveals the flaw in the Panel's analysis. If the bank here had been a small bank with very little pre-tax income, the Panel's analysis would create a scenario where only a small punitive damages award would be "reasonably related", despite the fact that the very same conduct had occurred and the same amount of actual damages were suffered.

The Panel's improper methodology of comparing the punitive damages award to an extrapolation of BOA's global income represents a complete departure from South Carolina jurisprudence on this issue. Since the South Carolina Supreme Court's decision in Gamble v. Stevenson, 305 S.C. 104, 111-12, 406 S.E.2d 350, 354 (1991),

a constitutional review of a punitive damages award has always involved a determination or whether the award is reasonably related to the harm likely to result from the defendant's conduct. The subsequent decisions of South Carolina's appellate courts have consistently made this determination by focusing solely on the actual or potential harm. See Austin v. Stokes-Craven Holding Corp., 387 S.C. 22, 53-54, 691 S.E.2d 135, 151 (2010) (upholding "a single-digit ratio" punitive award where the "extent of the wreck damage and the resultant safety issues" showed the potential for the plaintiff and his passengers "to be subjected to serious injury"); James v. Horace Mann Inc. Co., 371 S.C. 187, 196, 638 S.E.2d 667, 672 (2006) (holding that the punitive damages award "was reasonably related to the actual harm suffered"); Hollis v. Stonington Development, Opinion No. 4869 (S.C. Ct. App. Aug. 17, 2011) (holding that a ratio of 8.75 to 1 constituted an excessive disparity between the punitive damages awarded and the harm actually suffered by the plaintiffs, and determining that the reduced award is "reasonably related to the harm likely to result" from the specific conduct at issue - ignoring stormwater management regulations).

The Panel's utilization of BOA's extrapolated hourly global income ignores the actual or potential harm resulting from BOA's conduct and instead justifies an excessive punitive damages award by comparing it only to BOA's global income. This runs directly contrary to the South Carolina Supreme Court's clear warning in Mitchell that "a punitive damages award should never be based solely on a percentage of the defendant's net worth." Mitchell, 385 S.C. at 588 n. 8, 686 S.E.2d at 185 n. 8. The fact that BOA's global hourly income happens to be approximately the same as the punitive damages award has no bearing whatsoever on the issue of whether the award is

reasonably related to the actual or potential harm from BOA's conduct. The Panel's misapprehension and misapplication of the "reasonably related" test warrants rehearing and/or rehearing *en banc*.

C. The Panel overlooked or misapprehended the rule set forth in Branham v. Ford Motor Company limiting the relevant inquiry in a punitive damages analysis to a defendant's net worth and disallowing prejudicial extrapolations of other financial data.

The Panel misapprehended the effect of the Supreme Court's decision in Branham v. Ford Motor Co., 390 S.C. 203, 701 S.E.2d 5 (2010), and improperly concluded that basing a punitive damages award upon the extrapolated hourly global income of a corporate defendant remains permissible in the wake of the Branham decision. While noting that Branham "questioned the 'propriety of extrapolating financial data,'" the Panel then concluded that prior Court of Appeals decisions (Bryant v. Waste Mgmt., Inc., 342 S.C. 159, 536 S.E.2d 380 (Ct. App. 2000) and Orangeburg Sausage Co. v. Cincinnati Ins. Co., 316 S.C. 331, 450 S.E.2d 66 (Ct. App. 1994)), which allowed extrapolations of daily earnings were not overruled Branham. In doing so, the Panel misapprehended the meaning and effect of the Branham decision.

While the Branham Court noted the Bryant and Orangeburg Sausage cases, it did so in the context of stating "[t]hese court of appeals decisions have not been tested since the 2003 Supreme Court opinion of State Farm v. Campbell." Branham, 390 S.C. at 240, 701 S.E.2d at 24-25. The Branham Court then concluded that "evidence concerning net worth appears the safest harbor" and that the Campbell decision "militates against venturing beyond net worth and extrapolations from net worth." Id. The Panel's opinion in this case is, respectfully, improperly dismissive of this clear

statement limiting the punitive damages analysis to the area of net worth. The punitive damages award was based not on BOA's net worth (or an extrapolation of *net worth*). Rather, it was based on an extrapolation of BOA's global hourly pre-tax income. (R. 600-02). Thus, just as in Branham, this introduced an arbitrary and prejudicial factor into the punitive damages analysis.

Additionally, by using BOA's *global* pre-tax income as the basis for the hourly extrapolation, the punitive damages award was effectively based upon the multitude of BOA's operations outside of the State of South Carolina and wholly unrelated to its administering of conservator accounts. "[P]unitive damages awards may not be based on out-of-state conduct and must be related to the plaintiff's injury or damage." Mitchell, 385 S.C. at 586, 686 S.E.2d at 184. Significantly, if the exact same conduct had been committed by a small local bank, a punitive damages award of this size would be unsupportable. By improperly considering BOA's global operations, rather than a relevant sub-set thereof, the punitive damages award effectively punishes BOA not for its conduct, but rather for being a large business enterprise. "A defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business." Id., quoting State Farm v. Campbell, 538 U.S. at 423. Because the Panel's misapprehended the holding in Branham, and the limitations on extrapolations other than those based net worth, this Court should grant rehearing and/or rehearing *en banc* in this matter.

II. The Panel misapprehended the intervening act rule in determining that BOA's isolated mistakes were the proximate cause of Respondent's harm rather than the intervening criminal conduct of Karen Unrue.

The Panel's opinion incorrectly held that BOA's actions were the proximate cause of Respondent's damages. Specifically, the Panel concluded that the harm suffered was foreseeable by BOA. Op. No. 4875 at pp. 6-7. In coming to this conclusion, the Panel misapprehended the meaning of "foreseeable" and overlooked the evidence in the record which established a clear lack of foreseeability.

Under the "intervening act rule" where there is an intervening willful, malicious, or criminal act of a third person that was neither intended nor foreseen by the original actor, the causal chain between the original act and the harm is broken. Mellen v. Lane, 377 S.C. 261, 285, 659 S.E.2d 236, 248-49 (Ct. App. 2008). A plaintiff is required to prove that the defendant should have foreseen that his negligence would *probably* result in the injury or that the injury was the *natural* consequence of the defendant's negligence alone. Id. at 283, 659 S.E.2d at 247-48. The key point in a foreseeability analysis is that the injury suffered must be the *probable* consequence, and not a mere *possibility*. Id. at 284-85, 659 S.E.2d at 248-49; Young v. Tide Craft, Inc., 270 S.C. 453, 463, 242 S.E.2d at 671, 675-76 (1978). Thus, an intervening act is not probable unless it can be "*expected* to happen." Young, 270 S.C. at 463, 242 S.E.2d at 676 (emphasis added).

The Panel reasoned that "banks anticipate theft," leading to their conclusion that the criminal actions of Karen Unrue were foreseeable to BOA. While it is true that banks anticipate and actively seek to avoid the theft of their funds, this does not render every criminal action against a bank's deposits a foreseeable event. Rather it

acknowledges that the theft of funds from a bank is a *possibility*, not a *probability*. The Panel overlooked the fact that theft or fraud involving a bank's deposits is *always* a possibility. This analysis effectively means that the "intervening act" rule could never apply to a bank.

Additionally, the Panel overlooked the fact that while it was *possible* that Karen Unrue would steal the funds, it was not probable or expected that she would do so. To the contrary, the evidence at trial supported the opposite conclusion. The Panel acknowledged that "BOA implemented policies and procedures designed to avoid fraud and loss situations." Op. No. 4875 at p. 7. The evidence at trial further established that BOA had in place numerous and adequate policies, procedures, manuals and resources designed to guard against this loss. (R. 265, 398-402, 406-10, 526-27, 775, 843-47). Additionally, there was no evidence at trial that BOA or its employees had any reason to be suspicious of Karen Unrue, a long-term customer and local businesswoman, or aware of her criminal scheme to steal from her nephew and disappear with the funds as a fugitive. (R. 271-72, 283, 319-20). Thus, the Panel misapprehended the proper application of the intervening act rule, and this warrants a rehearing and/or rehearing *en banc* in this matter.

III. The Panel overlooked the evidence and incorrectly concluded that that it clearly and convincingly established that BOA and its employees acted in a wanton, willful, or reckless manner sufficient to support a punitive damages award.

The Panel misapprehended the evidence in the record in concluding that it was established by clear and convincing evidence that BOA and its employees acted in a willful, wanton or reckless manner. The Panel based this conclusion on the fact that,

despite the training given to the employees and the policies and procedures put in effect by BOA regarding conservator accounts, mistakes were still made in this instance. Op. No. 4875 at p. 9-12. The Panel's conclusion, however, overlooked the distinction between simple negligence and the elevated level of culpable conduct necessary for the imposition of punitive damages.

The actions of BOA's employees in this matter were honest mistakes which, due to the intervening criminal actions of Karen Unrue, were not the proximate cause of Respondent's damages. However, even if Ms. Unrue's theft of the funds was foreseeable, the mistakes made by BOA's employees amount to, at most, simple negligence which cannot support the imposition of punitive damages. Atkinson v. Orkin Exterminating Co., 361 S.C. 156, 170 n.8, 604 S.E.2d 385, 392 n.8 (2004) (recognizing that punitive damages cannot be awarded for simple negligence). Conduct does not rise to the level of willful, wanton, or reckless unless it is "is committed with a deliberate intention under such circumstances that a person or ordinary prudence would be conscious of it as an invasion of another's rights." Cohen v. Allendale Coca-Cola Bottling Co., 291 S.C. 35, 40, 351 S.E.2d 897, 900 (Ct. App. 1986). "It is the present consciousness of wrongdoing that justifies the assessment of punitive damages against the tort-feasor." Id.

The Panel misapprehended this standard by focusing not on whether there was any "deliberate intention" or "present consciousness of wrongdoing" by the BOA's employees, but rather by focusing on the egregiousness of the mistakes made. While, admittedly, mistakes were made, they were, nonetheless, unintentional *mistakes*. A "mistake" is not an intentional act. Rather, the term "mistake" occurs through

"unconsciousness, ignorance, or . . . forgetfulness, or it may be a belief of the existence of some fact, past or present, which did not or does not now exist and on which the party acted." Nat'l Bank of Newberry v. Boyd, 35 S.C. 233, 243, 14 S.E. 496, 497 (1892). "When one, without thinking, just carelessly does an act which results in an injury to another, then ordinary negligence is established." Weeks v. Carolina Power & Light Co., 156 S.C. 158, 169, 153 S.E.2d 119, 123 (1930). In order to rise to the level of deliberate intention or conscious disregard, the tort-feasor must commit the act "with the thought that his negligent act may produce an injury to another." Id. The Panel's misapprehension of this point warrants rehearing and/or rehearing *en banc* of this matter.

IV. The Panel misapprehended the prejudicial effect of Respondent's repeated references at trial to its size.

The Panel erred in concluding that Respondents repeated reference at trial to BOA's size and status as one of the world's largest banks was not prejudicial and requiring of a new trial. Op. No. 4875 at p. 9. While the panel acknowledged that BOA was referred to as "big," "the largest bank in America," and the "third largest bank in the world," it incorrectly concluded that these were isolated references which resulted in no prejudice to BOA. Id. The Panel overlooked the fact that the repeated references to BOA's size bore no relevance whatsoever to any issues in the case, and served no purpose other than to create passion and prejudice against BOA.

The prejudice resulting from the repeated emphasis on BOA's size and status was further compounded by the improper use of BOA's *global* pre-tax income as a basis and primary justification for the excessive punitive damages award. Nelson v.

Charleston & W. Carolina Ry. Co., 231 S.C. 351, 362, 98 S.E.2d 798, 802 (1957) (holding that “[t]he size of the verdict alone may show that it must have been the result of passion or prejudice”); Mathias v. Accor Econ. Lodging, Inc., 347 F.3d 672, 677 (7th Cir. 2003) (holding that a defendant’s wealth is not a sufficient basis for awarding punitive damages because it is discriminatory and “mak[es] punishment depend on status rather than conduct”). The emphasis on BOA’s global pre-tax income was yet another improper focus on the size and status of BOA, and the Panel overlooked the clear prejudice which resulted. Thus, this Court should grant re-hearing and/or rehearing *en banc* in this matter.

V. The Panel incorrectly concluded that BOA failed to preserve the issue of whether its actions were the cause-in-fact of Respondent’s injury where BOA’s directed verdict motion asserted that intervening criminal conduct broke all casual chains.

In footnote 3 of the opinion, the Panel incorrectly concludes that that BOA failed to preserve the issue of whether its conduct was the “cause-in-fact” of Respondent’s injury. Op. No. 4875 at p. 3 n.3. To the contrary, BOA’s directed verdict motion asserted that Karen Unrue’s intervening criminal action broke “any causal chain” between BOA’s action or omissions and Respondent’s injury. (R. 578-79; 894). The Panel misinterpreted BOA’s proximate cause argument to have been limited to only the “legal cause” portion of the proximate cause.

The proximate cause element of negligence contains two elements: (1) cause-in-fact; and (2) legal cause. Bramlette v. Charter-Medical-Columbia, 302 S.C. 68, 72, 393 S.E.2d 914, 916 (1990). Causation-in-fact is proved by establishing the injury would not have occurred “but for” the defendant’s negligence, and legal cause is

proved by establishing foreseeability. Id. By asserting that the intervening criminal conduct of Karen Unrue broke *any* causal chain, BOA adequately preserved its challenge that both the cause-in-fact and the legal cause prongs of proximate cause had not been established. An issue is properly preserved for appeal when it has been raised and ruled upon by the trial court. Spence v. Wingate, 381 S.C. 487, 489-90, 674 S.E.2d 169, 169 (2009). BOA's directed verdict motion addressed all causal links, including both cause-in-fact and legal cause. Thus, the issue of cause-in-fact was raised and ruled upon, and was properly preserved for appellate review. The Panel misinterpreted the full scope of BOA's proximate cause argument and failed to consider whether Respondent sufficiently established that BOA's actions, as opposed to the intervening criminal actions of Karen Unrue were the cause-in-fact of Respondent's injury. Therefore, this Court should grant rehearing and/or rehearing en banc in order to fully consider whether BOA should have been granted JNOV due to Respondent's failure to establish proximate cause.

VI. The Panel incorrectly concluded that BOA failed to preserve the issue of whether the punitive damages award was proper where Respondent failed to establish that BOA acted in complicity with its employees.

In footnote 4 of the opinion, the Panel held that BOA failed to raise the issue of whether it was established by clear and convincing evidence that BOA's conduct, as opposed to merely the conduct of BOA's employees, was willful, wanton or reckless. Op. No. 4875 at p. 12 n.4. In doing so, the Panel misinterpreted BOA's directed verdict argument as having been narrowly focused on whether its employees' conduct rose to the willful, wanton or reckless standard. To the contrary, BOA's argument broadly covered not only the issue of whether punitive damages could be imposed based

upon the employees' conduct, but also whether it had been established by sufficient evidence that BOA, as a whole, had acted in a willful, wanton or reckless manner.

A corporate defendant should not be held liable for punitive damages based on an employee's wrong unless: (1) the principle authorized the employee's wrongdoing; (2) the employee was unfit for service and the principle was reckless in employing him; (3) the employee was employed in a managerial capacity and acting within the scope of employment; or (4) the principle ratified the employee's actions after they occurred. Restatement (Second) of Torts § 909 (1979). This test is often referred to as the complicity rule or complicity doctrine. Briner v. Hyslop, 337 N.W.2d 858, 861 (Iowa 1983).

While BOA did not specifically refer to the "complicity rule" by name at the trial, its motion for a directed verdict addressed this argument by asserting that there was insufficient evidence of willful, wanton or reckless conduct *by BOA*. (R. 573-75, 579-84, 886-89). See e.g., Carroll v. Palmetto Bank, 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 in order to preserve it" for appellate review). This is the heart of the complicity rule – that to impose punitive damages on a corporate defendant, the corporation must be shown to have been complicit in the actions of its employees. The fact that this issue was fully preserved is further established by the trial court's ruling on the directed verdict motion. Specifically, the trial court reasoned that "[a]s to [BOA], of course, the bank functions through its employees acting within the scope of their employment. So the conduct of the bank as a whole as well as the bank through the actions of its employees must be evaluated on this issue." (R. 585). Thus, the

directed verdict motion preserved the issue of whether the actions of *BOA as a whole*, separate and apart from the actions of its employees, were sufficient to warrant punitive damages. Therefore, this Court should grant rehearing and/or rehearing *en banc* in order to fully consider whether Respondent established by clear and convincing evidence that BOA, as opposed to merely its employees, acted in a wanton, willful or reckless manner sufficient to allow punitive damages.

CONCLUSION

Based on the foregoing, and on the arguments in the appeal briefs filed in this matter, Bank of America, N.A., respectfully requests this Court grant rehearing or rehearing *en banc* as to this Court's opinion in this matter. Rehearing *en banc* is particularly appropriate in this case as the Opinion in this matter constitutes a significant departure from the established jurisprudence in this State on the constitutional review of punitive damages awards, which is a matter of exceptional importance.

[Signature page attached.]

Respectfully submitted,

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September 22, 2011

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM WILLIAMSBURG COUNTY
Court of Common Pleas

Clifton B. Newman, Circuit Court Judge

Case No. 2003-CP-46097

RECEIVED
SEP 22 2011

SC Court of Appeals

Cody P., by and through his Conservator Kelly H.
Kelley, and his natural and legal guardian Elizabeth
Powell, ...

Respondents,

v.

Bank of America, N.A., Karen P. Unrue, and Travis
Powell, ...

Defendants,

Of Whom Bank of America, N.A. is, ...

Appellant.

PROOF OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson
Mullins Riley & Scarborough LLP, attorneys for Bank of America, N.A. do hereby
certify that I have served all counsel in this action with a copy of the pleading(s)
hereinbelow specified via U.S. Mail, postage prepaid to the following address(es):

Pleadings:

Petition for Rehearing and Suggestion for Rehearing
En Banc

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September 22 2011

RECEIVED
SEP 22 2011
SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM WILLIAMSBURG COUNTY
In the Court of Common Pleas

The Honorable Clifton Newman, Circuit Court Judge

Case No.: 2003-CP-45-207

Cody P., by and through his Conservator, Kelly H. Kelley, and his natural
and legal guardian, Elizabeth Powell, ... Respondent,

v.

Bank of America, N.A., Karen P. Unrue, and Travis Powell, ... Defendants.

Of whom Bank of America, N.A., is Appellant.

RETURN TO PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING *EN BANC*

Respondent Cody P files his return to the petition for rehearing and suggestion for rehearing *en banc*. Cody argues the panel decision fully comports with established state and federal law on both liability and review of the punitive damages award. Contrary to the Appellant's representations, the panel opinion does not represent a significant departure from the South Carolina Supreme Court's established jurisprudence regarding review of punitive damage awards.

I. Punitive Damages Issues

In the interim between briefing and oral argument on this appeal, the South Carolina Supreme Court issued two decisions related to review of punitive damages awards, Mitchell v. Fortis Insurance Company, 385 S.C. 570, 686 S.E.2d 176 (2009), and Branham v. Ford Motor

Co., 390 S.C. 203, 701 S.E.2d 5 (2010). The panel questioned counsel regarding the application of these decisions to the facts of this matter at oral argument and incorporated the rulings of these cases in its analysis and opinion.

The Mitchell test organizes the review into three categories of factors – reprehensibility, the ratio of punitive damages to compensatory damages, and comparative penalties for similar conduct. Conducting a *de novo* review of the facts, the Court first evaluates the degree of reprehensibility. Mitchell, 385 S.C.570, 583, 587, 686.

A. The Panel's reprehensibility analysis correctly applied the law to the facts.

This panel applied the five factors of the reprehensibility test which BOA acknowledges apply. It considered whether

(i) the harm caused was physical as opposed to economic; (ii) the tortious conduct evinced an indifference to or a reckless disregard for the health or safety of others; (iii) the target of the conduct had financial vulnerability; (iv) the conduct involved repeated actions or was an isolated incident; and (v) the harm was the result of intentional malice, trickery, or deceit, rather than mere accident.

Op. 4875 p. 8. Mitchell, like State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 418-419 (2003), recognizes a scale of reprehensibility upon which wrongful acts are weighed. Mitchell, 385 S.C. 570, 587. As long as BOA's conduct was reprehensible, regardless of the degree, a punitive damages award may be upheld.

Application of the five reprehensibility subfactors does not involve counting which side has the greater number weighing in its favor. State Farm reasoned while all are to be considered, the factors do not carry equal weight. The weight of each factor depends on the particular circumstances of each case. Where a single reprehensibility factor is strong, it may outweigh several others -- or even a majority -- not supporting reprehensibility, thereby supporting substantial punitive damages. State Farm, 538 U.S. 408, 419 ; *see also* Saunders v. Branch Banking & Trust Co., 526 F.3d 142, 153 (4th Cir. 2008) (single factor can justify

substantial punitive damages award); Duncan v. Ford Motor Co., 385 S.C. 119, 143, 682 S.E.2d 877 (Ct. App. 2009) ("infliction of economic injury, especially ... when the target is financially vulnerable, can warrant a substantial penalty" quoting BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 576 (1996)).

Here, BOA's conduct was unquestionably reprehensible as the victim was financially vulnerable. The target of BOA's wrongful conduct was a fatherless five-year-old boy. BOA knew he was financially vulnerable. BOA employee Yourko who opened one of the accounts giving Unrue full access to Cody's funds admitted she knew Cody was a minor whose father was dead, knew the language on the checks meant the money belonged to Cody, not Unrue, and knew Unrue was assisting with Cody's affairs. Clearly each check handled by BOA came from insurance companies. (R.39-45). In short, she admitted she knew Cody was financially vulnerable, and still did not follow mandated safeguards to protect him. (R. 318 319, and 325, *see also* Op. 4875, p.8). She testified concerning a points-based commissions program for opening new accounts supporting the inference she profited from ignoring the irregularities of the transactions and Cody's financial vulnerability. (R.282-283). Additionally, the Probate Court order appointing the co-conservators provided evidence he was a special needs child, noting the minor is disabled and may be in need of government assistance to provide medical care if he is uninsurable as a result of his disabilities. (R. 85). The initial petition to appoint the co-conservators states he is unable to manage his own affairs and suffers from emotional and physical disabilities. (R. 788). The current conservator testified she uses his conservatorship funds to pay medical bills, school supplies and necessities. (R. 211). These funds were unquestionably necessary for the future safety and wellbeing of this small child.

Most importantly, BOA misapprehends the meaning of financial vulnerability. Financial vulnerability is not merely a matter of how much money a person has as BOA asserts.

"Vulnerable" means "lacking protection from danger or resistance against attack." It carries the connotation of being unable to protect oneself and being in need of extra protection or guarding or security against danger or harm. See <http://www.merriam-webster.com/thesaurus/vulnerable>.

For example, in Austin v. Stokes-Craven Holding Corp., 387 S.C. 22, 691 S.E.2d 135 (2010), the financial vulnerability factor weighed in favor of punitive damages apparently based solely on the plaintiff's position as a customer who had less access to information and less bargaining power than the dealership with whom he was doing business, thus putting him at a disadvantage in protecting himself in the transaction. In Mitchell v. Fortis Ins. Co., 385 S.C. 570, 686 S.E.2d 176 (2009), financial vulnerability was found when the defendant insurer's actions would have hindered the consumer plaintiff in obtaining alternative medical insurance.

As a matter of law, one who is in need of, or has, a conservator is financially vulnerable. The whole point of conservatorships is to provide protection for those who are unable to manage their own affairs or to protect their own financial interests. S. C. Code Ann. §62-5-101 et seq. What makes taking wrongful action against one who is financially vulnerable so reprehensible is the victim's inability to fight back or protect himself. Sidestepping, avoiding, disabling, disregarding, ignoring or not applying the very protections put in place to protect the property of this five-year-old is about as reprehensible as misconduct against a financially vulnerable person can get.

Contrary to BOA's assertions, in its analysis of reprehensibility, the panel did not overlook the evidence in the record or speculate concerning facts contradicted by the record. Rather, it considered the financial reality that loss of the life insurance proceeds left by a deceased parent to provide for the future support of his child with disabilities would substantially increase risks associated with major life expenses. These considerations are the

sort of considerations which led the U.S. Supreme Court in Gore to point out that economic injury, especially when the target is financially vulnerable, can warrant substantial punitive damages. 517 U.S. at 576 (1996). The fact that at the time of trial, a conservator may have been able to cover expenses which had arisen from workers compensation benefits of \$1,000 a month and social security benefits is no indicator such benefits will be sufficient for even basic support, much less medical or other major expenses, as the child grows older. Fender v. Fender, 256 S.C. 399, 405, 182 S.E.2d 755 (1971). This type of economic harm to a financially vulnerable victim was recognized in Gore as varying from the usual situation where the infliction of solely economic harm generally does not support a conclusion of enhanced reprehensibility.

Although the panel acknowledged “BOA’s conduct did not evince an indifference to or a reckless disregard for Cody’s health or safety,” it went on outlining extensively its surprise regarding the egregiousness of the Bank’s misconduct in handling these transactions indicating an indifference to or reckless disregard for Cody’s money. It outlined the failures at the initial levels with the Personal Banker and the Branch Manager, the teller level, and at the “operations area” level where the activity of the tellers and personal bankers is reviewed for compliance with BOA’s safeguards. The Court’s phrases, such as “BOA blindly followed Unrue’s request,” “BOA’s failure to recognize the significance of the conservator designation,” “the teller failed to verify Unrue’s authority before cashing the checks,” and “BOA’s conduct involved repeated failures to employ the safeguards prescribed to protect Cody’s funds” all occur immediately before its summary conclusion that BOA’s conduct was sufficiently reprehensible to support a punitive damages award. Clearly, the totality of these facts support the panel’s finding that “BOA’s conduct evinces a high degree of reprehensibility.” Op. 4875, p.8.

Finally, this panel’s finding that BOA’s action involved repeated misconduct is clearly

supported by the evidence. Even if BOA were correct that the repeated conduct must be directed against more victims than the plaintiff, which it is not, the two employees who opened the accounts giving Unrue unrestricted access to Cody's funds essentially testified they routinely treat the person presenting the checks as their customer and do what that person asks for regardless of what the checks or the manual says. (R. 274-283, 311, 313-314, 317, 324-325, 335, 354, 363-364, 800). While there may be no specific identification of other wards who have been injured by BOA's misconduct, these two employees have clearly testified they repeatedly and routinely engage in the misconduct of ignoring restrictive language on checks concerning whom the money belongs to and disregarding such restrictions as requiring proof of authority of those present in a fiduciary capacity to do what such persons ask them to do. This evidence shows that misconduct has been repeated in regard to multiple customers and is highly likely to be repeated in the future absent sufficient deterrence. Austin, 387 S.C. at 53 (admission by employee he routinely did not show titles to customers sufficient evidence of reprehensibility factor of repetitious/non-isolated conduct).

BOA is correct the 6th Circuit requires similar reprehensible conduct to be committed against different persons rather than repeated reprehensible acts within a single transaction with the plaintiff to find that factor enhances reprehensibility. However, it bases this ruling on references in State Farm and Gore to misconduct against third parties enhancing reprehensibility without any language in those opinions indicating that repeated conduct against the same plaintiff in multiple transactions over a period of time does not also enhance reprehensibility. Bach v. First Union Nat'l Bank, 149 F. App'x 354, 356 (6th Cir. 2005). In fact, given the language in State Farm limiting use of evidence of misconduct toward other parties, it seems ironic to say this factor increases reprehensibility but not if all the misconduct is directed at the plaintiff. Thus, other courts have rejected the 6th Circuit approach. Sec. Title Agency,

Inc. v. Pope, 219 Ariz. 480, 200 P.3d 977, n23 (Ct. App. 2008) (describing split between 6th and 3rd Circuits); *see also* CGB Occupational Therapy, Inc. v. RHA Health Services, Inc., 499 F.3d 184, 191 (3d Cir. 2007) (finding repeated conduct in regard to the same victim relevant to this factor); Qwest Servs. Corp. v. Blood, 252 P.3d 1071, (Colo. 2011) (following 3rd Circuit). Although it was addressing actual damages rather than punitive damages factors, the 4th Circuit declined to follow Bach in Sloane v. Equifax Info. Servs., 510 F.3d 495 (4th Cir. Va. 2007), noting that repeated misconduct in regard to the same victim over an extended period of time, even if connected to the same transaction, is worse than more isolated conduct against a single plaintiff as it causes more damages. Thus, it would appear unlikely that the 4th Circuit would adopt the approach suggested by BOA. South Carolina's cases often refer to multiple instances of misconduct in regard to the same plaintiff when considering this factor, thus it has at least implicitly rejected the 6th Circuit position. *See* Mitchell, 385 S.C. at 589-590; James v. Horace Mann Ins. Co., 371 S.C. 187, 196, 638 S.E.2d 667 (2006); Hollis v. Stonington Dev., LLC, Opinion No. 4869, 2011 S.C. App. LEXIS 215, *16-17 (August 17, 2011). Furthermore, even the 6th Circuit limits BOA's to repeated conduct in the course of a single transaction with the plaintiff. This case involves different transactions with the plaintiff involving different accounts occurring on different dates. Thus, BOA's argument is misplaced.

Finally, Hollis is readily distinguishable from the present case. It does not involve harm to a financially vulnerable victim, much less the repeated eradication of all the protections designed to protect him from economic harm. Hollis recognizes, as did Mitchell, that finding only economic harm "would typically weigh against reprehensibility." The word "typically" indicates there are some special and different situations. This case includes a special situation because it involves economic harm to a financially vulnerable victim which the U.S. Supreme Court found in Gore to be far more reprehensible than economic harm against those who are

not financially vulnerable. Hollis involved a dispute between competent adjoining property owners resulting in one owner's activities damaging the other owner's property with water runoff. Thus, there is no inconsistency in the analysis in this case and in Hollis.

The evidence clearly demonstrates what happened was not merely a mistake. While it might not rise to the level of intentional malice, trickery, or deceit, it does amount to knowing affirmative misconduct which is enough to cause the fourth reprehensibility factor to weigh at least somewhat in the plaintiff's favor. See Duncan v. Ford Motor Co., 385 S.C. 119, 682 S.E.2d 877 (Ct. App. 2009) (absence of mistake sufficient for this factor to weigh in favor of punitive damages although not rising to the level of intentional malice, trickery, or deceit).

B. The Panel properly analyzed the reasonable relationship of the punitive damages award to the actual and/or potential harm resulting from BOA's conduct.

When determining the reasonableness of a particular ratio of actual or potential harm to a punitive damages award, a court may consider: the likelihood that the award will deter the defendant from like conduct; whether the award is reasonably related to the harm likely to result from such conduct; and the defendant's ability to pay. Mitchell, 385 S.C. 570, 588. First, Mitchell states the reviewing court "may consider" these three factors. It neither limits the reviewing court to considering these three factors nor requires the reviewing court consider all three particular factors. As with the entire punitive damages analysis, relevant information to a punitive damages award will vary from case to case depending on the circumstances of the particular case. Here, the Panel considered all three factors and began its analysis:

Here, the ratio of punitive to actual damages is 7.69 to 1, at the high end of the single-digit spectrum. However, it is probable that a \$1.5 million punitive damages award will deter BOA from like conduct and encourage BOA to better train its employees and implement more effective safeguards to protect customer's funds. Furthermore, BOA has the ability to pay the punitive damage award. The net worth of its shareholder equity as of June 30, 2008, four months before trial, was \$163 billion.

Op. 4875, p.9.

The panel clearly notes the deterrence and ability to pay subfactors supported the reasonableness of this ratio even though it was on the upper end of the single-digit range. This discussion alone provides as much or more justification for finding the ratio reasonable and constitutional as most decisions reviewing punitive damages awards. BOA has not argued, much less demonstrated, that a smaller award would be sufficient to have any effect in deterring similar misconduct likely to occur given the testimony of its employees as to their routine conduct and BOA's employee incentive program. Here the award is not large enough to cause serious damage to BOA's operations or even its profitability, much less bankrupt it. There is no dispute as to the Bank's ability to pay.

Here, the adage "time is money" can be applied to BOA's conduct. The amount of time it takes to do something right and the amount of money earned by the defendant in that amount of time are highly relevant to both the likelihood the award will deter this particular defendant from similar conduct in the future and this defendant's ability to pay. Profit and earnings are related to the ability to pay. They are also relevant to whether a business defendant will continue to engage in the same or similar misconduct, as profit is probably the single greatest factor in driving business choices. Thus, when a defendant engages in a risk-benefit analysis, it must weigh the cost of engaging in this type of misconduct again.

Clearly, net worth can be considered as a factor in the ability to pay part of the ratio analysis. State Farm, 538 U.S. at 438 (use of wealth is not unlawful or inappropriate; it just cannot be used to make up for the failure of other factors, such as reprehensibility); Mitchell, 385 S.C. at 588 (wealth remains relevant although it may not be the sole basis for determining the amount of the punitive damages award). It necessarily follows that considering less than the defendant's entire net worth is also relevant and less likely to inflate the award, particularly

where the portion used is rationally related to the type of misconduct involved and the potential it has for harm.

The jury could not have been clearer in its attempt to tailor the specific wrong to the specific damage here. It is reasonably related to the harm suffered in that BOA handles and seeks to handle large quantities of other people's money daily. Given that its core business includes the protection of assets which it solicits for deposit, routine disregard of safeguards to protect those assets throughout different levels of review within the bank can and will result in significant repeated potential harm.

BOA claims Mitchell limits the reviewing court to comparing the punitive damages award to the harm to the plaintiff in the particular case before it. However, the language of Mitchell does not require or limit the reviewing court to comparing the amount of the punitive damages award to the damages of the plaintiff before it. The language used in Mitchell tells the court to evaluate the conduct and consider potential for harm to others similarly situated. Here, the true harm involves exposure of conservatorship assets to loss due to actions by BOA such as those present in this case. The loss of security/risk factor has a value in and of itself and is why conservative investors accept a lower return for safer investments and is why courts restrict what can be done with conservatorship assets. The measure of the loss resulting from that harm in this case was the amount of money that harm enabled the conservator to steal from Cody, an amount greater than the actual damages in this case due solely to Cody's efforts in recovering some of his stolen funds from Unrue. Powell v. Bank of America, et al., 379 S.C. 437, 665 S.E.2d 237 (Ct. App. 2008).

More importantly, the language used in Mitchell does not focus strictly, or even primarily, on the plaintiff. It focuses on harm "likely" to be caused by "such conduct." This language speaks to potential harm to future similarly-situated victims if similar conduct is not

deterred by the punitive damages award. Thus, the conservatorship assets of many future victims are at risk if similar conduct is not deterred. In that sense, a higher punitive damages award is justified because although the compensatory damages award was significant, it does not punish the true degree of egregiousness of the misconduct or the risk of loss resulting from it. State Farm, 538 U.S. at 425. The attitude of treating the person presenting the deposits as the customer and doing whatever that person requests without taking the time to verify authority and check for restrictions or even check for restrictive payee language or restrictive endorsements is the real root of the misconduct. This aspect of BOA's misconduct weighs in favor of a likelihood of problems with numerous accounts involving deposits made out to restrictive payees and a large number of potential future victims unless the conduct is changed.

C. The Panel properly interpreted and applied South Carolina law on financial extrapolations.

With regards to the Bank's argument that Branham overruled Bryant v. Waste Management, Inc., 342 S.C. 159, 536 S.E.2d 380 (Ct. App. 2009), when our Supreme Court overrules a decision, it makes it abundantly clear. See e.g., Crossmann Cmty. of N.C. v. Harleysville Mut. Ins. Co., Opinion No. 26909, 2011 S.C. LEXIS 277 (August 22, 2011). Branham did not overrule Bryant v. Waste Management, Inc.

It is BOA rather than the panel which has misinterpreted the full context and import of the statements and rulings made in Branham. In regard to the issue of the wealth and financial data evidence, Branham starts with the proposition "unless the United States Supreme Court holds otherwise under the Due Process Clause, we adhere to South Carolina law that "the wealth of a defendant is a relevant factor in assessing punitive damages." Thus, to the extent the Branham decision notes certain evidence has not been tested since the Supreme Court's decision in State Farm, it is merely acceding to the obvious that if the U.S. Supreme Court's

decision necessarily excludes the evidence on due process grounds, South Carolina will follow. Otherwise, South Carolina is sticking to its pre State Farm law on wealth and financial evidence. Thus, contrary to BOA's position, Branham cannot be read as overruling or disapproving of Orangeburg Sausage Co. v. Cincinnati Ins. Co., 316 S.C. 331, 344, 450 S.E.2d 66, 73-74 (Ct. App. 1994) or Bryant v. Waste Mgmt., Inc., 342 S.C. 159, 169-70, 536 S.E.2d 380, 385-86 (Ct. App. 2000) unless State Farm necessarily requires those decisions to be overruled. Branham declined make that ruling. Instead, it turned to a consideration of the boundaries of wealth evidence considered by the U.S. Supreme Court and concluded at one end, evidence of net worth falls in a clearly admissible safe harbor. At the other end, U.S. Supreme Court law clearly puts evidence of the salaries and compensation of a defendant corporation's officers beyond the limits of constitutionally-admissible financial data. It did not address the range of evidence falling between these extremes, including the evidence at issue in Orangeburg Sausage and Bryant.

Branham had introduced a large number of highly prejudicial figures concerning officer compensation which clearly runs afoul of due process. The court acknowledged that point, but went no further. It left existing South Carolina law on wealth evidence, including Orangeburg Sausage and Bryant, as it stood except to the extent the U.S. Supreme Court law necessarily overturns it. 390 S.C. At 240-241.

State Farm does not overturn either Orangeburg Sausage and Bryant or condemn financial extrapolation evidence. If anything, State Farm favors giving the jury more rather than less information, so it has a context to understand the import of wealth evidence rather than risk a knee-jerk reaction by the jury that a company with a large net worth needs a large punitive damages award to deter further misconduct. The majority opinion explains both the danger of wealth evidence and its legality as follows:

the presentation of evidence of a defendant's net worth creates the potential that juries will use their verdicts to express biases against big businesses, particularly those without strong local presences." ... Our concerns are heightened when the decisionmaker is presented, as we shall discuss, with evidence that has little bearing as to the amount of punitive damages that should be awarded. Vague instructions, or those that merely inform the jury to avoid "passion or prejudice," do little to aid the decisionmaker in its task of assigning appropriate weight to evidence that is relevant and evidence that is tangential or only inflammatory. ... The wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award. ... "[Wealth] provides an open-ended basis for inflating awards when the defendant is wealthy That does not make its use unlawful or inappropriate; it simply means that this factor cannot make up for the failure of other factors, such as 'reprehensibility,' to constrain significantly an award that purports to punish a defendant's conduct.

512 U.S. at 417, 427-428.

Thus, the Supreme Court acknowledges that wealth evidence is lawful and appropriate, but acknowledges concern that wealth evidence presented to the jury without additional information to aid it in assigning appropriate weight to such evidence will lead to awards based solely on bias against big business. Therefore, it follows that State Farm anticipates the presentation of other financial evidence putting net worth evidence in context and does not limit wealth or ability to pay evidence solely to evidence of net worth.

BOA misapprehends the word "militate" and takes it out of context in arguing the phrase "militates against venturing beyond net worth" in Branham means the South Carolina Supreme Court is limiting wealth evidence to evidence of net worth. The word "militate" means to have weight or effect. <http://www.merriam-webster.com/dictionary/militate>. It does not mean to draw a hard line or exclude. Thus, Branham was saying the connection between wealth evidence and the harm done to a plaintiff should be considered and weighed prior to its admission. The Branham plaintiff offered unbalanced financial evidence in the first trial including cash flow and extrapolations from cash flow which the Court found potential for misuse by the jury. Therefore, the court directed such evidence be excluded on retrial.

As argued above, time translates to money for this corporate defendant. Profit is more

closely related to the harm from misconduct in not spending the time, effort, or necessary resources to follow steps to protect a vulnerable customer than net worth is. As the Panel stated, evidence established through BOA's representative that correctly handling these transactions would have taken approximately one hour. Op. 4875 p.9. Presenting evidence of net worth, profit, and extrapolations of profit, as was done here, gives the jury a far more balanced picture of not only the particular defendant's ability to pay but also what it will take to deter this defendant from repeating this type of misconduct in the future. Thus, it logically follows that profit evidence does not offend due process especially when presented along with net worth evidence. See Green v. Laibco, LLC, 192 Cal. App. 4Th 441, 452-453, 121 Cal. Rptr. 3d 415 (2011).

The Court's statement in Branham that South Carolina would confine its admission of wealth evidence only to the extent required by U.S. Supreme Court due process law, indicate if wealth evidence had been limited to profit and reviewed, the Branham court would have found it and extrapolations therefrom admissible, just as it did for extrapolations of net worth.

D. The Panel properly applied the test for willful, wanton or reckless conduct for purposes of punitive damages.

Contrary to BOA's assertions, this court did not base its conclusion the evidence supported a finding of willful, wanton or reckless conduct on the fact that "despite the training given to the employees and the policies and procedures put into effect by BOA regarding conservatorship accounts, mistakes were still made in this instance." (Pet. at 13-14). In the context of the totality of the circumstances outlined extensively in the opinion, the court concluded that evidence at trial, considered in the light most favorable to Cody, showed that a person of ordinary reason and prudence in Yourko's or Lawrence's position would have known she was opening the accounts in contravention to BOA's policies and procedures and without

the safeguards legally mandated to protect a minor's rights. Op. 4875, p.7. In other words, a person of ordinary reason and prudence in Yourko's or Lawrence's position would then have been conscious of opening these accounts in the manner in which they were opened as an invasion of Cody's rights.

A conscious failure to exercise due care constitutes willfulness. When evidence exists suggesting a defendant, aware of a dangerous condition, fails to take action to minimize or avoid the danger, sufficient evidence exists to support a finding of clear and convincing evidence of willfulness. Mishoe v. OHG of Lake City, Inc., 366 S.C. 195, 201, 621 S.E.2d 363 (Ct. App. 2005) citing McGee v. Bruce Hosp. Sys., 321 S.C. 340, 346, 468 S.E.2d 633, 637 (1996) and Welch v. Epstein, 342 S.C. 279, 301, 536 S.E.2d 408, 419 (Ct. App. 2000). Applying the objective, person of ordinary reason standard, there was more than sufficient evidence for a jury to find clear and convincing evidence suggesting that BOA employees repeatedly, and as a matter of their routine habits, failed to take what should have been routine action to minimize the danger of a person lacking authority using restricted funds to open an account giving unrestricted access to the restricted funds of a vulnerable minor under the protection of a court-ordered conservatorship.

In this argument, BOA improperly focuses on a subjective standard of intent for willful, wanton or reckless conduct which is not the standard applied by controlling case law. This court properly focused on the objective Rogers test of a person of ordinary reason and prudence in the actor's position for willful, wanton or reckless conduct recently reiterated in Berberich v. Jack, 392 S.C. 278, 287, 709 S.E.2d 607, 612 (2011). The test applied by this court is the proper one for punitive damages analysis, and it was properly applied in the panel opinion.

II. The Panel properly considered the intervening act rule.

The standard of review on BOA's causation arguments requires viewing the facts and all

reasonable inferences from the facts in the light most favorable to Cody. If a reasonable inference from the facts exists that Cody's loss was the natural and probable consequence of the bank's failure to handle his funds correctly, it was a question for the jury. Mellen v. Lane, 377 S.C. 261, 659 S.E.2d 236 (Ct. App. 2008). Here it was, and the law on both proximate cause and intervening cause was charged to the jury. (R.713-716).

Three main facts, or groups of facts, show what happened here was the natural and probable consequence of the bank's misconduct. First, the BOA Manual by which these employees were trained states "performance losses occur because associates did not follow established policies and procedures." (R. 866). It also states "All associates are to follow precautionary measures when negotiating checks, processing large or suspicious transactions." (R.867). These employees were trained on these safeguards specifically stated in the manual when negotiating checks and opening accounts and had them at their fingertips. BOA's representative testified it had these safeguards in place because its business was to protect customers from individuals who are out to steal. This direct evidence shows the bank planned for this specific occurrence.

Here we do not have a possibility of wrongful or criminal conduct by a third party, we have a concrete probability. Restatement of Torts 2d § 449 states

If the likelihood that a third person may act in a particular manner is the hazard or one of the hazards which makes the actor negligent, such an act whether innocent, negligent, intentionally tortious, or criminal does not prevent the actor from being liable for harm caused thereby.

The likelihood that an unauthorized third person will try to misappropriate restricted funds deposited with the bank is the hazard that makes BOA's failure to abide by restrictions on deposit instruments wrongful, and its failure to use appropriate safeguards to implement the restrictions grossly negligent. Thus, the later criminal wrongdoing of the third party

misappropriating the restricted funds is not an intervening cause which can insulate the bank from liability.

The second main group of facts that proves causation is found in the irregularity of the transactions which put BOA on notice of Unrue's improper conduct. Here we have seven different checks totaling over a quarter of a million dollars. The checks themselves all had designations of "conservator," and each of them had the name of the minor and designated him as a "minor." The BOA manual defines "conservator" as a "court-appointed individual" (R.843). When presenting the three largest checks for deposit, including one for over 100,000.00 spelling out "Co-conservator T. Powell," only one person appeared and only one endorsed the checks. T. Powell's name is found nowhere. (R. 161-162, 164-165, 800, 880). The evidence of points-based commission from Yourko allows for the inference that she chose to ignore the irregularities to gain business. (R. 282-283). Importantly the focus on causation here is not whether she intended to steal when she entered bank, it is rather on the circumstances present at the time the checks were presented to the Bank. Mellen, 377 S.C. 280, 659 S.E.2d at 246.

Additionally, statutory law makes it clear a third party engaging in financial transactions with a conservator is bound by any restrictions endorsed on letters of conservatorship, whether or not she asks for or receives a copy of the letters. S.C. Code Ann. §§62-5-423, 62-5-426 (1976). Thus, a bank failing to ascertain whether letters of conservatorship contain restrictions on conservatorship funds acts at its own peril if it fails to examine a copy of the letter of conservatorship when someone presents checks for deposit clearly made out to a conservator.

Finally, the third group of facts regarding causation address causation in fact. The Panel found BOA did not preserve this issue for review, and Cody does not dispute the panel's finding. However, Kelley, the child's current conservator testified at trial Unrue could not have

stolen Cody's money from BOA the way she did but for BOA's misconduct in setting up his accounts. (R.223). Kelley testified the steps she went through are same steps Unrue would have had to go through. (R. 215). When she went to open a new account for Cody at Carolina First Bank, she kept the court order appointing her as conservator wanting to see if the bank employee would request it. (R.171-172). She also testified to a situation where a Probate Court order approving a disbursement was dropped off at the Andrews bank branch of the Exchange Bank, and the check was presented at the Kingstree bank branch before the Probate Court order got there. The Exchange Bank refused to pay the check. (R.211-212). BOA's own 30(b)(6) witness testified it had the same procedure with restricted accounts stating "when they're going to be touched, of course that's when a court order comes in to tell us to release a certain dollar amount." The Plaintiff's expert witness Bob Hubbs testified if you follow procedures, this won't happen. (R.518).

III. BOA's complicity argument would fail even if it had been preserved.

The court correctly concluded BOA did not preserve some of its arguments for appeal including its complicity argument. Regardless, several of BOA's employees participated in the egregious misconduct which harmed Cody. At least one of these was a branch manager, a "managerial employee." No employee existed in this location of any higher level representing BOA management. Her conduct and attitude toward Cody and his restricted funds mirrored that of the personal banker exhibited one week earlier. She was acting within the scope of her employment when she opened an account following Unrue's request in conflict with multiple BOA policies and procedures. Her action satisfies the third alternative in Restatement of Torts 2d §909. These BOA employees, the Personal Banker and her supervisor, the Branch Manager both testified to the same attitude of setting up new accounts however the person in front of them with the checks requested them to - ignoring any restrictive information on the checks and

all safeguards for financially vulnerable owners of restricted funds. Neither the teller line nor the "operations area" caught the irregularities of these transactions. This evidence allows an inference that BOA ratified the conduct in this case which satisfies the fourth prong of Restatement of Torts 2d §909.

IV. References to BOA's Size at Trial.

The Panel correctly concluded that references to BOA as a big bank were inconsequential and not prejudicial to BOA. These references to BOA as a big bank, the largest bank in America, and the third largest bank in the world were brief, isolated and occurred only a few times over the course of a four day trial. There was no prejudice to the Bank.

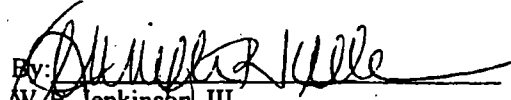
V. Conclusion

For these reasons, Cody Powell respectfully requests that this Court deny the petition for rehearing and rehearing en banc, as this Court's decision does not represent a significant departure from the South Carolina Supreme Court's established jurisprudence regarding either the review of punitive damage awards, or the application of law to the facts in this case.

September 30, 2011

Respectfully submitted,

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM WILLIAMSBURG COUNTY
Court of Common Pleas
Clifton B. Newman, Circuit Court Judge

Case No.: 2003-CP-45-207

Cody Steven Powell, by and through his Conservator Kelly H. Kelley, and his natural
and legal guardian Elizabeth Powell, ...Respondent,

v.

Bank of America, N.A., Karen P. Unrue, and Travis Powell, ... Defendants,
of whom

Bank of America, N.A., is Appellant.

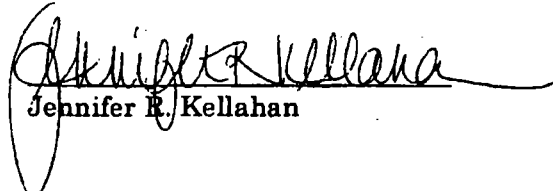
PROOF OF SERVICE

The undersigned hereby certifies that I have served all counsel in this action
with a copy of the pleadings hereinbelow specified via U.S. Mail, postage prepaid to
the following address:

Pleadings: Respondent's Return to Petition for Rehearing and Rehearing *en banc*

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October 3, 2011


Jennifer R. Kellahan

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM WILLIAMSBURG COUNTY
Court of Common Pleas

Clifton B. Newman, Circuit Court Judge

Case No. 2003-CP-45-207

RECEIVED
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SC Court of Appeals

Cody P., by and through his Conservator
Kelly H. Kelley, and his natural and legal guardian
Elizabeth Powell, ... Respondents,

v.

Bank of America, N.A., Karen P. Unrue, and Travis
Powell, ... Defendants.

Of Whom Bank of America, N.A. is Appellant.

APPELLANT'S REPLY TO RESPONDENTS' RETURN TO THE PETITION
FOR REHEARING AND SUGGESTION FOR REHEARING *EN BANC*

Pursuant to Rules 219 and 240(f) of the South Carolina Appellate Court Rules, Appellant Bank of America, N.A. ("BOA") hereby files this reply to Respondents' return to the petition for rehearing and suggestion for rehearing *en banc*. BOA respectfully submits that rehearing and/or issuance of a new opinion reversing the trial court's decision is warranted. The grounds for this petition are that the Panel's opinion in this matter overlooked or misapprehended several matters of fact and law. Additionally, this matter is of exceptional importance and is deserving of rehearing and *en banc* review as the Panel's opinion represents a significant departure from the South

Carolina Supreme Court's established jurisprudence regarding the applicability and constitutional review of punitive damages awards.

ARGUMENT

- I. The Panel's constitutional review of the punitive damages award misapprehended the test set forth in Mitchell v. Fortis Insurance Company and the limitations on financial extrapolations established in Branham v. Ford Motor Company.

In their return, Respondents incorrectly contend that the Panel's review of the punitive damages award comports with the test established in Mitchell v. Fortis Insurance Company, 385 S.C. 570, 686 S.E.2d 176 (2009). In Mitchell, the South Carolina Supreme Court established a three prong test focusing on reprehensibility, ratio, and comparable penalty awards, to be used by this State's courts in conducting a post-judgment review of punitive damages awards. Mitchell, 385 S.C. at 587, 686 S.E.2d at 185.

Respondents fail to acknowledge the clear rule set forth in Mitchell requiring an assessment of the *degree* of reprehensibility. Respondents then suggest that reviewing courts are not required to consider all three of the factors outlined in Mitchell. Respondents further incorrectly assert that the "ratio" analysis comparing the punitive damages award to the actual or potential harm suffered is not limited to the harm suffered *by the plaintiff*, but can be expanded to the actual or potential harm to others. Finally, Respondents misinterpret the limitations established by Branham v. Ford Motor Company, 390 S.C. 203, 701 S.E.2d 5 (2010), on the use of financial extrapolations that extend beyond net worth.

- A. The reprehensibility prong of the Mitchell v. Fortis Insurance Company test specifically focuses on the degree of reprehensibility and the evidence in the record directly contradicts the Panel's reprehensibility analysis.

In their return, Respondents incorrectly contend that "[a]s long as BOA's conduct was reprehensible, regardless of the degree, a punitive damages award may be upheld." {Resp. Return p. 2 (emphasis added)}. This misstates the rule set forth in Mitchell. In describing the "reprehensibility" prong of this test, the Mitchell Court clearly stated that the reviewing court "should consider the degree of reprehensibility." Id. (emphasis added). The degree of reprehensibility is the primary focus of this test. In fact, this is obvious from the fact that the Mitchell Court outlined a five factor test for assessing the degree of reprehensibility. Respondents' arguments should thus be rejected.

The Panel misapprehended the requirement that the degree of reprehensibility be considered, and this warrants rehearing and/or rehearing *en banc* of this matter. The Panel's reprehensibility determination was based upon its finding of financial vulnerability and that the conduct involved repeated actions. {Opinion No. 4875 pp. 13-14}. The Panel specifically acknowledged that the remaining three factors in a reprehensibility determination weighed in favor of BOA. Id. In their return, Respondents claim that it is "unquestionable" that the victim was financially vulnerable. {Resp. Return p. 3}. On this issue, both the Panel and Respondents have overlooked the facts and admission in the record. Respondents' counsel specifically admitted at the hearing on the post-trial motions that "there wasn't any evidence in the record about this child being financially vulnerable." {R. 769 (emphasis added)}. Despite this clear

admission of a lack of any financial vulnerability evidence, Respondents now claim that because the victim was a child and, because a conservatorship was established, it must be *presumed* that financial vulnerability existed. This is incorrect. The fact that a child, due to his or her youth, is physically "vulnerable" does not mean that such child is presumed to be "financially vulnerable." Evidence must actually be presented to the Court to support the financial vulnerability factor. See Leab v. Cincinnati Ins. Co., C/A No. 95-5690, 1997 U.S. Dist. Lexis 8868 *42-43 (E.D. Pa. June 26 1997) (copy attached as Exhibit A).¹ In this case, not only did Respondents' counsel admit that no such evidence was presented, but the evidence in the record directly contradicts the financial vulnerability conclusion. The evidence showed that the conservator was always able to take care of any of the child's needs from the significant other funds available for his care. {R. 209-10, 230}. Respondents and the Panel overlooked and misapprehended this point, and rehearing and/or rehearing *en banc* should be granted.

With regard to the "repeated conduct vs. isolated incident" sub-factor of the reprehensibility analysis, Respondents and the Panel overlooked the evidence in the record and incorrectly concluded that isolated unintentional mistakes that occurred at the inception of the accounts and which resulted in a compounding of errors constitutes "repeated conduct." However, the very purpose of the analysis is to differentiate isolated incidents, which are less reprehensible, from repeated conduct, which is more

¹ The Leab case is cited as an example of persuasive reasoning on this issue. In Leab, plaintiff's counsel argued that it was "obvious [plaintiff] was financially vulnerable, given that she was a young widow with two small children." Leab, at *42. The Leab Court rejected this conclusion holding that "there was no evidence to support this allegation." Id. The Leab Court further noted that, despite the fact that the plaintiff was a young widow, "the court's duty is to ensure that the parties receive a fair disposition of their case based on the evidence presented." Id. Due to the lack of any evidence of financial vulnerability, this factor of the reprehensibility determination weighed in favor of the defendant. Id. at *42-43.

reprehensible. Here, the key mistakes occurred at the inception of the accounts and were isolated. All subsequent actions or errors are not properly categorized as “repeated conduct” as they were merely the natural flowing result of the isolated errors at inception. Respondents’ claim that BOA’s actions constituted “knowing affirmative misconduct” rather than a mere mistake is wholly unsupported by the record and is merely part of Respondents’ continuing effort to support an otherwise improper punitive damages award. {Resp. Return p. 8}. The Panel’s misapprehension of this sub-factor warrants rehearing and/or rehearing *en banc*.

- B. The Mitchell ratio analysis is specifically limited to a comparison of the punitive damages award and the harm or potential harm suffered by the plaintiff, and the harm to others or financial extrapolations unrelated to the plaintiff’s harm are not proper considerations.**

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 first attempt to avoid this analysis by arguing that reviewing courts are neither limited to, nor required to consider, all three of the Mitchell factors. {Resp. Return p. 8}. Respondents are incorrect. When the South Carolina Supreme Court states “we articulate the following test for our courts in conducting a post-judgment review of punitive damages awards,” it could not be clearer that they are establishing a firm test the reviewing courts are required to follow. Mitchell, at 587, 686 S.E.2d at 185. Respondents’ contention that the Mitchell test is merely advisory is meritless.

Respondents then contend that “Mitchell does not require or limit the reviewing

court to comparing the amount of the punitive damages award to the damages of the plaintiff before it.” {Resp. Return p. 10}. Rather, Respondents claim that the reviewing court should consider “potential for harm to others similarly situated.” Id. (emphasis added). Respondents are not only misapprehending the Mitchell ratio analysis, they are suggesting an interpretation that is directly contradictory to the rule that has been firmly established in State Farm v. Campbell, 538 U.S. 408 (2003), Phillip Morris USA v. Williams, 549 U.S. 346 (2007), and Mitchell.

The ratio test set forth in Mitchell requires a comparison of the punitive damages award to “the actual or potential harm suffered by the plaintiff.” Mitchell, at 587-88, 686 S.E.2d at 185 (emphasis added). In setting this standard, the Mitchell court specifically incorporated the rule in State Farm v. Campbell that “punitive damages awards may not be based on out-of-state conduct and 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. at 421-22. Respondents’ suggestion that the ratio analysis should involve potential harm to persons other than the plaintiff was specifically rejected by the Mitchell Court and the United States Supreme Court in Phillip Morris USA v. Williams. The Mitchell Court 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. Respondents also claim that the reviewing court should consider not only present harm to others, but the “future victims” of conduct which has not even occurred. {Resp. Return p. 11}. Mitchell and the United States Supreme Court precedent on this issue expressly reject this view.

Here, the actual or potential harm suffered by Respondents was limited to the funds lost - \$205,735.37. The Panel, however, did not consider the disparity between this amount and the punitive damages award of \$1,583,000.00. Instead, the Panel compared the punitive damages award to an extrapolation of BOA's global income despite the lack of any correlation between this extrapolation and the actual or potential harm suffered by the plaintiff. Respondents attempt to justify this by referring to the adage "time is money." {Resp. Return p. 9}. This adage is not a legal principle, nor does it supplant or justify disregarding the rule set forth in Mitchell for a proper ratio analysis. Because the Panel misapprehended the Mitchell ratio analysis, rehearing and/or rehearing *en banc* should be granted.

- C. The Branham v. Ford Motor Company decision limits financial extrapolations to those based on net worth, and a punitive damages award based on an hourly extrapolation of BOA's global income violates this rule.

In their return, Respondents incorrectly conclude that the South Carolina Supreme Court's decision in Branham v. Ford Motor Company, 390 S.C. 203, 701 S.E.2d 5 (2010), has no effect with regard to financial extrapolations that extend beyond the net worth of a defendant. {Resp. Return pp. 11-14}. Both the Panel and Respondents misapprehend the meaning and effect of the Branham decision. The Branham Court held, with regard to financial extrapolations, that "evidence concerning net worth appears the safest harbor" and that the State Farm v. Campbell decision "militates against venturing beyond net worth and extrapolations from net worth." Branham, 390 S.C. at 240, 701 S.E.2d at 24-25. Respondents suggest that financial extrapolations, such as BOA's hourly global pre-tax income, are permissible because

they merely put net worth "in context." {Resp. Return p. 12}. This is incorrect.

As the Supreme Court stated in Campbell, "the wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award." Campbell, 538 U.S. at 427. This is precisely the situation that is occurring here. The global *income* of BOA is being manipulated to justify an otherwise unsupportable punitive damages award. Additionally, the punitive damages award in this case was based not on evidence or an extrapolation of "net worth," rather it was improperly based on BOA's global pre-tax income. Significantly, in their return, Respondents now incorrectly refer to the sum used as being "profit." {Resp. Return pp. 13-14}. "Profit" is not equivalent to "global pre-tax income." In any event, "income" or "profit" is not net worth. Therefore, the extrapolations used violated the rules established in Branham and Campbell. The Panel's misapprehension of the holding in Branham warrants rehearing and/or rehearing *en banc* of this matter.

II. There was no evidence supporting a finding that BOA and its employees acted in a willful, wanton or reckless manner sufficient to support punitive damages.

In their return, Respondent claim that the evidence at trial established that BOA's employees were *conscious* of the fact that they were opening the accounts in contravention with BOA's policies and procedures. {Resp. Return p. 15}. Respondents further claim that this "consciousness" supports the Panel's conclusion that willful, wanton or reckless conduct sufficient to support the award of punitive damages was established. {Resp. Return pp. 14-15}. The Panel and Respondent misapprehend and overlook the fact that the evidence in the record contradicts any such finding and there is an absence of evidence showing that any BOA employees deliberately or knowingly

disregarded BOA's policies and procedures regarding conservatorship accounts.

There is a key distinction between BOA employees mistakenly failing to do what a person of ordinary reason and prudence would have done, and such employees deliberately or consciously acting in a manner inconsistent with company policy. The former is either mere mistake or simple negligence, and such conduct does not support punitive damages. The latter involves "a present consciousness of wrongdoing" or an action "committed with deliberate intention." Cohen v. Allendale Coca-Cola Bottling Co., 291 S.C. 35, 40, 351 S.E.2d 897, 900 (Ct. App. 1986). While mistakes were made with regard to Respondents' accounts, there was no evidence that BOA's employees were conscious of the fact they were making the mistakes at the time they were made or that they acted deliberately with the intention of incorrectly opening the accounts. Hence, rehearing and/or rehearing *en banc* should be granted.

III. Under the proper application of the intervening act rule, BOA's isolated mistakes were neither the cause-in-fact nor the legal cause of Respondents' damages.

Under the "intervening act rule," an intervening willful, malicious, or criminal act of a third person that was neither intended nor foreseen breaks the causal chain between a defendant's act and the plaintiff's harm. Mellen v. Lane, 377 S.C. 261, 285, 659 S.E.2d 236, 248-49 (Ct. App. 2008). In order for a plaintiff to avoid this break in the causal chain, it must be established that the defendant should have foreseen that the intervening criminal action was either probable or the natural consequence of the defendant's negligence. Id. at 283, 659 S.E.2d at 247-48. There is a key distinction between that which is probable, and that which is merely possible. In order to avoid application of the intervening act rule, the injury suffered must be the probable

consequence, and not a mere possibility. Id. at 284-85, 659 S.E.2d at 248-49. An intervening act is not probable unless it can be "expected to happen." Young v. Tide Craft, Inc., 270 S.C. 453, 463, 242 S.E.2d at 671, 676 (1978) (emphasis added).

In their return, Respondents assert that Karen Unrue's criminal actions were a probability, and not merely a possibility. {Resp. Return p. 16}. This is incorrect. To accept Respondents' view would mean that banks would have to treat *every* transaction they conduct as a probable crime. While criminal actions are a possibility, the mere fact that they can occur and that BOA has policies and procedures designed to avoid their occurrence does not make independent criminal actions probable. Respondents do not look at the particular facts here, which are actually highly improbable. Instead, the Respondents point to the generalized notion that is possible some persons will attempt to steal money from banks when they have the opportunity. The Panel and Respondents overlooked the distinction between probability and possibility and misapprehended the application of the intervening act rule to this matter.

Respondents also contend that "but for" BOA's mistakes in setting up the accounts, Karen Unrue couldn't have stolen the funds. {Resp. Return p. 17-18}. This contention overlooks the fact that it was Ms. Unrue who directed that the account be set up in this manner in contravention with the Court's order. Thus, this was part of Ms. Unrue's overall criminal scheme to steal the funds. Therefore, under both the cause-in-fact and the legal cause determinations, proximate cause is lacking. Because of the Panel's misapprehension of these issues, this Court should grant rehearing and/or rehearing *en banc*.

IV. The BOA employees in question were not “managerial” agents as that term is applied in determining if BOA acted in complicity with its employees sufficient to justify an award of punitive damages.

Under what is commonly referred to as the “complicity rule,” a corporate defendant should not be held liable for punitive damages based on an employee’s wrong unless: (1) the principle authorized the employee’s wrongdoing; (2) the employee was unfit for service and the principle was reckless in employing him; (3) the employee was employed in a managerial capacity and acting within the scope of employment; or (4) the principle ratified the employee’s actions after they occurred. Restatement (Second) of Torts § 909 (1979); Briner v. Hyslop, 337 N.W.2d 858, 861 (Iowa 1983). In their return, Respondents contend that the complicity rule is not applicable to this case because of the third exception above. Specifically, Respondent’s claim that one of the BOA employees was a “branch manager” and that, therefore the “managerial capacity” exception applies. {Resp. Return p. 18-19}.

This argument overlooks the fact that a “branch manager” is not a “managerial” agent as that term is defined for purposes of applying the Restatement’s complicity rule. Rather, a “managerial” agent refers to individuals who manage the corporation as a whole, and does not include persons who merely have limited or subordinate managerial responsibilities, such as a branch manager. Mr. Furniture Warehouse, Inc. v. Barclays Am. Comm., Inc., 919 F.2d 1517, 1524 (11th Cir. 1990) (holding that an assistant vice-president was not a managerial agent because he was one of twenty assistant vice presidents, was subordinate to thirty vice-presidents and senior vice president, and did not participate in the formation of company policy). Thus, the fact that one of the BOA employees was a “branch manager” does not affect the application

of the complicity rule in this matter. This Court should grant rehearing and/or rehearing *en banc* in this matter in order to fully consider whether it has been established that BOA, as opposed to merely its employees, acted in a wanton, willful or reckless manner sufficient to allow punitive damages.

CONCLUSION

Based on the foregoing, and on the arguments in its petition for rehearing and suggestion for rehearing *en banc*, as well as in its appeal briefs filed in this matter, Bank of America, N.A., respectfully requests this Court grant rehearing or rehearing *en banc* as to this Court's opinion in this matter. Rehearing *en banc* is particularly appropriate in this case as the opinion in this matter constitutes a significant departure from the established jurisprudence in this State on the constitutional review of punitive damages awards, which is a matter of exceptional importance.

Respectfully submitted,

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October 17, 2011

Exhibit A



TAMMY S. LEAB, Administratrix of the Estate of EDWARD L. LEAB,
Plaintiff v. THE CINCINNATI INSURANCE COMPANY, Defendant

CIVIL ACTION No. 95-5690

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

1997 U.S. Dist. LEXIS 8868

June 23, 1997, Decided
June 26, 1997, Filed; June 26, 1997, ENTERED

DISPOSITION: [*1] Defendant's Motion for Judgment as a Matter of Law DENIED. Defendant's Motion for a New Trial GRANTED. The Court orders the \$ 5.5 million punitive damages award reduced to \$ 35,000.

COUNSEL: For TAMMY S. LEAB, Administratrix of the Estate of EDWARD L. LEAB, Deceased, PLAINTIFF: RONALD C. MESSMANN, JOSEPH F. RODA, P.C., LANCASTER, PA USA. JOSEPH F. RODA, ROBIN A. JABOUR, RODA & NAST, P.C., LANCASTER, PA USA. ERIC L. KEEPERS, RODA AND NAST, PC., LANCASTER, PA.

For THE CINCINNATI INSURANCE COMPANY, DEFENDANT: F. LEE SHIPMAN, KAREN S. FEUCHTENBERGER, GOLDBERG, KATZMAN & SHIPMAN, P.C., HARRISBURG, PA USA.

For TULLIO GENE LEOMPORRA, RESPONDENT: TULLIO GENE LEOMPORRA, UNITED STATES DISTRICT COURT, READING, PA.

OPINION

MEMORANDUM

JUDGE TULLIO GENE LEOMPORRA, U.S.M.J.

DATED: JUNE 23, 1997

I. INTRODUCTION

Following a four day trial, a jury found that Defendant Cincinnati Insurance Company ("CIC") acted in bad faith when processing the underinsured motorist ("UIM") claim of Plaintiff Tammy Leab in violation of Pennsylvania's bad faith statute, 42 Pa. Cons. Stat. § 8371. The jury awarded Leab \$ 5.5 million in punitive damages. CIC now seeks judgment as a matter of law pursuant to Federal [*2] Rule of Civil Procedure 50, or, in the alternative, a new trial pursuant to Federal Rule of Civil Procedure 59 as well as remittitur of the punitive damages. Leab contends that the jury has spoken and the verdict should stand. Neither party has alleged any trial errors.

1 42 Pa. Cons. Stat. § 8371 provides:

In an action arising under an insurance policy, if the court finds that the insurer has acted in bad faith toward the insured, the court may take all of the following actions:

- (1) Award interest on the amount of the claim from

the date the claim was made by the insured in an amount equal to the prime rate of interest plus 3%.

(2) Award punitive damages against the insurer.

(3) Assess court costs and attorney fees against the insurer.

II. FACTS

Edward L. Leab was killed in an automobile accident on March 6, 1993, while driving a vehicle owned by his employer, Eastern Consolidated & Distribution Services, Inc. ("ECD"). ECD was insured by defendant CIC under which the deceased [*3] was covered and received benefits. By March 18, 1993, Stephen Herb, CIC's field claims representative who had been assigned to process Leab's anticipated UIM claim, recommended that CIC set aside a reserve of \$ 35,000 in order to pay the claim. Pl. Exh. 1-A. Mr. Herb's recommendation was accepted and CIC set aside \$ 35,000.

Within two weeks of the accident, Tammy Leab, wife of Edward Leab, retained Thomas Bright, Esquire. Attorney Bright wrote a letter to ECD dated March 19, 1993 seeking information concerning Mr. Leab's employment, including "the names and addresses of both your Workers' Compensation Insurance carrier and your motor vehicle insurance carrier, together with a copy of the declarations page regarding the tractor Mr. Leab was operating on the date of his death." Pl. Exh. 4. Attorney Bright also wrote a letter dated April 20, 1993 to Mr. Herb requesting a copy of the declarations

page. Pl. Exh. 5. In a letter dated May 5, 1993, Keckler and Reitefuss, Inc., the agency that sold the insurance policy to ECD, sent Attorney Bright a copy of the declarations page. Pl. Exh. 6. That declarations page stated that the insurance policy at issue provided \$ 1,000,000 in automobile [*4] liability coverage, and nonstacked, uninsured and underinsured motorist coverage of \$ 35,000. Attorney Bright then wrote a letter to Mr. Herb dated May 19, 1993, requesting a copy of the signed election form in which ECD agreed to take underinsurance coverage that was less than the liability coverage. ² Pl. Exh. 7.

2 Under Pennsylvania law, the amount of a person's UIM coverage is the same as their liability coverage unless the person makes an affirmative choice to take lower limits. The person purchasing the policy must sign an election or waiver form indicating that they are accepting lower UIM coverage.

On June 1, 1993, CIC paid ECD for the value of the truck that was damaged in the accident and learned that the party responsible for the trucking accident only had \$ 50,000 in liability coverage for bodily injury. Pl. Exh. 8. Due to the severity of Edward Leab's accident, Mr. Herb noted in a status log report that CIC would surely be involved in an underinsured motorist claim "of which we have \$ 35,000 limits." [*5] Id.

Having received no response to his May 19 letter, Attorney Bright followed-up with letters to Mr. Herb dated June 9, and July 15, 1993, and a letter to ECD, the employer of Edward Leab, dated June 23, 1993 requesting copies of the signed election form. Pl. Exh. 9, 10, 11. Attorney Bright also wrote a letter dated July 21, 1993 to CIC's home office seeking a complete copy of the insurance policy, including a copy of the signed election form. Pl. Exh. 13. Having received no response, Attorney Bright once again requested the same information from CIC's home office by letter dated August 10, 1993. Pl. Exh. 14.

By letter dated August 23, 1993, Attorney Bright wrote again to CIC, stating that based on his investigation of the claim, which included the fact that a signed waiver form had not yet been produced, Leab was entitled to, and therefore was making, a demand for \$ 1,000,000. Pl. Exh. 15. Mr. Herb responded to Attorney Bright in an August 31, 1993 letter enclosing a copy of the signed election form dated September 13, 1991. Pl. Exh. 16.

Attorney Bright then sent Mr. Herb letters dated September 20 and October 13, 1993, requesting a certified copy of the insurance policy, [*6] which presumably would include a copy of the signed election form. Pl. Exh. 18, 20. In a status log report dated October 4, 1993, Mr. Herb notified CIC's home office of Attorney Bright's request for a certified copy. Pl. Exh. 19. CIC Claims Supervisor Skidmore requested the certified copy in October 1993, but it was not sent to Joseph Roda, Esquire, until March 4, 1994. Trial Tr. 10/22/96 at 119-20.

3 Martin Skidmore, CIC's regional casualty claims supervisor who worked at the home office, testified that part of the delay in sending Attorney Bright the certified copy was that he wanted to check with Thomas Brenner, Esquire, an attorney who did work on behalf of CIC, to make sure that it would be permissible to send a certified copy to Leab because the ECD policy contained confidential information regarding the insured. Trial Tr. 10/22/96 at 115-19. In fact, in a letter dated August 4, 1993, Mr. Skidmore had requested that Mr. Herb check with Attorney Brenner about sending Attorney Bright a copy of the policy. Trial Tr. 10/23/96 at 66; Def. Exh. 29. After speaking to Attorney Brenner, Mr. Herb was to inform Mr. Skidmore so that he (Skidmore) could order a certified copy of the policy. Thus, Mr. Skidmore had begun the process of obtaining a certified copy of the policy approximately six weeks

before Attorney Bright had formally requested it.

[*7]

4 Attorney Bright referred Leab's case to Attorney Roda in late 1993 or early 1994. Attorney Roda is Leab's counsel of record in this case.

In the certified copy of the policy, the signature page for the election of lower UIM limits was not signed or dated. Id. at 130. On April 28, 1994, Plaintiff Leab filed a Writ of Summons against CIC in the Court of Common Pleas in York County, seeking discovery on whether a proper election of lower limits had been executed in connection with the insurance policy. Trial Tr. 10/24/96 at 103.

After CIC produced documents to Leab in the York County matter, Attorney Brenner spoke with Leab's counsel in July 1994 concerning the unresolved UIM claim. Def. Exh. 13. Attorney Roda's office stated that they needed more time to review the matter and then would get back to Attorney Brenner regarding a possible settlement. Id. In August or September of 1994 CIC offered to settle the UIM claim by paying Leab \$ 35,000 in exchange for a release discharging CIC from paying any additional UIM benefits. Trial Tr. 10/22/96 at 148-49; Def. Exh. 14. CIC Attorney Brenner [*8] sent a letter dated September 6, 1994 to Attorney Roda and spoke with Attorney Roda on October 10, 1994, once again seeking Leab's position on the UIM claim. Def. Exh. 14. By letter dated October 12, 1994, Attorney Roda wrote that he needed to depose several people before addressing CIC's offer of \$ 35,000 to resolve the matter. Def. Exh. 15. Through a variety of scheduling delays that were not the fault of either party, the depositions were not completed until May 1995.

On May 16, 1995, Attorney Brenner, while meeting with Doug Barry and Fred Heitefuss of Keckler and Heitefuss, Inc., the insurance agency, in advance of their depositions in the York County proceeding, found another signed election form that was dated January

1991. Trial Tr. 10/22/96 at 141. In a letter dated May 16, 1995, Attorney Brenner sent Ronald Messmann, Esquire, who was an attorney in Mr. Roda's office, a copy of the election form that was signed January 8, 1991, in which the name of the insured was listed as "Hugo Services, Inc." rather than ECD. Pl. Exh. 32, 32A; Trial Tr. 10/22/96 at 146. Mr. Skidmore testified that "ECD and Hugo's was all one name within the policy itself." Trial Tr. 10/22/96 at 147.

[*9] Leab commenced the instant action against CIC on September 9, 1995, alleging that CIC acted in bad faith in its processing of Leab's UIM claim. The plaintiff contended that a release was not required and defendant acted in bad faith requesting one. During the months of September and October 1995, Attorney Brenner exchanged a series of letters with Attorneys Roda and Messmann, discussing whether a release needed to be signed before payment of the \$ 35,000 in UIM benefits. See Pl. Exh. 40-46. Leab claimed that while it was unlikely she would pursue a claim for \$ 1,000,000 (and she never, at any time, made any claim over the \$ 35,000), CIC had no basis to condition payment of the \$ 35,000 on the signing of a release for all present and future UIM claims. Pl. Exh. 46.

By letter dated November 1, 1995, CIC stated that it would pursue arbitration if Leab did not sign a release in exchange for the \$ 35,000. Pl. Exh. 47. Leab claimed there was no dispute as to the amount owed so no arbitration was necessary but would not sign a release. Pl. Exh. 54. Since Leab refused to select an arbitrator, CIC filed a petition with the York County court requesting that Leab appoint an arbitrator. [*10] Trial Tr. 10/24/96 at 27-28. A hearing was held on February 21, 1996, in which the York County court ordered Leab to appoint an arbitrator within ten days of the hearing date. Id. at 30-32. That same day, after learning of the York County court's decision, Attorney Roda faxed Attorney Brenner a letter accepting CIC's offer to pay Leab \$ 35,000 in exchange for a release absolving CIC of any future UIM claim. Def. Exh. 1(D). After receiving the release, CIC paid Leab \$ 35,000 on

March 4, 1996. The bad faith action that is the subject of these post-trial motions was tried in October 1996, at which time the jury awarded Leab \$ 5.5 million in punitive damages. No compensatory damages were alleged or claimed and none were awarded.

5 The insurance policy had an arbitration provision stating, "If we and an 'insured' . . . do not agree as to the amount of damages, either party may make a written demand for arbitration. Each party will select an arbitrator. The two arbitrators will select a third. If they cannot agree within 30 days, either may request that selection be made by a judge of a court having jurisdiction." Pl. Exh. 23.

[*11] III. LEGAL STANDARD

A. MOTION FOR JUDGMENT AS A MATTER OF LAW

A Motion for Judgment as a Matter of Law pursuant to Federal Rule of Civil Procedure 50 "should be granted only if, viewing the evidence in the light most favorable to the nonmovant and giving it the advantage of every fair and reasonable inference, there is insufficient evidence from which a jury reasonably could find liability." *Lightning Lube, Inc. v. Witco Corp.*, 4 F.3d 1153, 1166 (3d Cir. 1993) (citation omitted). The Motion for Judgment as a Matter of Law is denied. See detailed discussion in the text of this opinion.

B. MOTION FOR A NEW TRIAL

"In general, . . . a new trial [pursuant to Federal Rule of Civil Procedure 59] is committed to the sound discretion of the district court." *Bonjorno v. Kaiser Aluminum & Chemical Corp.*, 752 F.2d 802, 812 (3d Cir. 1984); see also *Garrison v. United States*, 62 F.2d 41, 42 (4th Cir. 1932) ("Verdict may be set aside and new trial granted, when the verdict is contrary to the clear weight of the evidence, or whenever in the exercise of a sound discretion the trial judge thinks this action necessary to prevent a miscarriage of justice."). In cases [*12] where a party is re-

questing a new trial based upon the weight of the evidence, a district court should grant a new trial only if "a miscarriage of justice would result if the verdict were to stand." *Williamson v. Consolidated Rail Corp.*, 926 F.2d 1344, 1352 (3d Cir. 1991). "A court may also grant a new trial if the verdict was the result of erroneous jury instructions, was excessive or clearly unsupported by the evidence, or was influenced by extraneous matters such as passion, prejudice, sympathy or speculation." *Rush v. Scott Specialty Gases, Inc.*, 930 F. Supp. 194, 197 (E.D. Pa. 1996) (citations omitted), rev'd on other grounds, 1997 WL 249175 (3d Cir. May 14, 1997).

CIC makes a myriad of arguments in support of its motions. Essentially, CIC argues:

1. The evidence was legally insufficient to support the jury's finding that CIC acted in bad faith. Alternatively, a new trial should be granted because the finding of bad faith was against the weight of the evidence.

2. A new trial should be granted because an important defense witness, Stephen Herb, was unable to testify at trial. CIC's ability to present an effective defense was severely prejudiced by Mr. Herb's [*13] absence and the court failed to allow a continuance of the trial for his appearance.

3. The evidence was legally insufficient to support an award of punitive damages. Alternatively, a new trial should be granted because the jury's award of punitive damages was against the weight of the evidence and/or grossly excessive. Even if punitive damages are warranted, the amount awarded by the jury shocks the court's conscience so a remittitur is required.

6. CIC also argues that a new trial must be ordered because the court, not the jury, should have decided the issue of whether it acted in bad faith. CIC had previously raised this issue before Judge Robert S. Gawthrop, III, who presided over this case before it was assigned, by consent of the parties, to the undersigned for trial. In an August 2, 1996 Order, Judge Gawthrop denied CIC's motion, and CIC has not raised any arguments in the instant motion that merit reconsideration of this issue.

Neither defendant CIC in its post-trial motions, nor Leab in [*14] her opposition thereto, has made any objection to the admission or exclusion of evidence during the trial, the court's jury instructions, or the conduct of the court or opposing counsel in this case.

CIC's Motion for a New Trial is based on four different grounds:

1. The jury's finding of bad faith was against the weight of the evidence;

2. The unavailability of Stephen Herb;

3. The award of punitive damages was against the weight of the evidence; and

4. The punitive damages award was grossly excessive and therefore unconstitutional.

IV. DISCUSSION

7 It should be emphasized that the court's following discussion of the bad faith and punitive damages issues are necessarily limited by the evidence that was presented at trial. The court is of the opinion that Stephen Herb's testimony, had he been available at trial, could have changed the court's (and presumably the jury's) perception of several key events that are at the heart of this case. The medical absence of Mr. Herb will be discussed herein.

[*15] A. BAD FAITH

The Pennsylvania Legislature did not define bad faith when it passed the statute at issue in this case, 42 Pa. Cons. Stat. § 8371, but its meaning has since been expounded upon in the case law:

'Bad faith' on [the] part of [the] insurer is any frivolous or unfounded refusal to pay proceeds of a policy; it is not necessary that such refusal be fraudulent. For purposes of an action against an insurer for failure to pay a claim, such conduct imports a dishonest purpose and means a breach of a known duty (i.e., good faith and fair dealing), through some motive of self-interest or ill will; mere negligence or bad judgment is not bad faith.

Terletsky v. Prudential Property & Casualty Ins. Co., 437 Pa. Super. 108, 649 A.2d 680, 688 (Pa. Super. 1994), citing *Black's Law Dictionary* 139 (6th ed. 1990) (emphasis added). To recover on a bad faith claim, a plaintiff must prove by clear and convincing evidence that (1) the insurance company did not have a reasonable basis for denying benefits under the policy; and (2) that the insurance company knew or recklessly disregarded its lack of a reasonable

basis for refusing payment. *Id.* (citations omitted).

[*16] CIC asserts that the evidence presented at trial is insufficient as a matter of law to support a finding that it acted in bad faith when processing Leab's claim. In the alternative, CIC seeks a new trial on the ground that the jury's finding of bad faith was against the weight of the evidence. In essence, Leab responds that CIC's insistence on a release before paying the \$ 35,000, its decision to seek arbitration to resolve the UIM claim, and its delay in turning over requested policy information are all sufficient grounds to support the jury's finding that CIC acted in bad faith. As will be discussed in detail below, the court finds that CIC did not act in bad faith by requiring a release and pursuing arbitration.

1. Requiring A Release

CIC argues that since the amount of insurance benefits that Leab was entitled to was the subject of a dispute, it was reasonable for CIC to ask for a release to resolve the UIM claim. Leab contends there was no dispute and that as a minimum, CIC owed \$ 35,000 which was an agreed figure of the parties on the UIM claim. Thus, Leab argues, CIC should have paid this amount without requiring a release for a potentially higher UIM claim of \$ 1,000,000. [*17] Leab also claims that this court has already ruled that it is a jury question as to whether it was reasonable to require a release and that the jury has spoken. The court will address Leab's second argument first.

It is clear that the jury has not specifically spoken on the question of whether CIC's insistence on a release constitutes bad faith. Rather, the written jury interrogatories asked, *inter alia*, "Did the Cincinnati Insurance Company act in bad faith?" Jury Interrog. No. 1. The jury answered "Yes" to this question, but was not asked to give the basis for its decision. Thus, Leab's claim that the jury has already spoken on the "release issue" must be rejected.

Leab also asserts that this court need not reconsider the release issue since it previously denied CIC's motion for summary judgment as well as CIC's motion for judgment as a matter of law made at the close of Leab's case in chief and renewed before the case was submitted to the jury. This argument is unpersuasive and plaintiff cites no authority to support it.

Judge Gawthrop's decision denying CIC's summary judgment motion stated that it was a jury question as to whether CIC acted in bad faith by withholding [*18] undisputed benefits from an insured in order to elicit a release. Judge Gawthrop's decision did not have the benefit of the testimony presented at trial, in which it was made clear that there was a dispute over the amount CIC owed. Accepting Leab's sweeping argument that Judge Gawthrop's decision forecloses this court's consideration of this issue at the post-trial stage would mean that judgment as a matter of law could never be granted to a party whose motion for summary judgment was denied, assuming that the two motions relied on similar grounds. In effect, Leab is arguing that since defendant's motion for summary judgment was denied, the issues of fact are necessarily decided in her favor. This is not the law.

This court's denial of CIC's motion for judgment as a matter of law made at the close of Leab's case in chief and before the case was submitted to the jury also does not foreclose the court's consideration of this issue at the post-trial stage. When the court denied CIC's motion at the close of Leab's case, it did not have the benefit of CIC's testimony concerning the reasonable and customary use of releases. Furthermore, "if, for any reason, the court does not grant [*19] a motion for judgment as a matter of law made at the close of all the evidence, the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion." Fed. R. Civ. P. 50(b) (emphasis added). Thus, the Federal Rules of Civil Procedure have specifically spoken on the issue that the court faces in the instant action, i.e.,

a court's denial of a motion for judgment as a matter of law made at the close of all the evidence does not foreclose it from considering the issue at the post-trial stage. Consequently, it is this court's duty to see if the evidence is sufficient to support the jury's bad faith finding.

The key issue to be determined is whether there was a dispute between the parties as to the amount owed to Leab under the UIM claim. Leab claims that at a minimum, she was owed \$ 35,000 and she should have been paid this amount without having to sign a release. CIC argues that it was reasonable and customary to require a release given the fact that Leab had made a formal demand for \$ 1,000,000 under the UIM policy, a demand made in August 1993 and which had never been formally withdrawn until February [*20] 1996. See Pl. Exh. 15, 46; Def. Exh. 1(D). CIC has consistently taken the position that the UIM limit was \$ 35,000. Thus, there was a dispute over the amount owed under the policy and CIC had the right to try to resolve the dispute. Such action is not bad faith delay. If so, all cases could be charged with mutual bad faith.

8 Leab relies on *Klinger v. State Farm Mutual Auto. Ins. Co.*, 895 F. Supp. 709 (M.D. Pa. 1995) and *Orangeburg Sausage Co. v. Cincinnati Ins. Co.*, 316 S.C. 331, 450 S.E.2d 66 (Ct. App. S.C. 1995) to support her claim that failure to pay an undisputed amount of a claim (in her case, \$ 35,000) constitutes bad faith. However, neither *Klinger* nor *Orangeburg* can be read to support such a per se rule and are factually distinguishable from the present action. *Klinger* held, in ruling on cross-motions for summary judgment, that it was for a jury to decide if an insurance company's failure to make an offer of settlement prior to arbitration was bad faith. *Klinger*, 895 F. Supp. at 715. In the instant action, CIC's offer of settlement (payment of \$ 35,000 in exchange for a release) was on the table long before arbitration was even proposed. In

Orangeburg, the court upheld the punitive damages award based on numerous actions by the defendant, including the fact that the defendant delayed, without explanation, in paying an undisputed amount even though the defendant had set aside reserves for nearly seven times as much. Orangeburg, 450 S.E.2d at 70, 72. By contrast, CIC always claimed the limit on the UIM policy was \$ 35,000, did not set aside reserves in excess of \$ 35,000, and made its position quite clear to Leab--a release must be signed in order for payment to be made. Furthermore, this case does not have elements of fraud and deceit as in the above cases.

On appeal of *Klinger v. State Farm Mutual Auto. Ins. Co.*, No. 96-1702, 1997 WL 307778 (3d Cir. June 10, 1997), the court listed the various delays which it felt justified the punitive damage award. CIC's conduct in the instant action is far less blameworthy than State Farm's conduct in *Klinger*. Unlike State Farm's attorney, CIC's defense counsel promptly advised CIC of Ms. Leab's demands for payment of the UIM claim. As discussed previously, CIC, unlike State Farm, made a reasonable settlement offer (payment of \$ 35,000 in exchange for a release). Moreover, CIC's decision to seek arbitration reflected its intention to resolve the disputed claim once and for all rather than let the claim drag on indefinitely. Thus, a punitive damages award against CIC of the magnitude upheld in *Klinger* would be unjustified.

[*21]

9 Even after taking the depositions that were intended to resolve the question of whether CIC owed \$ 35,000 or \$ 1,000,000, it still was not clear to Leab's counsel that the limit on the policy was \$ 35,000. See Trial Tr. 10/24/96 at 112, 121-122, 124.

When there is a dispute as to the money owed, it is reasonable, customary, and

prudent for an insurer of anyone to get a release as part of the settlement of the disputed claim. ¹⁰ See Trial Tr. 10/24/96 at 146-149 (testimony of CIC's expert, Jeffrey Rettig, Esquire). Moreover, even Attorney Roda's testimony " supports CIC's position of seeking a release when settling a disputed claim:

Q: In those cases that have been resolved before there is arbitration, have they been resolved with the execution of releases?

A [Roda]: In many cases, yes; in some cases, no.

Q: What are those cases that you can recall where they haven't been resolved with releases?

A: Payment of limits, I have said to the counsel for the insurance company that while I know their knee jerk reaction is to say, pay limits, give a release for anything, [*22] that the release is unnecessary where the company is paying the undisputed portion of what it owes because what would be released? Nobody claims there is anything higher.

Q: And that's right, there is no question in those cases, there was no issue about the limits

A: That's right.

Trial Tr. 10/24/96 at 101-102 (emphasis added). Attorney Roda's testimony denying the use of releases in settling claims is simply not credible. As discussed above, in the instant action, there was a dispute over whether the UIM limits were \$ 35,000 or \$ 1,000,000. It was an issue which both parties had to pursue and settle.

10. Leab claims that "evidence of custom and practice may not prevail over the unambiguous language of a

contract." Pl.'s Post-Trial Motion at 23, citing Weston Services, Inc. v. Halliburton NUS Envtl. Corp., 839 F. Supp. 1144, 1148 (E.D. Pa. 1993). As such, Leab argues, CIC could not in good faith require a release because it was not specifically provided for in the insurance policy. Leab's argument misses the point. Whether or not CIC could ask for a release is not contingent upon the language of the insurance policy. Rather, the request for a release was made in order to settle a disputed claim. As CIC's expert, Jeffrey Rettig, Esquire, testified, it is reasonable and customary for a release to be used in this situation.

[*23]

11 The presence of Attorney Roda as a witness was the result of pre-trial discussions at which both attorneys advised that they had several trial matters to discuss. Attorney Roda requested that no mention be made of Mrs. Leab's new marital status. Attorney Shipman agreed. Attorney Shipman stated that he intended to call Attorney Roda as a witness. Attorney Roda objected because it would be inconvenient and expensive to bring another attorney into the case. The Court asked both attorneys if it would satisfy the law if the Court would explain to the jury the different posture of Attorney Roda, the witness, and Mr. Roda, the attorney. The attorneys were satisfied with that explanation. When Attorney Roda was called as a witness, the jury was advised of the agreement and the explanation. Mrs. Leab's marital status was never mentioned, as agreed.

Leab also claims that CIC should have paid the \$ 35,000 without requiring a release because the payment would not have prejudiced CIC had Leab later made a claim for \$ 1,000,000. Nor would a release prejudice the plaintiff since she never, at any time, [*24] had a legitimate claim over the \$ 35,000 that was offered. To the contrary, CIC certainly would have been prejudiced

because it would have had an unresolved coverage claim on its books that it might someday have to defend against. " Signing a release was the only means by which to put an end to the UIM coverage dispute. Without such a release, the dispute could have dragged on even longer, with no finality in sight for either party. Leab was not coerced into signing the release. She was represented by able counsel; and, had she felt she was entitled to \$ 1,000,000 under the policy, she could have refused to release her UIM claim and pursued arbitration, as was required by the insurance policy in cases where there is a dispute over the amount owed.

12 The bad faith statute does not require an insurer to disregard its own interests when processing an insurance claim. See generally, Jung v. Nationwide Mutual Fire Ins. Co., 949 F. Supp. 353 (E.D. Pa. 1997) (summary judgment granted in favor of insurer in bad faith action when insurer had reasonable basis to deny insured's claim).

[*25] As discussed above, to succeed on a bad faith claim Leab needed to prove by clear and convincing evidence " that CIC did not have a reasonable basis for insisting on a release before paying out money, and that CIC knew or recklessly disregarded its lack of a reasonable basis. Given this high burden for Leab to meet, the fact that there was a dispute over the amount owed, and given the testimony concerning the reasonableness of using a release when settling a disputed claim, CIC did not act in bad faith by requiring a release. Furthermore, Leab's insistence on not signing a release unduly prolonged the settlement which plaintiff eventually signed. "

13 Clear and convincing evidence has been defined as follows:

"[The witnesses'] testimony [must be] so clear, direct, weighty, and convincing as to enable the jury to come to a clear conviction, without hesitancy, of

the truth of the precise facts in issue"

In re Estate of Fickert, 461 Pa. 653, 337 A.2d 592, 594 (1975) (quoting La Rocca Trust, 411 Pa. 633, 192 A.2d 409, 413 (1963).

14 Attorney Bright was retained on or about March 19, 1993. In July, 1994, CIC attempted to settle but was advised the plaintiff needed more time. Finally, not having heard of settlement from the plaintiff, CIC, on or about August or September, 1994, offered to settle the claim for \$ 35,000 upon the signing of the release. This offer was rejected because the plaintiff wished to conduct additional discovery and did not wish to sign a release. CIC did not act in bad faith in requesting a release. Finally, after court action by the defendant seeking arbitration, plaintiff did sign the release and received the \$ 35,000 which was the limits under the policy. Whatever delay that was caused by plaintiff needing to satisfy herself that the release was required and that a court proceeding was necessary to accomplish that fact should not be attributable to CIC since its position on settlement had remained the same.

Included in plaintiff's argument about the release was the fact that it included releasing any claim on the demand for \$ 1,000,000. By this time, plaintiff had exhausted every avenue of discovery that could be found and found no evidence that a \$ 1,000,000 coverage was included in the policy and she made no claim on that amount.

Therefore, because the release was signed and proper, because no claim could be made for \$ 1,000,000 coverage and, furthermore, because plaintiff presented no legitimate claim on the \$ 1,000,000 coverage because she had none, the plaintiff had incurred extensive discovery,

disputes and delays with no results. She received what had been promised to her and defendant litigating those issues was pursuing a proper issue which it won; it was not acting improperly, maliciously or with fraud and without conscience.

The next question in parsing this litigation is whether the defendant, in pursuing what it had a right to do, prolonged the dispute enough to be charged with acts of bad faith. Was CIC negligent? Was there fraud? Was there bad faith? CIC admits it was negligent. The negligence that is admitted refers to its poor response to some very simple requests regarding the terms of the policy which covered this situation. It is true that the home office had to contact an insurance agent and the agent had to contact the insurance agency that issued the policy and that the insured had several corporate names and the names represented the same business. Nevertheless, even conceding with the utmost generosity that the handlers of this claim may have botched up its administration more than was necessary for an uncomplicated claim, we must conclude that good faith support was not given to a legitimate claim. See *infra*.

[*26] 2. Seeking Arbitration

Leab contends that CIC's decision to seek arbitration rather than pay the \$ 35,000 that was owed to her was additional evidence of bad faith. CIC claims that under the policy, it had a right to pursue arbitration to resolve the limits of the UIM claim. The arbitration provision in the insurance policy provided, *inter alia*, that if CIC and the insured "do not agree as to the amount of damages, either party may make a written demand for arbitration." Pl. Exh. 23.

As discussed in the previous section, Leab made a written demand for \$ 1,000,000 while CIC took the position that only \$ 35,000 was owed. To be sure,

Leab certainly had a right to pursue the claim for \$ 1,000,000, if she had such a claim, but her course to prove a claim completely failed. Her decision to sign the release proved she did not have a basis for a \$ 1,000,000 claim. On the other hand, it was reasonable for CIC to take the position that it only owed \$ 35,000 since the initial election of lower limits form that had been produced was dated September 13, 1991, which was a year and a half before Mr. Leab's death. Since the positions taken by both parties were reasonable, and given that [*27] the parties' negotiations as well as Leab's York County lawsuit attempting to resolve the question of UIM limits had not settled the issue, either party had a right to pursue arbitration to resolve the disputed claim.

In addition, on February 21, 1996, York County Judge John Uhler held a hearing on CIC's petition requesting Leab to appoint an arbitrator pursuant to the requirements of the insurance policy. At that hearing, Judge Uhler ruled in favor of CIC. Judge Uhler's ruling provides further support for the court's conclusion that CIC's decision to seek arbitration was not made in bad faith. See *Leo v. State Farm Mutual Auto. Ins. Co.*, 939 F. Supp. 1186, 1191 (E.D. Pa. 1996) (no bad faith if defendant makes reasonable request of plaintiff that was proper under terms of insurance policy); *Kauffman v. Aetna Casualty & Surety Co.*, 794 F. Supp. 137, 141 (E.D. Pa. 1992) (since arbitrators awarded plaintiffs less than plaintiffs asked for, no reasonable factfinder could conclude that defendant acted in bad faith in seeking arbitration). Consequently, the court finds that the evidence was legally insufficient for a jury to find, by clear and convincing evidence, that CIC acted [*28] in bad faith in seeking arbitration to determine the limits of the UIM claim. Having concluded that Leab was unable to prove her claim for \$ 1,000,000 and that the release issue was won by the defendant, we now face the damages which Leab did suffer during the exercises in reaching the above results.

3. Delay in Turning Over Requested Documents

The most troubling aspects of CIC's conduct in this case are its repeated delays in turning over documents that were requested by Leab, and that CIC was only able to provide feeble explanations for why three different election of lower-limit forms were produced -- two with different dates, and one that was completely blank.

CIC's failure to respond to Leab's correspondence began with Attorney Bright's letter to Mr. Herb dated May 19, 1993, in which Attorney Bright requested a copy of the signed election form in which ECD agreed to take lower UIM limits. No response was forthcoming from CIC, despite repeated requests from Attorney Bright, until August 31, 1993, more than three months later. Moreover, CIC did not send this election form to Leab until after Attorney Bright made a formal demand for \$ 1,000,000

While Attorney Bright requested [*29] a certified copy of the insurance policy on September 20, 1993, it took CIC until March 4, 1994 to produce a copy. Mr. Skidmore, defendant's regional casualty claims supervisor who was responsible for obtaining the certified copy, attributed the delay due to the file being out for a "variety of reasons." Trial Tr. 10/22/96 at 120. Mr. Skidmore tried to locate the file during this time period, id. at 121, and claimed he was "trying to get it." Id. at 122. That Mr. Skidmore was supposedly unable to obtain a simple certified copy of an insurance policy for over five months despite the fact that he was "trying to get it" defies logic and common sense. The jury's verdict suggests that it did not accept Mr. Skidmore's explanation and the court finds no reason to rule to the contrary. See *PolSELLI v. Nationwide Mutual Fire Ins. Co.*, 23 F.3d 747, 752 (3d Cir. 1994) (delay in responding to communications is one factor to consider to determine if defendant acted in bad faith).

Furthermore, as discussed in Section II, supra, the signature line of the election of lower limits form on the certified copy of the insurance policy

was blank. The blank form undoubtedly raised a question [*30] in Leab's mind as to the actual limits of the policy for the UIM claim. As a result, plaintiff filed a Writ of Summons in York County against CIC seeking discovery on whether a proper election of lower limits had been executed. The York County proceeding was the source of further delay in the settlement of the UIM claim because of the difficulty the parties had in scheduling depositions. "Prior to the completion of the depositions, a third election of lower limits form, this one dated January 1991, was found and produced to Leab. Again, CIC was not able to offer a solid explanation as to why it took over two years after Mr. Leab's death to uncover this form. Notwithstanding the delay, the fact remains, and it was never proven otherwise, that the defendant's standing offer to pay \$ 35,000 in exchange for a release had been rejected by Leab until the result of CIC's York County action persuaded her to sign the release as originally offered.

15 The delay in scheduling the depositions, however, cannot be attributed to any bad faith on CIC's part.

[*31] CIC's tardiness in responding to Leab's requests contributed in part to the lengthy period of time between the date of the first demand and the final payment of the \$ 35,000. While CIC admits that there "was a delay in producing certain requested documents and there were copying errors in some of the documents produced" it characterizes this conduct as negligent, which is legally insufficient to support a bad faith finding. Def. Br. in Supp. of Post-Trial Mots. at 17. Taken together, however, these instances of delay on CIC's part and its inability to explain why three different election forms were produced provide sufficient evidence for a jury to conclude that CIC's conduct constituted bad faith rather than negligent behavior. As such, CIC's Motion for Judgment as a Matter of Law is denied.

B. UNAVAILABILITY OF DEFENSE WITNESS

CIC argues that a new trial is required because a key witness in this case, Stephen Herb, was unavailable to testify at trial because of documented illness. Therefore, CIC claims, its ability to present a defense was severely prejudiced.

During the pre-trial conference, CIC's counsel, F. Lee Shipman, Esquire, requested a continuance of the trial because [*32] Mr. Herb, CIC's field claims representative who was responsible for investigating Leab's insurance claim, would be medically unable to testify at trial. "In support of its request for a continuance, CIC argued that Mr. Herb was CIC's representative most familiar with the investigation of Leab's claim. Furthermore, although Mr. Herb had been deposed twice, these depositions were for plaintiff's discovery purposes only, and therefore, CIC did not question Mr. Herb about the events at issue in this case. In opposition to a continuance, Attorney Roda claimed that Mr. Herb was just a low level claims adjuster who did not make any of the decisions that formed the basis of the bad faith claim. Mr. Herb's actions, Attorney Roda argued, were not in dispute and could be reconstructed based on the documents to be introduced at trial. Prior to trial, this court denied CIC's motion for a continuance relying on Attorney Roda's explanation.

16 Just a few days before the pre-trial conference, Attorney Shipman became aware that Mr. Herb was on a medical leave of absence and not participating in cases for CIC. Subsequently, Attorneys Shipman and Roda spoke by telephone to Mr. Herb's doctor, Dr. Theresa Burick, to see if Mr. Herb would be able to testify or sit for a pretrial deposition. Dr. Burick told counsel for both parties that Mr. Herb had severe hypertension and was suffering from depression. Apparently, Dr. Burick found that Mr. Herb was unable to testify. CIC asked for a continuance of the trial until Mr. Herb was available to testify, but the court denied this request.

[*33] The evidence presented at trial, however, has convinced this court that CIC suffered severe prejudice by not being able to rely on Mr. Herb's testimony in refuting Leab's allegations. Mr. Herb was the person who initially corresponded with Attorney Bright in attempting to process Leab's claim and who requested CIC's home office to send information to Leab's counsel. For instance, Attorney Bright wrote letters to Mr. Herb on May 19, June 9, and July 15, 1993 seeking copies of the signed election form in which Edward Leab's employer agreed to take the lower insurance limits of \$ 35,000 for UIM coverage. These letters were not answered in a timely fashion. To take another example, Attorney Bright wrote to Mr. Herb on September 20, 1993, requesting a certified copy of the insurance policy. Mr. Herb, along with Mr. Skidmore, was intimately involved in the processing of Leab's request for a certified copy of the policy. While Leab claims that Mr. Skidmore was the person who undertook to obtain the certified copy, Mr. Skidmore relied on Mr. Herb to help him meet Leab's request. See, e.g., Trial Tr. 10/22/96 at 117-20 (Mr. Skidmore asks Mr. Herb to consult with legal counsel to determine [*34] if certified copy of insurance policy could be sent to Leab). The certified copy was not sent to Leab's representative until March 1994.

These delays by CIC in sending the employer's signed election form and the certified copy of the insurance policy undoubtedly influenced the jury's finding of bad faith and its punitive damages award. At trial, CIC did not have the benefit of Mr. Herb's explanation as to why there was a delay in these instances of alleged bad faith conduct. See id. at 118 (Mr. Herb was responsible for responding to Attorney Bright and informing him of reason for delay in sending certified copy of policy) and 87-88 (Mr. Skidmore asked about letters from Attorney Bright to Mr. Herb seeking signed election forms). Furthermore, Leab's bad faith allegations also encompassed the fact that CIC produced three different election of lower limits forms in this case. Mr. Herb would have

been one of the people to explain how this could have occurred. Consequently, CIC did not have the opportunity to provide a full defense to Leab's allegations. As such, the court's denial of a continuance was inconsistent with substantial justice."

17 Federal Rule of Civil Procedure 61 provides, in pertinent part (emphasis added):

No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial . . . unless refusal to take such action appears to the court inconsistent with substantial justice.

Allowing the verdict to stand without giving CIC the benefit of Mr. Herb's testimony would be inconsistent with substantial justice. See also *Morgan v. Bucks Associates*, 428 F. Supp. 546, 548 (E.D. Pa. 1977) ("The jury's verdict may be vitiated only if manifest injustice will result if it were allowed to stand.").

[*35] Although Attorney Roda asserts that all of Mr. Herb's relevant actions were documented in exhibits that were introduced at trial, Mr. Herb was the person in the best position to tell the jury why he took particular actions (or inactions) at different times. Furthermore, Mr. Herb's absence at trial prevented CIC from presenting Herb's recollection of any verbal communications that took place between him and agents for Leab and of any actions Mr. Herb took that might not have been documented in the case file." See Trial Tr. 10/22/96 at 100 (letter reflects oral discussions between Mr. Herb and Attorney Bright concerning production of signed election form). In short, the jury

heard all of the evidence concerning the mistakes and delays on CIC's part in processing Leab's claim without having the benefit of a full explanation by Mr. Herb of the reasons for these problems."

18 Mr. Skidmore testified that in his experience, "there are many times conversations and different things that go on that aren't always documented in the file." Trial Tr. 10/22/96 at 121.

19 In other words, a new trial is necessary because the trial that was held "may have resulted in the jury receiving a distorted, incorrect, or an incomplete view of the operative facts Under these conditions there is no usurpation by the court of the prime function of the jury as the trier of the facts and the trial judge necessarily must be allowed wide discretion in granting or refusing a new trial." *Lind v. Schenley Industries Inc.*, 278 F.2d 79, 90 (3d Cir. 1960).

[*36] "A trial judge has discretion to order a new trial when he is convinced that the judicial process has resulted in the working of an injustice upon any of the parties." *Tann v. Service Distributors, Inc.*, 56 F.R.D. 593, 599 (E.D. Pa. 1972). See also *Spence v. Bd. of Educ. of Christina Sch. Dist.*, 806 F.2d 1198, 1205 n.4 (3d Cir. 1986) (Higginbotham, J., concurring), quoting *Schreffler v. Bd. of Educ. of Delmar Sch. Dist.*, 506 F. Supp. 1300, 1306 (D. Del. 1981) ("[A] motion for a new trial may be granted even though there may be substantial evidence to support the verdict if the Court determines that this action is necessary to prevent a miscarriage of justice."). In the instant action, Mr. Herb's testimony would have comprised an essential element of CIC's defense. As the trial progressed, it became increasingly apparent that Mr. Herb's presence at trial was necessary to provide a full explanation of CIC's response to Leab's claim since CIC, as a corporation, could not speak for itself. Counsel for CIC timely requested a continuance after learning of Mr. Herb's medical condi-

tion, and there has been no allegation that the request for a continuance was made in bad faith. [*37] In addition, Leab did not make any assertion that a continuance would have been unduly prejudicial to her. Given these circumstances, the court grants a new trial based upon the unavailability of Mr. Herb. See *Gaspar v. Kassm*, 493 F.2d 964, 969 (3d Cir. 1974) (abuse of discretion for trial court to deny motion for continuance despite defendant's absence due to illness where defendant's testimony was necessary for defense of case, granting of continuance would not have unduly prejudiced other parties, and request for continuance was not motivated by procrastination, bad planning or bad faith by defense counsel).

C. PUNITIVE DAMAGES

1. Sufficiency of Evidence

CIC argues that the evidence presented at trial was legally insufficient to support an award of punitive damages. In the alternative, CIC contends it is entitled to a new trial since the award was against the weight of the evidence. "Since the standard for granting a new trial is 'lower' than that for entering judgment as a matter of law, it is clear that if a new trial is not warranted, the entry of judgment as a matter of law would be improper. For this reason, the court will analyze the [defendant's] arguments [*38] under the new trial standard." *Markovich v. Bell Helicopter Textron, Inc.*, 805 F. Supp. 1231, 1235 (E.D. Pa. 1992), *aff'd*, 977 F.2d 568 (3d Cir. 1992).

The purpose of punitive damages is to punish a defendant for outrageous conduct and to deter it from such conduct in the future. *Tunis Bros. Co. Inc. v. Ford Motor Co.*, 952 F.2d 715, 740 (3d Cir. 1992). Pennsylvania has adopted section 908(2) of the Second Restatement of Torts, which details when punitive damages may be awarded:

Punitive damages may only be awarded for conduct that is

outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others. In assessing punitive damages, the trier of fact can properly consider the character of the defendant's act, the nature and extent of the harm to plaintiff that the defendant caused or intended to cause and the wealth of the defendant.

Id., citing Restatement (Second) of Torts, § 908(2).

As discussed previously in this opinion, CIC did not act in bad faith by requiring a release from Leab as part of the UIM settlement and seeking arbitration when the parties were not able to resolve the dispute over the UIM limits. [*39] As such, there is no basis for an award of punitive damages on these grounds.

On the other hand, during the processing of the plaintiff's UIM claim regarding the \$ 1,000,000 policy and the issue of the release, which issues were resolved against the plaintiff, there were delays that plaintiff says were made in bad faith and that the defendant acknowledges were negligent but not prejudicial to the plaintiff and did not cause her any damages. CIC's delays in responding to Leab's correspondence and its production of three different election forms, without adequate explanation, constitute the type of conduct that an award of punitive damages is designed to punish and deter. Consequently, the court rejects CIC's contention that the jury's decision awarding punitive damages was against the weight of the evidence.

2. Constitutionality of Punitive Damages Award

Alternatively, CIC contends a new trial is required because the magnitude of the jury's punitive damages verdict, \$ 5.5 million, is grossly excessive and therefore unconstitutional. Leab counters that there was more than enough

evidence of CIC's reprehensible conduct to find that the verdict was not grossly excessive.

While [*40] punitive damages may be imposed to punish wrongful conduct and deter its repetition, the amount awarded cannot be so grossly excessive so as to violate due process. *BMW of North America, Inc. v. Gore*, 134 L. Ed. 2d 809, 116 S. Ct. 1589, 1595 (1996). The Supreme Court held that an award of punitive damages enters into the zone of arbitrariness that violates the due process clause only when that award can be fairly categorized as grossly excessive in relation to the interests charged.

The Supreme Court then set out the following three guideposts by which a reviewing court could determine whether the damage award is constitutionally excessive:

1. The degree of reprehensibility of defendant's conduct;

2. The ratio between the plaintiff's award of compensatory damages (representing the actual or potential harm suffered by plaintiff) and the amount of punitive damages; and,

3. The difference between the punitive damages and the award of civil or criminal sanctions that could be imposed for comparable misconduct. 116 S. Ct. at 1598-99.

a. Degree of Reprehensibility

In assessing CIC's conduct, the delays caused by defendant's conduct were all part of the procedure which eventually [*41] resulted in a solution in favor of the defendant, but which prolonged the litigation for both sides.

Added to this is the conduct of the plaintiff in pursuing both the release claims and the amount of coverage in the policy. Both issues were resolved in favor of the defendant. They were not the result of a compromise settlement. Both parties had a right to pursue the disputed claims in which the plaintiff did not succeed and in which the defendant was successful and not reprehensible.

"Perhaps the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct." *Id.* at 1599. In other words, "punitive damages may not be 'grossly out of proportion to the severity of the offense.'" *Id.*, quoting *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 453, 482, 125 L. Ed. 2d 366, 113 S. Ct. 2711 (1993). When assessing the reprehensibility of a defendant's conduct, aggravating factors include whether the defendant engaged in violence or the threat of violence, trickery and deceit, malice, affirmative misconduct, or repeatedly engaged in prohibited conduct while knowing or suspecting it was unlawful. *BMW*, 116 S. Ct. at 1599-1600. [*42]

In the instant action, there was no evidence that agents of CIC acted violently or threatened violence, were deceitful, or engaged in affirmative misconduct. Any harm inflicted on Leab in this case was purely economic in nature. The *BMW* Court did note that "infliction of economic injury, especially when done intentionally through affirmative acts of misconduct, or when the target is financially vulnerable, can warrant a substantial penalty." *Id.* at 1599 (internal citations omitted). Attorney Roda argues that it was obvious Leab was financially vulnerable, given that she was a young widow with two small children, but there was no evidence to support this allegation. While it is likely that the jury's punitive damages award was influenced in great part by the picture of a young widow fighting a large insurance company, the court's duty is to ensure that the parties receive a fair disposition of their case based on the

evidence presented. In this case, there was no evidence presented that Leab was financially vulnerable. The only "evidence" that was presented was plaintiff's counsel's argument regarding Leab. There was no indication or testimony of her financial condition. Plaintiff's [*43] counsel, addressing a jury of seven women and one man, presented the argument of the widow versus the careless insurance company.²⁰ Even with cautionary instruction, it is not difficult to understand the inclination to favor a woman who lost her husband versus a rich insurance company. She was represented by counsel within two weeks of the accident and has been duly represented throughout these proceedings.

20 Furthermore, the \$ 35,000 figure, although disputed, remained consistent and was the amount offered initially. After many delays, the plaintiff finally accepted this amount.

Leab also attempts to portray CIC as a recidivist, since it already has endured a significant punitive damages verdict in a claim where the insured alleged breach of contract, negligence, and bad faith failure to pay insurance benefits. See *Orangeburg Sausage Co. v. Cincinnati Ins. Co.*, 316 S.C. 331, 450 S.E.2d 66, 68 (Ct. App. S.C. 1994) (upholding \$ 1,630,000 punitive damages verdict against Cincinnati Insurance Company). Upon a close examination [*44] of Orangeburg, the court finds that there are significant differences between Orangeburg and the instant action which constrain this court from concluding that CIC engaged in repeated instances of misconduct which it knew to be unlawful. Among other differences, in Orangeburg, there were claims of fraud, malice, dishonesty and substantial bad faith.

By contrast, in the instant action, CIC has consistently taken the position, both internally and in its discussions with Leab, that only \$ 35,000 was owed under the UIM policy. Since CIC took a consistent position throughout this case, CIC cannot be found to have made

false representations to its insured, as was the case in Orangeburg. "

21 While Leab asserts that both cases involve the defendant's attempt to leverage the settlement of a disputed claim by withholding an undisputed amount, this court has already discussed why it was not bad faith for CIC to request a release in exchange for payment and the reasonableness of pursuing arbitration once CIC and Leab could not resolve their dispute.

[*45] CIC's delays in responding to Leab's legitimate requests for information have been extensively detailed in this opinion. These actions, while worthy of sanction, are not sufficiently reprehensible to warrant imposition of a \$ 5.5 million punitive damages award.

b. Ratio Between Plaintiff's Compensatory Damages and the Amount of Punitive Damages

"The second and perhaps most commonly cited indicium of an unreasonable or excessive punitive damages award is its ratio to the actual harm inflicted on the plaintiff." BMW, 116 S. Ct. at 1601 (citations omitted). The Supreme Court has rejected using a simple mathematical approach to determine whether a particular punitive damages award is excessive. See *Pacific Mut. Life Ins. v. Haslip*, 499 U.S. 1, 18, 113 L. Ed. 2d 1, 111 S. Ct. 1032 (1991) ("We need not, and indeed we cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case. We can say, however, that [a] general concern[] of reasonableness . . . properly enters into the constitutional calculus.").

In BMW, the ratio between the punitive and actual damages was 500 to 1. BMW, 116 S. Ct. at 1602. The BMW Court [*46] called this ratio "breathtaking," especially when considering the fact that there was no suggestion the plaintiff or others were threatened with any additional harm due to defendant's conduct. *Id.* at 1602-03. BMW also discussed two other Supreme Court cases that addressed

the issue of the potential excessiveness of a punitive damages award. In *Haslip*, supra, the Court "concluded that even though a punitive damages award of 'more than 4 times the amount of compensatory damages,' might be 'close to the line,' it did not 'cross the line into the area of constitutional impropriety.'" BMW, 116 S. Ct. at 1602, quoting *Haslip*, 499 U.S. at 23-24. In *TXO*, supra, the Court upheld a ratio of 526 to 1 (\$ 10 million punitive damages to \$ 19,000 in actual damages). In upholding the award, the *TXO* Court relied on the fact that had the defendant's tortious plan succeeded, the compensatory award would have been much higher so that the ratio would have been not more than 10 to 1. BMW, 116 S. Ct. at 1602.

The parties have submitted various mathematical formulas for determining the proper ratio which are unusual. Plaintiff contends by releasing the \$ 1,000,000 [*47] claim when Leab signed the release, that amount should be included in determining the harm inflicted on Leab resulting in a ratio of 5.5 to 1 (\$ 5.5 million to \$ 1 million). The defendant takes the position that since no compensatory damages were either sought or awarded in this case, the ratio, no matter how calculated, is far in excess of the constitutional limit. Attorney Roda further asserts that interest is due on the delayed payment of \$ 35,000. There was no evidence on this issue. In addition, the delay was caused by the plaintiff.

Attorney Roda also claims attorney's fees and costs should be considered compensatory damages. Compensatory damages of the type described are equitable remedies. *Fahy v. Nationwide Mutual Fire Ins. Co.*, 885 F. Supp. 678, 681 (M.D. Pa. 1995).

There was no evidence that Leab sustained any financial injury due to the delayed payment or that CIC's conduct would cause her any harm in the future. " In addition, Leab voluntarily signed the release for the UIM claim upon the advice of counsel. Leab was represented by counsel throughout these proceedings, and could have pursued this claim if she

felt she had a legitimate entitlement to \$ 1,000,000 [*48] under the policy. "

22 BMW did note that a low compensatory damages award "may properly support a higher ratio than high compensatory damages awards, if, for example, a particularly egregious act has resulted in only a small amount of economic damages." BMW, 116 S. Ct. at 1602. Here, as discussed previously, CIC did not act in bad faith by seeking a release or pursuing arbitration. CIC's delay in responding to Leab's legitimate requests for information, while troubling, does not amount to the type of egregious behavior that would allow this court to justify the affirmation of the punitive damages award given the exorbitant ratio in this case.

23 Leab asserts that it would have cost her at least \$ 1,000 to arbitrate her UIM dispute, thus making it prohibitively expensive to pursue this claim. The court cannot accept Leab's contention that she did not pursue the UIM claim due to the high cost of arbitration when, just one year earlier, she sought to depose four people--at a cost that was surely in excess of \$ 1,000--in connection with a potential \$ 1,000,000 UIM claim. See Def. Exh. 15. Furthermore, there is no evidence of the financial arrangements she made in pursuing her case. Attorney Roda has submitted a fee of over \$ 136,227 as well as costs of \$ 18,465 which clearly indicates a fee arrangement that would have allowed that case to be pursued if it had any merit.

[*49] Thus, while the ratio between punitive and compensatory damages cannot be calculated with certainty in this case, it is clear that the ratio is far in excess of that seen in BMW, TXO, and Haslip, supra. While a simple mathematical formula cannot be used to determine whether a particular punitive damages award is constitutionally permissible, BMW, 116 S. Ct. at 1602, the

ratio is nonetheless a helpful guidepost in determining whether the punitive damages award is grossly excessive. Here, the ratio suggests that the punitive damages award is grossly excessive and therefore is unconstitutional.

c. Sanctions for Comparable Misconduct

"Comparing the punitive damages award and the civil or criminal penalties that could be imposed for comparable misconduct provides a third indicium of excessiveness." Id. at 1603. In this case, there has been no contention that CIC's conduct would subject it to criminal penalties. In regards to potential civil penalties, Leab lists several bad faith cases from other states with large punitive damages awards as evidence that CIC had reasonable notice that the wrongfulness of its actions could lead to a significant punitive damages [*50] award. Leab relies on Continental Trend Resources, Inc. v. OXY USA, Inc., 101 F.3d 634 (10th Cir. 1996), pet. for cert. filed, 137 L. Ed. 2d 1049, 65 U.S.L.W. 3781 (Mar. 31, 1997) to support her use of other cases to help determine the sanctions for comparable misconduct. Continental Trend noted, however, that it was appropriate to use punitive damages awards from other cases as a means to show that the defendant had reasonable notice because the defendant's "misconduct involved a violation of common law tort duties that do not lend themselves to a comparison with statutory penalties." Id. at 641.

In the instant action, the bad faith claim was made pursuant to a statute promulgated by the Pennsylvania legislature, which has also passed other statutes providing civil penalties for comparable misconduct. Thus, this court should look first to the nature of these penalties as a guidepost to determine whether the punitive damages award in this case was grossly excessive. "

24 The punitive damages award in other bad faith cases can, however, be a useful guide in determining the

amount of the remittitur. See Section IV.C.3., *infra*.

[*51]

The sanctions for comparable misconduct can be found in the Unfair Insurance Practices Act ("UIPA"), 40 Pa. Cons. Stat. §§ 1171.1 et seq., which prohibits unfair methods of competition and unfair or deceptive acts or practices by the insurance industry. Id. § 1171.4. "Unfair methods of competition" and "unfair or deceptive acts or practices" in the business of insurance means, "inter alia, "failing to acknowledge and act promptly upon written or oral communications with respect to claims arising under insurance policies," "if committed or performed with such frequency as to indicate a business practice." Id. § 1171.5(a)(10)(ii). Each violation of this statute carries a penalty of not more than \$ 5,000 if the person knew or reasonably should have known there was such a violation, Id. § 1171.11(1), and not more than \$ 1,000 if the person did not know nor reasonably should have known of such a violation. Id. § 1171.11(2).

The punitive damages award in this case dwarfs the penalties available under the UIPA. "In fact, the difference between the punitive damages award and the statutory penalty (\$ 5.5 million to \$ 5,000 for a knowing violation) is similar [*52] to the differential that was declared unconstitutional in *BMW* (\$ 2 million to a statutory penalty of \$ 2,000). See *BMW*, 116 S. Ct. at 1603. Therefore, the fact that the potential civil penalties are far lower than the amount awarded in this case suggests, but does not compel, the conclusion that the punitive damages award is grossly excessive.

25 It must be stressed that this court is not making a finding that CIC violated the UIPA. Reference to that statute in this opinion is made only as a basis to assess the penalties for comparable misconduct.

When the three guideposts are considered collectively, the court finds

that the punitive damages award is so grossly excessive so as to render the award unconstitutional. In making this determination, the court is persuaded by the exorbitant ratio between the punitive damages award and the harm inflicted on Leab, as well as the gross disparity between the amount awarded and the penalties for comparable misconduct. Consequently, the court must now determine [*53] the maximum constitutionally permissible punitive damages award justified by the facts of this case. See *Continental Trend*, 101 F.3d at 643.

3. Remittitur

Where the verdict is so large as to shock the conscience of the court, the appropriate action for the court is to order plaintiff to remit the portion of the verdict in excess of the maximum amount supportable by the evidence or, if the remittitur [is] refused, to submit to a new trial.

Dunn v. Hovic, 28 V.I. 467, 1 F.3d 1371, 1383 (3d Cir.) (en banc) (internal quotation marks and citations omitted), cert. denied, 510 U.S. 1031 (1993). "Thus, the court must determine the maximum amount that is supported by the evidence--an amount sufficient to meet punitive damages' dual goals of punishment and deterrence.

26 See also *Atlas Food Systems v. Crane National Vendors, Inc.*, 99 F.3d 587, 595 (4th Cir. 1996) ("The court's review of the amount of a punitive damage award should involve comparison of the court's independent judgment on the appropriate amount with the jury's award to determine whether the jury's award is so excessive as to work an injustice.").

[*54]

In deciding the amount of the remittitur, a court may consider the nature

of defendant's conduct, the extent of harm to the plaintiff, the defendant's wealth, and the awards of punitive damages in similar cases. *Dunn*, 1 F.3d at 1391. In this case, the nature of CIC's wrongful conduct has already been discussed at length--not responding to repeated requests for the election of lower limits form and the unexplained delay in turning over a certified copy of the insurance policy. It must be noted, however, that Leab did not suffer any documented financial harm as a result of these delays. Attorney Roda argues that the \$ 5.5 million award should be upheld because a large, wealthy insurance company like CIC requires a significant monetary sanction in order to punish and deter it from future reprehensible conduct. "At trial, it was established that CIC had a net worth of \$ 1.2 billion in 1995, the latest year for which figures were available. Trial Tr. 10/23/96 at 95.

27 Leab quotes with approval the old adage, "You don't send a message to an elephant with a flyswatter."

[*55] Contrary to Leab's assertions, the wealth of a defendant is not, by itself, sufficient justification for the imposition of a large punitive damages award. *Pulla v. Amoco Oil Co.*, 72 F.3d 648, 659 n.16 (8th Cir. 1995). To accept Leab's contention that a punitive damages award against a wealthy corporate defendant must be significant in order to have any effect would mean that any punitive damages award against a Fortune 500 company must necessarily be in the millions of dollars to affect the company's behavior. The law makes no such requirement. Rather, the defendant's wealth is just one factor to be considered in determining the reasonableness of the award. *Tunis Bros.*, 952 F.2d at 740.

Leab also relies on *Orangeburg*, supra, as further evidence of the reasonableness of the \$ 5.5 million award against CIC. The \$ 1.6 million punitive damages award in *Orangeburg* was three tenths of one percent of Cincinnati's net worth at the time of that verdict while the \$ 5.5 million awarded in the instant

action is four tenths of one percent of CIC's net worth. As discussed earlier, the differing factual circumstances between *Orangeburg* and the instant action do not allow [*56] the court to treat the two cases identically. Furthermore, the fact that two different juries give similar awards on virtually identical evidence does not prevent the trial judge from assessing the reasonableness of the awards. See *Atlas*, supra. In *Atlas*, the issue on appeal was "whether the district court abused its discretion in ordering a new trial unless the plaintiff agreed to a remittitur of a \$ 3-million punitive damage award [to \$ 1 million] and, after the plaintiff's rejection of the remittitur and retrial, another new trial unless the plaintiff agreed to a remittitur of a \$ 4-million punitive damage award [to \$ 1 million]." 99 F.3d at 591. The Fourth Circuit Court of Appeals ruled that the district court did not abuse its discretion by ordering successive new trials unless the plaintiff accepted a remittitur. *Id.* at 595. In so holding, the Court of Appeals noted the comparative advantage a trial judge has over a jury in determining the amount of punitive damages. See *id.* at 594 ("The district courts not only see punitive damage awards daily, but themselves are required frequently to impose penalties for punishment and deterrence in a wide array of [*57] circumstances, both in civil and criminal contexts."). Thus, even assuming that *Orangeburg* and the instant action are against the same defendant on a charge of bad faith, the court retains its obligation to order a remittitur if the amount awarded exceeds that supported by the evidence. "

28 Courts in the Third Circuit have ordered significant remittiturs of punitive damages awards when the amount awarded exceeds that which was supported by the evidence. See *Dunn*, supra (trial court orders a remittitur of award from \$ 25 million to \$ 2 million, which is further reduced to \$ 1 million on appeal); *Friedman v. F.E. Myers Co.*, 710 F. Supp. 118 (E.D. Pa. 1989) (trial court orders

remittitur of jury's \$ 750,000 punitive damages award to \$ 30,000).

The punitive damages awards in other cases can serve as a useful guide in helping the court determine the amount of the remittitur. Unfortunately, the case law governing punitive damages awards under the Pennsylvania bad faith statute is limited because [*58] the statute was enacted relatively recently. Neither party cited any cases that discussed the amount of punitive damages awarded pursuant to Pennsylvania's bad faith statute. This court's independent research found only one case that will help assess the reasonableness of the punitive damages award against CIC. See *PolSELLI v. Nationwide Mutual Fire Ins. Co.*, 1995 U.S. Dist. LEXIS 10173, Civ. A. No. 91-1365, 1995 WL 430571 (E.D. Pa. July 20, 1995).

In *PolSELLI*, the court, following a bench trial, awarded \$ 75,000 in punitive damages on the plaintiff's bad faith claim. The court found that the defendant (Nationwide) acted in bad faith by not advancing money to the insured, *PolSELLI*, after determining she was covered under the policy. Nationwide took this course of action even though it had a custom of advancing money owed to destitute insureds for claims and 'was aware of *PolSELLI*'s dire financial need. *PolSELLI*, 1995 U.S. Dist. LEXIS 10173, 1995 WL 430571, at *8. Other grounds for the punitive damages award included Nationwide's delays in participating in settlement negotiations and in responding to plaintiff's communications. *Id.* at *8-9.

Nationwide's conduct in *PolSELLI* was more reprehensible than CIC's because Nationwide [*59] was informed on numerous occasions that the plaintiff did not have a place to live and was forced to rely on the charity of others until Nationwide paid what it owed her. *Id.* at *8. By contrast, there was no evidence introduced at trial suggesting that Leab was financially destitute and needed CIC's payment of the UIM claim in order to survive nor was any requested for that reason. On the other hand, both *PolSELLI*

and the instant action involve situations where there was an unjustifiable delay in handling the insured's claim that rose to the level of bad faith. "

29 See also *Schimizzi v. Illinois Farmers Ins. Co.*, 928 F. Supp. 760 (N.D. Ind. 1996) (court orders remittitur of punitive damages award from \$ 600,000 to \$ 135,000 for tortious breach of insurer's duty to deal in good faith). In *Schimizzi*, the court stated:

The jury reasonably could find that . . . [defendant] handled [plaintiff's] medical bills initially in a cavalier fashion, eventually burying its questions about the bills and the check for a fraction of the bills pending another inquiry from [plaintiff], years after the bills' submission, and many years after the accident and the provision of the medical services. [Defendant] never articulated a principled, rational basis for not paying [plaintiff's] medical bills before this suit was filed.

Id. at 775.

[*60] Finding no support in the case law for a multi-million dollar punitive damages award under the Pennsylvania bad faith statute, Leab cites numerous bad faith cases from around the country in which juries awarded significant punitive damages awards. " A close examination of these cases reveals, however, that the only unifying principle to be drawn is that a court plays a significant role in determining the reasonableness of the jury's award.

30 Although Leab made no attempt to show how the bad faith cases from

other states were based on a similar standard to that used by courts interpreting Pennsylvania's bad faith statute, this similarity will be assumed for the purposes of this discussion.

As an initial matter, it must be noted that several of the cases cited by Leab are unpublished, not included in her court submissions, and could not be located by the court. These cases include *Key v. Prudential*, CV 93-479 (Marshall Cty., Ala. Aug. 28, 1995); *Fellows v. Allstate Ins. Co.*, No. C 259993 (L.A. Cty., [*61] Cal. Nov. 9, 1993); *Santesson v. Beech Aircraft Corp.*, No. 312743 (San Mateo Cty., Cal. 1991); *Clark v. State Farm Fire & Casualty Ins. Co.*, No. WEC 094395 (L.A. Cty. Cal. 1989); *Warren v. Colonial Penn Franklin Ins. Co.*, No. SOC 78890 (L.A. Cty. Cal. 1987); *Satalich v. State Farm Mutual Auto Ins.*, No. 31-76-01 (Cal. Super. Apr. 9, 1984); *Bertolani v. Equitable Life Ins. Co.*, No. 304817 (Sacramento Cty., Cal. Mar. 29, 1984); *Sprague v. Maccabees Mutual Life Ins. Co.*, No. C-218000 (L.A. Cty. Jan. 10, 1983); *Whitmore v. 20th Century Ins. Co.*, No. C-306-467 (L.A. Cty. Aug. 18, 1981); *Norman v. Colonial Penn Franklin Ins. Co.*, No. EAC 22385 (L.A. Cty. Cal. Mar. 11, 1981). See Pl.'s Opp'n to Def.'s Post-Trial Mots. at 35-36 & Exh. 4. The court will not rely on the above-cited cases because there is no way for the court to determine their subsequent disposition. The award may very well have been reduced significantly on appeal (as was true with numerous other cases cited by Leab-see *infra*), settled out of court for a far lesser sum, or became moot due to a variety of circumstances. See *Arizonans for Official English v. Arizona*, 137 L. Ed. 2d 170, 117 S. Ct. 1055, [*62] 1071 (1997), quoting, *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39, 95 L. Ed. 36, 71 S. Ct. 104 (1950) ("When a civil case becomes moot pending appellate adjudication, 'the established practice . . . in the federal system . . . is to reverse or vacate the judgment below and remand with a direction to dismiss.'").

As for the published decisions cited by Leab, the subsequent histories of

these cases demonstrate the key role the court plays in ordering a remittitur of excessive punitive damages verdicts. In other words, Leab errs by relying on the jury's punitive damages award without taking into account how the award fared on appeal. See, e.g., *Dempsey v. Auto Owners Ins. Co.*, 717 F.2d 556 (11th Cir. 1983) (reduction of jury's \$ 3.1 million award to \$ 1.5 million); *Tan Jay Intl., Ltd. v. Canadian Indemnity Co.*, 198 Cal. App. 3d 695, 243 Cal. Rptr. 907 (Ct. App. Cal. 1988) (appellate court affirms trial court's decision to order remittitur of award from \$ 35 million to \$ 500,000); *Central Armature Works, Inc. v. American Motorists Ins. Co.*, 520 F. Supp. 283 (D. D.C. 1981) (trial court reduces jury's award from \$ 2 million to \$ 1 million); *Republic Ins. Co. v. Hires*, 107 Nev. 317, 810 P.2d 790 (Nev. 1991) (jury's [*63] \$ 22.5 million punitive damages award reduced to \$ 5 million on plaintiff's claims of breach of contract, misrepresentation, bad faith, negligence, and invasion of privacy). "

31 In another case cited by Leab, *Blough v. State Farm Fire & Casualty Co.*, 203 Cal. App. 3d 1260, 250 Cal. Rptr. 735 (Ct. App. Cal. 1988), the appellate court reversed a judgment of nearly \$ 10 million, including a punitive damages award of \$ 5.6 million. This case, however, may not be cited pursuant to Cal. Rules of Court 976, 977, and 979.

The \$ 5 million award remaining after the remittitur in *Hires*, *supra*, was meant to punish a defendant's conduct that was far more reprehensible than that seen in the present action. In *Hires*, the evidence demonstrated that the defendant insurance company had a policy of summarily reducing claims paid to low and middle income policyholders, who were less likely to dispute the insurance company's position. *Hires*, 810 P.2d at 792. Furthermore, the insurance company conducted a wide ranging investigation [*64] of the claim even after the police concluded that the insured had not participated in the burglary of his own house. *Id.* at 791-92. The investigation was so invasive that the plaintiff testified his neighbors' attitude toward

him and his family changed as a result. Id. at 792. In the case at bar, there was no evidence that CIC had a policy of unilaterally reducing claims. In fact, plaintiff's claim of \$ 35,000 was offered early in the case and was refused by plaintiff until court action convinced her to accept the release.

The other cases cited by Leab upholding multi-million dollar punitive damages awards all involved situations where the defendant acted far more reprehensibly than CIC. See *Ainsworth v. Combined Ins. Co.*, 104 Nev. 587, 763 P.2d 673 (Nev. 1988) (\$ 200,000 compensatory and \$ 5.939 million in punitive damages in case where insurance company denied initial claim without any investigation, did not consider documentation supporting plaintiff's claim, and knew plaintiff urgently needed claim to be paid); *Moore v. American United Life Ins. Co.*, 150 Cal. App. 3d 610, 197 Cal. Rptr. 878 (Ct. App. Cal. 1984) (\$ 30,000 compensatory and \$ 2.5 million in punitive damages upheld since jury could reasonably [*65] conclude that insurance company's deceptive claims practices were particularly invidious because lay persons would be unlikely to uncover the deception, and company did not change claims review procedures even though it had actual knowledge its procedures misstated California law); *Betts v. Allstate Ins. Co.*, 154 Cal. App. 3d 688, 201 Cal. Rptr. 528 (Ct. App. Cal. 1984) (\$ 500,000 compensatory and \$ 3 million in punitive damages upheld where evidence demonstrated insurance company deliberately concealed adverse reports not only from the other party, but also from its own insured, did not put adverse facts in writing, had a practice of invading an insured's privacy through a process known as "backdooring", and manipulated its own insured both during and after trial).

For its part, CIC's supplemental brief in support of its post-trial motions relies primarily on *Continental Trend*, supra, and *Utah Foam Products Co. v. Upjohn Co.*, 930 F. Supp. 513 (D. Utah 1996). The court in *Continental Trend* ordered a remittitur of a \$ 30 million punitive damages award to \$ 6 million,

which was six times the actual and potential damages plaintiff suffered. *Continental Trend*, 101 F.3d at 643. In [*66] *Utah Foam*, the trial court ordered a remittitur of the jury's \$ 5.5 million verdict to \$ 607,000, which reduced the punitive to compensatory damages ratio from 17 1/2 to 1 to a ratio of 2 to 1. *Utah Foam*, 930 F. Supp. at 532. While both *Continental Trend* and *Utah Foam* involve far different factual circumstances than the instant action, the cases still support the proposition that a punitive damages award can be subject to a remittitur if there is an excessive ratio between punitive and compensatory damages. As discussed in Section IV.C.2.b. supra, the ratio between the punitive damages awarded and the actual or potential harm suffered by Leab is far in excess of that seen either in *Continental Trend* or *Utah Foam*.

After considering all of the factors discussed above, including the reprehensibility of CIC's conduct, the extent of harm to Leab, CIC's wealth, and awards made in similar cases, the court concludes that the jury's \$ 5.5 million punitive damages award shocks the court's conscience and requires a new trial. In any event, the court feels that an award of \$ 35,000 would be adequate. This amount is sufficient to punish CIC for its wrongful conduct [*67] and deter it from engaging in such activity in the future.

V. CONCLUSION

This case was tried by very able counsel from both sides who vigorously represented the interests of their clients. While the court is understandably hesitant to disturb a jury's verdict, the interests of justice require the grant of a new trial due to the absence of Stephen Herb and the grossly excessive award of punitive damages. An appropriate order follows.

BY THE COURT:

TULLIO GENE LEOMPORRA

United States Magistrate Judge

ORDER

And now, this 23rd day of June, 1997, upon consideration of Defendant's Motion for Judgment as a Matter of Law and Motion for a New Trial, and Plaintiff's Opposition thereto, it is HEREBY ORDERED as follows:

1. Defendant's Motion for Judgment as a Matter of Law is DENIED.

2. Defendant's Motion for a New Trial is GRANTED.

3. The Court orders the \$ 5.5 million punitive damages

award reduced to \$ 35,000. If the Plaintiff does not accept the remittitur within twenty (20) days from the date of this order, a new trial is also granted on the excessive punitive damages award.

BY THE COURT:

TULLIO GENE LEOMPORRA

United States Magistrate Judge

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM WILLIAMSBURG COUNTY
Court of Common Pleas

Clifton B. Newman, Circuit Court Judge

Case No. 2003-CP-45-207

RECEIVED
OCT 17 2011
SC Court of Appeals

Cody P., by and through his Conservator Kelly H.
Kelley, and his natural and legal guardian Elizabeth
Powell, ...

Respondents,

v.

Bank of America, N.A., Karen P. Unrue, and Travis
Powell, ...
Of Whom Bank of America, N.A. is, ...

Defendants,

Appellant.

PROOF OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson
Mullins Riley & Scarborough LLP, attorneys for Bank of America, N.A. do hereby
certify that I have served all counsel in this action with a copy of the pleading(s)
hereinbelow specified via U.S. Mail, postage prepaid to the following address(es):

Pleadings:

**Appellant's Reply to Respondents' Return to the
Petition for Rehearing and Suggestion for Rehearing
*En Banc***

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Lisa P. Whitehurst
Administrative Assistant

October 17, 2011

The South Carolina Court of Appeals

Cody Powell, By and through his
Conservator Kelly H. Kelley, and his
natural and legal guardian Elizabeth
Powell,

Respondents,

v.

Bank of America, N.A., Karen P.
Unrue, and Travis Powell, Defendants,

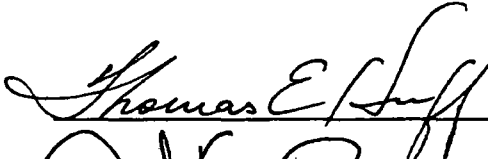
of whom Bank of America, N.A. is the, Appellant.

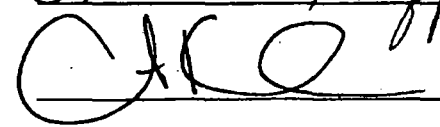
The Honorable Clifton Newman
Williamsburg County
Trial Court Case No. 2003-CP-45-00207

ORDER DENYING PETITION FOR REHEARING

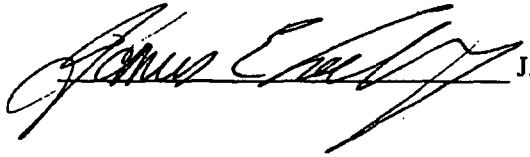
PER CURIAM: After a careful consideration of the Petition for Rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded and hence, there is no basis for granting a rehearing.

It is, therefore, ordered that the Petition for Rehearing be denied.



J.


J.

A handwritten signature in black ink, appearing to read "James E. McGee, III", with a horizontal line drawn through the middle of the signature.

Columbia, South Carolina

cc: C. Mitchell Brown, Esquire
Clarence Davis, Esquire
T. William McGee, III
A. Mattison Bogan, Esquire
Helen Tyler McFadden, Esquire
Ronnie Alan Sabb, Esquire
W.E. Jenkinson, III, Esquire
Jennifer Kellahan, Esquire

FILED
December 12, 2011

APPEAL FROM WILLIAMSBURG COUNTY
Court of Common Pleas

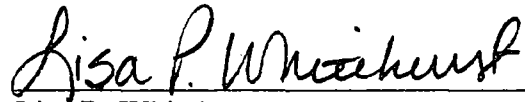
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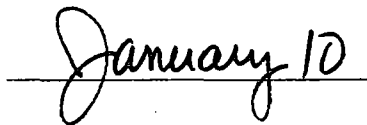
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, 2012