THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Casey L. Manning, Circuit Court Judge

Case No. 2009-CP-40-1477

Willie Mae Scott, individually and as Personal Representative of the Estate of Vernon Sulton, ... Respondents,

v.

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

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Statement of Issues

1. Did the Trial Court err in instructing the jury that Appellants owed a heightened duty of care?

2. Did the Trial Court err in refusing to use Appellants' proposed verdict form and instead using a flawed verdict form?

3. Did the Trial Court err in refusing to enter a judgment in favor of all Appellants on the loss of consortium claim based on the jury's selection of "none of the above" on the verdict form?

4. Did the Trial Court err in failing to grant Appellant HealthSouth Corporation JNOV or a new trial on the loss of consortium claim where there was no evidentiary support for the jury's supposed $4,000,000 actual damages award?

5. Does the jury's punitive damages award, which could only apply to the negligence claim, apply to the individual Nurse Appellants where there was no finding by the jury, by clear and convincing evidence, that any of the individual Nurse Appellants acted in a reckless, willful or wanton manner?

6. Did the Trial Court err in failing to grant Appellant HealthSouth Corporation a directed verdict or JNOV on the issue of punitive damages where there was insufficient evidence to sustain any punitive damages award because HealthSouth Corporation's liability was premised entirely on the acts of its employees, there was no finding sufficient to support a punitive damages award as to the individual Nurse Appellants, and HealthSouth Corporation cannot be properly held to be vicariously liable for punitive damages?

7. Did the Trial Court err in allowing Respondents to refer to the overall net revenue of HealthSouth Corporation during the punitive damages argument where no evidence on this issue was actually admitted and net worth, as opposed to net revenue, is the only proper consideration?

8. Did the $8,000,000 punitive damages verdict (26.1 times the applicable compensatory damages) violate HealthSouth Corporation's Constitutional rights to due process?

Statement of the Case

This appeal involves a medical malpractice action arising from an eleven day hospitalization at HealthSouth Rehabilitation Hospital following Respondent Vernon Sulton[1] ("Sulton") suffering from gunshot wounds and his initial treatment at a different hospital, Palmetto Richland Hospital ("Palmetto Richland"). Respondents' Complaint was filed on March 3, 2009, and amended on August 3, 2009. (Compl., Am. Compl.; R. ___). Respondents alleged that Appellants HealthSouth Corporation ("HealthSouth"), and six of HealthSouth's Nurses, Kathy Hoover, Lisa Page, Sharon Miller, Kim Harris, Betty Casteal, and Norine Corbin ("the Nurse Appellants") were negligent in allowing Sulton's stage 2 decubitus ulcer to advance to a stage 4 decubitus ulcer ("the ulcer" or the "pressure ulcer") during his hospitalization at HealthSouth. (Am. Compl. at ¶¶ 6-10; R. ___). The Amended Complaint consisted of two claims, with Sulton asserting a claim for negligence seeking actual and punitive damages, and Respondent Willie Mae Scott ("Scott") asserting a claim for loss of consortium seeking actual damages. (Am. Compl. at ¶¶ 11-14; R. ___). These claims were asserted against HealthSouth solely under the theory of *respondeat superior* and/or agency. (Am. Compl. at ¶¶ 2-3, 7; R. ___).

A jury trial was held before the Honorable Casey L. Manning from July 26 through July 30, 2010. At the close of Respondents' case, both Appellants and Respondents moved for directed verdict, and both motions were denied. (Tr. pp. 491-495; R. ___). Directed verdict motions were again made by both Appellants and

[1] Sulton died from causes unrelated to this lawsuit prior to the trial, and his Estate was substituted as the Plaintiff.

Respondents at the close of all evidence, and both motions were again denied by the Trial Court. (Tr. pp. 738-743; R. ___).

On July 30, 2010, the jury rendered a verdict, the meaning of which is in dispute. Specifically, on Sulton's negligence claim, the jury found for Sulton and against all of the Appellants, and awarded $306,693.25 in economic damages, but zero non-economic damages. (Verdict Form; R. ___). On Scott's loss of consortium claim the figure of $4,000,000 in non-economic damages is written on to the form. (Verdict Form; R. ___). As is explained below, Appellants contend that the verdict form must be read to be a total defense verdict on the loss of consortium claim. Additionally, the jury awarded $8,000,000 in punitive damages that could only apply to Sulton's negligence claim, as that was the only claim in which punitive damages were sought or could be awarded. (Am. Compl., Verdict Form; R. ___). Additionally, the punitive damages award was sought only as to HealthSouth, and not against the individual Nurse Appellants. (Verdict Form, Tr. p. 864; R. ___). On August 2, 2010, the Trial Court entered a Form 4 Order to which the jury's verdict form was attached, but which provided no explanation as to the meaning of the verdict and which provided no statement as to what, if any, judgment was rendered as to any of the Appellants. (Form 4 Order entered 8/2/10; R. ___).

On August 3, 2010, Respondents filed a post-trial motion seeking a new trial *nisi additur* as to the jury's verdict of zero non-economic damages on Sulton's negligence claim. (Plaintiff's Motion Nisi Additur; R. ___). On August 9, 2010, Appellants filed post-trial motions seeking a correct interpretation of the jury's verdict, judgment notwithstanding the verdict ("JNOV"), new trial absolute, and new trial nisi

remittitur. (Defendants' Motion for Judgment, New Trial Absolute or, in the Alternative, for New Trial Nisi Remittitur, Defendants Memorandum in Support of Post-Trial Motions; R. ___). On August 16, 2010, the Trial Court held a hearing on the post-trial motions, and denied all motions. The Trial Court's Form 4 Order denying all post-trial motions contained no explanation as to the meaning of the jury's verdict form and no statement as to the specific judgment that was to be entered as to any of the Appellants. (Form 4 Order denying Post-Trial Motions entered 8/17/10); R. ___). Appellants timely filed and served their Notice of Appeal on September 2, 2010.

Statement of the Facts

I. Facts Relating to Sulton's Injury and Treatment at HealthSouth.

On December 15, 2005, Sulton suffered multiple gunshot wounds which left him a paraplegic with no feeling from the chest down and limited use of his arms (Am. Compl. ¶4, Tr. p. 385; R. ___). Sulton was hospitalized at Palmetto Richland from December 15, 2005 until February 2, 2006, at which time he was transferred to HealthSouth Rehabilitation Hospital ("HealthSouth"). (Am. Compl. ¶4; Tr. p. 354; R. ___). On his arrival at HealthSouth, Sulton was diagnosed as already having a Stage 2 decubitus ulcer on his lower back. (Am. Compl. ¶ 6; Tr. pp. 203-05; R. ___).

There are four stages to what is commonly referred to as a pressure ulcer. At Stage 1, it is a red area of skin without any breakdown. (Tr. p. 128; R. ___). At Stage 2, there is some breakdown in the top layers of the skin. (Tr. p. 129; R. ___). Stage 3 involves more breakdown extending though the dermis layer of the skin into the epidermis. (Tr. p. 129; R. ___). At Stage 4 the breakdown extends through the skin. (Tr. p. 129; R. ___). As was noted by Respondents' expert witness, Nurse Ann

Muers, depending on the circumstances, even with reasonable care, a pressure ulcer can develop through all four stages. (Tr. pp. 222-23; R. ___). As Appellant's expert, Dr. Kurt Gambla, testified, the term "pressure ulcer" is actually a misnomer, as such ulcers are not solely caused by pressure. (Tr. p. 691; R. ___). Rather, pressure is merely one of many factors that can lead to the condition, and many of those other factors were already present in Sulton due to his various medical conditions. (Tr. pp. 691-93; R. ___). As Dr. Gambla testified, at the time Sulton came to HealthSouth, his pre-existing ulcer was likely to escalate, even with optimal care. (Tr. pp. 693-94; R. ___).

HealthSouth took numerous measures to treat Sulton's ulcer. Specifically, in addition to repositioning of the patient, HealthSouth initially treated Sulton's pressure ulcer through the application of comfeel dressings and the immediate use of a Rim Air mattress. (Tr. pp. 216-17, 504, 526-27, 531, 588-89, 636, 639, 678, 693; R. ___). The comfeel dressing, which is a dressing designed to facilitate wound healing for conditions such as pressure ulcers, was to be changed every three days, in accordance with its standard use. (Tr. pp. 531-32, 588-89, 636; R. ___). A Rim Air mattress is a mattress with varying air compartments that causes movement so there is a constant repositioning of the patient to offload pressure. (Tr. pp. 216-17, 504; 526-27, 588, 639, 678, 693; R. ___). Significantly, it was not common for a patient to be immediately placed on a Rim Air Mattress. (Tr. p. 526; R. ___). By February 7, 2006, upon noting that the ulcer was continuing to worsen, Sulton was provided an even more sophisticated Power Turn Elite bed, which, in addition to having varying air compartments like the Rim Air mattress, is more effective in providing a constant

repositioning of the patient. (Tr. pp. 168-69, 213, 638-40; 679, 681-82, 693; R. ___). Additionally, by February 9, 2006, the comfeel dressing was upgraded to silvadene dressings, which are medicated dressings designed to help with the healing of open wounds and which were ordered to be changed twice per day (Tr. pp. 603-04, 637-38, 680; R. ___). HealthSouth also sought to address the pressure ulcer though physical therapy, nutrition, and on February 10, 2006 arranged for a consultation with a plastic surgeon to take place later that month. (Tr. pp. 638-39, 641-42, 688; R. ___)

Sulton remained at HealthSouth until February 13, 2006, when he was transferred back to Palmetto Richland because of a possible heart attack. (Tr. pp. 176; R. ___). After arriving at Palmetto Richland, Sulton's ulcer was diagnosed as having increased to Stage 4. (Tr. p. 178; R. ___). Sulton underwent multiple subsequent hospitalizations at Palmetto Richland, Intermedical Hospital, Palmetto Health Baptist, and Lexington Medical Center for his various medical conditions, including, in part, treatment relating to the pressure ulcer such as a flap procedure to address the wound and a colostomy to prevent fecal contamination of the wound. (Tr. pp. 278-79, 340-45; R. ___). The ulcer was completely healed by the summer of 2006. (Tr. pp. 341-42, 391; R. ___). Mr. Sulton died from causes unrelated to the ulcer on February 6, 2010.

Numerous witnesses, including Respondents' experts, testified that HealthSouth had proper policies and procedures in place regarding the prevention and treatment of pressure ulcers and that these policies were not faulty. (Tr. pp. 128; 257; R. ___). The issue at trial was whether the nursing staff had properly following those policies and procedures. (Tr. p. 257; R. ___). The nurses and other witnesses testified that they were aware of HealthSouth's policies and procedures in this area and knew that they

were expected to follow the policies and procedures. (Tr. pp. 405-06, 435, 454, 461-63; 617; R. ___).

II. Facts Relating to Scott's Loss of Consortium Claim

Respondent Willie Mae Scott was Sulton's common law wife and asserted a claim for loss of consortium in this matter. (Am. Compl. ¶¶ 13-14; Tr. pp. 326-27, 362; R. ___). Scott had worked as a nursing assistant for over forty years before retiring in 2010, with her last job involving providing daily care to a patient in his home. (Tr. pp. 362, 383; R. ___). Prior to the shooting that left him paralyzed, Sulton had suffered from numerous health problems, including high blood pressure, heart problems, and mini-strokes (Tr. pp. 316, 321-22, 352, 366, 384). Due to his paralysis, Sulton's income was limited to social security disability. (Tr. p. 327; R. ___).

Prior to Sulton being transferred from Palmetto Richland to HealthSouth, Scott was unaware that Sulton had already developed a stage 2 pressure ulcer. (Tr. p. 368-69). Scott learned of Sulton's pressure ulcer when Sulton was transferred from HealthSouth back to Palmetto Richland due to a possible heart attack, and testified that seeing the ulcer caused her to be "upset". (Tr. pp. 372-74; R. ___). However, Scott testified that, during his treatment, Sulton was in good spirits, laughing, and was "uplifted." (Tr. pp. 370, 388-89; R. ___).

Sulton had a colostomy from 2006 until his death and Scott assisted him with the changing of his colostomy bags. (Tr. pp. 377-78; R. ___). Scott had previously provided colostomy care to patients in the course of her job as a nursing assistant. (Tr. p. 392; R. ___). Scott acknowledged that, where a person is incontinent but does not

have a colostomy, it is then necessary to undergo the messy and frequent process of changing that person's diapers and linings, and that the lack of a colostomy made hygiene difficult. (Tr. pp. 392-93; R. ___). Scott further acknowledged that, as a result of his gunshot wounds, Sulton had lost all feeling below his chest. (Tr. p. 385; R. ___). Thus, as was acknowledged by the experts in this case, Sulton's paralysis resulting solely from the gunshot wounds would have necessitated either a colostomy or the constant use of diapers. (Tr. pp. 291, 700-01; R. ___).

Significantly, Scott offered no evidence of any loss of Sulton's companionship, aid, society and services, specifically related to the pressure ulcer. Having been permanently rendered a paraplegic due to the gunshot wounds, Sulton's physical limitations were essentially unchanged by the temporary existence of the pressure ulcer. Despite the existence of the pressure ulcer, Sulton remained in high spirits and able to communicate with Scott. (Tr. pp. 388-89; R. ___). His social security disability income was unaffected by the pressure ulcer. (Tr. p. 327; R. ___).

III. Facts Relating to the Trial Court's Erroneous Jury Charge

During a conference on the proposed jury instructions Appellants specifically objected to the inclusion of Respondents' Request to Charge No. 15, which requested that the Trial Court instruct the jury that healthcare providers had a heightened duty of care to prevent injury to patients where the there is a risk of substantial danger present. (Tr. pp. 750-51; R. ___). Appellants' counsel noted that the jury would already be instructed that the appropriate standard in this case was reasonable care, and that this additional charge would "confuse the jury and they're going to believe that there was some higher duty that applied to the defendants in this case other than what the medical

malpractice standard actually is." (Tr. p. 751; R. ___). Despite this objection, the Trial Court instructed the jury that:

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

(Tr. p. 842; R. ___) (emphasis added). Appellants renewed the objection to this "heightened duty" charge following the completion of the jury instructions (Tr. p. 847-48; R. ___).

IV. Facts Relating to the Erroneous Verdict Form

Prior to this case being submitted to the jury, counsel for both sides submitted proposed verdict forms to the Court. (Tr. pp. 753-55; R. ___). Appellants' proposed verdict form contained five numbered paragraphs, the first four of which posed specific questions as to: (a) whether negligence had been established by a preponderance of the evidence as to each of the seven defendants; (b) whether proximate cause of the plaintiffs' injuries/damages had been established by a preponderance of the evidence as to each of the seven defendants; (c) whether grossly negligent, reckless, willful or wanton conduct had been established by clear and convincing evidence as to each of the seven defendants; and (d) the jury's determination of the actual damages for (i) Sulton's negligence claim (broken down by economic and non-economic damages), and (ii) Scott's loss of consortium claim (non-economic). (Appellants' Proposed Verdict Form; R. ___). The fifth paragraph provided the jury with the option of providing a total

defense verdict as to all claims. (Appellants' Proposed Verdict Form; R. ___). Thus, under Appellants' proposed verdict form, the jury would have been required to make specific findings of the necessary elements of Respondents' claims as to each individual defendant, and would have had the ability to find for or against each defendant individually. The jury could also have been given the option to render a total defense verdict.

In contrast, the verdict form supplied by Respondents and ultimately used by the Trial Court appeared as follows:

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND	)	
Willa Mae Sulton, as PR for the Estate of Vernon Sulton, Plaintiffs,	)	Civil Action No.: 09-CP-40-1477
vs.	)	
HealthSouth Corporation d/b/a HealthSouth of SC, Inc. d/b/a HealthSouth Rehabilitation Hospital, Kathy Hoover, RN, Lisa Page, RN Sharon Miller, RN, Kim Harris, RN, Betty Casteal, RN and Norine Corbin, RN, Defendants.	)	VERDICT FORM

JEANETTE W. McBRIDE C.C.P. & G.S. 2010 AUG -2 PM 2:18

1. We the jury find for the Plaintiff, the Estate of Vernon Sulton, and against the Defendant HealthSouth Corporation d/b/a HealthSouth of SC, Inc. d/b/a HealthSouth Rehabilitation Hospital and the following:

(Check any that apply)

✓ Kathy Hoover, RN
✓ Lisa Page, RN
✓ Sharon Miller, RN
✓ Kim Harris, RN
✓ Betty Casteal, RN
✓ Norine Corbin, RN
___ NONE OF THE ABOVE

And award $ 306,693.25

(Three Hundred six thousand [illegible] and six hundred ninety three dollars and twenty five cents dollars) in *ECONOMIC* damages

And award $ 0.00

(Zero dollars) in *NON-ECONOMIC* damages.

2. We the jury find for the Plaintiff, Willie Mae Scott, and against the Defendant HealthSouth Corporation d/b/a HealthSouth of SC, Inc. d/b/a HealthSouth Rehabilitation Hospital and the following:

(Check any that apply)

_____ Kathy Hoover, RN

_____ Lisa Page, RN

_____ Sharon Miller, RN

_____ Kim Harris, RN

_____ Betty Casteal, RN

_____ Norine Corbin, RN

✓ NONE OF THE ABOVE

And award $ 4,000,000

(Four Million dollars) in *NON-ECONOMIC* damages.

3. Do you find by clear and convincing evidence that Defendant HealthSouth Corporation d/b/a HealthSouth of SC, Inc. d/b/a HealthSouth Rehabilitation Hospital, by and through its employees was reckless, willful, or wanton and that their conduct was proximate cause of injury to Plaintiff?

✓ YES

_____ NO

If NO, go on to question number 4.

If YES, stop deliberations.

4. Do you find by a preponderance of the evidence that Defendant HealthSouth Corporation d/b/a HealthSouth of SC, Inc. d/b/a HealthSouth Rehabilitation Hospital, by and through its employees was grossly negligent, reckless, willful or wanton and that their conduct was a proximate cause of injury to the Plaintiff?

_____ YES

_____ NO

Richard Rowe #303
Foreperson

Columbia, South Carolina

Dated: 7 - 30, 2010

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND	))	Civil Action No.: 09-CP-40-1477

FILED
2010 AUG -2 PM 2:18
JEANETTE W. McBRIDE
C.C.P. & G.S.

Vernon Sulton and Willie Mae Scott,

Plaintiffs,

vs.

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

Defendants.

VERDICT FORM

1. We the jury award punitive damages in the amount of $ 8,000,000 . Eight Million Dollars

Richard Rose #303
Foreperson

(Verdict Form; R. ___). The first two numbered paragraphs of this verdict form contain "statements" rather than questions. (Verdict Form; R. ___). Significantly, aside from the option of "NONE OF THE ABOVE," this verdict form provided no other mechanism for the jury to find ***for*** HealthSouth on either Sulton's (paragraph No. 1) or Scott's claims (paragraph No. 2). Additionally, with respect to paragraphs Nos. 3 and 4, there was no indication on the form as to which claims the questions applied and no provision for independent findings as to the individual Nurse Appellants. Thus, the verdict form provided **no finding of proximate cause** as to any of the individual Nurse Appellants, and **no finding by clear and convincing evidence or willful, wanton or reckless conduct** by any of the individual Nurse Appellants.

Appellants specifically objected to Respondents' proposed verdict form, noting that Respondents' form was "confusing" and lacked separate questions on the issues of negligence and proximate cause as to the specific defendants. (Tr. p. 753; R. ___). Over Appellants' objection, the Trial Court declined to use Appellants' proposed

verdict form and instead submitted Respondents' verdict form to the jury. (Tr. pp. 753-55, 843-45; R. ___). In addition to Respondents' verdict form, the jury was also provided with a form that would have allowed a total defense verdict as to all claims. (Tr. p. 802; R. ___). These verdict forms were explained to the jury during the Trial Court's jury instructions. (Tr. pp. 843-45; R.___). Appellants renewed their objection to the use of Respondents' verdict form following the jury instructions and the submission of the form to the jury. (Tr. pp. 847-48; R. ___).

On the issue of liability and actual damages as to Sulton's negligence claim (paragraph No. 1 of the Verdict Form), the jury placed check marks by all six of the Nurse Appellants' names, and awarded $306,693.25 in economic damages, and zero non-economic damages. (Verdict Form ¶1; R. ___). As to Scott's loss of consortium claim (paragraph No. 2 of the verdict form), the jury selected only "NONE OF THE ABOVE," but then wrote in $4,000,000 in non-economic damages. (Verdict Form ¶2; R. ___). As to Paragraph No. 3, the jury answered the question "YES," resulting in no response being made on paragraph No. 4. (Verdict Form ¶3; R. ___).

V. Facts Relating to the Punitive Damages Award.

By agreement of the parties, the issue of punitive damages was bifurcated from the issue of liability and actual damages. (Tr. pp. 744-45; R. ___). Following receipt of the liability and actual damages verdict form from the jury, the trial then moved into a brief punitive damages phase. (Tr. pp. 859-72; R. ___). Respondents' counsel acknowledged at that time that Respondents needed to "get some evidence of ability to pay." (Tr. p. 859; R. ___). During this punitive damages phase, however, no

witnesses were called and no evidence of any kind was actually admitted. Rather, it was limited to additional argument by the parties' counsel. (Tr. pp. 863-67; R. ___).

Respondents' counsel sought to have the HealthSouth Corporation's 2009 10-K form admitted into evidence. (Court Exhibit No. 5; Tr. p. 860; R. ___). This was 10-K form for HealthSouth Corporation as a whole, and it was not limited to the specific HealthSouth hospital in question or HealthSouth's South Carolina operations. (Court Exhibit No. 5; R. ___). Appellants' counsel objected stating:

> We object to the admission of this information because number one this is a very complicated exhibit. I don't know if, You Honor, has had a chance to look at it but there are numerous rows of numerous financial figures and several columns dating over several years, some in parenthesis some not in parenthesis, some with complicated terms. I don't think there's anyway for the jury just looking at this will be able to tell it's proper -

(Tr. p. 860; R. ___). The Trial Court then noted that the 10-K form showed a "bottom line" of $1.9 Billion. (Tr. p. 860; R. ___). The figure to which the Trial Court was referring was an entry for HealthSouth Corporation's 2009 "net operating revenue" showing $1,911,100,000. This figure, addressing ***revenue***, did not account, of course, for HealthSouth's costs and expenses, which, when taken into account, showed that HealthSouth's actual total net income in 2009 was the significantly lower figure of $94,800,000, and that when HealthSouth's assets were compared to its debts and obligations, there was actually a ***negative*** shareholder deficit of almost $1 Billion. (Court Exhibit No. 5; R. ___).

Appellants' counsel again objected noting that other portions of the 10-K actually showed "negative shareholder equity in the company" and that Respondents had not brought in an expert witness to properly interpret the information on the form,

resulting in it being "confusing" and "prejudicial" as well as impermissibly seeking to have the jury consider the wealth of HealthSouth as a basis for imposing punitive damages. (Tr. p. 861; R. ___). The Trial Court then, over the express objection of Appellants' counsel, decided that instead of admitting the 10-K form into evidence (or admitting any evidence whatsoever), Respondents were permitted to present in their punitive damages argument the fact that HealthSouth's revenue was $1.911 Billion in 2009. (Tr. pp. 861-62, 865-66; R. ___). Appellants' counsel objected to this statement during the argument. (Tr. pp. 865-66; R. ___). Thus, Respondents were permitted to present the jury with the largest possible number, without admitting any actual evidence or providing any explanation as to its actual meaning. Respondents' objection to the reference to HealthSouth's revenue was renewed again following the Trial Court's charge to the jury regarding punitive damages. (Tr. p. 872; R. ___).

The only claim under which Respondents sought or could have received punitive damages was Sulton's negligence claim. (Am. Compl.; R. ___). While the jury's verdict on that claim was against ***all*** of the Appellants, the jury's finding of wanton, willful or reckless conduct by clear and convincing evidence, necessary to support any punitive damages award, was limited to Appellant HealthSouth. (Verdict Form ¶3; R. ___). This fact was actually noted by Respondent's counsel in his punitive damages argument, wherein he stated: "This is - your verdict was against HealthSouth Corporation and this is not about the individual nurses anymore either. This is about HealthSouth Corporation." (Tr. p. 864; R. ___). A punitive damages verdict form containing the statement "[w]e the jury award punitive damages in the amount of $[blank]" was submitted, and the jury completed it with an award of $8,000,000.

Argument

I. A New Trial Should Be Granted Because The Trial Court Erred In Instructing the Jury That Appellants Owed A Heightened Duty of Care.

Over Defense objection, the Trial Court erroneously instructed the jury that Defendants had a heightened duty of care as to Mr. Sulton due to his pre-existing condition. (Tr. pp. 750-51, 753, 842, 847-48; R. ___). Specifically, the Trial Court charged the jury that:

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

(Trial Transcript at p. 842).

A trial judge is required to charge only the current and correct law of South Carolina. Clark v. Cantrell, 339 S.C. 369, 390, 529 S.E.2d 528, 539 (2000); McCourt v. Abernathy, 318 S.C. 301, 305, 457 S.E.2d 603, 606 (1995). Reversal is appropriate where the Trial Court's decision regarding jury instructions constituted an abuse of discretion, in that the Trial Court's ruling is based on an error of law, and where the appealing party is prejudiced by this error. Cole v. Raut, 378 S.C. 398, 404-405, 663 S.E.2d 30, 33 (2008). "A jury charge consisting of irrelevant and inapplicable principles may confuse the jury and constitutes reversible error where the jury's confusion affects the outcome of the trial." Id. at 404, 663 S.E.2d at 33.

The Trial Court's charge to the jury that Appellants had a "greater duty" as to Sulton's care does not reflect the law of South Carolina. Rather, this charge erroneously elevated the applicable standard of care based on the existence of a "degree of danger" and invited the jury to punish Appellants based upon their alleged failure to meet a standard of care not imposed by South Carolina law. Medical malpractice is defined in South Carolina as "the failure of a physician to exercise that degree of care and skill which is ordinarily employed by the profession generally, under similar conditions and in like surrounding circumstances." Burrough v. Worsham, 352 S.C. 382, 402, 574 S.E.2d 215, 225 (Ct. App. 2002) quoting Jernigan v. King, 312 S.C. 331, 333, 440 S.E.2d 379, 381 (Ct. App. 1993). "The degree of care which must be observed is, of course, that of an average, competent practitioner acting in the same or similar circumstances." King v. Williams, 276 S.C. 478, 482, 279 S.E.2d 618, 620 (1981). The "heightened duty" instruction given to the jury is contrary to this established law.

This precise issue and this ***exact same charge*** were addressed by the South Carolina Supreme Court in Pittman v. Stevens, 364 S.C. 337, 613 S.E.2d 378 (2005), where the Court held this specific charge was inappropriate in a medical malpractice action. The charge in question comes from Section 27-2 of Judge Ralph King Anderson, Jr.'s South Carolina Requests to Charge. In Pittman, the plaintiff requested that this identical charge be given and, ultimately, the trial court refused to do so. The plaintiff then appealed after the jury returned a verdict for the defense, arguing that it was error for the court to not provide this charge. The Supreme Court disagreed, stating that, while this charge is contained in Judge Anderson's book, there is no

specific citation of authority supporting this principle. Id. at 341, 613 S.E.2d at 380. The Court then stated that "there is no South Carolina case law supporting its application in a medical malpractice action." Id. at 342, 613 S.E.2d at 380-81. The Court noted that, even in a general negligence context, this type of instruction had been questioned and further stated that "this instruction is ***even more inappropriate in a medical malpractice case***" because "[e]very medical decision encompasses varying degrees of danger." Id. at 343, 613 S.E.2d at 381 (emphasis added).

Significantly, the facts in Pittman involved alleged medical malpractice with regard to a patient who was at risk to, and who did, develop a pressure ulcer, as is the case here. ***Thus, the South Carolina Supreme Court has specifically rejected the application of this exact charge in virtually identical circumstances.*** By including this charge, the Trial Court erroneously instructed the jury that the law imposed a "greater duty" on the Defendants based upon Sulton's existing condition. Whether the Appellants breached their duty was the essential determination made by the jury in this case. Therefore, this improper instruction was highly prejudicial to the Defendants. Baker v. Weaver, 279 S.C. 479, 309 S.E.2d 770 (Ct. App. 1983) (finding the trial court's erroneous charge to be prejudicial where the requested instruction involved a substantial feature of the case).

II. A New Trial Should Be Granted Because The Verdict Form Was Flawed.

Appellants should be granted a new trial because the verdict form submitted to the jury was fatally flawed in a variety of respects, and this error resulted in a confused verdict and clear prejudice to the Appellants. In South Carolina, a verdict form "may be so defective in its formulation that its submission results in a prejudicial effect which

constitutes reversible error." S.C. Dep't of Transp. v. First Carolina Corp. of S.C., 372 S.C. 295, 303, 641 S.E.2d 903, 907-908 (2007). When evaluating the prejudicial effect of a defective verdict form, "the court must consider the question or interrogatory along with the instructions given to the jury." Id. at 303, 641 S.E.2d at 908. The verdict form used in this matter was defective and misled the jury, resulting in improper liability determinations and damage awards.

At trial, both sides submitted proposed verdict forms to the Trial Court. (Tr. pp. 753-55; R. ___). The Appellants' proposed verdict form would have allowed the jury to make *separate* determinations as to *each individual defendant* on the issues of: (a) negligence; (b) proximate cause; and (c) the establishment by clear and convincing evidence of reckless, willful, and wanton conduct. (Appellants Proposed Verdict Form; R. ___). Had Appellants form been used, there would be no issue as to the meaning or effect of the jury's verdict. The jury could have found that all, some, or none of the Defendants were negligent, or that their conduct was or was not the proximate cause of Plaintiffs' injuries, or that their conduct met or failed to meet the threshold for punitive damages.

In contrast, Respondents' verdict form did not allow for specific findings by the jury on the key matters to be determined. Rather, without any reference to negligence or loss of consortium, the jury could find "for" the Plaintiffs and "against" HealthSouth and the six Nurse Appellants. (Verdict Form ¶¶ 1-2; R. ___). Under both of these selections, the jury could pick and choose which of Nurse Appellants they "found against" or they could choose the option of "NONE OF THE ABOVE." Significantly, aside from the provision of "NONE OF THE ABOVE," the verdict form did not did

not provide a clear option for the jury to find in favor of HealthSouth. Instead, the "statements" contained in paragraphs 1 & 2 of the verdict form implicitly ***required*** the jury to find against HealthSouth, leaving only the determinations as to the Nurse Appellants for the jury's determination. (Verdict Form ¶¶ 1-2; R. ___). As Respondents' motions for directed verdict had been denied by the Trial Court, this presumption of liability as to HealthSouth was both improper and highly prejudicial. (Tr. pp. 491-95, 738-43; R. ___). The jury was placed by the verdict form in the position of automatically finding against HealthSouth as to various claims. The only option for it not to do so was the option of granting a total defense verdict as to ***all defendants*** on ***all claims***.

The verdict form also failed to require the jury to make any determination of proximate cause as to the individual Nurse Appellants. The jury was not asked to determine whether reckless, willful or wanton conduct had been established by clear and convincing evidence as to any of the Nurse Appellants. Instead, paragraph 3 of the verdict form merely posed the question:

> Do you find by clear and convincing evidence that Defendant [HealthSouth], by and through its employees was reckless, willful, or wanton and that their conduct was the proximate cause of injury to Plaintiff.

(Verdict Form ¶3; R. ___). Thus, the only determination of proximate cause or reckless, willful or wanton conduct, made by the jury was as to HealthSouth alone.

Appellants objected to the verdict form, specifically noting that it was confusing and failed to properly separate the issues as to the separate defendants, however, the Trial Court rejected Appellants' proposed form and instead used the Respondents'

form. (Tr. pp. 753-55, 843-45, 847-48; R. ___). This was error. Stevens v. Allen, 342 S.C. 47, 52 n.4, 536 S.E.2d 663, 665 n.4 (2000)_ (noting that inconsistent verdicts from the jury were exacerbated by a verdict form which failed to separately inquire as to the defendants' liability on each cause of action and encouraging members of the bar to submit verdict forms that are more specifically tailored to the facts of the case). The result of this error was jury confusion and clear prejudice to the Appellants. The form required the jury to "find for" the two plaintiffs without any identification of their distinct claims of negligence and loss of consortium. Additionally, the jury was provided with no clear method to find for HealthSouth on either cause of action. Rather, absent a total defense verdict, HealthSouth's liability was presented to the jury through the verdict form as already established. Additionally, the absence of any individual determinations of proximate cause or reckless, willful or wanton conduct as to the individual Nurse Appellants improperly suggested that no such findings were needed.

The confusing effect of the verdict form is evidenced by the jury's responses to paragraphs 1 and 2. In paragraph 1, the jury "found for" Sulton and "against" all of the Appellants (although no option to find for HealthSouth was provided). (Verdict Form ¶1; R. ___). However, in paragraph 2, the jury was effectively required to "find for" Scott and "against" HealthSouth, but the jury actually selected "NONE OF THE ABOVE." (Verdict Form ¶2; R. ___). As discussed in Section III of this brief, Appellants contend that the "NONE OF THE ABOVE" selection must be interpreted as a finding by the jury in favor of ***all*** of the Appellants, including HealthSouth, despite the figure of $4,000,000 in non-economic damages written onto the form.

Respondents, however, contend that this was a verdict against just HealthSouth on the loss of consortium claim despite that fact that no other option, other than "NONE OF THE ABOVE," existed for the jury to find "for" HealthSouth in these circumstances.

When a jury's verdict is so confused that it is not absolutely clear what was intended, a new trial should be granted. Anderson v. Aetna Cas. & Surety Co., 175 S.C. 254, 178 S.E. 819, 830 (1935); Camden v. Hilton, 360 S.C. 164, 173, 600 S.E.2d 88, 93 (Ct. App. 2004); see also Sarvghad v. Sitton Buick Co., Inc., 312 S.C. 429, 440 S.E.2d 894 (1994) (holding that a new trial was warranted where the jury returned single verdict in consolidated actions for negligence brought by plaintiff individually and as guardian ad litem for infant son). In this case, the verdict form is "so defective in its formulation that its submission result[ed] in a prejudicial effect which constitutes reversible error." First Carolina, 372 S.C. at 303, 641 S.E.2d at 907-908; see also Chastain v. Anmed Health Found., 388 S.C. 170, 694 S.E.2d 541, 543 (2010) (reducing the verdict amount where, based on the instructions and the verdict form, it was impossible to determine the number of negligent acts or negligent nurses found by the jury). Therefore, Appellants should be granted a new trial.

III. The Jury's Verdict on the Loss of Consortium Claim Must be Interpreted As a Total Defense Verdict.

The only reasonable interpretation of the loss of consortium verdict is that it was a verdict in favor of ***all*** of the Appellants, specifically including HealthSouth. It was error for the Trial Court to interpret it as a verdict against only HealthSouth, and this verdict should have resulted in judgment being entered in favor of all the Appellants on this consortium claim.

In addition to providing places for individual findings for or against the Nurse Appellants, the verdict form contained the option of "NONE OF THE ABOVE." (Verdict Form ¶ 2; R. ___). The jury selected "NONE OF THE ABOVE" on the loss of consortium claim. HealthSouth must have been included in the "NONE OF THE ABOVE" category. To hold otherwise would result in a verdict form wherein the jury had no option other than finding against HealthSouth on that claim. Such would be a defective verdict form requiring a new trial. Thus, either the verdict form was fatally flawed because it required a finding against HealthSouth, or it must be interpreted as including HealthSouth in the "NONE OF THE ABOVE" determination by the jury.

From Appellants' perspective, the meaning of "NONE OF THE ABOVE" as including HealthSouth was obvious and clear. "None of the above" is rationally interpreted as "none" of the Appellants, which would include HealthSouth. While not listed with a blank beside it, HealthSouth was referenced "above" the "none of the above" line on this portion of the verdict form. However, even if because of the flawed nature of the verdict form the jury's verdict was ambiguous, the Trial Court cannot impose its own interpretation of the verdict. Instead, a new trial is necessary.

Significantly, the Form 4 Order entered by the Trial Court fails to state what the jury's verdict was or what specific verdicts were rendered against which of the Appellants. (Form 4 Order entered 8/2/10; R. ___). Therefore, in their post-trial motions, Appellants asked for judgment to be entered in favor of all defendants as to the loss of consortium claim based on the jury's verdict. (Defendants' Post-Trial Motions and Supporting Memorandum; R. ___). During the hearing on the post-trial motions, the Trial Court rejected Appellants' view that the loss of consortium verdict

was a total defense verdict. (Hearing on Post Trial Motions Tr.; R. ___). Rather, the Trial Court took the view that it was a $4,000,000 verdict against only HealthSouth. (Hearing on Post Trial Motions Tr.; R. ___). Thus, the Trial Court ignored the only reasonable interpretation of the jury's "NONE OF THE ABOVE" determination, and instead substituted its own view and interpretation. This was in error.

Where the court is faced with an ambiguous verdict, "[t]he court cannot construe the verdict of the jury, nor can it 'correct' the verdict." Stevens v. Allen, 336 S.C. 439, 451, 520 S.E.2d 625, 631 (Ct. App. 1999). In such circumstances, if the court believes the verdict to be ambiguous, the court must resubmit the case to the jury, not act as a substitute for the jury. Id.; Johnson v. Phillips, 315 S.C. 407, 417 n.7, 433 S.E.2d 895, 902 n.7 (Ct. App. 1993). Having failed to resubmit the issue to the jury, the only avenue for amending or correcting the jury's verdict is through a motion for a new trial. Camden v. Hilton, 360 S.C. 164, 173, 600 S.E.2d 88, 93 (Ct. App. 2004).

On its face, the jury's verdict has but one obvious meaning. "NONE OF THE ABOVE" means ***none*** of the defendants identified. This must include HealthSouth, and cannot logically be limited to only the Nurse Appellants. If HealthSouth is not read to be included in "NONE OF THE ABOVE," then the form was fatally flawed in that it required the jury to find against HealthSouth on the loss of consortium claim by not providing any other mechanism for an independent jury finding for HealthSouth on that

claim only[2]. Thus, HealthSouth is either entitled to JNOV on the loss of consortium claim, or a new trial is required.

IV. HealthSouth Should Be Granted JNOV On The Loss Of Consortium Claim Or At Minimum A New Trial Because There Is No Evidentiary Support For The Loss Of Consortium Verdict.

The jury's $4,000,000 verdict in non-economic damages in favor of Scott is unsupportable based on the nature of her claim and the evidence at trial. A claim for loss of consortium is ***not*** a claim for personal injury *to the claimant*. Rather, it is a claim which allows the claimant to recover the value of the loss of "companionship, aid, society and services" resulting from a personal injury *to the claimant's spouse*. S.C. Code Ann. § 15-75-20. The only non-economic damages recoverable for loss of consortium are those which compensate the claiming spouse for the loss of the injured spouse's services, society, and companionship. Gosnell v. Dorchester School District No. 2, 301 S.C. 21, 23-24, 389 S.E.2d 865, 866 (1990). The proper measure of damages has been described as the spouse's right to the services of the injured spouse and for expenses incurred, Hughey v. Ausborn, 249 S.C. 470, 477, 154 S.E.2d 839, 842 (1967).

Additionally, the damages recoverable for loss of consortium **do not** include any emotional distress allegedly suffered by Scott.[3] Nothing in the record supports a

[2] There was another option to render a verdict for HealthSouth, but it was only an option to render a verdict for all Appellants as to all claims.

[3] While South Carolina's Courts have not directly stated that mental anguish is not included in a loss of consortium claim, the decision in Hughey clearly limits any recovery to the value of the loss of services and any expenses incurred. Hughey, 249 S.C. at 477, 154 S.E.2d at 842. Additionally, other jurisdictions have held that mental anguish is not recoverable under a loss of consortium claim. Reagan v. Vaughn, 804 S.W.2d 463 (Tex. 1990) (loss of consortium does not include an element of mental

determination that Sulton's services, society, and companionship lost as a result of any actions by the Appellants could be reasonably valued at $4,000,000.00. The evidence at trial established that prior to developing the pressure ulcer, Sulton had been permanently rendered a paraplegic as a result of his gunshot wounds. (Tr. p. 385; R. ___). His only source of income as a result of his paralysis was Social Security disability. (Tr. p. 327; R. ___). This income was not affected by the pressure ulcer. Scott testified that, despite the ulcer, she was able to communicate with Sulton and he was in good spirits. (Tr. pp. 370, 388-89; R. ___). Additionally, while subsequent medical procedures related to the pressure ulcer were necessary, those hospitalizations were also required to address issues related to his gunshot wounds as well as unrelated medical conditions. Similarly, while the treatment of the pressure ulcer necessitated a colostomy which was attended to by Scott, Sulton's paralysis would have required the use of either a colostomy or the more burdensome process of constant changing of adult diapers. (Tr. pp. 291, 392-93, 700-01; R. ___).

During trial, Scott testified that she was "upset" upon seeing Sulton's pressure ulcer. (Tr. p. 361; R. ___). While Scott was understandingly upset, any distress she suffered was not a proper element of her damages under a loss of consortium claim. Even if emotional distress was recoverable under a claim for loss of consortium, the verdict in this matter in unsupported by the evidence. Although mental suffering may be a recoverable element of damage in appropriate cases, the South Carolina Supreme Court has held that "there is no liability for emotional distress without a showing that

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anguish); Sharp v. Metropolitan Prop. & Liab. Ins. Co., 478 So.2d 724 (La. App. 1985) (holding that loss of consortium does not include mental anguish suffered by an uninjured spouse).

the distress inflicted is extreme or severe." Rhodes v. Security Fin. Corp. 268 S.C. 300, 302, 233 S.E.2d 105, 106 (1977); see also Roberts v. Dunbar Funeral Home, 288 S.C. 48, 51-52, 339 S.E.2d 517, 519-20 (Ct. App. 1986) (restating severity requirement on claims for intentional infliction of emotional distress *and* invasion of privacy and affirming non-suit on both where plaintiff presented insufficient evidence of severe emotional distress). "[U]nder the law of this State damages cannot be recovered for mental suffering in the absence of bodily injury." Padgett v. Colonial Wholesale Dist. Co., 232 S.C. 593, 103 S.E.2d 265, 270 (1958) (determining, in a negligence case, whether damages were recoverable for "shock, fright and emotional upset when there is no physical upset"). The bodily injury requirement is a manifestation requirement related to severity. Whitten v. American Mut. Liability Ins. Co., 468 F. Supp. 470, 477-78 (D.S.C. 1977) (concluding that "degree of distress" must be extreme or severe enough to "encompass no less than some physical manifestation of bodily injury or illness resulting from the emotional distress").

There was no evidence that Scott suffered "severe" emotional distress or distress resulting in the manifestation of any physical injury. While Scott may have been upset by her husband's injury, she did not become physically ill and she required no medical treatment. Applying the proper measure of damages for loss of consortium, the evidence submitted at the trial cannot sustain an award of $4,000,000.00. Rather, this award is out of proportion to any "injury" associated with the loss of consortium claim. See Nelson v. Charleston & Western Ry. Co., 231 S.C. 351, 362, 98 S.E.2d 798, 802-03 (1957) (a verdict should be set aside that is "obviously so disproportionate to the injury proved").

In sum, Scott was only entitled to those actual damages due to the loss of companionship and services of her husband because of his pressure ulcer. Any loss suffered by Scott due to Sulton's paraplegia, while unfortunate, was irrelevant to this case. Sulton's medical condition after the shooting would have prevented him from providing any household services, and Scott was not deprived of his society or companionship as a result of any action of inaction by Appellants.

The $4,000,000.00 verdict for actual damages on the loss of consortium claim, is "without any rational support whatever in the evidence and is so grossly excessive as to show that the jury was actuated by considerations not founded on the evidence and/or the instructions of the court." Joyner v. St. Matthews Builders, 263 S.C. 136, 140–41, 208 S.E.2d 48, 50 (1974) (granting a new trial due to the "actual damages being so manifestly and grossly excessive"). Given the complete lack of any cognizable basis to support a four million dollar actual damages award, it is nothing other than a punitive damages award in disguise and is therefore barred for that reason as well. See Hughey, 249 S.C. at 477, 154 S.E.2d at 842 (holding punitive damages may not be award on a loss of consortium claim). Therefore, HeathSouth is entitled to JNOV as to the loss of consortium claim, or, alternatively, a new trial should be granted.

V. The Punitive Damages Award Was Improper.

A. There Is No Punitive Damages Award As To The Six Individual Nurse Appellants, and any Award Against HealthSouth Should Be Reversed Because There Was Insufficient Evidence To Sustain It.

The punitive damages verdict form merely states "[w]e the jury award punitive damages in the amount of Eight Million Dollars ($8,000,000)." (Verdict Form; R. ___). It does not state which Appellant(s) it is against or identify the claim to which it

applies. The only claim under which Respondents sought or could have received punitive damages was Sulton's negligence claim (Am. Compl.; R. ___). While the jury's verdict on the negligence claim was against all of the Appellants, including the six Nurse Appellants, Respondents expressly did not seek a punitive damages award as to the Nurses, and jury's verdict cannot support any punitive damages award as to the Nurse Appellants.

Under South Carolina law, the plaintiff has the burden of proving punitive damages by clear and convincing evidence. S.C. Code Ann. § 15-35-135. Additionally, in a medical malpractice action, punitive damages may only be awarded where the plaintiff proves that the defendants' conduct was willful, wanton or reckless. Taylor v. Medencia, 324 S.C. 200, 221, 479 S.E.2d 34, 46 (1996). Here, the only finding of reckless, willful or wanton conduct established by clear and convincing evidence was against HealthSouth *alone*. Question 3 on the verdict form limited this finding to HealthSouth "by and through its employees." (Verdict Form ¶3; R. ___). Thus, even though the verdict form purports to find the individual Nurses liable on the negligence claim, the related punitive damages award cannot be held to apply to the Nurse Appellants. In fact, during Respondents' Counsel's argument on the specific issue of punitive damages, he stated: "...your verdict was against HealthSouth Corporation and this is not about the individual nurses anymore either. This is about HealthSouth Corporation." (Tr p. 864; R. ___). Thus, to the extent that a punitive damages award exists as part of the verdict, it exists only as to HealthSouth alone.

Further, the evidence at trial was insufficient to support any such finding of reckless, willful or wanton conduct by the HealthSouth, and, therefore, the punitive damages award should be reversed. It was undisputed at trial that HealthSouth had in place proper policies and procedures regarding the care and prevention of pressure ulcers, and that the nursing staff were aware of these policies and HealthSouth's expectation and requirement that they be followed. (Tr. pp. 128, 257, 405-06, 435, 454, 461-63, 617; R. ___). Additionally, HealthSouth's liability in this case was premised entirely upon the theories of *respondeat superior* and agency. Significantly, there was no specific finding by the jury that Respondents had established by clear and convincing evidence that *any* of the Nurse Appellants (or any specific employee or agent of HealthSouth) had engaged in reckless, willful or wanton conduct.

Even if there was evidence that a HealthSouth employee's conduct rose to the level required for punitive damages, HealthSouth should not be held "vicariously" liable for punitive damages. The complicity rule precludes the imposition of punitive damages against the HealthSouth in this setting. 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 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 v. Hyslop, 337 N.W.2d 858, 865 (Iowa 1983) (adopting the complicity rule).

Under 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).

HealthSouth did not engage in any wrongdoing that would warrant imposition of punitive damages against it under the Restatement test. Respondents did not present any evidence that HealthSouth's policies or procedures deviated from the standard of care or that HealthSouth was negligent in promulgating precautions, policies, or procedures to the nurses. The evidence at trial clearly established that HealthSouth had in place specific policies and procedures regarding the prevention and treatment of decubitus ulcers, and that the nurses and other healthcare providers knew that HealthSouth expected them to follow those policies and procedures. (Plaintiff's Exhibit 2, Tr. pp. 128, 257, 405-06, 435, 454, 461-63, 617; R. ___). Respondents' own expert witness acknowledged that HealthSouth's policies and procedures on this issue were proper and she opined that the blame, if any, was on the individual caregivers for not carrying out what were otherwise perfectly acceptable policies and procedures. (Tr. p. 257; R. ___). Thus, there was no evidence that HealthSouth's corporate conduct

was willful, wanton or reckless. Rather, the only possible evidence of conduct that could have met this threshold is that of the individual Nurse Appellants or other employees of HealthSouth, and any such conduct by an employee would have been in direct violation of HealthSouth's proper policies and procedures.

Appellants, likewise, failed to present any evidence that HealthSouth was reckless in its hiring or retention of the specific caregivers. None of the caregivers were employed in any managerial capacity as that term is defined for purposes of applying the Restatement's complicity sections. Finally, the record is devoid of any evidence that HealthSouth ratified the actions of the caregivers in any way.

The United States District Court for the District of South Carolina has applied the complicity rule in an action where the plaintiff sued her employer for sexual harassment and constructive discharge by the plant supervisor. Scott v. Ameritex Yarn, 72 F. Supp. 2d 587, 590 (D.S.C. 1999) . 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. 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); see also Bryant v. Aiken Reg'l Med. Ctr., Inc., 333 F.3d 536, 548-49 (4th Cir. 2003) (reversing a punitive damages award against an employer for the same reasons).

Therefore, application of the complicity rule to the facts of this case demonstrates a complete absence of wrongdoing by HealthSouth as a corporation. Having failed to present any evidence that HealthSouth's actions were reckless, willful or wanton, and absent such finding by the jury as to any of the Nurse Appellants or other employees of HealthSouth, the punitive damages award should be reversed.

B. The Trial Court Erred In Allowing Respondents to Refer to the Overall Net Revenue of HealthSouth And This Error Requires Reversal Of The Punitive Damages Award.

Over Appellants' repeated objections, and without having admitted any actual testimony or other evidence on the issue, Respondents were permitted to argue to the jury that HealthSouth's revenue in 2009 was $1,911,100,000.00. (Tr. pp. 860-62, 865-66, 872; R. ___). Respondents sought to admit HealthSouth's Form 10-K to support this statement as to HealthSouth's finances. (Tr. p. 860, Court Exhibit No. 5; R. ___). Appellants objected to the admission of this complex financial document, noting it would likely cause confusion and prejudice, particularly where no expert witness was offered to explain the data to the jury. (Tr. pp. 860-61; R. ___). The Trial Court did not admit the Form 10-K into evidence. However, the Trial Court permitted Respondents' counsel to present the jury with the $1.9111 billion revenue figure in his punitive damages argument. (Tr. pp. 861-62; R. ___). Significantly, the $1.9111 Billion figure reflected HealthSouth's national operating *revenue*, and, as such, **did not** take into account any of its expenses or costs. Thus, over Appellants' objections and without presenting any actual evidence on the issue, Respondents were permitted to present the jury with the huge revenue figure, despite its irrelevance to the net worth of

HealthSouth. This reference to HealthSouth's national ***revenue*** was improper and highly prejudicial, requiring reversal of the punitive damages award.

1. Respondents' Reference to HealthSouth's $1.9111 Billion Revenue was not Supported by any Evidence in the Record.

"Closing arguments must be confined to evidence in the record and reasonable inferences therefrom." O'Leary-Payne v. R.R. Hilton Head, II, Inc., 371 S.C. 340, 352, 638 S.E.2d 96, 102 (Ct. App. 2007). Moreover, "[a]rguments made by counsel are not evidence," and the South Carolina Supreme Court "'has repeatedly held that statements of fact appearing only in argument of counsel will not be considered.'" S.C. Dep't of Transp. v. Thompson, 357 S.C. 101, 105-106 & n.8, 590 S.E.2d 511, 513 & n.8 (Ct. App. 2003); see also Historic Charleston Found. v. Krawcheck, 313 S.C. 500, 508 n.7, 443 S.E.2d 401, 406 n.7 (Ct. App. 1994) ("Ordinarily, arguments of counsel may not be considered as evidence in deciding factual issues." (citations omitted)).

Furthermore, the South Carolina Supreme Court has held a new trial is warranted if, during summation, an attorney proffers an opinion on how damages should be calculated that is unsupported by the evidence in the record. See Harper v. Bolton, 239 S.C. 541, 124 S.E.2d 54 (1962). In Harper, an attorney "while addressing the jury, and over the objection of the appellant, 'was permitted to endorse on a blackboard his own opinions as to the *per diem* value of pain and suffering.'" 237 S.C. at 543-44, 124 S.E.2d at 55. "There was no evidence in the record to support the attorney's opinion as to the *per diem* value thereof." *Id.* at 548, 124 S.E.2d at 57. In remanding for a new trial, the Supreme Court concluded:

> In allowing counsel for the respondent to endorse on a blackboard his own opinion as to the *per diem* value of pain and suffering was to permit him to make an argument that had no foundation whatever in the evidence. Though wide latitude and freedom of counsel in arguments to the jury are and ought to be allowed, such arguments cannot be based on facts not in the record, or inferences based on or drawn from facts which are not even admissible in evidence.

Id. at 550-51, 124 S.E.2d at 59. Therefore, because there was no evidence in the record to support the $1.9111 Billion figure that Respondents' proffered as HealthSouth's 2009 revenue, the reference to this figure constitutes reversible error.

2. Under South Carolina Law, Only HealthSouth's Net Worth, Not Its Revenue, May Be Considered In Determining Its Ability to Pay.

The fact that the $1.9111 Billion figure was actually HealthSouth's "Net Operating Revenue" and was not its "net worth" also establishes that the reference to this figure was error. The South Carolina Supreme Court has held that only consideration of a defendant's ***net worth*** is proper for purposes of determining its ability to pay a punitive damages award. Branham v. Ford Motor Co., 390 S.C. 203, 240, 701 S.E.2d 5, 25 (2010) (confining retrial to evidence of defendant's net worth). In Branham, the plaintiff introduced evidence of the defendants "net worth, income, revenues, and cash flow" and then "extrapolated these figures to 'per week,' 'per day,' and 'per hour.'" Id. at 239, 701 S.E.2d at 24. The Branham court held that under controlling Supreme Court precedent, admission of evidence beyond the defendant's net worth was improper. Id.

In Honda Motor Co. v. Oberg, 512 U.S.415 (1944), the United States Supreme Court acknowledged that "[p]unitive 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 biases against big businesses, particularly those without strong local presences." 512 U.S. 415, 432 (1994). More recently, in State Farm Mut. Auto. Ins. Co. v. Campbell, the Supreme Court stated that "reference[s] to [a defendant's] assets (which, of course, are what insured parties in Utah and other states must rely upon for payment of claims) ha[s] little to do with the actual harm sustained by the [plaintiffs]. The wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award." 538 U.S. 408, 427 (2003) (citing BMW of N. Am. v. Gore, 517 U.S. 559, 585 (1996)). Relying on Honda Motor and Campbell, the Branham court held that:

> Evidence concerning net worth appears the safest harbor. *Honda Motor* speaks directly to "net worth". 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***. The retrial shall be confined to such evidence.

Branham, 390 S.C. at 240, 701 S.E.2d at 25 (citations omitted) (alterations in original) (emphasis added). Therefore, Respondents' reference in the instant case to HealthSouth's *revenue* was erroneous and highly prejudicial under South Carolina law and requires reversal and a new trial.

C. The Punitive Damages Award is Unconstitutional and Excessive.

The jury's award of $8,000,000.00 in punitive damages constitutes an impermissible violation of due process and is, therefore, unconstitutional. "Punitive

damages may properly be imposed to further a state's legitimate interests in punishing unlawful conduct and deterring its repetition." BMW of North America v. Gore, 517 U.S. 559, 568 (1996). The state's interests in awarding punitive damages must remain consistent with the principle of penal theory that "the punishment should fit the crime." Atkinson v. Orkin Exterminating Co., Inc., 361 S.C. 156, 164, 604 S.E.2d 385, 389 (2004). Nevertheless, "while states possess discretion over the imposition of punitive damages, it is well established that there are procedural and substantive constitutional limitations on these awards." State Farm v. Campbell, 538 U.S. 408, 416 (2003). "To the extent an award is grossly excessive, it furthers no legitimate purpose and constitutes an arbitrary deprivation of property." Id. at 417.

In Mitchell v. Fortis Ins. Co., 385 S.C. 570, 686 S.E.2d 176 (2009) , the South Carolina Supreme Court articulated the test to be used in conducting post-judgment review of a punitive damage award, stating:

> We have said in the past that trial courts must consider both the Gamble [Gamble v. Stevenson, 305 S.C. 104, 406 S.E.2d 350 (1991)] and Gore factors . . . . However, considerations of judicial economy weigh in favor of a less burdensome and duplicative analysis . . . . With these considerations in mind, we articulate the following test for our courts in conducting a post-judgment review of punitive damage awards.

Id. at 587, 686 S.E.2d at 185 (internal citation omitted). First, the court should consider "the degree of reprehensibility of the defendant's conduct." Id. Second, the court should consider "the disparity between the actual or potential harm suffered by the plaintiff and the amount of the punitive damages award," known as the ratio. Id. at 587-88, 686 S.E.2d at 186. Third, the court "should consider the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed

in comparable cases." Id. Applying these factors demonstrates that the $8 Million punitive damages award is unconstitutional.

1. The Evidence At Trial Failed To Establish That HealthSouth's Conduct Was Reprehensible.

On the issue of the reprehensibility of a defendant's conduct, the factors to be considered include whether: (1) the harm caused was physical as opposed to economic; (2) the tortious conduct evinced an indifference to or a reckless disregard for the health or safety of others; (3) the target of the conduct had financial vulnerability; (4) the conduct involved repeated actions or was an isolated incident; and (5) the harm was the result of intentional malice, trickery, or deceit, rather than mere accident. Fortis, 385 S.C. at 587, 686 S.E.2d at 185 "The existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect." Campbell, 538 U.S. at 419.

HealthSouth did not engage in any reprehensible conduct based on such factors. First, while Sulton did suffer a physical injury - the stage-four decubitus ulcer, the damages awarded by the jury were solely for *economic loss* occasioned by the treatment of the pressure ulcer and not for non-economic harm or injury to Sulton. (Verdict Form ¶1; R. ___). Second, HealthSouth's corporate conduct did not exhibit an indifference to or reckless disregard for the health or safety of others. Rather, the record at trial clearly established that HealthSouth had instituted policies and procedures designed to address the treatment and prevention of pressure ulcers, and that its nursing staff were well aware of the policies and the requirement that they be followed. (Tr. pp. 128, 257, 405-06, 435, 454, 461-63, 617; R. ___). Respondents did not present

any evidence that HealthSouth's policies and procedures deviated from the standard of care or that HealthSouth was negligent in promulgating precautions, policies, or procedures to its staff. In fact, Respondents' own expert testified that she had no criticism as to HealthSouth's policies and procedures. (Tr. p. 257; R. ___). Rather, the blame, in her opinion, lay with the fact that the individual nurses had not fully complied with the otherwise perfectly acceptable policies and procedures. (Tr. p. 257; R. ___). The evidence at trial further established that HealthSouth was proactive in the treatment of the pre-existing pressure ulcer by immediately using a Rim Air mattress, comfeel dressings, physical therapy and nutrition, and that its treatment correspondingly escalated as the ulcer progressed to silvadene dressings, a Power Turn Elite bed, and a request for a plastic surgery consultation. (Tr. pp. 216-17, 504, 526-27, 531-32, 588-89, 603-04, 636-42, 678, 680-82, 688, 693; R. ___).

Third, there was little evidence of Sulton's financial vulnerability introduced at trial. To the extent that Sulton was financially vulnerable, that vulnerability was caused by the paralysis resulting from his gunshot wounds which left him dependent on Social Security disability, and was not significantly exacerbated by the pressure ulcer when considering the presence of numerous other significant medical issues. (Tr. pp. 316, 321-22, 327, 352, 366, 384; R. ___). Next, there was no evidence at trial that this was anything more than an isolated incident. Finally, Plaintiff introduced no evidence of intentional malice, trickery, or deceit. Thus, HealthSouth's conduct in this matter was not reprehensible, and certainly did not rise to a level of reprehensibility sufficient to warrant an award of Eight Million Dollars in punitive damages.

2. The Ratio of the $8 Million Punitive Damages Award, When Compared to the Actual Damages Awarded, is Unconstitutional.

The overwhelming disparity between the $8 Million punitive damages award and the $306,693.25 actual damages award requires a reversal or, failing that, a reduction of the punitive damages award. For the purposes of assessing the ratio of punitive damages to actual damages, the only relevant amounts are the awards under Sulton's negligence claim - $306,693.25 in actual damages and $8 Million in punitive damages. To the extent that any verdict was actually rendered against HealthSouth as to Scott's loss of consortium claim, the $4 Million non-economic damages award is completely irrelevant and inapplicable in this analysis. Punitive damages were sought only in Sulton's negligence claim. (Am. Complaint ¶12; R. ___) (specifically praying for punitive damages). In contrast, the prayer for relief specific to the loss of consortium claims seeks only "an award of damages as determined by a jury in this matter." (Am. Compl. ¶14; R. ___). Further, as a matter of law, punitive damages are not recoverable for loss of consortium. The South Carolina Supreme Court has clearly held that "**[d]amages awarded for loss of consortium are compensatory damages**, which by definition are actual damages." Gosnell v. Dorchester School Dist. No. 2, 301 S.C. 21, 23-24, 389 S.E.2d 865, 866 (1990) (emphasis added); see also Hughey v. Ausborn, 249 S.C. 470, 478, 154 S.E.2d 839, 843 (1967) (reversing trial court's refusal to grant directed verdict in defendant's favor on plaintiff's claim for punitive damages in conjunction with loss of consortium claim). Thus, even if a verdict was rendered against HealthSouth on the loss of consortium claim, and even if the $4 Million in damages on that claim was supported by the Trial Record, the punitive

damages verdict is wholly unrelated to the loss of consortium verdict. Thus the proper comparison is $8 Million in punitive damages to $306,693.25 in actual damages, which is ***a ratio of 26.1 to 1***. Such a ratio is constitutionally untenable.

As the United States Supreme Court has instructed, "few awards exceeding a ***single-digit*** ratio between punitive and compensatory damages . . . will satisfy due process." State Farm v. Campbell, 538 U.S. 408, 425 (2003) (emphasis added). Indeed, "an award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety." Id. (citations omitted). A multiplier of 26.1, is well beyond any demarcation of constitutional propriety. Moreover, where, as here, "compensatory damages are ***substantial***, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." Id. (emphasis added). "The Supreme Court has reserved the upper echelons of constitutional punitive damage—a 9 to 1 ratio—for conduct done with the most vile of intentions." In re Exxon Valdez, 472 F.3d at 614 (9th Cir 2006); see also Casumpang v. Int'l Longshore & Warehouse Union, 411 F. Supp. 2d 1201, 1220-22 (D. Haw. 2005) (1 to 1 ratio appropriate because the damages were substantial). Thus, even if HealthSouth's conduct had been highly reprehensible, which it was not, awarding Respondent Sulton punitive damages amounting to 26.1 times his actual damages is a denial of HealthSouth's due process rights and therefore unconstitutional.

South Carolina's appellate courts have followed The United States Supreme Court's guidance, affirming awards reflecting ***only*** single-digit ratios between punitive and actual damages. See Fortis, 385 S.C. at 593, 686 S.E.2d at 188 (stating that "[i]n reviewing more recent punitive damage awards, South Carolina courts have most often

upheld verdicts on the low end of the single digit spectrum . . . ."); James v. Horace Mann Ins. Co., 371 S.C. 187, 196-97, 638 S.E.2d at 671-72 (2006) (approving $1 million in punitive damages versus $146,600 in actual damages, a 6.82 to 1 ratio); Mackela v. Bentley, 365 S.C. 44, 614 S.E.2d 648 (Ct. App. 2005) (upholding a ratio of 3.75 to 1); Austin v. Specialty Transp. Services, Inc., 358 S.C. 298, 594 S.E.2d 867 (Ct. App. 2004) (affirming a ration of 2.54 to 1); Collins Entertainment Corp. v. Coats & Coats Rental Amusement, 355 S.C. 125, 130, 584 S.E.2d 120, 123 (Ct. App. 2003) (affirming a single digit ratio) (aff'd by 368 S.C. 410, 629 S.E.2d 635 (2006) (not addressing the punitive damages issue)). Consistent with Fortis, Campbell, and South Carolina precedent, the ***26.1 to 1 ratio*** awarded here is grossly excessive and does not pass constitutional scrutiny.

Moreover, in considering the ratio, the ability of HealthSouth to pay the punitive damage award should be considered. Branham v. Ford Motor Co., 390 S.C. 203, 240, 701 S.E.2d 5, 24 (2010); Fortis, 385 S.C. 588, 686 S.E.2d at 185. Here, despite the fact that no evidence or testimony was actually admitted on the subject, the Trial Court erroneously permitted Respondents' counsel to argue to the jury that HealthSouth's net revenue was $1.9111 billion, and that such related to the ability to pay. (Tr. pp. 861-62, 865, 872; R. ___). This reference to HealthSouth's national revenues was improper. Revenue derived from activities of HealthSouth outside the borders of South Carolina having nothing to do with South Carolina may not constitutionally be used to support a punitive damage award enforced by a South Carolina Court. See State Farm v. Campbell, *supra*. Additionally, the South Carolina Supreme Court has cautioned trial courts to "be careful about considering the net worth

of the defendant." Fortis, 385 S.C. at 588, 686 S.E.2d at 185 n. 8. "[A] punitive damages award should never be based solely on a percentage of the defendant's net worth." Id. To that end, the Court has established that "punitive damage awards many not be based on out-of-state conduct and must be related to the plaintiff's injury." Id. at 586, 686 S.E.2d at 184 (citing Campbell, 538 U.S. at 421-22). As the Fortis Court stated, the review of a punitive damages award focuses on the defendant's net worth, not on the revenues of the entire corporation. See Fortis, 385 S.C. 588, 686 S.E.2d at 185 (holding the consideration is on the ***net worth*** of the defendant). Argument as to HealthSouth's national revenue violates the Supreme Court's admonition that wealth cannot justify an otherwise unconstitutional punitive damage award. Fortis, 385 S.C. at 588, 686 S.E.2d at 185 n. 8 (holding that "[w]ealth cannot justify an otherwise unconstitutional punitive damage award"); see also Branham, 390 S.C. at 240-41, 701 S.E.2d at 25 (ordering a retrial where the punitive damages evidence included income, revenue and cash flow in addition to the defendant's net worth)..

Lastly, as to the factor of the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases, the punitive damages award is not justified by comparing it to any civil or criminal penalties for similar conduct because HealthSouth is not subject to any penalty for a single act of alleged negligence. Hence, none of the Fortis guidelines support the constitutionality of the punitive damages award in this case and the punitive damages award should be reversed. Failing that, and if a new trial is not ordered, the punitive damages should be reduced to a ratio of 1:1.

Conclusion

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

Respectfully Submitted,

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