

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas

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Casey L. Manning, Circuit Court Judge

**SC Court of Appeals**

Case No. 2009-CP-40-1477

Vernon Sulton and Willie Mae Scott, ..... Respondents,

v.

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

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**COUNTER-STATEMENT OF THE  
ISSUES ON APPEAL**

- I. Are the Defendants Entitled to a New Trial Based upon Alleged Error in Instructing the Jury?
- II. Are the Defendants Entitled to a New Trial Based upon Alleged Flaws in the Verdict Form?
- III. Is the Jury's Verdict on the Loss of Consortium Claim a "Total Defense Verdict"?
- IV. Is Healthsouth Entitled to a New Trial or a JNOV on the Loss of Consortium Claim?
- V. Is the Punitive Damages Award Properly Applicable to the Individual Nurse Appellants?
- VI. Did the Trial Court Err in Failing to Grant Appellant Healthsouth Corporation's Motions for Directed Verdict or JNOV as to the Issue of Punitive Damages?
- VII. Is There Reversible Error Regarding Evidence of Appellant Healthsouth Corporation's Ability to Pay a Punitive Damages Award?
- VIII. Does the Actual Comparison Ratio for the Punitive Damages in this Case Violate HealthSouth's Constitutional Rights to Due Process?

## COUNTER-STATEMENT OF THE CASE

Vernon Sulton filed a Notice of Intent To Sue in October 2008 against HealthSouth Corporation d/b/a HealthSouth of SC, Inc., d/b/a HealthSouth Rehabilitation Hospital ("HealthSouth") and nurses Kathy Hoover, RN, Lisa Page, RN, Sharon Miller, RN, Kim Harris, RN, Betty Casteal, RN, and Norine Corbin, RN. The claims arose out of negligent medical care Mr. Sulton received while a patient at a HealthSouth facility.

On August 3, 2009, Mr. Sulton and his wife, Willie Mae Scott, filed an amended complaint against all defendants asserting a claim for actual and punitive damages for personal injury caused to Mr. Sulton and a claim for loss of consortium on behalf of Ms. Scott. The defendants collectively answered, denying liability and raising several affirmative defenses.

The matter was tried from July 26 through July 30, 2010. The jury returned a verdict for Mr. Sulton for \$306,693.25 in economic damages and zero in non-economic damages. The jury awarded Ms. Scott \$4,000,000.00 on her claim for loss of consortium against Defendant HealthSouth. The jury also awarded \$8,000,000.00 in punitive damages. The trial court entered the judgment by Form 4 Order on August 2, 2010.

On August 3, 2010, Respondents moved for new trial *nisi additur* as to the jury's zero verdict on Mr. Sulton's non-economic damages. On August 9, 2010, Defendants filed post-trial motions for new trial, new trial nisi remittitur, or JNOV. Defendants also sought a ruling by the court as to the interpretation of the jury's verdict. The trial court held a hearing on August 16, 2010 and denied all post-trial motions.

Defendants filed and served their Notice of Appeal on September 2, 2010.

## FACTS

In an action at law, on appeal of a case tried by a jury, the appellate court may correct only errors of law. *Watson v. Ford Motor Co.*, 389 S.C. 434, 699 S.E.2d 169 (2010). The factual findings of the jury will not be disturbed unless no evidence reasonably supports the jury's findings. *Berberich v. Jack*, 392 S.C. 278, 709 S.E.2d 607 (2011). Accordingly, the testimony in support of the verdict was as follows.

**Ann Meurs (plaintiff's expert)** - Registered nurse Ann Meurs testified as plaintiffs' expert. (Tr. p. 122, l. 20-25; p. 123, ll. 17-18; p. 125, ll. 5-10). Nurse Meurs reviewed materials relevant to the case, including depositions of the nurse defendants, the charts, medical records from HealthSouth and Palmetto Richland, and HealthSouth's policies and procedures. (Tr. p. 124, l. 15-p.125, l. 3; p. 155, ll. 6-9; p. 201, ll. 6-12; p. 201, l. 23-p.202, l. 2). Based upon her review, Nurse Meurs found numerous deviations from the applicable medical standards of care by HealthSouth's employees. (Tr. p. 125, ll. 12-21; p. 257, ll. 4-11). These deviations were known to people in the field to cause or substantially contribute to the formation of worsening ulcers. (Tr. p. 125, l. 22-p.126, l. 1). Nurse Meurs opined that the deviations she identified caused or contributed to the worsening ulcer suffered by Mr. Sulton. (Tr. p. 126, ll. 2-5).

Nurse Meurs described what a decubitus or pressure ulcer is, and the known risk factors for their development. (Tr. p. 126, ll. 6-25). Nurse Meurs described the four stages of ulcer development in great detail. (Tr. p. 128, l. 8-p.129, l. 11; Pl. Exh. 36). Ulcers at stage three or stage four are very dangerous because of infections that can develop. (Tr. p. 129, ll. 12-22). Nurse Meurs also testified as to known methods and guidelines for

preventing the ulcers. (Tr. p. 127, ll. 1-25).

Hospitals develop their own policies and procedures and follow the national guidelines, and HealthSouth had such policies. (Tr. p. 128, ll. 1-7; Pl. Exh. 2). Nurse Meurs went over HealthSouth's policy and procedures and the "personalized care plan" for Mr. Sulton in detail. (Tr. p. 130, l. 2-p.133, l. 9; p. 144, l. 12-p.). She described why each procedure was important to the patient's care. (Tr. p. 145, ll. 10-25).

When Mr. Sulton arrived at HealthSouth, he had a "stage two irritation" (Tr. p. 132, ll. 10-13; p. 199, l. 11-p.200, l. 6). This was in his sacral area and both heels. (Tr. p. 151, ll. 8-10). The ulcer ultimately went from a stage two decubitus to a stage four decubitus ulcer. (Tr. p. 195, l. 24-p.196, l. 3; p. 264, l. 25-p.265, l. 5).

Nurse Meurs stated she reviewed the depositions of the defendant nurses. (Tr. p. 146, l. 1-p.153, l. 5). Nurse Meurs also reviewed the deposition of Debra Thompson, who was the defense expert wound specialist. (Tr. p. 153, ll. 6 - 13). Nurse Meurs testified Mr. Sulton had several risk factors for developing decubitus ulcers. (Tr. p. 153, l. 22-p.154, l. 3). HealthSouth's employees were aware of these risk factors when they took him in. (Tr. p. 154, ll. 4-6; Pl. Exh. 11). HealthSouth's records also indicate they knew he had a stage two irritation in his sacral area. (Tr. p. 154, l. 16-p.155, l. 5).

From her review of those depositions and records Nurse Meurs identified 97 deviations from the standard of care in HealthSouth's treatment of Mr. Sulton. (Tr. p. 155, ll. 10-15; p. 155, l. 16-p.165, ll. 16-19; p. 265, ll. 10-15; Pl. Exh. 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 25, 35). This included failure to have a care plan (Tr. p. 157, ll. 13-15), failure to properly turn or change patient position (Tr. p. 158, ll. 12-23; p. 159, l.

11-p.160; p. 163, ll. 17-24; p. 167, ll. 19-25; p. 174, ll. 8-15; p. 176, ll. 1-9; p. 230, l. 16-p.231, l. 14), failure to measure the wound regularly (Tr. p. 158, l. 24-p.159, l. 2), failure to treat the wound (Tr. p. 159, ll. 3-10), and failure to properly document his care (Tr. p. 159, l. 19-p.161, l. 14; p. 162, l. 4-p.163, l. 5; p. 208, ll. 20-25; p. 218, ll. 21-23). Some entries demonstrated Mr. Sulton was on his back for an entire shift or even an entire 24-hour period. (Tr. p. 165, ll. 6-19; p. 167, ll. 1-18; p. 170, ll. 9-16; p. 171, l. 20-p.172, l. 1; p. 172, ll. 14-22; p. 174, ll. 9-13). Nurse Meurs described it as “days and days and days of not repositioning.” (Tr. p. 231, ll. 19-22).

Nurse Meurs reviewed the records of an examination of Dr. Thomas Norris of Family and Geriatric Medicine Physicians for February 6 which stated “will change from Room Air mattress to Power Turn Elite as patient reports he is having trouble getting staff help him turn at night.” (Tr. p. 168, ll. 6-23; p. 212, ll. 14-22). Entries for several days thereafter indicated Mr. Sulton was on a “Rim Air” mattress which was not the mattress that was ordered. (Tr. p. 170, l. 21-p.171, l. 4; p. 172, ll. 8-12; p. 173, ll. 16-18; p. 174, ll. 14-24). According to the HealthSouth record the turn bed was likely put into place on February 11. (Tr. p. 174, l. 25-p.175, l. 4; p. 175, ll. 13-22). On cross-examination, however, Dr. Norris’s notes indicated the bed was in place by February 7. (Tr. p. 212, l. 14-p.214, l. 1). Nurse Meurs added that placing someone on an air mattress is no substitute for repositioning the patient. (Tr. p. 161, ll. 15-18; p. 169, ll. 2-5).

Nurse Meurs opined that according to the documentation the care Mr. Sulton received was not in compliance with the standard of care. (Tr. p. 161, ll. 19-21). She stated that nurses are taught that “if it’s not documented it’s not done, and that’s

something that nurses know and always know.” (Tr. p. 163, ll. 12-16). She also opined that the nurses and other employees of HealthSouth who signed off on the documentation knew or should have known that Mr. Sulton was not repositioned as required by the standard of care. (Tr. p. 161, l. 22-p.162, l. 3; p. 163, l. 25-p.164, l. 6; p. 165, ll. 20-24; p. 166, ll. 20-23; p. 169, l. 24-p.170, l. 3; p. 170, ll. 17-20; p. 172, ll. 2-5; p. 172, l. 23-p.173, l. 1; p. 173, ll. 19-23; p. 175, ll. 5-12).

Nurse Meurs stated that if a nurse sees from the chart that care is not being provided is supposed to inquire about what those responsible for care have been doing, find out why it is not documented, and the RN supervisor make sure they document whatever they are doing. (Tr. p. 164, ll. 7-20; p. 169, ll. 12-23). It is the RN’s responsibility to see to it that a patient is being turned, although a nursing assistant could do it. (Tr. p. 164, l. 21-p.165, l. 5; p. 181, ll. 2-4). When asked about the failure to change the care in the face of the documentation, Nurse Meurs stated, “I think that’s a shame. I think that they, they, that’s the first thing they should have done is looked at the care, looked at what was going on and try to figure out why this man is complaining, and what we’re going to do about it.” (Tr. p. 171, ll. 5-19).

On February 12, Mr. Sulton was transferred to Palmetto Richland Hospital for suspected cardiac problems. (Tr. p. 176, ll. 10-14). The hospital’s assessment noted a sacral ulcer that was “stained with fecal matter” that was “open and leaking,” “redden,” and had “bloody drainage.” (Tr. p. 176, l. 20-p.177, l. 12). The next day Mr. Sulton received a Wound and Ostomy Care Nursing (WOCN) consult. (Tr. p. 177, ll. 13-20). By February 14 one of the wounds was “not stageable” because it was necrotic. (Tr. p. 177, l.

24-p.178, l. 18). This was the kind of wound a nurse would have seen had the nurse looked. (Tr. p. 178, ll. 19-25). It would have also smelled terrible. (Tr. p. 178, l. 25-p.179, l. 3). Had the nurses been doing their assessments properly there would have been no doubt about what was happening and the response that was required, which included contacting a doctor. (Tr. p. 179, ll. 4-13; p. 262, l. 5-p.264, l. 10; Def. Exh. 7, 8).

Nurse Meurs gave the following opinion about the care Mr. Sulton received at HealthSouth: "Actually, they're not providing care; they're providing negative [care] because it's getting worse. It's [negligence] on the part of the nurse not to address this." (Tr. p. 180, ll. 13-15). She added that a reasonable nurse would have "absolutely" addressed the situation, would have turned and repositioned the patient from day one, and would have taken steps to address the deficiencies in care and the deficiencies in the charts. (Tr. p. 180, l. 16-p.181, l. 4).

Mr. Sulton had to have a debridement to surgically remove the "bad skin" off of the wound. (Tr. p. 181, ll. 10-14). He then had to have a colostomy performed to bypass his colon because of the presence of fecal matter in the wound area. (Tr. p. 181, l. 14-p.183, l. 17). Nurse Meurs identified a colostomy bag similar to the one into which Mr. Sulton's fecal matter was collected. (Tr. p. 183, ll. 18-23; Pl. Exh. 45). Mr. Sulton had the colostomy bag until the end of his life, which required "much care." (Tr. p. 183, l. 24-p.184, l. 5).

Mr. Sulton also had a "flap" procedure in which a surgeon takes skin from another part of the body, usually the "backside," and moves it to cover the wound area so that the wound can heal with his own skin. (Tr. p. 184, l. 6-p.185, l. 5; Pl. Exh. 32).

Nurse Meurs testified that the deviations from the standard of care in this case were “sufficient and dangerous” because “all these things that happened to this man are potentially life threatening, and to have it go to the point that it is and not have somebody notice it is, is, dangerous a good word.” (Tr. p. 185, ll. 6-14). She stated that the level of care was “bad” and “unreasonable.” (Tr. p. 188, ll. 15-19). She also said the documentation as it existed was inconsistent with good care. (Tr. p. 218, ll. 17-23). She agreed that the conduct was capable of repetition. (Tr. p. 189, ll. 7-9, 16-19). Nurse Muers also had no information from any source to indicate changes were made at HealthSouth as a result of “the activities concerning Mr. Sulton.” (Tr. p. 190, ll. 10-14).

**Dr. David Seignious (plaintiffs’ expert)-** Dr. Seignious is a physician specializing in internal medicine with a subspecialty in geriatric medicine. (Tr. p. 267, ll. 24-25). He reviewed the Palmetto Richland records from December 2005 until February 2, 2006, and the flap procedure done on April 2006. (Tr. p. 269, ll. 11-18). He also reviewed the HealthSouth records covering February 2, 2006 through February 13, 2006. (Tr. p. 269, ll. 19-21; p. 283, ll. 12-14). Dr. Seignious reviewed Lexington Hospital records from 2007 through 2010, and the depositions of Mr. Sulton, Ms. Scott and the defense experts. (Tr. p. 269, ll. 21-25). Finally, he reviewed HealthSouth’s policies and procedures. (Tr. p. 270, ll. 1-3). He was proffered without objection as an expert in the field of internal medicine with a subspecialty in geriatrics. (Tr. p. 270, ll. 5-9).

Dr. Seignious described the ulcer at the time of Mr. Sulton’s admission to HealthSouth as “a stable stage two” because it had remained roughly at the same size for several weeks prior to that admission. (Tr. p. 271, l. 20-p.272, l. 3). However, 11 days

later the wound had gone from stage two to a wound that had to be debrided down to the sacral bone, and had gotten larger. (Tr. p. 270, ll. 10-25). This was in a relatively short amount of time. (Tr. p. 271, ll. 18-19). Dr. Seignious opined that it “would not be expected for someone to come with stable stage two ulcer and turn 11 days later to a stage four ulcer, if that’s happening and you can identify that it’s happening then you can investigate what’s going on that allows that to happen. If you don’t identify then you’re not going to do anything to change it.” (Tr. p. 282, ll. 14-21).

Dr. Seignious stated he found deviations from the applicable medical standard of care by HealthSouth employees. (Tr. p. 270, ll. 16-19). These deviations were of the type known to people in the medical field to cause or substantially contribute to the formation or worsening of ulcers. (Tr. p. 270, ll. 20-24). In this case, one or more of those deviations caused or substantially contributed to the worsening of the ulcer on Mr. Sulton to a stage four necrotic foul smelling fecal stained decubitus ulcer. (Tr. p. 270, l. 25-p.271, l. 4). This type of ulcer is life-threatening. (Tr. p. 285, ll. 18-21).

Dr. Seignious stated he agreed with Nurse Meurs’ testimony regarding the day-to-day deviations in care. (Tr. p. 271, ll. 5-9, 15-16). This included lack of sufficient documentation (Tr. p. 271, ll. 9-10; p. 273, ll. 15-17), and documentation of days where Mr. Sulton remained on his back for hours at a time and was not repositioned. (Tr. p. 271, ll. 11-13; p. 273, ll. 9-14; p. 273, l. 21,-p.274, l. 8; p. 274, ll. 21-22; p. 283, ll. 15-18). Dr. Seignious added, “If you lie that many hours continuously on your back a person who is not a small person, can’t move at all, that’s how those [wounds] developed.” (Tr. p. 272, ll. 19-25; p. 274, ll. 2-8). Dr. Seignious stated that from February 2 to February 5 the

ulcer had gotten worse. (Tr. p. 274, ll. 9-17).

Dr. Seignious noted that documentation on February 4 demonstrated “that he’s on his back pretty much the entire day,” and stated that would be negligent. (Tr. p. 274, ll. 18-24). He would expect the nurse who signed off on the record to know or should have known about this deviation. (Tr. p. 274, l. 25-p.275, l. 3). If this care were repeated over and over it would lead to the way the ulcer looked on February 5. (Tr. p. 275, ll. 4-7).

Dr. Seignious opined the ulcer was preventable with proper care. (Tr. p. 275, ll. 15-15). It is more probably that with reasonable care Mr. Sulton would not have advanced to a stage four ulcer. (Tr. p. 275, l. 17-p.276, l. 3). He agreed that an air mattress is not a substitute for the policy and procedure of turning and repositioning for pressure reduction. (Tr. p. 276, ll. 4-12). The Power Turn Elite would help but does not alleviate the need to turn someone. (Tr. p. 276, ll. 13-16).

Dr. Seignious agreed the care Mr. Sulton received was not reasonable care under the circumstances. (Tr. p. 276, ll. 20-22). He opined that the nurses at HealthSouth were negligent. (Tr. p. 276, l. 24-p.277, l. 1). In fact, he described it as gross negligence. (Tr. p. 277, ll. 2-10). He also stated the level of negligence was “not very subtle.” (Tr. p. 283, ll. 19-23).

Dr. Seignious stated that when Mr. Sulton was taken from HealthSouth to Palmetto Richland for chest pains the doctors discovered the decubitus ulcer which they then treated. (Tr. p. 277, l. 11-p.10; Pl. Exh. 33). The doctors gave him antibiotics and debridements for the ulcers. (Tr. p. 278, ll. 10-13). He had a colostomy so that his stool would not contaminate the ulcer. (Tr. p. 278, ll. 13-15; p. 290, l. 20-p.291, l. 3). Mr.

Sulton also received a wound vac which helped heal the wound. (Tr. p. 278, ll. 24-25). He also went to Palmetto Baptist Hospital for a flap procedure. (Tr. p. 279, ll. 10-12). Later Mr. Sulton had to have the colostomy done over "to make it work right." (Tr. p. 279, l. 22-p.280, l. 1). He went to Lexington Hospital twice for procedures related to the colostomy, and these procedures were substantially related to the stage four ulcer he developed at HealthSouth. (Tr. p. 280, ll. 2-18).

Dr. Seignious would expect the nurses to know that Mr. Sulton's ulcer had progressed from stage two to stage four. (Tr. p. 281, ll. 14-18). He believed a reasonably prudent hospital corporation with properly skilled and trained employees should have been able to recognize the poor care on their own. (Tr. p. 283, l. 24-p.284, l. 2). Dr. Seignious had no evidence that any incident report or other actions were undertaken as a result of this case. (Tr. p. 284, ll. 3-7). Dr. Seignious also noted that 30 people looked at the charts, saw what was happening, and it continued, and he described this as a "system error" which would be repeated. (Tr. p. 285, ll. 4-12; p. 287, ll. 3-9). If nothing changed at HealthSouth Dr. Seignious expected this to happen again. (Tr. p. 286, l. 24-p.287, l. 2).

Dr. Seignious agreed that patients at HealthSouth Rehab Hospital were "particularly vulnerable to issues of this kind given their physical infirmities when they enter the rehab hospital." (Tr. p. 285, ll. 13-17).

Dr. Seignious reviewed the bills and estimated that about \$100,000.00 was unrelated to treatment for the worsening decubitus ulcer. (Tr. p. 288, l. 5-p.289, l. 21).

**Vernon Sulton (plaintiff by deposition)** - Mr. Sulton and Ms. Scott had been together for 36 years and had a 28-year old daughter. (Tr. p. 326, l. 20-p.327, l. 2).

On December 15, 2005, Mr. Sulton was helping a friend close up a convenience store when a person robbed the store and shot Mr. Sulton. (Tr. p. 328, ll. 8-15; p. 329, ll. 13-15). Mr. Sulton was taken to Palmetto Richland Hospital for treatment and was there a long time. (Tr. p. 328, ll. 23-25). He was in a coma until January 21, 2006. (Tr. p. 329, ll. 14-25). As a result of the gunshot, Mr. Sulton had no feeling from his chest down to his feet. (Tr. p. 329, ll. 1-10).

Mr. Sulton stated the nurses turned him frequently while he was at Palmetto Richland. (Tr. p. 330, l. 12-p.331, l. 11). No one at Palmetto Richland told him about any problems he was having with skin breakdowns. (Tr. p. 331, ll. 12-19). Mr. Sulton told the staff that he wanted to go home and he was told he needed therapy for his upper body. (Tr. p. 331, ll. 20-25). Mr. Sulton was taken to HealthSouth. (Tr. p. 332, ll. 13-15).

Mr. Sulton did not see a doctor at HealthSouth until the day he was taken by ambulance to the hospital to have his heart examined. (Tr. p. 332, ll. 18-25). He also did not recall being put on a bed at HealthSouth that would help him turn. (Tr. p. 333, ll. 12-14). The only time he recalled being turned at HealthSouth was when the nurse would come in to bathe him. (Tr. p. 334, l. 12-p.335, l. 1).

Mr. Sulton described times when the staff would bring his food in but he could not reach it. (Tr. p. 334, l. 23-p.335, l. 4). He would push the button to call for help and eventually someone would come and push the food over to him. (Tr. p. 335, ll. 5-9). By then the food would be cold. (Tr. p. 335, ll. 8-9).

About a week after he got to HealthSouth the staff was washing him and he heard them whispering. (Tr. p. 335, ll. 19-21; p. 339, ll. 14-17). When he asked them about it

they said it was nothing and that everything was all right. (Tr. p. 335, ll. 21-25). Mr. Sulton also described the difficulty he had getting assistance one night and through the early morning when he was feeling very bad. (Tr. p. 336, l. 1-p.337, l. 15). When the doctor came in that morning he was transferred to the hospital. (Tr. p. 337, ll. 16-19). The staff at the hospital turned him over and told him he was “full of infection” from the decubitus ulcer. (Tr. p. 337, l. 20-p.338, l. 2). He stated he still had the infection and it had “messed up” his kidneys. (Tr. p. 342, ll. 7-10; p. 346, ll. 5-24).

Mr. Sulton had not known he had any issue with skin breakdown while at HealthSouth. (Tr. p. 338, ll. 10-25). Dr. Davis at Baptist Hospital treated the ulcer and healed it with surgery. (Tr. p. l. 5-p.342, l. 4).

**Willie Mae Scott (plaintiff)** - Ms. Scott was Mr. Sulton’s wife. (Tr. p. 362, ll. 19-24). Before Mr. Sulton was transferred to HealthSouth he did not have skin irritation on his backside. (Tr. p. 368, l. 20-p.369, l. 1). She did not learn about the decubitus ulcer until Mr. Sulton was transferred to Emergency Room. (Tr. p. 372, l. 1-p.373, l. 13; p. 389, ll. 8-11; p. 394, ll. 11-18). She stated the ulcer had brown dead skin on it and smelled awful. (Tr. p. 373, ll. 12-13). It was very large, “about as big as a plate almost.” (Tr. p. 373, ll. 15-16; p. 374, ll. 7-16). Ms. Scott became upset because she did not know he had a sore like that. (Tr. p. 374, ll. 17-20). She had trusted HealthSouth to take care of him. (Tr. p. 375, ll. 1-3; p. 376, ll. 10-11; p. 380, ll. 12-20; p. 390, ll. 16-20).

Ms. Scott testified the wound had to be debrided several times and Mr. Sulton had to get the colostomy. (Tr. p. 378, ll. 18-24; p. 392, ll. 9-12). He also had the wound flap procedure. (Tr. p. 378, l. 25-p.379, l. 2; p. 391, ll. 5-6). He also had to have a revision

done to the colostomy. (Tr. p. 379, ll. 3-5). No one at HealthSouth offered her any assistance with any of his treatment. (Tr. p. 379, l. 19-p.380, l. 9).

Ms. Scott was not aware of any disciplinary action taken against any of the nurses. (Tr. p. 380, ll. 21-24). She added that HealthSouth has not taken responsibility for the harm to Mr. Sulton. (Tr. p. 380, l. 25-p.381, l. 2). Ms. Scott agreed that she wanted the jury to award her \$4,000,000.00. (Tr. p. 381, ll. 3-18).

**Kathy Hoover (nurse defendant)** - Ms. Hoover is one of the defendant nurses, and was called as an adverse witness. (Tr. p. 396, l. 19-p.397, l. 23). She worked for HealthSouth during the time Mr. Sulton was treated there. (Tr. p. 398, ll. 3-5; p. 399, ll. 17-19). She was initially a charge nurse, but was involved in a serious traffic accident in September 2005 and did not return until January 2006. (Tr. p. 399, l. 20-p.401, l. 5). When she returned she was a house supervisor. (Tr. p. 401, ll. 18-20). Her responsibilities were not different. (Tr. p. 402, ll. 14-19). Although the position of house supervisor is very important to patient care, the position was not filled when she returned in January 2006. (Tr. p. 403, l. 23-p.404, l. 8).

Nurse Hoover stated HealthSouth had policies and procedures in place that govern patient care and patient safety, and these were available to all of the nurses there. (Tr. p. 405, l. 24-p.406, l. 5). These policies and procedures were in place to ensure patient safety, and all employees, including nurses, were expected to follow them. (Tr. p. 406, ll. 6-19; p. 417, ll. 15-25). The policies and procedures are guidelines to follow and establish the standards of care. (Tr. p. 406, l. 20-p.407, l. 4). Failure to follow them results in a breach of the standard of care and people get hurt. (Tr. p. 407, l. 14-p.408, l. 1).

Mr. Sulton had the right to receive reasonable and proper care from HealthSouth. (Tr. p. 408, ll. 7-10). Turning and positioning is important for bedridden patients like Mr. Sulton. (Tr. p. 409, ll. 2-4). Under the policies and procedures Mr. Sulton should have been turned at a minimum every two hours. (Tr. p. 407, ll. 5-13; p. 409, ll. 5-12).

Nurse Hoover agreed that charting and documentation is very important in delivering proper health care to patients. (Tr. p. 402, ll. 20-23; p. 408, ll. 11-23; p. 419, ll. 5-7). This allows the next nurse who comes along to see what is going on with the patient. (Tr. p. 408, l. 24-p.409, l. 1; p. 429, ll. 9-17). That was part of her job as a charge nurse until she returned from the wreck. (Tr. p. 402, ll. 24-25; p. 403, ll. 3-6).

Nurse Hoover reviewed Mr. Sulton's HealthSouth records. (Tr. p. 409, l. 15-p.410, l. 2). Mr. Sulton arrived at HealthSouth with a stage two irritation on his backside. (Tr. p. 410, ll. 3-6). When he got to Richland Memorial 11 days later he had a necrotic, foul smelling, massive stage four decubitus ulcer. (Tr. p. 410, ll. 7-12). She would not expect someone with a stage two irritation to progress to a stage four decubitus ulcer in about 11 days. (Tr. p. 410, ll. 13-22; p. 413, ll. 17-21). The records demonstrated Mr. Sulton was on his back the majority of the time he was in his bed. (Tr. p. 411, ll. 10-17; p. 415, ll. 8-13; p. 418, ll. 3-10; p. 419, l. 8-p.420, l. 18). The reason Mr. Sulton went from stage two to stage four was because he was not repositioned. (Tr. p. 415, ll. 15-25). She agreed it was not all right to keep a patient on his back for 24 hours. (Tr. p. 417, ll. 11-14).

Nurse Hoover claimed the nurses did, in fact, turn Mr. Sulton, (Tr. p. 422, l. 21-p.423, l. 1), but stated she did not chart that he was being turned. (Tr. p. 423, ll. 2-14).

She agreed the nurses could have done a better job charting Mr. Sulton's care. (Tr. p. 427, ll. 1-4). Nurse Hoover agreed that if the jury found the staff did not follow the rules then they would have committed gross negligence. (Tr. p. 434, l. 16-p.435, l. 24).

**Barbara McRedmond** - Ms. McRedmond is the risk manager for HealthSouth. (Tr. p. 436, l. 17-p.437, l. 12). Her job is to ensure that the staff knows what the standards are and to communicate the policies and procedures to the departments. (Tr. p. 439, ll. 9-13). She was called as a witness to testify for HealthSouth on policies and procedures pursuant to Rule 30 (b)(6), SCRPC. (Tr. p. 440, l. 11-p.441, l. 2; p. 442, l. 20-p.443, l. 7; p. 449, ll. 2-4).

Ms. McRedmond agreed that policies and procedures are critical for patient care and the failure to follow them can hurt or kill patients. (Tr. p. 453, ll. 8-17). She was familiar with the policies and procedures at HealthSouth, and every nurse was expected to follow them. (Tr. p. 454, ll. 15-24; p. 477, l. 15-p.478, l. 19). She was taught to turn a patient every two hours and every nurse is expected to know that rule. (Tr. p. 454, ll. 1-9).

Ms. McRedmond did not believe that documentation was required by the standard of care. (Tr. p. 456, l. 8-p.457, l. 8; p. 463, ll. 2-8; p. 465, ll. 9-11). She agreed that under the policies the primary nurse is responsible for reviewing documentation to ensure the plan of care is being followed. (Tr. p. 458, ll. 7-15; p. 459, l. 8-p.460, l. 2; p. 463, l. 9-p.464, l. 16; Pl. Exh. 3, 4, 5, 6). She also agreed that documentation is required of the RNs at HealthSouth. (Tr. p. 461, l. 17-p.462, l. 21).

Ms. McRedmond reviewed the Wound Prevention Documentation policy and procedure and agreed it established the standard of care to which Mr. Sulton was entitled.

(Tr. p. 468, ll. 5-25 ; Pl. Exh. 2). The policy established the reasonable care that should be provided to a patient. (Tr. p. 469, ll. 1-6). It would be unreasonable for a nurse not to follow that policy and procedure. (Tr. p. 469, ll. 7-10). The standard included turning a patient every two hours. (Tr. p. 469, ll. 13-20).

HealthSouth's policies and procedures required a hospital incident report when a person enters care with a documented pressure ulcer and the ulcer worsens. (Tr. p. 482, ll. 14-20; Pl. Exh. 2, p. 5). Ms. McRedmond did not have such an incident report regarding Mr. Sulton. (Tr. p. 482, l. 21-p.483, l. 4). Although she was the designated 30(b)(6) representative Ms. McRedmond had no knowledge that such an investigation was done or report completed. (Tr. p. 483, l. 10-p.484, l. 9).

Ms. McRedmond disagreed that the records indicated Mr. Sulton was on his back for 24 hours straight. She speculated that even though the records had entries every two hours showing "B" for back, he could have been turned during the interim periods. (Tr. p. 469, l. 23-p.472, l. 6). She agreed, however, that the documentation policy requires the practitioner to "pick the most appropriate time slot when the patient is repositioned." (Tr. p. 472, ll. 7-15). She said she did not like to see the entries the way they were and it was a matter of continually educating and teaching the staff the correct way to document care. (Tr. p. 472, l. 23-p.473, l. 13; Pl. Exh. 15). She agreed that either the charting was below the standard of care or the care was accurately documented and was itself below the standard of care. (Tr. p. 474, ll. 8-16; p. 475, ll. 5-11).

Ms. McRedmond agreed that there were episodes of poor documentation throughout Mr. Sulton's stay at HealthSouth. (Tr. p. 478, l. 24-p.479, l. 3). Had someone

spoken up the problems should have stopped. (Tr. p. 479, ll. 4-14). She could not explain why there were the signatures of 30 different people on the daily flow sheets but nothing was done to stop the problems. (Tr. p. 479, l. 15-p.480, l. 22; p. 481, ll. 4-7). Ms. McRedmond also agreed that the first step to positive change would be taking responsibility. (Tr. p. 481, ll. 8-10).

**Kim Harris (nurse defendant)** - Nurse Harris is a day shift nurse and has been with HealthSouth since 1989. (Tr. p. 499, l. 12; p. 500, l. 25). She agreed that the policies and procedures created the standard of care for Mr. Sulton. (Tr. p. 563, l. 14-p.565, l. 1). She also agreed that she knew Mr. Sulton had a skin breakdown and was at risk for skin breakdown, but she did not fill anything in the assessment to reflect that. (Tr. p. 565, ll. 2-14). She did not fill in a care plan for his skin care. (Tr. p. 566, ll. 1-15).

Nurse Harris agreed that the record contained entries reflecting some repositioning of Mr. Sulton. (Tr. p. 566, l. 16-p.567, l. 5). She also agreed that other parts of the charts indicated Mr. Sulton had not been repositioned, but claimed he had been turned. (Tr. p. 567, l. 12-p.570, l. 3).

**Betty Casteal (nurse defendant)** - Nurse Casteal worked as a staff nurse and a charge nurse with HealthSouth from 1989. (Tr. p. 572, ll. 11-13; p. 578, ll. 19-23). She participated in Mr. Sulton's care. (Tr. p. 573, ll. 12-17). Nurse Casteal agreed that the flow sheets did not chart anything on repositioning for the entire day and night for February 5, 2006. (Tr. p. 579, ll. 5-12).

**Sharon Miller Lane (nurse defendant)** - Nurse Lane worked as an LPN at HealthSouth from 2005 to 2009. (Tr. p. 584, ll. 4-16). She also participated in Mr.

Sulton's care. (Tr. p. 585, ll. 5-13). She agreed that the chart did not reflect the care she claimed she gave to Mr. Sulton. (Tr. p. 591, l. 18-p.595, l. 5; p. 596, ll. 8-12). She agreed that she did not write down that she turned him, but claimed she had to have done so to change the dressing. (Tr. p. 595, ll. 10-14; p. 596, ll. 16-18). She also agreed that from the chart she would know that Mr. Sulton was not being turned or repositioned. (Tr. p. 595, ll. 15-24). Nurse Lane said she was not in the room when others turned Mr. Sulton, and agreed "that's why you have the charts." (Tr. p. 597, ll. 5-13).

**Lisa Page (nurse defendant)** - Nurse Page began working for HealthSouth in 1996 as a staff RN. (Tr. p. 599, ll. 1-10). She conceded she did not document regarding repositioning of Mr. Sulton. (Tr. p. 601, ll. 12-20; p. 604, l. 24-p.605, l. 19; p. 607, ll. 5-20). She agreed the charting "could have been done better." (Tr. p. 601, ll. 23-25).

**Norine Corbin (nurse defendant)** - Nurse Corbin was an RN with HealthSouth and participated in Mr. Sulton's care. (Tr. p. 609, ll. 16-20; p. 610, ll. 3-8; p. 610, l. 20-p.611, l. 14). She agreed the standard of care at HealthSouth required that Mr. Sulton be turned and repositioned every two hours. (Tr. p. 614, ll. 9-12; p. 618, ll. 13-15). All of the nurses understand the importance of this standard because of the risk of skin breakdown and ulcers, which could cause serious injury or even death. (Tr. p. 618, l. 16-p.619, l. 1; p. 620, ll. 1-4).

Nurse Corbin agreed that she did not consult the daily flow sheet to see that there was no turning or repositioning being recorded. (Tr. p. 615, ll. 1-8). The record appears to demonstrate that the standard of care was not met. (Tr. p. 619, ll. 22-25; p. 620, ll. 5-7). Had she seen that she would have brought it to the attention of the nurse who was

providing care for Mr. Sulton. (Tr. p. 615, ll. 9-15; p. 620, ll. 8-16). She agreed she would have seen that Mr. Sulton was on his back for 24-hours a day had she looked at the chart. (Tr. p. 616, ll. 5-12).

**Debra Thompson (defense expert)** - Ms. Thompson testified as an expert of nursing and a wound care specialist. (Tr. p. 627, ll. 10-14). She reviewed Mr. Sulton's HealthSouth chart as well as the Richland Memorial chart. (Tr. p. 628, ll. 2-11). She opined that the overall care was "very reasonable" from her review of the records and the nurses were not negligent. (Tr. p. 647, ll. 17-22; p. 664, ll 2-7).

Ms. Thompson agreed that turning and repositioning a patient is the way to reduce pressure to address the problem of pressure ulcers. (Tr. p. 649, ll. 20-22). She also agreed the standard required turning every two hours. (Tr. p. 649, l. 23-p.650, l. 7). She also agreed that sitting up at greater than 30 degrees to eat would make the pressure worse on the ulcer. (Tr. p. 651, l. 19-p.652, l. 20).

Ms Thompson agreed that she had testified in her deposition that looking solely at the chart the nurses did not meet the standard of care regarding turning and repositioning Mr. Sulton. (Tr. p. 652, l. 21-p.657, l. 4; p. 660, l. 24-p.661, l. 4; p. 665, ll. 12-18). However, she changed her opinion at trial. (Tr. p. 657, ll. 13-16; p. 657, l. 23-p.658, l. 3; p. 658, l. 22-p.660, l. 23). Ms. Thompson agreed that the nurses at HealthSouth knew what the rules regarding documentation are and that repositioning Mr. Sulton was critical for his care. (Tr. p. 661, ll. 5-15). Ms. Thompson also agreed that every nurse who signed the record with "Bs" across the page would know that the standard of care was not being provided and would be conscious of a failure to exercise due care. (Tr. p. 661, ll. 16-25).

They would also have been aware that their conduct was wrongful under the applicable standards. (Tr. p. 662, ll. 1-6). She agreed that looking solely at the flow sheet the behavior amounted to recklessness. (Tr. p. 662, l. 12-p.663, l. 21; p. 665, ll. 5-6).

**Kurt Gambla (defense expert)** - Dr. Gambla testified as an expert in internal medicine. (Tr. p. 669, ll. 4-7). He reviewed Mr. Sulton's hospital admissions records, including the HealthSouth records, and several depositions. (Tr. p. 673, ll. 16-22; p. 682, ll. 3-19).

Dr. Gambla was aware that the published standard of care required repositioning every two hours, although he did not like the term "reposition." (Tr. p. 679, l. 17-p.680, l. 2). He opined that the mattress Mr. Sulton was provided satisfied the requirement of "offloading" the pressure. (Tr. p. 680, ll. 3-7). Dr. Gambla agreed, however, that the treatment reflected by the flow sheets would violate the accepted standard of care. (Tr. p. 684, l. 23-p.685, l. 23; p. 687, ll. 5-9).

Dr. Gambla disagreed that the standard of care required that Mr. Sulton be turned or repositioned every two hours. (Tr. p. 708, ll. 4-8; p. 711, ll. 18-23; p. 714, ll. 1-12). He acknowledged that Nurse Hoover, Nurse Casteal, Nurse Harris, Nurse Corbin, Nurse Lane, and Nurse Page all testified the standard of care required turning or repositioning every two hours. (Tr. p. 709, l. 4-p.711, l. 17). Dr. Gambla stated he had a differing definition of the standard of care from the nurses. (Tr. p. 713, ll. 9-12). He agreed that under their definition of the standard of care the records reflected repeated and flagrant violations. (Tr. p. 714, ll. 18-23; p. 716, ll. 7-13). He also agreed that the witnesses testified that the policies and procedures established the standard of care, but disagreed

with them. (Tr. p. 715, ll. 20-25).

Dr. Gambla was also aware that HealthSouth's policy and procedures required the filing of an incident report because Mr. Sulton's decubitus ulcer had gotten worse during his stay there. (Tr. p. 726, ll. 19). He was also aware that no report was filed. (Tr. p. 726, l. 20-p.727, l. 6). Dr. Gambla opined that while the care Mr. Sultan received was "not optimal," it was acceptable. (Tr. p. 729, ll. 11-23).

## ARGUMENTS

### I. THE DEFENDANTS ARE NOT ENTITLED TO A NEW TRIAL BASED UPON ALLEGED ERROR IN INSTRUCTING THE JURY

HealthSouth contends the trial court committed reversible error in charging the jury “that Appellants owed a heightened duty of care.” (App. Br. pp. 16-18). HealthSouth contends the very charge complained about was rejected in *Pittman v. Stevens*, 364 S.C. 337, 613 S.E.2d 378 (2005). This argument should not be persuasive.

The parties conferred over proposed jury charges and Defendants objected to Mr. Sulton’s suggestion that the trial court give a “heightened obligation” charge. (Tr. p. 750, ll. 15-17). The precise objection was as follows:

We [object] to it on the basis that Your Honor is already going to charge the law regarding eggshell plaintiffs. Your Honor’s going to charge [that] the standard in this case is reasonable care. I don’t think that there’s been really any discussion that would warrant that charge plus I think it’s already covered in the charges Your Honor [plans] to give. \* \* \* I think it’s going to confuse the jury and they’re going to believe that there was some higher duty that applied to the defendants in this case other than what the medical malpractice standard actually is.

(Tr. p. 750, l. 24-p.751, l. 10). Following closing arguments the trial court once again discussed the proposed charges. (Tr. p. 815, l. 2-p.821, l. 1).

The trial court charged the jury on negligence concepts as they relate to medical malpractice, and included the following language:

I further charge you, Mr. Foreman, members of the jury, 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] injuries to other persons. A similar rule applies to physicians or healthcare providers in their treatment of patients. When there’s 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.

(Tr. p. 842, ll. 4-15). After giving the charge, the trial court asked for objections or exceptions and Appellants responded “If I can just reincorporate the prior argument specifically about the greater duty and all...” (Tr. p. 847, ll. 23-25). When asked if counsel needed to “add anything else,” the response was “I don’t believe so.” (Tr. p. 848, ll. 8-10). At no point did Appellants specifically contend that this charge was a misstatement of the law of South Carolina.

On appeal, HealthSouth contends the “heightened duty” charge requires reversal under *Pittman*. This Court should reject this argument.

In *Pittman*, the jury found for the defendant physician in a medical negligence case. The plaintiff appealed, contending the trial court erred in refusing to charge the following:

If there is a great degree of danger present, then there is a greater duty of care to prevent injury to other persons. When there is a risk of substantial danger present, and the symptoms of the patient are considered with such a risk, then the physician 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 physician to respond appropriately and to provide the appropriate treatment.

*Pittman*, 364 S.C. at 340, 613 S.E.2d at 379. The Supreme Court noted this proposed charge was derived from section 27-2 of Judge Ralph King Anderson’s *South Carolina Request to Charge* book and was “a general negligence law principle....” 364 S.C. at 342, 613 S.E.2d at 380. See Ralph King Anderson, Jr., *South Carolina Requests to Charge-Civil § 27-2* (2002). The Supreme Court stated:

This type of instruction has been questioned in general negligence actions because the amount of care in relation to the degree of danger is encompassed in the appropriate standard of care which is determined by the facts of each case. See *Stewart v. Motts*, 539 Pa. 596, 654 A.2d 535 (1995)(holding the highest degree of care practicable is simply another way of phrasing a standard of reasonable or ordinary care under the circumstances). Furthermore, this instruction is even more inappropriate in a medical malpractice case. Every medical decision encompasses varying degrees of danger. Thus, the trial court did not err in failing to charge the jury Request Number 8.

Based on the foregoing, we conclude the trial court did not err in failing to charge the jury the two requested instructions. We remind the bench and the bar that while treatises and other scholarly works are useful research tools, it is necessary to review controlling case law for the current and correct jury charges.

*Pittman*, 364 S.C. at 343, 613 S.E.2d at 381.

The actual holding of *Pittman* is that the trial court did not err in refusing to give the requested charge from Judge Anderson's book. The *Pittman* Court noted the instruction would be "inappropriate" in medical malpractice cases, but did not declare it would be reversible *per se* to give the instruction. The Court cited to *Hinkle v. Cleveland Clinic Found.*, 159 Ohio App.3d 351, 823 N.E.2d 945 (2004) as the only case discussing the issue, and noted that the *Hinkle* court found no error in the refusal to give a "greater danger" charge. Importantly, the South Carolina court noted that the Ohio court stated it could "find no case law to support the proposed jury instruction in a medical malpractice case." *Pittman*, at 342, 613 S.E.2d at 381. Thus, the South Carolina court was affirming a trial court's decision *not* to give the charge, and basing that decision on an Ohio court's affirmance of a refusal to give the charge because there were no cases supporting such a charge in medical negligence cases. Of course, there were also no cases *preventing* such a

charge in this area, that is, holding it was error to give the charge.

There is also the question of whether the arguments being advanced on appeal were made below. At trial, Appellants contended the charge should not be given because it would be confusing in light of the charges already being given. (Tr. p. 750, l. 24-p.751, l. 10). Rule 51, SCRCF, provides in part “No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds for his objection.” Therefore, to preserve any claim that the charge violated *Pittman*, Appellants were required to make that argument below – they did not. See *Jackson v. Speed*, 326 S.C. 289, 486 S.E.2d 750 (1997) (a party may not argue one ground at trial and an alternate ground on appeal); *State v. Benton*, 338 S.C. 151, 157, 526 S.E.2d 228, 231 (2000) (finding an issue unpreserved when the appellant argued one ground in support of a jury charge at trial and another ground in support of the charge on appeal).

And assuming the charge was erroneous and was preserved for appeal, a party must still demonstrate prejudice in the giving of an improper charge. When an appellate court reviews an alleged error in a jury charge, it must consider the court’s jury charge as a whole in light of the evidence and issues presented at trial. *Ardis v. Sessions*, 383 S.C. 528, 682 S.E.2d 249 (2009). If, as a whole, the charges are reasonably free from error, isolated portions which might be misleading do not constitute reversible error. *Ardis v. Sessions*; *Keaton ex rel. Foster v. Greenville Hosp. Sys.*, 334 S.C. 488, 497, 514 S.E.2d 570, 575 (1999). This holistic approach to jury instructions is linked to the principle of appellate procedure that “[a]n error not shown to be prejudicial does not constitute

grounds for reversal.” *Ardis*, 383 S.C. at \_\_\_, 682 S.E.2d at 250-251; *Brown v. Pearson*, 326 S.C. 409, 417, 483 S.E.2d 477, 481 (Ct. App.1997); see also *Ellison v. Simmons*, 238 S.C. 364, 372, 120 S.E.2d 209, 213 (1961) (noting that a jury charge, even if erroneous, on a matter not in issue, is not always considered prejudicial). This is a longstanding rule in this state. See, e.g., *Westinghouse Electric & Mfg. Co. v. Glencoe Cotton Mills*, 111 S.C. 364, 98 S.E. 128 (1919) (where trial court made erroneous statement of law in 17-page jury charge Supreme Court refused to reverse where appellant failed to demonstrate the charge was prejudicial; Court held charge must be considered in its entirety and added “[i]n a charge of such length, it is not surprising if expressions were used, which, standing alone, might be regarded as erroneous”). Accordingly, even if there is some error or misstatement of the law in the charge, this Court must review that error or misstatement against the backdrop of the entire charge.

This Court applied this rule in *Pope v. Heritage Communities, Inc.*, Op. No. 4888 (S.C. Ct. App. filed Sept. 14, 2011) (Shearouse Adv. Sh. No. 32 at 65). In *Pope*, the trial court erroneously included the standard of willful, wanton and reckless conduct in the definition of simple negligence. The appellants in *Pope* asserted this effectively required the jury to find the recklessness necessary to award punitive damages and suggested to the jury that the court had already determined that Appellants were willful, wanton, and reckless. This Court stated:

In reviewing an alleged error in jury instructions, we are mindful that an appellate court will not reverse the trial court’s decision absent an abuse of discretion. See *Cole v. Raut*, 378 S.C. 398, 404, 663 S.E.2d 30, 33 (2008) (applying an abuse of discretion standard of review to an alleged error in jury instructions). Furthermore, an appellate court will review the

charge as a whole. See *Keaton ex rel. Foster v. Greenville Hosp. Sys.*, 334 S.C. 488, 497, 514 S.E.2d 570, 575 (1999) (finding a jury charge should be reviewed as a whole, and if the charges are reasonably free from error, isolated portions that might be misleading do not constitute reversible error). Here, although the trial court's initial language in instructing the jury on negligence may have been a misstatement of law, the court then extensively defined willful, wanton, and reckless conduct and instructed the jury on the difference between mere negligence and willful, wanton, and reckless conduct. In reading the charge in its entirety, we find no prejudice to Appellants. See *Priest v. Scott*, 266 S.C. 321, 324, 223 S.E.2d 36, 38 (1976) (finding an alleged error in a jury charge must be prejudicial to warrant a new trial).

*Pope*, at p. 71.

The *Pittman* court stated that "the amount of care in relation to the degree of danger is encompassed in the appropriate standard of care which is determined by the facts of each case." *Pittman*, at 343, 613 S.E.2d at 381. In this case, the trial court's charge on negligence encompassed eighteen (18) pages of the Record. (Tr. p. 825, l.7-p.842, line 3). The trial court's lengthy charge included:

- A. A correct and unchallenged instruction on the elements and burden of proof in medical malpractice actions (Tr. p. 827, l. 12-p.832, l. 12);
- B. A correct and unchallenged definition of gross negligence (Tr. p. 837, ll. 17-23);
- C. A correct and unchallenged definition of recklessness, willfulness and wantonness and its comparison to ordinary negligence (Tr. p. 838, l. 12-p.839, l. 17);
- D. A correct and unchallenged definition of "clear and convincing evidence" standard to support a finding of punitive damages (Tr. p. 836, ll. 14-17; p. 836, l. 22-p.837, l. 15).

Most of the instructions were, in fact, agreed to or proffered by Appellant. (Tr. p. 750, ll.

7-13).

The trial court also instructed the jury as to the burden of proof for punitive damages when the court discussed the verdict form with the jury. (Tr. p. 845, l. 18-p.846, l. 13; p. 867, l. 13-p.871, l. 13). Against the backdrop of the instructions on the heightened burden of proof for awarding punitive damages, the jury, in fact, awarded punitive damages. Appellants cannot demonstrate that this one paragraph in an 18-page jury instruction regarding negligence had any impact on the verdicts for actual and punitive damages the jury rendered in this case in light of the award of punitive damages.

Therefore, assuming the trial court's instruction on the "heightened duty of care" was a misstatement of the law in South Carolina, the trial court also extensively defined willful, wanton, and reckless conduct and instructed the jury on the difference between mere negligence and willful, wanton, and reckless conduct, as the trial court did in *Pope v. Heritage Communities*. HealthSouth cannot demonstrate prejudice from any error in giving a "heightened duty of care" charge when viewed in the context of the jury instructions as a whole. See, e.g., *Berberich v. Jack*, 392 S.C. 278, 709 S.E.2d 607 (2011) (erroneous jury instruction will not result in reversal unless it causes prejudice to the appealing party); *Harris v. University of South Carolina*, 391 S.C. 518, 706 S.E.2d 45 (Ct. App. 2011) (an erroneous jury instruction is not grounds for reversal unless the appellant can show prejudice from the erroneous instruction). See also *Wiggins v. Thomas*, 264 S.C. 360, 215 S.E.2d 426 (1975) (even if charge was erroneous, there must be reasonable grounds for supposing that the jury was misled and would have reached a different verdict).

The argument advanced on appeal is not preserved, and if it was, the proper resolution of the argument would be to hold, as in *Pope*, that assuming error in giving the “heightened duty of care” instruction, HealthSouth has not carried its burden of establishing harm deriving from any error in the charge.

**II. THE DEFENDANTS ARE NOT ENTITLED TO A NEW TRIAL BASED UPON ALLEGED FLAWS IN THE VERDICT FORM**

HealthSouth contends the jury form was “fatally flawed in a variety of respects” such that it is entitled to a new trial. HealthSouth claims these alleged defects resulted in a “confused verdict and clear prejudice to the Appellants.” (App. Br. p. 18). The Court should reject this argument.

Counsel for each side submitted proposed verdict forms. The trial court indicated it had adopted the version Mr. Sulton submitted (Tr. p. 753, ll. 11-13) and Appellants stated the following objections:

COUNSEL: First of all, I think the question should be segregated out on the elements of their claims, in other words, there should be a separate question of finding regarding negligence. There should be a separate question regarding finding of proximate cause as to the [specific] defendants. I believe that the way this verdict form was worded is a little confusing. To have all of the defendants listed separately because that’s the way they were listed in the complaint.

COURT: All right.

COUNSEL: Also the big issue that we have with regard to - - we’ve had a lot of discussion about the cap on noneconomic damages provided by the tort [reform statute] and question number three I think is correct. It asks whether or not the jury finds that the - - that HealthSouth and its employees were reckless, willful and wanton by clear and convincing evidence. And if you look at the [statute] in order to get around the caps it

talks about gross negligence, recklessness, willfulness, and wantonness. It's clear that the [statute] means by - - it's talking about the same standard that would apply to an award of punitive damages basically that's how you would get beyond the cap of noneconomic damages. And so, it must mean that that finding has to be by clear and convincing evidence not by a preponderance of evidence. So, that's our big problem with questions three and four.

In addition, on question number four it asks not only if they find by a preponderance of evidence that [the] defendants were grossly negligent, but also [asks] if they were reckless, willful or wanton. And it's never the case that recklessness, willfulness, and wantonness can be proved by [a] preponderance of the evidence, that's just incorrect.

Also if you take a look at the case law in South Carolina there are varying degrees of gross negligence and the type of gross negligence that would be required to be proven in order to justify punitive damages requires that recklessness - -

COURT: [We're] not talking about punitive damages.

COUNSEL: Well, I think they're talking about the same standard that applied in punitive damages, Your Honor, that's, that's - -

COURT: And the [statute], of course, is silent that is.

COUNSEL: It does not provide the standard for the evidence but if you look at it as a whole and the purpose of the tort reform [statutes] I think that has to be what it means. And so on that basis we object to the claims - -

COURT: That's fine. Anything else? Does that cover everything?

(There was no response.)

Once again, I'll invite you to revisit this afterwards.

(Tr. p. 753, l. 14-p.755, l. 18). After the jury charges Appellant's counsel was asked for any additional objections and stated, "And the objection to the verdict form," meaning the objection previously placed on the record. (Tr. p. 848, ll. 2-10). There was no other objection to the verdict form prior to its submission to the jury.

On appeal, Appellants contend the verdict form was defective and misled the jury, resulting in improper liability determinations and damages awards. (App. Br. pp. 18-19).

Specifically, Appellants contend:

1. The verdict form did not provide a clear option for the jury to find in favor of HealthSouth. (App. Br. pp. 19-20, 21). This argument was not made at trial.
2. The verdict form fails to require the jury to make any determinations of proximate cause as to the individual Nurse Defendants, indicating no such findings were required. (App. Br. p. 20, 21). This contention was arguably made to the trial court which apparently rejected it.
3. The form required the jury to “find for” the two plaintiffs without any identification of their distinct claims of negligence and loss of consortium. (App. Br. p. 21). This argument was not made at trial.

Thus, the only challenge arguably made below that is being made on appeal is that the trial court should have used a verdict form that required the jury to make specific determinations of proximate cause as to each of the Nurse Defendants. The remaining grounds are not preserved for review. See *Jackson v. Speed*, 326 S.C. 289, 486 S.E.2d 750 (1997) (a party may not argue one ground at trial and an alternate ground on appeal).

The trial judge has the discretion to determine how a case is submitted to a jury. *South Carolina Dept. of Transp. v. First Carolina Corp. of SC*, 372 S.C. 295, 641 S.E.2d 903 (2007); Rule 49, SCRCP. Our Supreme Court has observed that a special verdict question may be so defective in its formulation that its submission results in a prejudicial effect which constitutes reversible error. *South Carolina Dept. of Transp.* (citing 9A

Wright & Miller, *Federal Practice and Procedure, Civil 2d* § 2508, p. 193).

In evaluating the prejudicial effect of a defective special verdict question or special interrogatory, the appellate court must consider the question or interrogatory along with the instructions given to the jury. *South Carolina Dept. of Transp.; Fortune v. Gibson*, 304 S.C. 279, 282, 403 S.E.2d 674, 675 (Ct. App.1991) (finding that special interrogatories and instructions must be considered together). The prejudicial effect of a defective verdict form may be cured where the trial court provides clear and cogent jury instructions. *South Carolina Dept. of Transp.*, citing to *State v. Covert*, 368 S.C. 188, 214, 628 S.E.2d 482, 496 (Ct. App.2006), *aff'd as modified* 382 S.C. 205, 675 S.E.2d 740 (2009) (unchallenged oral jury instructions removed possible prejudice from use of allegedly defective jury form).

In this case, the trial court gave the jury the following instructions regarding the verdict form:

So Mr. Foreman and members of the jury, whatever your verdict in this case it must be unanimous that means all 12 of you must agree. And to aid you I've prepared what we refer to as a verdict form and the lawyers mentioned it to you I'll go over it with you quickly. \* \* \* And, you know, it's one of two possible verdicts basically. You can find the verdict for the plaintiff or you can find the verdict for the defense that makes sense. I got to go - - I can't talk to you about both of them at the same time [so] I'm going to go over the verdict form that's specifically applies to the plaintiff [you've] heard something about. And the verdict [form] for the defendants would be if you have not been convinced by the greater weight or the preponderance of the evidence that the standard of care was not breached or they failed their - - their actions fell below it or that they complied with the standard of care your verdict would be for the defendant. of course. And it's simple. it says defense verdict we the jury unanimously find for the defendants. That's as to the defendant.

(Tr. p. 843, l. 6-p.844, l. 6) (emphasis added).

Now, as to the plaintiff this is the [form] you heard the lawyers argue about. I'm going to go over it with you real quick. And you have to list them one at a time. So for number one it has \* \* \* we the jury find for the plaintiff the Estate of Vernon Sulton and against the defendant, HealthSouth Corporation, DBA HealthSouth of South Carolina, DBA HealthSouth Rehabilitation Hospital, and the following and in parenthesis it says check any that apply, against Kathy Hoover, against Lisa Page, against Sharon Miller, against Kim Harris, against Betty Casteal, against Norine Corbin, or none of the above. If you've been convinced by the greater weight or the preponderance of the evidence that the plaintiff is entitled to economic damages as I define that for you, members of the jury, you write that amount that you all agree upon along the line an award of blank. You write out the - - you write out the amount and then you put the numerical amount in the little parenthesis there. Y'all understand that I'm sure. That's page one.

Going to page two and relating back to the first question we the jury find for the plaintiff the estate against the defendants economic damages if you've been convinced by the greater weight of the evidence the amount and noneconomic damages as I define that for you.

And number two on this form is we the jury find for the plaintiff Willie Mae Scott against the defendant, HealthSouth Corporation, doing business as HealthSouth Rehabilitation and everything else and the following, number two would be once again against Kathy Hoover, Lisa Page, Sharon Miller, Kim Harris, Betty Casteal, Norine Corbin, or none of the above and then there's a line for the noneconomic damages that I talked to you about. And you can find an amount that you've been convinced by the greater weight or the preponderance of the evidence you will put that amount there as I just described for the question above.

And number three says this, do you find by clear and convincing evidence as I defined it for you that the defendant, HealthSouth Corporation, doing business as HealthSouth so forth and so on by and through its employees was reckless, willful or wanton and \* \* \* that their conduct proximately caused the injury to the plaintiff - - their conduct was the proximate cause of the injuries I - - does that make sense to you? I might have to add a word in there. Y'all with me so far? (Jurors nodded.)

And do you find that by clear and convincing evidence the defendant, HealthSouth, by and through its employees was reckless, willful or wanton and that their conduct was the proximate cause of injury yes or no, okay. If no go to question four, if yes you just stop right there

don't go any further. And question four says this members of the jury, do you find by a preponderance of the evidence that the defendant, HealthSouth, by and through its employees was grossly negligence, reckless, willful or want and that their conduct was a proximate cause of the plaintiff's injure, yes or no. Y'all with me so far, aren't you? (Jurors nodded head.)

And then, Mr. Foreman, you either find for the defendant as I just went over that short form with you. You go through this form with the plaintiff and whatever you find if you decide the plaintiff has proven their case by the greater weight or the preponderance of the evidence you sign your name above the line that says foreperson and that should conclude your service on this particular case.

(Tr. p. 844, l. 7-p.846, l. 22). There were no objections to these instructions regarding the verdict form.

The judge then submitted the verdict forms to the jury which returned the verdict as to **actual damages** as follows:

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)

- |                                     |                   |
|-------------------------------------|-------------------|
| <input checked="" type="checkbox"/> | Kathy Hoover, RN  |
| <input checked="" type="checkbox"/> | Lisa Page, RN     |
| <input checked="" type="checkbox"/> | Sharon Miller, RN |
| <input checked="" type="checkbox"/> | Kim Harris, RN    |
| <input checked="" type="checkbox"/> | Betty Casteal, RN |
| <input checked="" type="checkbox"/> | Norine Corbin, RN |
| <input type="checkbox"/>            | NONE OF THE ABOVE |

And award \$ 306,693.25  
(Three Hundred Six thousand and six dollars) in **ECONOMIC** damages  
*hundred ninety three dollars and*

twenty five cents

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 \$( 4,000,000.00  
( 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

(Verdict form; italics reflects handwriting on the form).

The trial judge also submitted a separate verdict form that provided:

1. [We] the jury find for Defendants and against Plaintiff.

\_\_\_\_\_  
Foreperson

Columbia, South Carolina

Dated: \_\_\_\_\_, 2010

This form permitted the jury to render a defense verdict if it saw fit to do so.

After the verdict on the actual damages, the trial court gave the jury specific instructions regarding punitive damages. (Tr. p. 867, l. 14-p.871, l. 8). The judge also advised the jury that under the verdict form the amount "can be zero. It can be whatever you feel is appropriate to deter this particular defendant from doing a repeat - - repeating such conduct as you [found] existed in this particular trial." (Tr. p. 871, ll. 16-19). The jury deliberated regarding **punitive damages** and returned the following verdict:

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

Richard Rowe # 303  
Foreperson

(Verdict form; Italics reflects handwriting on the form). When viewed with the instructions, the verdict forms sufficiently provided the jury the means to decide the case.

It is the duty of the court to sustain verdicts when a logical reason for reconciling

them can be found. *Austin v. Stokes-Craven Holding Corp.*, 387 S.C. 22, 50, 691 S.E.2d 135, 149 (2010); *Rhodes v. Winn-Dixie Greenville, Inc.*, 249 S.C. 526, 155 S.E.2d 308 (1967). In this case, the logical view of these verdicts is that the jury awarded Mr. Sulton \$306,693.25 in economic damages and nothing for his claimed non-economic damages, against all of the defendants. The jury then awarded Ms. Scott \$4,000,000.00 on her loss of consortium claim but directed it solely at HealthSouth. Next, the jury determined that under the clear and convincing evidence, HealthSouth was guilty of reckless, willful and wanton conduct “by and through its employees” which proximately injured the plaintiffs. After making these factual determinations, the jury awarded punitive damages of \$8,000,000.00. The jury awarded the plaintiffs \$4,306,693.25 in actual damages and \$8,000,000.00 in punitive damages for the actions of HealthSouth by and through its employees.

Appellants ask this Court to declare the verdict defective without attempting to logically reconcile the result. Appellants want this Court to reject the jury’s verdict as illogical rather than presuming the verdict’s correctness and upholding it if possible. The law of South Carolina, however, is otherwise. It is the duty of this Court to construe the verdict in a logical manner and uphold it, using every presumption in favor of its correctness. See *Camden v. Hilton*, 360 S.C. 164, 600 S.E.2d 88 (Ct. App. 2004) (a jury’s verdict should be upheld when possible to do so and to carry into effect what was clearly jury’s intentions; when the verdict is so confused that it is not absolutely clear what was intended, the court should order a new trial).

This Court should review the verdict and, applying the correct standard of review,

should uphold the verdict in this case as the jury's clear expression that HealthSouth, through its employees, was willful, wanton and reckless, this behavior injured Mr. Sulton and Ms. Scott, and that injury is reflected in the verdict the jury rendered.

**III. THE JURY'S VERDICT ON THE LOSS OF CONSORTIUM CLAIM IS NOT A "TOTAL DEFENSE VERDICT"**

Appellants contend that the jury's verdict as to loss of consortium can only be interpreted as being a verdict in favor of ALL of the Appellants, including HealthSouth. (App. Br. pp. 22-25). This Court should reject this argument.

As noted above, the jury returned the following verdict on the loss of consortium claim:

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)

<input type="checkbox"/>	Kathy Hoover, RN
<input type="checkbox"/>	Lisa Page, RN
<input type="checkbox"/>	Sharon Miller, RN
<input type="checkbox"/>	Kim Harris, RN
<input type="checkbox"/>	Betty Casteal, RN
<input type="checkbox"/>	Norine Corbin, RN
<input checked="" type="checkbox"/>	NONE OF THE ABOVE

And award \$( 4,000,000.00 )  
( Four Million dollars) in **NON-ECONOMIC** damages.

Appellants contend HealthSouth had to have been included in the "NONE OF THE ABOVE" category, and this was "obvious and clear." (App. Br. pp. 23, 24). Appellants contend alternatively that the verdict is "ambiguous" and cannot be accepted. This Court should reject these arguments.

Contrary to Appellants' contention, the jury viewed "NONE OF THE ABOVE" as referencing only the list of nurses immediately above that option. This makes sense when the prefatory language is considered. This portion of the verdict form stated that the jury found for Plaintiffs against HealthSouth "and the following" and gave the option of checking each individual nurse or none of the above. Had the jury truly intended to give a verdict as to all defendants then the jury would not have listed a dollar amount for non-economic damages for Ms. Scott's claim. See *Camden v. Hilton*, 360 S.C. 164; 600 S.E.2d 88 (Ct. App. 2004) (a jury's verdict should be upheld when possible to do so and to carry into effect what was clearly jury's intentions; when the verdict is so confused that it is not absolutely clear what was intended, the court should order a new trial).

This Court should construe the verdict in the only reasonable manner that will give effect to the jury's intent to award Ms. Scott her damages. That is, the Court should construe the jury's verdict as a verdict solely against HealthSouth on Ms. Scott's loss of consortium claim for the amount the jury determined that claim to be. It is, in fact, absolutely clear that the jury did not intend to render a verdict for all of the defendants, but intended to make an award to Ms. Scott on her claim against HealthSouth alone. The Court should accordingly affirm the trial court's denial of Appellants' new trial motion on this ground.

**IV. HEALTHSOUTH IS NOT ENTITLED TO A NEW TRIAL OR A JNOV ON THE LOSS OF CONSORTIUM CLAIM**

Appellants contend that the jury's verdict of \$4,000,000.00 for Ms. Scott on her loss of consortium claim "is unsupportable based on the nature of her claim and the evidence at trial." (App. Br. p. 25). The Court should reject Appellants' argument and sustain the jury's verdict.

The trial court charged the jury without objection as follows:

Now, noneconomic damage, members of the jury, means non pecuniary damages arising from pain, suffering, inconvenience, physical impairment, disfigurement, mental anguish, emotional distress, loss of society and companionship, [loss] of consortium, injury to reputation, humiliation, other non pecuniary damages and any other theory of damages included but not limited to fear of loss, illness and injury.

(Tr. p. 835, l. 19-p.836, l. 1). Against this backdrop the jury brought back its verdict.

Appellants contend the elements of damages recoverable under a claim for loss of consortium are limited, citing to cases from other jurisdictions for the rule that "mental anguish is not included in a loss of consortium claim." (App. Br. p. 25-26). Appellants also liken a claim for loss of consortium to a claim for outrage (intentional infliction of emotional distress) and assert there must be some showing of bodily injury. (App. Br. pp. 26-27). These arguments should not be persuasive.

In support of their argument, Appellants cite to *Gosnell v. Dorchester School Dist. No. 2*, 301 S.C. 21, 389 S.E.2d 865 (1990) and *Hughey v. Ausborn*, 249 S.C. 470, 154 S.E.2d 839 (1967). The cases cited, however, do not preclude the jury's award under the modern view of loss of consortium claims.

At one time a claim for loss of "consortium" derived from the common law. See

*Cook v. Atlantic Coast Line R. Co.*, 196 S.C. 230, 13 S.E.2d 1 (1941) (discussing the common law right of her husband to the companionship, aid, society and services of his wife, which is comprehended by the term “consortium,” and his attendant right to sue therefor in the event of their loss through personal injury to her). Loss of consortium in this State, however, is now governed by statute.

Section 15-75-20 of the South Carolina Code of Laws provides:

Any person may maintain an action *for damages* arising from an intentional or tortious violation of the right to the companionship, aid, society and services of his or her spouse. Provided, that such action shall not include any damages recovered prior thereto by the injured spouse. This section shall not be retroactive but shall be effective only on cause of action arising after June 25, 1969.

S.C. Code Ann. § 15-75-20 (2010) (emphasis added). This statute was first enacted in 1969. See *Berry v. Myrick*, 260 S.C. 68, 194 S.E.2d 240 (1973) (describing the adoption of the consortium statute in 1969).

Section 15-75-20 permits a person to “maintain an action for *damages*” that arise from a tort that injures a spouse. The word “damages” is not defined in the statute, nor is it modified in any way. “‘Damages,’ absent a restrictive modifier like ‘compensatory,’ ‘actual,’ ‘consequential’ or ‘punitive,’ is an inclusive term embracing the panoply of legally recognized pecuniary relief.” *Leininger v. Pioneer Natl. Latex*, 115 Ohio St.3d 311, 317-318, 875 N.E.2d 36, 43 (2007), citing *Rice v. CertainTeed Corp.*, 84 Ohio St.3d 417, 419, 704 N.E.2d 1217 (1999). See also Black’s Law Dictionary 445 (9th Ed. 2009) (“damages” means “money claimed by, or ordered to be paid to, a person as compensation for loss or injury”).

Furthermore, South Carolina's consortium statute uses the word "damages" without limitation or modification. Had the legislature intended to limit the types of damages available for loss of consortium, it could have drafted the statute differently. For instance, the legislature could have said a person may maintain an action for loss of consortium for "pecuniary loss only" or "damages limited to compensation for loss of companionship, aid, society, and services." The legislature also could have said a person may maintain "an action for damages, but not punitive damages." The legislature knows how to draft a statute so as to limit the definition of damages under a statutory scheme. See S.C. Code Ann. § 15-78-120 (b) (Supp. 2010) (South Carolina Tort Claims Act provides "No award for damages under this chapter shall include punitive or exemplary damages...."). In the consortium statute, however, the legislature chose to state the word "damages" without qualification and without limitation.

*Hughey v. Ausborn* is of no aid to the Appellants because it was decided in 1967 and involved a cause of action that necessarily predated the adoption of the loss of consortium statute, Section 15-75-20. Hence, the statement in *Hughey* that the proper measure of damages for loss of consortium (the spouse's right to services of the injured spouse and for expenses incurred) describes the damages recoverable under the common law *before* the adoption of Section 15-75-20. This statement also derived from an older Alabama case under the common law rules; unlike Alabama, claims for consortium in South Carolina are now governed by statute.

Defendants also cite to *Gosnell* for the rule that 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." (App. Br. p. 25). When read in context, however, this language from *Gosnell* does not preclude the jury's determination of damages in this case under the modern view of consortium claims.

In *Gosnell*, the Court had before it the narrow issue of whether loss of consortium was included within the definition of "loss" for purposes of the South Carolina Tort Claims Act. Because that Act defines "loss" to include "any other element of actual damages recoverable in actions for negligence," S.C. Code Ann. § 15-78-30(f)(Supp. 2010), the defendant argued a Tort Claim Act plaintiff could recover only for economic loss and not for loss of consortium. The Supreme Court disagreed, noting that consortium was included within the operative phrase "any other element of actual damages recoverable" because:

At *common law*, a spouse is entitled to recover the value of the injured spouse's services, society, and companionship in an action for loss of consortium as well as medical expenses incurred on behalf of the injured spouse. Damages awarded for loss of consortium are compensatory damages, which are by definition actual damages. We therefore conclude the legislature intended "loss" as defined in § 15-78-30(f) to include loss of consortium.

*Gosnell*, 301 S.C. at 23-24, 389 S.E.2d at 866 (citations omitted; emphasis added).

*Gosnell*, therefore, does not stand for the broad principle Appellants claim it does.

Furthermore, *Gosnell* focused on the common law derivation of consortium claims, and did not address the elements of "damages" recoverable under § 15-75-20. Accordingly, this Court should reject Appellants' attempt to limit the nature of the actual damages award to Mr. Sulton under *Gosnell*.

Appellants also contend the record does not support the verdict the jury rendered,

and there is “no rational basis” to support the verdict. (App. Br. pp. 25-28). The Court should reject Appellants’ arguments.

The trial court specifically charged the jury that it must limit its determination of damages to those damages related to the Appellants’ behavior. (Tr. p. 826, l. 10-p.827, l. 11; p. 834, l. 23-p.835, l. 2; p. 838, ll. 1-11). In fact, the judge instructed:

Any portion of the injury which was not caused by an act or omission on the part of the defendant is not compensable. You can award damages for any aggravation of a preexisting condition but not for the original injury itself. If you find that the plaintiff received an injury as a result of the negligence of the defendant so that he is entitled to recover for said injuries the fact that he had a preexisting defect would not defeat his recovery.

(Tr. p. 840, l. 22-p.841, l. 4). The jury is presumed to have followed its instructions in this regard. *Conner v. City of Forest Acres*, 363 S.C. 460, 611 S.E.2d 905 (2005); *State v. Grovenstein*, 335 S.C. 347, 517 S.E.2d 216 (1999).

Furthermore, the type of damages involved – loss of consortium – is not susceptible of mathematical certainty, and is uniquely within the province of the jury. Cf. *Cook v. Atlantic Coast Line R. Co.*, 196 S.C. 230, 13 S.E.2d 1 (1941) (the companionship and society of a spouse are not articles of commerce and cannot be weighed or measured; the amount of that compensation is to be determined by the jury, not from evidence of value, but from their own observation, experience, and knowledge, conscientiously applied to the facts and circumstances of the case); *Davis v. Tripp*, 338 S.C. 226, 525 S.E.2d 528 (Ct. App. 1999) (loss of consortium encompasses not only the loss of services, but also the loss of society and companionship; these are issues for the jury); *Panhorst v. Panhorst*, 301 S.C. 100, 390 S.E.2d 376 (Ct. App. 1990) (describing

consortium as the conjugal society, comfort, companionship, and affection of each other).

There was sufficient testimony in this case that Ms. Scott suffered actual losses encompassed within a consortium claim. Mr. Sulton's daughter, Naeema, testified Mr. Sulton was a good husband to her mother, Ms. Scott. (Tr. p. 350, ll. 7-8; p. 357, ll. 23-25). Ms. Scott testified Mr. Sulton was a good husband and provider, and they had a good relationship. (Tr. p. 363, l. 23-p.364, l. 1). Ms. Scott stated that both she and Naeema worked so Mr. Sulton would watch their grandchildren. (Tr. p. 364, l. 16-p.365, l. 1).

Ms. Scott identified the colostomy bag Mr. Sulton required as a result of the wound. (Tr. p. 376, l. 21-p.377, l. 11; p. 378, ll. 22-24). She also described the effort she took to help him with the bag, and the odor that emanated from the bag. (Tr. p. 377, l. 12-p.378, l. 17). Mr. Sulton also had a wound flap procedure and revision of the colonostomy. (Tr. p. 379, ll. 1-13). Ms. Scott asked the jury to compensate her for the mental anguish and other suffering she went through because of the wound. (Tr. p. 379, ll. 14-18).

The jurors heard the evidence and the instructions the trial court gave to them. It was within their province to determine the value of this loss to Ms. Scott, subject only to the discretionary power of the trial court, who saw and heard all of the evidence, to grant a new trial if the trial court believed the verdict not to be supported by the evidence.

Accordingly, this Court should reject Appellants' arguments that the verdict for loss of consortium is not sustainable under the record or the law of South Carolina. The Court should affirm the trial court's denial of Appellants' new trial motion and permit the jury's verdict to stand.

## V. THE PUNITIVE DAMAGES AWARD IS NOT IMPROPER

The punitive damages award in this case is subject to review by both the trial judge and the appellate courts under the framework established in *Mitchell v. Fortis Ins. Co.*, 385 S.C. 570, 686 S.E.2d 176 (2009). In light of the record in this case, the award is not improper.

The *Mitchell* Court set out a framework for the review of punitive damages. The guideposts to be considered are: (1) the reprehensibility of the defendant's conduct; (2) the ratio between the actual or potential harm suffered by the plaintiff and the amount of the punitive damages award; and (3) any comparative penalty awards. See also *Cody P. v. Bank of America*, Op. No. 4875 (S.C. Ct. App. filed Aug. 23, 2011) (Shearouse Adv. Sh. No. 29 at 93) (the appellate court performs a de novo review in evaluating the constitutionality of a punitive damages award). An analysis of these guideposts demonstrates the propriety of the jury's award of punitive damages in this case.

### 1. REPREHENSIBILITY OF THE DEFENDANT'S CONDUCT

The first guidepost is the reprehensibility of the defendant's conduct. It is informed by at least five factors, which include: (a) the harm caused was physical versus economic; (b) the tortuous conduct evinced an indifference to or a reckless disregard for the health and safety of others; (c) the target had a special economic or other vulnerability; (d) the conduct involved repeated actions or was an isolated incident; and (e) the harm was the result of intentional malice, trickery, or deceit rather than mere accident. *Mitchell v. Fortis*, 385 S.C. at 587, 686 S.E.2d at 185.

The punitive award in this case was proper given the reprehensibility of

Defendants' conduct. The injuries in this case were physical. Mr. Sulton suffered a stage 4 decubitus ulcer (bed sore) that was infected and foul-smelling. He underwent multiple surgical procedures including debridements, skin grafts, and a colostomy. The wound was such that Mr. Sulton could smell his flesh rotting, while being helpless to do anything about it. Mr. Sulton was also aware that he was being mistreated by virtue of his informing his doctor that the staff was neglecting to turn him.

HealthSouth is a "rehab" hospital. As such, HealthSouth should know the special needs of and risk to patients. There is clear and convincing evidence that the Defendants were reckless and consciously indifferent to Mr. Sulton's needs. Mr. Sulton, who was paralyzed, had special needs of which HealthSouth was specifically aware.

Moreover, HealthSouth had very clear standards of care that should have been followed. Despite Mr. Sulton's needs and despite the clear standards, HealthSouth's employees (more than 30 of them over 11 days) all knew that Mr. Sulton was not getting the basic standard of medical care. Indeed, in some instances the negligence of HealthSouth's employees were well-documented.

This was not just a "failure to document" case. It is true that in many instances no care was documented as required. Equally as many times, such as on February 4, 2006, Mr. Sulton was documented as being on his back for the full 24-hour period. That is, HealthSouth's records proved not only the deviation from the standard of care, but also proved HealthSouth's recklessness. That substandard, deviant care was well-documented and plain for the jury to see. The indifference is palpable in light of the fact that thirty (30) employees over a course of eleven (11) days failed to provide the basic standard of

medical care to Mr. Sulton.

Mr. Sulton also had a special vulnerability; he was paralyzed from the chest down. He had medical problems and he came into HealthSouth with a stage 2 skin irritation. Despite these special vulnerabilities (about which HealthSouth specifically knew), Healthsouth did not even provide the most basic level of care their standards required.

This was not an isolated incident. The conduct giving rise to the injuries lasted over eleven (11) days and was with the specific knowledge of at least thirty (30) medical professional employees of HealthSouth. There were more than ninety-seven (97) deviations from the standard of care committed by named and unnamed defendants.

The harm was also not a mere accident. The actions of these thirty (30) employees over eleven (11) days, all of whom knew that the basic care was not being provided, demonstrate something that is much more than a mere accident.

All of the reprehensibility factors weigh heavily in favor of the punitive damages award in this case.

## 2. RATIO

“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.” *Id.* at 587-588, 686 S.E.2d at 185. Notably, the Supreme Court used the term “potential” harm in *Mitchell*. The jury found the total actual harm the Defendants caused to be \$4,306,693.25. The punitive damages of \$8,000,000 yields a ratio of 1.86:1. This is at the very low end of the “single digit” multiplier that easily passes Constitutional muster.

There are three factors to be considered when looking at the ratio: (1) the

likelihood that an award will deter the defendant from like conduct; (2) the award being reasonably related to the harm likely to result from such conduct; and (3) the defendant's ability to pay. *Id.* at 588, 686 S.E.2d at 185. All three factors urge that the punitive damage award is proper.

Paying \$8,000,000 in punitive damages will hopefully cause HealthSouth to address its deficiencies. The evidence demonstrated the severity of the injuries HealthSouth visited upon Mr. Sulton was not enough for HealthSouth to change its conduct. If it had been, HealthSouth would have properly reported the stage 4 decubitus ulcer, performed the investigation, and made changes. It did not. It is right to infer that a for-profit hospital corporation will make changes when it hurts the bottom line. This punitive damage award will properly give HealthSouth the incentive to do the right thing.

Second, the kind of harm here is easily preventable physical harm to a particularly vulnerable patient population. Bed sores are of great danger to patients in general and in particular at HealthSouth. These bed sores not only costs hundreds of thousands of dollars in needless medical bills, they also cause tremendous suffering and even death. Simply following the standard of care of turning Mr. Sulton every two (2) hours would have prevented this harm.

Third, HealthSouth's revenue in the year prior to trial was \$1.911 Billion, demonstrating its ability to pay a punitive damage award of \$8,000,000.

All of these factors urge that the award be upheld.

### 3. COMPARATIVE PENALTY AWARDS

The neglect of a vulnerable adult is a crime under South Carolina law. Where there is “great bodily injury,” as here, the crime is a felony and punishable by up to fifteen (15) years in prison. S.C. Code Ann. § 43-35-85 (Supp. 2010). Moreover, this is a “violent crime” and subjects the offender to mandatory terms of imprisonment. It is also considered a “most serious offense,” meaning someone convicted of the crime must serve eighty-five (85%) percent of the sentence before parole eligibility, S.C. Code Ann. § 24-13-150 (Supp. 2010), and a recidivist would be eligible for Life without Possibility of Parole. S.C. Code Ann. § 17-25-45 (C)(2)(c) (Supp. 2010). Compared to the available terms of incarceration, paying the punitive damages awarded here is a slight punishment.

Respondents could not find any reported punitive damages cases involving decubitus ulcers in South Carolina. There were, however, a number of other medical negligence cases. See, e.g., *Scott v. Porter*, 340 S.C. 158, 172, 530 S.E.2d 389, 396 (2000) (ratios of 2.5:1 and 1.33:1 not excessive); *Taylor v. Medenica*, 324 S.C. 200, 479 S.E.2d 35 (1996) (ratio of 10:1 not excessive); *McCourt ex rel. McCourt v. Abernathy*, 318 S.C. 301, 306, 457 S.E.2d 603, 606 (1995) (ratio of 2.5:1 not excessive); *Hundley v. Rite Aid of South Carolina, Inc.*, 339 S.C. 285, 314, 529 S.E.2d 45, 61 (Ct. App. 2000) (ratios of 2:1 for one plaintiff and 200:1 for another not excessive); *Welch v. Epstein*, 342 S.C. 279, 536 S.E.2d 408 (Ct. App. 2000) (ratio slightly greater than 1:1 not excessive). Respondents located numerous punitive damages awards in other contexts and did not locate any case that held a multiplier less than 2 to be excessive.

Given that neglect of a vulnerable adult is a felony and in light of the history of

punitive damages awards in South Carolina, the damage ratio of less than 2:1 is more than reasonable. The punitive damage award of \$8,000,000 under the facts of this case was proper, and well within the guidelines set forth by the Supreme Court in *Mitchell v. Fortis*.

HealthSouth contends the appropriate comparison for the ratio is the award of \$306,693.25 for Mr. Sulton's economic losses against the \$8,000,000.00 award, because those are "the only relevant amounts" under Mr. Sulton's negligence claim. HealthSouth also contends any award for punitive damages cannot relate to the \$4 million for Ms. Scott's loss of consortium claim because punitive damages were sought only in Mr. Sulton's negligence claim. (App. Br. p. 40). These arguments should not be persuasive.

#### A. THE PUNITIVE DAMAGES TO ACTUAL DAMAGES RATIO

Under *Mitchell*, the comparison involves "the disparity between the actual and potential harm suffered by the plaintiff and the amount of the punitive damages award." *Mitchell*, 385 S.C. at 583, 686 S.E.2d at 183. Accord *Austin v. Stokes-Craven Holding Corp.*, 387 S.C. 22, 691 S.E.2d 135 (2010). The 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." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 426 (2003). The comparison is between the all of the compensatory damages suffered in the case and the overall award of punitive damages. The actual damages figure used for this calculation includes the potential harm to all plaintiffs in the case. Compare *Mitchell*, 385 S.C. at 590-591, 686 S.E.2d at 187 (in

reviewing the ratio guidepost court need not always compare punitive damages award to the actual damages awarded, but in certain cases may compare it to the potential harm suffered by the plaintiff).

Here, the ratio is not 26:1, as HealthSouth reports. It is, in fact, 1.86:1. The comparison is between all of the potential actual harm the Defendants caused and the punitive damages the jury awarded. Here, the potential actual harm was, in fact, \$4,306,693.25, because that is the amount the jury awarded as compensation to both plaintiffs in the case. HealthSouth attempts to create a limitation of the punitive damages to actual damages awarded to one plaintiff on one cause of action, but there is no authority for such a restriction. Instead, *Mitchell* demonstrates the court is to compare the punitive damages actually awarded in the case with all actual damages awarded to all plaintiffs, including potential harm caused by the Defendant's behavior even if not actually awarded.

Accordingly, the Court should reject HealthSouth's argument insofar as it limits the ratio to a comparison of the \$306,693.25 awarded to Mr. Sulton on his separate claim.

#### **B. PUNITIVE DAMAGES AND LOSS OF CONSORTIUM**

Appellants also contend that the Court may not consider the \$4,000,000 award to Ms. Scott for loss of consortium in the analysis because punitive damages are not recoverable as an element of damages for loss of consortium, citing to *Gosnell v. Dorchester School Dist. No. 2*, 301 S.C. 21, 389 S.E.2d 865 (1990) and *Hughey v. Ausborn*, 249 S.C. 470, 154 S.E.2d 839 (1967). As noted above, the limitation

HealthSouth would place on the ratio is contrary to current case law. Even so, the cases cited do not preclude an award of punitive damages related to consortium under the modern view of loss of consortium claims.

As noted above, at one time a claim for loss of “consortium” derived from the common law. *Cook v. Atlantic Coast Line R. Co.*, 196 S.C. 230, 13 S.E.2d 1 (1941). Since 1969, loss of consortium in this State is governed by Section 15-75-20 of the South Carolina Code of Laws, which permits a person to “maintain an action for *damages*” that arise from a tort that injures a spouse. The word “damages” is not defined in the statute, nor is it modified in any way. “‘Damages,’ absent a restrictive modifier like ‘compensatory,’ ‘actual,’ ‘consequential’ or ‘punitive,’ is an inclusive term embracing the panoply of legally recognized pecuniary relief.” *Leininger v. Pioneer Natl. Latex*, 115 Ohio St.3d 311, 317-318, 875 N.E.2d 36, 43 (2007), citing *Rice v. CertainTeed Corp.*, 84 Ohio St.3d 417, 419, 704 N.E.2d 1217 (1999). See also Black’s Law Dictionary 445 (9th Ed. 2009) (“damages” means “money claimed by, or ordered to be paid to, a person as compensation for loss or injury”; punitive and exemplary damages are listed as subheadings under the general heading).

Punitive damages are considered part of the “compensation” an injured party may claim from being injured by another’s tort. As the Supreme Court recently instructed:

[P]unitive damages, in addition to punishing the defendant and deterring similar conduct by the defendant and others, serve to vindicate the private rights of the plaintiff *and they provide some measure of compensation to plaintiffs for the intentional violation of those rights that is separate and distinct from the usual measure of compensatory damages.*

*O’Neill v. Smith*, 388 S.C. 246, 252, 695 S.E.2d 531, 534 (2010) (emphasis added).

Punitive damages are therefore part of the “compensation” an injured party may recover under appropriate circumstances.

Also, the consortium statute uses the word “damages” without limitation. Had the legislature wanted to limit the types of damages available for loss of consortium, it could have drafted the statute differently. For instance, the legislature could have said a person may maintain an action for “actual damages only” for loss of consortium. The legislature also could have said a person may maintain “an action for damages, but not punitive damages.” The legislature knows how to draft a statute so as to limit the definition of damages under a statutory scheme. See S.C. Code Ann. § 15-78-120 (b) (Supp. 2010) (South Carolina Tort Claims Act provides “No award for damages under this chapter shall include punitive or exemplary damages....”). In the consortium statute, however, the legislature used the word “damages” without qualification and without limitation.

Defendants rely upon *Hughey v. Ausborn*, but *Hughey* was decided in 1967 and involved a cause of action that necessarily predated the adoption of the loss of consortium statute. While the Court in *Hughey* adopted the rule from Alabama that the common law right to consortium did not include a claim for punitive damages, that rule did not survive the adoption of Section 15-75-20. In fact, the Alabama Court also stated “[w]hile the relationship is not identical, the right of the husband to recover damages for injuries to the wife is analogous with the right of the parent to recover for injuries to a child.” *Hughey*, 249 S.C. at 478, 154 S.E.2d at 842 (discussing *People’s Home Telephone Company v. Cockrum*, 182 Ala. 547, 62 So. 86 (1913)). The *Hughey* Court discussed another Alabama case earlier in the opinion:

In the case of *Bube v. Birmingham R. Light & P. Co.*, 140 Ala. 276, 37 So. 285 [(1904)], it was said to be a well recognized principle of common law that the right of action in the father for injuries to a minor child is based upon the idea of loss of service of the minor to the father, and the damages are compensatory, including, of course, nursing, medical expenses, and the like, “and that punitive damages are not recoverable in such an action *unless they are given by a statute.*” In 67 C.J.S. *Parent and Child* s 55, at page 758, it is said “A parent is entitled to recover damages measured by the pecuniary loss sustained, and his recovery is restricted to such loss, and, hence, exemplary damages may not be recovered *in the absence of a statute authorizing them.*” In 22 Am.Jur.2d, *Damages*, para. 254, at page 347, it is stated that exemplary damages are allowed only to the immediate person receiving the injury, either in a suit prosecuted by himself or by someone for his use. Hence, such damages cannot be recovered by a parent in his own right for injuries to a minor child *unless a statute so provides.* We have no such statute in this state.

*Hughey*, 249 S.C. at 476-477, 154 S.E.2d at 841-842 (emphasis added). Pairing this language regarding parental consortium with the later language in the opinion analogizing spousal consortium claims to the right of a parent to recover for the injuries to a child, the rule is that at common law, punitive damages are not recoverable for loss of consortium unless provided by statute. Section 15-75-20 is such a statute, and modifies the common law rule as set forth in *Hughey*.

Defendants also cite to *Gosnell* for the rule that “damages awarded for loss of consortium are compensatory damages, which by definition are actual damages.” (App. Br. p. 40). When read in context, however, this language from *Gosnell* does not preclude an award for punitive damages under the modern view of consortium claims.

In *Gosnell*, the Court had before it the narrow issue of whether loss of consortium was included within the definition of “loss” for purposes of the South Carolina Tort Claims Act. Because that Act defines “loss” to include “any other element of actual

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At common law, a spouse is entitled to recover the value of the injured spouse’s services, society, and companionship in an action for loss of consortium as well as medical expenses incurred on behalf of the injured spouse. Damages awarded for loss of consortium are compensatory damages, which are by definition actual damages. We therefore conclude the legislature intended “loss” as defined in § 15-78-30(f) to include loss of consortium.

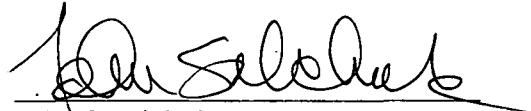
*Gosnell*, 301 S.C. at 23-24, 389 S.E.2d at 866 (citations omitted). *Gosnell*, therefore, does not stand for the broad principle HealthSouth claims it does. Furthermore, *Gosnell* focused on the common law derivation of consortium claims, and did not address whether punitive damages were included within the “damages” recoverable under § 15-75-20.

Accordingly, this Court should reject HealthSouth’s attempt to limit the punitive damages comparison ratio to the actual damages award to Mr. Sulton without regard to the award for consortium on the basis that consortium may not support punitive damages.

## CONCLUSION

This case involves a horrible and preventable injury caused by reckless conduct that was "no subtle." This Court should affirm the circuit court's decision upholding the verdict of the jury.

Respectfully submitted,



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