THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM EDGEFIELD COUNTY
Court of Common Pleas

Doyet A. Early, III, Circuit Court Judge

Case No. 2009-CP-19-0276

Cecelia Jackson, PR of the
Estate of William Peterson ..... Appellant

v.

Edgefield Medical Clinic or
Edgefield Medical Clinic, P.A., ... Respondent.

INITIAL BRIEF OF APPELLANT

James D. Nance
Nance, McCants & Massey
P.O. Box 2881
218 Newberry Street
Aiken, SC 29801
(803) 649-6200
jimnance@nancefirm.com

Andrew F. Lindemann
Davidson & Lindemann, P.A.
P.O. Box 8568
1611 Devonshire Drive
Columbia, SC 29202
(803) 806-8222
alindemann@dml-law.com

Attorneys for Respondent

J. Stephen Welch
McGowan, Hood & Felder, LLC
1501 N. Fant Street
Anderson, SC 29621
(864) 225-6228
(864) 225-7928 (fax)
swelch@mcgowanhood.com

Jordan C. Calloway
McGowan, Hood & Felder, LLC
1539 Health Care Drive
Rock Hill, SC 29732
(803) 327-7800
(803) 328-5656 (fax)
jcalloway@mcgowanhood.com

Attorneys for Appellant

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STATEMENT OF ISSUE ON APPEAL

1. Whether the circuit court erred in directing a verdict against a nursing home resident's estate when evidence showed the resident was anxious, restless, struggling to breathe, and moaning to the touch following his doctors' allegedly negligent medical treatment
2. Whether the circuit court abused its discretion in denying Appellant's motion for new trial *nisi additur* where the jury awarded only a small portion of Mr. Peterson's medical expenses

STATEMENT OF THE CASE

This appeal arises out of a medical malpractice claim. Appellant Cecelia Jackson, daughter and personal representative of the estate of William Peterson, alleged medical negligence claims against Respondent Edgefield Medical Clinic, P.A. ("EMC") and its physicians Dr. Benjamin Nicholson, Dr. Tami Massey, Dr. George Rainsford, and Dr. Eleanor Leaphart. First Am. Compl. at 1-4. Appellant alleged EMC and its physicians negligently failed to diagnose and treat a decubitus ulcer Mr. Peterson sustained while under EMC's care. Id. at 5-7. Appellant alleged EMC's conduct proximately caused Mr. Peterson to incur medical expenses and to sustain conscious pain and suffering. Id. Appellant's claims were tried before a jury on March 17-20, 2014. Appellant produced documentary, expert, and eyewitness evidence to show EMC breached the standard of care it owed Mr. Peterson and proximately caused him to sustain conscious pain and suffering from May 2006 until his death in August 2006.

At the close of Appellant's evidence, all Defendants moved for a directed verdict on the issue of liability. Tr. of Record 251-54. The circuit court denied the motions but, on its own motion, raised the possibility of a directed verdict on Appellant's pain and suffering claim. Tr. of Record 254. After hearing argument from all parties, the circuit court directed a verdict in Defendants' favor. Tr. of Record 264. At the close of all evidence, Appellant moved for reconsideration of the directed verdict. Tr. of Record 411-12. The circuit court reconsidered the issue, heard additional arguments, but reaffirmed its earlier ruling. Tr. of Record 432. The case went to the jury to consider EMC's

liability[1] and only Appellant's medical expenses as potential damages. The jury returned a verdict in Appellant's favor but only awarded $27,086, a small portion of Mr. Peterson's medical expenses. Tr. of Record 496.

After the verdict was entered on March 20, 2014, Appellant immediately moved for a new trial *nisi additur* and also requested ten days to file a written motion. Tr. of Record 498. Appellant filed a written motion which the circuit court denied by Form 4 order on April 10, 2014. Appellant filed a timely Notice of Appeal on May 9, 2014.

STATEMENT OF FACTS

William Peterson was admitted to the Trinity Mission Health and Rehab ("Trinity") nursing home in Edgefield, South Carolina twice in 2006. On both occasions, Mr. Peterson was a patient of Respondent EMC and its physicians: Dr. Tami Massey, Dr. Benjamin Nicholson, Dr. George Rainsford, and Dr. Eleanor Leaphart. During the second admission beginning on March 21, 2006, Mr. Peterson developed a skin breakdown on his left hip. This skin breakdown, also known as a decubitus ulcer or pressure wound, increased in severity over the following weeks. Mr. Peterson's Trinity records show the ulcer worsened from a Stage I wound to a Stage IV wound. TMH&R of Edgefield Bates # 117-124.

EMC was responsible for Mr. Peterson's care for his entire time at Trinity but EMC physicians rarely saw Mr. Peterson in person. The bulk of EMC's care was provided through telephone orders transmitted between EMC's office and Trinity's staff. TMH&R of Edgefield Bates # 024-034. There is no record that EMC physicians

[1] Based on the circuit court's decision reaffirming its directed verdict on pain and suffering, the parties reached a stipulation dismissing Appellant's claims against the EMC physicians. Tr. of Record 438, lines 6-11. Only EMC was a defendant when the case was submitted to the jury.

physically examined Mr. Peterson after April 16, 2006. EMC physicians did order a culture for Mr. Peterson's increasingly severe wound on May 2, 2006, the results of which showed Mr. Peterson was suffering from a methicillin-resistant staphylococcus aureus ("MRSA") infection. TMH&R of Edgefield Bates # 081. EMC's physicians still did not physically examine Mr. Peterson or order a hospital transfer so Mr. Peterson could receive more extensive treatment for the wound and the infection.

On May 15, 2006, Mr. Peterson's family members received phone calls from Trinity as Mr. Peterson's condition had grown dire. Mr. Peterson's daughter, Melinda Butler witnessed her father in deep distress. He "looked lethargic and scared," "couldn't hardly breathe," and his eyes appeared as if they would "bug out of his head." Tr. of Record 86, line 24 - 87, line 2. Trinity nurse's notes from May 15th indicate that Mr. Peterson was "anxious, restless, continuously shuffling and moving extremities" and "moan[ing] to the touch." TMH&R of Edgefield Bates # 068-69. Horrified by Mr. Peterson's condition, his daughters demanded that he be transferred to a hospital, and Mr. Peterson was transferred later in the day to Aiken Regional Medical Center ("ARMC") against medical advice. Tr. of Record 229.

At the time of his ARMC admission, Mr. Peterson was suffering from MRSA, sepsis, and hypothermia. ARMC Bates # 12-15. Mr. Peterson spent 16 days at ARMC and his condition began to improve. In early June 2006, Mr. Peterson was transferred to Select Specialty Hospital in Augusta, Georgia, for continued treatment of his infected decubitus ulcer. Due to the severity of the wound, Mr. Peterson was forced to undergo skin grafts at the wound site. SSH-Augusta 2, 13. His daughters observed that Mr. Peterson was "in pain" during his admission at Select Specialty Hospital. Tr. of Record

91, lines 23-24. Mr. Peterson's condition grew more severe, and he passed away on August 2, 2006, while in hospice care.

At trial, Appellant's evidence included eyewitnesses who saw Mr. Peterson's distress on May 15th and the days that followed and Mr. Peterson's medical records documenting his condition during this time. Ms. Jackson's testimony established $161,521.00 in medical expenses Mr. Peterson sustained after the May 15th transfer to ARMC. Tr. of Record 242-44. A photo of Mr. Peterson's decubitus ulcer showed a deep, yellow wound base that was black on the periphery. Appellant's Trial Exhibit 14; Tr. of Record 216-17. Finally, Appellant presented the testimony of an expert witness, Dr. Jeffrey Levine, who testified that EMC and its physicians breached the standard of care by failing to properly diagnose Mr. Peterson's wound and by failing to properly treat the increasingly severe wound. Tr. of Record 160, line 17 -161, line 2. Dr. Levine was especially critical of Respondent's failure to act after receiving a culture report demonstrating the severity of Mr. Peterson's situation. Tr. of Record 169. Dr. Levine also testified that Mr. Peterson's ARMC and Select Specialty Hospital admissions would likely not have been necessary had EMC provided proper care. Tr. of Record 171-73.

STANDARD OF REVIEW

A directed verdict is appropriate if the evidence in the record is susceptible to only one reasonable inference. Proctor v. Dept. of Health & Envtl. Control, 368 S.C. 279, 292, 628 S.E.2d 496, 503 (Ct. App. 2006) (citing Adams v. G. J. Creel & Sons, Inc., 320 S.C. 274, 277, 465 S.E.2d 84, 85 (1995)). A directed verdict may not be entered if a verdict in favor of the non-movant "would be reasonably possible under the facts as liberally construed" in favor of the non-movant. Proctor, 368 S.C. at 292, 628 S.E.2d at

503 (quoting Harvey v. Strickland, 350 S.C. 303, 309, 566 S.E.2d 529, 532 (2002)). A directed verdict on a pain and suffering claim is proper only "where there is no evidence of conscious pain and suffering." Stevens v. Allen, 342 S.C. 47, 52, 536 S.E.2d 663, 665 (2000). In its review of a directed verdict, an appellate court must apply the same standard as the trial court. Wright v. Craft, 372 S.C. 1, 18, 640 S.E.2d 486, 495 (Ct. App. 2006).

ARGUMENT

I. THE CIRCUIT COURT ERRED IN DIRECTING A VERDICT AGAINST APPELLANT WHEN APPELLANT'S EVIDENCE SHOWED MR. PETERSON WAS ANXIOUS, RESTLESS, STRUGGLING TO BREATHE, AND MOANING TO THE TOUCH FOLLOWING EMC'S ALLEGEDLY NEGLIGENT MEDICAL CARE.

The circuit court directed a verdict in EMC's favor on Appellant's pain and suffering claim after concluding Appellant presented no evidence that Mr. Peterson sustained conscious pain and suffering as a result of EMC's conduct. Tr. of Record 263-64. This ruling was in error because the circuit court defined pain and suffering too narrowly and disregarded documentary and testimonial evidence supporting Appellant's claim.

A. Pain and suffering may be proved in many different ways.

Pain and suffering is a broadly defined damages category reimbursing an injured party for a variety of losses manifested in a number of different ways. Pain and suffering damages "compensate[] the injured person for the physical discomfort and the emotional response to the sensation of pain caused by the injury itself." Boan v. Blackwell, 343 S.C. 498, 501-02, 541 S.E.2d 242, 244 (2001); see also Black's Law Dictionary 1825 (9th ed. 2009) (defining "pain and suffering" to mean "[p]hysical discomfort or emotional distress

compensable as an element of noneconomic damages in torts"). Pain and suffering damages tend to be less certain than other forms of damages. These "unliquidated and indeterminate" losses "are not capable of being exactly and accurately determined and there is no fixed rule or standard whereby damages for them can be measured." Edwards v. Lawton, 244 S.C. 276, 281, 136 S.E.2d 708, 710 (1964). Pain and suffering damages have no "yardstick." Bates v. Merritt Seafood, Inc., 663 F. Supp. 915, 933 (D.S.C. 1987). However, the inherent lack of certainty in pain and suffering damages should present no challenges for a judge or jury because proving pain and suffering damages does not require "mathematical precision." Id.

The circuit court's directed verdict ruling failed to acknowledge the broad variety of injuries pain and suffering damages are intended to cover or the many ways in which these injuries may be proved. The circuit court's expressed concerns were that Appellant failed to produce evidence that Mr. Peterson received pain medication or evidence that Mr. Peterson verbalized extreme pain. Tr. of Record 256, lines 11-17; 262, lines 1-7. While the use of pain medication and verbal reports of agony are two signs of the injuries compensated by pain and suffering damages, they are not the only possible signs. Mr. Peterson's behavior from May-July 2006 as reported through eyewitnesses, expert testimony, and Mr. Peterson's medical record show signs of Mr. Peterson's pain from the septic decubitus ulcer EMC physicians failed to properly diagnose or treat. By limiting its inquiry to just a few of the many possible manifestations of pain, the circuit court

overlooked the broad definition of pain and suffering provided in Boan and improperly applied a "fixed rule or standard" to an inherently fluid analysis.[2]

Additionally, "pain and suffering" damages are not limited to just an injured person's pain. The "suffering" component of this form of damages must have some meaning independent of pain. The Boan definition demonstrates that an injured person may recover not only for pain but for all "physical discomfort" proximately caused by an opposing party's tort. Discomfort is a broader term than pain and encompasses a person's distress, grief, uneasiness, and annoyance. Merriam-Webster's Collegiate Dictionary (11th ed. 2006). Irritability, combativeness, and difficulty sleeping may be signs of discomfort even though they are not overt statements of pain. Scott v. Porter, 340 S.C. 158, 171, 530 S.E.2d 389, 395 (Ct. App. 2000). All evidence of Mr. Peterson's pain and all evidence of Mr. Peterson's physical discomfort should have been considered when determining whether a jury question had been created.

B. Appellant presented sufficient evidence of pain and suffering to submit the issue to the jury.

Mr. Peterson developed a decubitus ulcer on his hip while at Trinity under EMC's care. A photo of the ulcer as it appeared on May 16, 2006, was admitted to evidence, presented to the jury, and discussed during the testimony of Appellant's expert Dr. Levine.[3] Dr. Levine testified that EMC and its physicians violated the standard of care

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[2] The circuit court's unduly inflexible approach to the pain and suffering issue is clear from the court's comments at the moment a verdict was directed. In summing up the perceived lack of evidence, the court considered it important that Appellant's expert did not specifically mention the term "pain and suffering." Tr. of Record 263, line 25 – 264, line 1.

[3] Dr. Levine is board certified in internal medicine and geriatrics and was qualified by the circuit court as an expert in both fields. Tr. of Record 146, line 23 – 147, line 17; 154, line 15 – 155, line 18.

they owed Mr. Peterson not by allowing the ulcer to form but in failing to diagnose and treat the infected wound which led to its severe state as evidenced in the photo. Tr. of Record 160, line 17 – 161, line 2. The wound deteriorated to Stage IV[4] or may have even been "unstageable" since its base was deep and not fully visible. Tr. of Record 216, line 24 – 217, line 3. The wound base's yellow tint was indicative of infection. Tr. of Record 217, lines 3-5. The wound's periphery showed that the wound was not healing and its black portions showed that the wound contained tissue Dr. Levine described as "necrotic," "dead," and "gangrenous." Tr. of Record 217, lines 18-25.

A key component of Dr. Levine's testimony was his opinion that EMC and its physicians should have transferred Mr. Peterson to a hospital much earlier due to the rapidly deteriorating condition of his improperly treated decubitus ulcer. Tr. of Record 160, lines 23-25. By failing to transfer Mr. Peterson, EMC and its physicians allowed the wound to become septic. Tr. of Record 164, lines 1-5. Sepsis had set in by the time Mr. Peterson was finally transferred to ARMC (at his family's urging) on May 15, 2006, if not earlier. Tr. of Record 171, lines 12-14 (concluding Mr. Peterson was "acutely ill with sepsis" on May 15th). Respondent's witness and EMC physician Dr. George Rainsford agreed changes in Mr. Peterson's condition consistent with sepsis were present on May 14 and May 15, 2006. Tr. of Record 384, lines 9-19.[5]

Dr. Rainsford's testimony on the timing of Mr. Peterson's sepsis affliction is important not only because it confirms Dr. Levine's opinion but also because it should

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[4] Decubitus ulcer staging is a mechanism for determining an ulcer's depth and severity. A Stage I ulcer is a "superficial wound" while a Stage IV ulcer "goes to the bone." Tr. of Record 133, line 24 – 134, line 3.

[5] Respondent's expert Dr. Stuart Eads did not dispute that Mr. Peterson was suffering the effects of a septic decubitus ulcer on May 15, 2006. Tr. of Record 354, lines 8-14.

have allayed the circuit court's causation concern. When Appellant's counsel opposed a potential directed verdict by citing the evidence discussed in this section, the circuit court responded by questioning whether the cited evidence of pain and suffering was related to EMC's negligent conduct or to ailments from which Mr. Peterson was suffering independent of the negligent conduct. Tr. of Record 259, lines 19-22. The circuit court was concerned that there was no evidence of when the sepsis set in. Id. In reality, Dr. Levine's sepsis testimony, already in the record at the time of the circuit court's statement, was later joined by Dr. Rainsford's confirmation that Mr. Peterson was under the effects of sepsis on May 14th and May 15th.

Sepsis causes several signs and symptoms for which pain and suffering damages are intended to compensate. Sepsis is a syndrome manifested in a variety of painful or discomforting ways including lethargy, altered mental status, rapid respirations, and unstable vital signs. Tr. of Record 174, line 20 – 175, line 2. In Mr. Peterson's case, sepsis manifested in several ways including hypothermia. Tr. of Record 171, lines 14-15. Mr. Peterson's body temperature dropped from the homeostatic norm of 98.6 degrees to approximately 91 degrees. Tr. of Record 171, lines 17-19. Warming blankets were used at the hospital in an attempt to ease Mr. Peterson's discomfort. (ARMC Records, p. 25 of 359).

Mr. Peterson's family witnessed the discomfort he suffered from the septic decubitus ulcer. Mr. Peterson's daughter Melinda Butler testified that she received a call from Trinity on May 15, 2006, in which it became clear that Mr. Peterson's condition had deteriorated. Tr. of Record 86, lines 7-12. Ms. Butler rushed to the home and observed her father in significant distress. She saw that Mr. Peterson was having difficulty

breathing, appeared "lethargic and scared," and his eyes appeared as if they would "bug out of his head." Tr. of Record 86, line 24 – 87, line 2. The symptoms Ms. Butler observed are many of the same symptoms Dr. Levine described as common in patients suffering from sepsis. Hattie Ashley, another of Mr. Peterson's daughters, also witnessed Mr. Peterson's distress on May 15th. While Ms. Ashley witnessed that her father's condition was serious, she also observed that he was conscious and responsive to stimuli. Tr. of Record 233:2-5 (agreeing Mr. Peterson was "com[ing] around" when given ice chips). The family were horrified by the level of Mr. Peterson's distress and called for an ambulance to transport him to the hospital for additional treatment. Tr. of Record 105, lines 19-20; 229, lines 2-5.

Mr. Peterson's medical record confirms what his family observed on May 15, 2006. Trinity's nurse's notes for May 15th show that Mr. Peterson's extremities were cold to the touch and that he was reaching in the air with his arms. (Trinity Nurse's Note, May 15, 2006, Bates # 068) A note from later in the day describes Mr. Peterson as "anxious, restless, continuously shuffling and moving extremities." Id. at Bates # 069. The Trinity nurse observed that Mr. Peterson "moan[ed] when touched." Id. Mr. Peterson's anxiety was so distressful for him that his medical providers discussed ordering a dose of the anti-anxiety drug Ativan. Tr. of Record 377, lines 7-11; Trinity Nurse's Note, May 15, 2006, Bates # 069. Dr. Rainsford's testimony supports the conclusion that Mr. Peterson was suffering anxiety sufficiently severe to warrant Ativan administration because of the sepsis "change" that he was undergoing on May 15th. Tr. of Record 385, lines 4-11. Pamela Decampli, the Trinity nurse that wrote these notes, affirmed them when she testified at trial. Tr. of Record 101-103.

After May 15, 2006, Mr. Peterson continued to endure pain and suffering resulting from EMC's failure to timely diagnose and treat Mr. Peterson's decubitus ulcer. The core of Appellant's negligence claim against EMC was that EMC's diagnostic and treatment failures allowed the ulcer to progress far further than it would have if EMC had intervened in a timely manner. Tr. of Record 160-61; 169, lines 18-20 (Dr. Levine's testifying that the standard of care required EMC to initiate a response to the deteriorating ulcer "within 24 hours" of receiving the culture report). If EMC had treated the ulcer properly, then Mr. Peterson's continuing course of treatment would have been different. Tr. of Record 171-72. Mr. Peterson likely would not have required the transfer to ARMC or the later transfer to Select Specialty Hospital. Tr. of Record 172, lines 5-14. During the hospital admissions made necessary by EMC's negligence, Mr. Peterson underwent several painful medical procedures to treat his decubitus ulcer. The Select Specialty Hospital records admitted in evidence showed that Mr. Peterson underwent painful skin graft procedures. SSH Augusta 13. The wound site also required repeated debridement, a surgical procedure using sharp instruments and cutting. Id.; Tr. of Record 138, lines 17-22; 167, lines 3-10. While he was at Select Specialty Hospital undergoing these procedures, made necessary by EMC's negligent care, Mr. Peterson's family observed that he was "not feeling well" and was "in pain." Tr. of Record 91, lines 20-24.

In sum, Appellant produced eyewitness, expert, and documentary evidence that Mr. Peterson experienced conscious pain and suffering proximately caused by EMC's negligent conduct. The circuit court's decision to direct a verdict was based on an overly narrow definition of "pain and suffering" and an analysis that was more stringent than the one outlined in Edwards and Bates.

C. The Circuit Court based its directed verdict ruling on inaccurate statements of South Carolina procedural and substantive law.

1. The circuit court improperly limited the scope of pain and suffering damages.

In its response to the circuit court's proposed directed verdict on pain and suffering, Appellant's counsel cited all the evidence in the record to support a finding in Appellant's favor. Tr. of Record 254-57. Part of the evidence on which Appellant relied was Mr. Peterson's medical record from Trinity, ARMC, and Select Specialty Hospital. However, the circuit court appeared to refuse consideration of these documents when addressing a possible directed verdict. Tr. of Record 257, lines 7-14. The circuit court's refusal to consider Mr. Peterson's medical record was contrary to the standard for a directed verdict and the well understood purview of a jury. A directed verdict is only proper where there is no evidence to support the non-movant's position. Stevens, 342 S.C. at 52, 536 S.E.2d at 665. This standard "mirrors" South Carolina's standard governing summary judgment. Baughman v. Am. Tel. & Tel. Co., 306 S.C. 101, 401 S.E.2d 537 (1991) (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986)).

The summary judgment standard requires a court to consider all evidence in the record. Rule 56(c), SCRCP (permitting summary judgment only if all items in record show no genuine issue as to any material fact). The same standard applies when considering a directed verdict. Sanders v. Wright, 291 S.C. 516, 517, 354 S.E.2d 411, 411 (Ct. App. 1987) (requiring trial courts to consider "all evidence" when ruling on a directed verdict motion). A court considering a possible directed verdict must consider all evidence because a jury would be permitted to consider all evidence in the record if the case was submitted for its consideration. In fact, a trial court charges jurors to consider all

evidence during deliberations. Jurors are routinely instructed to "consider any and all evidence which was properly admitted at trial and give it the weight that you think it deserves." Watson v. Ford Motor Co., 389 S.C. 434, 443, 699 S.E.2d 169, 173 (2010).

Mr. Peterson's medical record from Trinity, ARMC, and Select Specialty Hospital were admitted in evidence without objection at the beginning of trial. Tr. of Record 9. All of these documents would have been available for the jury's review had the jury been permitted to consider the pain and suffering claim. Accordingly, the circuit court was required to consider these documents when ruling on a potential directed verdict. As recounted above, the medical record shows that Mr. Peterson was struggling to breathe and moaning when touched on May 15, 2006. Similar evidence has been deemed sufficient to support a verdict on conscious pain and suffering. See Small v. S.C. Dep't of Educ., 339 S.C. 208, 217, 528 S.E.2d 682, 686 (Ct. App. 2000) (finding pain and suffering evidence was supplied by testimony indicating decedent was "gasping for air and moaning somewhat"). The circuit court's statements during its ruling show that the court did not consider the medical record when making its ruling. Tr. of Record 257, lines 7-14. By overlooking the medical record, the circuit court misapplied the directed verdict standard and overlooked important evidence showing Mr. Peterson's pain and suffering.

2. A jury may infer conscious pain and suffering from circumstantial evidence.

The circuit court was required to review all circumstantial evidence and draw all reasonable inferences from the evidence in Appellant's favor. Proctor, 368 S.C. at 293, 628 S.E.2d at 503 (Ct. App. 2006). During its discussion of Appellant's pain and suffering evidence, the circuit court appeared to conclude that a jury issue could not arise

from inferences based on circumstantial evidence. Tr. of Record 262, line 19; 263, lines 9-15. Appellant's pain and suffering claim was not limited to inferences but supported by the documentary and testimonial evidence discussed above. Even so, South Carolina law does permit a jury to infer pain and suffering from the evidence presented. Scott, 340 S.C. at 171, 530 S.E.2d at 395 (noting "evidence from which the jury could have inferred pain and suffering"); Vereen v. Liberty Life Ins. Co., 306 S.C. 423, 432, 412 S.E.2d 425, 431 (Ct. App. 1991) (finding jury could infer decedent suffered conscious pain and suffering before death); see also Clark v. Wright, 224 S.E.2d 825, 826 (Ga. App. 1976) ("The law infers bodily pain and suffering from personal injury").

Scott and Vereen are consistent with South Carolina's liberal directed verdict standard. A directed verdict must be refused where "the evidence **and all reasonable inferences** which have to be drawn from it" demonstrate a jury question. Proctor, 368 S.C. at 293, 628 S.E.2d at 503 (Ct. App. 2006) (emphasis added). A trial court "must deny the [directed verdict] motions when the evidence yields more than one inference or its inference is in doubt." Huffines Co., LLC v. Lockhart, 365 S.C. 178, 187, 617 S.E.2d 125, 129 (Ct. App. 2005). This rule is especially strong in cases like this one where the "scintilla of evidence rule" is applied. Proctor, 368 S.C. at 293, 628 S.E.2d at 503.

South Carolina courts have made less certain inferences in other cases than any inference Appellant may have asked the circuit court to make in this case. In Vereen, this Court held that a reasonable jury could infer that a murder victim survived a shotgun blast to the chest. 306 S.C. at 431-32, 412 S.E.2d at 430-31. The Court held that a reasonable jury could further infer that the victim suffered conscious pain and suffering during whatever time period elapsed between the gunshot and the victim's death. Id.

There was no testimony by eyewitnesses observing shouts of pain only testimony from an investigating police officer and a photo of the victim's body. Id. The Court found that a jury could infer consciousness and conscious pain and suffering from the trail of blood observed by the officer and from the victim's hand position as portrayed in the photo. Id. Based on this circumstantial evidence and the inferences arising from this evidence, the Court reversed the circuit court's directed verdict. Id. at 432, 412 S.E.2d at 431.

Vereen is a straight forward application of the deferential directed verdict standard. A trial court must refuse to direct a verdict "if there is more than a scintilla of evidence from which the court could draw a reasonable inference that the decedent was conscious of pain and suffering." Bowers v. Charleston & W.C. Ry. Co., 210 S.C. 367, 372, 42 S.E.2d 702, 706 (1947). The trial court is not to determine the relative strength of the evidence but only whether the evidence presented and the reasonable inferences could lead to a verdict in the non-movant's favor. Id. (refusing a directed verdict even though evidence of pain and suffering was "both meager and weak").

Appellant's evidence shows that Mr. Peterson was in pain and distress in May-July 2006 as a result of EMC's failure to properly diagnose and treat a decubitus ulcer. Mr. Peterson's medical record, his family's testimony, Dr. Levine's testimony, and the reasonable inferences arising from this evidence were sufficient to prevent a directed verdict. A jury may make inferences from the circumstantial evidence it reviews, and the circuit court erred in refusing to consider the reasonable inferences arising from Appellant's evidence.

3. A circuit court lacks authority to enter a directed verdict *sua sponte.*

The South Carolina Rules of Civil Procedure permit a court to issue an order directing a verdict on part or all of the issues raised at trial. Rule 50(a), SCRCP. The prescribed method for obtaining an order from a court involves making a motion. Rule 7(b), SCRCP ("An application to the court for an order shall be made by motion . . ."). A court may issue some orders *sua sponte*, i.e. on its own motion. For example, a court may raise and rule on subject matter jurisdiction without being prompted by the parties. McLeod v. Starnes, 396 S.C. 647, 660, 723 S.E.2d 198, 205 (2012). However, there is no similar provision or precedent that would permit a court to proactively direct a verdict as the circuit court did in this case.

Rule 50, SCRCP, does not authorize a trial court to enter a directed verdict on its own motion. In doing so, a court acts contrary to the clear pattern established by Rule 50. Rule 50(a) discusses "[a] party who moves for a directed verdict." Only "[a] party who has moved for a directed verdict may move" for judgment notwithstanding the verdict. Rule 50(b), SCRCP. A party may only move for JNOV if the party first moved for a directed verdict and may only seek appellate review of a denied directed verdict motion if the party renewed that motion at the close of all evidence. Stephens v. CSX Transp. Inc., 400 S.C. 503, 516, 735 S.E.2d 505, 512 (Ct. App. 2012). The impetus is on a party to act and to maintain a dogged pursuit of a directed verdict or risk losing the relief to which it believes it is entitled. In other words, a party should not expect a court to do for the party what the party has failed to seek for itself.

A court may issue a directed verdict on its own motion in a criminal trial but only because the South Carolina Rules of Criminal Procedure expressly permit this action.

Rule 19(a), SCRCrimP (providing that court presiding over criminal trial may enter a directed verdict "[o]n motion of the defendant or on its own motion"). If the rule makers intended to permit a court to take similar action in a civil trial, the South Carolina Rules of Civil Procedure would have expressly permitted it. The absence of a specific authorization for *sua sponte* action in Rule 50 along with the rule's specific discussion of party-initiated motions show that a circuit court is not permitted to introduce and enter a directed verdict without a motion from one of the parties.

In this case, Respondent and its codefendants moved for directed verdicts at the close of Appellant's case on the issue of liability. Dr. Massey moved for a directed verdict arguing Appellant produced no evidence that Dr. Massey breached a duty owed to Mr. Peterson. Tr. of Record 251, lines 12-21. The circuit court denied that motion citing Dr. Levine's testimony. Tr. of Record 251, line 22 – 252, line 11. Dr. Massey's counsel informed the circuit court that he had no further motions. Tr. of Record 252, lines 13-14. Counsel for Dr. Rainsford and Dr. Leaphart then moved for a directed verdict on the same grounds. Tr. of Record 252, line 16 – 253, line 19. The circuit court denied this motion as well. Tr. of Record 253, line 22 – 254, line 8. At that point, the circuit court asked the attorneys if there were any further motions and none were made. Tr. of Record 254, lines 10-11. It was as this point that the circuit court proactively introduced the possibility of a directed verdict on pain and suffering. Tr. of Record 254, lines 12-14. Thus, the directed verdict on pain and suffering was not obtained through a party's motion as permitted by Rule 50(a), SCRCP. Instead, the circuit court acted on its own motion in a way that the rule does not expressly permit.

II. THE CIRCUIT COURT ABUSED ITS DISCRETION IN DENYING APPELLANT'S MOTION FOR A NEW TRIAL NISI ADDITUR WHERE THE JURY AWARDED ONLY A SMALL PORTION OF MR. PETERSON'S MEDICAL EXPENSES.

A trial court has discretion to grant a new trial either in full or a new trial *nisi* in which a new trial will be granted only if the party opposing it fails to comply with a condition established by the court. Waring v. Johnson, 341 S.C. 248, 257, 533 S.E.2d 906, 911 (Ct. App. 2000) (citing Elliot v. Black River Elec. Coop., 233 S.C. 233, 104 S.E.2d 357 (1958)). A motion for a new trial in full requires evidence that the verdict was grossly insufficient and clearly indicative of prejudice or some other improper motive. Waring, 341 S.C. at 257, 533 S.E.2d at 911 (citing Cock-N-Bull Steakhouse, Inc. v. Generali Ins. Co., 321 S.C. 1, 466 S.E.2d 727 (1996)). In contrast, a motion for new trial *nisi additur* requires only that the verdict was "merely insufficient" based on the evidence presented. Pelican Bldg. Ctrs. Of Horry-Georgetown, Inc. v. Dutton, 311 S.C. 56, 61, 427 S.E.2d 673, 676 (1993).

While a motion for new trial *nisi additur* is within a circuit court's discretion, that discretion is limited and an appellate court must examine the evidence in the record when reviewing the circuit court's ruling. Id. (citing Toole v. Toole, 260 S.C. 235, 195 S.E.2d 389 (1973)). A court abuses its discretion when its decision is "wholly unsupported by the evidence" or when its conclusion is based on an error of law. Waring, 341 S.C. at 256, 533 S.E.2d at 910. In this case, Appellant moved for a new trial *nisi additur* and requested either a new trial or the full value of Mr. Peterson's medical expenses incurred as a result of EMC's negligent medical care. The motion was made immediately after trial. Tr. of Record 498, lines 7-11. Pursuant to Rule 59, SCRCP, Appellant requested ten

days to submit a written motion. Tr. of Record 498, lines 14-18. The circuit court denied Appellant's motion by Form 4 order on April 10, 2006.

After the circuit court entered a directed verdict in Respondent's favor on Appellant's pain and suffering claim, the jury considered only Appellant's claim for Mr. Peterson's medical expenses. Following the EMC medical care on which Appellant's claims were based, Mr. Peterson incurred $383 in medical expenses from EMC, $57,220 in medical expenses from ARMC, and $146,911.96 in expenses from Select Specialty Hospital. Mr. Peterson's medical bills totaled $204,514.96. These medical bills were admitted in evidence at trial without objection, and Appellant presented Ms. Jackson's testimony in support of the amounts stated in the medical bills. Tr. of Record 241-45. Ms. Jackson acknowledged that Mr. Peterson required nursing home care regardless of EMC's negligent medical care, and Appellant decreased its claim for medical expenses by the daily rate for nursing home care Mr. Peterson incurred while a resident at Trinity. Tr. of Record 245, lines 7-14. In the end, Appellant's medical expenses claim totaled $161,521. Tr. of Record 246-47.

The evidence considered by the jury showed a causal connection between all of these medical expenses and the EMC conduct underlying Appellant's negligence claims. Dr. Levine testified that Mr. Peterson's condition became so dire on May 15, 2006, because EMC and its physicians failed to properly diagnose and treat Mr. Peterson's infected decubitus ulcer. Tr. of Record 160, line 19 – 161, line 7. Dr. Levine also testified that the ARMC admission and Select Specialty Hospital admission would likely not have been necessary if EMC had complied with the standard of care. Tr. of Record 171-73. Based on this testimony, the jury had evidence before it showing Appellant suffered

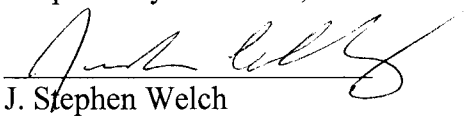
$161,521 in damages. By reaching a verdict in Appellant's favor, the jury concluded EMC breached a duty to Mr. Peterson and that this breach proximately caused Mr. Peterson's medical expenses. Yet, the jury went on to award Appellant a sum ($27,086) much less than the medical expenses established by Ms. Jackson's testimony, Mr. Peterson's medical bills, and causally related to EMC's negligent conduct by Dr. Levine. Tr. of Record 496, lines 19-25.

Given the jury's finding on liability and causation, there is no rational basis for its decision to award an amount so far less than the medical bills. The jury's decision must have been based on caprice, prejudice, or some other motive unrelated to the substantive of the evidence presented for its consideration. As such, a new trial *nisi additur* was warranted. While the circuit court's reasoning for denying Appellant's motion is not clear from the Form 4 order, the evidence establishing Mr. Peterson's medical expenses and the expert testimony linking those expenses to EMC's negligent conduct is overwhelming. The circuit court's denial of the motion was wholly unsupported by the evidence and was an abuse of the court's discretion.

CONCLUSION

Based on the arguments stated above, Appellant respectfully requests an order reversing the circuit court's directed verdict on Appellant's pain and suffering claim. Appellant produced testimonial and documentary evidence showing Mr. Peterson's pain and distress and evidence linking this suffering to EMC's negligent conduct. Appellant also requests an order reversing the circuit court's denial of Appellant's motion trial *nisi additur*.

Respectfully submitted,



J. Stephen Welch
McGowan, Hood & Felder, LLC
1501 N. Fant Street
Anderson, SC 29621
(864) 225-6228
(864) 225-7928 (fax)
swelch@mcgowanhood.com

Jordan C. Calloway
McGowan, Hood & Felder, LLC
1539 Health Care Drive
Rock Hill, SC 29732
(803) 327-7800
(803) 328-5656 (fax)
jcalloway@mcgowanhood.com

Attorney for Appellant

October 2, 2014
Rock Hill, SC

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM EDGEFIELD COUNTY
Court of Common Pleas

Doyet A. Early, III, Circuit Court Judge

Case No. 2009-CP-19-0276

Cecelia Jackson, PR of the
Estate of William Peterson ..... Appellant

v.

Edgefield Medical Clinic or
Edgefield Medical Clinic, P.A., ... Respondents.

PROOF OF SERVICE

The undersigned hereby certifies that on this 2nd day of October, 2014, she served counsel for the Defendants with a copy of the Appellant's Designation of Matter to be Included in the Record on Appeal and Initial Brief of Appallant in this matter by mailing a copy of the same by United States Mail with first class postage prepaid to the following addresses:

James D. Nance, Esquire
Nance, McCants & Massey
Post Office Box 2881
218 Newberry Street
Aiken, South Carolina 29801

Andrew F. Lindemann, Esquire
Davidson & Lindemann, P.A.
Post Office Box 8568
1611 Devonshire Drive
Columbia, South Carolina 29202

Susan Huntley Guard
Paralegal to Jordan Calloway

McGowan, Hood & Felder, LLC

Chad A. McGowan (SC,GA,NC)
S. Randall Hood
John G. Felder, Jr.
W. Jones Andrews, Jr.
Jordan C. Calloway
Susan F. Campbell
Ashley White Creech
Shawn B. Deery
Ruskin C. Foster
Lara Pettiss Harrill

Whitney Harrison
Patrick M. Killen
William A. McKinnon (SC,DC)
Daniel "Ernie" Peagler
Robert V. Phillips
Seth Rose
Anna S. Magann
James Stephen Welch* (SC,OK)
Joseph G. Wright, III*
Of Counsel*

Writer's Email: jcalloway@mcgowanhood.com

October 2, 2014

Hon. Jenny Abbott Kitchings
S.C. Court of Appeals
PO Box 11629
Columbia, SC 29211

Re: Cecelia Jackson, PR of the Estate of William Peterson v.
Edgefield Medical Clinic or Edgefield Medical Clinic, P.A.
C.A. No. 2009-CP-19-0276

Dear Ms. Kitchings:

I have enclosed originals and copies of Appellant's Designation of Matter to be Included in the Record on Appeal and Initial Brief of Appellant, along with Proof of Service, for the above-referenced matter. Please file the originals and return the copies in the enclosed envelope.

By copy of this letter to opposing counsel, I am hereby serving them with copies of the same.

Please feel free to call if you have any questions. Thank you.

Sincerely,

Jordan Calloway

Jordan C. Calloway

JCC/shg
Enclosures
cc: James D. Nance, Esq.
Andrew F. Lindemann, Esq.

McGowan, Hood & Felder, LLC
1539 Health Care Drive
Rock Hill, SC 29732

Hon. Jenny Abbott Kitchings
SC Court of Appeals
PO Box 11629
Columbia, SC 29211