THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas

Edgar W. Dickson, Circuit Court Judge

Case No. 2012-CP-38-0845

Ralph C. Williams, Sr., and Linda Williams, ... Appellants,

v.

Patricia A. Johnson, Josette Peppers
and UniHealth Post-Acute Care-Orangeburg, LLC ..... Respondents.

INITIAL BRIEF OF APPELLANT

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II. Did the circuit court judge err in overruling Plaintiff's objection to the verdict form and in denying Plaintiff's motions for directed verdict and for JNOV as to the issue of whether the individual defendant nurses were acting within the course and scope of their employment?

III. Did the circuit court judge err in permitting the Defendants to present an alleged joint defense when the employer Defendant sought to relieve its liability by deflecting fault upon its own employees, who were also Defendants, by arguing these employees were of acting outside the scope of their employment?

STATEMENT OF THE CASE

On June 21, 2012, Mr. Williams (Plaintiff) and his wife filed an action against Plaintiff's former employer, UniHealth Post-Acute Care-Orangeburg, LLC (UniHealth) and two of its nurses/employees, Patricia A. Johnson and Josette Peppers. Plaintiff asserted claims against the nurses for defamation and abuse of process, and against UniHealth under a theory of respondeat superior. Mrs. Williams asserted a claim for loss of consortium.

On August 2, 2012, the same law firm filed separate but nearly identical answers on behalf of each defendant. Each answer denied that the nurses were acting within the course and scope of their employment with UniHealth or that UniHealth had *respondeat superior* liability. (UniHealth Answer, ¶¶ 165, 166, 182, 183, 200, 201, 217, 218, 234, 235, 243, 244, 254, 255, 268, 269; Johnson Answer, ¶¶ 165, 166, 182, 183, 200, 201, 217, 218, 234, 235, 243, 244, 254, 255, 268, 269; Peppers Answer, ¶¶ 165, 166, 182, 183, 200, 201, 217, 218, 234, 235, 243, 244, 254, 255, 268, 269). UniHealth also separately alleged the nurses' actions were "not in furtherance of [UniHealth's] business." (UniHealth Answer, Tenth Defense, ¶ 285). That defense, however, was not included in the answers filed on behalf of Nurse Johnson or Nurse Peppers.

On August 27, 2013, UniHealth moved for summary judgment. UniHealth argued in part that "employers are not liable for the intentional acts of their employees which fall outside the scope of employment." (Memorandum, pp. 1-2, 6-13). On January 6, 2014, the circuit court denied UniHealth's motion for summary judgment on the basis that triable issues of fact existed as to (1) whether the Plaintiffs had overcome the rebuttable presumption of good faith under the Omnibus Adult Protection Act and (2) whether the nurses acted outside the scope of their

employment with UniHealth. The court also entered a scheduling order. On January 13, 2014, Plaintiff filed an amended complaint.

The case was tried from September 4 through September 8, 2014. Each side moved for directed verdict at the close of all of the evidence. Plaintiff sought a directed verdict as to UniHealth's argument that the nurses acted outside the scope of their employment so as to relieve UniHealth of any liability. UniHealth moved for directed verdict as to all aspects of the case. The trial court denied both motions.

The jury returned verdicts finding the nurses did not act in good faith when they reported suspicions that Plaintiff had abused a patient. The jury also found both nurses acted outside the scope of their employment when they made the reports regarding Plaintiff. The jury awarded Plaintiff $102,500 actual damages and awarded Mrs. Williams $0 on her consortium claim.

The jury next found by clear and convincing evidence that each defendant, including UniHealth, engaged in willful, wanton or reckless conduct in harming Plaintiff. The jury then awarded punitive damages as follows: $200,000 against Nurse Johnson; $97,000 against Nurse Davis (Peppers); and $600,000 against UniHealth.

All defendants filed a joint motion for JNOV or, alternatively, for a new trial absolute. Defendants contended alternatively the trial court should grant a new trial under the "thirteenth juror" doctrine. Defendants also filed a joint motion to reduce the amount of the punitive damages award.

UniHealth filed a separate motion for JNOV or new trial "consistent with special interrogatory answers." UniHealth asserted that the jury specifically found that Nurse Johnson and Nurse Davis (formerly Peppers) did not act in good faith or in the course and scope of their

employment so that UniHealth should be exonerated as a matter of law. Again, the same law firm represented all defendants throughout the proceedings.

Plaintiff moved for JNOV as to the scope of employment questions. Plaintiff also raised the issue of the conflict of interest of the attorneys representing all defendants as a basis to preclude UniHealth from arguing the nurses acted outside the scope of their employment.

On January 14, 2016, the trial judge entered an order granting Defendants' motion for new trial under the Thirteenth Juror Doctrine. The trial judge gave as a reason that the facts did not justify the verdict in light of the "good faith" provisions under the South Carolina Omnibus Adult Protection Act. The judge ruled the remaining post-trial motions were dismissed as moot.

Plaintiff received written notice of the entry of the order on January 25, 2016. On February 2, 2016, Plaintiff filed a motion for reconsideration and to alter or amend the judgment pursuant to Rule 59, SCRCP, contending the order was controlled by an error of law such that the trial judge abused his discretion in granting the Defendants' motion. Plaintiff also requested a ruling on each of his post-trial motions.

On March 16, 2016, Defendants jointly filed a return to Plaintiff's motion. The return essentially mirrored the order the trial judge entered.

On April 14, 2016, Plaintiff filed a supplemental brief in support of his Rule 59 motion. On August 1, 2016, Defendants filed a response to the supplemental brief, requesting the judge strike the supplemental brief and arguing Plaintiff's contentions did not have merit. On August 11, 2016, Plaintiff filed a response to these assertions.

On March 10, 2017, the trial judge entered an order denying Plaintiff's Rule 59 motion. The judge stated he was "concerned that the jury improperly handled the issue of the Defendant

[nurses'] immunity under the South Carolina Omnibus Adult Protection Act. See S.C. Code Ann. §§ 43-35-25(A) & (G)." (Order of March 10, 2017, p. 2).

Plaintiff thereafter appealed.

FACTS

The trial court granted Defendants' motion for a new trial under the Thirteenth Juror Doctrine. The trial judge gave as the reason that the facts did not justify the verdict in light of the "good faith" provisions under the South Carolina Omnibus Adult Protection Act. In denying Plaintiff's motion for reconsideration the judge stated he was "concerned that the jury improperly handled the issue of the Defendant [nurses'] immunity under the South Carolina Omnibus Adult Protection Act. See S.C. Code Ann. §§ 43-35-25(A) & (G)." These statements demonstrate the judge's belief that "good faith" under the Act was not an issue for the jury because there was no evidence to overcome the permissive presumption under the Act. The record, however, contains evidence which permitted the jury to find a lack of good faith so as to overcome the presumption under the Act so that the nurses did not enjoy qualified immunity. The following testimony was presented at trial.

Defendant Patricia Johnson testified she has been employed as a licensed practical nurse (LPN) with UniHealth since 2005. (Tr. p. 149, l. 24 - p. 150, l. 5; p. 183, ll. 1-5). She worked at a nurse's station on the "rehab hall." (Tr. p. 153, ll. 10-20; Pl. Exh. No. 4).

Plaintiff was a Certified Nurse's Assistant (CNA). (Tr. p. 229, ll. 7-8; p. 240, ll. 11-12). A CNA is required to answer the call light and make rounds every two hours. (Tr. p. 185, ll. 20-21). Rounds means the CNA checks on patients, turns and repositions the patients, changes their diapers, and attends to basic patient needs. (Tr. p. 185, ll. 20-23; p. 241, ll. 11-17).

On September 20, 2010, Ms. Johnson was working with Plaintiff, Pat Bruce, Alicia and Brady. (Tr. p. 154, ll. 11-15; p. 155, ll. 2-4; Pl. Exh. 35A). Plaintiff was assigned to rooms 39 through 64, although some of them were empty. (Tr. p. 155, ll. 7-15; p. 156, ll. 2-9).

Ms. Johnson identified photographs of the patient's room and her bed. (Tr. p. 157, l. 17 - p. 158, l. 2). The room has two separate alarms including a panic button. (Tr. p. 164, ll. 13-15; p. 223, l. 7 - p. 224, l. 2).

Ms. Johnson agreed that the first item on the perineal policy stated "provide for privacy." (Tr. p. 161, 5-14; Pl. Exh. No. 11). The policy added "perineal care is given during the daily bath and after voiding or bowel movement." (Tr. p. 161, ll. 15-18). The procedure required the employee to (1) wash hands, (2) assemble necessary equipment (kept on the cart), (3) identify yourself before entering the room and explain to the patient what you are doing, and (4) provide privacy by closing the door to the room and pulling the cubicle curtain all the way around the bed. (Tr. p. 161, l. 19 - p. 162, l. 24). The policy also spelled out how to clean a female patient. (Tr. p. 230, ll. 11-20). She agreed that Plaintiff had a right to be where he was in the room, and while Plaintiff was in the room he was supposed to have the door closed and provide privacy. (Tr. p. 163, ll. 6-18; p. 231, ll. 4-6).

Around 3:00 a.m. on June 21, 2010, Ms. Johnson heard a bed alarm and found a resident in Room 50 who needed assistance, including the need to be changed. (Tr. p. 186, ll. 3-9; p. 187, ll. 5-19; p. 232, ll. 2-3). The patient was soiled and Ms. Johnson began looking for Plaintiff to take care of this. (Tr. p. 186, ll. 8-10; p. 187, ll. 20-22).

Plaintiff's CNA cart was outside of Room 39A on the night of the alleged incident. (Tr. p. 158, ll. 6-14; p. 186, ll. 12-14; p. 188, ll. 14-20). There were two residents in the room. (Tr. p. 188, ll. 21-25). The other resident was a dementia patient. (Tr. p. 189, ll. 1-5; p. 208, ll. 18-21; p. 245, ll. 12-19). Plaintiff regularly cared for the patients in Room 39A. (Tr. p. 189, ll. 11-13).

Ms. Johnson knocked on the door and pushed the door open. (Tr. p. 186, ll. 14-15). Ms.

Johnson stated that when she walked into the room, the lights were off and the curtains were pulled mostly around the bed, but she could still see Plaintiff. (Tr. p. 164, ll. 4-7, ll. 18-19; p. 176, ll. 2-4; p. 195, ll. 5-7; p. 221, ll. 4-10). She stated Plaintiff was climbing on top of the patient and his pants were down. (Tr. p. 186, ll. 15-16; p. 190, ll. 1-2). Plaintiff asked her to "please shut the door." (Tr. p. 165, l. 13; p. 173, ll. 7-10). Ms. Johnson claimed the resident's breast was exposed. (Tr. p. 170, ll. 20-22; p. 228, ll. 3-5; p. 232, ll. 4-5). Ms. Johnson claimed Plaintiff "froze." (Tr. p. 173, ll. 2-3; p. 178, ll. 9-10; p. 195, ll. 24-25; p. 196, ll. 6-8; p. 202, ll. 8-9). He did not ask her for help with the resident. (Tr. p. 173, ll. 4-5; p. 186, ll. 17-18; p. 195, ll. 14-16). She asked him what he was doing and he yelled and told her to please shut the door. (Tr. p. 187, ll. 2-4; p. 195, ll. 13-14). The resident was lying on her back and Ms. Johnson claimed the resident's gown was pushed up over her breasts so that her breast was exposed. (Tr. p. 190, ll. 17-23). Ms. Johnson did not think the resident knew what was happening. (Tr. p. 190, ll. 19-20; p. 208, l. 25 - p. 209, l. 5). Ms. Johnson claimed she had no doubt that Plaintiff would have raped the patient if Ms. Johnson had not walked into the room. (Tr. p. 164, l. 22 - p. 165, l. 1; p. 196, ll. 11-15).

Ms. Johnson did not pull the room's alarm. (Tr. p. 164, ll. 16-17; p. 199, ll. 5-6). Had she done so a light would flash outside the door and all employees in the facility would have been required to respond. (Tr. p. 178, ll. 16-23). Instead, she left the room and went down the hallway to get a witness. (Tr. p. 165, ll. 10-16; p. 171, ll. 13-19). She saw Defendant Josette Peppers. (Tr. p. 165, ll. 15-19, 24-25; p. 196, ll. 1-5; p. 198, ll. 1-12; p. 202, ll. 17-18). Ms. Johnson did not yell for Ms. Peppers. (Tr. p. 165, ll. 10-23; p. 199, ll. 3-4). She claimed she did not tell Ms. Peppers that Plaintiff was having sex with the resident. (Tr. p. 171, ll. 9-12). Later, however, she

testified she said to her to hurry and come on because Plaintiff was trying to have sex with the resident. (Tr. p. 186, ll. 20-21; p. 197, ll. 11-13; p. 202, ll. 20-21).

Ms. Johnson and Ms. Peppers then went back into the room. (Tr. p. 171, ll. 20-25; p. 186, ll. 22-24; p. 204, ll. 1-4). She claimed Plaintiff was fixing his pants and he sat down in the chair and put his head down. (Tr. p. 172, ll. 3-10; p. 186, ll. 23-24; p. 197, ll. 5-6; p. 206, ll. 5-6; p. 208, ll. 14-15). Plaintiff did not run but waited until the police came. (Tr. p. 172, ll. 11-14; p. 225, ll. 17-22). Ms. Peppers asked Plaintiff to leave the room. (Tr. p. 209, ll. 11-14).

Ms. Johnson did not call the police but Ms. Peppers did. (Tr. p. 157, ll. 12-16; p. 210, ll. 11-13). The police came and Ms. Johnson made a statement. (Tr. p. 166, ll. 1-3; p. 191, ll. 15-17; Pl. Exh. No. 9). Ms. Johnson stated that Plaintiff's pants were down and he was climbing on top of the resident. (Tr. p. 177, ll. 4-5). In that statement she stated "there is no doubt in my mind if I had not walked in the room he would have had sex with resident." (Tr. p. 166, ll. 8-11; p. 175, ll. 15-16; p. 219, ll. 21-24).

Ms. Johnson agreed she wrote a statement alleging Plaintiff sexually assaulted a resident in Room 39A. (Tr. p. 156, l. 10 - p. 157, l. 15). The statement read as follows:

> This nurse making rounds and looking for CNA Ralph Williams to check on another resident and I checked all the rooms on the back hall and couldn't find him. This nurse then started checking the rooms on the middle hall and when I walked into Ms. Mayes room I see CNA Ralph Williams with his pants down climbing up on the resident. I stated, what are you doing. CNA Ralph Williams stated, please shut the door. At this point, I went to get the other nurse, Josette Peppers to witness. When we walked back in the room he was fixing up his clothes and the room was dark and the covers was messed up on the bed. And I got at 3:00 a.m. manager notified and at 3:25 police department notified. At 4:00 a.m. responsible party, Bertha Tyler, sister, was notified.

(Tr. p. 157, l. 24 - p. 158, l. 11; p. 160, ll. 20-23; Pl. Ex. No. 8).

Ms. Johnson claimed she did not change the resident before the police arrived. (Tr. p. 167, ll. 2-4). She agreed that in a prior deposition she testified she had changed the resident's diaper. (Tr. p. 168, ll. 1-4). She explained that they did not change the resident until the police came to the facility. (Tr. p. 168, ll. 12-16; p. 169, ll. 17-22; p. 211, ll. 2-5; p. 212, ll. 2-12; p. 213, ll. 15-17; p. 215, ll. 1-6).

Ms. Johnson agreed she did not include anything in her statement to the police that the resident's breasts were exposed or that she had seen Plaintiff's "naked butt." (Tr. p. 170, l. 23 - p. 171, l. 8; p. 176, ll. 11-15; p. 177, ll. 22-25; p. 191, ll. 8-14). She also did not include in the statement that she had knocked on the door. (Tr. p. 175, ll. 6-11).

Ms. Johnson was asked if she had legal obligations regarding reporting abuse or suspected abuse and she pointed to the Act. (Tr. p. 218, ll. 2-7). She stated this required her to report even a suspicion. (Tr. p. 218, ll. 11-13). If she failed to report she could go to jail, be fined lose her nursing certificate, and be fired. (Tr. p. 218, l. 14 - p. 219, l. 9).

Ms. Johnson stated that she suspected abuse was occurring when she saw Plaintiff on the resident's bed. (Tr. p. 219, ll. 10-12). That is why she reported it. (Tr. p. 219, ll. 13-14). She denied she made up the allegations so as to get Plaintiff in trouble. (Tr. p. 219, ll. 15-20).

Defendant Josette Peppers[1] was employed by UniHealth as an LPN. (Tr. p. 233, l. 24 - p. 234, l. 2). She was working on June 21, 2010. (Tr. p. 234, ll. 9-10). She was headed to the snack machine in the break room when Ms. Johnson rushed up to her and said to come on because Plaintiff was in the resident's room with his pants down, and she said something about sex. (Tr.

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[1] Ms. Peppers was married after the case began and now has the surname "Davis." (Tr. p. 233, ll. 18-23; p. 239, ll. 5-10). Plaintiff refers to her in this brief as "Peppers" for consistency with the pleadings and exhibits.

p. 235, ll. 8-24; p. 236, ll. 5-10; p. 244, l. 12 - p. 245, l. 7; p. 245, l. 23 - p. 246, l. 23; p. 257, ll. 15-18). She agreed that in earlier testimony she had stated that Ms. Johnson had told her Plaintiff was having sex with the resident. (Tr. p. 237, ll. 16-21; p. 258, l. 22 - p. 259, l. 3; p. 261, ll. 4-6). Ms. Peppers rushed into the room and saw Plaintiff adjusting his pants. (Tr. p. 248, l. 2 - p. 249, l. 22). Ms. Peppers told him to leave the room. (Tr. p. 250, ll. 3-4; p. 262, ll. 12-13). Plaintiff did not protest or ask why he had to leave the room. (Tr. p. 250, ll. 5-8). She claimed Ms. Johnson stopped Plaintiff from having sex with the resident. (Tr. p. 263, ll. 20-21; p. 264, ll. 7-9). She agreed that based upon what Ms. Johnson said to her in the hallway she "expected to see something happen" when they went back into the room. (Tr. p. 265, ll. 10-16).

Ms. Peppers contacted the Director of Nursing (DON) who told her to call the police. (Tr. p. 250, l. 23 - p. 251, l. 14; p. 261, l. 24 - p. 262, l. 3; p. 262, ll. 14-21). Ms. Peppers called the police immediately. (Tr. p. 251, ll. 18-22). She told the police they suspected abuse and needed someone there. (Tr. p. 251, ll. 23-25). Ms. Peppers also gave the police a written statement. (Tr. p. 252, ll. 16-17). She claimed she had nothing against Plaintiff that would cause her to lie. (Tr. p. 253, ll. 2-4). Ms. Peppers never heard of any rift between Plaintiff and Ms. Johnson. (Tr. p. 253, l. 25 - p. 254, l. 7).

Ms. Peppers stated that she had an obligation to report suspected abuse and could get in trouble if she fails to do so. (Tr. p. 255, ll. 14-18). This included being "fired, terminated, [and] go to jail." (Tr. p. 255, ll. 18-19; p. 255, ll. 22-24). She claimed she suspected that abuse had occurred and that is why she reported it. (Tr. p. 255, l. 25 - p. 256, l. 12). She denied she made up false allegations against Plaintiff. (Tr. p. 256, ll. 13-17).

Deputy Robert Warrington was working on June 21, 2010. (Tr. p. 271, ll. 13-18). He

responded to the call at 3:20 a.m. from UniHealth with PSO Stephanie Scott, Officer O'Cain and Corporal Hanes. (Tr. p. 272, ll. 1-90). Officer Warrington spoke with Ms. Johnson and Ms. Peppers. (Tr. p. 272, ll. 21-25; p. 273, ll. 11-16; p. 274, l. 23 - p. 275, l. 2). Officer Warrington advised Plaintiff he would be placed in investigative detention and placed him in handcuffs. (Tr. p. 274, ll. 6-17).

Ms. Johnson told Deputy Warrington that it appeared Plaintiff was trying to initiate sex with a resident. (Tr. p. 275, ll. 4-11). Both Ms. Johnson and Ms. Peppers told him that the resident's gown was pulled up over her but she had been covered up by the nurses. (Tr. p. 276, ll. 2-5). Deputy Scott, a female, attempted to communicate with the resident but the resident had "a mental incapacity." (Tr. p. 278, ll. 11-15). Deputy Warrington left the room to permit Deputy Scott to gather evidence. (Tr. p. 278, ll. 16-22). Ms. Johnson and Ms. Peppers gave written statements to Deputy Warrington. (Tr. p. 279, ll. 2-7; Pl. Exhs. No. 9, 12).

Deputy Warrington collected items of clothing and bedding from the room. (Tr. p. 280, ll. 16-20; p. 283, ll. 11-15; p. 284, ll. 4-5). The resident was transported to the hospital. (Tr. p. 280, ll. 23-25). Deputy Warrington placed Plaintiff under arrest and transported him to jail. (Tr. p. 285, ll. 12-21).

Deputy Scott also responded to the call on June 21, 2010. (Tr. p. 288, ll. 24-25). She was briefed by the officers on the scene but did not speak with Ms. Johnson, Ms. Peppers or Plaintiff. (Tr. p. 290, l. 18 - p. 291, l. 8). Deputy Scott entered the room and could see only the resident's feet because the curtain was pulled around. (Tr. p. 294, ll. 10-19). She introduced herself to the resident but had been advised that the resident was mentally incapacitated. (Tr. p. 292, ll. 7-12). Deputy Scott confirmed the resident was incompetent. (Tr. p. 292, ll. 13-15). Deputy Scott took

photographs of the resident and gathered the clothing and linens. (Tr. p. 296, l. 18 - p. 298, l. 10). She also collected the clothing Plaintiff was wearing. (Tr. p. 298, ll. 11-15; p. 302, ll. 9-11). She pulled the sheet up and saw the diaper, and the diaper did not have any feces in it. (Tr. p. 301, l. 20 - p. 302, l. 21). The clothing was not wet nor did it have any waste product on it. (Tr. p. 303, l. 16 - p. 304, l. 4). The workers at the facility had to change the patient since the clothing she was wearing was being collected as evidence. (Tr. p. 302, ll. 1-9).

Deputy Scott met the ambulance at the hospital and got a CSC kit. (Tr. p. 299, ll. 16-19). The kit is to test for DNA. (Tr. p. 299, ll. 23-24). She requested a SAME nurse, and then gave the kit to Jamie Smoak, the SAME nurse who responded. (Tr. p. 300, ll. 7-16; p. 300, l. 22 - p. 301, l. 3).

Ms. Smoak testified she is the nurse manager of the emergency room at the Regional Medical Center and the coordinator of the Nurse's Sexual Assault Examiner Program. (Tr. p. 305, ll. 6-10). Ms. Smoak performed the exam on the patient who Plaintiff allegedly assaulted. (Tr. p. 306, ll. 1-11). An officer had accompanied the patient to the examination room but did not stay in the room during the exam. (Tr. p. 306, l. 23 - p. 307, l. 5).

Ms. Smoak found the patient had "mental deficits." (Tr. p. 307, ll. 6-7). The officer left a CSC kit for Ms. Smoak to use to collect evidence for DNA purposes. (Tr. p. 307, ll. 8-13). Ms. Smoak examined the patient's skin and vaginal area and found no evidence of physical trauma or bleading. (Tr. p. 308, ll. 1-19; p. 311, ll. 9-11). She also took swabs from the patient's mouth, genitals and anus and scrapings under her fingernails (Tr. p. 307, l. 14 - p. 311, l. 8). She prepared the samples and delivered them to an officer from the Orangeburg Police Department. (Tr. p. 311, l. 12 - p. 312, l. 11). Ms. Smoak has never heard of the police cleaning up a CSC

victim before bringing the victim to the hospital. (Tr. p. 312, ll. 19-25). She would expect the patient to arrive the way they were. (Tr. p. 313, ll. 1-3).

Brian Queen is the news director at WIS TV in Columbia. (Tr. p. 324, ll. 2-9). WIS serves about 407,000 households in a 10-county demographic audience (DMA). (Tr. p. 324, ll. 12-17). Mr. Queen described the story WIS ran regarding the alleged incident on June 22, 2010. (Tr. p. 324, l. 18 - p. 325, l. 18). The text of the story was as follows:

> An Orangeburg man is behind bars this afternoon after police say he tried to rape a handicapped woman. Police have charged 54-year-old Ralph Williams, Sr., with assault with the intent to commit criminal sexual assault. Investigators say several employees at UniHealth on Whitman Street saw Williams trying to have sex with a 42-year-old disabled woman early Monday morning. A judge issued a bond, police say more charges are pending.

(Tr. p. 325, l. 18 - p. 326, l. 1). Viewers would have seen Plaintiff's mug-shot and a map of the facility in Orangeburg. (Tr. p. 326, ll. 2-9). WIS would have obtained the photograph along with a press release from the detention center. (Tr. p. 326, ll. 10-13).

Mr. Queen ran a "Google" search on Plaintiff and the web version of the WIS story was still available on the internet. (Tr. p. 326, l. 18 - p. 328, l. 12). The search result yields the following number one link: "Assisting living employee charged with attempted rape at the facility." (Tr. p. 328, ll. 7-9). The story is still available as part of WIS's archives. (Tr. p. 328, ll. 13-16; p. 330, ll. 8-22; p. 331, ll. 12-15; Pl. Exh. No. 14A). No one has contacted Plaintiff for a retraction of the story. (Tr. p. 335, ll. 14-18).

Captain Carl Shultz of Orangeburg Public Safety supervises investigations and forensics, which includes evidence collection. (Tr. p. 341, l. 1 - p. 342, l. 13). He was a crime scene investigator in June 2010. (Tr. p. 341, ll. 19-22). Captain Shultz obtained the sealed CSC kit and

the patient's clothing from the RMC and placed it in the evidence cooler. (Tr. p. 342, l. 14 - p. 343, l. 20; Pl. Exh. No. 2B). Captain Shultz did not know whether the patient was changed before she went to the hospital. (Tr. p. 344, ll. 16-18). Captain Shultz also obtained a buccal swab from Plaintiff under a warrant. (Tr. p. 345, l. 1 - p. 346, l. 24; Pl. Exh. No. 39).

All of the evidence was then transported to SLED on June 23, 2010, by Debra Byrd. (Tr. p. 347, ll. 1-25; p. 352, ll. 4-11; p. 352, ll. 20-25; p. 353, ll. 6-16; Pl. Exhs. 2C, 3A). Captain Shultz received a report from SLED on April 12, 2011. (Tr. p. 349, ll. 11-17; p. 352, ll. 18-19; Pl. Exh. 3). Captain Shultz did not obtain any buccal swabs from any other person, including any other UniHealth employee. (Tr. p. 349, l. 25 - p. 350, l. 4).

Lily Gallman was qualified as an expert as a DNA analyst with SLED. (Tr. p. 355, ll. 3-5; p. 357, ll. 6-8). She received the items on June 23, 2010. (Tr. p. 358, l. 19 - p. 359, l. 2). These included buccal swabs from Plaintiff and from the patient, fingernail scrapings from the patient, and vaginal swabs from the patient, . (Tr. p. 360, l. 23 - p. 361, l. 18). There was no semen present. (Tr. p. 362, ll. 2-16; p. 372, ll. 1-14). Ms. Gallman's report stated "that no DNA profile foreign to the victim...was developed from" the fingernail scrapings. (Tr. p. 362, l. 25 - p. 363, l. 7). There was nothing to identify Plaintiff in any of the items. (Tr. p. 363, ll. 17-20). There was no "Y" chromosome (male) associated with the salivary swabs. (Tr. p. 364, l. 6 - p. 365, l. 14). Ms. Gallman did not receive any clothing or bed linens to analyze. (Tr. p. 370, ll. 10-24). She also analyzed a pair of briefs but found no hair or anything from which she could do a DNA analysis. (Tr. p. 370, l. 25 - p. 371, l. 16; p. 374, ll. 10-19).

Several witnesses testified in support of Plaintiff's claim that the incident impacted his reputation and his relationship with his wife.

Terry Rivers was a stroke victim who knows Plaintiff (Mr. Rivers' wife is Plaintiff's cousin). (Tr. p. 378, ll. 14-24; p. 384, ll. 3-11). Mr. Rivers was familiar with the events of June 21, 2010. (Tr. p. 379, ll. 2-4). He observed an individual attack Plaintiff due to the accusations of attempted rape. (Tr. p. 381, ll. 6-16; p. 383, ll. 13-15). Mr. Rivers identified a newspaper articles regarding the accusations against Plaintiff. (Tr. p. 381, l. 20 - p. 382, l. 6; p. 383, ll. 2-10; Pl. Exh. Nos. 15A, 15B).

Cynthia Mack is a Medicaid worker with DHHS. (Tr. p. 386, l. 23 - p. 387, l. 1; p. 429, l. 23 - p. 430, l. 3). Plaintiff is married to her sister. (Tr. p. 388, ll. 1-2). She testified in support of Plaintiff's reputation in the community. (Tr. p. 390, ll. 14-25; p. 416, l. 17 - p. 419, l. 6). She was aware of the events of June 21, 2010, and helped her sister bail Plaintiff out of jail. (Tr. p. 391, ll. 2-23). She read about the charges in the newspaper the next day. (Tr. p. 392, ll. 5-8; p. 392, l. 24 - p. 393, l. 3; p. 394, l. 15 - p. 395, l. 2; p. 421, ll. 7-10; p. 422, ll. 4-9; Pl. Exh. 15C). She was aware that the nursing home employees suspected Plaintiff was attempting to have sex with the patient. (Tr. p. 433, ll. 5-11). She did not believe Plaintiff could have done what he was accused of doing. (Tr. p. 393, l. 24 - p. 394, l. 3; p. 419, ll. 9-18). She was told investigators found semen and she suggested to her sister that she divorce Plaintiff. (Tr. p. 394, ll. 5-13; p. 395, ll. 5-7; p. 431, l. 18 - p. 432, l. 14; p. 432, ll. 21-22).

Plaintiff never indicated to her that he had done what he was accused of doing. (Tr. p. 419, ll. 20-24). However, people in the community believed Plaintiff had raped the patient. (Tr. p. 420, ll. 16-22). She described him as "publicly hated." (Tr. p. 420, l. 23 - p. 421, l. 2; see also Tr. P. 423, l. 21 - p. 424, l. 12). The event also affected Plaintiff's marriage. (Tr. p. 425, l. 25 - p. 426, l. 11).

Plaintiff's son testified he heard about the incident on June 21, 2010, and was "shocked" and "disgusted, because all those things, knowing my father, was not subjective to my father due to his character." (Tr. p. 441, ll. 16-20). He looked at the internet and read the newspaper story. (Tr. p. 441, l. 22 - p. 442, l. 15; p. 442, l. 18 - p. 443, l. 1; Pl. Exh. 14B). Plaintiff's reputation "took a major hit" and he was unable to obtain employment. (Tr. p. 443, ll. 13-25). Plaintiff was depressed, disappointed, and cried. (Tr. p. 444, ll. 3-13).

Dr. Earline Sabb, who is a minister and knows Plaintiff, testified regarding the damage to his reputation in the community. (Tr. p. 451, l. 2 - p. 456, l. 2). She felt in her heart that the allegations against Plaintiff were not true because of how well she knows Plaintiff. (Tr. p. 453, ll. 12-18). She also testified about how the allegations affected Plaintiff's marriage. (Tr. p. 456, l. 15 - p. 457, l. 20).

Connie Jackson works with Plaintiff's wife. (Tr. p. 459, ll. 7-14). She also knows Plaintiff. (Tr. p. 459, ll. 17-20). She read about the incident in the newspaper. (Tr. p. 460, ll. 6-16; Pl. Exh. 15C). She did not believe Plaintiff did what he was accused of doing because of how well she knows him. (Tr. p. 460, l. 17 - p. 461, l. 12). Ms. Jackson described how this incident affected Plaintiff's reputation in the community. (Tr. p. 461, l. 13 - p. 462, l. 23). She also testified about how the incident impacted Plaintiff's marriage. (Tr. p. 462, l. 24 - p. 463, l. 14).

Plaintiff testified he became a certified nursing assistant (CNA) in 2009. (Tr. p. 485, l. 21 - p. 486, l. 3). He began working at UniHealth in February 2010. (Tr. p. 487, ll. 1-2; p. 491, ll. 6-16; p. 555, ll. 2-3; p. 562, ll. 7-12). UniHealth was close to his home and because he did not have a driver's license it was convenient. (Tr. p. 557, ll. 6-18).

Plaintiff worked the night shift after a few days of training. (Tr. p. 562, ll. 13-24).

Plaintiff initially worked in the rehab wing. (Tr. p. 492, ll. 9-10; p. 563, ll. 4-8). Plaintiff did not feel comfortable caring for female patients and explained this to Ms. Shriver, his nursing supervisor, so UniHealth switched him to a section for men. (Tr. p. 491, l. 20 - p. 492, l. 4; p. 492, ll. 12-16; p. 495, ll. 7-14). He provided perineal care, which involves daily cleanliness and comfort for the patients. (Tr. p. 493, ll. 9-20; p. 570, ll. 16-20). Ms. Shriver left and Plaintiff got a new supervisor, Defendant Johnson, who put him back to caring for women at night time. (Tr. p. 495, ll. 14-21).

Plaintiff described the procedure for entering a room and caring for the patients. (Tr. p. 494, l. 11 - p. 495, l. 6; p. 495, l. 25 - p. 496, l. 19; p. 511, ll. 13-19; p. 564, l. 18 - p. 565, l. 6). This included a specific policy for dealing with female patients. (Tr. p. 498, l. 18 - p. 499, l. 24; p. 520 ll. 10-19). UniHealth did not have a policy for dealing with a patient who could not speak. (Tr. p. 496, l. 20 - p. 497, l. 13).

Plaintiff testified regarding difficulties he had with the defendant nurses. It began about one month into Plaintiff's employment and involved mis-communication. (Tr. p. 499, l. 25 - p. 500, l. 10). He told his supervisor, Defendant Johnson, about a patient whose blood pressure and respiration were too low. (Tr. p. 500, ll. 12-19). Ms. Johnson told him to check again and when he came back in the patient was turning blue, so he returned to the desk for help. (Tr. p. 500, l. 21 - p. 501, l. 2; p. 592, l. 16 - p. 593, l. 6; p. 594, ll. 2-4). Ms. Johnson did not respond to him so he ran to the other end of the hallway to get another LPN, who helped stabilize the patient and who called EMS. (Tr. p. 501, ll. 4-10; p. 594, ll. 5-20; p. 595, ll. 6-15). Plaintiff was shaken and he said Ms. Johnson was incompetent and needed to be fired. (Tr. p. 501, ll. 11-16; p. 598, ll. 16-24). Thereafter Plaintiff and Ms. Johnson "didn't really have any words." (Tr. p. 501, ll. 20-21; p.

599, ll. 10-11).

About two weeks later Plaintiff was assisting a large male patient into a wheelchair when they lost footing. (Tr. p. 501, l. 21 - p. 502, l. 14; p. 589, l. 14 - p. 591, l. 5). Ms. Johnson was distributing medication two doors down so Plaintiff called out for help. (Tr. p. 502, ll. 15-18). Plaintiff called out again when nobody came and eventually the janitor came and helped him stabilize the patient. (Tr. p. 502, ll. 18-20). This upset Plaintiff and he said something under his breath that she probably heard. (Tr. p. 502, l. 20 - p. 503, l. 1; p. 591, ll. 13-19). He also told his wife what happened. (Tr. p. 504, l. 7 - p. 505, l. 8).

On another occasion Plaintiff had been arguing with his wife and after he arrived at work and checked on his patients he called her to apologize. (Tr. p. 503, ll. 7-14; p. 586, ll. 4-20; p. 587, ll. 18-19). He hung up and returned to his duties. (Tr. p. 503, ll. 14-15). When he got home the next morning his wife asked him "who in the hell is Patricia Johnson?" and "what's going on?" (Tr. p. 503, ll. 15-18; p. 587, ll. 23-25). When he explained who Ms. Johnson was Plaintiff's wife informed him that Ms. Johnson had called the house at 3:00 a.m. (Tr. p. 503, l. 18 - p. 504, l. 6).

Plaintiff also described a situation in which he was suspended for a day while the facility investigated an inquiry from a patient's children as to why the patient had a bruise on his head. (Tr. p. 505, l. 14 - p. 506, l. 4). Plaintiff was not written up and he was able to return to work. (Tr. p. 506, ll. 8-14). He never heard anything more about the incident. (Tr. p. 506, ll. 15-20).

Plaintiff described the incident of June 20, 2010, adamantly denying he abused or attempted to abuse anyone. (Tr. p. 506, l. 21 - p. 526, l. 3). He placed his cart outside the room and knocked on the door. (Tr. p. 511, l. 20 - p. 512, l. 5). The television was off. (Tr. p. 516, ll. 5-

6). He did not turn the overhead light on to avoid disturbing the patient in the other bed. (Tr. p. 516, ll. 9-11). He did turn on the light that was over the bed once he provided privacy. (Tr. p. 516, ll. 13-15). There was a curtain on a U-shaped rail allowing him to pull it around the bed for privacy. (Tr. p. 522, ll. 5-23; p. 566, ll. 13-15).

If someone requires assistance in the room a patient or an employee can press a "panic" button on the wall next to the bed. (Tr. p. 518, ll. 14-19; p. 519, ll. 1-3). This would alert all CNAs and nurses to come assist in the room. (Tr. p. 518, ll. 20-22). There is also a "call" button on the wall. (Tr. p. 518, ll. 23-25; p. 519, ll. 7-10). The patient in this situation was not able to press the call button. (Tr. p. 519, ll. 11-16).

Because of the time he quietly introduced himself and then checked on the patient's pamper by pulling the cover down. (Tr. p. 512, ll. 5-14; p. 516, ll. 21-22; p. 565, l. 7 - p. 566, l. 3). The patient needed her pamper changed (she had feces and urine) but because she was paralyzed she could not help. (Tr. p. 507, l. 25 - p. 508, l. 3; p. 512, ll. 13-15; p. 568, ll. 4-12; p. 575, ll. 16-18; p. 616, ll. 1-4, 14-22). Plaintiff returned to his cart to get his supplies and when he entered the hallway he did not recall if he saw anyone at the nurse's station. (Tr. p. 512, l. 15 - p. 513, l. 13; p. 515, ll. 3-13; p. 517, ll. 1-2; p. 566, ll. 16-17; p. 569, ll. 11-14; p. 575, ll. 18-23). When he returned into the room he closed the door and placed his supplies either in a chair or on the patient's dresser. (Tr. p. 515, l. 14 - p. 516, l. 4; p. 517, ll. 2-3; p. 569, ll. 17-18; p. 617, ll. 13-18; p. 618, ll. 19-25; Pl. Exhs. No. 6, 50). He pulled the privacy curtain into place and began to change her. (Tr. p. 566, ll. 18-19; p. 567, ll. 3-7; p. 569, ll. 21-22).

Plaintiff turned to the side of the patient's bed. (Tr. p. 517, ll. 5-9). The patient was "big boned" and heavy and Plaintiff is "a little light-weight dude," so he had to prop himself on the

bed to get the job done. (Tr. p. 508, ll. 5-7; p. 569, l. 23 - p. 570, l. 7; p. 576, l. 3). Plaintiff was wearing drawstring pants that night (Tr. P. 574, ll. 9-11) and as he leaned over the bed the ties on his scrub pants caught and his pants slipped down. (Tr. p. 509, ll. 11-13).

Plaintiff had to work from one side of the bed and then the other side of the bed. (Tr. p. 517, l. 5 - p. 518, l. 7; p. 567, l. 13 - p. 568, l. 5). The CNAs had to be careful removing the pamper, and Plaintiff was in the process of doing so when Defendant Johnson entered the room. (Tr. p. 508, ll. 11-21; p. 571, ll. 21-22). She pulled back the curtain and said "what are you doing?" (Tr. p. 508, ll. 21-22; p. 519, l. 23- p. 520, l. 1; p. 571, ll. 23-24). Plaintiff replied "would you please shut the door." (Tr. p. 508, ll. 22-24; p. 519, ll. 20-21; p. 520, l. 3; p. 571, l. 25 - p. 572, l. 13). He asked her twice to shut the door due to privacy concerns. (Tr. p. 508, l. 25; p. 519, ll. 20-21). He also had to pull his pants back up "so they wouldn't be hanging off [his] behind." (Tr. p. 509, ll. 13-14). Ms. Johnson did not shut the door; instead, she just walked out. (Tr. p. 508, l. 25 - 509, l. 1; p. 520, ll. 5-6; p. 572, ll. 14-17). Plaintiff had to stop what he was doing, go shut the door for privacy, and return to removing the pamper, which had feces and urine. (Tr. p. 509, ll. 2-5; p. 520, ll. 7-9; p. 572, l. 19 - p. 573, l. 4; p. 574, ll. 7-8).

Ms. Johnson returned to the room with Defendant Peppers and they told him to leave the room. (Tr. p. 509, ll. 5-7, 22-24; p. 573, ll. 17-22; p. 576, ll. 19-21). Plaintiff left the room and stood outside in the hallway. (Tr. p. 509, ll. 7-8, ll. 14-15; p. 523, ll. 4-8; p. 576, ll. 22-25). Another LPN in training came and stood with him. (Tr. p. 577, ll. 1-2).

Plaintiff had not been able to finish changing the patient. (Tr. p. 510, ll. 2-4; p. 574, l. 12 - p. 575, l. 12). He left the dirty diaper in the room, and did not see any red shirt on the bed. (Tr. p. 510, ll. 5-9; p. 577, ll. 15-21). The patient did have a pad under the patient to catch any overflow,

and the pad is usually discarded with the pamper. (Tr. p. 510, l. 10 - p. 511, l. 12). Plaintiff overheard someone say "you stay with Mr. Williams while we take care of something" so they stood there for a moment. (Tr. p. 524, ll. 1-3).

From the hallway, Plaintiff went to the patio to smoke a cigarette and eventually was placed in handcuffs and taken to jail. (Tr. p. 509, ll. 17-18; p. 523, l. 24 - p. 525, l. 4; p. 577, ll. 9-11). He asked why and they told him he was being charged with attempting to molest the patient. (Tr. p. 525, ll. 8-18). At the detention center they collected his clothing as evidence. (Tr. p. 525, ll. 22-24). While he was in jail two detectives collected swabs from his mouth. (Tr. p. 526, ll. 5-6). The charges were eventually upgraded to sexual conduct with a vulnerable adult. (Tr. p. 528, ll. 1-15).

Plaintiff eventually was released on bail and when he got home he saw the news report on WIS TV. (Tr. p. 526, l. 8 - p. 527, l. 12). He described how this impacted him with his wife and in the community. (Tr. p. 526, l. 17 - p. 527, l. 18). He was also unable to find work for a while but found work for a family friend at The Crab Pit. (Tr. p. 528, l. 16 - p. 529, l. 4). He lost the job when another worker showed the article about the arrest to Plaintiff's boss. (Tr. p. 529, l. 11 - p. 530, l. 9). He got a job at another restaurant called the Brown Derby, but lost that job when the owner heard about the allegations. (Tr. p. 530, ll. 11-22).

Plaintiff's nursing license was suspended although he had gotten it back by the time of the hearing. (Tr. p. 531, l. 9 - p. 532, l. 1). At one time the CNA registry listed the allegations. (Tr. p. 534, ll. 4-9). The letter of reinstatement was dated September 2, 2014, and stated, "This nurse's aid has no sustained findings of abuse or neglect or misappropriation of property found in the South Carolina Nurse's Aid Registry." (Tr. p. 532, ll. 1-4; Pl. Exh. No. 25). He was reluctant

to seek employment as a CNA until some public acknowledgment of his innocence as "there's always going to be a little cloud." (Tr. p. 532, ll. 12-18).

Plaintiff's wife married Plaintiff in May 1988. (Tr. p. 652, ll. 1-2). She testified about a day that she picked Plaintiff up from work and he was upset because a patient nearly died. (Tr. p. 680, ll. 9-18). She also discussed the phone call from Defendant Johnson after Plaintiff had called to apologize following an argument. (Tr. p. 664, l. 19 - p. 666, l. 14; p. 694, l. 17 - p. 699, l. 17).

Plaintiff's wife testified about the events of the night Plaintiff was arrested. (Tr. p. 666, l. 17 - p. 668, l. 4; p. 690, l. 13 - 691, l. 4). She stated she was told the charges were upgraded because investigators found semen and "they had a DNA hit on [Plaintiff]." (Tr. p. 668, ll. 5-14; p. 692, ll. 10-21). She testified as to how the accusations affected Plaintiff's demeanor, their marriage and Plaintiff's reputation. (Tr. p. 654, ll. 19-22; p. 662, ll. 15-21; p. 669, l. 7 - p. 670, ll. 7-17; p. 670, l. 17 - p. 671, l. 10; p. 671, l. 25 - p. 672, l. 16; p. 681, l. 2 - p. 684, l. 1; p. 703, ll. 5-21). When asked what she was claiming, Plaintiff's wife stated, "I'm alleging that the statements that they gave to the arresting officers, that the arresting officers and law enforcement, said they give to law enforcement, say they give to law enforcement was given to the papers." (Tr. p. 700, l. 23 - p. 701, l. 1).

JURY INSTRUCTIONS

The trial court gave the following instructions to the jury:

> You are to consider only the evidence before you. If there was any testimony ordered stricken from the record of this trial you are to disregard that testimony. You are to consider only the testimony which has been presented from this witness stand and any exhibits which have been made part of the record. It is my duty to charge you the law applicable to this case and it is your duty as jurors

to accept and apply this law as I now state it to you. If you think you have any idea what the law is or what the law ought to be and it does not agree with what I tell [you] the law is you must forget that idea, because you are sworn to accept the law and apply the law exactly as I now state it to you.

In every case tried before a jury the jury is the sole and exclusive judge of the facts.

(Tr. p. 820, l. 22 - p. 821, l. 11). The judge charged the jury on the burden of proof (Tr. p. 821, l. 23 - p. 822, l. 17), circumstantial and direct evidence (Tr. p. 822, l. 18 - p. 823, l. 17), and credibility (Tr. p. 823, l. 18 - p. 824, l. 9).

The circuit court then gave the jury case-specific instructions. This included instructions on defamation (Tr. p. 825, l. 8 - p. 827, l. 3), *respondeat superior* and the liability of a principal for the defamatory statements of an agent "acting within the scope of his employment" or "in the scope of his apparent authority" (Tr. p. 827, l. 4 - p. 828, l. 15), privileged communications (Tr. p. 828, l. 16 - p. 830, l. 2; p. 842, ll. 17-20), the Adult Protection Act (Tr. p. 830, l. 3 - p. 832, l. 5), truth as a defense. (Tr. p. 832, ll. 6-17) and Plaintiff's burden of proof as to actual and punitive damages. (Tr. p. 833, l. 9 - p. 837, l. 14). The court then stated:

Now, I have declared the law to you through these instructions to help guide you to a just and lawful verdict. *Whether some of these instructions apply will depend on what you find to be the facts.* The fact that I have instructed you on various subjects in this case must not be taken as indicating an opinion of this court as to what you should find to be the facts or as to which party is entitled to your verdict. Your verdict must represent the considered judgment of each juror. In order to return a verdict it is necessary that each one of you agree. Your verdict must be unanimous. All 12 of you must agree on the verdict. *Your verdict cannot be based on sympathy, passion, prejudice, emotion or any other consideration not in evidence in this case.* Remember at all times you are not favoring one party over another. *You are the judges of the facts.* Your sole interest is to seek the truth from the evidence in this case ....

(Tr. p. 837, l. 15 - p. 838, l. 6) (emphasis added). Finally, the court went over the verdict form

with the jury. (Tr. p. 838, l. 8 - p. 840, l. 8).

Plaintiff renewed his objections he made prior to the charge. (Tr. p. 843, ll. 5-10).

The Verdict

The jury deliberated for nearly five hours and returned a verdict finding each nurse did not act in good faith in making the report. (Tr. p. 847, ll. 7-13; verdict form). The jury found, however, that each nurse acted outside the scope of her employment. (Tr. p. 847, ll. 14-24). The jury awarded actual damages of $102,500 to Plaintiff and punitive damages against each defendant as follows: (1) $200,000 against Defendant Johnson; (2) $97,500 against Defendant Davis (Peppers); and (3) $600,000 against UniHealth. (Tr. p. 848, ll. 1-19). Defendant requested the jury be polled and each adhered to the verdict. (Tr. p. 849, l. 3 - p. 852, l. 8).

Each party made post-verdict motions. The trial court granted the Defendants a new trial under the Thirteenth Juror doctrine and denied Plaintiff's motion.

This appeal follows.

ARGUMENTS

The trial court granted the Defendants' motion for a new trial under the Thirteenth Juror Doctrine. The court gave reasons that demonstrate the order was controlled by an error of law. Furthermore, the court improperly permitted the Defendants to proceed with a joint defense although defendant UniHealth took positions during the trial that deflected its liability unto the individual defendants, nurses Patricia A. Johnson and Josette Peppers, despite assurances by UniHealth's counsel that it would not do so.

This Court should reverse the grant of the new trial on the facts. If the Court does not reverse the grant of a new trial, the Court should instruct the circuit court to either require the defendants to truly present a unified front (without deflecting UniHealth's fault) or require each party to obtain new, separate counsel on remand.

SCOPE OF REVIEW

A trial judge's order granting or denying a new trial under the thirteenth juror doctrine will not be disturbed unless the judge's decision is wholly unsupported by the evidence, or the conclusion was controlled by an error of law. *Folkens v. Hunt*, 300 S.C. 251, 254-55, 387 S.E.2d 265, 267 (1990); *Norton v. Norfolk Southern Railway Co.*, 350 S.C. 473, 478, 567 S.E.2d 851, 854 (2002).

The trial judge is not required to explain its rationale for granting a new trial under the thirteenth juror doctrine. *Folkens*, 300 S.C. at 254, 387 S.E.2d at 267. However, if the trial court chooses to do so, the appellate court will review the reasons the trial judge provided. *See Lane v. Gilbert Constr. Co.*, 383 S.C. 590, 597-600, 681 S.E.2d 879, 883-84 (2009) (reviewing the trial

court's rationale for granting a new trial despite the fact the trial court granted the new trial under the thirteenth juror doctrine and was not required to provide any reasons for the outcome). *Cf. Youmans v. S.C. Dep't of Transp.*, 380 S.C. 263, 282, 287-88, 670 S.E.2d 1, 10, 13 (Ct. App.2008) (holding that despite the discretion given the trial court by the thirteenth juror doctrine, the trial court could not grant a new trial based on the brevity of the jury deliberations); *id.* at 282, 670 S.E.2d at 10 ("[G]ranting a new trial due to suspicions of deliberation quality is a flagrant deviation from premising a new trial upon the facts.").

Therefore, although a trial judge enjoys a broad level of discretion when ruling upon a motion for new trial on the facts, that decision is subject to review for abuse of that discretion. And where the trial judge gives reasons for granting the motion, the appellate court will review the reasons given. And where those reasons are controlled by an error of law, the appellate court should reverse the decision.

I. THE CIRCUIT COURT JUDGE ABUSED HIS DISCRETION IN GRANTING THE DEFENDANTS A NEW TRIAL UNDER THE THIRTEENTH JUROR DOCTRINE

The trial judge stated he granted the motion for new trial under the Thirteenth Juror doctrine because he was "concerned that the jury improperly handled the issue of the Defendant [nurses'] immunity under the South Carolina Omnibus Adult Protection Act. See S.C. Code Ann. §§ 43-35-25(A) & (G)." (Order of March 10, 2017, p. 2). Thus, the judge believed these Code sections provided immunity from liability under the Act for a reporter as a matter of law and that the jury must have misunderstood this fact. This was an error of law.

In 1993, the General Assembly enacted the Omnibus Adult Protection Act ("the Act") to protect vulnerable adults from abuse, neglect, and exploitation. S.C. Code Ann. §§ 43-35-5 to

43-35-595 (2015). The Act imposes a duty on certain individuals to report if they have "reason to believe that a vulnerable adult has been or is likely to be abused, neglected, or exploited..." S.C. Code Ann. § 43-35-25(A) (2015). The individual nurse defendants are among those Individuals designated as "mandated reporters" under the Act. *Id. See also Doe v. South Carolina Department of Social Services*, 407 S.C. 623, 757 S.E.2d 712 (2014) (describing the purpose of workings of the Act).

The report must be made to the agencies enumerated in Section 43-35-25(D). Subsection (G) adds that so long as a person meets the mandatory reporting requirements of the section, the person is not precluded from also "reporting directly to law enforcement, and in cases of an emergency, serious injury, or suspected sexual assault law enforcement must be contacted immediately."

Importantly, the Act provides qualified immunity:

> A person who, *acting in good faith*, reports pursuant to this chapter or who participates in an investigation or judicial proceeding resulting from a report is immune from civil and criminal liability which may otherwise result by reason of this action. In a civil or criminal *proceeding good faith is a rebuttable presumption.*

S.C. Code Ann. § 43-35-75(A) (2015) (emphasis added). Thus, a report under the Act is presumably made in "good faith," but that presumption is rebuttable. *Williams v. Watkins*, 379 S.C. 530, 665 S.E.2d 243 (Ct. App. 2008).

Regarding presumptions, the Rules of Evidence provide:

> In all civil actions and proceedings not otherwise provided for by statute or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, *but does not shift to such party the burden of proof in the sense of the risk of non-persuasion, which remains throughout the trial upon the party on whom it was*

originally cast.

Rule 301, SCRE (emphasis added). *Compare State Accident Fund v. SC Second Injury Fund*, 409 S.C. 240, 762 S.E.2d 19 (2014) (a presumption is a "legal inference or assumption that a fact exists, based on the known or proven existence of some other fact or group of facts; a presumption shifts the burden of production or persuasion to the opposing party, who can then attempt to overcome the presumption) (*citing* Black's Law Dictionary 1304 (9th ed. 2009)).

A "rebuttable presumption" is defined as an "inference drawn from certain facts that establish a *prima facie* case, which may be overcome by the introduction of contrary evidence." *Jowers v. SC Dept. of Health and Envir. Ctrl.*, Op. No. 27725 (S.C. Sup. Ct. filed July 19, 2017) (Shearouse Adv. Sh. No. 27 at 28) (slip at 38, n. 12) (*citing* Black's Law Dictionary, *Rebuttable Presumption* (10th ed. 2014)). Thus, so long as there was contrary evidence which served to overcome the presumption of good faith, then it is up to the fact finder to determine whether the nurses were entitled to immunity under Section 43-35-75(A).

In denying directed verdict, the court stated there was a question of fact "as to what" defendants Johnson and Peppers saw and whether they were acting in good faith. (Tr. p. 716, l. 18 - p. 717, l. 2). In granting the new trial, however, the trial judge expressed his belief that the jury misapplied or "improperly handled" the presumption of good faith under the statute. That reasoning cannot stand in the face of the express language in the statute that the presumption is rebuttable and the jury's finding of the existence of evidence that overcame that presumption. Thus, the trial judge's grant of a new trial under the Thirteenth Juror doctrine is controlled by an error of law and is, therefore, the result of an abuse of discretion.

The trial judge correctly charged the jury regarding the Act, the presumption of good

faith, and that the presumption was rebuttable. Specifically, the judge charged:

> In this case there is a rebuttable presumption that Patricia Johnson and Josette Davis acted in good faith with their oral and written statements regarding the plaintiff. *A rebuttable presumption is a presumption made by the Court and the jury that a fact or issue is taken to be true unless someone comes forward to contest it and prove otherwise.* In this case the rebuttable presumption is that the defendants acted and reported in good faith when they made their oral and written statements and the jury must assume that to be true unless the plaintiffs prove otherwise. *The plaintiffs have the burden of proof and must establish by a preponderance of the evidence that the defendants did not act in good faith.* If you find that the defendants acted in good faith when they reported a suspected abuse, then they cannot be held liable and your verdict must be in favor of the defendants.

(Tr. p. 831, l. 21 – p. 832, l. 5) (emphasis added). The jury was, therefore, given a correct charge on the operation of the Act. Against the background of the remaining instructions there was nothing to indicate the jury "misapplied" any aspect of the Act.

The jury concluded from the testimony that Defendant Johnson, with the assistance of Defendant Peppers, acted recklessly in reporting that Plaintiff was attempting to have sex with the patient. Plaintiff and his wife testified about several incidents from which the jury could have concluded Plaintiff and Defendant Johnson, his supervisor, were not on good terms. The jury believed Plaintiff's version of events, including his testimony that the patient was soiled, that Plaintiff left the soiled brief on her when he was ordered out of the room, and by the time investigators arrived the soiled clothing was nowhere to be found (inferring that Johnson, Peppers or both of them removed the items to support their assertion that Plaintiff was acting improperly). There was abundant evidence to support the verdict in light of the instructions.

In reviewing the verdict form, the circuit court advised the jury to find whether each nurse acted in good faith when she reported her suspicions about Plaintiff. (Tr. p. 838, l. 17 - p. 839, l.

6). The jury specifically found each defendant did not act in good faith. There were no questions to the court, nor was there anything else to indicate the jury "misapplied" the law. And when Defendants requested the jury be polled, each reaffirmed his or her verdict.

Although the case law indicates the grant of a new trial under the Thirteenth Juror doctrine is nearly unreviewable, under the circumstances of this case where the trial judge gives a reason and that reason is flawed under the law, the decision should not stand. Defendants received a fair trial (in fact a trial under more favorable instructions than the law permitted) and the jury sorted through the facts and correctly applied the law as instructed. The jury's verdict was not infected by improper motive, and was supported by the testimony and evidence. There is nothing to indicate the jury "misapplied" the Act.

The Court should reverse the trial judge's decision and remand for entry of judgment in accordance with the jury's verdict.

II. THE CIRCUIT COURT JUDGE ERRED IN SUBMITTING THE ISSUE OF WHETHER THE INDIVIDUAL DEFENDANTS WERE ACTING WITHIN THE SCOPE OF THEIR EMPLOYMENT TO THE JURY AND IN DENYING PLAINTIFF'S MOTION FOR JNOV

Plaintiff objected to the verdict form on the ground there was no issue "as to whether or not the nurses were outside the scope of their employment...." (Tr. p. 752, ll. 5-9). Plaintiff also moved for directed verdict "on the course and scope of the nurses' employment for UniHealth in making the reports at issue." (Tr. p. 752, l. 16 - p. 753, l. 7). Defendants' counsel contended whether his clients, the nurses, were acting within the course and scope of their employment with his other client, UniHealth, was an issue for the jury. (Tr. p. 753, ll. 9-18). Plaintiff responded that he was not contending they acted intentionally but that they were reckless. (Tr. p. 753, ll. 19-25). The trial court overruled the objection to the verdict form and denied Plaintiff's motion. (Tr. p. 754, ll. 2-10; p. 757, ll. 19-21).

Following the verdict Plaintiff moved for JNOV as to the issue of whether the nurses were acting within the course and scope of their employment. (Plaintiff's Post Verdict Motions). After granting the Defendants motion for new trial the trial court ruled this motion was moot. This Court should reverse that decision.

SCOPE OF REVIEW

On review from a trial court's denial of a motion for directed verdict or JNOV, the appellate court applies the same standard as the trial court and views the evidence and all reasonable inferences in the light most favorable to the nonmoving party. *Maybank v. BB&T Corporation*, 416 S.C. 541, 787 S.E.2d 498 (2016); *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 28, 602 S.E.2d 772, 782 (2004). Motions for directed verdict or JNOV should be denied if the

evidence yields more than one reasonable inference or its inference is in doubt. *Strange v. S.C. Dep't of Highways & Pub. Transp.*, 314 S.C. 427, 429–30, 445 S.E.2d 439, 440 (1994). Further, "[a] motion for JNOV may be granted only if no reasonable jury could have reached the challenged verdict." *Gastineau v. Murphy*, 331 S.C. 565, 568, 503 S.E.2d 712, 713 (1998). An appellate court will reverse the trial court's ruling only if no evidence supports the ruling below. *Welch v. Epstein*, 342 S.C. 279, 300, 536 S.E.2d 408, 418 (Ct. App. 2000).

DISCUSSION

Under the doctrine of *respondeat superior*, the master is liable for the wrongful acts of his servant while the servant acting within the scope of his employment. An act is within the scope of a servant's employment where reasonably necessary to accomplish the purpose of his employment and is in furtherance of the master's business. *Lazar v. Great Atlantic & Pacific Tea Company*, 197 S.C. 74, 14 S.E.2d 560 (1941); *Holder v. Haynes*, 193 S.C. 176, 7 S.E.2d 833 (1940). *See also Armstrong v. Food Lion, Inc.*, 371 S.C. 271, 276, 639 S.E.2d 50, 52–53 (2006) (stating to recover from a tortfeasor's employer under the doctrine of *respondeat superior*, a plaintiff must show the tortfeasor was acting in the scope of his employment by furthering his employer's business, otherwise employers are not vicariously liable for the actions of their employees (*citing Lane v. Modern Music, Inc.*, 244 S.C. 299, 304–05, 136 S.E.2d 713, 716 (1964))). As the Supreme Court has instructed:

> The act of a servant done to effect some independent purpose of his own and not with reference to the service in which he is employed, or while he is acting as his own master for the time being, is not within the scope of his employment so as to render the master liable therefor. Under these circumstances the servant alone is liable for the injuries inflicted. If a servant steps aside from the master's business for some purpose wholly disconnected with his employment, the relation of master and servant is temporarily suspended; this is

> so no matter how short the time, and the master is not liable for his acts during such time.

Armstrong, 371 S.C. at 276, 639 S.E.2d at 53.

In defamation cases an agent of a corporation the employer is liable if the agent is acting within the scope of employment and in the actual performance of the duties of the corporation touching the matter in question. *Johnson v. Life of Ga.*, 227 S.C. 351, 88 S.E.2d 260 (1955).

In this case there was no evidence from which the jury could have concluded that Defendants Johnson and Peppers were acting for some independent purpose of their own completely separate from their duties in support of the business of their master, UniHealth. Not only were the reporting acts of the nurses at issue "reasonably necessary to accomplish the purpose of their employment," these acts were mandated by the employer, and clearly in furtherance of the master's business relating to the care of the resident in Room 39-A. The nurses carried them out in reckless fashion and for that their employer is liable as a matter of law.

The only evidence in this case was that the statements Defendants Johnson and Pepper made were in the actual performance of UniHealth's duties and touched the matter in question (the subject matter the nurses were required to report as to whether Plaintiff was changing diapers per facility policy versus abusing a resident).

Even slight deviations from employment by an agent have been held by our courts to be within the scope of employment as a matter of law. The following is quoted from *Adams v. South Carolina Power Co.*:

> The terms "course of employment" and "scope of authority," are not susceptible of accurate definition. What acts are within the scope of employment can be determined by no fixed rule. The authority from the master is generally to be gathered from all the surrounding and attendant circumstances. In cases where

> the deviation is slight and not unusual the Court may, and often will, as matter of law, determine that the servant was still executing his master's business.

200 S.C. 438, 21 S.E.2d 17, 18 (1942).

In *Miller v. C.P. Chems*, 808 F. Supp. 1238 (DSC 1992), the district court turned to the common law rules of agency and found instructive the Restatement (Second) of Agency, which provides:

> (1) Conduct of a servant is within the scope of employment if, but only if: (a) it is of the kind he is employed to perform; (b) it occurs substantially within the authorized time and space limits; [and] (c) it is actuated, at least in part, by a purpose to serve the master.

The Restatement (Second) of Agency § 228 (1958). The court added that the comments to section 229 state that acts incidental to authorized acts may be within the scope of the employment:

> *Acts incidental to authorized acts.* An act may be incidental to an authorized act, although considered separately it is an entirely different kind of an act. To be incidental, however, it must be one which is subordinate to or pertinent to an act which the servant is employed to perform. It must be within the ultimate objective of the principal and an act which it is not unlikely that such a servant might do. The fact that a particular employer has no reason to expect the particular servant to perform the act is not conclusive.

Restatement (Second) of Agency § 229 comment b (1958). *See also* Restatement (Second) of Agency § 235 (1958) ("An act of a servant is not within the scope of employment if it is done with no intention to perform it as a part of or incident to a service on account of which he is employed."); Restatement (Second) of Agency § 236 cmt. b (1958) ("The fact that the predominant motive of the servant is to benefit himself or a third person does not prevent the act from being within the scope of employment").

The evidence presented at trial included Defendant/Employer UniHealth's policy that all

of its employees were mandated to report possible abuse or neglect of a resident immediately. Both nurses testified they were aware of such policy and were carrying out the employer's policy directives at the time of the reporting events. They also testified as to the consequences of failing to report, including being fired from their jobs with UniHealth. The nurses were both on duty at the employer's facility on the 11:00 p. m. to 7:00 a. m. shift, performing their jobs and were being paid for that work at the time of the relevant events of June 21, 2010. The only evidence was that they were furthering the interests of the master, UniHealth in making these reports, and were attempting to follow the Omnibus reporting law of South Carolina, but they just went about it in a reckless manner. *Compare J.E.B. v Danks*, 785 N.W.2d 741 (Minn. 2010) (under Minnesota's reporting statute filing a report that is knowingly or recklessly false will defeat a showing of good faith).

While Plaintiff did not agree that there was evidence of any personal motive by either nurse to intentionally injure Plaintiff, the Restatement standard cited above holds the conduct at issue inside the scope of employment as long as the conduct "is actuated, *at least in part*, by a purpose to serve the master." (Emphasis added). And the conduct falls outside the scope of employment only if "done with no intention to serve the master." That standard is met in the instant case and, in fact, there was no evidence to the contrary. Both nurses were serving a business purpose of UniHealth at the time of reporting and were acting within the scope of employment under any reasonable view of the evidence. Unfortunately, they reported recklessly and without regard for whether their snap judgments were reasonable or accurate.

There was also no evidence that either of the two nurses were somehow outside their employment when making these reports. There likewise was no argument or suggestion or

request by the defense attorneys during any portion of the trial while in the presence of the jury that either nurse was not working for the facility nor acting outside the course and scope of their employment at the time the statements at issue were made; or that they should find the nurses acted outside the scope of their jobs. And in the motion for directed verdict made at the close of Plaintiff's case, defense counsel argued "if you dismiss [because] the individuals are fulfilling their duties then likewise UniHealth has to be dismissed." (Tr. p. 707, ll. 9-10). Defendants renewed this motion at the close of all the evidence. (Tr. p. 754, li. 15-24).

Plaintiff's counsel maintained in arguments to the jury that the nurses were indeed doing their jobs at the time the statements were made, and that the employer would thus be liable for those acts. Plaintiffs argued reckless indifference by the nurse Defendants, not intentional conduct outside the scope of employment. (Tr. p. 753, ll. 19-25).

It is true that for purposes of *respondeat superior*, whether an employee was acting in the course of his employment is usually a question for the jury. *Adams v. S.C. Power Co.*, 200 S.C. at 441, 21 S.E.2d at 18-19. However, where the evidence yields but one conclusion, and there is no evidence to the contrary so as to place the inferences from that evidence in doubt, the issue should be decided by the court as a matter of law. *Cf. Erickson v. Jones Street Publishers, L.L.C.*, 368 S.C. 444, 629 S.E.2d 653 (2006) (directed verdict motion should be denied where evidence yields more than one inference or inferences are in doubt).

Neither the evidence nor the reasonable inferences that flowed therefrom were in doubt in this case. Both individual defendants were acting in the course of their employment, and there was no evidence they exclusively were serving a personal motive apart from their employment. The trial court should have directed a verdict for Plaintiff on this issue, and should never have

allowed the jury to make an express finding on the verdict form.

The Court should reverse the trial court's denial of Plaintiff's directed verdict and JNOV motions on scope of employment, as well as the trial court's decision to submit this issue to the jury on the verdict form. If the Court affirms the grant of the Thirteenth Juror ruling (and it should not), then the Court should instruct the trial court not to charge this issue absent evidence to support the Defendant UniHealth's contention that it is not liable because its nurses were serving their own agenda unrelated to their employment.

III. THE CIRCUIT COURT JUDGE ERRED IN PERMITTING THE DEFENDANTS TO PRESENT AN ALLEGED JOINT DEFENSE UNDER THE CIRCUMSTANCES OF THIS CASE

Plaintiff contends the circuit court erred in permitting the Defendants to present an alleged "joint defense" in this case because UniHealth asked that the jury determine whether the Defendant nurses acted outside the scope of their employment. This point raised an unwaivable conflict of interest. This Court should address this serious issue on appeal.

The Rules of Professional Conduct provide:

> (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
>
> (1) the representation of one client will be directly adverse to another client; or
>
> (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.
>
> (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
>
> (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
>
> (2) the representation is not prohibited by law;
>
> (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; *and*
>
> (4) each affected client gives informed consent, confirmed in writing.

Rule 1.7, RPC, Rule 407, SCACR (emphasis added).

When an attorney has a conflict of interest, a court has the power to remove the attorney from the action. *See State v. Wilson*, 387 S.C. 597, 599, 693 S.E.2d 923, 924 (2010) (the circuit court removed an assistant solicitor due to a conflict of interest; Supreme Court found the order was not immediately appealable); *State v. Justus*, 392 S.C. 416, 419-20, 709 S.E.2d 668, 670 (2011) (affirming the circuit court's removal of defense counsel due to a conflict of interest).

In an attempt to avoid the obvious concurrent and intractable conflict of interest prohibited by Rule 1.7, RPC, UniHealth did not offer evidence on the scope of employment issue or argue the issue to the jury. In fact, UniHealth's counsel moved to prevent Plaintiffs from arguing "the facility has taken the position that these two nurses acted intentionally and had a desire to do something harmful to Ralph Williams." (Tr. p. 90, ll. 10-13). Defense counsel stated, "we do not want it stated that the facility has taken the position that the ladies - acted intentionally. That is not our position." (Tr. p. 90, ll. 20-24). The Court remarked "if they were acting intentionally then the health care facility would not be liable," (Tr. p. 91, ll. 1-2) to which Defendants' counsel responded, "it would not be, but we're not going to be arguing that in this case, Your Honor." (Tr. p. 91, ll. 3-4). When Plaintiffs' counsel sought to verify that Defendants would not later "do an about-face" and ask the Court "for a charge on intentional conduct that relieves UniHealth," Defendants' counsel replied "we're not going to be, you know, dividing the defense in that sense." (Tr. p. 91, l. 21 - p. 92, l. 8).

Despite these assurances, and despite the lack of any evidence or argument on the point, Defendants' counsel requested a jury instruction and two special verdict questions (#3 and #4) on scope of employment, over Plaintiffs' objections. (Tr. pp. 752, l. 3 - p. 753, l. 18). The court ruled "the way the case has been tried there is inherently an issue about whether or not they were

acting inside or outside their employment, and that's a question of fact, I think, for the jury to determine." (Tr. p. 754, ll. 2-3). Of course, it was a jury question only because UniHealth made it one, pointing its finger at the nurses in an attempt to absolve itself.

In the response to Plaintiff's motion for JNOV, purportedly filed on behalf of all the Defendants, UniHealth argued that the evidence showed the nurses were furthering their own agenda, they acted intentionally and outside the scope of their employment, they made "deliberate" false statements and "destroy[ed]" evidence, and are at best on their own in the fault found by the jury. (Response of 5/14/15, p. 9-10). This argument is seriously detrimental to these nurses, and will be on retrial, yet the same counsel purports to represent their interests while trying to exonerate their employer by placing all blame on those employees. Such is offensive not only to the spirit of Rule 1. 7 but to the letter of the Rule as well. Had Defendants stuck to their word and faced the jury in a united front, such a concurrent conflict would not have arisen or would have, at best, been waivable.

The trial court should not have permitted the Defendants to whipsaw the Plaintiff in this manner. The jury heard the evidence, heard the arguments, and rendered its verdict, even in the face of UniHealth's attempt to deflect undetached blame onto its own employees. The Defendants then asked the trial court to use their change of position to undercut that verdict. What's rewarded will be repeated. The Court should hold the Defendants to their word, and prevent their lawyers from eviscerating the rules regarding concurrent conflicts of interest.

The Restatement provides guidance on the issue. Section 121 of the Restatement of the Law Governing Lawyers states:

> Unless all affected clients and other necessary persons consent to the

representation under the limitations and conditions provided in § 122, a lawyer may not represent a client if the representation would involve a conflict of interest. *A conflict of interest is involved if there is a substantial risk that the lawyer's representation of the client would be materially and adversely affected by the lawyer's own interests or by the lawyer's duties to another current client, a former client, or a third person.*

Restatement (Third) of the Law Governing Lawyers § 121 (2000) (emphasis added). The next section adds:

> (1) A lawyer may represent a client notwithstanding a conflict of interest prohibited by § 121 if each affected client or former client gives informed consent to the lawyer's representation. Informed consent requires that the client or former client have reasonably adequate information about the material risks of such representation to that client or former client.
>
> (2) Notwithstanding the informed consent of each affected client or former client, a lawyer may not represent a client if:
>
> (a) the representation is prohibited by law;
>
> (b) one client will assert a claim against the other in the same litigation; or
>
> (c) in the circumstances, it is not reasonably likely that the lawyer will be able to provide adequate representation to one or more of the clients.

Restatement (Third) of the Law Governing Lawyers § 122 (2000).

Next, Section 128 provides:

> Unless all affected clients consent to the representation under the limitations and conditions provided in § 122, a lawyer in civil litigation may not:
>
> (1) represent two or more clients in a matter if there is a substantial risk that the lawyer's representation of one client would be materially and adversely affected by the lawyer's duties to another client in the matter; or
>
> (2) represent one client to assert or defend a claim against or brought by another client currently represented by the lawyer, even if the matters are not related.

Restatement (Third) of the Law Governing Lawyers § 128 (2000).

Lastly, Section 131 states:

> Unless all affected clients consent to the representation under the limitations and conditions provided in § 122, a lawyer may not represent both an organization and a director, officer, employee, shareholder, owner, partner, member, or other individual or organization associated with the organization if there is a substantial risk that the lawyer's representation of either would be materially and adversely affected by the lawyer's duties to the other.

Restatement (Third) of the Law Governing Lawyers § 131 (2000).

These provisions demonstrate that under the circumstances of this case counsel should not have been permitted to proceed as counsel for all defendants. UniHealth asserted a defense that was detrimental to the interests of its employees: It sought a determination that the Defendant nurses were acting outside the course and scope of their employment. That determination served no purpose other than to relieve UniHealth of any liability while leaving the individual defendants exposed to full liability for the judgment. Through its counsel, UniHealth was able to deflect any respondeat superior liability and place all liability on its employees. If this is not a nonwaivable conflict of interest, then such does not exist in the law.

This issue informs Plaintiff's Issue II, above. If the Defendants were truly putting forth a unified front in defense of this case, then there was no basis for submitting to the jury the question of whether the individual nurses were acting outside the scope of their employment. Counsel repeatedly reassured the trial court that there would be no "divided defense," but the denial of Plaintiff's motions for directed verdict and JNOV, and the submission of the questions regarding this issue on the verdict form, belied those assurances.

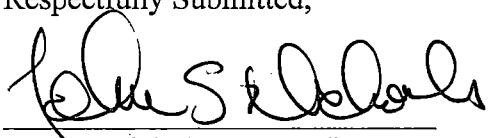
Accordingly, although this Court should reverse the trial court's decision on the

Thirteenth Juror Issue, if the Court affirms the Court should advise the trial court to either refuse to submit this issue to the jury on retrial or require all defendants to obtain separate, and new, counsel.

CONCLUSION

For the reasons stated the Court should reverse the trial court's order and remand for entry of judgment in accordance with the jury's verdict. Alternatively, should the Court affirm the trial court's order then the Court should instruct that the trial court must police the so-called joint defense to preclude UniHealth from attempting to relieve its own liability at the hands of its employees, or require each party to obtain new and separate counsel.

Respectfully Submitted,



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Attorney for Appellants

October 12, 2017

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas

Edgar W. Dickson, Circuit Court Judge

Case No. 2012-CP-38-0845

Ralph C. Williams, Sr., and Linda Williams, ... Appellants,

v.

Patricia A. Johnson, Josette Peppers
and UniHealth Post-Acute Care – Orangeburg, LLC ..... Respondents.

PROOF OF SERVICE

The undersigned hereby certifies that on the date indicated below she served counsel for the Respondents with a copy of the *Motion for the Court to Accept the Brief Out of Time and the conditionally filed Initial Brief of Appellants and Designation of Matter to be Included in the Record on Appeal* by mailing copies of the same by United States Mail with first class postage prepaid to the following addresses:

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October 12, 2017

Erin Bridges

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October 12, 2017

VIA HAND DELIVERY
The Honorable Jenny Kitchings
Clerk of Court
South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

RE: Ralph C. Williams, Sr., et al v. Patricia A. Johnson, et al
Case Tracking No.: 2017-000963

Dear Ms. Kitchings:

Please find enclosed for filing the original and seven (7) copies of a *Motion for the Court to Accept the Initial Brief of Appellants and Designation of Matter to be Included in the Record on Appeal Out of Time*. Also, please find enclosed the conditionally filed original and one (1) copy of the *Initial Brief of Appellants* and *Designation of Matter to be Included in the Record on Appeal*. I have also enclosed a proof of service upon counsel for the Respondent and a check in the amount of $25.00 for filing this motion. Please return the additional filed copies to me via our courier.

Thank you for your attention to this matter. If you have any questions or need any additional information, please do not hesitate to contact me.

Sincerely,

Erin Bridges

/emb
Enclosures
cc: Robert P. Foster, Esquire
Javá O. Warren, Esquire
Tyler L. Arnold, Esquire
Jason E. Bring, Esquire