THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

Walton J. McLeod, IV, Circuit Court Judge

Appellate Case Number.: 2018-002236

Case No. 2016-CP-32-00950

Amy S. Davis, as Personal Representative of the Estate of Utricia Shealy, deceased, ...Respondent,

v.

Agape Nursing Rehabilitation Center, Inc., Agape Management Services, Inc., John Doe, Richard Roe Corporation, Jane Doe, and Mary Doe Corporation, ... Defendants

Of which Agape Nursing Rehabilitation Center, Inc. and Agape Management Services, Inc., are the ..... Appellants.

FINAL BRIEF OF APPELLANTS

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STATEMENT OF THE CASE

This action began when Utricia Shealy, through her then attorney-in-fact, filed a Summons and Complaint on March 16, 2016. (R. p. 27-65.) On or about October 3, 2017, Respondent's predecessor filed the Second Amended Complaint (the "Complaint") in this action, wherein she claimed that the ordinary and professional negligence of the Appellants caused the decedent, Utricia Shealy, to suffer a fall in a nursing home resulting in damages. (R. p. 66-80.) On October 18, 2017, Appellants answered the Complaint, asserting in relevant part the affirmative defense of intervening cause. (R. p. 81-87.) The case was tried before a jury and the Honorable Walton J. McLeod, IV, in Lexington County, South Carolina the week of October 22, 2018.

Following the close of Respondent's case, Appellants moved for directed verdict on both causes of action, and the court denied these motions. (R. p. 717-735.) Appellants restated and renewed their motions for directed verdict at the close of all evidence, and the court denied these motions. (R. p. 796-801.) Respondents then moved for directed verdict on Appellants' affirmative defense of intervening cause, which the court granted over Appellants' opposition. (R. p. 801-809.) After oral arguments and the charge, the jury returned a verdict against both Appellants, finding that Appellants were amalgamated; that the Respondent suffered $47,500 of economic damages; that Respondent suffered $250,000 of non-economic damages. (R. p. 1219-1222) The jury allocated sixty-five (65%) of the damages to ordinary negligence and thirty-five percent (35%) of the damages to professional negligence. (Id.) The trial court entered judgment against the Appellants on the verdict. (R. p. 1-2.)

Following the Judgment on November 5, 2018, Appellants made a timely Motion for Judgment Notwithstanding the Verdict, or in the alternative, a Motion for a New Trial Absolute, or in the Alternative, a Motion for a New Trial *Nisi Remittitur*. (R. p. 1163-1182.) Appellants also

made a timely Motion for Leave to Deposit and Stay the Accrual of Interest and Execution Pending a Ruling on Post-Trial Motions and any Appeal. (R. p. 1202-1205.) Appellants received notice of electronic notice of the entry of the court's orders denying these motions on November 30, 2018. The Notice of Appeal timely followed on December 19, 2018. (R. p. 1223-1257.)

STANDARDS OF REVIEW

(1) Denial of Appellants' motion for new trial following the erroneous grant of Respondent's Motion for Directed Verdict.

An appellate court will reverse the trial court's grant of a directed verdict when any evidence supports the party opposing the directed verdict. Milhouse v. Food Lion, Inc., 289 S.C. 203, 345 S.E.2d 739, 739 (Ct.App.1986). The appellate court must determine "whether a verdict for a party opposing the motion would be reasonably possible under the facts as liberally construed in his [or her] favor." Erickson v. Jones St. Publishers, L.L.C., 368 S.C. 444, 463, 629 S.E.2d 653, 663 (2006). "When considering directed verdict motions, neither the trial court nor the appellate court has authority to decide credibility issues or to resolve conflicts in the testimony or evidence." Id.

Under Rule 59(a), SCRCP, "A new trial may be granted ... in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the State .... The grant or denial of new trial motions rests within the discretion of the circuit court, and its decision will not be disturbed on appeal unless its findings are wholly unsupported by the evidence or the conclusions reached are controlled by error of law." Brinkley v. S.C. Dep't of Corr., 386 S.C. 182, 185, 687 S.E.2d 54, 56 (Ct.App.2009).

(2) Denial of Appellants' motion for a new trial under Rule 59(a), SCRCP or a new trial under the Thirteenth Juror Doctrine.

In addition to Rule 59(a), SCRCP, the trial court has the authority to grant a new trial on

the facts under the Thirteenth Juror Doctrine. The trial court's discretion to grant or deny a new trial as the thirteenth juror is very broad. "As has often been said, the trial judge is the thirteenth juror, possessing the veto power to the Nth degree...." Worrell v. S.C. Power Co., 186 S.C. 306, 313–14, 195 S.E. 638, 641 (1938). As this court has stated, "'to reverse the denial of a new trial motion under [the thirteenth juror doctrine,] we must, in essence, conclude that the moving party was entitled to a directed verdict at trial.'" Curtis v. Blake, 392 S.C. 494, 709 S.E.2d 79 (Ct.App.2011).

(3) *Denial of Appellants' Motion for Directed Verdict and JNOV regarding Agape Management Company, Inc.'s liability for professional negligence.*

"[A] motion for JNOV under Rule 50(b), SCRCP, is a renewal of a directed verdict motion." Wright v. Craft, 372 S.C. 1, 20, 640 S.E.2d 486, 496 (Ct.App.2006). The trial court must grant a motion for directed verdict or for judgment notwithstanding the verdict unless "the evidence yields more than one inference or its inference is in doubt." Welch v. Epstein, 342 S.C. 279, 299, 536 S.E.2d 408, 418 (Ct.App.2000). "A motion for JNOV may be granted only if no reasonable jury could have reached the challenged verdict." Id. at, 300, 536 S.E.2d at 419

(4) Denial of Appellants' Leave to Deposit Motion

Relying on federal court precedent, the South Carolina Supreme Court has concluded that the granting of leave to deposit money with the court pursuant to Rule 67, SCRCP is a matter within the discretion of the trial court and will not be overturned absent an abuse of that discretion. S.C. Dep't of Transp. v. First Carolina Corp. of S.C., 369 S.C. 150, 153, 631 S.E.2d 533, 535 (2006) (citing Cajun Elec. Power Co-op., Inc. v. Riley Stoker Corp., 901 F.2d 441, 445 (5th Cir.1990)). Presumably, then, the same standard of review applies to the denial of a motion seeking leave to deposit money with the court pursuant to Rule 67, SCRCP. An abuse of discretion occurs when the ruling is based on an error of law or a factual conclusion without evidentiary support. Conner v. City of Forest Acres, 363 S.C. 460, 467, 611 S.E.2d 905, 908 (2005). Counsel for the

Appellants is not aware of any case in South Carolina specifically establishing the standard of review for the denial of leave to deposit money with the court and stay execution under either Rule 62(d), SCRCP or S.C. Code Ann. § 18-9-130. However, historically, such matters have been reviewed under an abuse of discretion standard. *See* Brown v. Buttz, 15 S.C. 488, 492 (1881).

ARGUMENT

A. THE TRIAL COURT ERRED AS A MATTER OF LAW BY GRANTING RESPONDENT'S MOTION FOR DIRECTED VERDICT ON APPELLANTS' AFFIRMATIVE DEFENSE OF INTERVENING CAUSE, REQUIRING THE GRANT OF A NEW TRIAL ABSOLUTE.

Proximate cause is normally a question of fact for determination by the jury and may be proved by direct or circumstantial evidence. Gause v. Smithers, 403 S.C. 140, 150, 742 S.E.2d 644, 649 (2013) (quotations omitted). "The touchstone of proximate cause is foreseeability which is determined by looking to the natural and probable consequences of the defendant's conduct." Id. "To exculpate a negligent defendant, the intervening cause must be one which breaks the sequence or causal connection between the defendant's negligence and the injury alleged." Id. (quotation omitted). **"Only in rare or exceptional cases may the issue of proximate cause be decided as a matter of law."** Id. (quoting Bailey v. Segars, 346 S.C. 359, 367, 550 S.E.2d 910, 914 (Ct.App.2001)) (emphasis added).

The trial court granted Respondent's motion for directed verdict, which prevented the jury from considering Appellant's affirmative defense of intervening cause or that defense being placed on the verdict form. (R. p. 801-808.) The trial court erred, because the facts at trial, when liberally viewed in favor of the Appellants, required the affirmative defense of intervening cause to be submitted to the jury. Sufficient evidence existed for the jury to believe that the actions of Mrs. Shealy's treating physician, Dr. Gal Margalit, was an intervening cause of her fall on July 2, 2014.

1. Ellen Lewis' testimony and the medical records.

This case involves allegations of nursing negligence that allegedly resulted in Mrs. Shealy's fall in the nursing home on July 2, 2014. Respondent contended throughout the trial that Mrs. Shealy's fall was an unwitnessed event. Respondent did not obtain a Rule 27, SCRCP, deposition of Mrs. Shealy to preserve her testimony regarding the fall and offer it at trial, and no witness that testified at trial had any actual recollection of the actual events temporally surrounding Mrs. Shealy's fall or the fall itself. Therefore, at trial, Respondent presented no direct evidence as to the either how Utricia Shealy fell or why Utricia Shealy fell. Rather, Respondent relied upon the purchased expert testimony of Ellen Lewis, RN, to attempt to establish negligence and causation. Specifically, Nurse Lewis reviewed certain records and opined that it was the negligence of the nursing home employees that was the proximate cause of Utricia Shealy's fall. (R. p. 490-696.)

The primary "breach of the standard of care" identified by Ellen Lewis was her contention that the nursing home failed to obtain physician consultation when Mrs. Shealy's agitation and confusion was not improving after taking Ativan at 5:30 p.m. on July 2, 2014. (R. p. 534-538;552-553.) The relevant facts surrounding her testimony follow:

Mrs. Shealy came to the nursing home from Lexington Medical Center with a prescription for Ativan, an antianxiety prescription made on July 1, 2014. (R. p. 521, 635.) Mrs. Shealy was admitted to the nursing home on July 1, 2014, and she remained in the nursing home a total of only 27 hours. (R p. 521, 644.) On that first day of admission, July 1, 2014, the nursing home staff observed Mrs. Shealy suffering from confusion and agitation, and the nursing home staff provided Mrs. Shealy with a dose of her Ativan, the antianxiety medication ordered by Lexington Medical Center. (R. p. 521.) Mrs. Shealy had taken Ativan for twenty (20) years. (R. p. 212-213.) On the

morning of July 2, 2014, even after receiving Ativan the prior evening and her family staying at the nursing home until around midnight in an effort to calm Mrs. Shealy, Mrs. Shealy remained very agitated, tearful, and experiencing hallucinations on July 2, 2014. (Tr. p. 521-523.)

Mrs. Shealy remained agitated and combative all afternoon. (R. p. 987.) Her family was present all afternoon while Mrs. Shealy was exhibiting these symptoms. (Id.). The nursing home staff provided Mrs. Shealy the Ativan at 5:30 p.m. Because she remained agitated and confused, she was moved to the nurse's station for close monitoring. (Id.) This one sentence in Agape Record 141, namely that "Patient remained agitated, confused, and combative," is the only evidence, circumstantial or direct, in the record regarding Mrs. Shealy's physical or mental condition in the 115-minute window after she took Ativan and prior to her fall at 7:25 p.m.

Ellen Lewis conceded that she had no idea how long Ms. Shealy's circumstances that she experienced at the time of the fall actually existed prior to the fall. (R. p. 637-641.) Nurse Ebonie McDaniel, who created Agape Record 141, could provide no direct testimony about the fall; she testified that she had absolutely no independent recollection of either Utricia Shealy or the fall, and her testimony was based solely on the records shown to her by Respondent's counsel. (R. p. 433.)

Ellen Lewis contends that the nursing home staff owed a duty to notify Mrs. Shealy's physician, Dr. Gal Margalit, of the fact that Mrs. Shealy was confused and agitated so that he could order a change in Mrs. Shealy's interventions. (R. p. 534-542; 986.) Appellants agree; as discussed below, the record confirms that is exactly what the nursing home staff did. Dr. Margalit was informed by the nursing home staff of Mrs. Shealy's conditions on the date of the fall and he made the orders he deemed appropriate, his acts were an intervening event.

2. Dr. Margalit's treatment on the date of the fall.

On July 2, 2014, Mrs. Shealy was seen by her selected physician, Dr. Margalit. (R. p. 524--525; 985). Dr. Margalit was employed by a company called Agape Senior Primary Care, Inc.[1] (R. p. 961-962.) The nursing home staff specifically notified Dr. Margalit that, despite Mrs. Shealy taking Ativan on July 1, 2014, Mrs. Shealy remained "confused and agitated" on July 2, 2014, indicating specifically to Dr. Margalit that Mrs. Shealy was a "huge fall risk." (R. p. 418-419; 988-996.) Ebonie McDaniel, RN, testified that she believed that she was the actual nurse who advised Dr. Margalit of Mrs. Shealy's condition on July 2, 2014. (R. p. 476-477.)

The record specifically indicates that Dr. Margalit performed his own examination and found Mrs. Shealy to be "**confused/verbally not connected to conversation**" and "**confused** and **agitated**" the morning after she was given Ativan. (R. p. 990, emphasis in the original.) In his examination records, Dr. Margalit noted that Mrs. Shealy had "post op confusion superimposed on some pre existing [sic] confusion after hip surgery." [Id.] Dr. Margalit considered the medications being give to Utricia Shealy on the date of her fall, including the Ativan prescription. (R. p. 991.) He issued an order increasing the number of Ativan from once daily to four (4) times daily. (R. p. 325.) Dr. Margalit indicated that he was "satisfied" with Mrs. Shealy's active medication list and satisfied with the documentation surrounding Mrs. Shealy's current medications. (R. p. 996.) Dr. Margalit signed this medical record at 7:46 p.m., approximately twenty (20) minutes after the time Ellen Lewis states Mrs. Shealy fell at the nursing home. (Id.)

Ellen Lewis provided a list of other fall interventions that might have been used, many that required a physician's order from Dr. Margalit before the interventions could have been used for

[1] Agape Senior Primary Care, Inc. was initially a party to the lawsuit prior to being dismissed by Respondent's predecessor. (R. p. 27-65; 1137-1162.)

Mrs. Shealy. (R. p. 652-654; 680-685.) The interventions that Ellen Lewis indicated that Dr. Margalit could have ordered included a chair alarm or some other restraints (R. p. 549, 642, 652-655.) However, Ellen Lewis agreed that Dr. Margalit received notification from the nursing staff about her ongoing confusion, agitation, and high risk for falls on July 2, 2014, and he made the overriding medical determination on what change in fall interventions needed to be ordered for Mrs. Shealy on the day of her fall:

Q. You're a nurse practitioner; correct?
A. Yes.
Q. And you work subordinate to a physician; correct?
A. Correct.
Q. You don't tell physicians how to do their job. It's vice-versa; right?
A. I mean, I've made suggestions to physicians.
Q. Sure.
A. You have to do it the right way. If I know the patient better and if the patient is in front of me, I'm going to make a suggestion if they're on the phone. I'm not going to say it rudely or, you know, condescendingly. But, no, I certainly make suggestions to physicians.
Q. Sure. But you don't tell them, ultimately, what to do. They make their own independent determinations; correct?
A. Correct.
Q. And nurses follow doctors' orders; right?
A. Correct.
Q. That's the standard of care; correct?
A. Correct.
Q. And Dr. Margalit, once armed with the change in the patient's condition, he opted for an intervention, didn't he?
A. Yes.
Q. And he increased the amount of Ativan from one time a day to four times a day; correct?
A. Correct.
Q. He didn't order any type of physical restraint to be placed on Ms. Shealy, did he?
A. Correct.

(R. p. 643-644.)

3. The intervening cause defense.

For the jury to find that the nursing home staff's failure to contact Dr. Margalit was negligent, and that such negligence was the proximate cause of Utricia Shealy's fall, the jury must

inherently also believe that a call to Dr. Margalit would have resulted in some additional orders being provided by Dr. Margalit that could have prevented this fall. Respondent did not present Dr. Margalit's testimony by *de bene esse* deposition or otherwise. Therefore, the only evidence in the record is that a nursing home employee had already advised Dr. Margalit of Ms. Shealy's mental condition and fall risk earlier that same day. Dr. Margalit had already determined that Ms. Shealy's psychiatric mental status was "confused and agitated." There is no evidence in the record to differentiate in any meaningful way between Ms. Shealy's mental status at the time of her fall and at the time that Dr. Margalit saw Ms. Shealy earlier the same day.

Ellen Lewis testified regarding a list of restraints, such as a lap belt or lap cushion, that she opined were medically necessary to prevent Utricia Shealy's fall, and she stated that it was a breach of the standard of care for these restraints to not have been provided to Ms. Shealy based on her "confused" and "agitated" mental status. On cross examination, Nurse Lewis agreed that only a physician could have ordered these restraints, and that Dr. Margalit did not order those on July 2, 2018. Instead, he ordered an increase in Ativan for Utricia Shealy. There is no dispute that a nurse gave this Ativan to Ms. Shealy at 5:30 p.m., 115 minutes before her fall, per Dr. Margalit's order, and then moved Ms. Shealy to the nurse's station for closer observation.

There existed no "rare" or "exceptional" reason in this case for Dr. Margalit's assessment of Mrs. Shealy and direction of the Appellants on the date of the fall to not be submitted to the jury as a potential intervening cause, resulting in a charge on an affirmative defense of intervening cause and on option on the verdict form. If Ellen Lewis' opinions about the medical need for additional orders on the date of Utricia Shealy's fall, including restraints, is sufficient circumstantial evidence whereby the jury could find or infer that the Appellants' negligent failure to obtain or use restraints was the cause of Utricia Shealy's fall, then her testimony and Dr.

Margalit's records must also constitute sufficient circumstantial evidence whereby the jury could have found or inferred that Dr. Margalit's supervening decision, as the treating physician, not to order restraints when he treated Ms. Shealy that same day and while she was in the same condition as when she fell, is a sufficient break in the sequence or causal connection.

Notably, despite Appellants' request during Respondent's Motion for Directed Verdict, the Respondent was not limited to submitting or arguing evidence to the jury to only those allegedly negligent acts that followed Dr. Margalit's visit at on July 2, 2018. Rather, the Respondent was permitted to submit evidence of a number of acts of alleged negligence – including matters of alleged ordinary negligence in hiring, training, and supervision nursing home staff that all preceded Mrs. Shealy's 27-hour stay at the facility, as well as alleged professional negligence in the initial admission and assessment of Utricia Shealy – that all preceded Dr. Margalit's evaluation and medical orders on July 2, 2018. Therefore, Appellants respectfully contend that the court committed error in granting Respondent's motion for directed verdict. Appellants request that this ruling be reconsidered, amended, and that a new trial absolute be ordered so that Appellants may submit their affirmative defense of intervening cause to the jury for consideration by way of closing jury instructions and on the verdict form.

B. THE TRIAL COURT ERRED AS A MATTER OF LAW BY ADMITTING IMPROPER AND PREJUDICIAL EVIDENCE, REQUIRING A NEW TRIAL ABSOLUTE.

Over the Appellants' objection, the court allowed Respondent to present evidence to the jury that was prejudicial and admitted in error. "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of South Carolina, statutes, [the South Carolina Rules of Evidence], or by other rules promulgated by the Supreme Court of South Carolina." Rule 402, SCRE. Evidence meets the test of relevance if it

tends to establish or to make more or less probable some matter in issue upon which it directly or indirectly bears. Crowley v. Spivey, 285 S.C. 397, 410, 329 S.E.2d 774, 782 (Ct. App. 1985). However, relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Rule 403, SCRE. Determinations of relevance are largely within the trial court's discretion, and its decision to either admit or exclude evidence will not be disturbed on appeal unless there is an abuse of discretion amounting to an error of law to the prejudice of the appellant's rights. Merrill v. Barton, 250 S.C. 193, 195, 156 S.E.2d 862, 863 (1967).

1. Prior South Carolina DHEC survey results

First, the trial court erred by admitting prior bad act evidence in the form of certain South Carolina DHEC nursing home survey results. This admission of evidence of allegedly similar "bad acts" was error that warrants a new trial. In Branham v. Ford Motor Co., 390 S.C. 203, 230, 701 S.E.2d 5, 19–20 (2010), the South Carolina Supreme Court stated:

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

At trial, the court allowed Respondent to offer into evidence a number of negative past complaints investigated by DHEC into evidence and to be considered by the jury which were highly prejudicial without requiring Respondent to set forth a factual foundation for admissibility, including establishing "substantial similarity." (R. p. 311-336.) For example, the Court allowed complaints over wound treatments, even though there is no allegation of wound care being at issue

in Ms. Shealy's fall case. Likewise, Respondent was allowed to discuss past complaints of medication administration issues even though the Respondent's own expert, Nurse Lewis, testified that there was not a medication administration error (or even a medication administration document error) that contributed to the fall. (Tr. 474-475.) The prior "bad acts" that were submitted to the jury occurred under a different administrator of the facility, a different director of nursing, and different staff. No person identified in the care of Ms. Shealy was shown to be involved in any way in any of the prior incidents of "bad acts" that the Respondent was permitted to submit to jury. Therefore, Respondent failed to lay the proper foundation, and the details of the prior survey results was erroneously submitted to jury, resulting in material prejudice to Appellants.

2. Evidence of the Appellants' owner having companies that received $20M in gross proceeds from the sale of real estate for three (3) nursing homes and employing his wife and daughter.

Second, the court erred when it allowed the jury to receive evidence, through the deposition of Gregory Scott Middleton, that there was an "approximately $20M sales price" received from the sale of three (3) nursing home facilities – only one of which was where Ms. Shealy stayed – that was completed on December 31, 2015, almost a year and a half after Ms. Shealy's one-day stay at the nursing home. (R. p. 239-240.) That evidence regarding the sale of real estate by non-party entities, including a gross, cumulative amount received, was given without any context in terms of liabilities or expenses to be netted against it. (R. p. 966-969.) That sales price had absolutely no bearing on any issue in Respondent's lawsuit, and its admission served only one purpose – for the Respondent to suggest to the jury that Mr. Middleton, the sole shareholder of the Appellants – is a wealthy man. Like the three (3) land holding companies involved in the "approximately $20M sale," Mr. Middleton himself is a non-party to this lawsuit. The same is true for the Court's admission, over the Appellants' objection, of the fact that compensation was paid

to family members of Mr. Middleton who were employed by certain corporate entities. (R. p. 244-245; R. p. 981-982.)

Even in the context of punitive damages, the South Carolina Supreme Court has held that officer compensation, salaries, and assets in general are "highly prejudicial" and that the admission of such evidence constitutes manifest error requiring reversal. Branham, 390 S.C. at 238-242, 701 S.E.2d at 23-25. In this case, evidence relating solely to punitive damages were to be bifurcated pursuant to S.C. CODE ANN. § 15-32-520. Therefore, there is no justifiable reason why this information should have been submitted to the jury in the first, and ultimately only, phase of the trial. Appellants suffered prejudice as a result.

3. Evidence of the CMS Cost Report.

The same is true of the court's admission of the Medicare Cost Report, even as it was redacted, for the jury to consider. (R. p. 1088-1134; 241-242; 257-258; 973-978.) While the Court did have the financial values transferred between companies on the cost report redacted, the Cost Report was still submitted to the jury over Appellants' objections. The Cost Report is probative of no issue in this case. Respondent failed to illicit any evidence that there were any improper or unearned payments made by any Appellant to any other party – whether or not "related" by some common ownership. Respondent also failed to present any evidence that there was a lack of funds in the possession of Agape Nursing and Rehabilitation Center, Inc., to adequately operate the nursing home in July 2014. Respondent further failed to present any evidence that any lack of resources in fact was the proximate cause of Ms. Shealy's fall. Again, the only purpose of showing the redacted Medical Cost Report to the jury was to suggest to the jury that Mr. Middleton had made a lot of money through "related" companies from the operation of the nursing home in order to inflame the passions and prejudice of the jury. (R. p. 839-841.)

The submission of the prior "bad acts" by prior employees in unrelated healthcare situations and of Mr. Middleton and his family's "wealth" from the operation and sale of this and other nursing homes was highly prejudicial to the Appellants in this case. Because Respondent was unable to present any meaningful facts surrounding the "how" or the "why" of Ms. Shealy's fall, she instead proceeded to try a case painting Appellants' owner and his relatives to be rich, bad actors in the hopes of arousing the jury's passion and prejudice. Because this prejudicial evidence was improperly admitted and argued to the jury, under Rule 59(a), SCRCP, and the Thirteenth Juror Doctrine, the court should, respectfully, order a new trial absolute.

C. THE TRIAL COURT ERRED AS A MATTER OF LAW BY NOT GRANTING JNOV AFTER ERRONEOUSLY SUBMITTING RESPONDENT'S CLAIM FOR PROFESSIONAL NEGLIGENCE AGAINST AGAPE MANAGEMENT COMPANY, INC. TO THE JURY.

Appellants argued during their Motions for Directed Verdict that there is no basis in fact whereby the jury could conclude that Agape Management Services, Inc., is liable for professional negligence. (R. p. 720-721; 796-799.) Respondent failed to present evidence that Agape Management Services, Inc., meets any definition under S.C. CODE ANN. § 15-79-110 whereby it may be liable for professional negligence. To the contrary, the only evidence at trial outlining Agape Management Services, Inc.'s role in connection with the nursing home is the "Agreement to Provide Management Services" and the consistent testimony of Mr. Middleton. (R. p. 1039-1042; 959-960; 963-965; 970-972; 979-980.) That agreement demonstrates that services provided by Agape Management Services, Inc., were in the areas of financial services, human resources, information technology, and legal services. (R. p. 1039-1042.) There was no evidence that Agape Management Services, Inc., employed any person that was a "health care provider" that provided any skilled nursing services to Mrs. Shealy; to the contrary, the undisputed evidence is that all such

persons were employed by Agape Nursing & Rehabilitation Center, Inc., the operator of the nursing home where Mrs. Shealy fell on July 2, 2014.

Specifically, the evidence shows that each of the three (3) professionals that testified at trial, were employed by the nursing facility. Scott Smith, the Director of Nursing, was employed by the facility. (R. p. 351-352.) Javan Vaughn, a nurse who testified at trial, was employed by the facility. (R. p. 387-388.) Ebonie McDaniel, the nurse who treated Mrs. Shealy on the date of her fall, was employed by the nursing facility. (R. p. 420-421.)

The only means whereby Respondent could possibly obtain a judgment against Agape Management Services, Inc., for professional negligence is if the Respondent had presented sufficient evidence at trial whereby the jury could find Agape Management Services, Inc., liable for professional negligence by means of joint venture, amalgamation, or as a principal liable for the acts of an agent. However, even in this respect, the evidence is insufficient.

First, as to joint venture, Respondent needed to present some evidence that Agape Management Services, Inc., and Agape Nursing & Rehabilitation Center, Inc., must have possessed "an equal right to direct and control the conduct of each other with respect" to the professional medical care provided to Ms. Shealy. Spradley v. Houser, 247 S.C. 208, 212, 146 S.E.2d 621, 623 (1966). There is no evidence in the record whereby the jury could have concluded that Agape Management Services, Inc., was even directly engaged in the conduct of providing professional care to Mrs. Shealy, much less that it was subject to the "direction" and "control" of Agape Nursing & Rehabilitation Center, Inc., regarding that conduct. Therefore, there is no basis in the record for the jury to conclude a "joint venture" existed between the two Appellants.

Second, as to agency, South Carolina law required Respondent to establish facts that were never presented at trial. "A party asserting agency as a basis of liability must prove the existence

of the agency, and the agency must be clearly established by the facts." McCall v. Finley, 294 S.C. 1, 6, 362 S.E.2d 26, 29 (Ct.App.1987). "The existence of an agency relationship is ... determined by the relation, the situation, the conduct, and the declarations of the party sought to be charged as principal." Langdale v. Carpets, 395 S.C. 194, 201, 717 S.E.2d 80, 83 (Ct.App.2011). In no way does either the Management Agreement or the facts presented at trial establish that Agape Nursing & Rehabilitation Center, Inc., was authorized to act as an agent for Agape Management Services, Inc., in providing medical services.

For example, there is no evidence that Agape Management Services, Inc., had any right to control the medical care that the employees of Agape Nursing & Rehabilitation Center, Inc. actually provided to Mrs. Shealy. To the contrary, Agape Management Services, Inc., was only authorized to provide administrative services to Agape Nursing & Rehabilitation Center, Inc. (R. p. 1039-1042.) Furthermore, the undisputed testimony of Scott Smith, the Director of Nursing at the nursing home at the time of Ms. Shealy's residence, was that he was the person ultimately responsible for the clinical care provided to Ms. Shealy while she was in the nursing home. (R. p. 351-352.) Therefore, there is no basis in the record for the jury to conclude that Agape Nursing & Rehabilitation Center, Inc., was the "agent" of Agape Management Services, Inc., for the purpose of providing medical care to Mrs. Shealy.

Third, there is insufficient evidence in the record for the Respondent to establish amalgamation or single enterprise between the two Appellants. In a recent decision that provided further details to the requirements to establish amalgamation in South Carolina, the South Carolina Supreme Court has stated that it is wholly insufficient for the Respondent to show merely a blurring of the lines between two companies; rather, the Supreme Court stated:

> We formally recognize today this single business enterprise theory, and in doing so, we acknowledge that corporations are often formed for the purpose of shielding

> shareholders from individual liability; there is nothing remotely nefarious in doing that. For this reason, the single business enterprise theory requires a showing of more than the various entities' operations are intertwined. Combining multiple corporate entities into a single business enterprise requires further evidence of bad faith, abuse, fraud, wrongdoing, or injustice resulting from the blurring of the entities' legal distinctions.

Pertuis v. Front Roe Restaurants, Inc., 423 S.C. 640, 655, 817 S.E.2d 273, 280–81 (2018), reh'g denied (Aug. 16, 2018); *see also* Walbeck v. I'On Co., LLC, No. 2015-001590, 2019 WL 1065928, at *15 (S.C. Ct. App. Feb. 27, 2019) (reversing the circuit court's finding on amalgamation and holding even though there is evidence showing the various entities' operations are intertwined, there is no evidence of bad faith, abuse, fraud, wrongdoing, or injustice *resulting from* the blurring of the entities' legal distinction.") The record in this case is absolutely devoid of evidence, such as some harmful confusion by Mrs. Shealy's power of attorney, or some improper depletion of resources from the nursing home by Agape Management Services, Inc., that would support a finding of bad faith, abuse, fraud, wrongdoing, or injustice that resulted from any blurring of the lines (by use of a shared trademark or by an overlap in officers) that may have occurred between the two Appellants. Therefore, there is no basis in the record for the jury to have concluded that the two Appellants are amalgamated or a single enterprise per the Court's requirements in Pertius.

Given the fact that the Respondent failed to establish any evidence to render Agape Management Services, Inc., liable for the actions of the employees of Agape Nursing & Rehabilitation Center, Inc., and the Respondent failed to establish that Agape Management Services, Inc. employed any person engaged in providing nursing care to Mrs. Shealy for which it could be vicariously liable, then the court erred in denying Agape Management Services, Inc.'s motion for directed verdict on Respondent's claim for professional negligence, its subsequent motion for judgment notwithstanding the verdict, and its request for a new trial absolute under Rule 59(a), SCRCP, and the Thirteenth Juror Doctrine.

D. THE TRIAL COURT ERRED BY DENYING APPELLANTS' MOTION FOR LEAVE TO DEPOSIT AND STAY THE ACCRUAL OF INTEREST AND EXECUTION PENDING A RULING ON POST-TRIAL MOTIONS AND APPEAL.

On November 5, 2018, Appellants filed the Leave to Deposit Motion, pursuant to S.C. CODE ANN. § 18-9-130, Rules 62(d) and Rule 67, SCRCP, seeking an order granting them (1) leave to deposit the amount of the sum of the Judgment and accrued interest with the court; and (2) an order recognizing the stay of the accrual of interest and of any execution upon the Judgment pending the court's ruling on Appellants' contemporaneously filed post-trial motions to alter or amend the Judgment and for new trial and the final resolution, by delivery of the remittitur, of any appeal that may be initiated in this action by either party ("Order denying Leave to Deposit Motion"). (R. p. 1202-1205.) The court denied the motion in a written Order on November 30, 2018. (R. p. 20-26.) Appellants respectfully assert that the trial court erred by not allowing them to avail themselves of S.C. CODE ANN. § 18-9-130 and Rules 62(d) and Rule 67, SCRCP.

Rule 62(b), SCRCP, allows a trial court to stay the execution of or any proceedings to enforce a judgment pending the resolution of post-trial motions. Rule 62(d), SCRCP, in accordance with S.C. Code Ann. § 18-9-130, further provides that a trial court may stay any efforts by a plaintiff to obtain execution of or to conduct any proceedings to enforce a monetary judgment upon appeal. The trial court may order such surety as it may deem proper, up to and without exceeding the amount of the judgment, to protect the Respondent's interest in the interim. Id. Additionally, Rule 67, SCRCP, provides defendants the right to deposit the amount of the judgment obtained by a plaintiff into the account of the appropriate Clerk of Court at such financial institution as this court may direct, and it provides that such money, once paid by the defendants, shall be held by the applicable County Clerk of Court in that financial institution until the trial court issues an order directing further disposition of the funds.

The South Carolina Supreme Court has held that a defendant's deposit of funds, pursuant to Rule 67, SCRCP, prevents the accrual of interest during the court's determination of post-trial motions and any subsequent appeal. Russo v. Sutton, 317 S.C. 441, 444, 454 S.E.2d 895, 896 (1995) (holding that "[J]udgment debtor's deposit of funds into the court pending his own appeal prevents further accrual of interest. Such a rule encourages the debtor to pay the judgment and assures the judgment creditor the funds will be available at the conclusion of the appeal."). Likewise, the South Carolina Court of Appeals, in refusing an argument against precedent and for post-judgment interest following a deposit with the court under Rule 67, has stated that, following Russo, the law is "unmistakably clear" that a "judgment debtor's deposit of funds into court pursuant to Rule 67, SCRCP, pending the debtor's own appeal stops the accrual of interest on the judgment." Duval v. Heritage Life Ins. Co., 339 S.C. 616, 620, 529 S.E.2d 566, 568 (Ct. App. 2000).

In the Order denying Leave to Deposit Motion, the trial court only evaluated the Leave to Deposit Motion under Rule 67, SCRCP, and it erroneously failed to consider Appellants' interest under Rule 62(d), SCRCP or under S.C. CODE ANN. § 18-9-130. The trial court further noted that no appellate authority in South Carolina appears to address whether the court may refuse to allow a defendant to deposit money with the court and stay the accrual of interest, and if so, how the court should exercise its discretion.

The Order denying Leave to Deposit Motion concluded that, because leave of court is required under Rule 67, SCRCP, then the court may refuse to allow a defendant to deposit money with the court. The Order denying Leave to Deposit Motion then adopted the factors considered by other jurisdictions to perform its analysis, as follows: (1) whether the judgment debtor would be able to satisfy the judgment at a later date (citing Qwest Corp. v. City of Portland, 204 F.R.D.

468, 470 (D.Or. 2001)); (2) whether the depositor is likely to succeed on the merits when the motion to deposit is filed (citing to Precision Shooting Equip. Co. v. Allen, 646 F.2d 13, 320 (7th Cir. 1981)); and (3) whether judgment debtor denies liability to the judgment (citing Tarpey v. Crescent Ridge Dairy, Inc., 713 N.E.2d 975, 984 (Mass. App. Ct. 1991)). (R. p. 23.)

Summarily weighing these factors, the court determined that the factors favored denying the motion solely because the Respondent won at trial and opposed the Leave to Deposit Motion. (R. p. 24.) Appellants respectfully assert that this analysis, coupled with the court's failure to consider the other grounds for Appellants' Leave to Deposit Motion, amounts to an abuse of discretion.

First, the trial court abused its discretion by entirely failing to consider either S.C. CODE ANN. § 18-9-130 or Rule 62(d), SCRCP, which was a part of the stated basis for the Leave to Deposit Motion and Appellant's request for an order allowing payment of the Judgment, with interest, into the court. Appellants are not aware of South Carolina appellate authority construing Rule 62(d), SCRCP. However, like Rule 67, SCRCP, Rule 62 is drawn from the Federal Rule, and it is proper for this court to treat federal cases interpreting the federal rule as persuasive authority. Roberts v. Peterson, 292 S.C. 149, 151-52, 355 S.E.2d 280, 281 (Ct.App.1987). The Supreme Court of the United States has plainly stated: "With respect to a case arising in the federal system it seems to be accepted that a party taking an appeal from the District Court is entitled to a stay of a money judgment **as a matter of right** if he posts a bond in accordance with Rule 62(d)...." Am. Mfrs. Mut. Ins. Co. v. Am. Broad.-Paramount Theatres, Inc., 87 S. Ct. 1, 3, 17 L. Ed. 2d 37 (1966) (emphasis added); *see* Faulkner v. Jones, No. CIV. A. 2:93-488-2, 1994 WL 456621, at *3 (D.S.C. Aug. 5, 1994) (stating that, in cases of a money judgment, the "appealing defendant is entitled to a stay as a matter of right if it posts a bond in accordance with the Federal Rules of Civil

Procedure). Respectfully, the Order fails to weigh the Appellants' ability to obtain a stay of execution as a matter of right upon obtaining a supersedeas bond – a less certain form of security than that tendered by Respondents here – in deciding to deny the Leave to Deposit Motion.

Second, the trial court erred by not really exercising discretion at all. The court's reasoning is simply that, because the Respondent won at trial and did not want Appellants to deposit the Judgment and accrued interest into the court, then therefore Appellants simply could not do so. This is not an exercise of discretion; it is simply deferring to the wishes of the prevailing creditor.

Further to this point, the second factor, adopted as a matter of first impression by the trial court, is improper and amounts to an error at law. The second factor has no bearing in the analysis of a motion seeking leave to pay into the court a following a final judgment to avoid execution under Rule 67 and under S.C. CODE ANN. § 18-9-130. The authority for the second factor cited by the Order, Precision Shooting Equipment Co., *supra*, involved an interlocutory order and preliminary injunction, a proceeding where the likelihood of success on the merits is a factor in the substantive analysis. In contrast, there is no circumstance that comes to mind where a trial court would both deny a motion for JNOV and new trial and simultaneously find that the judgment debtor is likely to prevail on the merits of an appeal. In this context, the second factor becomes a mere truism always favoring the party prevailing at trial. Therefore, in the context of a post-judgment request for deposit, the second factor weighed by the court is improper. Respondents respectfully contend that the First Circuit's test of a live, genuine dispute set forth in Alston, *infra*, is the proper consideration; and where, as here, the grounds for reconsideration and appeal are genuine and are not frivolous, that factor is satisfied in favor of the party seeking to make deposit.

Third, the other factors adopted as a matter of first impression by the trial court favor granting Appellants' Leave to Deposit Motion. As with the first factor, the Order denying Leave

to Deposit Motion mistakenly reasons that, because Respondent opposed the Leave to File Motion, then Appellants can satisfy the Judgement later. There is no evidence to support this conclusion. To the contrary, the only evidence that had been presented to the court demonstrated that both of the Appellants ceased all operations years ago. (R. p. 959-960; 966; 968.)

As for the third factor, Appellants' then-pending motion for JNOV or for a new trial demonstrated that Appellants maintained a genuine, live dispute over Respondent's entitlement to the funds awarded by the Judgment. *See* Alston Caribe, Inc. v. George P. Reintjes Co., 484 F.3d 106, 113 (1st Cir. 2007) (Rule 67 requires that there be a live, genuine dispute over the entitlement to the funds). While the court simultaneously denied Appellants' Motion for JNOV or new trial, the Order denying Leave to Deposit Motion did not find that Appellants' grounds for reconsideration and/or appeal posited were frivolous, were not genuine, or were not made in good faith.

In order to deny Appellants request to simply make full cash payment into the court prior to filing an appeal under Rule 67 – a more certain security for the Respondent and at a greater sum than provided for by S.C. Code Ann. § 18-9-130 – there must a non-arbitrary basis for the court to exercise its discretion to deny a defendant relief under Rule 67 and require these Appellants, which are non-operating companies in winding up, to go through the difficulty and expense to obtain a supersedeas bond upon the filing of the Notice of Appeal. No such reason is stated in the Order other than the fact that the payment would also stop the accrual of post-judgment interest. However, in Manning v. Brandon Corporation, 163 S.C. 178, 161 S.E. 405, 498 (1931), the South Carolina Supreme Court has stated that, "from the earliest decisions down to this time," our law has allowed a judgment debtor to pay a disputed sum into the court to stay the accrual of interest,

and that "[i]t is just, equitable, and no one can be harmed by so doing." Id.; *see also* Small v. Pioneer Mach., Inc., 330 S.C. 62, 65, 496 S.E.2d 884, 885 (Ct.App.1998).

Likewise, federal courts of appeal have stated that the "core purpose" of Rule 67 is to "relieve a party who holds a contested fund from responsibility for disbursement of that among those claiming some entitlement thereto." Zelaya/Capital Int'l Judgment, LLC v. Zelaya, 769 F.3d 1296, 1302 (11th Cir. 2014) (further quotation omitted) (holding that allowing judgment debtor to deposit funds under Rule 67, which disallowed both execution and the accrual of further interest, was not an abuse of discretion); *see also* Gulf States Utilities Co. v. Alabama Power Co., 824 F.2d 1465, 1474 (5th Cir.), amended, 831 F.2d 557 (5th Cir. 1987) ("The 1983 amendment to Rule 67 makes clear that the depositor may have an interest in the deposited funds. Once funds are deposited, the court should determine ownership and make disbursements."). Therefore, the trial court erred in denying Appellants' Leave to Deposit Motion.

CONCLUSION

For the foregoing reasons Appellants respectfully request that this court vacate the Judgment, reverse the order of the trial court denying Appellants' motions for judgment as a matter of law and confirm that Agape Management Company, Inc. cannot be liable for Respondent's claim for professional negligence; and remand this case to Lexington County for a new trial absolute consistent with the opinion of this court, to include instructions to avoid the errors in evidence identified herein. Alternatively, if the court does not grant a new trial, Appellants respectfully request that the court reverse the trial court's order denying the Leave to Deposit Motion and vacate any accrued interest from the date of Appellants' Leave to Deposit Motion.

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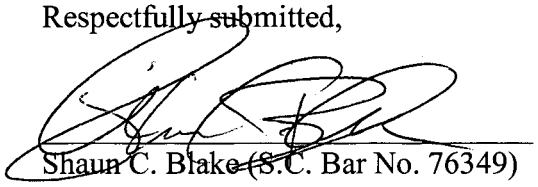
Respectfully submitted,



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August 9, 2019

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

Walton J. McLeod, IV, Circuit Court Judge

Appellate Case Number.: 2018-002236

Case No. 2016-CP-32 00950

Amy S. Davis, as Personal Representative of the Estate of Utricia Shealy, deceased, ...Respondent,

v.

Agape Nursing & Rehabilitation Center, Inc., and Agape Management Services, Inc., ... Appellants.

CERTIFICATE OF COUNSEL

I certify that the Final Brief of Appellants complies with the requirements of Rule 211(b), SCACR.

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August 9, 2019