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

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Appellate Case No.: 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 RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

I. WHETHER THE TRIAL COURT AS A MATTER OF LAW CORRECTLY DIRECTED VERDICT IN FAVOR OF RESPONDENT ON APPELLANTS' AFFIRMATIVE DEFENSE OF INTERVENING CAUSE?

II. WHETHER THE TRIAL COURT AS A MATTER OF LAW CORRECTLY ADMITTED CERTAIN EVIDENCE DURING TRIAL, AND IF ADMITTED ERRONEOUSLY, WHETHER SUCH ADMISSION AMOUNTED TO HARMLESS ERROR?

III. WHETHER THE TRIAL COURT AS A MATTER OF LAW CORRECTLY DENIED APPELLANTS' MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT REGARDING THE PROFESSIONAL NEGLIGENCE OF AGAPE MANAGEMENT COMPANY, INC.?

IV. WHETHER THE TRIAL COURT CORRECTLY DENIED APPELLANTS' MOTION FOR LEAVE TO DEPOSIT AND STAY THE ACCRUAL OF INTEREST AND EXECUTION PENDING A RULING ON POST-TRIAL MOTIONS AND APPEAL?

STATEMENT OF THE CASE

Respondent commenced this action on March 16, 2016, seeking damages for personal injuries sustained by Utricia K. Shealy ("Ms. Shealy") during her admission to Agape Nursing & Rehabilitation Center (the "Facility"), a skilled nursing facility owned and operated by Agape Nursing & Rehabilitation Center, Inc. ("Agape Nursing") and Agape Management Services, Inc.'s ("Agape Management") (collectively "Appellants"). (R. pp. 00027-00065). In her Second Amended Complaint, Respondent asserted claims of ordinary negligence, professional negligence, and punitive damages against Appellants alleging they were directly and indirectly liable for Ms. Shealy's injuries under theories of corporate liability which included alter ego, joint enterprise/joint venture, agency, and amalgamation of interest. (R. pp. 00068-00078, ¶¶ 16, 23, 27-36, 47-48, 54-55). During the litigation, in accordance with Rule 68 of the South Carolina Rules of Civil Procedure (SCRCP), and S.C. Code Ann. § 15-35-400, Respondent filed and served Offers of Judgment ("Offers") upon Appellants. (R. pp. 01213-01218). Said Offers were rejected, and litigation continued for approximately two (2) years.

On October 22, 2018, jury trial began in Lexington County before the Honorable Walton J. McLeod, IV. (R. pp. 00088-00955). On October 26, 2018, the Lexington County jury returned a verdict in favor of Respondent and awarded Two Hundred Ninety-Seven Thousand Five Hundred ($297,500.00) Dollars. (R. pp. 00945-00947, 001219-001222). The jury found Appellants were engaged in a joint enterprise/joint venture, were agents of one another, or were amalgamated. *Id.* The jury allocated sixty-five (65%) percent of damages on account of Appellants' ordinary negligence and thirty-five (35%) percent for Appellants' professional negligence. *Id.* The jury did not find clear and convincing evidence to support Respondent's claim for a punitive award. *Id.*

Dissatisfied with this outcome, on November 5, 2018, Appellants moved the Trial Court for judgment notwithstanding the verdict, or in the alternative, for a new trial absolute, or in the alternative, for a new trial *nisi remittitur*; Appellants also moved the Trial Court for leave to deposit and stay the accrual of interest and execution pending a ruling on post-trial motions and any appeal (collectively as "Motions"). On November 30, 2018, the Trial Court denied Appellants' Motions (R. pp. 00003-00026), and this appeal followed.

FACTS

The injuries which form the basis of this action arise from Ms. Shealy's 27-hour admission to Appellants' Facility. On July 1, 2014, Ms. Shealy was admitted to the Facility for short-term rehabilitation, and she remained a resident there until July 2, 2014, when she was emergently transferred to Lexington Medical Center. (R. pp. 00071, 00073-00074, ¶¶ 24, 40-45).

Upon admission to the Facility, Ms. Shealy was documented to have "dementia," was "[e]xtremely prone to fall," and had "no safety awareness." (R. p. 01060). Appellants knew Ms. Shealy was "[v]ery confused," experienced "agitation," and required "constant supervision." *Id.*

Appellants also had knowledge she was a "huge fall risk." (R. p. 00988). Despite notice of her condition and fall risk, Ms. Shealy suffered an "unwitnessed fall" and was found on the floor in the hallway. (R. pp. 00453, 00988). According to Appellants' incident report, Ms. Shealy "tried to pull herself up from [her] wheelchair [using] crown molding in [the] hallway and fell to [the] floor on [her] right side." (R. p. 01037). Appellants' nurse, Ebonie McDaniel, testified that she did not know how long Ms. Shealy remained on the floor before being discovered by Appellants' staff. (R. p. 00453). Ms. Shealy suffered a right femoral neck fracture requiring hospitalization and surgical intervention. (R. pp. 00983-00984).

Appellants were responsible for protecting Ms. Shealy from avoidable injury and providing the services necessary to keep her safe. (R. pp. 00071-00072, 00074-00075, ¶¶ 29, 31-33, 47-48). The duties Appellants were obligated to uphold included, but were not limited to: acting with due care; compliance with the applicable standard of care; compliance with all applicable laws, codes and regulations; and ensuring sufficient financial and operational resources were allocated to meet the needs of residents of the Facility, including Ms. Shealy. (R. pp. 00072, 00074-00078, ¶¶ 31-33, 47-49, 54-55). Despite these obligations, the jury found that Appellants breached their duty to Ms. Shealy, and as a consequence of their negligence, she suffered a fall resulting in significant injuries. (R. pp. 00945-00947, 001219-001222). As a result of Appellants' neglect and her resulting fall, Ms. Shealy sustained a right hip fracture, hospitalization and surgery, significant medical expenses, physical and mental pain and suffering, emotional upset, anxiety, loss of enjoyment of life, and permanent disability, amongst other damages. *Id.* As compensation for the injuries she sustained, the jury awarded Respondent Forty-Seven Thousand Five Hundred ($47,500.00) Dollars in economic damages and Two Hundred Fifty Thousand ($250,000.00) Dollars in non-economic damages. *Id.*

STANDARD FOR REVIEW

A. Grant of Respondent's Motion for Directed Verdict

"In ruling on a motion for directed verdict, a court must view the evidence and all reasonable inferences in the light most favorable to the non-moving party." *Lucas v. Rawl Family Ltd. P'ship*, 359 S.C. 505, 512, 598 S.E.2d 712, 715 (2004). "When the evidence yields only one inference, a directed verdict in favor of the moving party is proper." *R & G Constr., Inc. v. Lowcountry Reg'l Transp. Auth.*, 343 S.C. 424, 431, 540 S.E.2d 113, 117 (Ct. App. 2000). "In ruling on a directed verdict motion, the trial court is concerned only with the existence or non-existence of evidence." *Id.* "The appellate court will reverse the trial court's ruling on a directed verdict motion only when there is no evidence to support the ruling or when the ruling is controlled by an error of law." *Estate of Carr ex rel. Bolton v. Circle S Enterprises, Inc.*, 379 S.C. 31, 39, 664 S.E.2d 83, 86 (Ct. App. 2008).

B. Denial of Appellants' Motion for Judgment Notwithstanding the Verdict (JNOV)

"[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). "[O]nly the grounds raised in the directed verdict motion may properly be reasserted in a JNOV motion." *RFT Mgmt. Co. v. Tinsley & Adams L.L.P.*, 399 S.C. 322, 331, 732 S.E.2d 166, 170 (2012); *In re McCracken*, 346 S.C. 87, 551 S.E.2d 235 (2001). "The trial court must deny the motions when the evidence yields more than one inference or its inference is in doubt." *Walbeck v. I'On Co., LLC*, 426 S.C. 494, 827 S.E.2d 348, 356 (Ct. App. 2019), *reh'g denied* (May 22, 2019) (*citing Sabb v. S.C. State Univ.*, 350 S.C. 416, 427, 567 S.E.2d 231, 236 (2002)). "The grant or denial of new trial motions rests within the discretion of the trial judge and his decision will not be disturbed on appeal unless his findings are wholly unsupported by the evidence or the conclusions reached

are controlled by error of law." *Howard v. Roberson*, 376 S.C. 143, 149, 654 S.E.2d 877, 880 (Ct. App. 2007).

C. Denial of Appellants' Motion for New Trial on the Thirteenth Juror Doctrine and a New Trial Upon the Facts

"The thirteenth juror doctrine is a vehicle by which the trial court may grant a new trial absolute when he finds that the evidence does not justify the verdict." *Folkens v. Hunt*, 300 S.C. 251, 254, 387 S.E.2d 265, 267 (1990). "[D]iscretion is founded upon the facts, the evidence, the witnesses, the trial circumstances, the verdict and the judge's view of them." *S.C. State Highway Dep't v. Townsend*, 265 S.C. 253, 258, 217 S.E.2d 778, 781 (1975) (*citing Fallon v. Rucks,* 217 S.C. 180, 60 S.E.2d 88 (1950)). The trial judge's decision "will not be disturbed unless his decision is wholly unsupported by the evidence, or the conclusion reached was controlled by an error of law. *Folkens*, 300 S.C. at 254-55; *S.C. State Highway Dep't v. Clarkson*, 267 S.C. 121, 226 S.E.2d 696 (1976).

D. Denial of Appellants' Motion for Leave to Deposit Money and Stay Accrual of Interest

The denial "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); *Cajun Elec. Power Co-op., Inc. v. Riley Stoker Corp.*, 901 F.2d 441, 445 (5th Cir.1990). "An abuse of discretion occurs when the ruling is based on an error of law or a factual conclusion without evidentiary support." *Id.*; *Conner v. City of Forest Acres*, 363 S.C. 460, 467, 611 S.E.2d 905, 908 (2005). Likewise, under Rule 62, SCRCP, "[w]hether to grant . . . a stay [also] rests in the court's discretion. . . ." *Stearns Bank Nat. Ass'n v. Glenwood Falls, LP*, 375 S.C. 423, 426, 653 S.E.2d 274, 276 (2007).

ARGUMENT

As explained below, the evidence and law support the findings by the Trial Court as well as the conclusions drawn by the Lexington County jury. Further, this Court "may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal." Rules 208(b)(2) and 220(c), SCACR.

I. THE TRIAL COURT CORRECTLY DIRECTED VERDICT FOR RESPONDENT ON APPELLANTS' AFFIRMATIVE DEFENSE OF INTERVENING CAUSE.

Appellants contend the Trial Court erred in granting Respondent's directed verdict motion as to their affirmative intervening cause defense because "sufficient circumstantial evidence" existed "whereby the jury could have found or inferred that Dr. Margalit's [conduct], as the treating physician, not to order [certain fall-related interventions] when he treated Ms. Shealy" on the morning of July 2, 2014, ten and a half (10.5) hours prior to her fall, broke the causal connection. (Br. of App. p. 11).

To meet their burden of proof that a third-party physician's intervening conduct amounted to professional negligence, Appellants must offer expert testimony of a medical doctor. No medical doctor testified in this case; therefore, necessary evidence was non-existent yielding only one inference. Accordingly, the Trial Court correctly directed verdict in favor of Respondent on Appellants' affirmative defense of intervening cause, and no new trial is warranted.

An affirmative defense is a "defendant's assertion of facts and arguments that, if true, will defeat the plaintiff's . . . even if all the allegations in the complaint are true." Defense, *Black's Law Dictionary* (11th ed. 2019). "When a defendant interposes an affirmative defense, he becomes as to that matter the actor in the suit, and the burden of proof rests upon him to establish his affirmative defense by the preponderance of the evidence." *Cole v. South Carolina Electric and*

Gas, Inc., 355 S.C. 183, 195, 584 S.E.2d 405, 412 (2003) (*quoting Lorick & Lowrance, Inc. v. Julius H. Walker & Co.*, 153 S.C. 309, 318, 150 S.E. 789, 792 (1929)).

An intervening cause may be asserted as an affirmative defense and is defined as an "event that comes between the initial event in a sequence and the end result, thereby altering the natural course of events that might have connected a wrongful act to an injury." Cause, *Black's Law Dictionary* (11th ed. 2019). "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." *Gause v. Smithers*, 403 S.C. 140, 150, 742 S.E.2d 644, 649 (2013). Such an intervening act must be unforeseeable. *Graham v. Whitaker*, 282 S. C. 393, 399, 321 S.E. 2d 40, 44 (1984).

To establish "intervening" professional negligence by a physician, the propounding party must provide "evidence, through expert testimony, showing (1) the generally recognized and accepted practices and procedures that would be followed by average, competent practitioners in the physician's field of medicine under the same or similar circumstances, and (2) that the physician departed from the recognized and generally acceptable standards." *Melton v. Medtronic, Inc.*, 389 S.C. 641, 655, 698 S.E.2d 886, 893 (Ct. App. 2010) (emphasis added). Expert testimony is required "to establish both the standard of care and the [physician's] failure to conform to that standard." *Gooding v. St. Francis Xavier Hosp.*, 326 S.C. 248, 254, 487 S.E.2d 596, 599 (1997). Also, the party must show that the doctor's departure from such standards was the proximate cause of the patient's injuries and damages. *David v. McLeod Reg'l Med. Ctr.*, 367 S.C. 242, 248, 626 S.E.2d 1, 4 (2006).

A. Appellants were foreclosed from offering expert medical testimony because they failed to disclose any expert witness and the substance of their opinions prior to trial.

Pursuant to Rule 26(b)(4)(A), SCRCP, Respondent propounded discovery of Appellants' expert witnesses, including the subject matter and substance of facts and opinions of their expected testimony. During discovery, Appellants failed to disclose any such witnesses. At trial, the Trial Court granted Respondent's motion in limine excluding Appellants from offering expert testimony that was not properly disclosed. (R. pp. 00111-00116).

B. Appellants failed to offer expert medical testimony necessary to establish any intervening professional negligence of a physician, including Dr. Margalit.

To avail themselves of an affirmative defense of intervening cause relating to any physicians' conduct, Appellants must establish by the preponderance of the evidence through competent expert testimony that the physician whose conduct is at issue was subject to recognized and generally acceptable standards, that his conduct departed from such standards, and, that as a result of such departure, Ms. Shealy suffered injuries. At the trial of this matter, no evidence to support the aforementioned elements was presented, mandating directed verdict on Appellants' affirmative defense of intervening cause.

An "expert witness" means "an expert who is qualified as to the acceptable conduct of the professional whose conduct is at issue." S.C. Code Ann. § 15-36-100(A). To be competent to testify, an expert witness "must have acquired by reason of study or experience or both such knowledge and skill in a profession . . . that [s]he is better qualified than the jury to form an opinion on the particular subject of h[er] testimony." *Daves v. Cleary*, 355 S.C. 216, 228, 584 S.E.2d 423, 429 (Ct. App. 2003); *Gooding*, 326 S.C. at 252–53. Medical doctors and nurses are distinct professions. S.C. Code Ann. §§ 15-36-100(G)(7),(9). The standard of care for a physician must be established by one knowledgeable or skilled in the practice of medicine because the "standards of education and licensure for [nurses] are different from those of medical doctors." *Botehlo v. Bycura*, 282 S.C. 578, 585, 320 S.E.2d 59, 64 (Ct. App. 1984).

In this case, Appellants erroneously argue that the testimony of Respondent's nursing expert, Ellen Lewis, RN, MSN, GNP-C, supports their theory that Dr. Gal Margalit's conduct, as a treating physician, was negligent and an intervening cause of Ms. Shealy's injuries. (Br. of App. pp. 6-8). Specifically, Appellants contend that Dr. Margalit failed to provide Facility staff "additional orders" after his initial "assessment of Ms. Shealy" upon her admission to the nursing home, thus causing her to fall. (Br. of App. pp. 10-11).

During the trial, Ms. Lewis was the only expert witness offered. No physician offered any testimony whatsoever. (R. pp. 00166-00810). Ms. Lewis is not a medical doctor nor did she hold herself out as competent to testify concerning the standard of care by physicians such as Dr. Margalit. (R. pp. 00492, 00511-00512). Moreover, during directed verdict argument at trial, Appellants' counsel conceded that Dr. Margalit[1] did not breach "the standard of care." (R. p. 00807).

In South Carolina, the practice of nursing means "the provision of services" requiring "the use of nursing judgment . . . in the clinical context . . . which guide nursing actions." S.C. Code Ann. § 40-33-20(46). Pursuant to Rules 701, 702, and 703 of the South Carolina Rules of Evidence (SCRE), Ms. Lewis, who is a nurse and nurse practitioner, was tendered, without objection, as an ***expert in the field of nursing***:

> MR. CONNOR: Your Honor, at this time, I'd like to tender the witness as an expert in the following areas of nursing: The nursing process; . . . the nursing process as it relates to the care of gerontological patients; . . . [and] the standard of care for nursing homes. . .
>
> MR. BLAKE: Without objection.

(R. pp. 00511-00512).

[1] In their brief, Appellants also make clear that "Dr. Margalit was employed by a [third-party] company called Agape Senior Primary Care, Inc.," and "Nurse Lewis" was only critical of "the nursing home employees." (Br. of App. pp. 6, 8).

Ms. Lewis, however, did offer numerous examples of substandard nursing care rendered by Appellants' staff. (R. pp. 00490-00696). Specifically, Ms. Lewis identified a host of nursing interventions available to Appellants prior to Ms. Shealy's fall that should have been, but were not, implemented by the Facility, including but not limited to:

- the failure to adequately monitor Ms. Shealy after administration of medication, including maintaining the resident in line of sight (R. pp. 00534, 00552, 00554);
- the failure to communicate with physical and occupational therapists (R. p. 00549);
- the failure to request a chair alarm (R. p. 00549);
- the failure to obtain a lap buddy, safety belt, or pommel cushion (R. pp. 00553, 00556);
- the failure to utilize hipsters or nonskid socks and shoes (R. p. 00557);
- the failure to place Ms. Shealy in a communal setting with group activities (R. p. 00555);
- the failure to notify a doctor in the face of a change in Ms. Shealy's condition, including increased combativeness (R. pp. 00534-00536, 00552-00553); and
- the failure to contact Ms. Shealy's family regarding her condition change (R. p. 00557).

As a nurse and nurse practitioner, Ms. Lewis' opinions were held within a ***reasonable degree of nursing certainty***. (R. pp. 00529, 00533, 00558, 00563, 00593).

Because the record is completely devoid of any credible evidence that Dr. Margalit, or any other third-party physician, was negligent, the Trial Court's directed verdict as to Appellants' intervening cause defense was appropriate.

C. Even though Respondent's directed verdict was granted, Appellants were not prejudiced by the Trial Court's ruling because they received the benefit of an "intervening cause" jury instruction.

Despite objection from Respondent, the Trial Court charged the jury at the Appellants' request on the "unavoidable accident" defense. (R. pp. 00811-00812). This jury instruction is, in effect, the same charge which would have been provided had the Trial Court not granted Respondent's motion for directed verdict on Appellants' intervening cause defense. (R. pp. 00929-

00930). Therefore, by providing this instruction, the Trial Court effectively cured any error for which the Appellants now complain, further mandating denial of the pending appeal.

II. THE TRIAL COURT PROPERLY ADMITTED LIMITED, RELEVANT EVIDENCE FOR CONSIDERATION BY THE JURY.

Appellants misconstrue Respondent's claims and legal theories, and the nature and purpose of certain evidence offered at trial, which was relevant and probative. In this case, Respondent asserted legal theories of corporate liability seeking to hold the business savvy Appellants, as owners, operators, and managers of the Facility, accountable for their acts and omissions which created and perpetuated the systemic abuse and neglect of residents, including Ms. Shealy. Ms. Shealy's injury was not an isolated event, and Appellants should not be permitted to escape liability by claiming to manage their Facility with their eyes closed.

Relevant evidence is that "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence," Rule 401, SCRE, and the Trial Court "serves as the gatekeeper." *Watson v. Ford Motor Co.*, 389 S.C. 434, 445, 699 S.E.2d 169, 174 (2010).

"The admission of evidence is within the trial court's discretion." *R & G Constr., Inc.*, 343 S.C. at 439. "The court's ruling to admit or exclude evidence will only be reversed if it constitutes an abuse of discretion amounting to an error of law." *Id.* "To warrant reversal based on the admission or exclusion of evidence, the appellant must prove both the error of the ruling and the resulting prejudice, i.e., that there is a reasonable probability the jury's verdict was influenced by the challenged evidence or the lack thereof." *Fields v. Reg'l Med. Ctr. Orangeburg*, 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005).

Within its sound discretion as gatekeeper of all evidentiary matters, the Trial Court properly admitted limited, relevant evidence, after weighing its probative value against prejudice

and other considerations. Moreover, even if certain admitted evidence was prejudicial, there is no reasonable support that the jury's verdict was swayed by any evidence challenged by Appellants.

A. Prior regulatory survey results were used to illustrate Appellants' notice and knowledge of dangerous conditions at the Facility, not to establish prior bad acts.

Appellants brief misinterprets the nature and purpose of regulatory survey evidence offered by Respondent, mischaracterizes objections lodged during the trial, and ignores the Trial Court's rationale as to why Respondent was permitted to use survey evidence to elicit testimony. South Carolina Department of Health and Environmental Control (DHEC) survey results were not offered to establish "similar accidents, transactions, or happenings" but were used to elicit testimony to reflect Appellants had notice and knowledge of dangerous conditions at their Facility.[2]

Courts throughout the United States have held regulatory surveys and other similar evidence are relevant and admissible to show prior knowledge and notice of dangerous conditions existing on the premises, as well as motive, intent, and the absence of mistake of nursing home operators.[3] Like here, an Arkansas court held "surveys [were] probative of the fact that the [A]ppellants were on notice of dangerous conditions in the nursing home due to . . . adequacy-of-staff issues." *Advocat*, 353 Ark. at 60. Similarly, a Georgia court found reports admissible in the "liability" phase of trial because they "show [the nursing home] had notice its employees were not properly supervising residents. . . ." *Peacock*, 230 Ga. App. at 727. In Florida, the court has also allowed evidence of general conditions at the nursing home "not directly related to care or

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[2] Appellants' Designation of Matter to be Included in the Record on Appeal references "Plaintiff's Exhibit 6 – DHEC Survey"; however, no such exhibit exists in the Trial Transcript. (R. pp. 00092-00093). In fact, the survey documents at issue were not actually submitted as evidence for review and consideration by the jury.

[3] *See e.g., Advocat, Inc. v. Sauer*, 111 S.W.3d 346 (Ark. 2003); *Peacock v. HCP III Eastman, Inc.*, 497 S.E.2d 253 (Ga. Ct. App. 1998); *Mitchell v. State,* 491 So.2d 596 (Fla. 1996); *Criswell v. Best Western International*, 636 So.2d 562 (Fla. 3d Dist.Ct.App. 1994); *Montgomery Health Care Facility v. Ballard*, 565 So.2d 221 (Ala. 1990).

condition of the named victims" because it showed "knowledge and absence of mistake" on part of the facility. *Mitchell*, 491 So.2d at 598-99.

It is well established within our own State that "prior complaints of similar defects are relevant" in the determination of foreseeability and whether a party "should have known [conditions] were defective." *JKT Co. v. Hardwick*, 274 S.C. 413, 416, 265 S.E.2d 510, 512 (1980). Further, this evidentiary concept has been applied to admit this type of evidence to show "intent, motive, and knowledge." *See Rutledge v. St. Paul Fire and Marine Ins. Co.*, 286 S.C. 360, 369, 334 S.E.2d 131, 136-37 (Ct. App. 1985).

In this case, Appellants' corporate representative, Danielle Henderson, affirmed the primary purpose of the regulatory survey process and corresponding plan of correction is to prevent deficiencies from reoccurring at the Facility. (R. p. 00296). Ms. Henderson testified that the survey process puts the Facility on notice of problems and dangerous conditions that the surveyors identify, and she affirmed the Appellants' execution of the plan of correction is an acknowledgement that the Facility is on notice of the cited issues. (R. pp. 00322-00323).

Despite Appellants' assertion that this information should have been excluded because it was prejudicial evidence of "prior bad acts," the Trial Court, within its discretion and after balancing the probative value and potential prejudicial effect, properly allowed Respondent to elicit testimony of relevant violations for purpose of establishing Appellants' prior "notice" of dangerous conditions related to falls existing at the Facility. (R. pp. 00317-00321). Consequently, no error occurred warranting a new trial.

B. Redacted Medicare Cost Reports and other financial information were properly admitted.

Appellants also argue the jury should not have received testimony or exhibits which included financial data, including sales information and a redacted Medicare Cost Report.

To support Respondent's theory of vicarious liability, evidence of Appellants' exercise of control over its subsidiary was properly submitted to the jury. This evidence was also properly considered in light of Respondent's allegation of agency, joint venture, and amalgamation of interest. Testimony relating to the sale of the Facility showed Appellant Agape Management exerted complete control over the Facility.[4] Testimony regarding the employment of Middleton family members, as managers and officers involved in decision-making, further illustrated Appellant Agape Management's exercise of control over the Appellant Agape Nursing. Furthermore, the Medicare Cost Report, which was redacted by Appellants to remove all references to financial figures, was admitted to further reflect the interrelatedness of the Appellants in the provision of services at the Facility. The evidence at issue illustrated Appellant Agape Management's operation, management, and control of the Facility, including its control over the allocation of financial resources at the Facility, and was properly admitted by the Trial Court. (R. pp. 00245-00247).

The evidence was properly admitted for purposes of showing bias, for impeachment, and to show Appellant Agape Management's operation, management, and control of the Facility and other indicia relevant to Respondent's corporate theories of alter ego, agency, joint venture, and/or amalgamation of interests. Even if error occurred, such error was harmless as there is no indication it unduly influenced the jury.

C. Appellants waived the opportunity to contest admissibility of matters of a financial nature to the extent they failed to timely object.

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[4] Despite the assertion that evidence of Appellants' transaction was prejudicial and should have been excluded, there was only a single sales-related reference to the "little less than $20 million" transaction within Mr. Middleton's deposition. Moreover, Appellants opened the door for such evidence during opening statements: "[The] nursing home is closed. It shut down in 2015. The company doesn't have any operations anymore, doesn't have any employees. Its only existence now is to wrap up its liabilities, things like this lawsuit, and close out its financial books." (R. p. 00156). It was evident that Appellants reference to the sale of the company was intended to persuade the jury that rendering a verdict against a defunct company would be futile. Nevertheless, allowing the jury to hear one mention of the Appellants' sale of the Facility within a five (5) day trial was harmless.

During the trial, Appellants failed to timely object to the testimony now complained of concerning Scott Middleton's sale of Appellant Agape Nursing. With respect to that specific testimony, Respondent filed her notice of intent to publish the testimony of Scott Middleton, including deposition designations, in advance of trial. Appellants had an obligation to timely file objections under Rule 32(a)(5), SCRCP, but failed to do so. Appellants lodged no formal objections, despite being on notice of Respondent's intent to offer certain excerpts which included a reference to the sales price.

Despite not furnishing or filing any formal objections as required by rule, counsel met in chambers with the Trial Court to discuss potential objections prior to the publication of the testimony in Respondent's case in chief. Based on the Trial Court's rulings, videotaped testimony of these corporate officers was redacted and adjusted overnight prior to their presentation to the jury to include requested, oral counter-designations made by Appellants. Appellants then lodged objections on the record. An objection must be lodged contemporaneously to preserve any error for appeal. *State v. Hartley*, 307 S.C. 239, 241, 414 S.E.2d 182, 184 (Ct. App. 1992). Appellants should not be permitted to spin the wheel of chance, lose, and thereafter be heard to complain. "The failure to make an objection at the time evidence is offered constitutes a waiver of the right to object." *Cogdill v. Watson*, 289 S.C. 531, 537, 347 S.E.2d 126, 130 (Ct. App. 1986).

Appellants should not be permitted to sit back, fail to make timely and contemporaneous objections, and then assert an after-the-fact evidentiary claim when they had notice of Respondent's intent to offer such testimony and ample opportunity to timely object. Appellants' failure to lodge such objections was waiver.

III. THE TRIAL COURT CORRECTLY DENIED APPELLANTS' MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT REGARDING THE PROFESSIONAL NEGLIGENCE OF AGAPE MANAGEMENT COMPANY, INC.

Appellants contend the Trial Court erred in denying their motion for JNOV and/or a new trial because "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." (Br. of App. p. 15). This logic is wholly flawed and unsupported by the evidence and law of this State.

A parent corporation of nursing home facilities can be held both directly liable for their own actions in operating the facility and indirectly liable for the acts of their subsidiaries. In her Second Amended Complaint, Respondent asserted claims of direct and indirect liability, including but not limited to alternative legal theories of alter ego, agency, joint venture, and amalgamation of interests. (R. pp. 00069-00070, 00074-00075, ¶¶ 23, 47-48). Respondent further alleged that Appellants made "operational, budgetary, and administrative decisions" and "entered into a continuing course of negligent conduct . . . implementing and enforcing dangerous operational budgets, practices, and policies at the facility" which deprived Ms. Shealy of safe, adequate, and essential care and resources. (R. pp. 00071-00072, ¶¶ 28-29).

A nursing home is liable for professional negligence when licensed professionals at the facility fail to exercise "that degree of care and skill which is ordinarily employed by the profession generally, under similar circumstances and in like surroundings." *Jernigan v. King*, 312 S.C. 331, 333, 440 S.E.2d 379, 381 (Ct. App. 1993). As previously stated, to establish professional negligence, South Carolina requires expert testimony to show: (1) the generally recognized and accepted practices and procedures or standard of care; (2) departure from those standards; and (3) that such departure proximately caused the plaintiff's alleged injuries and damages. *David*, 367 S.C. at 247-48; S.C. Code Ann. § 15-79-125.

A "parent corporation is [itself] responsible for the wrongs committed by its agents in the course of its business." *United States v. Bestfoods*, 524 U.S. 51, 65, 118 S.Ct. 1876, 1886 (1998) (internal citations omitted). "[D]irect corporate liability attaches due to a breach of a duty ***which runs directly between a parent company and a patient***, arising from negligence in actions such as leaving a [nursing home] underfunded, understaffed, ***or undertrained so as to provide substandard care***." *Id.* (emphasis added). *Morrow v. Fundamental Long-Term Care Holdings, LLC*, 412 S.C. 534, 538, 773 S.E.2d 144, 146 (2015)

The parent company is directly liable for the subsidiary's actions where it has "forced the subsidiary to take the complained-of action, in disregard of the subsidiary's distinct legal personality," or "has interfered with the subsidiary's operations in a way that surpasses the control exercised by a parent as an incident of ownership." *Pearson v. Component Technology Corp.*, 247 F.3d 471, 487 (3d Cir. 2001). Direct liability may result when the parent company "manages, directs, or conducts operations specifically related to the violation" that cause the harm to the nursing home resident, including the failure to train or employ qualified staff. *United States v. Days Inn of Am., Inc.*, 151 F.3d 822, 826 (8th Cir. 1998).

Vicarious liability is different than the theory of direct corporate liability: "[v]icarious liability attaches to a parent company . . . as the result of negligence on behalf of its employees" or subsidiary. *Morrow,* 412 S.C. at 538. "[T]he two theories of vicarious liability and corporate liability can coexist in a lawsuit, and a finding of one does not necessarily preclude a finding of the other." *Id.*

In South Carolina, a parent company may be liable to third persons for negligence and other malfeasance and omissions of duty of the subsidiary acting within the scope of the agency. *See Crystal Ice Co. of Columbia v. First Colonial Corp.*, 273 S.C. 306, 257 S.E.2d 496 (1979). A

parent company may also be liable if engaged in a joint venture or enterprise which involves the operation, management, or control of an entity responsible for negligence. *Peoples Fed. Sav. & Loan Ass'n v. Myrtle Beach Golf & Yacht Club*, 310 S.C. 132, 147, 425 S.E.2d 764, 774 (Ct. App. 1992). Finally, where defendants are amalgamated "so as to blur the legal distinction" between the entities they are in effect one and the same as far as their representation and operation of the nursing home, and the actions of one should apply to the others. *Kincaid,* 289 S.C. at 96.

During the trial, Respondent offered copious evidence to support her claims that Appellants acted negligently violating the professional standard of care, including expert testimony to show Appellants failure to adequately train staff. (R. pp. 00515, 00562-00563, 00587-00588). Respondent also provided evidentiary support that Appellant Agape Management controlled and managed day-to-day operations of the nursing home; or in the alternative, Appellant Agape Nursing was an agent of Appellant Agape Management, Appellants' operations were so intermingled that they lost any separateness or identity, or through their business arrangement, Appellant Agape Nursing became a mere instrumentality of Appellant Agape Management. (R. pp. 00270, 00273-00274, 00291-00292, 00295, 00297-00298, 00300-00301, 00327-00330, 00348-00349, 00372-00373, 01039-01042).

In support of Respondent's claims, Appellants' corporate representative, Danielle Henderson, testified that Appellants' marketed themselves to the public as "Team Agape" – an "integrated network of healthcare service providers" including assisted living, physician services, therapy, and skilled nursing, medical staff and other services, as well as a "team of professional registered nurses, licensed practical and nurses' assistants," which provide "24-hour nursing care." (R. pp. 00268-00270, 01063-01087, 01135-01136). Additionally, Appellants' facility management agreement, which was admitted into evidence without objection, illustrated Appellant

Agape Management's control over services "required to operate the business." (R. pp. 00348-00349, 01039-01042). According to the management agreement, Appellants' control of nursing home operations, included, but was not limited to, "cash flow management," "assistance with operational budgets," "preparation of monthly financial statements," provision of "in-service training for company staff," "development and preparation of employee policies and procedures," and provision of technological systems used by the facility. (R. pp. 00348-00351, 01039-01042).

Through control of "human resources," Appellant Agape Management directed "employee recruitment," "employment qualifications," and "management and analysis of human resource statistics." *Id.* Appellant Agape Management also directed employment decisions and dictated whether unqualified or unfit nurses were hired and/or retained at the Facility. (R. pp. 00349-00350). Furthermore, Ms. Henderson testified Appellant Agape Management was directly involved with regulatory surveys, preparing responses to those surveys, negotiating penalties and instituting corrective action for deficiencies at the Facility. (R. pp. 0291-00292, 00295-00297, 00300-00301).

Appellants' corporate representative, Ms. Henderson, also testified that Appellant Agape Management provided "management services" and had responsibility to ensure nursing home staff were adequately trained. (R. pp. 00783-00784). Appellants further testified regarding Appellant Agape Management's integral role in the implementation of policies and procedures, including but not limited to oversight of the fall prevention program at Agape. (R. pp. 00282-00283, 00352-00353, 00355-00356). Moreover, Appellants' Code of Conduct & Compliance Program Handbook, which was admitted without objection, mandated obedience by "all employees" of "any entity managed by Agape":

> This **code applies to all Agape Senior entities and any entity managed by Agape**. This code has been approved and adopted by senior management. . . .
>
> * * *
>
> The code is designed to ensure that **all employees** share in their responsibility for keeping Agape in full compliance with all applicable laws, regulations, standards of care and all policies and procedures. . . .

(R. pp. 00260-00261, 01043-01059) (emphasis added).

In addition to evidence and testimony of direct corporate liability, which resulted in substandard care, Respondent offered evidence to show common ownership and control of owners, officers, shareholders, including Scott Middleton as President and Gregory Middleton as Vice President of each company. (R. pp. 00249-00250, 00258, 00350-00351, 00997-01036, 01039-01042). Respondent illustrated Appellants' common location businesses, use of the same logo, and other intermingling of operations. (R. pp. 00268-00270, 00997-01036, 01039-01059, 01063-01134). Respondent further offered evidence to show it would be unjust or fundamentally unfair to allow Appellant Agape Management to control and impact day-to-day operations, including oversight of the quality and competency of nursing staff, but attempt insulate itself from liability through a complex corporate arrangement which circumvents applicable statutes. (R. pp. 00348-00351, 00515, 00562-00563, 00587-00588, 00783-00784, 01039-01042).

In short, the evidence of Appellant Agape Management's participation in the overall operation of the nursing home and the direct impact its activities had on patient care, including Ms. Shealy, overwhelmingly supports the Trial Court's denial of Appellants' motion JNOV as to Respondent's professional negligence claim.[5]

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[5] Even if Appellant Agape Management could not be held liable for professional negligence individually, the jury's verdict rendered this matter moot because it determined Appellants "were engaged in a joint enterprise/joint venture, were agents of one another, or were amalgamated." (R. p. 01220). The verdict form was agreed upon by the Appellants without objection. (R. p. 00812). Moreover, no objection was lodged by Appellants regarding the

IV. THE TRIAL COURT CORRECTLY DENIED APPELLANTS' MOTION FOR LEAVE TO DEPOSIT AND STAY THE ACCRUAL OF INTEREST AND EXECUTION PENDING A RULING ON POST-TRIAL MOTIONS AND APPEAL.

Appellants contend the Trial Court erred in denying their request to deposit funds and stay the accrual of interest during post-trial motions and their appeal; however, Appellants ignore Respondent's right to interest and costs pursuant to Rule 68, SCRCP, and disregard the discretion afforded the Trial Court by Rules 62 and 67, SCRCP. By rule, the Trial Court has wide latitude in deciding whether or not to permit the deposit of funds, stop the accrual of post-judgment interest, require a bond with conditions, or stay enforcement of a judgment. Any such relief is not automatic.

South Carolina law mandates "[a] money decree or judgment of a court enrolled or entered must draw interest according to law." S.C. Code Ann. § 34-31-20(B). Generally, "[a] notice of appeal from a judgment directing the payment of money ***does not stay*** the execution of the judgment unless the presiding judge before whom the judgment was obtained grants a stay of execution." S.C. Code Ann. § 18-9-130(A)(1) (emphasis added). However, "the court ***may*** stay the execution of or any proceeding to enforce a judgment pending the disposition" of post-trial motions "in its discretion." Rule 62(b), SCRCP (emphasis added). Rule 62(d), SCRCP, also allows a party to give a supersedeas bond during the pendency of an appeal, if "approved by the court." If the presiding judge grants a stay of execution, it may require a bond or other surety to guarantee the payment of the judgment pending the appeal. S.C. Code Ann. 18-9-130(A)(1). Rule 67, SCRCP, allows a party, upon notice to every other party and by leave of court, to deposit with the court all or any part of a sum of money such as a monetary judgment.

A. South Carolina law precludes the relief requested by Appellants as it relates to interest accruing pursuant to Respondent's Offers.

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inclusion of a joint enterprise/joint venture, agency, or amalgamation of interest instruction in the jury charge. (R. pp. 00811-00812).

The Trial Court was within its discretion and properly denied Appellants request to abate Respondent's entitlement to interest and costs as prescribed by law under Rule 68, SCRCP, as it would be unjust to abrogate Appellants' legal duty until conclusion of the appeal.

In accordance with Rule 68, SCRCP, and S.C. Code Ann. § 15-35-400, Respondent filed and served her Offers upon Appellants. (R. pp. 01213-01218). Appellants rejected the Offers, and the jury rendered a verdict in excess of them. Following the trial, Appellants appealed; therefore, final entry of judgment remains in flux and pre-judgment interest continues to accrue as Appellants contest liability and the verdict.

Although Rule 67, SCRCP, provides a procedure for safekeeping of disputed funds, South Carolina recognizes the Rule "cannot be used as a means of altering . . . legal duties of the parties." *Renaissance Enterprises, Inc. v. Ocean Resorts, Inc.*, 334 S.C. 324, 327, 513 S.E.2d 617, 619 (1999) (*quoting LTV Corp. v. Gulf States Steel, Inc.*, 969 F.2d 1050, 1063 (D.C.Cir.1992)). Appellants' failure to accept Respondent's Offers imposes a "legal duty" of eight (8%) percent interest[6] per annum, plus costs. Rule 68(b)(1)-(2), SCRCP.[7] "The proper time for the assessment of . . . costs and [interest]" under Rule 68, SCRCP, "is after a decision on the merits of the appeal." *Steinert v. Lanter*, 284 S.C. 65, 65, 325 S.E.2d 532, 533 (1985). Accordingly, allowing Appellants to stop the "accrual of interest" owed to Respondent by law "would in effect substitute the interest rate of the court's deposit account for that provided by [other statute,] which the court has no authority to do." *Renaissance Enterprises*, 334 S.C. at 327.

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[6] Rule 67, SCRCP, applies to the legal rate of interest which accrues post-judgment as a matter of law under S.C. Code Ann. § 34-31-20. A comparison of interest rates in S.C. Code Ann. § 34-31-20 confirm that Rule 67, SCRCP, is not applicable to Rule 68, SCRCP, nor S.C. Code Ann. §15-35-400 as different rates apply (i.e., 8.0%, 8.5%, and 8.75%). Therefore, Appellants cannot use Rule 67, SCRCP, to stay interest which accrues pursuant to Rule 68, SCRCP.

[7] As of October 26, 2018, the total amount of interest accrued and owed by Appellants equals Forty-One Thousand Two Hundred Nine and Eighty-Six One-Hundredths ($41,209.86) Dollars. Estimated costs total more than $2,000.00.

South Carolina favors settlement because it avoids costly litigation and delay to an injured party, and Appellants' Motions and appeal effectively suspend any entry of judgment. Thus, Appellants' request to deposit funds under Rule 67, SCRCP, is an attempt to circumvent their "legal duty" and thwart public policy, while working an injustice against Respondent who is entitled to interest and costs as prescribed by law, and causing Respondent to incur additional and unnecessary time and expense in responding to post-trial Motions and this appeal.

B. The Trial Court properly denied Appellants request to deposit judgment funds and stay accrual of interest and execution of judgment after weighing all considerations.

The Trial Court properly determined within its discretion that Appellants were not entitled to an automatic right to deposit judgment funds, stay the accrual of interest, and stay execution of judgment. "[W]hen a money judgment is affirmed upon an appeal taken by a judgment debtor, interest is generally allowed at the statutory rate from the date of the entry of judgment, notwithstanding the appeal, with the imposition of interest being viewed as a *penalty* for the improper retention by the debtor of the creditor's funds during the pendency of the appeal." 11 A.L.R.4th 1099 (1982); S.C. Code Ann. 34-31-20(B). In other words, post-judgment interest serves to "compensate the judgment creditor for damages sustained by nonpayment of the judgment." *Southeastern Freight Lines v. Michelin Corp.*, 279 S.C. 174, 176, 303 S.E.2d 860, 862 (1983).

Pursuant to Rules 62 and 67, SCRCP, the Trial Court has discretion to permit or deny the deposit of funds, allow a supersedeas bond with conditions, or stay the execution of any proceeding to enforce a judgment. *See notes* to Rules 62 and 67, SCRCP.[8] In denying Appellants' request, because South Carolina case law provides little guidance, the Trial Court properly considered a number of factors relied upon in other jurisdictions: (1) whether the judgment debtor would be

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[8] "[I]n the absence of prior state law on a specific issue in question, federal cases interpreting the rule are persuasive." *Unisun Ins. v. Hawkins*, 342 S.C. 537, 542, 537 S.E.2d 559, 561 (Ct. App. 2000).

able to satisfy the judgment at a later date (*see Qwest Corp. v. City of Portland*, 204 F.R.D. 468 (D.Or. 2001)); (2) whether the depositor is likely to succeed on the merits when the motion to deposit is filed (*see Precision Shooting Equipment Co. v. Allen*, 646 F.2d 313 (7th Cir. 1981)); and (3) whether judgment debtor denies liability to the judgment (*see Tarpey v. Crescent Ridge Dairy, Inc.*, 47 Mass. App. Ct. 380, 393, 713 N.E.2d 975, 984 (1999)). The Trial Court further explained why the decisions from other jurisdictions were persuasive and set forth its rationale in denying Appellants' request by analyzing each factor.[9]

Appellants' underlying Motions contest the verdict and liability. By discontinuing post-judgment interest, Appellants are incentivized to pursue their appeal, even if frivolous, because they avoid all risk associated with prolonged delay. Meanwhile, Respondent continues to incur costs with no end in sight. Thus, the Trial Court properly denied Appellants' request within its discretion.

C. Prior to the appeal, Respondent proposed to allow Appellants' deposit of the jury award and limited post-judgment interest so long as it did not interfere or interrupt her continued accrual of interest and costs under Rule 68, SCRCP.

In response to Appellants' post-trial Motions, Respondent proposed that Appellants deposit the jury award and post-judgment interest into the court so long as it did not interfere or interrupt Respondent's interest and costs that continue to accrue pursuant to Rule 68, SCRCP. Despite Appellants representation that they "ceased all operations years ago," but have the ability to go "through the difficulty and expense to obtain a supersedeas bond," Appellants failed to acknowledge or respond to Respondent's proposal. (Br. of App. at pp. 23-24).

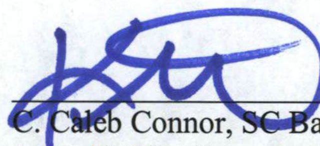
[9] Although the opinions cited in Appellants' brief are informative of Federal policy as to Rules 62 and 67, the cases are each factually distinguishable from the instant action and fail to account for the implications of Rule 68, SCRCP.

CONCLUSION

For the reasons explained herein, this Court should affirm the Trial Court's grant of Respondent's motion for directed verdict on Appellant's affirmative defense of intervening cause, should affirm the Trial Court's denial of Appellants' motion for a new trial absolute due to the admission of certain evidence, and should affirm the Trial Court's denial of Appellants' motion for JNOV for the submission of Respondent's professional negligence claim against Appellant Agape Management to the jury. This Court should also affirm the Trial Court's denial of Appellants' motion for leave to deposit and stay the accrual of interest and execution pending appeal. The verdict is fully supported by the evidence and law, and any alleged error, if made, was harmless.

This the 12th day of August, 2019.

Respectfully submitted,



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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 No.: 2018-002236

Case No. 2016-CP-32-00950

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

v.

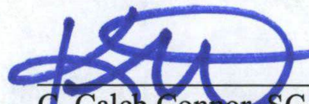
Agape Nursing Rehabilitation Center, Inc., Agape Management Services, Inc., John Doe, Richard Roe Corporation, Jane Doe, and Mary Doe Corporation,……………………………Defendants,

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

CERTIFICATE OF COUNSEL

The undersigned counsel hereby certifies that Final Brief of Respondent complies with Rule 211(b), SCACR.

Respectfully submitted,



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