2009 WL 854566 (Mo.App. W.D.) (Appellate Brief)
Missouri Court of Appeals, Western District.

Estate of John R. NOVOGRADAC, by Personal Representative Denise Schmelzle, Plaintiff/Respondent,
v.
Sharo SHIRSHEKAN, et al., Defendants/Appellants.

No. WD69358.
February 17, 2009.

Appeal from the Circuit Court of Platte County, Missouri, 6th Judicial Circuit, Hon. Daniel M. Czamanske, Judge

Brief of Respondent Estate of John R. Novogradac, by Personal Representative Denise Schmelzle

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I. INTRODUCTION

Defendants Sharo Shirshekan, Barry Manor, LLC, White Oak Manor, LLC, and Health Care Management, Inc. (HCM) bring this appeal on the heels of a $3,022,500 jury verdict in favor of Plaintiff Estate of John R. Novogradac. Prior to Novogradac's death, his family entrusted the 73-year-old, who had suffered a stroke, to Defendants' nursing facilities. Rather than provide Novogradac with care and dignity, Defendants neglected him to the point that he was left lying in his own urine and feces, fell numerous times, became severely dehydrated, developed numerous pressure sores, and was left writhing in pain with no pain medication. The conditions and lack of care were so egregious at Defendants' facilities that Novogradac's pressure sores become necrotic and gangrenous and eventually required the amputation of both of his legs. Witnesses at trial described the conditions as “scary,” “very concerning,” “very understaffed,” and “facility-wide.” Defendants' neglect of Novogradac was so apparent that an emergency room doctor who examined him felt obligated to call the **Elder Abuse** hotline to report his concerns about Defendants' lack of care.

After Novogradac was removed from the Defendants' facilities, the Estate of John Novogradac, by Personal Representative Denise Schmelzle, filed medical negligence claims against Sharo Shirshekan, Barry Manor, White Oak Manor, and HCM, alleging that Defendants' understaffing, underfunding, inadequate training, and failure to properly care for and treat Novogradac caused Novogradac pain, suffering, and the eventual amputation of both of his legs. After seven days of trial at which 18 witnesses testified, a ***10** jury of twelve deliberated for only four hours and returned a verdict in favor of Plaintiff, awarding it $500,000 in compensatory damages against all Defendants and finding that punitive damages were warranted. The jury apportioned 50% of the fault to Sharo Shirshekan personally, 40% to his management company, HCM, and 5% each to the nursing homes - Barry Manor and White Oak. After the second phase of trial, the jury deliberated for 50 minutes and awarded $2,522,500 in punitive damages against Defendants Shirshekan and HCM.

On appeal, Defendants are attempting a scattershot approach - asserting twelve allegations of trial error, including insufficient evidence, improper expert testimony, irrelevant and prejudicial evidence, and improper jury instructions. Each of these arguments is baseless. During the seven days of trial, Plaintiff presented overwhelming evidence of Defendants' egregious neglect. The jury carefully assessed the evidence, and awarded damages commensurate with the harm caused and the willful actions taken. Moreover, all of the jury instructions of which Defendants complain are either Missouri Approved Instructions or based on the same. Contrary to Defendants' assertions, there was no injustice at trial; rather, a cavalier, hands-on business owner who neglected and exploited elderly residents to increase his profit margin was forced to pay for the pain, suffering and injuries he caused John Novogradac to suffer. The punishment was fair, and hopefully adequate to deter future improprieties by Defendant Shirshikan. As such, this Court should deny Defendants' arguments for judgment notwithstanding the verdict or new trial, and affirm the jury's reasoned verdict.

***11 II. FACTUAL BACKGROUND**

In August 2001, Shirshekan became the owner and operator of two nursing homes in Kansas City - Barry Manor, LLC and White Oak Manor, LLC - and set up a company, HCM, to manage the facilities. He hired Carol Jeans, who was employed by HCM from 2000 to 2003 as the Regional Manager and Quality Assurance Nurse in charge of the northern area, which included Barry Manor and White Oak Manor. (Tr. 330, 333-34.) Her duties included overseeing eight to ten nursing homes, including ensuring that they were following policies, procedures, protocols, and regulations and providing good patient care. (Tr. 334-35, 359.) Jeans testified that Shirshekan, as the owner and licensed operator of Barry Manor and White Oak Manor, had the authority to hire and fire employees of those facilities and set the salaries of the administrators and directors of nursing. (Tr. 342-44, 356.) Furthermore, as the operator of the facilities, Shirshekan was responsible for ensuring that they had adequate supplies, budgets and staff. (Tr. 342-44, 355-56.) Moreover, Shirshekan was responsible for any State deficiencies they received. (Tr. 342.) Jeans

was in daily contact with Shirshekan, who was very active and involved in management of the homes. (Tr. 343.) At all times relevant to this lawsuit, Jeans and Shirshekan were employees of HCM. (Tr. 338.)

In September 2002, approximately one year after Shirshekan bought Barry Manor and White Oak Manor, the Department of Health and Human Services (DHSS) sent a team of six investigators to conduct a full investigatory survey of Barry Manor. (Tr. 854-55.) As a result of that survey, Barry Manor received numerous citations, including 26 quality-of-care deficiencies for inadequate staffing to meet the needs of the residents, ***12** improper care planning, and failure to notify physicians of significant changes in condition, among many others. (Tr. 883-888, 909.) Additionally, the facility received a broad citation for failure to meet the physical, mental, and psychological needs of the residents. (Tr. 901.)

Lisa McGee, who was a registered nurse and licensed nursing home administrator, was employed by DHSS as a Health Care Surveyor and was part of the team that conducted the survey of Barry Manor. (Tr. 849-50; 854-55.) After conducting her investigation in September 2002, McGee concluded that the facility was understaffed. (Tr. 914.) Specifically, the staffing regulation required that the facility staff an appropriate number of credentialed care providers to meet the needs of the residents, taking into consideration the residents' acuity. (Tr. 913.) McGee stated that in order to determine whether a facility was or was not violating the regulation, she reviewed residents' records, interviewed residents, interviewed their families, interviewed staff, and observed the facility and the care being provided firsthand. (Tr. 914.) She concluded that there was “absolutely no way [the staff] could get their work done.” (Tr. 909-10.) In fact, at times, one CNA was in charge of two halls so call lights could not be answered, and during the night shifts, most halls were staffed with only one CNA. (Tr. 911-12.) Moreover, McGee surveyed 15 actual residents, all of whom told her that the care was not good. (Tr. 912.) Notably, an entire hallway of the building had no staff whatsoever, so patients with “serious medical conditions” were not receiving adequate care, were not being fed, and were pressing call lights that went nowhere and, therefore, went unanswered. (Tr. 902-03, 904.) McGee testified that it “was pretty scary” and that she ***13** had never seen anything like it in all of her investigations. (Tr. 903.) She stated that the neglect was “facility-wide,” and during the time she was employed by DHSS, she was not aware of any other facility receiving so many deficiencies - only one other facility even came close. (Tr. 915.) In fact, she even spent the night at the facility, which she had never done before, because “the things [the surveyors] were seeing, and the information [they] were collecting, was very concerning to [them]. And based on the information that [they] had, [they] had reason to believe that the night shift was very understaffed. And the concerns [they] had were that people weren't getting the proper care.” (Tr. 916.)

As a result of the September 2002 survey, Barry Manor was also cited for inadequate care planning and inadequate Minimum Data Sets (“MDS”). (Tr. 871-72; 884-85.) As McGee and Cheryl Swope, LPN (Barry Manor's former MDS Coordinator) testified, federal law requires skilled nursing facilities to create an MDS and applicable care plans for each resident, setting forth the resident's conditions and proper care, but due to inadequate staffing and management at Barry Manor, the MDSs and care plans at the facility did not match up to the correct residents. Consequently, residents were not receiving necessary care and treatment. (Tr. 153-55, 884-88, 898.) Essentially, the entire system was in shambles, resulting in residents receiving inadequate and improper care. (Tr. 153-55, 884-88, 898.)

Additionally, during McGee's investigation, she found that nurse aides were not properly trained. They did not know how to care for residents, about the special needs of residents, how to transfer residents, and how to feed residents who required liquid diets. (Tr. 904-05.) One nurse aide told McGee that in terms of training, she received a two- ***14** hour tour, shadowed another nurse aide for one day, and was then “thrown to the wolves.” (Tr. 905.) McGee concluded that there were inadequate systems in place for orientation and training. (Tr. 907.)

The facility was required to correct all deficiencies within forty-five days of the date the survey team exited, which was September 18, 2002. (Tr. 863, 878.) HMC's Regional Manager, Carol Jeans, testified that all deficiencies are a “big deal” and are “very serious” and that Shirshekan was fully aware of the results of the surveys and the nature of the deficiencies. (Tr. 370, 405.)

Immediately prior to exiting the facility, McGee spoke with Shirshekan regarding the survey and “the amount of concerns [they] had and the number of tags that were being cited. And the fact that [a DHSS surveyor] had been in the facility ... [in]

mid-August," and yet, the facility was still violating numerous regulations. (Tr. 917 (emphasis added).) McGee testified that "[t]hings were getting kind of stressful [and] tensions were kind of building." (Tr. 917.) During that conversation, Shirshekan "was upset" and told her that he was going to call her supervisor (which he did) and that he had connections with the Governor, who "was going to hear about this." (Tr. 918.)

McGee and the rest of the DHSS survey team returned to Barry Manor on November 13, 2002 for a "revisit," which was a follow-up investigation to determine whether the facility had corrected all of the deficiencies, including the 26 quality of care deficiencies. (Tr. 918-19, 922.) During that investigation, which was unannounced, McGee found that shortly after the survey team arrived, "a lot more staff than was in the building" initially suddenly showed up at the facility. (Tr. 922-23.) When she asked ***15** nurses and nurse aides about this apparent attempt to pad the staff, they told her that the additional staff was called in due to the arrival of the survey team. (Tr. 924-25.) Barry Manor was again cited for a deficiency for inadequate staffing because the needs of the residents still were not being met. (Tr. 925.) Specifically, DHSS surveyors' interviews with residents, staff, and residents' family members revealed that residents' call lights still were not getting answered, residents' incontinence needs were not being met, and residents still were not receiving adequate care. (Tr. 925, 927-28.) One nurse told McGee that she could not provide a resident with ordered treatments because she simply ran out of time. (Tr. 928.) McGee testified that the understaffing problem was still facility-wide. (Tr. 928.) Including the staffing deficiency, nine of the original 26 quality of care deficiencies remained at the time of the November 2002 revisit survey. (Tr. 929.)

Two former employees of Barry Manor - Tawonia Scott, LPN and Lynn Daniels, LPN - testified at trial regarding the conditions at Barry Manor and White Oak Manor. Scott testified that she was employed by Barry Manor from August 2002 through January 2003, while Novogradac was a resident. (Tr. 216.) Her duties included administering narcotics and other treatments. (Tr. 217.) She testified that while she was at Barry Manor, it was full of residents, and she was responsible for between 40 and 60 residents per shift. (Tr. 221-22.) Scott testified that the facility was grossly understaffed and provided inadequate care. (Tr. 226-27.) Moreover, she testified that the orientation process was simply too short and there was no continuity of care. (Tr. 223-25.) Scott testified that the majority of the patients were high acuity, meaning that they were very needy, with multiple residents requiring ventilators, feeding tubes, and other treatments ***16** that require a high level of care. (Tr. 226-27.) Scott testified that often there would be only one CNA per hall during the evening shift to care for 18 to 25 residents and even less staff during the night shift. (Tr. 231.) Scott testified that pressure wounds were a problem at Barry Manor because it was difficult to turn and reposition patients every two hours and patients were often left lying in their feces or urine. (Tr. 232-33.) She testified that the reason for this problem was that there "was just not enough staff to do and take care of the people to the best of their abilities. There just wasn't enough staff." (Tr. 233-34.) She further testified that the facility often lacked adequate supplies, such as gauze, Kerlix, wipes, briefs, and towels. (Tr. 335.) Scott testified that during the state surveys, HCM - through Jeans and Shirshekan - would purposely pad the staff making it appear as if the facility operated with more staff than were actually present when the state surveyors were not there. (Tr. 239.)

Similarly, Lynn Daniels was an LPN who worked at Barry Manor for a year and a half, starting in May 2002. (Tr. 297.) She testified that at times, she was responsible for 80 to 100 patients and simply did not have time to provide quality care. (Tr. 291.) She testified that there were not enough nurse aids to turn and reposition patients as a treatment for pressure ulcers. (Tr. 291.) She also testified the facility did not have adequate supplies, such as diapers, washed clothes, sheets and bandages. (Tr. 292-93.) Daniels testified that the nurse aides did not elevate wounds to provide pressure relief due to understaffing. (Tr. 293-94.) She went on to testify that people who complained of the conditions at Barry Manor were fired and, therefore, she did not complain. (Tr. 303.)

***17** John Novogradac was a resident of Barry Manor from February 15, 2001 to January 23, 2003 - meaning he was a resident at the time of the September 2002 and November 2002 DHSS surveys, as well as the August 2002 visit discussed by Lisa McGee. (L.F. 57; Tr. 959-60.) He was 73 years old upon admission and had suffered a stroke before he entered the facility. (Tr. 957-60.) As a result of the stroke, he had paralysis on his left side as well as swallowing difficulties, the latter of which required him to have a feeding tube. (Tr. 556-58, 664, 960-61.)

While Novogradac was at Barry Manor he fell six times in three months, became severely dehydrated, and repeatedly developed pneumonia due to the staff's failure to monitor, assess, and care for him. (Tr. 556-57.) Most importantly, he developed pressure wounds on his left foot. His initial wound started on his left heel and then spread to the side and, eventually, the top of his foot. (Tr. 710-11, 713, 717-18.) Moreover, he developed pressure sores on his buttocks. All of these wounds caused severe pain that was never treated. (Tr. 1088-92.) Additionally, he was found by his family lying in soiled sheets with feces on his body. (Tr. 972.) As a result of the staff's failure to monitor, assess, care and treat Novogradac's pressure sores on his left heel and foot, they became necrotic and gangrenous and eventually requiring the amputation of his left leg on January 28, 2003. (Tr. 718-19, 722-23.)

Novogradac was discharged from the hospital after the amputation of his left leg on February 3, 2003. A few days prior, DHSS surveyors had cited White Oak Manor for 10 regulatory violations, including improper care planning and improper treatment of pressure wounds, after conducting a survey at the facility. (Tr. 435-45.) Additionally, ***18** the assistant director of nursing testified that White Oak Manor was understaffed and unstable at this time. (Tr. 1039-40.) Unfortunately, Novogradac and his family were unaware of the deplorable conditions at this facility and chose to transfer him there, rather than Barry Manor. (Tr. 981-82.)

While at White Oak Manor, Novogradac became dehydrated and again developed pneumonia repeatedly due to the staffs failure to adequately monitor, assess and care for him. (Tr. 601-02, 756, 1069-70.) Moreover, when he arrived at White Oak Manor, he had a nickel-size ulcer on his right heel, which had developed at Barry Manor. Due to the egregious care and treatment at White Oak Manor, that ulcer grew much larger and, additionally, Novogradac developed ulcers on his buttocks, tailbone, hip and shoulder. (Tr. 751-52.) Despite the extreme pain that these ulcers caused, Defendants failed to provide Novogradac with pain treatment. After the heel ulcer became infected and covered with gangrene, Novogradac's remaining leg was amputated. (Tr. 603-04, 606, 609, 738-39, 740-41, 754-55, 760, 1088-92.) His condition became so poor during his stay at White Oak Manor that when he arrived at Saint Luke's Hospital on April 17, 2003, one day before the amputation, healthcare providers in the emergency room contacted the **Elder Abuse** Hotline regarding their concerns. (Tr. 607-08.) After Novogradac's discharge from St. Luke's, he was transferred to another facility, and this lawsuit eventually followed.

At trial, Plaintiffs called numerous witnesses, including DHSS surveyor McGee and former employees, all of whom testified regarding the deplorable conditions at Barry Manor and White Oak Manor. Additionally, Plaintiff called three expert witnesses - ***19** Joyce Black, RN, PhD; Jane Zaccardi, RN, and Raymond Wojtalik, MD - who testified regarding standard of care, causation, and damages as to each of the four Defendants.

Two of Plaintiff's expert witnesses - Dr. Wojtalik and Nurse Zaccardi - testified that the understaffing at Barry Manor, as well as understaffing at White Oak Manor, was a breach of the standard of care that caused or contributed to cause Novogradac's pressure ulcers and overall neglect.

In particular, Dr. Wojtalik testified that Barry Manor, as well as White Oak Manor, were understaffed and, as a result of staff being spread too thin, staff did not (1) keep pressure off of Novogradac's feet by adequately turning and repositioning him, (2) properly assess and monitor Novodradac's pressure ulcers; and (3) adequately communicate with Novogradac's physicians. (Tr. 742-44, 761-66.) He testified that the understaffing was directly related to infrequent treatments and negligent care. (Tr. 761-66.)

He also testified that Shirshekan, as the facilities' operator, was the individual charged with the duty to adequately staff Barry Manor and White Oak Manor and that Shirshekan breached this duty by failing to staff the facilities with enough care providers to provide adequate care to Novogradac and the other residents. (Tr. 766-67, 769-73.) He explained that in staffing a nursing facility, one must consider the number of patients in the facility and the amount of care that each patient requires. (Tr. 766.) Dr. Wojtalik testified that Shirshekan breached the standard of care by being aware of the staffing deficiencies and the on-going dysfunction of the facilities and negligently allowing the understaffing and inadequate care to continue. (Tr. 773.)

***20** He also testified that HCM was responsible for consulting with doctors with regard to staffing and hiring adequate employees for the facilities, and that HCM breached the standard of care by failing to do adequately do so. (Tr. 767-69.) Dr. Wojtalik further testified that the understaffing caused or contributed to cause Novogradac's pressure ulcers and, ultimately, amputation of his legs. (Tr. 742-44, 755, 761-66.)

Nurse Zaccardi testified that the evidence showed Shirshekan, who was ultimately responsible for staffing Barry Manor and White Oaks Manor, was negligent in staffing the facilities and that his negligence caused or contributed to cause injury to Novogradac. (Tr. 1060-62.) She further testified that Shirshekan's understaffing was willful because he was aware that his facilities were cited for staffing deficiencies and failed to either increase the staffing, decline admission of new residents and/or transfer patients out of the facilities to improve the staffing ratios. (Tr. 1066.) She testified that HCM was negligent in understaffing the facilities in that it failed to establish staffing patterns, failed to monitor residents' acuity, and failed to fill vacant positions. (Tr. 1066-69.) She testified that this understaffing, which resulted in a failure to turn, reposition, assess, hydrate, feed, clean, care for, and treat Novogradac, caused Novogradac's pressure ulcers and ultimately, the amputations of his legs. (Tr. 1069-70.)

After Defendants presented their evidence, the jury returned a verdict in favor of Plaintiff. (L.F. 159-61.) Although the trial was bifurcated as to punitive damages, after the first phase of trial, the jury awarded Plaintiff $500,000 in actual damages and $1,100,000 in punitive damages. (L.F. 159-60.) Because the trial was bifurcated, the ***21** trial court disregarded the amount of the punitive damages award and instructed the jury to hear additional evidence about Defendants Shirshekan's and HCM's net worth during the second phase of trial, which it did. (L.F. 159-60; Tr. 1629-33.) After further deliberation, the jury awarded Plaintiff $2,522,500.00 in punitive damages against Defendants Shirshekan and HCM. (L.F. 159-61.) This appeal followed.

***22** *ARGUMENT*

I. Plaintiff made a submissible case of negligence and for punitive damages against Shirshekan and HCM.

A. Standard of Review

The standards of review for the denial of a motion for judgment notwithstanding the verdict and the denial of a motion for a directed verdict are essentially the same. *Dhyne v. State Farm Fire & Cas. Co.*, 188 S.W.3d 454, 456 (Mo. banc 2006). In reviewing the circuit court's judgment, this Court views the evidence in the light most favorable to the verdict and gives the prevailing party all reasonable inferences from the verdict and disregards unfavorable evidence. *Id*. at 456-57. This Court may reverse the jury's verdict for insufficient evidence only where there is a complete absence of probative fact to support the jury's conclusion. *Richey v. Philipp*, 259 S.W.3d 1, 7 (Mo. App. 2008). Where reasonable minds can differ on the question before the jury, a court may not disturb the jury's verdict. *Ryan v. Maddox*, 112 S.W.3d 476, 480-81 (Mo. App. 2003). The jury determines the credibility of the witnesses. *Id*.

B. Argument

Defendants argue that Plaintiff failed to make a submissible case for punitive damages and/or negligence in that Plaintiff (1) failed to put forth substantial evidence of Shirshekan's and HCM's duty or breach of duty regarding staffing decisions at Barry Manor and White Oak Manor, (2) failed to put forth evidence of willful, wanton, or malicious misconduct with regard to either Shirshekan or HCM, and/or (3) failed to put forth a theory of negligence on which Plaintiff could recover. These arguments are ***23** baseless. On the contrary, Plaintiff put forth overwhelming evidence that Shirshekan and HCM had a duty to adequately staff Barry Manor and White Oak Manor and that they breached this duty by understaffing the facilities, as evidenced by the jury apportioning 90% of the fault to these Defendants. (L.F. 159.) Moreover, Plaintiff put forth overwhelming evidence that clearly and convincingly showed that both Shirshekan and HCM showed a complete indifference to or conscious disregard for the safety of others and knew or had reason to know that there was a high degree of probability that the understaffing would result in injury. Their willful, wanton, and malicious conduct was evidenced by the jury's punitive damages award of

$2,522,500. Plaintiff clearly made a submissible case for negligent understaffing and punitive damages against Shirshekan and HCM. As such, the trial court did not abuse its discretion in denying Defendants' motions for directed verdict and judgment notwithstanding the verdict.

1. Plaintiff made a submissible case of negligence against Shirshekan and HCM.

For a medical malpractice action, a plaintiff must prove that the defendant failed to use that degree of skill and learning ordinarily used under the same or similar circumstances by members of the defendant's profession and that the negligent act or acts caused or contributed to cause the plaintiff's injury. *State Ed. of Registration for Healing Arts v. McDonagh*, 123 S.W.3d 146, 164 n.5 (Mo. 2003). The standard of care generally must be established by expert testimony. *McLaughlin v. Griffith*, 220 S.W.3d 319, 320 (Mo. App. 2007). Moreover, expert medical testimony is necessary to establish that the defendant's negligence caused the plaintiffs injury "except where the want of skill or lack ***24** of care is so apparent as to require only common knowledge and experience to understand and judge it." *Coon v. Dryden*, 46 S.W.3d 81, 90-91 (Mo. App. 2001).

In this case, Plaintiff presented substantial evidence by way of expert testimony from Dr. Wojtalik and Nurse Zaccardi that Shirshekan and HCM had a duty to adequately staff Barry Manor and White Oak Manor, they breached that duty by understaffing the facilities, and the breach caused Novogradac's pressure sores, dehydration, falls, pneumonia, and leg amputations. *See supra* at 19-20.

Wholly ignoring this evidence, Defendants argue that the administrators of Barry Manor and White Oak Manor, rather than Shirshekan, were responsible for operating the nursing homes and, therefore, Shirshekan had no duty to adequately staff the facilities. (Apet. Brief at 25.) In support of this argument, Defendants quote trial testimony from Regional Manager Carol Jeans that the administrators staffed the facilities, and that she "strongly" advised them regarding staffing. (Apet. Brief at 25.) Defendants further argue that because Shirshekan "never denied requests for staffing," then he did not breach his duty to adequately staff the facilities. (Apet. Brief at 25-27.) Defendants even argue that because Shirshekan never provided "hands-on care" to Novogradac, he owed no duty to him whatsoever. (Apet. Brief at 28.)

Defendants' argument is nothing more than an attempt to highlight facts favorable to their view of the case. A view the jury obviously rejected. This is improper because the evidence is viewed in the light most favorable to the verdict and unfavorable evidence is disregarded. *Dhyne*, 188 S.W.3d at 456. Plaintiff put forth substantial evidence, by way of testimony from Jeans and others, that Shirshekan was the sole individual ***25** ultimately responsible for ensuring that the nursing homes had adequate staff and supplies. (Tr. 342-44; 355-56.) The fact that administrators implemented his staffing decisions or that Shirshekan never denied a staffing request does not absolve him from liability - it is simply one fact that the jury may consider. Shirshikan had a duty to ensure that Barry Manor and White Oak Manor were adequately staffed because he was the individual ultimately responsible for staffing. HCM was responsible for implementing Shirshekan's staffing decisions by hiring employees for the facilities, as well as monitoring residents' acuities, which Plaintiff's expert witnesses testified it failed to do. (Tr. 767-69, 1066-69.) Dr. Wojtalik and Nurse Zaccardi testified that Shirshekan and HCM's failure to adequately staff Barry Manor and White Oak Manor resulted in a failure to turn, reposition, assess, hydrate, feed, clean, care for, and treat Novogradac, caused Novogradac's pressure ulcers and ultimately, the amputations of his legs. (Tr. 742-44, 755, 761-66, 1069-70.) The jury obviously found this testimony and evidence persuasive. It concluded that Shirshekan and HCM, who were responsible for staffing, were 90% at fault for Novogradac's injuries. (Tr. 159.) If the evidence Defendants presented so clearly showed that Defendant Shirshekan and HCM had no involvement at the nursing home facilities, that fact should have been reflected in the jury's verdict. The jury's verdict says it all. Shirshekan was the primary bad actor.

2. Plaintiff made a submissible case for punitive damages against Shirshekan and HCM.

Punitive damages are submissible in a case in which liability has been established by the negligence of the defendant where the evidence clearly and convincingly shows ***26** the defendant knew or had reason to know that there was a high degree of

probability that the action would result in injury. *Jone v. Coleman Corp.*, 183 S.W.3d 600, 610 (Mo. App. 2005). The plaintiff must demonstrate that the defendant showed a complete indifference to or conscious disregard for the safety of others. *Id*.

Defendants again attempt to highlight testimony that the nursing home administrators, not Shirshekan, staffed the facilities and Shirshekan never refused a request for additional staff. (Apet. Brief 29-30.) As discussed above, this argument is meritless as the evidence must be viewed in the light most favorable to Plaintiff and unfavorable evidence must be disregarded on appeal. *Dhyne*, 188 S.W.3d at 456. Consequently, the testimony on which Defendants base their argument that Shirshekan was not responsible for staffing should be disregarded. Plaintiff presented substantial evidence that Shirshekan was the individual ultimately responsible for staffing, that he knew the facilities were understaffed, and that he allowed them to remain understaffed. (Tr. 342-44; 355-56, 917-18, 925.)

Defendants also argue that Nurse Zaccardi's testimony that Shirshekan willfully allowed Barry Manor and White Oak Manor to be understaffed was insufficient to support the punitive damages awards. (Apet. Brief at 29-30.) This argument is meritless. Plus, it assumes that expert testimony regarding willfulness is required to support a claim for punitive damages, and there is no such requirement under Missouri law. *See, e.g., Schoor v. Wilson*, 731 S.W.2d 308, 311 (Mo. App. W.D. 1987). The jury, as the fact finder, may determine whether a defendant's actions are willful without the aide of expert testimony. *Id*. In this case, in addition to Nurse Zaccardi's testimony, there was ***27** overwhelming evidence that showed that Shirshekan's failure to adequately staff the facilities was willful. As stated, Regional Manager Carol Jeans testified that Shirshekan, as the owner and licensed operator of the facilities, was responsible for ensuring that they had adequate staff and supplies. (Tr. 342-44; 355-56.) Moreover, Shirshekan was responsible for any State deficiencies they received. (Tr. 342.) DHSS surveyor Lisa McGee, testified that Barry Manor was cited for ***26*** quality of care deficiencies, including understaffing. (Tr. 909.) She found that there was "absolutely no way [the staff members] could get their work done" and that due to understaffing, call lights went unanswered and residents were not receiving adequate care and ***were not even being fed.*** (Tr. 902-03, 904, 909-12.) McGee testified that it "***was pretty scary***" and that ***she had never seen anything like it in all of her investigations.*** (Tr. 903 (emphasis added).) She stated that the neglect was "facility-wide," and ***she was not aware of any other facility receiving so many deficiencies.*** (Tr. 915.) In fact, ***she even spent the night at the facility, which she had never done before,*** because she was so concerned about residents' safety. (Tr. 916.)

Former employee Tawonia Scott testified that one LPN was responsible for between ***40 and 60 residents*** per shift and one CNA was responsible for ***18 to 25 residents*** during the evening shift and ***even more*** residents during the night shift. (Tr. 221-22, 231.) She testified that the facility was so ***grossly understaffed*** that it was difficult to turn and reposition patients every two hours and ***patients were often left lying in their feces or urine;*** consequently, pressure wounds were a problem. (Tr. 226-27, 232-34.) Former employee Lynn Daniels also testified that at times, an LPN was ***28** responsible for ***80 to 100 patients*** and simply did not have time to provide quality care. (Tr. 291.) Like Scott, she testified that there were not enough nurse aids to turn and reposition patients as a treatment for pressure ulcers. (Tr. 291.)

DHSS surveyor McGee discussed the results of the survey with Shirshekan personally before exiting the facility, ***including the fact that DHSS surveyors had been in the facility just one month prior.*** Instead of discussing ways to improve the facility, Shirshekan threatened to report his dissatisfaction with her findings to both her supervisor and the Governor. (Tr. 917-18.) Moreover, instead of correcting the deficiencies (which HMC's own Regional Manager testified were a "big deal" and "very serious") within forty-five days, Shirshekan and HCM failed to do so, attempted to falsely pad the staff upon the survey team's arrival, and again received nine deficiencies, including another for understaffing. (Tr. 370, 405, 63, 878, 918-19, 922.) Shirshekan and HCM were fully aware of the serious problems at Barry Manor as DHSS had cited the facility for deficiencies in August and September 2002 and McGee spoke to Shirshekan personally regarding her concerns upon exiting the facility in September. Despite being put on notice of 26 quality of care deficiencies, including understaffing, as well as several other deficiencies, Shirshekan and HCM knowingly and willfully continued to operate Barry Manor in a wanton manner and ***again was cited for deficiencies, including understaffing,*** in November 2002. John Novogradac was a patient during all of these events.

The evidence clearly and convincingly shows that Shirshekan and HCM (by and through Shirshekan and Jeans) knew or had reason to know that there was a high degree ***29** of probability that the understaffing, as well as inadequate supplies, training and care planning, would result in injury. *See Jone*, 183 S.W.3d at 610. In being fully aware of the numerous deficiencies, including inadequate care planning and understaffing, which Jeans acknowledged were a "big deal" and "very serious," and willfully and wantonly allowing the dangerous conditions and understaffing to continue, Shirshekan and HCM showed a complete indifference to and conscious disregard for the safety of Novogradac and the other residents. *Id*. Consequently, the trial court correctly concluded that Plaintiff made a submissible case for punitive damages.

3. Shirshekan is personally and individually liable for his own acts of negligence and his own complete indifference to and conscious disregard for the safety of others, including Novogradac.

Under Missouri law, a corporation normally bears sole liability for debts created in its own name. Mo. Rev. Stat. § 351.275. A corporation does not, however, protect an owner from liability for ***his own acts of negligence.*** *See, e.g., State ex rel. Doe Run Resources Corp. v. Neill*, 128 S.W.3d 502, 505 (Mo. 2004) (holding the CFO of a corporation had actual or constructive knowledge of the corporation's wrongful conduct and participated in it and, thus, was liable in his individual capacity). Plaintiff concedes that under Missouri law, Shirshekan could not be held individually liable for the negligence of a nurse, for example, but he can and is individually liable for his own acts of negligence. He had a duty to adequately staff Barry Manor and White Oak Manor, and he breached this duty. The jury found him 50% responsible for Novogradac's injuries.

***30** The Florida Court of Appeals' decision in *Canavan v. National Healthcare Corp.*, 889 So.2d 825 (Fla. App., 2d Dist. 2004) is directly on point and instructive. In that case, the estate of a nursing home resident filed suit against various defendants for damages sustained by the resident while he was living at the nursing home. As in this case, the evidence showed that an individual defendant, Friedbauer, used a limited liability company to purchase the nursing home at issue, and the manager of the limited liability company was a corporation. All of these entities were named as defendants, in addition to defendant Friedbauer. The only principals or shareholders of the limited liability company and the corporation were defendant Friedbauer and his wife. *Id*. at 826. The trial court granted a directed verdict in favor of Friedbauer, concluding that liability could not be imposed on him without piercing the corporate veil.

On appeal, the Estate argued that the concept of piercing the corporate veil does not apply in the case of an individual tort and presented sufficient evidence of Friedbauer's own negligence, by act or omission, for the jury to reasonably conclude that Friedbauer, personally, caused harm to the decedent. The Estate argued that Friedbauer had the responsibility for approving the budget for the nursing home and was the sole person responsible for establishing and implementing policies regarding the management and operation of the facility and for appointing the administrator responsible for management of the facility. *Id*. The Estate further argued that because Friedbauer ignored complaints of inadequate staffing while cutting the operating expenses and because the problems the decedent suffered - pressure sores, infections, poor hygiene, ***31** malnutrition, and dehydration - were the direct result of understaffing, a reasonable jury could have found that Friedbauer's elevation of profit over patient care was negligent. *Id*.

The Court of Appeals agreed with the Estate, concluding that there was evidence upon which the jury could have found that Friedbauer's negligence in ignoring the documented problems at the facility contributed to the harm suffered by the decedent. *Id*. at 827. "This was not a case in which the plaintiffs were required to pierce the corporate veil in order to establish individual liability because Friedbauer's alleged negligence constituted tortious conduct, which is not shielded from individual liability." *Id*.

As in *Canavan*, the concept of piercing the corporate veil does not apply here because Shirshekan, himself, committed negligence in failing to adequately staff Barry Manor and White Oak Manor despite repeated notice of the conditions at the nursing homes, as discussed in detail above. As in *Canavan*, the problems Novogradac suffered, including pressure sores resulting in leg amputations, were the direct result of understaffing and underfunding, as Plaintiffs' experts testified. There was more than sufficient evidence at trial, including the testimony of Carol Jeans, that Shirshekan, and Shirshekan alone, was responsible for the facilities' budgets, supplies, staff, and salaries. (Tr. 342-44; 355-56.) He was in daily contact with Jeans and

was highly active and involved in management of the homes. (Tr. 343.) Consequently, there was more than sufficient evidence for the jury to reasonably conclude that Shirshekan's elevation of profit over patient care amounted to negligence, for which he is personally liable. As in *Canavan*, because Shirshekan's own negligence constituted tortious conduct for which he ***32** is individually liable under Missouri law, Plaintiff was not required to pierce the corporate veil in order to establish individual liability.

II. The trial court properly admitted Shirshekan's deposition testimony regarding his prior criminal conviction.

A. Standard of Review

A trial court's denial of a motion for a new trial is reviewed for an abuse of discretion. *See, e.g.*, *Arrington v. Goodrich Quality Theaters, Inc.*, 266 S.W.3d 856, 860 (Mo. App. 2008). " 'Judicial discretion is abused when the trial court's ruling is clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration; if reasonable persons can differ about the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion.' " *Id*. (citation omitted). A new trial may be granted only upon a showing that trial error or misconduct of the prevailing party incited prejudice in the jury. *Id*. "This Court must review the evidence from a 'standpoint favorable to the trial court's ruling.' " *Id*. (citation omitted). "[C]ourts should not overturn a jury verdict lightly. Trials are costly - for the litigants, the jurors and taxpayers." *Keltner v. K-Mart Corp.*, 42 S.W.3d 716, 722 (Mo. App. 2001). An alleged error in the trial court's admission or exclusion of evidence also is reviewed by this Court for an abuse of discretion. Appellate courts give "substantial deference to the trial court's decision regarding the admissibility or exclusion of evidence, and the trial court's decision will not be disturbed absent a showing of abuse of discretion." *Woods v.* ***33** *Friendly Ford, Inc.*, 248 S.W.3d 665, 673 (Mo. App. 2008) (citing *Jerry Bennett Masonry, Inc. v. Crossland Const. Co.*, 171 S.W.3d 81, 88 (Mo. App. 2005)).

"To be admissible, evidence must be both logically and legally relevant." *Id*. "Evidence is considered relevant when 'the facts tend to prove or disprove facts at issue or corroborate other relevant evidence.' " *Id*. (quoting *Gates v. Sells Rest Home, Inc.*, 57 S.W.3d 391, 396 (Mo.App.2001)). "Determining relevancy is subjective and trial courts are 'accorded considerable discretion' in their admissibility rulings." *Id*.

"The trial court is [also] required to weigh the probative value of the evidence against any possible prejudice which might occur due to its admission." *Id*. (quoting *Porter v. Toys 'R' Us-Delaware, Inc.*, 152 S.W.3d 310, 318 (Mo.App.2004)). "The trial court is in the best position to evaluate whether the potential prejudice of relevant evidence outweighs the relevance." *Giles v. Riverside Transport, Inc.*, 266 S.W.3d 290, 295 (Mo. App. 2008). "The trial court is vested with broad discretion in ruling questions of relevancy of evidence and, absent a clear showing of abuse of that discretion, the appellate court should not interfere with the trial court's ruling." *Id*.

B. Argument

At trial, counsel for Plaintiff read certain portions of Defendant Shirshekan's deposition as part of its case-in-chief, including a short admission by Shirshekan that he is a convicted felon. (Tr. 1109-1110.) Defense counsel objected at trial to the manner in which Plaintiff sought to establish that Defendant Shirshekan was a convicted felon. Defense counsel argued that Defendant Shirshekan needed to take the stand (Tr. 1096), and, second, that for foundation reasons plaintiff had to ask the question in a specific ***34** way: Were you on [insert date] convicted of the felony of [state felony]. (Tr. 1097.) Plaintiff argued that reading the deposition excerpt into the record was a permissible method under the Missouri Rules of Evidence. The trial court agreed with Plaintiff, and overruled the objection. Defendant now seeks a new trial, arguing that the evidence was admitted through an improper method and for the improper purpose of creating bias and prejudice. (Apet. Brief at 34-47.) Defendant's argument is meritless.

Defendant Shirshekan's transcript excerpt regarding his felony conviction was properly admitted at trial. Rule 57.07 provides that a deposition that is admissible under the rules of evidence may be used in court for any purpose:
(a) Use of Depositions. Any part of a deposition that is admissible under the rules of evidence applied as though the deponent were testifying in court may be used against any party who was present or represented at the taking of the deposition . . . . ***Depositions may be used in court for any purpose.***

Rule 57.07(a) (emphasis added). This language has been interpreted exactly as it reads: if part of a deposition is admissible under the rules of evidence, then it can be admitted and used for any purpose. *See, e.g.*, *Cook v. Willis*, 885 S.W.2d 791, 795 (Mo. App. 1994) (interpreting meaning of "for any purpose" under previous, more restrictive version of Rule 57.07, and holding that the phrase means exactly what it says, rejecting the defendant's argument that the plaintiffs could use the defendant's deposition testimony "for any purpose" so long as it was an admission against interest).

***35** Defendant Shirshekan's deposition transcript was admissible under the Missouri Rules of Evidence. The fact that Shirshekan was a convicted felon was relevant to Defendant Shirshikan's character, and the short deposition testimony about his criminal conviction was not unduly prejudicial given the circumstances.

First, Defendant Shirshikan's character was at issue because the case involved the potential award of punitive damages. *See, e.g.*, *Barnett v. La Societe Anonyme Turbomeca France*, 963 S.W.2d 639, 666 (Mo. App. 1997) (listing factors to be considered on a punitive damage award, including character of the defendant).

Second, from the onset of trial, defense counsel placed Shirshekan's character at issue, thereby making the criminal conviction relevant at the point in time the evidence was introduced. For example, during defense counsel's opening statement, he stated: "I promise you I'm gonna bring the evidence that shows you, he is the good guy;" "[Shirshekan] came to this country because this was where he thought he could . . . do good for fellow people. And the evidence is going to be that that's what he's done;" and "This is a case of no good deed going unpunished. This is a case where he came in at the State's request to try to save these nursing homes . . . ." (Tr. 68, 69, 88.)

Defense counsel then elicited evidence about Defendant Shirshekan's character during Plaintiff's case-in-chief. During the examination of Carol Jeans, for example, defense counsel attempted to establish that Defendant Shirshekan's life's work is to help people:
Q: From your observation, is Sharo [Shirshekan] operating nursing homes for any basic reason other ***36** than because he thinks it's his life's work to try to help people?

A: I feel that he thinks that, yes.

Q: And has tried to act that way?

A: Yes, I feel he has.

(Tr. 475-76.)

At the time that Plaintiff sought to introduce Defendant Shirshekan's deposition transcript, defense counsel had placed Defendant Shirshekan's character at issue. Plaintiff sought to refute Defendants' contentions about Shirshekan's character by establishing that Shirshekan is a convicted felon. The evidence was thus relevant.

It also was not unduly prejudicial. Plaintiff chose the most expedited manner to do so - reading the short deposition transcript excerpt -- because Plaintiff's case was running long, and defense counsel could call Defendant Shirshekan in its case. (Tr.

1099-1100.) In fact, Plaintiffs counsel expressly acknowledged that defense counsel could call Shirshekan in its case and explain the details of the conviction to the jury. (Tr. 1099.) Defense counsel declined to do so.

The trial court's decision to admit the deposition transcript is support by Missouri case law. Missouri courts have routinely held that the admission of testimony regarding a criminal conviction is not reversible error when the party attempting to exclude the evidence put his or her character at issue in the case. In *Collins v. West Plains Memorial Hospital*, 735 S.W.2d 404 (Mo. App. 1987), the trial court sustained a motion in limine preventing the defendant from discussing the plaintiff's prior criminal record at the ***37** wrongful death trial. *Id*. at 407. At trial, however, defendant argued that plaintiff's counsel had opened the door by eliciting testimony about the plaintiff's good character and conduct such as volunteering. *Id*. The court agreed, and permitted the defendant to illicit testimony about the plaintiffs prior criminal conviction. *Id*. The Court of Appeals affirmed, explaining that "evidence of [plaintiff's] character was relevant" and a criminal conviction can bear on his character and be admissible. *Id*.

Similarly, the Missouri Supreme Court explained that a party can open the door to evidence of prior crimes by remarks in the opening statement. *See State v. Rutter*, 93 S.W.3d 714, 727 (Mo. 2002). It explained: "When evidence is inadmissible because it is not relevant, it can nevertheless become admissible because a party has opened the door to it with a theory presented in an opening statement. Therefore, a defendant's opening statement can open the door to evidence of a prior crime." *Id*. at 727 (citing *Bucklew v. State*, 38 S.W.3d 395, 401 (Mo. banc 2001)).

The same is true here: defense counsel opened the door to character evidence both in his opening statement and during plaintiff's case-in-chief. As such, the trial court properly admitted the testimony to refute the statements and testimony regarding Defendant Shirshikan's character.

Defendants' case law is factually distinguishable, and is not relevant to the issues. None of the cases address the issue of whether testimony regarding a criminal conviction is relevant to the award of punitive damages or is relevant as evidence of the defendant's character when the defendants' character is disputed. (Apet. Brief at 39-45.)

***38** *Manufacturers American Bank v. Stamatis*, 719 S.W.2d 64 (Mo. App. 1986), discusses Mo. Rev. Stat. § 491.050, a statute that addresses convicts as competent witnesses and the use of criminal convictions to affect their credibility as a trial witness. *Id*. at 71-72. Here, plaintiff was not attempting to affect Defendant Shirshikan's credibility as a witness; Shirshikan did not testify during the first phase of trial. This case has no applicability to the facts here.

Moran v. North County Neurosurgery, Inc., 714 S.W.2d 231 (Mo. App. 1986) is similarly distinguishable. There, the trial court denied plaintiff's request to read portions of the defendant's deposition concerning felony convictions. The court did so after concluding that the criminal convictions were not relevant to determining whether the defendant was negligent in his treatment of the plaintiff. *Id*. at 233. Whether he is a convicted felon did not tend to prove or disprove whether he misdiagnosed the plaintiff. *Id*. Significantly, unlike this case, there the defendant did not attempt to put on evidence of his good character. *Id*. As such, the defendant's character was not a disputed issue of fact. That case also did not involve punitive damages. As such, *Moran* is not persuasive authority because the facts here are clearly distinguishable.

State v. Holleran, 197 S.W.3d 603 (Mo. App. 2006) - a criminal case standing for the unremarkable proposition that evidence of other unrelated crimes is typically not admissible in a criminal case - also has no applicability to the facts here. In that case, the prosecution tried to argue that it used evidence of prior guilty pleas at trial to prove identity. *Id*. at 609. The court rejected the argument because the prior guilty pleas had no logical relevance in establishing the defendant's identity as the person who committed ***39** the crime. *Id*. at 610. As such, the guilty pleas were not admissible evidence. *Id*. That case does not stand for any broader proposition than evidence must be relevant to be admissible. As discussed above, the evidence here was relevant and not unduly prejudicial, and thus properly admissible.

Defendants also argue that Plaintiff should have had to produce other evidence of the conviction, such as a record or additional details regarding the crime, including that Shirshekan pled guilty to check fraud. (Apet. Brief at 38-39.) This argument fails for

at least three reasons. First, Missouri law does not require additional proof of a conviction prior to admissibility by way of a record. In this case, there is no dispute as to whether Shirshikan is a convicted felon. Second, Defendants are essentially arguing that the deposition testimony regarding the criminal conviction was prejudicial, while also arguing that additional evidence regarding the conviction somehow would have made it admissible and non-prejudicial; these arguments are contradictory. Defense counsel made the strategic choice not to call Shirshekan at trial to clarify the particular felony. That was defendants' choice. Third, to the extent that Defendants argue that the crime was irrelevant because it had nothing to do with "care of the elderly, stealing, robbery, rape or murder" (Apet. Brief 38-39), this argument fails for the reasons explained above. This evidence was clearly relevant to Defendant Shirshikan's character and the defendants made that an issue.

In sum, the trial court properly admitted Defendant Shirshikan's short deposition testimony regarding his prior felony conviction. Defendants opened the door to the admission of this evidence, and the evidence was relevant and not unduly prejudicial ***40** given the circumstances. Plaintiff had the right to refute Defendants' contentions regarding Shirshikan's character, and they did so in the shortest, most direct manner. Defendant Shirshikan had an opportunity to take the stand and clarify the details of his conviction or testify about being a good person. He chose not to do so. He should not be allowed to now allege error. The trial court did not abuse its discretion in admitting this evidence and denying Defendants' requests for a new trial.

III. The trial court properly admitted testimony regarding witnesses' observations that were relevant to Plaintiff's negligence claims.

A. Standard of Review

This Court's standard of review of the trial court's denial of a motion for new trial and for admission or exclusion of evidence is discussed in Section II.A.

B. Argument

Defendants next argue that the trial court abused its discretion in permitting Plaintiff to "offer evidence and testimony regarding collateral issues with no relevance to this matter, which created confusion, bias, and prejudice against all defendants." (Apet. Brief at 49.) Specifically, defendants contend the trial court erred in admitting the following evidence and testimony: (1) Missouri Health and Senior Services ("DHSS") Annual Surveys that contain no reference to Novogradac; (2) testimony from DHSS surveyor Lisa McGhee, who admitted that she had no recollection of Novogradac, and stated that she could not tell whether any deficiencies actually applied to Novogradac; and (3) testimony from McGee and other employees regarding other residents at the nursing home that were not Novogradac. (Apet. Brief at 49.) In essence, Defendants ***41** argue this evidence and testimony was irrelevant and unrelated to this case because, though it involved events during the same time period, it contained no express reference or connection to John Novogradac. (Apet. Brief at 48-62.) This argument fails for at least two reasons.

First, this evidence was directly relevant to Novogradac's understaffing claims. Evidence is relevant when it tends to prove or disprove facts at issue or corroborate other relevant evidence. *Bank of Am., N.A. v. Stevens*, 83 S.W.3d 47, 53 (Mo. App. 2002). At trial, Plaintiff claimed, *inter alia*, that Novogradac's pressure sores were caused by understaffing, inadequate funding, improper training, improper care planning, and inadequate treatment and prevention of pressure sores at Defendants' facilities. (Tr. 1503, 1509-10, 1512-13, 1517-20. 1522-26.) The observations of DHSS Surveyor McGee, as well as former employees, made at the facilities where Novogradac was a resident at the time he was a resident tend to prove facts at issue, i.e., that the facilities were understaffed and inadequately funded, that employees were improperly trained, that care planning was improper, and that pressure sores were not properly prevented and treated.

Defendants' contention that the witnesses need to connect their testimony to Novogradac takes far too restrictive of a view of what is relevant evidence. McGee and former employees were not required to make a causal connection between their observations and Novogradac's injuries, as Defendants seem to allege. The testimony and evidence admitted at trial involved events that occurred at Barry Manor while Novogradac was a patient. This evidence was thus highly relevant to establishing the

conditions at the facility during the relevant time period. To the extent that Ms. McGee ***42** or other former employees testified about other patients, that evidence was relevant to establish that Barry Manor was an understaffed facility, that its problems and issues were wide ranging, and that other patients suffered similar injuries during the same time period. For example, contrary to Defendants' assertions, the trial court did not abuse its discretion in admitting McGee's testimony regarding the 700 hall and a resident who developed pressure sores within twelve days of admission. (Tr. 902-04; 908-09.) McGee's observations regarding failure to staff an entire hall due to understaffing and failure to prevent pressure sores within 12 days of admission due to understaffing (Tr. 902-04; 908-09) was highly relevant and probative. A claim of understaffing, by its very nature, requires evidence that there was not enough staff to properly care for and treat the residents at the facility, factoring in the residents' acuity. The fact that an entire hall went unstaffed and that staff did not have time to move a manual-lift resident for 5 days because there simply wasn't enough staff (Tr. 902-04; 908-09) tends to prove that the staff was spread so thin that it could not properly care for and treat residents.

Second, the trial court did not abuse its discretion because this evidence was directly relevant to Plaintiff's punitive damages claim. "Punitive damages require clear and convincing proof of a culpable mental state. . . 'by. . .' reckless, disregard for an act's consequences (from which evil motive is inferred)." *Rinehart v. Shelter Gen. Ins. Co.*, 261 S.W.3d 583, 591 (Mo. App. 2008) (quoting *Downey v. McKee*, 218 S.W.3d 492, 497 (Mo. App. 2007)). "When such intent is a focus of the inquiry, 'evidence should be allowed to take a wide range,' and a party's actions toward others which tend to demonstrate intent in the present case is relevant." *Id*. (citing *Brockman v. Regency Fin.* ***43** *Corp.*, 124 S.W.3d 43, 51 (Mo. App. 2004)). "Evidence of conduct not directly related to the claim becomes admissible if the acts are sufficiently connected to show the defendant's disposition, intention, or motive in the acts central to the current claim of damage." *Id*.

Here, Plaintiff had to prove that Defendant Shirshikan was deliberately indifferent to or had a conscious disregard for Plaintiff and the other residents at Barry Manor and White Oak. The DHSS surveys are directly relevant to Defendant Shirshikan's state of mind at the time. Indeed, the evidence involved (a) patient's at the same facility; (b) being cared for (or not cared for) by the same staff; (c) during the same period of time; and (d) with similar problems and injuries. This evidence was highly relevant to proving Defendant Shirshikan's state of mind and willful actions.

Indeed, McGee's testimony regarding her observations, including those pertaining to other residents, tended to prove that Defendants were on notice of the dangerous conditions that existed at the facilities, but failed to remedy those dangerous conditions - facts that were directly relevant to proving Plaintiff's punitive damages claim. *See Schroeder v. Lester E. Cox Med. Ctr.*, 833 S.W.2d 411 (Mo. App. 1992). McGee discussed the results of the September 2002 survey with Shirshekan before exiting the facility. (Tr. 917-18.) Moreover, instead of correcting the deficiencies (which HMC's own Regional Manager testified were a "big deal" and "very serious") within forty-five days as required, Shirshekan and HCM failed to do so, attempted to falsely pad the staff upon the survey team's arrival, and again received nine deficiencies, including another for understaffing. (Tr. 370, 405, 63, 878, 917-19, 922.) Shirshekan and HCM were fully ***44** aware of the serious problems at Barry Manor because DHSS had cited the facility for deficiencies in August and September 2002 and McGee spoke to Shirshekan personally regarding her concerns upon exiting the facility in September. Despite being put on notice of 26 quality of care deficiencies, including understaffing as well as several other deficiencies, Shirshekan and HCM knowingly and willfully continued to operate the facility in a wanton manner and *again was cited for deficiencies, including* ***understaffing***, in November 2002. (Tr. 924-29.)

To the extent that Defendants are contending that the DHSS surveys were improperly referred to by Lisa McGee that argument fails as well. The issue of admissibility of surveys was decided by the Alabama Supreme Court in *Montgomery Health Care Facility v. Ballard*, 565 So. 2d 221 (Ala. 1990). There, the court held that a survey is "evidence of notice to a defendant of an alleged dangerous condition or defect [that] can be relevant to the issue of negligence and is admissible if the alleged defect proximately caused or contributed to the injury involved." *Id*. at 223. At trial, Plaintiffs experts testified that understaffing proximately contributed to cause Novogradac's injuries. *See supra* at 19-20. As discussed in Ballard, the DHSS surveyor's testimony regarding her survey findings was evidence of notice to Defendants of dangerous conditions at their facilities, including understaffing. Consequently, that testimony was highly relevant and admissible.

Missouri courts also have admitted nursing home surveys into evidence. In *State v. Kaiser*, 139 S.W.3d 545 (Mo. App. 2004), the court determined that nursing home surveys conducted by DHSS were "logically and legally relevant" and that any ***45** prejudicial effect of the evidence did not outweigh its probative value. *Id*. at 557-58. Here, the actual surveys were never even admitted into evidence; rather, the DHSS surveyor was permitted to discuss her own observations and findings as a witness.

It is also worth noting that defense counsel mentioned the DHSS surveys and "deficiencies" contained within those surveys within the first minute of Defendants' opening statement. (Tr. 68.) Defense counsel went on to again mention the DHSS surveys and the "thirty-five deficiencies." (Tr. 69.) He also mentioned a deficiency related to "a Spanish speaking resident who couldn't communicate with staff. That's a federal deficiency. In fact, two or three deficiencies grew outta that fact." (Tr. 69-70.) Defense counsel mentioned "a whole handful of deficiencies from the kitchen." (Tr. 69.) In doing so, Defendants opened the door for the admission of such evidence and is, therefore, precluded from complaining about the same. *See State v. Rutter*, 93 S.W.3d at 727.

Finally, if Defendants believed that this evidence should not have been considered for certain purposes, Defendants could have requested limiting instructions to that effect. None were requested. As such, they cannot now claim prejudice. *See, e.g., Rinehart*, 261 S.W.3d at 591 (affirming jury verdict and finding no error when defendant did not request a limiting instruction regarding evidence of other similar conduct). Moreover, on cross-examination of Lisa McGee, defense counsel elicited testimony establishing that Ms. McGee was not contending that the problems she witnessed and documented directly involved Novogradac. (Tr. 935.) As such, the jury was not misled into believing that this evidence alone proved Novogradac's claims. Instead, other witnesses and evidence were ***46** used to that effect. For example, Plaintiff's expert witnesses - Dr. Wojtalik, Nurse Zaccardi, and Nurse Black - satisfied the causation element (and standard of care element) of Plaintiffs claims by testifying that Defendants were negligent in understaffing, inadequately funding, improperly training, improperly care planning and/or inadequately treating and preventing pressure sores and that such negligence caused injury to Novogradac. *See supra* at 19-20. Lisa McGee's testimony, the DHSS surveys, and the former employee testimony supported the contention that the Barry Manor was underfunded and understaffed. Also, this same evidence established Defendant Shirshikan's culpable state of mind at the time. It was clearly relevant, admissible evidence. The trial court did not abuse its discretion in admitting it or denying Defendants a new trial.

IV. The trial court properly admitted the opinion testimony of Raymond Wojtalik, M.D. and Joyce Black, R.N.

A. Standard of Review

This Court's standard of review of the trial court's denial of a motion for new trial is discussed in Section II.A.

The admission or exclusion of expert opinion testimony is a matter within the discretion of the trial court, which will not be disturbed unless it plainly appears that it has been abused. *Eltiste v. Ford Motor Co.*, 167 S.W.3d 742, 750-51 (Mo. App. E.D. 2005). The trial court has discretion to determine an expert's qualifications to testify on specific matters. *Wingate v. Lester E. Cox Med. Ctr.*, 853 S.W.2d 912, 918 (Mo. 1993).

***47 B. Argument**

Defendants argue that two of Plaintiffs expert witnesses - Raymond Wojtalik, M.D. and Joyce Black, R.N.- lacked the necessary experience and expertise to offer certain opinions and, therefore, the trial court abused its discretion in admitting the same. (Apet. Brief at 64-76.) Defendants' arguments are meritless.

The standard for the admission of expert testimony in civil cases is set forth by Mo. Rev. Stat. § 490.065. Determining whether a witness is an expert is not a determination of whether there is another better qualified witness. *Emerson Elec. Co. v. Crawford & Co.*, 963 S.W.2d 268, 272 (Mo. App. 1997). Rather, the question is "whether the witness possesses peculiar knowledge, wisdom or skill regarding the subject of inquiry, acquired by study, investigation, observation, practice or experience." *Bynote v. National Super Markets, Inc.*, 891 S.W.2d 117, 125 (Mo. 1995) (citation omitted). None of these sources is more important

than the others. *State v. Hoff*, 904 S.W.2d 56, 58 (Mo. App. 1995). Moreover, a witness need not have a complete knowledge of a subject. *Schreibman v. Zanetti*, 909 S.W.2d 692, 698 (Mo. App. 1995). Testimony ought to be admitted if the expert witness possesses some qualification. *Whitnell v. State*, 129 S.W.3d 409, 413 (Mo. App. 2004). "Any weakness in the factual underpinnings of the expert's opinion or in the expert's knowledge goes to the weight that testimony should be given and not its admissibility . . . . In general, the expert's opinion will be admissible, unless the expert's information is so slight as to render the opinion fundamentally unsupported." *Id*. at 414 (citation omitted).

***48 1. Raymond Wojtalik, M.D.**

Defendants allege that Dr. Wojtalik, who is a vascular surgeon, had no experience in management, staffing or administration of a nursing home facility and no special knowledge regarding business structures in general, and therefore, he was not qualified to offer opinions regarding the same. (Apet. Brief at 64-70.) Specifically, Defendants complain about Dr. Wojtalik's opinion that Shirshekan, as the owner/operator of, and individual ultimately responsible for, Barry Manor and White Oak Manor, was negligent in knowingly allowing staffing issues to continue after receiving notice regarding the same. (Apet. Brief at 67-68.) Defendants also claim that this testimony amounted to an opinion regarding corporate structure that Dr. Wojtalik was not qualified to make. (Apet. Brief at 68-69.) This argument is meritless.

Dr. Wojtalik possessed the qualifications to give each of his opinions. Dr. Wojtalik is a board-certified general and vascular surgeon who, at the time of trial, had 35 years of experience in wound care and amputations. (Tr. 678-79.) He testified that in his practice, he has regularly admitted patients to nursing homes and seen patients in nursing homes for wound treatment, and the majority of his patients are elderly. (Tr. 682.) Moreover, he is the director of a wound clinic that specializes in the etiology, diagnoses, and treatment of wounds. As the director, he was responsible for ensuring that the facility was adequately staffed so that patients' wounds received proper care and treatment. (Tr. 687-88.) Additionally, Dr. Wojtalik was the Director of Surgical Reviews for a program mandated by the federal government that involved review of Medicare and Medicaid records of nursing facilities to determine whether the quality of ***49** care, including staffing, was proper. (Tr. 760-61.) Moreover, he had personal experience in evaluating staffing needs and making recommendations regarding staffing for wound care patients being treated in nursing facilities. (Tr. 688, 761-65.) Dr. Wojtalik testified that adequate staffing of a nursing facility depends on two elements - the number of patients in the facility and the amount of care that each of the patients required. (Tr. 764-65.) He further testified that staffing at nursing homes is directly related to whether wound patients receive adequate care and treatment. (Tr. 761-62.) Dr. Wojtalik's 35 years of experience in treating the wounds of elderly nursing home residents and evaluating and making recommendations regarding nursing home staffing qualified Wojtalik to render opinions regarding these issues.

Moreover, as an experienced vascular surgeon, Dr. Wojtalik was qualified to evaluate the etiology and cause of Novogradac's pressure wounds. As stated, one important function of his wound care clinic is to determine the cause of patients' pressure wounds, and he has vast experience in making such a determination. (Tr. 687-88.) He testified that the medical records made clear that Novogradac's wounds were caused by pressure which, in turn, was caused by the staff's failure to turn and reposition him. (Tr. 717-718, 722, 740, 742.) He further testified that the staffs failure to turn and reposition Novogradac was directly related to understaffing. (Tr. 761-62.) He based this opinion on the medical records, employees' depositions, the DHSS surveyor's deposition, medical literature, and his own training and experience. (Tr. 761-62.)

In addition to having the qualifications to render his opinions regarding staffing, Dr. Wojtalik had a factual basis for his opinion that Shirshekan was responsible for ***50** staffing. He based his opinion, in part, upon Shirshekan's own deposition testimony that he was the licensed operator of and was ultimately responsible for the facilities. (Tr. 772-73.) He also based his opinions on the testimony of Regional Manager Carol Jeans, who testified that Shirshekan, as the owner and licensed operator of Barry Manor and White Oak Manor, had the authority to hire and fire employees of those facilities, was responsible for ensuring that they had adequate supplies, budgets and staff, and had the ultimate authority to make staffing decisions. (Tr. 330, 333-34, 342-44; 355-56, 765.) She further testified that Shirshekan was responsible for any State deficiencies they received, including understaffing. (Tr. 342.) Consequently, Dr. Wojtalik had a proper factual basis for and was qualified to render his opinion that Shirshekan had a duty to adequately staff the facilities and that he breached this duty.

Dr. Wojtalik clearly possessed the training, experience, knowledge, and skill to testify regarding prevention and treatment of pressure ulcers, as well as how inadequate staffing contributes to the inability to treat, assess and prevent pressure ulcers. *See Bynote*, 891 S.W.2d at 125. Defense counsel had an opportunity to cross examine Dr. Wojtalik. Any alleged weakness in the factual underpinnings of his opinions or in his knowledge goes to the weight his testimony should be given and not its admissibility. *See Whitnell*, 129 S.W.3d at 414.

2. Joyce Black, R.N.

Defendants argue that the trial court abused its discretion in admitting the opinions of Nurse Black regarding the nursing care delivered at Barry Manor and White Oak Manor because Black had never worked at a long-term care facility. (Apet. Brief at 70- ***51** 71.) Defendants fail to point to any specific opinions that they deem improper; rather, they generally and vaguely state that she was not qualified to render opinions regarding nursing care at the facilities. (Apet. Brief at 70-71.) Because Defendants have failed to point to any specific testimony, this Court cannot determine whether defense counsel objected to the allegedly improper opinions and, therefore, cannot determine whether Defendants properly preserved their argument for appellate review. *See Schindler v. Schindler*, 209 S.W.3d 35, 39 (Mo. App. 2006). For this reason, the Court should not even consider Defendants' argument.

Furthermore, Defendant's argument fails on the merits. Contrary to Defendants' assertion, Nurse Black was highly qualified to offer opinions regarding nursing care at Barry Manor and White Oak Manor. She has associate's, bachelor's, and master's degrees in nursing, as well as a PhD in nursing. (Tr. 519-20.) As part of her PhD studies, she collected data regarding pressure ulcers and peripheral vascular disease at long-term care facilities for an extended period of time and analyzed the same. (Tr. 524-25.) Moreover, she is a member and the president of the National Pressure Ulcer Advisory Panel, a group of 18 experts, including medical doctors and engineers, with extensive experience with pressure ulcers. (Tr. 522.) Moreover, she has given multiple presentations regarding pressure ulcers and has published a vast number of journals with regard to the care of the elderly. (Tr. 526-67.)

Plaintiffs case involved issues of understaffing, inadequate training and poor nursing care that caused or contributed to cause the general neglect of Novogradac and, specifically, his pressure ulcers. It is difficult to fathom an expert more ideally qualified ***52** than Nurse Black to testify regarding these matters. Clearly, she has acquired a “peculiar knowledge” regarding the proper care and treatment of patients at long-term care facilities, particularly those with pressure wounds, through education, study, and experience. The fact that she has not had specific experiences, such as being employed by, an administrator of, or a director of nursing at a long-term care facility, goes to the weight of her testimony and not its admissibility. *Whitnell*, 129 S.W.3d at 414.

Defendants also argue that Nurse Black was not qualified to opine regarding causation. (Apet. Brief at 5.) Specifically, Defendants claim that the trial court abused its discretion in allowing Nurse Black to testify regarding whether a myocardial infarction suffered by Novogradac several months before development contributed to the development of his pressure ulcers. (Apet. Brief at 73.) Nurse Black, who has a PhD in nursing and lectures on this exact subject, testified that she believed that it did not. (Tr. 587-88.) Under clearly established Missouri law, the trial court did not abuse its discretion in admitting this testimony. In *Parris v. Uni Med, Inc.*, 861 S.W. 2d 694, 699 (Mo. App 1993), the Missouri Court of Appeals clearly held that nursing experts can testify with regard to cause and treatment of pressure ulcers, which was the exact subject of Nurse Black's testimony. She was not, for example, testifying regarding the cause of Novogradac's myocardial infarction. Rather, her testimony was regarding the cause of Novogradac's pressure ulcers, which Missouri courts have clearly stated is proper.

***53 V. The jury's punitive damages award was based on evidence, was not driven by passion and prejudice, and was not excessive.**

A. Standard of Review

This Court's standard of review of the trial court's denial of a motion for new trial is discussed in Section II.A.

Typically, the decision to award punitive damages is markedly committed to the jury and trial court's discretion, and the appellate court will interfere only in extreme cases. *See, e.g.*, *Barnett*, 963 S.W.2d at 661. After a jury awards punitive damages, both the trial court, which has the option of a remittitur pursuant to Section 510.263, and the appellate court review the award for an abuse of discretion. *Call v. Heard*, 925 S.W.2d 840, 849 (Mo. banc 1996).

"On appellate review, an abuse of discretion is established when the punitive damage award is so disproportionate to the factors relevant to the size of the award that it reveals improper motives or a clear absence of the honest exercise of judgment." *Id*. (quotations and citation omitted). "In other words, the amount of punitive damages must somehow be related to the wrongful act and the actual or potential injury resulting therefrom, although there is no fixed mathematical relation between the amount of actual damages and the amount of punitive damages awarded." *Id*. "Only when the amount is manifestly unjust will appellate courts interfere with or reduce the size of a verdict." *Barnett*, 963 S.W.2d at 661. A case by case analysis is used to evaluate punitive damage awards. *Id*.

***54 B. Argument**

Defendants argue that the jury's punitive damages award was (1) not based on evidence, but instead was driven by passion and prejudice, and (2) excessive. (Apet, Brief at 76-82.) Both of these arguments fail".

1. The punitive damages award was based on evidence, not passion or prejudice.

Essentially, Defendants argue that because the jury initially awarded $500,000 in compensatory damages and $1,100,000 in punitive damages prior to hearing any evidence regarding Defendants' net worth, then the jury's award must not have been based on evidence, but, rather, was a result of passion for Plaintiff and prejudice against Defendants. (Apet. Brief at 78-81.) This argument is nonsensical.

The jury heard ample evidence during the first phase of trial to support a finding of punitive damages. *See supra* Section I. As such, the jury initially awarded a punitive damages award of $1,100,000. This amount, however, was awarded after the first phase - prior to the parties putting on evidence regarding the appropriate amount of punitive damages. As such, the Court disregarded the award and proceeded to the second phase of trial in which Plaintiff was permitted to put on evidence of Defendants' net worth. In light of this new evidence, the jury awarded a higher amount of punitive damages.

Nothing about these events suggests that the award was based on passion or prejudice. Rather, the events establish that the jury was persuaded by the evidence regarding Defendants' net worth, and thus decided to award a higher punitive damage award after hearing all the evidence. The fact that the jury actually entered a punitive ***55** damage award after phase one before hearing evidence regarding Defendants' net worth is no basis for a new trial. It did not prejudice Defendants; the jury had already determined that punitive damages were appropriate. As such, the trial court did not abuse its discretion by disregarding the initial punitive damage award, and allowing phase two and the evidence regarding Defendants' net worth.

2. The punitive damages award was not excessive.

The punitive damages award was not excessive. "The well-established purpose of punitive damages is to inflict punishment and to serve as an example and a deterrent to similar conduct." *Hess v. Chase Manhattan Bank, USA, N.A.*, 220 S.W.3d 758, 771 (Mo. 2007) (quoting *Call*, 925 S.W.2d at 849). The evidence was overwhelming that Defendant Shirshikan's nursing homes were grossly understaffed, he was aware of this fact, did nothing about it, and patients like John Novogradac suffered greatly because of Defendant Shirshikan's actions. *See supra* Section I. The jury obviously found this evidence persuasive, and concluded that Defendant Shirshikan and his corporation that oversaw the nursing homes should be punished and deterred from

harming patients in the future. The $2.5225 million award - and the approximate 5:1 ratio of punitive to compensatory damages - is entirely appropriate given the circumstances. *See, e.g.*, *Miller v. Levering Reg'l Health Care Ctr., LLC*, 202 S.W.3d 614, 617-19 (Mo. App. 2006) (upholding damages award for aggravating circumstances totaling 24 times the compensatory damages based on nursing home negligence). This simply is not a case where the award is manifestly unjust. Rather, the record reveals a "calm and deliberate jury that reached reasoned results." *Id*.

***56** Though Defendants do not come out and say it directly, they appear to argue that the jury's verdict does not comport with the United States Constitution's due process requirements. That issue was not properly raised in Defendant's Motion for Judgment Notwithstanding the Verdict, or in the Alternative for a New Trial. Defendants argued that the evidence did not support a punitive damage award, that the award was based on passion and prejudice, and that punitive damages should not have been awarded at all (L.F. 177-80; 185-88; 223-25), but they did not argue that the punitive damage award was unconstitutionally excessive or should have been remitted to a lower amount by the trial court. As such, Defendants have waived this argument.

The argument also fails on the merits. In support of their argument, they cite to the United States Supreme Court's recent opinion in *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605 (2008). That opinion, however, is not directly relevant to this action. State law governs punitive damage awards such as the one here, although subject to the limits of constitution due process - the Constitutional requirement that the defendant have fair notice that such a penalty could result from its conduct. *See, e.g.*, *BMW v. Gore*, 517 U.S. 559 (1996); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2002). *Exxon Shipping* involved the application of federal maritime laws, and the Court's limitation of punitive damage to a ratio of 1:1 to the compensatory damages was based on an application of federal maritime laws. *Exxon Shipping Co.*, 128 S. Ct. at 2605-08. The Court's holding in *Exxon Shipping* does not apply directly to awards of punitive damages in state law cases and did not involve application of the Due Process Clause or constitutional principles. *Id*.

***57** The Supreme Court has stated it is "reluctant to identify concrete constitutional limits on the ratio between harm, or potential harm, to the plaintiff and the punitive damages award." *State Farm Mut. Auto. Ins. Co.*, 538 U.S. at 424. The Court has stated that single-digit ratios are more likely to comport with due process. *Id*. at 425. Greater ratios, however, are more likely to be upheld when "a particularly egregious act has resulted in only a small amount of economic damages." *Id*. (citation omitted). "In sum, courts must ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered." *Id*. at 426. Appellate courts do not have "license to toss aside considered jury verdicts based upon arbitrary ratios or mathematical formulae [because to] do so would undermine the essential deterrent effect provided by properly awarded punitive damages." *Scott v. Blue Springs Ford Sales, Inc.*, 176 S.W.3d 140, 144 (Mo. banc 2005) (Teitelman, J., concurring).

In these Supreme Court cases, the Court identified three factors to evaluate to ensure that punitive damages do not violate due process: (1) the defendant's degree of reprehensibility; (2) the disparity between the harm suffered and the punitive damages award; and (3) the difference between the award and the civil penalties authorized or imposed in similar cases. *State Farm Mut. Auto. Ins. Co.*, 538 U.S. at 424 (citing *BMW*, 517 U.S. 559); *see also Miller*, 202 S.W.3d at 619 (stating and applying the three factors). The primary focus is the reprehensibility factor. *Id*.

Within the primary factor, reprehensibility, the Supreme Court defined five sub-factors: (1) the type of harm; (2) reckless disregard for health and safety of others; (3) ***58** financially vulnerable targets; (4) repeated misconduct; and (5) intentional malice, trickery or deceit. *State Farm Mut. Auto. Ins. Co.*, 538 U.S. 408. It did not rank these factors. *Id*.

Application of the facts here to those three factors makes clear that the punitive damages award was not excessive. First, the degree of reprehensibility is great. Defendants knew their facilities were understaffed and that residents were developing pressure sores that went untreated and, yet, they did nothing to correct this life-threatening problem, as evidenced by the DHSS surveyor's testimony. *See supra* Section I.

Second, there was no disparity between the harm suffered and the punitive damages award. Novogradac was forced to undergo amputations of both of his legs as a result of the negligence of Defendants in allowing him to develop multiple pressure sores and in allowing those sores to progress to the point that they became necrotic, severely infected, and gangrenous.

Third, the final punitive damages award of $2,522,500, which is approximately five times the amount of compensatory damages, is comparable to civil penalties imposed in similar cases. *See, e.g.*, *Miller*, 202 S.W.3d 614 (upholding damages award for aggravating circumstances totaling 24 times the compensatory damages based on nursing home negligence); *Schroeder*, 833 S.W.2d 411 (upholding punitive damages award totaling four times the compensatory damages based on nursing home negligence).

Here, the ratio between compensatory and punitive damages was roughly 5:1. Given the egregious facts, this award is fully consistent with due process.

***59 VI. The trial court did not abuse its discretion in approving and giving Jury Instruction Nos. 5, 14 and 15.**

A. Standard of Review

Ordinarily, "[t]he submission of an instruction will be upheld if supported by substantial evidence." *Warren Davis Props. V, L.L.C. v. United Fire & Cas., Co.*, 111 S.W.3d 515, 523 (Mo. App. 2003) (citation omitted). Substantial evidence is that which, if it is true, is probative and can constitute the basis for a jury verdict. *Id*. In reviewing a challenged instruction on appeal, "we view the evidence and inferences in the light most favorable to the instruction and disregard any contrary evidence." *Id*. On appeal, a trial court's ruling on an alleged instructional error is not disturbed absent an abuse of discretion. *Burns v. Elk River Ambulance*, 55 S.W.3d 466, 476 (Mo. App. 2001).

B. Argument

At trial, Plaintiff prepared and offered Jury Instructions 1-18 and also prepared and offered Verdict Forms "A" and "B." (L.F. 136-61.) Defendants did not prepare or offer any jury instructions. Instead, they logged certain objections to Plaintiffs' proposed instructions.

On appeal, Defendants now argue that the punitive damages instructions - Instructions 4, 14, and 15 - were erroneous for three reasons. First, Defendants contend that Instruction 4 should not have included language about punitive damages and Instructions 14 and 15 should not have been given because Plaintiff failed to put forward clear and convincing evidence of any actions by Defendants that would give rise to punitive damages. (Apet. Brief at 85.) Second, Defendants contend that Instructions 14 ***60** and 15 set forth the wrong standard for punitive damages against a health care provider. Third, Defendants contend that Instructions 14 and 15 were given in error because they referenced "Barry Manor, LLC residents and/or White Oak Manor, LLC residents." None of these arguments are persuasive. The trial court properly instructed the jury on punitive damages.

Defendants' first argument is not a challenge to the wording of particular jury instructions but rather the same contention made in Section I - that Plaintiff failed to present clear and convincing evidence of actions by any Defendants that would give rise to punitive damages. As explained in Section I, Plaintiff presented ample evidence to support the submission of Instructions 4, 14, and 15, and the inclusion of a claim for punitive damages against Defendant Shirshekan and Defendant HCM.

Defendants' second argument maintains that through Instructions 14 and 15 the trial court provided an improper and lower punitive damages standard than is required, thereby prejudicing Defendants. This argument is meritless.

Plaintiff submitted Instructions No. 14 and 15 based on MAI 10.07, which is the approved instruction for punitive damages in negligence cases. Instructions 14 and 15 allowed for an award of punitive damages only if there was clear and convincing

evidence that Shirshekan and/or HCM "showed complete indifference to or conscious disregard for the safety of others." (L.F. 151-52).

MAI 10.07 is the proper punitive damage instruction in cases against health care providers. As Defendants concede, Plaintiff's claims were for medical *negligence*. (Apet. Brief at 89.) While there are Missouri Approved Instructions that are applicable in ***61** medical malpractice cases only, there is no such instruction on the issue of punitive damages. *Schroeder*, 833 S.W.2d at 424. Consequently, the punitive damages instruction applicable to negligence cases should be used. *See id; see also Miller*, 202 S.W.3d at 617 (holding that for punitive or aggravating circumstances damages in a nursing home negligence case, evidence must show that defendant either "knew or had reason to know that there was a high degree of probability that the action would result in injury" and instructing the jury regarding the same); Robert H. Dierker and Richard J. Mehan, Medical Malpractice, 34 Mo. Prac, Personal Injury and Torts Handbook § 28:13 (2007 ed.) (stating that the Missouri Approved Instructions regarding punitive damages should be used in medical malpractice cases).

Defendants point out that Mo. Rev. Stat. § 538.210.5 states that "an award of punitive damages against a health care provider. . . shall be made only upon a showing by a plaintiff that the health care provider demonstrated willful, wanton, or malicious misconduct with respect to his actions. . . ." Mo. § 538.210.5. Significantly, this statute does not mention jury instructions or state that a jury must be instructed using the exact words "willful, wanton or malicious"; rather, it states that the plaintiff must show that defendants' conduct was "willful, wanton or malicious."

Instructions 14 and 15 comport with the requirements of Section 538.210.5. Missouri courts and cases from the Eighth Circuit interpreting Missouri law have explained that "complete indifference or conscious disregard" necessarily requires a showing of willful, wanton, or malicious conduct. *See Sutherland v. Elpower Corp.*, 923 F.2d 1285, 1290-1291 (8th Cir. 1991); ***62** *Roth v. Black & Decker*, 737 F.2d 779, 781 (8th Cir. 1984); *see also Evans v. Illinois Cent. R.R. Co.*, 233 S.W. 397 (Mo. 1921); *Professional Ins. Managers v. RCA Mut. Ins. Co.*, 884 S.W.2d 332, 337 (Mo. App. 1994).

In *Sutherland*, the Eighth Circuit expressly stated that "complete indifference or conscious disregard necessarily" requires a showing of willful, wanton, or malicious conduct:
Under Missouri law, to establish complete indifference or conscious disregard, a plaintiff must show a "significant degree of fault" on the part of the defendants. *Ferren v. Richards Mfg. Co.*, 733 F.2d 526, 529 (8th Cir. 1984). The defendants' actions must have been "willful, wanton, malicious or so reckless as to be in utter disregard of consequences." *Roth v. Black & Decker*, 737 F.2d 779, 781 (8th Cir. 1984) (quoting *Vanskike v. ACF Indus., Inc.*, 665 F.2d 188, 208-09 (8th Cir.1981), cert. denied, 455 U.S. 1000, 102 S.Ct. 1632, 71 L.Ed.2d 867 (1982) (applying Missouri law)). To meet this high standard, the plaintiff must produce evidence that the defendant, at the time of the occurrence giving rise to liability, was "conscious that his action [would] naturally or probably result in injury." *Ferren*, 733 F.2d at 529 (quotations and citations omitted).

Sutherland, 923 F.2d at 1290-91 (citing *Roth*, 737 F.2d at 781-82). Moreover, as the Eighth Circuit observed in *Roth*, for an award of punitive damages under Missouri law ***63** there must be some element of wantonness, and "[t]he knowledge of the wrongfulness of the act may be evidenced by a complete indifference to or conscious disregard for the safety of others." *Roth*, *137* F.2d at 781-82. Because the jury found there was "complete indifference to or conscious disregard for the safety of others," it necessarily found that Shirshikan and HCM had engaged in willful, wanton, or malicious conduct.

Notably, MAI 10.07 was created after Mo. Rev. Stat. § 538.210.5 was enacted. The statutory section was passed into law in 1986. MAI, 4th edition - which created many instructions for use in actions against health care providers, including MAI 10.07 - was promulgated and approved by the Supreme Court of Missouri on April 9, 1991, and their use has been required since January 1, 1992. *Schroeder*, 833 S.W.2d at 424. Presumably the drafters of MAI 10.07 and the Missouri Supreme Court were aware of Section 538.210.5, and drafted MAI 10.07 to comport with its requirements. Moreover, these instructions have been updated at least twice, and no changes were made to MAI 10.07. Finally, for more than 16 years MAI 10.07 has been the

approved instruction in actions for medical negligence, and plaintiff was not able to find a single case in which a punitive damage award was set aside or a new trial was granted because the jury instructions did not comport with Section 538.210.5.

Defendants cannot claim error or attempt to seek a new trial based on Mo. Rev. Stat. § 538.210.5 because it is unquestionable that Plaintiff proved at trial that Defendants Shirshekan and HCM demonstrated willful, wanton, and malicious conduct. *See supra* Section I. The evidence was overwhelming that Defendant Shirshekan was aware that his nursing homes were understaffed, and given the language in the jury instructions, the jury ***64** necessarily found his conduct and HCM's conduct to be willful, wanton, and malicious. *See id*. That is all the statute requires; it does not requirement a jury to apply instructions with those exact words. The trial court did not abuse its discretion instructing the jury on punitive damages, and Defendants were not prejudiced by the use of the punitive damage instructions, Instructions 14 and 15.

Defendants' third argument in this section contends that Instructions 14 and 15 were given in error because they referenced "Barry Manor, LLC residents and/or White Oak Manor, LLC residents." (Apet. Brief at 90.) This is a new argument on appeal.

Defendants failed to preserve this argument for appellate review. In order to preserve an alleged instructional error for review on appeal, a party "must make *specific* objections to the giving or failure to give instructions before the jury retires to consider its verdict; the objections and grounds therefore must be stated *distinctly* on the record, and the objections must also be raised in the motion for new trial." *Doe v. McFarlane*, 207 S.W.3d 52, 74 (Mo. App. 2006) (emphasis added); *see also* Rule 70.03. A vague, general objection does not allow the trial court to make an informed ruling as to the validity of the objection. *Gill Constr., Inc. v. 18th & Vine Auth.*, 157 S.W.3d 699, 719 (Mo. App. 2004). As such, a general objection preserves nothing for appellate review. *Gurley v. Montgomery First Nat'l Bank, N.A.*, 160 S.W.3d 863, 868-69 (Mo. App. 2005). Here, Defendants did not make this argument at the trial court level. (Tr. 1446-47; 1465-67.) As such, they have waived their right to make it on appeal.

The argument also fails on the merits. Instructions 14 and 15 permitted the jury to award punitive damages if it determined there was clear and convincing evidence that, ***65** among other things, Shirshekan and/or HCM "failed to provide sufficient staff to adequately care for Barry Manor, LLC residents and/or White Oak Manor, LLC residents." (L.F. 151.) Defendants claim this instruction led the jury to award damages based on Shirshekan's and HCM's actions toward all patients at the facilities. They provided no basis for believing this is what occurred.

Plus, the instruction accurately reflected the circumstances. One of Plaintiffs claims at trial was that Defendants failed to adequately staff the facilities and that such failure caused or contributed to cause injury to Novogradac. As discussed, the DHSS surveyor and Plaintiff's experts testified that what constitutes "adequate staff depends on the number of residents and the acuity of the residents. At trial, Plaintiff argued that Defendants failed to properly take into account the number and acuity of residents in staffing the facilities and that this failure caused injury to Plaintiff. Consequently, Instruction No. 14 was a proper statement. If the instruction had read as Defendants desired, then it would have stated, in pertinent part: "Shirshekan failed to provide sufficient staff to adequately care for John Novogradac." (Apet. Brief at 90.) Such an instruction would have been nonsensical because, in theory, if Defendants had staffed the facility with only one nurse total, this would have been "sufficient staff to adequately care for John Novogradac." Because Plaintiff's claim was that Defendants failed to adequately staff the facilities by taking into account the number and acuity of residents and that this understaffing caused injury to Novogradac, Instruction No. 14 was proper. Defense counsel had every opportunity to explain to the jury that it could not award damages to Novogradac based on conduct toward other patients. Defendant also could have included ***66** an instruction to that effect. Defendant offered no instructions, and there is no reason to believe that the jury award damages based on conduct toward other patients. Defendants' third argument provides no basis for a new trial.

VII. The trial court did not abuse its discretion in approving and giving Instruction No. 5.

A. Standard of Review

On appeal, a trial court's ruling on an alleged instructional error is not disturbed absent an abuse of discretion. *Burns*, 55 S.W.3d at 476.

B. Argument

Defendants next argue that Instruction No. 5 did not properly define the meaning of "defendant's profession" in the instruction and, thereby, failed to give the jury information necessary to determine the appropriate standard of care. (Apet. Brief 94-96.) Defendants argue that, as worded, Instruction No. 5 implied that all Defendants were members of a single profession and that all Defendants have the same duties and responsibilities to the nursing home residents. (Apet. Brief at 94-96.) Defendants argue that Instruction No. 5 gave the jury a roving commission to determine the applicable standard for each of the Defendants. (Apet. Brief at 94-96.) Defendants' argument is meritless.

Instruction No. 5, which is MAI 11.06, reads:

> The term "negligent" or "negligence" as used in these instructions means the failure to use that degree of skill and ***67** learning ordinarily used under the same or similar circumstances by the members of defendant's profession.

(L.F. 142.)

If "defendant" had been plural, then the instruction would have read "members of defendants' profession," thereby implying that all defendants shared a single profession which seems to be Defendants' current concern. On the contrary, "defendant's" is singular, meaning that the instruction applied to each separate defendant, each of whom had its own profession. Consequently, the instruction is not confusing or misleading.

To the extent that Defendants argue that the actual professions of each of Defendant should have been defined, this argument is nonsensical. MAI 11.06 defines negligence as "the failure to use that degree of skill and learning ordinarily used under the same or similar circumstances by the members of defendant's profession." The MAI does not require or even suggest that "profession" be defined. Moreover, there is no case law imposing such a requirement. Furthermore, as Instruction No. 5 clearly states, the definition of "negligent" or "negligence" was to be used each time "negligent" or "negligence" was used in the instructions. If "defendant's profession" had been defined with regard to each Defendant within Instruction No. 5, then that instruction could no longer be applied universally throughout the set of instructions.

Defendants further argue that Plaintiff never presented evidence regarding the standard of care applicable to Shirshekan. This argument is contrary to the evidence (which must be considered in the light most favorable to Plaintiff) as Dr. Wojtalik testified that as the licensed operator of the nursing homes and the individual responsible ***68** for staffing the facilities, the standard of care required Shirshekan to adequately staff Barry Manor and White Oak Manor, taking into account the number of patients and patient acuity, in order to prevent, *inter alia*, pressure ulcers. (Tr. 761-62, 765, 767, 773.)

Instruction No. 5 was an unmodified approved instruction that was neither misleading nor prejudicial and was properly used in this case. Moreover, as discussed, the pronoun ("defendant's") and the noun ("profession") are both singular; thus, there could be no confusion regarding whether all Defendants share one profession.

VIII. The trial court did not abuse its discretion in approving and giving Jury Instruction Nos. 7 and 8.

A. Standard of Review

Ordinarily, "[t]he submission of an instruction will be upheld if supported by substantial evidence." *Warren Davis Props. V*, 111 S.W.3d at 523 (citation omitted). Substantial evidence is that which, if it is true, is probative and can constitute the basis for a jury verdict. *Id*. In reviewing a challenged instruction on appeal, "we view the evidence and inferences in the light most favorable to the instruction and disregard any contrary evidence." *Id*. On appeal, a trial court's ruling on an alleged instructional error is not disturbed absent an abuse of discretion. *Burns*, 55 S.W.3d at 476.

B. Argument

1. Jury Instruction No. 7

Instruction No. 7 read:
In your verdict you must assess a percentage of fault to defendant Sharo Shirshekan, if you believe:

***69** First, defendant Sharo Shirsekan [*sic*], acting either individually or by and through his agents and employees, either:

failed to provide sufficient staff and/or proper supplies to adequately care for Barry Manor, LLC residents, or White Oak Manor, LLC residents, or failed to properly supervise management of Barry Manor, LLC, or White Oak Manor, LLC, and

Second, defendant Sharo Shirshekan in any one of more of the respects submitted in paragraph First, was thereby negligent, and

Third, such negligence directly caused or contributed to case damage to John Novogradac.

(L.F. 144.)

Defendants argue that Instruction No. 7 was improper for four reasons. (Apet. Brief at 98.) First, they claim Plaintiff failed to make a submissible case against Defendant Shirshekan, individually. (Apet. Brief at 98.) As discussed in detail in Section I above, this argument is meritless. Similarly, Defendants argue that Plaintiff failed to offer evidence that the corporate structure of the limited liability companies should be ignored. (Apet. Brief at 98.) Because Shirshekan was individually liable for his own acts of negligence, as discussed in Section I above, this argument is also meritless.

***70** Second, Defendants argue that Instruction No. 7 improperly referred to "Barry Manor LLC residents, or White Oak Manor, LLC residents," rather than just Novogradac. (Apet. Brief at 98-99.) This argument fails. At trial, Plaintiff presented evidence through, *inter alia*, the testimony of the DHSS surveyor and Plaintiff's experts that Shirshekan failed to properly take into account the number and acuity of residents in staffing and supplying the facilities and that this failure caused injury to Novogradac. Essentially, Plaintiff argued that Shirshekan made decisions that resulted in understaffing and underfunding at Barry Manor and White Oak Manor and that, because the staff and supplies were spread too thin, Novogradac suffered significant injuries. Consequently, insufficient staff and supplies for the residents, as a whole, was the issue, and plaintiff provided that this understaffing caused Novogradac's injuries.

Third, Defendants argue that "adequately care for" is indefinite and unclear and amounted to a roving commission. An instruction results in a "roving commission" when it assumes a disputed fact or posits an "abstract legal question that allows the jury to roam freely through the evidence and choose any facts which suited its fancy or its perception of logic to impose liability." *Duren v. Union Pac. R.R. Co.*, 980 S.W.2d 77, 79 (Mo. App. 1998) (citations omitted). A proper instruction submits only the ultimate facts, not evidentiary details, to avoid undue emphasis of certain evidence, confusion, and the danger of favoring one party over another. *Id*. "Adequately care for" did not amount to a roving commission because it did not assume any facts, disputed or otherwise, and did not submit an abstract legal question to the jury. *See id.*

***71** Moreover, the instruction, including the phrase at issue, was supported by the evidence, including testimony from the DHSS surveyor and former employees that there simply was not adequate staff to care for residents. It also did not contain evidentiary details, but rather, submitted ultimate facts that defined Plaintiffs theory of the case (i.e., that Defendant Shirshekan made decisions that resulted in understaffing and underfunding at Barry Manor and White Oak Manor and because staff and supplies were spread too thin to provide adequate care to residents, Novogradac suffered injuries). *See Syn, Inc. v. Beebe*, 200 S.W.3d 122, 132 (Mo. App. 2006) (holding that where an instruction is supported by the evidence or submits ultimate facts that define plaintiff's theory of the case, the instruction is not considered a roving commission).

Fourth, Defendants argue that the phrase within Instruction No. 7 that read "failed to properly supervise management" was undefined, vague, and unclear and amounted to a roving commission. (Apet. Brief at 98.) Notably, Defendants provide no explanation or discussion of this argument beyond simply stating it, and therefore, it should be disregarded. (Apet. Brief at 98.) Even if the argument is considered, however, it becomes clear that it is meritless. "[F]ailed to properly supervise management" did not amount to a roving commission because it did not assume any facts or submit an abstract legal question to the jury. *See Duren*, 980 S.W.2d at 79. Moreover, this phrase was supported by the evidence, including testimony from Regional Director Carol Jeans that Shirshekan was the person ultimately responsible for the facilities, including staffing and funding them. (Tr. 342-44; 355-56.) Furthermore, Instruction No. 7, including the phrase "failed to properly supervise management," submitted ultimate facts that defined ***72** Plaintiffs theory of the case (again, that Defendant Shirshekan knowingly allowed Barry Manor and White Oak Manor to be understaffed and underfunded, and because staff and supplies were spread too thin to provide adequate care to residents, Novogradac suffered injuries). *See Syn*, 200 S.W.3d at 132. Moreover, an almost identical instruction was upheld in *St. John Bank & Trust Co. v. City of St. John*, 679 S.W.2d 399 (Mo. App. 1984), in which the court held that a verdict director instructing the jury to find negligence if it believed four elements, including that the defendant city "failed to use ordinary care to supervise the St. John Police Department" was not improperly vague or overbroad. *Id*. at 404.

2. Jury Instruction No. 8

Instruction No. 8 is identical to No. 7, except that it applied to Defendant HCM. Defendants argue that this instruction was improper for the same four reasons why Instruction No. 7 was improper. (Apet. Brief at 101-03.) As discussed in detail in the preceding subsection, these arguments fail.

IX. The trial court did not abuse its discretion in approving and giving Jury Instruction Nos. 9 and 10.

A. Standard of Review

Ordinarily, "[t]he submission of an instruction will be upheld if supported by substantial evidence." *Warren Davis Props. V*, 111 S.W.3d at 523 (citation omitted). Substantial evidence is that which, if it is true, is probative and can constitute the basis for a jury verdict. *Id*. In reviewing a challenged instruction on appeal, "we view the evidence and inferences in the light most favorable to the instruction and disregard any ***73** contrary evidence." *Id*, On appeal, a trial court's ruling on an alleged instructional error is not disturbed absent an abuse of discretion. *Burns*, 55 S.W.3d at 476.

B. Argument

Instruction No. 9, which was based on MAI 21.02, read:
In your verdict you must assess a percentage of fault to defendant Barry Manor, LLC, if you believe: First, defendant Barry Manor, LLC, acting by and through its agents and employees, either:

failed to prevent and/or properly treat John Novogradac's pressure sores, or

failed to properly assess and monitor John Novogradac to prevent him from falling, or

failed to provide John Novogradac with adequate fluids to prevent hydration, or

failed to properly monitor and assess John Novogradac to prevent recurrent hospitalizations, or

failed to keep John Novogradac clean with good hygiene, or

failed to adequately assess and/or report John Novogradac's pain and discomfort to his physicians, and

***74** Second, defendant Barry Manor, LLC, in any one or more to the responses submitted in paragraph First, was thereby negligent, and

Third, such negligence directly caused or directly contributed to cause damage to John Novogradac.

(L.F. 146.) Instruction No. 10 was identical to No. 9, except that it applied to Defendant White Oak Manor, LLC. (L.F. 147.)

Defendants' only arguments on appeal with respect to Instruction Nos. 9 and 10 is that (1) Plaintiff failed to make a submissible case against Barry Manor and White Oak Manor on the claim that these Defendants "failed to property monitor and assess John Novogradac to prevent recurrent hospitalizations" and (2) that this quoted phrase resulted in a roving commission. (Apet. Brief at 106-09.)

At the trial court level, Defendants did not raise the first point regarding sufficiency of the evidence on the particular claim of recurrent hospitalizations, and so they have waived that argument on appeal. *See, e.g., Doe*, 207 S.W.3d at 74; Rule 70.03.

The first argument also fails on the merits. In this medical malpractice action, Plaintiff had to prove that Defendants Barry Manor and White Oak Manor failed to use that degree of skill and learning ordinarily used under the same or similar circumstances by members of their profession and that the negligent act or acts caused *or contributed to cause* the plaintiffs injury. *McDonagh*, 123 S.W.3d at 164 n.5 (Mo. 2003). In their brief, Defendants devote much discussion to the numerous health-related problems from which Novogradac suffered, essentially arguing that Plaintiff failed to eliminate these ***75** problems as causes of Novogradac's numerous hospitalizations and, therefore, failed to make a submissible case regarding the phrase within Instruction Nos. 9 and 10 that is currently at issue. (Apet. Brief at 106-11.)

Defendants' argument lacks merit as Plaintiff did not have such a burden. On the contrary, Plaintiff had the burden to show that Barry Manor's and White Oak Manor's failure to properly monitor and assess Novogradac caused or *contributed to cause* hospitalizations. Consequently, if there was evidence that Novogradac was hospitalized for several health problems, including injuries caused by Defendants' failure to properly monitor and assess him, then Plaintiff made a submissible case for purposes of Instruction Nos. 9 and 10. In viewing the evidence and inferences in the light most favorable to Plaintiff and disregarding any contrary evidence, it is clear that the trial court did not abuse its discretion in approving and giving Instruction Nos. 9 and 10. *See Warren Davis Props. V.* 111 S.W.3d at 523; *Burns*, 55 S.W.3d at 476.

Additionally, Defendants argue that no expert testified that "all of John Novogradac's 'recurrent hospitalizations' while at Barry Manor or White Oak Manor were the result of improper monitoring or assessments." (Apet. Brief at 106-11.) Notably, such testimony was not required. Rather, Plaintiff was required to present evidence that Barry Manor and White Oak Manor failed to properly monitor and assess Novogradac to prevent *recurrent* (or more than one) hospitalization.

Plaintiff presented substantial evidence in the form of expert testimony that Barry Manor's and White Oak Manor's failure to properly monitor and assess Novogradac caused hospitalizations. Nurse Black testified that Barry Manor failed to monitor and ***76** assess Novogradac's fluid intake and hydration, which required him to become dehydrated, requiring a hospitalization

starting December 20, 2002. (Tr. 556-57.) Additionally, she testified that Novogradac was again hospitalized in January 2003 for evaluation and, ultimately, amputation of his left leg due to necrotic wounds, which she testified were caused by Barry Manor's failure to properly monitor and assess Novogradac's pressure ulcers. (Tr. 579-86.)

With regard to White Oak Manor, Nurse Black testified that the nurses at the facility failed to properly monitor and assess the pressure ulcers on Novogradac's right heel, resulting in another hospitalization in January 2003, during which his wounds were treated by a doctor and wound nurse. (Tr. 590-97.) In order to treat the pressure ulcers, the hospital ordered a PRAFO boot and a sophisticated bed and turned and repositioned Novogradac. (Tr. 596-97.) Nurse Black further testified that Novogradac was hospitalized again in March and April of 2003 for dehydration, which she testified was the nurses' responsibility and which prevented the pressure wounds from healing. (Tr. 557, 601-02.) Finally, Nurse Black testified that White Oak Manor's failure to monitor and assess Novogradac's pressure wounds resulted in another hospitalization in April 2003, at which time the hospital employees called the **Elder Abuse** hotline due to overall neglect of Novogradac, including development of necrotic tissue, which Black previously testified was due to failure to monitor and assess. (Tr. 607-10.)

With regard to Barry Manor, Dr. Wojtalik testified that Novogradac was hospitalized in January 2003 for respiratory problems and evaluation of an enlarged and chronic heel ulceration, which was caused by Barry Manor's failure to properly monitor ***77** and assess Novogradac. (Tr. 717-18, 722.) Specifically, he testified that while Novogradac was at Barry Manor, "there was not adequate attention paid that should have prevented, first, the formation; and then, ultimately, the need to lose the extremity," the latter of which required yet another hospitalization. (Tr. 742.) Dr. Wojtalik further testified that a high risk patient, such as Novogradac, required nurses at Barry Manor (as well as White Oak Manor) to monitor and assess Novogradac's wounds, and the nursing home records indicate that Defendants failed to meet this requirement. (Tr. 743-44.)

With regard to White Oak Manor, Dr. Wojtalik testified that Novogradac's February - March 2003 hospitalization was caused in part by wounds on his right foot, which he testified were caused by White Oak Manor's failure to properly monitor and assess. (Tr. 735-37, 740-41, 745.) Notably, Dr. Wojtalik testified that upon admission to White Oak Manor, Novogradac was not properly assessed and no care plan for pressure ulcer prevention was established. (Tr. 744-45.) Moreover, he testified that Novogradac was not assessed by a wound care nurse, as he regularly should have been, until 21 days after admission. (Tr. 745.) He even testified that there was ***never*** a full assessment at White Oak Manor of the wounds on Novogradac's right leg. (Tr. 745-46.) Dr. Wojtalik testified that there was a "significant deviation" from the standard of care with regard to monitoring and assessing Novogradac at White Oak Manor. (Tr. 746.) Dr. Wojtalik further testified that the amputation of Novogradac's right leg, which required a another hospitalization, was caused by White Oak Manor's negligence, including failure to properly monitor and assess. (Tr. 754-55.)

***78** Additionally Nurse Zaccardi testified that understaffing at both Barry Manor and White Oak Manor resulted in repeated hospital admissions for various problems caused by the understaffing, including dehydration and pressure sores. (Tr. 1069-70.) Moreover, she testified that some of Novogradac's numerous hospitalizations were caused by urinary tract infections that went undiagnosed due to Defendants' failure to monitor and assess, causing him to become septic and dehydrated, the latter of which could have been prevented by monitoring and assessments. (Tr. 1077.) She further testified that Novogradac's January 24, 2003 hospitalization was caused by respiratory distress which "[t]he facility [i.e., Barry Manor] did not assess." (Tr. 1078.) Additionally, she testified that Novogradac's December 2002 hospitalization was caused by dehydration at Barry Manor which, again, was caused by nurses' failure to monitor and assess. (Tr. 1082-83.) Nurse Zaccardi further testified that dehydration at White Oak Manor caused or contributed to cause Novogradac's April 2003 hospitalization. (Tr. 1083-84.)

Defendants also argue that the phrase "failed to properly monitor and assess John Novogradac to prevent recurrent hospitalizations" resulted in a roving commission. (Apet. Brief at 107-09.) This argument fails as the quoted phrase did not assume any disputed facts or posit any abstract legal questions. *See Duren*, 980 S.W.2d at 79. Rather, Instruction Nos. 9 and 10, including the phrase at issue, were proper in that they submitted only the ultimate facts and contained no evidentiary details. *See id*. (holding a proper instruction submits only the ultimate facts, not evidentiary details, to avoid undue emphasis of certain evidence, confusion, and the danger of favoring one party over ***79** another); *see also Syn, Inc.*, 200 S.W.3d at 132 (holding

that where an instruction is supported by the evidence or submits ultimate facts that define plaintiffs theory of the case, the instruction is not considered a roving commission).

X. The trial court did not abuse its discretion in approving and giving Jury Instruction No. 11.

A. Standard of Review

Ordinarily, "[t]he submission of an instruction will be upheld if supported by substantial evidence." *Warren Davis Props. V*, 111 S.W.3d at 523 (citation omitted). Substantial evidence is that which, if it is true, is probative and can constitute the basis for a jury verdict. *Id*. In reviewing a challenged instruction on appeal, "we view the evidence and inferences in the light most favorable to the instruction and disregard any contrary evidence." *Id*. On appeal, a trial court's ruling on an alleged instructional error is not disturbed absent an abuse of discretion. *Burns*, 55 S.W.3d at 476.

B. Argument

Instruction No. 11 read:

> If you assess a percentage of fault to any defendant then you must determine the total amount of plaintiff's damages to be such sum as will fairly and justly compensate plaintiff for any damages you believe John Novogradac sustained as a direct result of the occurrences mentioned in the evidence. You must state such total amount of plaintiffs damages in your ***80** verdict, and you must itemize those damages by the categories set forth in the verdict form.

(L.F. 148.)

Defendants claim that Instruction No. 11 was improper because Plaintiff failed to make a submissible case against Defendants (Apet. Brief at 112) which, as discussed, is meritless. *See supra* Sections I and IX.

Defendants further argue that this instruction improperly cited "occurrences mentioned in the evidence" as a basis for asserting negligence, which amounted to a roving commission. (Apet. Brief at 112-15.) Defendants claim that the instruction should have identified what occurrences were alleged to be negligent. (Apet. Brief at 113.) Defendant alleges, as an example, that under Instruction No. 11, the "occurrences mentioned in the evidence" could theoretically have included the skin breakdown of "an obese female resident of Barry Manor." (Apet. Brief at 114.) This argument lacks merit.

Instruction No. 11 is MAI 21.04. It is well settled in Missouri that before reversible error can be predicated on the giving of a MAI, the complaining party need show that, under all the evidence, the instruction was a misdirection to the jury resulting in prejudicial error. *Yoos v. Jewish Hosp. of St. Louis*, 645 S.W.2d 177, 189-90 (Mo. App. 1982). To this end, therefore, all the instructions are to be read together as a whole and as being given to and considered by jurors of reasonable intelligence. *Id*.

Here, Defendants have shown no misdirection resulting in prejudicial error. When the instructions are read together, no juror of reasonable intelligence would understand Instruction No. 11 to mean that an occurrence not involving Novogradac (such as the skin ***81** breakdown of an "obese female resident") could have caused compensable injury to Novogradac. Defendants' suggestion in this regard is nonsensical.

Moreover, an argument similar to Defendants' was considered and rejected in *Yoos*, 645 S.W.2d 177. In that case, the defendant argued that "occurrences mentioned in the evidence" was improper because more than one occurrence could have caused the plaintiff's injury and, therefore, "occurrences mentioned in the evidence" should have been defined. *Id*. at 188. The court rejected

the defendant's argument, holding that the instruction was proper because there was no evidence that two or more occurrences contributed proportionately to the plaintiffs injury. *Id*. at 189.

Similarly, this is not a case in which more than one occurrence contributed proportionately to the plaintiff's injury. Consequently, modification of the instruction to define "occurrences" was not warranted, and Instruction No. 11 was proper.

XI. The trial court did not abuse its discretion in approving and giving Jury Instruction No. 13.

A. Standard of Review

On appeal, a trial court's ruling on an alleged instructional error is not disturbed absent an abuse of discretion. *Burns*, 55 S.W.3d at 476. In determining the existence of prejudicial error, all of the instructions must be reviewed as a whole. *State v. Dooley*, 851 S.W.2d 683, 687 (Mo. App. 1993).

***82 B. Argument**

Instruction No. 13 read: "The phrase 'ordinary care' as used in these instructions means that degree of care that an ordinarily careful person would use under the same or similar circumstances." (L.F. 150.)

Defendants argue that Instruction No. 13 was improper because it defines a term - "ordinary care" - that was not the applicable standard in a case involving nurses and other health care providers. (Apet. Brief at 116-18.) This argument is meritless for two primary reasons.

First, Instruction No. 5 set forth the standard of care for nurses and other health care providers: "The term 'negligent' or 'negligence' as used in these instructions means the failure to use that degree of skill and learning ordinarily used under the same or similar circumstances by members of the defendant's profession." (L.F. 142.) Consequently, the trial court gave the jury the proper standard of care. Because the jury instructions must be reviewed as a whole and the trial court gave the jury the proper standard of care, there is no prejudicial error. *Dooley*, 851 S.W.2d at 687.

Second, Instruction No. 13 is MAI 11.05. The Notes to this MAI clearly state that "[w]hen the phrase 'ordinary care' is used, it ***must*** be defined." MAI 11.05 [1996 Revision] (emphasis added). Because "ordinary care" appears in Instruction Nos. 14 and 15 regarding punitive damages, its definition was mandatory. Failure to define the term would have resulted in presumed reversible error. *See City of Kansas City v. Habelitz*, 857 S.W.2d 299, 303 (Mo. App. 1993) (holding "[i]f a mandatory MAI instruction is not given, or if an attempt is made to modify it, reversible error is presumed. [Citation ***83** omitted.]") Consequently, the trial court did not abuse its discretion in approving and giving Instruction No. 13.

XII. The trial court did not abuse its discretion in approving and giving Verdict Form A.

A. Standard of Review

Ordinarily, "[t]he submission of an instruction will be upheld if supported by substantial evidence." *Warren Davis Props. V*, 111 S.W.3d at 523 (citation omitted). Substantial evidence is that which, if it is true, is probative and can constitute the basis for a jury verdict. *Id*. In reviewing a challenged instruction on appeal, "we view the evidence and inferences in the light most favorable to the instruction and disregard any contrary evidence." *Id*. On appeal, a trial court's ruling on an alleged instructional error is not disturbed absent an abuse of discretion. *Burns*, 55 S.W.3d at 476.

B. Argument

The parties agreed to bifurcate the trial with regard to punitive damages. (Tr. 3-4.) Consequently, Plaintiff prepared two verdict forms, in addition to the jury instructions. (L.F. 136-58.) Verdict Form A was to be used by the jury to determine and state their findings regarding liability, the amount of non-economic damages, and whether punitive damages were warranted. (L.F. 153-54.) Verdict Form B was to be used by the jury to determine and state the amount of the punitive damages award. (L.F. 158.) Verdict Form B was not given to the jury until after they submitted a completed Verdict Form A indicating that Defendants were liable for punitive damages.

Verdict Form A read:
***84** Note: Complete the following paragraph by filling in the blanks as required by your verdict. If you assess a percentage of fault to any of those listed below, write in a percentage not greater than 100%, otherwise write in "zero" next to that name. If you assess a percentage of fault to any of those listed below, the total of such percentages must be 100%.

On the claim of Plaintiff, the Estate of John Novogradac, for personal injury, we, the undersigned jurors, assess percentages of fault as follows:

Defendant Sharo Shirshekan	___ % (zero to 100%)
Defendant [HCM]	___ % (zero to 100%)
Defendant Barry Manor, LLC	___ % (zero to 100%)
Defendant White Oak Manor, LLC	___ % (zero to 100%)
Total	___ % (zero OR 100%)

Note: Complete the following if you assessed a percentage of fault to one or more defendants. Complete by writing in the amount of damages, if any, for each of the following itemized categories. If you do not find that ***85** plaintiff has damages in a particular category, write "none" in that category. The total damages must equal the total of the itemized damage amounts you have assessed.
We the undersigned jurors find the total damages of plaintiff, the Estate of John Novogradac as follows:

For past non-economic damages	$ _____
TOTAL DAMAGES	$ _____

Note: If you found in favor of plaintiff the Estate of John Novogradac and assessed fault against defendant Sharo Shirshekan, complete the following paragraph by writing in the word[s] required by your verdict.
We, the undersigned jurors, find that defendant Sharo Shirshekan _____ ("is" or "is not") liable for punitive damages.

Note: If you found in favor of plaintiff the Estate of John Novogradac and assessed fault against defendant Health Care Management, Inc., complete the following ***86** paragraph by writing in the word[s] required by your verdict.

We, the undersigned jurors, find that defendant Health Care Management, Inc., _____ ("is" or "is not") liable for punitive damages.

Note: All jurors who agree to the above findings must sign below.

(L.F. 153-54.)

Due to the parties' agreement to bifurcate, Verdict Form A did not include a line for the jury to enter a punitive damages dollar amount (L.F. 153-54) and the parties did not offer any evidence regarding Defendants' financial worth or income during the first phase of trial. Defendants do not challenge either of these matters on appeal, and they admittedly consented to the same at trial. (Apet. Brief at 123.) Instead, Defendants argue that Verdict Form A was confusing in that it failed to inform the jury of the second phase of trial, which Defendants allege resulted in jury confusion. Specifically, they claim that because Verdict Form A did not inform the jury of the second phase of trial, the jury awarded Plaintiff $1,100,000 in punitive damages on Verdict Form A after the first phase of trial, prior to any evidence regarding Defendants' financial worth and/or income. (L.F. 159-60; Apet. Brief 123-32.)

87** Contrary to Defendants' assertions, the trial court did not abuse its discretion in approving and giving Verdict Form A, which is MAI 36.22. MAI 36.22 expressly states that it is the Verdict Form to be used in "Actions Against Health Care Providers - Plaintiff vs. Single or Multiple Defendants," which this action clearly was. Moreover, Verdict Form A is consistent with the MAI Illustrations for "Punitive Damages - Bifurcated Trial Under § 510.263 - No Comparative Fault - Two Defendants - Apportionment of Fault Between Defendants," which clearly apply to this case. *See* MAI 35.19. Notably, the MAI 35.19 Illustrations set forth an example of a "Verdict A," which contains no mention of the second phase of trial. In fact, within that example, the only mention of punitive damages is: "We, the undersigned jurors, find that defendant Acme _____ liable for punitive damages. ("is" or "is not")" *See* MAI 35.19 (Illustration No. 14). The Verdict Form A in this case *is exactly the same as* ***this Illustration. Consequently, the trial court did not abuse its discretion in approving and giving Verdict Form A.

Defendants seem to argue for the first time on appeal that MAI 10.04, which expressly applies to "Damages - Exemplary - Strict Liability - Either Product Defect or Failure to Warn Submitted," should have been used. MAI 10.04 is "Instruction Number 13" in the Illustrations set forth under MAI 35.19. (Apet. Brief at 129.) Notably, the MAI Illustrations' set of instructions upon which Defendants base their argument apply to a certain factual scenario set forth at the beginning of the Illustration. *See* MAI 35.19. This scenario involves a claim for product defect (unlike this case), and therefore, MAI 10.04 expressly applied. Clearly, MAI 10.04 does not apply to this medical negligence ***88** case. Defendants are now essentially arguing that the trial court should have taken portions of MAI 10.04 and added them to Verdict Form A, which is meritless. (Apet. Brief at 129-30.) Additionally, because Defendants are raising this argument for the first time on appeal, this Court should not consider it.

In addition to challenging Verdict Form A, itself, Defendants also seem to challenge the jurors' conduct, as well as the trial court's response. During the jury's deliberations after the first phase of trial, the jurors sent two sets of questions to the trial court which asked, *inter alia*, where on Verdict Form A the jury was to write in punitive damages. (L.F. 165-66.) The trial court responded to the inquiries stating that it could not answer the jury's questions and that the jury must be guided by the instructions, verdict form, and evidence. (L.F. 165-66.) The jury then drew its own line for punitive damages, awarding $500,000 in punitive damages against Shirshekan and $600,000 in punitive damages against HCM. (L.F. 159-60.) The trial court disregarded the punitive damages amounts as surplusage and instructed the jurors that they would determine the amount of punitive damages after the parties presented evidence concerning the income and assets of Shirshekan and HCM. (Tr. 1632.)

Defendants generally and summarily argue that the jurors engaged in some sort of misconduct, and therefore, they are entitled to a new trial. (Apet. Brief at 123-26.) This argument fails as there is no evidence of juror misconduct and no case law to support Defendants' assertion. Rather, the jurors clearly were attempting to comply with the trial court's instructions, as evidenced by the fact that they sent the trial court questions regarding the verdict form. Moreover, even assuming for the sake of argument that the ***89** jury's addition of punitive damages amounts to Verdict Form A was misconduct (despite the fact that there is no Missouri law supporting this notion), Defendants have failed to show prejudice. Under Missouri law, Defendants are required to show that the absence from Verdict Form A of an explanation regarding the second phase of trial resulted in prejudice. *See M.P. Industries, Inc. v. Axelrod*, 706 S.W.2d 589, 592 (Mo. App. 1986) (holding that alleged error in verdict forms are not treated as

errors in instructions; parties complaining of deviations in verdict forms must show prejudice). Defendants claim that requiring the jury to reconsider punitive damages improperly suggested to the jury that its second punitive damages award should be higher. (Apet. Brief at 124-26.) This claim lacks merit. After the jury rendered its verdict in favor of Plaintiff at the end of the first phase of trial, it was instructed to disregard its initial punitive damages award and consider the evidence presented during the second phase of trial. (Tr. 1632.) After considering such evidence and the instructions on Verdict Form B, the jury awarded Plaintiff a punitive damages amount that was, indeed, higher than its initial award; however, there is absolutely no evidence that this second award was due to some prejudicial error, and Defendants have failed to point to any such evidence. Rather, the jury awarded a higher punitive damages amount based on the financial worth and income evidence it heard during the second phase of trial.

The court of appeals has addressed similar situations in other cases. In *Van Eaton v. Thon*, 764 S.W.2d 674 (Mo. App. 1988), the jury initially returned a verdict of zero actual damages on Counts I and II, but assessed $2,000 and $5,000 respectively for punitive damages. There was a bench conference, and the jury was instructed that the ***90** verdicts for Counts I and II were incorrect and were sent back to correct verdicts A and B (Counts I and II). Subsequently, the jury returned a verdict as to Count I for the plaintiff in the amount of $100 actual damages for personal injuries and $2,000 punitive damages. On Count II, the jury returned a verdict for the plaintiff in the amount of $100 actual and $5,000 punitive damages. *Id*. at 676.

On appeal, the defendant argued that the trial court erred in not accepting the initial verdicts of the jury. The court of appeals rejected this argument, holding: "It is well established in Missouri that '[i]f the verdict is found to be ambiguous, inconsistent, or otherwise defective, the jury should be given the opportunity to correct the verdict or to find a new one before such verdict is recorded and made part of the judgment.' [Citation omitted.]" *Id*. at 676. The court of appeals noted that the verdicts were defective in that there were no actual damages assessed for either Count I or Count II, while both counts included punitive damages. It then held that the trial court correctly resolved the issue by informing the jury that its verdict forms were incorrect and that it needed to return to the jury room, while "carefully refrain[ing] from making any suggestions that would influence the jury's final determination." *Id*. at 677. The Court of Appeals held, "Judge Messina, consequently, did precisely what had been outlined as proper procedure under the circumstances. The judge simply required the jury to reconsider its verdicts after the inconsistency or defect was brought to the jury's attention." *Id*.

Similarly, in this case, the Court responded to the jury's questions regarding punitive damages with an instruction to review and reconsider the jury instructions, ***91** Verdict Form A, and the evidence. (L.F. 165-66.) When the jury returned a verdict in favor of Plaintiff with the initial erroneous punitive damages amounts, the Court properly instructed the jury to disregard that amount and carefully consider the evidence presented during the second phase of trial. (Tr. 1632.) As stated, Defendants bear the burden to show prejudice, and they have not identified one statement made by the trial judge that might have even arguably prejudiced them or implied to the jury that the initial punitive damages amount was inadequate. Consequently, their arguments fail.

CONCLUSION

Defendants have failed to meet their burden to prove that the trial court erred in denying Defendants' Motion for Judgment Notwithstanding the Verdict or, in the Alternative, for New Trial, and for the foregoing reasons, this Court should affirm the trial court's judgment in its entirety.

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