

FILED

NORTH CAROLINA

2007 JUL 13 PM 2:32

IN THE GENERAL COURT OF JUSTICE

SUPERIOR COURT DIVISION

ORANGE COUNTY

ORANGE CO., C.S.C.

09.CVS

Anne Blanchard, Executrix of the Estate of
Mary Lou Barthazon, deceased,
Plaintiff

vs.

COMPLAINT

Britthaven, Inc. and Hillco, Ltd.,

Defendants

The plaintiff, complaining of the defendant, alleges and says as follows:

1. The Plaintiff, Anne Blanchard, is the personal representative of Mary Lou Barthazon, who was a resident of the nursing home doing business as Britthaven of Chapel Hill exclusive of hospitalizations or therapeutic leaves from June 21, 2004 until October 14, 2007. The plaintiff brings this action as the Executrix of the Estate of Mary Lou Barthazon (as is reflected in Orange County estate file 07-E-534).

2. "Britthaven of Chapel Hill" will be used herein to describe the facility at 1716 Legion Road, Chapel Hill, North Carolina, that defendants as named herein, individually or in combination owned, operated, managed, controlled, and/or maintained.

3. At all times material to this complaint, upon information and belief, Britthaven, Inc., (hereinafter "Britthaven") was a North Carolina for profit corporation with its principal place of business in Kinston, North Carolina, doing business in Chapel Hill, North Carolina, as Britthaven of Chapel Hill, whose registered agent for the service of process is Erik P. Lindberg, 223 Highway 70 East, Garner, North Carolina, 27529. Defendant, individually or in combination with defendant Hillco, Ltd., owned, operated, managed, controlled, and/or maintained Britthaven

of Chapel Hill.

4. At all times material to this complaint, upon information and belief, Hillco, Ltd., (hereinafter "Hillco") was a North Carolina for profit corporation with its principal place of business in Kinston, North Carolina, was the parent company of Britthaven, and dominated and controlled Britthaven, such that they were one and the same, doing business in Chapel Hill, North Carolina, as Britthaven of Chapel Hill. Hillco's registered agent for the service of process is also Erik P. Lindberg, 223 Highway 70 East, Garner, North Carolina, 27529. Defendant, individually or in combination with Britthaven, owned, operated, managed, controlled, and/or maintained Britthaven of Chapel Hill.

5. At all times relevant to this complaint, David Krizmanich was the licensed nursing home administrator of Britthaven of Chapel Hill. At all times relevant to the complaint, Krizmanich was a managerial employee and/or agent of one or more of the defendants identified herein. Krizmanich, in combination with the defendants, managed the overall operation of Britthaven of Chapel Hill.

6. Upon information and belief, at times relevant to this complaint, Barbara Gallagher was the Director of Nursing of Britthaven of Chapel Hill. Upon information and belief, at times relevant to the complaint, Gallagher was a managerial employee and/or agent of one or more of the defendants. Gallagher, in combination with the defendants, managed the provision of nursing services at Britthaven of Chapel Hill.

7. Upon information and belief, at times relevant to this complaint, Pamela Bondan was the Director of Nursing of Britthaven of Chapel Hill. At times relevant to the complaint, Bondan was a managerial employee and/or agent of one or more of the defendants. Bondan, in

combination with the defendants, managed the provision of nursing services at said facility.

Duties of the Defendants

8. At all times during Mary Lou Barthazon's residency, the defendants operated Britthaven of Chapel Hill as a nursing home within the meaning of N.C. Gen. Stat. § 131E-101 offering skilled and intermediate care at 1716 Legion Road, Chapel Hill, North Carolina, which defendant Britthaven was licensed by the State of North Carolina to operate.

9. As a condition of licensure, the defendants and their managerial employees and agents had the duty, at all times material to this complaint, to operate Britthaven of Chapel Hill in compliance with 10A NCAC 13D, the regulations governing licensed nursing homes in North Carolina in effect during Mary Lou Barthazon's residency.

10. At all times material to this complaint, the defendants operated Britthaven of Chapel Hill as a skilled nursing facility participating in the Medicare program and as a nursing facility participating in the Medicaid program.

11. At all times material to this complaint, as a condition of participation in the Medicare and Medicaid programs, the defendants and their managerial employees and agents had the duty, and state regulations required them, to operate Britthaven of Chapel Hill in compliance with the regulations governing skilled nursing facilities participating in the Medicare program and nursing facilities participating in the Medicaid program, codified at 42 USC Ch. 4, Part 483.

12. At all times material to this complaint, the defendants were and/or employed "health care providers" as defined in N.C. Gen. Stat. § 90-21.11, and owed Mary Lou Barthazon (either directly or vicariously), while she was a resident at Britthaven of Chapel Hill, the duty, when providing her with health care, to:

- a. use reasonable care and diligence in the application of their knowledge and skill to her care;
- b. to use their best judgment in her treatment and care;
- c. to provide her with treatment and care in accordance with the standards of practice among members of the nursing profession and other medical support professions with similar training and experience situated in Chapel Hill, North Carolina and/or similar communities; and
- d. to employ medical record-keeping practices which were in keeping with the standards of practice among nursing homes situated in Chapel Hill, North Carolina, and/or similar communities, to ensure that care providers rely on correct information in assessing the needs and condition of the Mary Lou Barthazon.

13. The defendants were, at all relevant times, legally responsible for the actions of their managerial employees and agents, and/or those employees they supervised, while acting within the course and scope of their employment and/or agency.

14. The defendants , and their managerial employees and agents, owed certain non-delegable fiduciary duties to Mary Lou Barthazon, including the administrative duties to exercise reasonable care in:

- a. monitoring and overseeing the treatment which is prescribed and administered by nurses and other health care professionals practicing at the facility;
- b. monitoring and overseeing the qualifications, competency, and compliance with their policies and the applicable standards of care of the nurses and

other health care professionals practicing at the facility;

- c. monitoring and overseeing the selection and retention of nurses and other health care professionals practicing at the facility;
- d. monitoring and overseeing the compliance of all employees and agents with safety standards the voluntarily agreed to abide by, including N.C. Gen. Stat Chapter 131E, 10A N.C.A.C. 13D, 42 U.S.C. Ch. 4, Part 483;

15. The defendants also had non-delegable fiduciary duties to Mary Lou Barthazon, including but not limited to, the duties set forth in the ensuing paragraphs of this complaint.

16. The defendants had the non-delegable fiduciary duty to Mary Lou Barthazon to exercise direct management control of Britthaven of Chapel Hill on a full-time basis, to develop and implement policies for the management and operation of the facility, to train employees concerning those policies and their job duties, and specifically to ensure that the following duties owed to Mary Lou Barthazon were met by their employees:

- a. that patient services were provided in accordance with all applicable local, state and federal regulations and codes;
- b. that patient services were provided in accordance with acceptable standards of practice applicable to professionals providing patient services in the facility, and specifically that services provided or arranged by the defendants for Mary Lou Barthazon met professional standards of quality and were provided by qualified persons in accordance with Mary Lou Barthazon's written plan of care;
- c. that facility staff (both professional and non-professional including

employees, agents, and/or independent contractors) were properly hired in sufficient numbers, screened, trained, and supervised; and that all staff was competent and fit to provide custodial and nursing care for the health, safety, and proper care of Mary Lou Barthazon;

- d. that a comprehensive assessment of Mary Lou Barthazon's needs was promptly conducted and conducted again after a significant change in her physical or mental condition, which assessment was to be used to develop, review, and revise her comprehensive plan of care;
- e. that a comprehensive care plan was developed for Mary Lou Barthazon, which was periodically prepared, reviewed and revised by an interdisciplinary team, that included the attending physician, a registered nurse with responsibility for Mary Lou Barthazon, and other appropriate staff in disciplines as determined by Mary Lou Barthazon's needs, and to the extent practicable, the participation of Mary Lou Barthazon, Mary Lou Barthazon's family or Mary Lou Barthazon's legal representative, and was periodically reviewed and revised by a team of qualified persons after each assessment;
- f. that Mary Lou Barthazon received, and that they provided, the necessary care and services to attain or maintain her highest practicable physical, mental and psychosocial well being, in accordance with her comprehensive assessment and plan of care;
- g. that, based on Mary Lou Barthazon's comprehensive assessment:

- i. Mary Lou Barthazon's abilities in activities of daily living not diminish unless the circumstances of her clinical condition demonstrated that diminution was unavoidable;
 - ii. Mary Lou Barthazon was given the appropriate treatment and services to maintain or improve her activities of daily living; and
 - iii. Mary Lou Barthazon, while unable to carry out activities of daily living, received the necessary services to maintain good nutrition, grooming, and personal and oral hygiene;
- h. that defendants promoted care for Mary Lou Barthazon in a manner and in an environment that maintained or enhanced Mary Lou Barthazon's dignity and well being, and with respect and in full recognition of Mary Lou Barthazon's individuality;
- i. that Britthaven of Chapel Hill had sufficient nursing staff to provide nursing and related services to Mary Lou Barthazon in order to attain or maintain her highest practicable physical, mental and psychosocial well being, as determined by her assessments and individual plan of care;
- j. that they conducted initially and periodically a comprehensive, accurate, standardized, reproducible assessment of Mary Lou Barthazon's functional capacity;
- k. that Mary Lou Barthazon was examined no less than every three months, and as appropriate, that Mary Lou Barthazon's assessment was revised to assure the continued accuracy of the assessment;

- l. that the results of the assessment were used to develop, review and revise her comprehensive plan of care;
- m. that, if Mary Lou Barthazon displayed mental or psychosocial adjustment difficulty, the defendants provided (in accordance with Mary Lou Barthazon's comprehensive assessment) appropriate treatment and services to correct the assessed problem;
- n. that Mary Lou Barthazon's environment remained as free of accident hazards as is possible, and that she received adequate supervision and assistance devices to prevent accidents;
- o. that Mary Lou Barthazon received medical care that was supervised by a physician;
- p. that the facility's nurses aides were able to demonstrate competency in skills and techniques necessary to care for Mary Lou Barthazon's needs, and that its professional staff were qualified to fulfill the facility's obligations to Mary Lou Barthazon;
- q. that physician services were available twenty-four hours a day in the event of emergencies;
- r. that Mary Lou Barthazon's physician and interested family member or legal representative were immediately notified when there was an accident involving Mary Lou Barthazon which resulted in injury and had the potential for requiring physician intervention, or a significant or acute change in Mary Lou Barthazon's physical, mental, or psycho-social status,

- or a need to alter Mary Lou Barthazon's treatment significantly;
- s. that the facility provided Mary Lou Barthazon the necessary care and services to attain or maintain her highest practicable physical, mental, and psycho-social well-being;
- t. that facility staff followed doctor's orders and implemented Mary Lou Barthazon's plan of care;

17. The defendants held Britthaven of Chapel Hill out to the North Carolina Department of Health and Human Services and/or the public at large and/or Mary Lou Barthazon and Mary Lou Barthazon's family specifically, as being:

- a. skilled in the performance of nursing, rehabilitative, and other medical support services;
- b. properly staffed, supervised and equipped to meet the total needs of its residents including Mary Lou Barthazon; including the ability to specifically meet the total nursing, medical, and ordinary care needs of Mary Lou Barthazon and other residents like Mary Lou Barthazon; and
- c. licensed by the North Carolina Department of Health and Human Services as complying on a continual basis with all rules, regulations, and standards established for nursing homes in North Carolina.

18. The defendants held Britthaven of Chapel Hill out to the Centers for Medicare Services and/or to the public at large and/or to Mary Lou Barthazon and Mary Lou Barthazon's family specifically, as being a skilled nursing facility and as a nursing facility meeting the requirements of 42 CFR Part 483.

19. On June 21, 2004, Mary Lou Barthazon was admitted to Britthaven of Chapel Hill in order to have more supervision and care than could be provided to her at home.

20. Upon admission to Britthaven of Chapel Hill, Mary Lou Barthazon had several existing medical conditions, all of which were known or should have been known to the defendants and their employees and agents, including osteoporosis, scoliosis, xerosis, osteoarthritis, Alzheimer's dementia and a history of bone and vertebral fracture. She was frail and completely dependent upon the defendants and/or their employees and agents for all activities of daily living.

21. During Mary Lou Barthazon's admission to Britthaven of Chapel Hill, Mary Lou Barthazon suffered bilateral distal femur fractures, pain and suffering, scars and deformity, deprivation of necessary treatment and medications, delay in treatment, medical expenses, wrongful death and such other injuries as are uncovered during the course of discovery in this case, which were proximately caused by the care failures delineated in the following paragraphs and breaches of duties alleged in the preceding paragraphs.

22. At all times relevant to this complaint, David Krizmanich (as the facility Administrator), either acting with or under the direct control of defendants, had direct management control of Britthaven of Chapel Hill and was responsible for the following:

- a. its operation on a full-time basis;
- b. ensuring patient services were provided in accordance with all applicable local, state and federal regulations and codes, and with acceptable standards of practice that apply to Britthaven of Chapel Hill professionals providing such services at ;

- c. developing and implementing policies for the management and operation of Britthaven of Chapel Hill.

23. Upon information and belief, at times relevant to this complaint, Barbara Gallagher and Pamela Bondan, as Directors of Nursing of Britthaven of Chapel Hill, either acting with or under the direct control of the defendants and under the supervision of Krizmanich, had direct management control of and direct responsibility for all nursing services and nursing care provided at Britthaven of Chapel Hill.

24. At all times material to this cause of action, specifically from June 21, 2004 until October 14, 2007, Britthaven, was responsible as the licensee, and defendant Hillco, were responsible as parties providing management services, for the operation and management of Britthaven of Chapel Hill, including their duty to comply with the requirements of N.C.G.S. Chapter 131E, Article 6 and the state regulations adopted and promulgated there under contained in 10A NCAC Ch. 13D, and the federal regulations contained in 42 CFR Part 483.

25. The defendants , through their employees and/or agents acting within the course and scope of their employment and/or apparent or actual agency and/or independent contractor relationship, failed to follow the duties described above, deprived and infringed upon the decedent's aforementioned rights, were negligent, and deviated from the applicable standard of care by, among other things:

- a. PLAN OF CARE:

- i. Failing to adequately staff, train, and supervise the employees, agents, or independent contractors to handle and provide proper nursing home care for Mary Lou Barthazon as it related to proper transfer, the use of

mechanical lifts, fracture prevention, medication administration, pain prevention, prevention of injuries sustained as a result of rough handling, improper transfer and drops and/or falls, proper care of osteoporosis, osteoarthritis and scoliosis (including pain management of those conditions), proper responses to significant and/or acute changes in condition including proper assessment, and timely communication to family and physician of such changes;

- ii. Failing to establish a proper system for the transmission of treatment information for persons involved in the care and treatment of Mary Lou Barthazon with others involved in her care, as it related to transfers for patients at high risk for fracture and fall, such as her;
- iii. Failing to adequately assess and implement a plan of care for Mary Lou Barthazon's nursing/health care and rehabilitative services;
- iv. Failing to formulate and/or follow a care plan that prescribed actions to achieve defined goals and objectives and provide guidance to the staff for the treatment osteoporosis, osteoarthritis and scoliosis (and the prevention and management of pain related to those conditions); the prevention of falls and fractures and proper transfer techniques;
- v. Failing to provide adequate nursing and support staff to carry out the plan of care;
- vi. Failing to adequately supervise the nursing and support staff to carry out the plan of care, including but not limited to the use of proper transfer

techniques and adherence to patients' plans of care.

b. **NEGLECT AND ABUSE:**

- i. Failing to provide those goods and services necessary to avoid physical harm, mental anguish, or mental illness, as alleged above, including proper services for pain prevention and management, proper medication administration, proper transfer, proper and timely assessment, proper and timely care planning, and proper responses to significant and/or acute changes in Mary Lou Barthazon's conditions;
- ii. Failing to properly and timely report and investigate the incidents of neglect and abuse as outlined herein.

c. **QUALITY OF LIFE:**

- i. Failing to promote care of Mary Lou Barthazon in a manner and environment which maintained Mary Lou Barthazon's dignity and respect, including failing to prevent pain by promptly providing adequate medical care after her bilateral femurs were negligently fractured during an improper transfer occurring on or about September 30, 2007, and
- ii. Failing to provide proper pain management and care of treatment of osteoporosis and scoliosis.

d. **ASSESSMENTS:**

- i. Failing to promptly observe and report a significant change in Mary Lou Barthazon's condition, namely, bilateral femur fractures and pain, and conduct a comprehensive reassessment to properly determine the needs of

status of Mary Lou Barthazon;

- ii. Failing to properly and timely assess Mary Lou Barthazon and to timely secure diagnostic testing and medical attention for her despite her symptoms and despite knowing that she had been improperly transferred when the registered nursing staff, including the Director of Nursing knew or should have known that the patient showed symptoms of possible bilateral femur fracture requiring medical attention, between on or about September 30, 2007, and October 14, 2007, causing Mary Lou Barthazon to suffer needless and severe pain during the two week period between traumatic fracture of her bilateral femurs and treatment thereof;

e. PHYSICIAN ISSUES:

- i. Failing to properly notify Mary Lou Barthazon's physician of Mary Lou Barthazon's condition stemming from bilateral femur fractures occurring on or about September 30, 2007, for two weeks from the date of traumatic injury, when the circumstances indicated that such notification was necessary;
- ii. Failing to timely transfer Mary Lou Barthazon to a hospital which could provide care for Mary Lou Barthazon's bilateral femur fractures sustained on or about September 30, 2007;
- iii. Failing to properly provide for provision of physician services in case of emergency;

f. NOTIFICATION OF CHANGES:

- i. Failing to immediately consult with Mary Lou Barthazon's physician and notify Mary Lou Barthazon's legal representative or interested family member when there was an accident involving Mary Lou Barthazon, a significant change in Mary Lou Barthazon's physical, mental or psychosocial status, and/or a need to alter treatment significantly.

g. OTHER ACTS OF NEGLIGENCE

- i. Harming Mary Lou Barthazon by other acts of negligence and negligent omissions not specifically enumerated herein but to be developed and determined through further discovery in this action;

FIRST CLAIM FOR RELIEF: ORDINARY CORPORATE NEGLIGENCE

26. Paragraphs (1) through (25) are herein incorporated by reference as if fully set forth.

27. The defendants breached their administrative duties to Mary Lou Barthazon by:

- a. failing to exercise ordinary care in monitoring and overseeing the treatment which was prescribed for and administered to Mary Lou Barthazon by nurses and other health care professionals practicing at the facility;
- b. failing to exercise ordinary care in monitoring and overseeing the qualifications, competency, and compliance with their policies and the applicable standards of care of the nurses and other health care professionals practicing at and rendering care to Mary Lou Barthazon at

- the facility;
- c. failing to exercise ordinary care in monitoring and overseeing the selection and retention of nurses and other health care professionals practicing at the facility;
 - d. failing to exercise ordinary care in monitoring and overseeing the compliance of all their employees and agents with safety standards they voluntarily agreed to abide by, including but not limited to N.C. Gen. Stat Chapter 131E, 10A N.C.A.C. 13D, 42 U.S.C. Ch. 4, Part 483, and their own policies and procedures;
 - e. and other acts and omissions, which will be shown at the trial of this matter.

28. The breaches of administrative duties described in this claim for relief proximately caused damage to Mary Lou Barthazon including scars and disfigurement and other bodily injuries including bilateral distal femur fractures, mental anguish, inconvenience, loss of capacity for enjoyment of life, loss of dignity, pain and suffering, permanent injury and disability, inconvenience, discomfort, reduced life expectancy, and other damages in excess of \$10,000.00.

SECOND CLAIM FOR RELIEF: MEDICAL NEGLIGENCE

29. Paragraphs (1) through (28) are herein incorporated by reference as if fully set forth.

30. At all times relevant to this complaint, the defendants (vicariously through their health care provider employees and agents as applicable) owed Mary Lou Barthazon, while she was a patient at Britthaven of Chapel Hill, a duty to use reasonable care and diligence in the

application of their knowledge and skill to her care.

31. At all times relevant to this complaint, the defendants and their employees and agents failed to use reasonable care and diligence in the application of their knowledge and skill to Mary Lou Barthazon's care.

32. At all times relevant to this complaint, the defendants and their employees and agents owed Mary Lou Barthazon, while she was a patient at Britthaven of Chapel Hill, a duty to use their best judgment in the Mary Lou Barthazon's treatment and care.

33. At all times relevant to this complaint, the defendants and their employees and agents failed to use their best judgment in the treatment and care of Mary Lou Barthazon while she was a patient at Britthaven of Chapel Hill.

34. At all times relevant to this complaint, the defendants and their employees and agents owed Mary Lou Barthazon, while she was a patient at Britthaven of Chapel Hill, a duty to provide her treatment and care which was in accordance with the standards of practice among members of the nursing profession and other health care professions with similar training and experience situated in Chapel Hill, North Carolina, and/or similar communities.

35. The defendants and their employees and agents failed to provide Mary Lou Barthazon treatment which was in accordance with the standards of practice among members of the nursing profession and other health care professionals with similar training and experience situated in Chapel Hill, North Carolina, and/or similar communities at all times material to this complaint.

36. The plaintiff and plaintiff's attorneys object to the requirements of Rule 9(j) of the North Carolina Rules of Civil Procedure on the basis that this Rule seems to require Plaintiff to prove her case before factual discovery is even begun, this Rule denies medical malpractice Plaintiffs

their rights of due process of law, of equal protection under the law, of the right to open courts, and of the right to a jury trial (in violation of the United States and North Carolina Constitutions) and, further, that Rule 9(j) is an unconstitutional violation of the following:

- a. Amendment VII and Amendment XIV of the United States constitution;
- b. Article I, Sections 18, 19 and 25 of the North Carolina Constitution.

37. Without waiving these objections, counsel for the Plaintiff provides the following information to comply with the requirements of Rule 9(j). The care received by Mary Lou Barthazon at Britthaven of Chapel Hill has been reviewed by one or more persons who are reasonably expected to qualify as an expert witness or witnesses under Rule 702 of the Rules of Evidence and who are willing to testify that the nursing and other health care provided to her did not comply with the applicable standards of care.

38. The breaches of the standard of care described in this claim for relief proximately caused damage to Mary Lou Barthazon as is more particularly set forth in the SURVIVAL and WRONGFUL DEATH claims for relief which follow, which damage allegations are specifically incorporated by reference into this paragraph as if specifically set forth.

THIRD CLAIM FOR RELIEF: ORDINARY NEGLIGENCE

(NON-ADMINISTRATIVE BASIC CARE)

39. Plaintiff adopts and realleges Paragraphs (1) through (38) above.

40. Defendants owed a duty of reasonable care to Mary Lou Barthazon.

41. To the extent the breach of defendants' duties as alleged in the foregoing claims for relief constitutes simple (non-administrative) negligence rather than, or in addition to, medical malpractice and/or statutory rights violations, this negligence is hereby pled.

42. The care provided by nursing assistants (who are not licensed health care providers) to Mary Lou Barthazon was ordinary care by its nature, including the failure to properly transfer her by failing to use a mechanical lift in accordance with her care plan, which resulted in and proximately caused her to suffer bilateral femur fractures and other injuries on or about September 30, 2007, when she was dropped and roughly handled by the nursing assistant who did not comply with her care plan.

43. As a direct and proximate result of defendants' ordinary basic negligence, Mary Lou Barthazon suffered personal injury as alleged above.

44. The breaches of the standard of care described in this claim for relief proximately caused damage to Mary Lou Barthazon as is more particularly set forth in the SURVIVAL and WRONGFUL DEATH claims for relief which follow, which damage allegations are specifically incorporated by reference into this paragraph as if specifically set forth.

FOURTH CLAIM FOR RELIEF: SURVIVAL ACTION

45. Plaintiff adopts and re-alleges paragraphs (1) through (44) above.

46. As a direct and proximate cause of the breaches of duty and standards of care described in the foregoing and subsequent paragraphs, Mary Lou Barthazon suffered scars and disfigurement and other bodily injuries including bilateral femur fractures, mental anguish, inconvenience, loss of capacity for enjoyment of life, loss of dignity, pain and suffering, permanent injury and disability, inconvenience, discomfort, reduced life expectancy, medical expenses and other damages in excess of \$10,000.00.

FIFTH CLAIM FOR RELIEF: WRONGFUL DEATH

47. Plaintiff adopts and realleges Paragraphs (1) through (46) above.

48. Mary Lou Barthazon died as a direct and proximate result of the defendants' negligence in bilaterally fracturing her femurs and then delaying medical diagnosis and treatment of said injuries, as well as other acts and omissions, which will be shown at the trial of this matter.

49. The beneficiaries of the Estate of Mary Lou Barthazon, pursuant to N.C.Gen. Stat. §28A-18-2, are entitled to recover the damages therein listed, including, but not limited to, pain and suffering, death, reasonable funeral expenses, loss of society, companionship, love, and comfort of Mary Lou Barthazon to her family, in an amount in excess of \$10,000.00.

SIXTH CLAIM FOR RELIEF: PIERCE THE CORPORATE VEIL

50. Plaintiff adopts and realleges Paragraphs (1) through (49) above.

51. Britthaven, was Hillco's alter ego, and was dominated and controlled by Hillco, such that it had no separate mind, will or existence of its own.

52. Britthaven, Inc., was a sham corporation which had been inadequately capitalized to provide protection for its frail elderly residents, including Mary Lou Barthazon, to whom both defendants owed a non-delegable fiduciary duty to provide nursing and custodial care within the applicable standards of care. Said frail elderly residents, including Mary Lou Barthazon, depended upon Britthaven, Inc., the licensee to protect them from harm, which dependence was known and cultivated by Hillco.

53. Defendant Hillco used its control of Britthaven to commit wrong, and/or to perpetrate the violation of the positive legal and fiduciary duties enumerated in the preceding and subsequent causes of actions, and/or to unjustly contravene Mary Lou Barthazon's legal rights.

54. The defendant's exercise of control and breach of duty to Mary Lou Barthazon

and other patients proximately caused the injuries and unjust loss suffered by Mary Lou Barthazon and her heir.

SEVENTH CLAIM FOR RELIEF: PUNITIVE DAMAGES

55. Plaintiff adopts and re-alleges Paragraphs (1) through (54) above.

56. The defendants, through their agents and employees, and with the condonation and/or participation of their managerial employees including but not limited to the Directors of Nursing and the Nursing Home Administrator and others yet unknown demonstrated conscious and intentional disregard of and indifference to the rights and safety of Mary Lou Barthazon and others similarly situated demonstrated by:

- a. their business practice of attempting to care for residents with an inadequate number of insufficiently qualified staff, which their officers and managers knew or should have known were reasonably likely to result in injury to Mary Lou Barthazon and their other patients;
- b. their business practice of overworking staff, which their officers and managers knew or should have known were reasonably likely to result in injury to Mary Lou Barthazon and their other patients; and
- c. their business practice of insufficiently training staff, which their officers and managers knew or should have known were reasonably likely to result in injury to Mary Lou Barthazon and their other patients;
- d. their business practice of knowingly and falsely holding themselves out to the plaintiff, Mary Lou Barthazon, the public, and government agencies as being adequately staffed with sufficiently trained and sufficiently rested

nursing and other staff such that the plaintiff and others would detrimentally rely on those representations;

- e. and all of the other business practices described in plaintiff's FIRST CLAIM FOR RELIEF: ORDINARY CORPORATE NEGLIGENCE, all of which practices led to Britthaven of Chapel Hill's staff's recurring inability to perform necessary care for Mary Lou Barthazon and other patients, as is described in more detail in the foregoing paragraphs.
- f. Other acts and omissions, which will be shown at the trial of this matter.

57. The defendants knew or should have known that their willful and wanton conduct was reasonably likely to cause injury, damage, or other harm to Mary Lou Barthazon and others similarly situated.

58. The willful and wanton conduct of the defendants was related to the injuries suffered by Mary Lou Barthazon.

59. An award of punitive damages is warranted to punish the defendant's egregious conduct and to deter the defendants and others from engaging in similar conduct.

60. The plaintiffs object to the limitations on recovery of punitive damages, and to the requirement that, in the case of corporate defendants, the conduct complained of be either condoned by or participated in by managers or officers of the corporate entity, all contained in the North Carolina Punitive Damages Statute, N.C.G.S. §§ 1D-1 through 1D-50, and allege, in compliance with N.C. Rule of Civil Procedure 11(a), that they have a good faith argument that existing appellate law on the limitations on recovery under the existing statutory scheme should be reversed because these limitations are violative of the Plaintiff's rights of due process of law,

of equal protection under the law, of the right to open courts, of access to the courts, and of the right to a jury trial (in violation of the United States and North Carolina Constitutions) and, further, that the Punitive Damages Statute is an unconstitutional violation of the following:

- a. Amendment VII, IX, and XIV of the United States Constitution;
- b. Article I, Sections 1, 6, 7, 14, 18, 19, 25, 35, and 36; and Article IV, Sections 1 and 13 of the North Carolina Constitution.


WHEREFORE, Plaintiffs pray the Court for the following relief:

- 1. That the plaintiff as Administrator of the Estate of Mary Lou Barthazon, have and recover of the Defendants sums in excess of \$10,000.00 in compensatory and punitive damages, costs, pre- and post-judgment interest, and all other appropriate relief available in the foregoing causes of action.
- 2. That this matter be tried by a jury.
- 3. For such other and further relief as the Court may deem just and proper.

This the 10th day of July, 2009.

HENSON & FUERST, P.A.

BY:


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