NO. 20-CI-001763

JEFFERSON CIRCUIT COURT
DIVISION 3
HON. MITCH PERRY

DIANNE HOLBROOK, AS EXECUTRIX AND PERSONAL REPRESENTATIVE OF THE ESTATE OF RALPH D. HOLBROOK AND DIANNE HOLBROOK, INDIVIDUALLY

PLAINTIFFS

v.

DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF MOTION TO ALTER OR AMEND JUDGMENT ENTERED JUNE 20, 2022 AND/OR FOR A NEW TRIAL

LAKE FOREST POST ACUTE, LLC d/b/a VALHALLA POST ACUTE; PROVIDENCE GROUP, INC.; ERIC HENRY; KEVIN SCHOENFELD; EVANGELINE BURCH; JEFF BAXTER; AND DONNA CANTWELL, ADMINISTRATOR

DEFENDANTS

* * * * *

Defendants, Lake Forest Post Acute, LLC d/b/a Valhalla Post Acute ("Valhalla Post Acute") and Providence Group, Inc., tender the following Memorandum of Law in support of their motion to alter or amend the Judgment entered on June 20, 2022 and/or order a new trial on Mrs. Holbrook's loss of consortium claim:

INTRODUCTION

Dianne Holbrook maintained this action individually and on behalf of the Estate of her husband, Ralph Holbrook, ("Plaintiff") to recover damages allegedly sustained when Mr. Holbrook fell during physical therapy at Valhalla Post Acute and broke his hip. Plaintiff alleged Mr. Holbrook experienced a medical decline following surgery to repair his fractured hip and ultimately died more than two years later as a result of such decline and immobility caused by the hip fracture. Plaintiff asserted claims for personal injuries to Mr. Holbrook, wrongful death, and loss of spousal consortium. Following an 8-day jury trial, the jury found for Plaintiff on the personal injury and loss of consortium claims but rejected the wrongful death claim. The jury's

award included $500,000 for Mr. Holbrook's pain and suffering and $1,200,000 for Mrs. Holbrook's loss of consortium before her husband's death. Prior to the verdict, at the close of Plaintiff's case-in-chief, Plaintiff withdrew her claim for violation of Mr. Holbrook's resident's rights and Defendants moved for a directed verdict to dismiss the claims against Defendant, Providence Group, Inc. ("PGI"). The Court granted PGI's motion and dismissed what it referred to as the "corporate negligence" claim, which was the only remaining claim asserted in the Complaint.

On June 20, 2022, the Court entered its "Orders and Judgment" ("Judgment") consistent with the verdict. The Judgment also provides the claims against PGI for "corporate negligence" have been dismissed, but the claims against PGI "for vicarious liability and collection matters are reserved and subject to further entry."

Plaintiff did not assert in the Complaint or Amended Complaint (hereinafter "Complaint") a claim against PGI for vicarious liability. It is axiomatic that a claim for vicarious liability cannot be reserved and subject to further entry where it was never alleged in the Complaint. If PGI is now subject to potential post-judgment liability on a claim that was never pled, by directing a verdict dismissing the only remaining claim against PGI, PGI was precluded from offering evidence contesting Valhalla Post Acute and its employees were agents of PGI subjecting PGI to respondeat superior liability. Moreover, Plaintiff offered insufficient evidence to even create a fact issue on her agency theory. Accordingly, the Judgment should be altered or amended to remove the language reserving vicarious liability and collection matters for potential further entry, which will secure PGI's dismissal from this action as a defendant.

Additionally, Defendants are entitled to an amendment or alteration of the Judgment reducing the amount of the jury's loss of consortium award on the grounds it is excessive and

disproportionate to the award of pain and suffering damages to Mr. Holbrook's Estate, or in the alternative, a new trial on Mrs. Holbrook's loss of consortium claim. Absent exceptional circumstances, the amount of damages awarded for loss of consortium should not exceed the award of non-economic damages to the injured spouse who generally experiences comparable losses of physical and emotional affection in addition to being the one who suffers the direct effects of the injury itself. There were no exceptional circumstances in this case where there was no evidence the marriage was an unequal one in which Mrs. Holbrook derived far more satisfaction from the marriage than Mr. Holbrook. Where the jury awarded Mrs. Holbrook consortium damages nearly two-and-a-half times its pain and suffering award to Mr. Holbrook's Estate, such award was improperly motivated by undue sympathy or bias toward Mrs. Holbrook and/or prejudice against Defendants. Accordingly, the Court should reduce the consortium award to an amount less than the pain and suffering award to the Estate or grant a new trial on Mrs. Holbrook's loss of consortium claim.

FACTS

Ralph Holbrook, 82, was admitted to Valhalla Post Acute rehabilitation facility on March 6, 2019 where he was to receive two weeks of daily physical and occupational therapy following a right total knee replacement surgery at Norton Audubon Hospital one week earlier. Over the course of his first 10 days of therapy, Mr. Holbrook achieved significant progress. On the eleventh day, Mr. Holbrook fell while doing a balloon toss exercise with physical therapy assistant, Eric Henry. Mr. Holbrook fractured his hip as a result of the fall and underwent surgery.

Ralph Holbrook filed suit in March 2020 against Valhalla Post Acute, Mr. Henry, two supervising physical therapists (Kevin Schoenfeld and Evangeline Burch), the Director of Rehabilitation (Jeff Baxter), and the Administrator (Donna Cantwell) at the time of Mr. Holbrook's

residency. Plaintiff asserted negligence claims against all Defendants, a gross negligence claim against Mr. Henry and Valhalla Post Acute, and claims against Valhalla Post Acute and/or PGI for breach of contract and violation of the Resident's Rights statute, KRS 216.515. Mrs. Holbrook also asserted a loss of consortium claim. *See* Complaint, attached as **Exhibit 1**.

The entirety of the claims against PGI alleged in the Complaint is as follows:

> 14. The Defendant Providence by and through its agents, ostensible agents, servants, and employees, undertook to provide and were responsible for providing, management services; supervision; oversight, financial services and oversight; advice on policies, procedures, and business objectives; regulatory compliance oversight; and other support services for the Defendant Valhalla Post Acute, and its agents, ostensible agents, servants, and employees, and the other Defendants named herein.
>
> 15. The Defendant Providence negligently fulfilled the responsibilities discussed in the immediately preceding paragraph.
>
> 16. The Defendants Valhalla and/or Providence breached their contract to provide care to the Plaintiff Ralph Holbrook, which caused and brought about monetary damages and injuries to both Plaintiffs complained of herein.
>
> 17. The Defendant Valhalla and/or Providence breached the requirements of KRS 216.515, including but not limited to violating the Plaintiff Ralph Holbrook's right to be fee from mental and physical abuse and his right to be treated with consideration, respect, and full recognition of his dignity and individuality. Said violations give Plaintiffs a cause of action for damages, costs and attorney fees, to which these Plaintiffs are entitled as a result of the breaches of KRS 216.515.

(Complaint at pp. 4-5). All of these claims allege direct negligence of PGI. Nowhere in the Complaint does Plaintiff allege liability under a vicarious liability or respondeat superior theory.

Mr. Holbrook died in May 2021 and Mrs. Holbrook revived the action as personal representative of Mr. Holbrook's Estate asserting the identical claims and allegations set forth in the original Complaint. *See* Amended Complaint, attached as **Exhibit 2**. Plaintiff also added a

wrongful death claim alleging the fall and surgery for the fractured hip caused a medical decline that eventually resulted in his death. *Id.* at ¶ 38.

The case was tried by a jury from May 23 through June 2, 2022. On the first day of trial before jury selection began, Plaintiff voluntarily dismissed the individually named Defendants. At the close of Plaintiff's case-in-chief, Plaintiff withdrew her Resident's Rights claims. Defendants moved for a directed verdict to dismiss the punitive damages claim against Defendants, the negligence claim against Valhalla Post Acute, and any remaining claims against PGI. The Court denied Defendant's motion for directed verdict to dismiss the negligence and punitive damages claims and granted PGI's motion for directed verdict "on issues of corporate negligence." (Judgment at 1, attached as **Exhibit 3**). Plaintiff also abandoned the breach of contract claim, having not included it in her proposed jury instructions and it not being included in the final instructions given to the jury.

After deliberations following Defendant's case-in-chief, the jury rendered a verdict in favor of Plaintiff against Valhalla Post Acute on the negligence and gross negligence claims and awarded Plaintiff's Estate $360,000 in medical expenses, $500,000 in pain and suffering, and $700,000 in punitive damages. *Id.* at 2. The jury found in favor of Defendant on the wrongful death claim, finding Mr. Holbrook's death was not caused by the hip fracture and surgery. *Id.* The jury also awarded Mrs. Holbrook $1,200,000 in loss of consortium damages incurred before Mr. Holbrook's death, which is 2.4 times the pain and suffering award to the Estate. *Id.*

On June 20, 2022, the Court entered the Judgment reflecting the jury's determinations. In the final paragraph, the Court stated the following:

> At this time, claims against the Defendant Providence Group, Inc. for corporate negligence have been dismissed. Claims against the Defendant Providence Group, Inc. for vicarious liability and collection matters are reserved and subject to further entry.

Id. at 3.

The Judgment should be altered or amended to remove the provision that PGI is still subject to vicarious liability and collection matters because no vicarious liability claim was ever asserted and there are no remaining claims against PGI.

Additionally, there is no reasonable relationship between the size of the consortium award to Mrs. Holbrook and the pain and suffering award to Mr. Holbrook's Estate, as the factual circumstances do not warrant an award of the former 2.4 times that of the latter. Likely not coincidentally, the amount of the award was equal to the sum of the pain and suffering and punitive damages awards. Even viewing the evidence in a light most favorable to Plaintiff, the jury's disproportionate consortium award was likely improperly motivated by undue sympathy, bias, and/or prejudice. The Court, therefore, should order a remittitur of the consortium award or order a new trial on the loss of consortium claim.

ARGUMENT

I. Plaintiff Has Not Pled a Claim for Vicarious Liability Against PGI, So the Judgment Should be Altered or Amended to Remove the Language that PGI Remains Potentially Liable for Vicarious Liability and Subject to Collection Matters.

Kentucky courts recognize that a claim for vicarious liability is separate and distinct from a claim for the principal's own negligence. *See, e.g., Feltner v. PJ Operations,* LLC, 568 S.W.3d 1, 9 (Ky. App. 2018) ("negligent hiring, supervision, and retention claims [are] separate and apart from vicarious liability claims"); *MV Transp. Inc. v. Allgeier*, 433 S.W.3d 324, 337 (Ky. 2014) ("Kentucky law has recognized that a distinction exists between the vicarious liability of an employer and the actual liability of that employer" and "hold[ing] that a plaintiff may assert and pursue in the same action a claim against an employer based under *respondeat superior* upon the

agent's negligence, and a separate claim based upon the employer's own direct negligence in hiring, retention, supervision, or training.").

> The distinction between these types of claims "being, 'respondeat superior' is based upon the employer/employee relationship and imposes strict liability, whereas claims of negligent hiring/retention focus on the direct negligence of the employer which permitted an otherwise avoidable circumstance to occur."

Feltner, 568 S.W.3d at 9-10 *citing Ten Broeck Dupont, Inc. v. Brooks*, 283 S.W.3d 705, 734 (Ky. 2009).

Clearly, vicarious liability is not a theory that may be asserted and addressed for the first time after the trial has occurred and a verdict rendered. It is a distinct claim that must have been pled in the action. *Accord Cohen v. Alliant Enters., Inc.*, 60 S.W.3d 536, 539 (Ky. 2001) (holding the plaintiff could have sued the principal under a vicarious liability theory in one of two ways, either by suing "the principal only, so long as he did so before the statute of limitations had run as to the agent" or suing both the principal and agent together.). Absent the assertion of a vicarious liability claim, the principal cannot be held liable for such a claim.

In this case, Plaintiff asserted three claims against PGI: (1) negligently providing management services; supervision; oversight, financial services and oversight; advice on policies, procedures, and business objectives; regulatory compliance oversight; and other support services;[1] (2) breach of contract;[2] and (3) violations of the Resident's Rights statute.[3] All three of these claims are premised on alleged direct or active conduct of PGI. The first claim is the "corporate negligence" claim the Court dismissed on directed verdict. Plaintiff abandoned the breach of contract claim when she did not offer any evidence of a contract or breach and did not include it

[1] Complaint, ¶¶ 14-15; Amended Complaint, ¶¶ 16-17.
[2] Complaint, ¶ 16; Amended Complaint, ¶ 18.
[3] Complaint, ¶ 17; Amended Complaint, ¶ 19.

in her proposed jury instructions nor was it included in the final instructions given to the jury. And Plaintiff withdrew the resident's rights claim at the close of her case in chief. Plaintiff alleged no other cause of action, including a claim for vicarious liability or respondeat superior liability. Having failed to plead such a claim, Plaintiff is barred from seeking recovery under it post-trial.

Moreover, to subject PGI to potential liability under a vicarious liability theory that was not pled and where the court dismissed on directed verdict the only remaining claim Plaintiff had asserted would unfairly prejudice PGI because PGI was precluded from offering evidence contesting Valhalla Post Acute and its employees were agents of PGI subjecting PGI to respondeat superior liability. Moreover, Plaintiff, having the burden of proving an agency relationship, failed to introduce sufficient evidence to submit that issue to the jury even if vicarious liability had been pled. Under these circumstances, PGI had no need to introduce evidence to rebut a principal/agency relationship existed between it and Valhalla Post Acute. Defendants do not believe fact issues exist as to whether PGI exercised any authority or control over Valhalla Post Acute, and PGI's previously filed motion for summary judgment should have been granted on the grounds that it is merely a holding company with no management, operational, supervisory, control, oversight, or other duties or responsibilities with respect to Valhalla Post Acute. To the extent the Court believes, however, fact issues exist on Plaintiff's purported vicarious liability claim, PGI was precluded from offering evidence to rebut such claim when it was not asserted in the Complaint or Amended Complaint and the only remaining claim against PGI was dismissed on directed verdict. Subjecting PGI to liability on a claim in defense of which PGI was precluded from offering evidence as it had no reason at the time to do so violates PGI's due process rights. *McGregor v. Hines*, 995 S.W.3d 384, 388 (Ky. 1999) ("It is crucial to a defendant's fundamental

right to due process that he be allowed to develop and present any exculpatory evidence in his own defense.").

II. The Consortium Award Was Excessive and Disproportionate to the Award of Pain and Suffering Damages to Mr. Holbrook's Estate, Entitling Defendant to a Remittitur of the Consortium Award or a New Trial on the Loss of Consortium Claim.

KRS 411.145 permits a spouse to recover damages against a third person for loss of consortium, which is defined as "the right to the services, assistance, aid society, companionship and conjugal relationship" between the two spouses. Mrs. Holbrook alleged as a result of the injuries Mr. Holbrook sustained, she suffered a loss of his "consortium, companionship, love, affection, services and society." (Complaint, ⁋ 37, Amended Complaint, ⁋ 39). The jury's award of $1,200,000 in consortium damages is greatly disproportionate to and bears no relationship to its award to the Estate of $500,000 in pain and suffering damages. It is apparent the consortium award was improperly motivated by sympathy for Mrs. Holbrook and/or bias or prejudice against Defendants, and therefore, must be reduced whether by court order or a new trial on the loss of consortium claim.

Efforts to seek relief from excessive verdicts are typically undertaken through a motion to alter, amend, or vacate the judgment under CR 59.05 and/or a motion for a new trial under CR 59.01. *See, e.g.*, *Emberton v. GMRI, Inc.*, 299 S.W.3d 565, 579 (Ky. 2009) (addressing defendant's motions seeking to reduce a pain and suffering award of $225,000 for contracting hepatitis A at a restaurant). The decision to do either lies within the discretion of the trial court. *Id.* In exercising such discretion, the trial court considers whether "the verdict bears any relationship to the evidence of loss suffered." *Id.* citing *Childers Oil Co. v. Adkins*, 256 S.W.3d 19, 28 (Ky. 2008). If so, the trial court generally does not disturb the jury's assessment of damages. *Id.*

Nevertheless, "jury verdicts on disputed questions of fact are not final or unassailable." *Commonwealth, Dep't of Highways v. Riley*, 414 S.W.2d 885, 886 (Ky. 1967). "In Kentucky, it is well established that a jury verdict on a disputed question of fact 'may be reviewed and upset where . . . the amount at first sight appears excessive and to have been rendered as a result of passion or prejudice.'" *Rockwell Int'l Corp. v. Wilhite*, 143 S.W.3d 604, 628-29 (Ky. App. 2003) citing *Riley*, 414 S.W.2d at 886-87. The *Wilhite* court recognized appellate courts have employed this guideline in reviewing an award of punitive damages. *Id.* at 629. However, the court further recognized this guideline is not limited to punitive damage cases and that the touchstone of the guideline in all cases is whether the amount awarded is disproportionate and it appears the jury was motivated by sympathy, bias, or prejudice:

> Put another way, "[o]ur reluctance to set aside a verdict as being excessive does not preclude us from doing so where the amount seems disproportionate to the actual damages suffered and it appears the jury may probably have been actuated by sympathy or by bias, prejudice or like unjudicial and improper motive."

Id. at 629 citing *Field Packing Co. v. Denham*, 342 S.W.2d 524, 527 (Ky. 1961) (assessing excessiveness of verdict for personal injuries and loss of earning power).

The Court in *Childers* also applied a proportionality requirement in assessing the excessiveness of emotional distress damages awarded to the plaintiff. *See Childers*, 256 S.W.3d at 21-22 (holding an award of $50,000 for emotional distress in an age discrimination claim "is not so disproportionate to the evidence as to warrant the verdict being set aside or the order for a new trial.").

While Kentucky appellate courts have not yet addressed the excessiveness of a loss of consortium award in proportion to the award of non-economic damages to the injured spouse, numerous other jurisdictions have. They concluded "there 'should be some **reasonable relationship** between the size of a verdict awarded in a consortium action and that given [to] the

injured spouse,' and it would be a highly unusual case in which the consortium award exceeded the damages award to the principal plaintiff." *Kingman v. Dillard's Inc.*, 643 F.3d 607, 618 (8th Cir. 2011) quoting *Hodges v. Johnson*, 417 S.W.2d 685, 693 (Mo. Ct. App. 1967) (emphasis added). These courts reason that presumably the injured spouse suffers the same marital deprivations—companionship, support, intimacy, and love—as does the deprived spouse asserting loss of consortium, but the injured spouse in addition experiences pain and suffering resulting from the injury itself. As a result, these courts have adopted the rule there is:

> a presumption that a direct injury to one spouse is no less harmful, everything considered, than the concomitant loss of consortium suffered by the deprived spouse, insofar as the impaired spouse ordinarily will experience more or less comparable losses of physical and emotional affection, in addition to being the one who suffers all of the direct effects of the injury itself.

Ashmore v. Hartford Hosp., 208 A.3d 256, 268 (Conn. 2019). The presumption can be overcome "by evidence that the marriage was an unequal one, in which the deprived spouse relied more heavily on the support of or derived far more satisfaction than the impaired spouse, or that the impaired spouse somehow had less to lose." *Id.*

The Court in *Ashmore* noted this rule, "which strikes us as eminently reasonable, has been applied by courts both in Connecticut and in other jurisdictions":

> *See, e.g., Kingman v. Dillard's, Inc.*, *supra*, 721 F.3d 615, 620 (concluding that loss of consortium award that was more than five times greater than award to impaired spouse was disproportionate, and observing that "it would be a highly unusual case in which the consortium award exceeded the damages award to the principal plaintiff" [internal quotation marks omitted]); *Musorofiti v. Vlcek*, 65 Conn. App. 365, 376, 783 A.2d 36 ("the derivative spouse may not recover more than the injured spouse"), cert. denied, 258 Conn. 938, 786 A.2d 426 (2001); *Blake v. Neurological Specialists, P.C.*, *supra*, Superior Court, Docket No. X02-CV-94-0155265-S, 2003 Conn. Super. LEXIS 1471 (remitting $2 million loss of consortium award in absence of any evidence that surviving spouse derived more satisfaction from marriage than decedent spouse [whose estate was awarded $1,000,000 in non-

> economic damages] had derived from all of life's pleasures); *see also Wheat v. United States*, 860 F.2d 1256, 1261 (5th Cir. 1988) (concluding that loss of spousal consortium award of $1.8 million was "grossly disproportionate" to $3 million wrongful death award [and ordered a remittitur of half of the consortium award], notwithstanding that deprived husband had to endure wife's painful four year battle with undiagnosed, untreated cancer); *Rascop v. Nationwide Carriers*, 281 N.W.2d 170, 173 (Minn. 1979) (reasonableness of loss of consortium award must be assessed in light of damages awarded to impaired spouse); M. McLaughlin, "Wife's Damages for Loss of Consortium," 10 Am. Jur. Proof of Facts 3d 97, 153, § 35 (1990) ("there should be some reasonable relationship between the size of a verdict awarded in a consortium action and the amount recovered by the [impaired] spouse"); 2 F. Harper *et al.*, Harper, James and Gray on Torts (3d Ed. 2006) § 8.9, pp. 661-62 (observing that most incidents of marriage are equally valuable to both spouses). This rule also is consistent with our observation in *Champagne v. Raybestos-Manhattan, Inc.*, *supra*, 212 Conn. 556, that a derivative action such as one for loss of consortium cannot afford greater relief than would be permitted under the predicate action. Notably, in *Champagne*, we held that a loss of consortium award that was more than twice as large as the corresponding wrongful death award was excessive, although we did not expressly rely on the rule that we have articulated in the present case. *Id.*, 558; *see id.*, 516-18.

Id. *Ashmore* involved a medical malpractice action in which the plaintiff's decedent suffered oxygen deprivation from a postoperative condition and died after life support was withdrawn. *Id.* at 780-81. In the wrongful death action, the jury awarded the decedent's estate $75,000 in economic damages and $1,200,000 in noneconomic damages, and awarded the plaintiff surviving spouse $4,500,000 for loss of consortium. *Id.* at 781. The defendant filed a motion seeking a remittitur of the consortium award, which the trial court denied, and the defendant appealed.

The Connecticut Supreme Court began its analysis by "recogniz[ing] that rarely does a jury award – let alone an appellate tribunal uphold – a loss of consortium award that is multiples greater than the underlying award compensating the impaired spouse." *Id.* at 796. In adopting the rebuttable presumption rule set forth above, the Court acknowledged loss of consortium damages defy any precise mathematical computation but held "an award of noneconomic damages to the

impaired spouse, awarded at the same time, by the same finder of fact, provides a natural and meaningful benchmark by which we may evaluate the reasonableness of the corresponding loss of consortium award." *Id.* at 798. The Court noted, "When the latter is substantially greater than the former, a suspicion naturally arises that the loss of consortium award was the product of sympathy or partiality toward the deprived spouse or prejudice against the defendant." *Id.* at 799. The Court held the trial court erred in denying the defendant's motion for remittitur concluding the jury could not reasonably have found the plaintiff's lost consortium was substantially more damaging than the decedent's loss of life and its enjoyments and remanded for the trial court to reconsider the remittitur motion. *Id.* at 814.

In this case, there is no relationship, much less a reasonable one, between the size of the consortium award to Mrs. Holbrook and the pain and suffering award to the Estate of Mr. Holbrook, which resulted in the former being 2.4 times more than the latter. As for the companionship and society components of the loss of consortium claim, Mrs. Holbrook testified to a loving and happy marriage of nearly 40 years. She said they liked to travel, camp, and hike; they socialized with friends and went to estate sales; and they made birthday and anniversary cards for people at their church. (Trial tape "TT", 6/1/22, 10:07:59-10:09:17). They attended church on Sundays and fixed communion for church, went out to eat with friends, and Mr. Holbrook taught bible class on Wednesdays. (TT, 6/1/22, 10:18:45-10:19:10). Other than continuing to make cards, Mrs. Holbrook testified the other activities mentioned ceased after the fall. Mr. and Mrs. Holbrook **both** enjoyed doing these activities together and there is no evidence to suggest Mr. Holbrook suffered the deprivation of this marital affection and companionship any less than Mrs. Holbrook.

As for the assistance and aid components of a consortium claim, Mrs. Holbrook testified they lived, and she continues to live, on 20+ acres. Before the hip fracture, Mr. Holbrook mowed the grass and sawed and picked up limbs after storms. (TT, 6/1/22, 10:11:18-10:11:47). After the hip fracture, a neighbor, Leldon Lockart, mowed their grass because Mr. Holbrook was physically unable to do so. However, Mrs. Holbrook has not incurred any monetary damages for this replacement service, because Mr. Lockart testified he told Mr. Holbrook not to worry about mowing his grass and that Mr. Lockart would do it for him until Mr. Holbrook was ready to mow it again on his own. (TT, 5/27/22, 10:19:30-10:19:41). Therefore, the consortium award cannot include damages for Mr. Holbrook being unable to mow the grass prior to his death. *See Schultz v. Chadwell*, 558 S.W.2d 183, 188 (Ky. App. 1977) (holding a deprived spouse may recover the cost of replacing services the injured spouse used to perform "if [the deprived spouse] had paid for the expense of household help.").

Further, Mrs. Holbrook testified she and Mr. Holbrook split the household operation equally. Mr. Holbrook took care of the outside of the house while Mrs. Holbrook took care of the inside. (TT, 6/1/22, 10:07:15-10:07:45). This comports with each receiving equal value from the marriage and precludes a finding that Mrs. Holbrook "relied more heavily on the support of or derived far more satisfaction than" Mr. Holbrook to explain the disproportionate consortium award. *Ashmore*, 208 A.3d at 268.

Mrs. Holbrook also testified to the daily routine she followed caring for Mr. Holbrook after his hip fracture and surgery, which consisted of tasks such as giving him his medicine, checking his vitals, walking him to increase his mobility and strength, getting him to eat and drink, and documenting the details of these tasks in a journal. (TT, 6/1/22, 10:39:45-10:43:03). However, these tasks are not encompassed within a claim for loss of consortium. While such a claim is an

independent cause of action, "case law also recognizes that a spouse's claim for loss of consortium is not a separate injury, but is derivative of the injured spouse's personal injury claim." *Kentucky Farm Bur. Mut. Ins. Co. v. Armfield*, 2016 Ky.App. LEXIS 23 *5 (Feb. 26, 2016) citing *Daley v. Reed*, 87 S.W.3d 247, 248 (Ky. 2002). The crux of a consortium claim is the loss of things the injured spouse provided to the deprived spouse and contributed to the marriage. Therefore, Mrs. Holbrook's "right of recovery is limited to loss of society, companionship, conjugal affections, and physical assistance" by or from Mr. Holbrook. *Kotsiris v. Ling*, 451 S.W.2d 411, 412 (Ky. 1970). Her consortium claim does not also compensate her for the burden, inconvenience and emotional distress she experienced caring for him in the two years between the hip fracture and his death.

As the Court in *Ashmore* recognized, an award of $500,000 in non-economic damages to the Estate for Mr. Holbrook's pain and suffering, awarded at the same time by the same finder of fact, provides a natural and meaningful benchmark by which the reasonableness of the corresponding $1,200,000 loss of consortium award can be evaluated. 208 A.3d at 798. As shown above, Mr. Holbrook suffered approximately the same marital deprivations—companionship, support, intimacy, and love—from his injuries as did Mrs. Holbrook prior to his death. But, Mr. Holbrook also experienced the pain and suffering resulting from the injury itself, which Mrs. Holbrook of course did not experience. Given these circumstances, there is simply no relationship, reasonable or otherwise, between the jury's award to Mrs. Holbrook of consortium damages nearly 2 ½ times the pain and suffering award to Mr. Holbrook's estate.

Accordingly, the only rational conclusion is the substantially disproportionate consortium award was the product of sympathy or partiality toward Mrs. Holbrook or prejudice against Defendants. In this regard, it is notable the consortium award is exactly equal to the sum of the

pain and suffering award to the Estate and the punitive damages award. Obviously, the jury's consideration of the amount of punitive damages it awarded – and ultimately including the entire amount – in determining the amount to award in consortium damages is *prima facie* improper and reflects prejudice against Valhalla Post Acute.

Furthermore, the award of $1,200,000 in consortium damages in a **non-death case** is unprecedented in Kentucky and far exceeds the largest consortium award in Kentucky over the past 23 years. According to The Kentucky Trial Court Review, of the 53 spousal consortium awards in non-death cases between 1999 and 2021, juries awarded six figures only six times and the largest award was $500,000. (The Kentucky Trial Court Review, Year in Review 2021, 24th Ed., p. 451-52 (2022)). In light of the large disparity between this jury's consortium award and the verdict history in Kentucky as well as the pain and suffering award to Mr. Holbrook's Estate in addition to reflecting sympathy toward Mrs. Holbrook and prejudice against Valhalla Post Acute, it appears clear the jury included the loss of Mr. Holbrook's services, assistance, aid, society, companionship and conjugal relationship **after** his death. The jury's award of $1,200,000 to Mrs. Holbrook is even greater than half of the consortium awards juries in Kentucky have awarded in **wrongful death cases** since the decision in *Martin v. Ohio County Hosp. Corp.*, 295 S.W.3d 104 (Ky. 2009) holding that loss of consortium damages are recoverable after the injured spouse's death. *See* The Kentucky Trial Court Review, Year in Review 2021 at p. 452. The inclusion in its award of consortium damages incurred after Mr. Holbrook's death is impermissible and inconsistent with its verdict in favor of Defendants on the wrongful death claim finding Mr. Holbrook's death was not caused by his hip fracture.

Therefore, the Court should either order a remittitur of the jury's award for loss of consortium reducing such award to an amount less than the pain and suffering award to the Estate, or order a new trial on Mrs. Holbrook's loss of consortium claim.

CONCLUSION

For all the foregoing reasons, Defendants request the Court to enter the attached Order granting Defendants' motion to alter or amend the Judgment entered on June 20, 2022 to remove the language, "Claims against the Defendant, Providence Group, Inc. for vicarious liability and collection matters are reserved and subject to further entry"; add that the dismissal of Providence Group, Inc. is with prejudice and final and appealable as there is no just cause for delay; and for a remittitur of the jury's award of loss of consortium damages of $1,200,000 or a new trial on Plaintiff, Dianne Holbrook's, loss of consortium claim.

BOEHL STOPHER & GRAVES, LLP

/s/ *Scott A. Davidson*

Scott A. Davidson (#86413)
Rod D. Payne (#86836)
400 West Market Street, Suite 2300
Louisville, KY 40202
Office: (502) 589-5980
Fax: (502) 561-9400
sdavidson@bsg-law.com
rdpayne@bsg-law.com
COUNSEL FOR DEFENDANTS