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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM MARLBORO COUNTY
Court of Common Pleas

The Hon. Paul M. Burch, Circuit Court Judge

Appellate Case No.: 2020-00989

Daisy Frederick……..…Respondent,

v.

Daniel Lee McDowell……..Appellant.

RESPONDENT'S RETURN TO PETITION FOR REHEARING

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Pursuant to Rule 221 of the *South Carolina Appellate Court Rules*, Respondent Daisy Frederick (herein "Ms. Frederick") submits the following Memorandum of Law in opposition to Appellant Daniel Lee McDowell's (herein "Appellant") Petition for Rehearing. This memorandum is supported by applicable rules, decisions of the court, and any arguments of counsel at the hearing on this matter.

INTRODUCTION

On July 20, 2022, in a well-reasoned per curiam opinion, this Court affirmed both the jury verdict awarding Ms. Frederick $5,000,000 and the trial court's denial of Appellant's post-trial motions. Now, in half-hearted protest, Appellant sets forth – almost verbatim – the arguments from his seventeen-month-old appeals brief.

Appellant's attempt to resuscitate arguments long grown cold adds nothing to warrant revisiting this Court's decision. Therefore, Ms. Frederick respectfully asks the Court to deny Appellant's petition.

ARGUMENT

I. The proper standard of review requires deference to the trial court's decisions.

Most of Appellant's claims of error relate to evidentiary and jury-instruction issues – issues that call for a deferential standard of review.

In general, this Court will not reverse a trial court's evidentiary rulings "absent a clear abuse of discretion." *Hartfield v. Getaway Lounge & Grill, Inc.*, 388 S.C. 407, 413, 697 S.E.2d 558, 561 (2010). More specifically, as this Court correctly pointed out, "[t]he admissibility of an expert's testimony . . . will not be reversed on appeal absent an abuse of discretion." *Frederick v. McDowell*, No. 2020-000989, 2022 WL 2826718, at *2 (S.C. Ct. App. July 20, 2022) (quoting

State v. Jones, 423 S.C. 631, 636, 817 S.E.2d 268, 270 (2018)). Furthermore, this Court "will not reverse the trial court's decision regarding jury instructions" absent "an abuse of discretion." *Stephens v. CSX Transp., Inc.*, 415 S.C. 182, 197, 781 S.E.2d 534, 542 (2015) (quoting *Cole v. Raut*, 378 S.C. 398, 404, 663 S.E.2d 30, 33 (2008)).

Ms. Frederick respectfully asks the Court to bear those standards in mind while reviewing the following arguments.

II. Based on extensive evidence of prior and ongoing damages, this Court correctly affirmed the trial court's denial of Appellant's motions for a new trial or a new trial *nisi remittitur*.

Appellant alleges that Ms. Frederick presented no evidence of future damages, and that the jury could not have delivered such a large verdict without positing future damages. Pet. Rehearing at 7–14.

Contrary to Appellant's assertion, Ms. Frederick presented substantial evidence of future damages. Even if she had presented no evidence of future damages, however, her prior damages justified the size of the award. Therefore, the Court should deny Appellant's petition.

A. EVIDENCE OF FUTURE DAMAGES

Ms. Frederick presented significant evidence of future pain. She testified that at the time of trial, nearly three years after the wreck, she was in pain serious enough to require pain medication. [R. p. 82.]

In a 2011 case, *Wilder v. Blue Ribbon Taxicab Corp.*, this Court held that the trial court did not err "in awarding damages for permanent injury and future pain and suffering" where the plaintiff's pain continued through the trial. *Wilder,* 396 S.C. 139, 147, 719 S.E.2d 703, 708 (Ct. App. 2011). Clearly, Ms. Frederick's ongoing pain supported damages for future pain.

In addition, Ms. Frederick presented evidence of permanent injury, future medical treatment, and future lost wages. At deposition, her treating physician testified that due to Ms. Frederick's severe injuries, medical personnel had to place a rod and screws in her thigh, and a plate and screws near her ankle. [R. pp. 178–79.] Therefore, Ms. Frederick sustained permanent internal scarring. Presumably, she sustained permanent external scarring as well. She also testified that she was still undergoing physical therapy and medical treatment, and that due to the effects of her injuries, she had been unable to secure a job. [R. pp. 73, 80–82.][1]

Ms. Frederick's pain, scarring, need for medical treatment, and difficulty working lasted until trial, nearly three years after the wreck. Contrary to Appellant's suggestion, these issues did not vanish the following day; they have dogged Ms. Frederick's future. Therefore, Ms. Frederick presented ample evidence of future damages.

Given this evidence, the Court properly charged the mortality tables. *See* Pet. Rehearing at 9–10. "It is proper to charge the mortality tables in a personal injury action when there is evidence of permanent injury." *Abofreka v. Alston Tobacco Co.*, 288 S.C. 122, 126, 341 S.E.2d 622, 625 (1986). Indeed, it is error for a trial court not to charge the mortality tables where there is evidence of permanent injury, including pain. *Gethers v. Bailey*, 306 S.C. 179, 182, 410 S.E.2d 586, 587–88 (Ct. App. 1991). Although the trial judge did not, in so many words, tell the jury "to disregard the tables if it finds the injury was not permanent based upon the evidence of the case," *id.* at 182, 410 S.E.2d at 588, he clarified at least twice that his detailed instructions on damages were not a suggestion that Ms. Frederick suffered any particular type of damage, instructing the jury to make

[1] Appellant claims that Ms. Frederick's counsel "disavowed any claim for future lost income." Pet. Rehearing at 9. This is untrue. Rather, counsel stated, "I don't think it's necessary to give her lost wages *for the rest of her life* . . ." [R. p. 143 (emphasis added).]

its own decision regarding each type of damages. [R. pp. 150–52.] Even if there had been no evidence of permanent injury, this clear instruction rendered any possible error harmless.

B. REASONABLENESS OF VERDICT

Assuming arguendo that Ms. Frederick presented no evidence of future damages, the verdict was, as this Court correctly noted, "not shockingly disproportionate" to Ms. Frederick's past damages. *Frederick v. McDowell*, No. 2020-000989, 2022 WL 2826718, at *1 (S.C. Ct. App. July 20, 2022). Ms. Frederick presented substantial evidence not only of serious injuries and major medical expenses, but also of "pain and suffering, mental anguish, and loss of enjoyment of life." *Ibid.* For example, she testified that her bones were shattered, that she spent nine months bedridden, and that she spent a year and a half just learning to walk again; she also testified to her fears that her children had been injured or killed in the crash and that she herself would die or become addicted to pain medication. [R. P. 58–59, 62–63, 66, 70–71.] Thus, this Court correctly declined to order a new trial absolute.

This Court also correctly declined to order a new trial *nisi remittitur*. *See* Pet. Rehearing at 10–13. *Becker v. Wal-Mart Stores, Inc.*, on which Appellant relies, is not to the contrary. In *Becker*, the jury returned a verdict of $1,750,000 – more than fifty-seven times the plaintiff's medical expenses of $30,538.44. *Becker*, 339 S.C. 629, 633–34, 529 S.E.2d 758, 760–61 (Ct. App. 2000). The trial court, taking into account factors such as the plaintiff's advanced age, granted the defendant's motion for a new trial *nisi remittitur* and reduced the verdict to $525,000, despite her four-percent impairment rating. *Id.* at 633–34, 529 S.E.2d at 760–61.

Here, Ms. Frederick was twenty-three years old at the time of trial, more than fifty years younger than the *Becker* plaintiff. [R. p. 152.] She, like the *Becker* plaintiff, presented evidence of

permanent injuries. And here, the jury returned a verdict that was little more than twenty-two times her special damages. *Becker* does not dictate a different result.

Instead, *Hawkins v. Pathology Assocs. of Greenville, P.A.* – on which this Court correctly relied, *Frederick*, 2022 WL 2826718 at *1 – supports the original award. Appellant tries to distinguish *Hawkins* from Ms. Frederick's case, alleging that this Court overlooked "a key distinguishing fact": that the *Hawkins* plaintiff suffered, and knew that she suffered, from a terminal condition. Pet. Rehearing at 13. But in distinguishing the case, Appellant trivializes Ms. Frederick's mental anguish. Most significantly, Ms. Frederick was terrified that her little children had been injured or killed, and that she herself would die or become a drug addict. Therefore, the award was proportionate to Ms. Frederick's past damages.

Because the award was proportionate to her past damages and because "[t]he jury's verdict must be upheld unless no evidence reasonably supports the jury's findings," *Curcio v. Caterpillar, Inc.*, 355 S.C. 316, 320, 585 S.E.2d 272, 274 (2003), this Court correctly declined to apportion the verdict between past and future damages, *Frederick*, 2022 WL 2826718 at *2. Appellant, who did not object to the general verdict form, cannot now ask this Court to protect him from his own decision. *See Pearson v. Bridges*, 344 S.C. 366, 372 n.5, 544 S.E.2d 617, 619 n.5 (2001) (stating that where the defendant "never requested a special verdict form separating the elements of damage," "there [was] no way of knowing whether any allowance was made for future medical expenses.")

III. Because contributory negligence was a question for the jury, this Court correctly affirmed the trial court's denial of Appellant's motions for a directed verdict and for JNOV.

As this Court correctly pointed out, the evidence did not establish that Ms. Frederick was contributorily negligent. *Frederick*, 2022 WL 2826718 at *2. Rather, the differences between the

parties' accounts required the trial court to submit the issue to the jury. *Frederick*, 2022 WL 2826718 at *2.

As Appellant admits, the parties presented different accounts of the incident. Pet. Rehearing at 16. But, contrary to Appellant's contention, the differences between the two scenarios *are* "germane to the contributory negligence defense." *See ibid.* Indeed, as this Court stated, Appellant's own "expert acknowledged that the accident was not avoidable if Frederick's account was true." *Frederick*, 2022 WL 2826718 at *2.

Appellant belabors the point that, because Ms. Frederick could have seen obstructions seven hundred feet ahead, she had ample opportunity to stop or take evasive action. Pet. Rehearing at 16–17. However, the line of sight is relevant only to Appellant's account. Appellant claims that he was in Ms. Frederick's lane for about "15 to 20 seconds," then was backing out of the lane when Ms. Frederick hit him. [R. p. 88–89.] In other words, Appellant claims that his vehicle was a conspicuous obstruction for some time; therefore, Ms. Frederick's failure to see him until she was "three car lengths away" [R. p. 55] was negligence.

According to Ms. Frederick, however, Appellant suddenly swerved into her lane a short distance ahead of her. [R. pp. 54–56.] Under those circumstances, Ms. Frederick would not have been responsible for the resulting accident even if she had had a ten-mile line of sight. She would have had no reason to stop or engage in evasive action until Appellant became a hazard, not just a fellow user of the road. And by then, it would have been too late.

The parties' accounts of the incident differed in material respects. The fact that the jury believed Ms. Frederick's account rather than Appellant's is no reason for this Court to invade the jury's province. Therefore, this Court should deny Appellant's petition.

IV. Because Appellant failed to preserve the Rule 414 issue for review, this Court correctly declined to address it.

Appellant alleges that the trial court erred in admitting an exhibit which allegedly violated Rule 414 of the North Carolina Rules of Evidence. Pet. Rehearing at 18. However, although Appellant summarized the challenged exhibit on appeal, he failed to include the exhibit itself. Therefore, this Court correctly declined to address the issue, pursuant to Rule 210(h), SCACR ("[T]he appellate court will not consider any fact which does not appear in the Record on Appeal") and *Helms Realty, Inc. v. Gibson-Wall Co.*, 363 S.C. 334, 339–40, 611 S.E.2d 485, 487–88 (2005) (declining to address merits of appellant's jury-charge claim where actual jury charge not in record on appeal). *Frederick*, 2022 WL 2826718 at *2.

Even if Appellant had preserved the issue, however, his argument would fail. Rule 414 provides that

> Evidence offered to prove *past* medical expenses shall be limited to evidence of the amounts actually paid to satisfy the bills that have been satisfied, regardless of the source of payment, and evidence of the amounts actually necessary to satisfy the bills that have been incurred but not yet satisfied. (emphasis added).
> [N.C. Gen. Stat. Ann. 8C-1, 414.]

Here, Ms. Frederick did not offer the exhibit to prove her *past* expenses, but only the amount pending. [R. p. 140–42.] Therefore, the trial court did not err in admitting it.

Even if the court erred, however, the error was harmless. As this Court correctly noted, "To warrant reversal based on the admission or exclusion of evidence, the appellant must prove both the error of the ruling and the resulting prejudice, i.e., there is a reasonable probability the jury's verdict was influenced by the wrongly admitted or excluded evidence." *Frederick*, 2022 WL 2826718 at *2 (quoting *Vaught v. A.O. Hardee & Sons, Inc.*, 366 S.C. 475, 480, 623 S.E.2d 373, 375 (2005)). Ms. Frederick complied with the rule's intent by claiming only her unpaid medical bills, specifically disclaiming any expenses that her health insurance had written off. Her counsel

heavily stressed this point during closing argument. [R. p. 140–142.] And in response to a jury question, the trial judge clarified the matter further, stating that "[t]he issue of insurance is not to be considered . . . in reaching [the] verdict." [R. p. 157.] Therefore, there was no probability, let alone a reasonable one, that the jury's verdict was influenced by the alleged error.

V. Because Ms. Frederick's expert used objective information from the police report and because Appellant's own testimony conclusively established that he was moving forward at the time of the wreck, this Court correctly held that the trial court did not err in admitting the expert's testimony.

Appellant alleges that Ms. Frederick's expert relied on evidence of unproven reliability – that is, an investigating officer's accident reconstruction – to conclude that Appellant was moving forward at the time of the wreck. Pet. Rehearing at 24–25. Naturally, he argues that the court's admission of that testimony was error. Pet. Rehearing at 25. However, the court did not err in admitting the expert's testimony. Even if it did err, that error was harmless because Appellant's own testimony established that he was moving forward. Therefore, this Court should deny Appellant's petition on this ground.

Ms. Frederick's expert relied on the police report for one main point: "the direction of post-impact travel." [R. p. 203.] Because the parties did not disagree as to either where the accident occurred or the orientation of the vehicles when they collided, the only possibly disputed piece of information needed to determine "the direction of post-impact travel" would have been the vehicles' ultimate resting point. No one can argue that a police officer is unqualified to observe the resting point a wrecked vehicle; even an untrained high-school student could make the same observation.

And even if Ms. Frederick's expert had relied on the officer's subjective conclusions, the expert's opinion would be admissible if the officers' conclusions were "of a type reasonably relied upon by experts in the particular field in forming opinions." *See* Rule 703, SCRE. The officer's

conclusions themselves would not need to be admissible. *See id.* And *Hamrick v. State*, 426 S.C. 638, 828 S.E.2d 596 (S.C. 2019), is not to the contrary. *Hamrick* dealt with the admissibility of the underlying police opinion, *not* with an expert opinion that reasonably relied on a police report.

But ultimately, Ms. Frederick's expert's use of the police report is irrelevant. Appellant's own testimony established his vehicle's post-impact location. Using a model created by his own expert, appellant drew his vehicle's ultimate resting point. [R. pp. 90, 138.] When Appellant's expert later examined Appellant's drawing, he agreed that there was only one way the vehicle could have ended up where Appellant said it did: the vehicle had to have been moving forward. [R. pp. 138–39.] Appellant's drawing and his expert's subsequent analysis proved to be the death knell of Appellant's theory of liability.

CONCLUSION

For the reasons set forth above, the Court should deny Appellant's petition for rehearing.

Respectfully submitted,

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PROOF OF SERVICE OF RESPONDENT'S RETURN TO APPELLANT'S PETITION FOR REHEARING

I certify that Respondent's Return to Appellant's Petition for Rehearing was served on Appellant by U.S Mail Postage Paid on August 24, 2022, addressed to Appellant's attorney of record, R. Hawthorne Barrett at P.O. Box 1473, Columbia, SC 29202.

[SIGNATURE ON FOLLOWING PAGE]

August 24, 2022

Respectfully submitted,

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Re: *Daisy Frederick v. Daniel Lee McDowell*
Appellate Case No.: 2020-00989

Dear Ms. Kitchings,

Enclosed for filing please find six (6) copies of Respondent's Return to Appellant's Petition for Rehearing and Proof of Service.

If you should have any questions, please do not hesitate to contact us.

Sincerely,

s/Eric M. Poulin

cc: R. Hawthorne Barrett *(via email and mail)*