

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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Aug 31 2022

SC Court of Appeals

APPEAL FROM MARLBORO COUNTY
The Hon. Paul M. Burch, Circuit Court Judge

Appellate Case No.: 2020-00989

Daisy Frederick,.....Respondent,

v.

Daniel Lee McDowell,.....Appellant.

**REPLY IN SUPPORT OF
PETITION FOR REHEARING**

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Attorney for Appellant

The Appellant Daniel Lee McDowell respectfully submits this Reply in order to respond briefly to some of the arguments made in the Respondent's Return. By limiting this Reply to those certain direct responses, McDowell does not waive, but expressly reserves and relies upon, all the arguments and authorities included in his Petition for Rehearing and his appellate briefs.

I. The actual record evidence does not support the amount of the verdict.

One of McDowell's primary arguments on appeal is that the evidence submitted to the jury does not support the exorbitant amount of the verdict. Part of the reason for that assertion is the complete lack of any evidence that the Respondent would likely experience any future damages.¹ The Respondent's Return does not point out anything that can remedy that fatal flaw.

The Respondent relies on this Court's decision in *Wilder v. Blue Ribbon Taxicab Corp.*, 396 S.C. 139, 719 S.E.2d 703 (Ct. App. 2011), for the proposition that the presence of pain as of the trial date justifies an award of future damages. Although *Wilder* contains language that might seem to support that assertion in a general sense, it is important to consider the facts and circumstances at issue in that case. The plaintiff in *Wilder* sustained injuries in an automobile accident and testified in a damages hearing² that she still had some pain three years later. Based on that testimony, the circuit court judge included in the default judgment award an amount for "pain, suffering, loss of enjoyment of life, emotional distress and mental anguish (past, present and future)." 396 S.C. at 144, 719 S.E.2d at 706. While this Court considered the plaintiff's

¹ The Respondent suggests that an analysis of future damages is unnecessary because her pre-trial medical expenses and pain were sufficient to support the verdict amount. To the contrary, the absence of future damages evidence is crucial because without it, the Respondent is forced to argue that a verdict of more than 20 times the claimed specials was not at least merely excessive. McDowell respectfully asserts that such a position cannot withstand any real scrutiny.

² *Wilder* involved a default judgment award rather than a jury trial.

evidence of future pain to be “sparse,” it affirmed the amount of the circuit court’s judgment. 396 S.C. at 148, 719 S.E.2d at 708.

There are two important facts that distinguish *Wilder* from the present case, however. First the plaintiff in *Wilder* testified that she experienced pain in certain specific circumstances – i.e. when “standing or sitting for long periods of time.” 396 S.C. at 147, 719 S.E.2d at 708. She also described her pain, calling it “dull because it just feels like by back is going to give out.” *Id.* In the present case, the Respondent did not provide any such details or descriptions of the alleged lingering pain. Instead, she merely answered “Yes, sir” when her attorney asked on redirect if she was still experiencing pain. [R. p, 82, lines 16-18.] Thus, if the evidence in *Wilder* was “sparse,” as this Court concluded, it is hardly present in this case, if it can fairly be deemed to exist at all.³

Second, the amount of the award at issue in *Wilder* is important to consider. The plaintiff presented total economic damages of \$5,682.56, which included medical bills, property damage and lost wages. 396 S.C. at 144, 719 S.E.2d at 706. The circuit court judge awarded all those expenses and added \$15,000 for pain and suffering, etc. (past, present and future) to create a final award of \$20,682.56. *Id.* In other words, the “sparse” evidence of current or future pain, combined with past pain, justified only an amount that was a little less than three times the claimed specials. In the present case, as noted above, the total verdict was more than twenty times the amount of the specials, and that was based on “evidence” that was far sparser than the testimony noted in *Wilder*. Therefore, *Wilder* does not support the Respondent’s position. If anything, it supports McDowell’s argument that the verdict in this case is at least merely excessive, if not grossly so, in light of the actual record evidence.

³ The Respondent also testified that she sometimes took “pain pills,” but offered no specifics as to what kinds of pills she took, or how often she felt the need to take them. [R. p. 82.]

The Respondent also argues that she did not disclaim all future lost wages, but that her attorney merely argued that she would not be unable to work for the rest of her life. McDowell believes that argument incorrectly construes the arguments by the Respondent's counsel when considered in the proper context. But even if her counsel did make that exact assertion, it does not change the fact that the Respondent presented no evidence upon which a jury could base any award of future lost wages. There was no medical evidence that she was unable to work at the time of trial, let alone how long any such restrictions would be expected to last. There was also no testimony about the wages the Respondent could have been earning at the time or trial, or that she would have earned in the future. Thus, any award for future lost wages was necessarily based on speculation. It is well settled that speculation and conjecture are not, and cannot be, a proper basis for a verdict, or any part of one. *See, e.g., Humphries v. Whitlock Combing Co.*, 309 S.C. 356, 359, 422 S.E.2d 154, 156 (Ct. App. 1992) (“A verdict may not be based on speculation or conjecture.”).⁴

Even viewing the record in the light most favorable to the Respondent, the only possible evidence of future damages of any kind was the Respondent's conclusory testimony that she still experienced some unspecified nature and level of pain as of the trial date. Even if that is considered to be “evidence” of future pain, it is so sparse that it cannot possibly justify the amount of the jury's verdict. Therefore, the Court should grant McDowell's rehearing petition on this issue.

II. The verdict amount was unreasonable and excessive.

In arguing for the reasonableness of the verdict amount, the Respondent relies upon this Court's citation of *Hawkins v. Pathology Assocs. of Greenville, P.A.*, 330 S.C. 92, 498 S.E.2d 395

⁴ The Respondent's argument about the value of scarring is also speculative. There was no evidence of any such scarring, and her Return states only “Presumably, she sustained permanent external scarring as well.” [Return, p. 4 (emphasis added)]. As the emphasized word indicates, that assertion is based on nothing more than a guess, which cannot serve as the basis for a verdict.

(Ct. App. 1998). Yet, the Respondent fails to adequately explain away the significant distinguishing factors between *Hawkins* and the present case. As noted in the rehearing petition, *Hawkins* involved a plaintiff's decedent who knew that the alleged misdiagnosis left her with a terminal condition – and a significant amount of time to live with the knowledge and certainty of her impending death. It is not “trivializing” the Respondent's experience to note that there is a significant and clear difference between a person recovering from a physical injury (even a traumatic one) and a person knowing that she faces a terminal condition with no prospects for successful treatments. Those are simply very different scenarios, and the distinction makes *Hawkins* inapplicable in terms of being adequate support for the jury's verdict in the present case.

There is no rational basis for the extreme amount of the jury's verdict. *Hawkins* does not mandate any other conclusion, and the Respondent has not presented any other authorities to support her position. Therefore, the Court should grant the rehearing petition and reexamine the purported reasonableness and proportionality of the verdict in light of the actual record evidence.

III. The admission of the full amount of the medical bills was reversible error under the controlling North Carolina law.

Not surprisingly, the Respondent supports the Court's conclusion that the issue of the North Carolina statute regarding the amounts of medical bills that can be presented to a jury was not preserved for review because the actual exhibit is not in the Record on Appeal. For the reasons stated in the rehearing petition, that conclusion is erroneous. McDowell will not repeat his arguments on the issue preservation question. For present purposes, it is sufficient to say that the information necessary to evaluate this issue does appear in the Record on Appeal, and the absence of the actual exhibit is irrelevant.

The Respondent also argues that the circuit court did not err in admitting the full amount of the medical bills because she submitted the information for the purposes of demonstrating what

she still owed, rather than the total amount charged. However, that is a distinction without a difference. The flaw under the controlling North Carolina law is that the jury was permitted to see the total amount of medical bills, and not just the amount left to be paid. To comply with the North Carolina statute, the Respondent would have had to present only the outstanding balance as her claimed medical bills. Allowing the jury to see both numbers (the total amount and the amount still to be paid) is exactly what the North Carolina law is designed to prevent. Thus, the Respondent's purported motive for presenting both numbers is irrelevant, and the circuit court erred in allowing that information to go to the jury.

In addition, notwithstanding the Respondent's argument to the contrary, the circuit court's error in admitting the full amount of the medical bills was prejudicial. It does not matter that the Respondent's attorney stated in his closing that she was not claiming the entire amount of the bills. In fact, that argument merely called more attention to the total amount of the bills, which the jury should never have seen or known. This was akin to telling a person that she cannot have something, only then to place it within her reach. The risk that the jury would use that information existed as soon as they were allowed to know it, and that risk only increased when the Respondent brought it up again. That risk, coupled with the stunningly high verdict amount, demonstrates the prejudice to McDowell. Therefore, the Court should grant a rehearing to consider the merits of McDowell's arguments on this issue.

CONCLUSION

For the reasons stated above, and based also on the arguments and authorities asserted in the original petition, this Court should grant a rehearing on all issues, reconsider the points that it misapprehended or overlooked in its decision, and reverse the result in the circuit court.

s/ R. Hawthorne Barrett

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PROOF OF SERVICE

The undersigned, an attorney in this matter for the Appellant, certifies that I have this **31st day of August, 2022**, served a copy of the **Reply in Support of Petition for Rehearing** upon counsel for the Respondent by email and also by causing it to be deposited in the United States mail with sufficient postage attached, addressed to: Eric M. Poulin, Roy T. Wiley, J. Camden Hodge; Anastopoulo Law Firm, LLC; 32 Ann St., Charleston, SC 29403.

s/ R. Hawthorne Barrett

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