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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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

Appellate Case No.: 2020-00989

Daisy Frederick,……Respondent,

v.

Daniel Lee McDowell,……..Petitioner.

PETITION FOR WRIT OF CERTIORARI

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Pursuant to Rule 242, SCACR, the Petitioner Daniel Lee McDowell respectfully requests that this Court issue a writ of certiorari to review the Court of Appeals' decision in this case.

QUESTIONS PRESENTED FOR REVIEW

I. Did the Court of Appeals err in affirming the trial court's failure to grant a new trial absolute or new trial *nisi remittitur*, where the amount of the verdict was either so grossly excessive as to be motivated by passion prejudice, or other issues beyond the record evidence, or was merely excessive, based on the absence of any evidence of future damages?

II. Did the Court of Appeals err in affirming the trial court's denial of McDowell's motions for a directed verdict or judgment notwithstanding the verdict, where the evidence demonstrated that Frederick's own negligence contributed to cause the accident, and under controlling North Carolina law, Frederick was therefore barred from any recovery?

III. Did the Court of Appeals err in affirming the trial court's decision to admit evidence of the full amount of medical bills, where allowing the jury to see that full amount constituted prejudicial error under controlling North Carolina law?

IV. Did the Court of Appeals err in affirming the trial court's decision to allow Frederick's expert to use and rely upon the subjective opinions and information contained in the accident report completed by the investigating law enforcement officer?

STATEMENT OF THE CASE

This case arose from an automobile accident that occurred in North Carolina on April 29, 2015. The Respondent Daisy Frederick ("Frederick") filed her Summons and Complaint on April 1, 2016. [R. pp. 10-14.] The Petitioner Daniel Lee McDowell ("McDowell") filed and served a timely Answer on May, 25, 2016. [R. pp. 15-17.] The parties then conducted full discovery.

The case was called to trial before the Honorable Paul M. Burch on January 29, 2018. During a pre-trial hearing, Judge Burch ruled that the substantive law of North Carolina applied because the subject accident occurred there. Frederick did not challenge that ruling [R. pp. 47-48.]

At trial, Frederick testified on her own behalf. She also presented testimony by other witnesses, including engineer Ken Richardson. During his testimony, Richardson was permitted to testify about measurements and other conclusions drawn by the North Carolina law enforcement officer who responded to the accident, even though that officer did not testify. McDowell's attorney made timely objections to that testimony, which were overruled. [R. pp. 42-43, 101.]

Following the testimony of those witnesses, counsel for McDowell moved for a directed verdict. [R. pp. 104-106.] Counsel based the directed verdict motion on the following grounds: (1) the only reasonable inference from the evidence was that Frederick's negligence contributed to cause the accident, and therefore she was barred from any recovery under the North Carolina law of contributory negligence, (2) there was no evidence to support an award of punitive damages, and (3) there was no evidence of any permanent impairment or disability that would justify an award of future damages. [R. pp. 104-106.] The judge granted the motion as to punitive damages, but denied it on the other two grounds. [R. pp. 106-108.]

Because he had already testified during Frederick's case, McDowell's case consisted only of testimony by engineer Don Roberts, who was admitted as an expert. Based on his examination of the accident site, Roberts testified there was a line-of-sight of at least 700 feet from the place on the roadway where Frederick's vehicle was before the accident occurred. [R. pp. 117-122.] Roberts further testified that a driver traveling at 40 miles per hour (the speed at which Frederick testified she was traveling before the collision) would have needed only 213 feet to stop the vehicle to avoid something in the roadway. [R. pp. 122-127.]

McDowell's counsel renewed the motions for a directed verdict at the close of the evidence. [R. p. 139.] The judge again denied the motions. [R. p. 139.]

During his closing argument, Frederick's attorney identified the following special damages: (1) $171,909.87 in medical expenses due,[1] (2) and $53,460 in lost wages. [R. pp. 141-143.] However, Frederick's attorney did not refer to any claim for future medical bills or lost wages. Indeed, Frederick's attorney expressly told the jury that future lost wages were not warranted. [R. p. 143, lines 12-14.] The attorney did request an award for future pain, even though there was no medical evidence to support such a claim. [R. pp. 145-146.]

After the closing arguments, counsel for McDowell again renewed the directed verdict motions. [R. p. 147.] The judge denied those motions. [R. p. 147.] Following the jury instructions, McDowell's attorney objected to the charges regarding permanent disability, future damages, and the statutory life expectancy, but the judge overruled the objection. [R. pp. 154-155.]

The jury deliberated for a little more than one hour before returning a verdict in Frederick's favor for $5,000,000. [R. p. 159.] McDowell filed timely post-trial motions on February 14, 2018. [R. pp. 18-26.] McDowell sought a judgment notwithstanding the verdict for the same reasons raised in his directed verdict motions at trial. [R. pp. 18-20.] Alternatively, McDowell moved a new trial absolute and/or a new trial *nisi remittitur* based on: (1) the absence of evidence to support the verdict, (2) the lack of any medical evidence to support a claim for permanent impairment or disability, (3) improper testimony by Frederick's expert about the subjective opinions and information contained in the police report for the accident, (4) the improper admission of the full amount of Frederick's medical bills, (5) the erroneous decision to charge the mortality table given

[1] Under the controlling law of North Carolina, Frederick was not allowed to claim or recover the full amount of her medical bills, only the amounts that her medical insurer had not paid.

the absence of any evidence of permanent impairment or disability, and (6) the grossly excessive or merely excessive amount of the verdict. [R. pp. 18-26.]

The trial judge heard the post-trial motions on August 21, 2019. [R. pp. 210-221.] However, the judge did not rule until May 12, 2020, when he filed a denial order. [R. pp. 3-5.] Because the order contained an inaccurate statement about the law that was applied to the case, McDowell made a timely motion under Rule 59(e), SCRCP, asking the judge to amend the previous order. [R. p. 27.] The judge filed an amended order that corrected the earlier misstatement of the controlling law. [R. pp. 6-9.] McDowell then filed a timely Notice of Appeal.

The Court of Appeals issued an opinion on July 20, 2022, in which it affirmed the trial court's rulings. McDowell filed and served a timely Petition for Rehearing on August 4, 2022. The Court of Appeals denied that petition in Order filed on September 22, 2022.

STATEMENT OF THE FACTS

On August 29, 2015, McDowell was traveling from his home in South Carolina to his workplace in North Carolina. [R. pp. 49, 83.] McDowell was traveling approximately 40 miles per hour. [R. p. 92.] He came to a portion of the two-lane road that had a slight curve to the right followed by another slight curve to the left and then a straight away. [R. p. 92.] As he was coming out of the second curve, his truck suddenly spun around and came to rest in the opposite lane of travel. [R. pp. 92-93.] After composing himself, McDowell tried to back up into his original lane of travel. [R. pp. 92-93.] Before he could do so, another vehicle collided with his truck. [R. p. 93.]

The other vehicle was being driven by Frederick. According to Frederick, as she approached a curve in the road, she saw a truck appear in her lane of travel. [R. pp. 54-55.] Frederick said she saw the truck when was about three car lengths away from her vehicle. [R. pp.

54-55.] Yet, Frederick never applied her brakes or took any other measure to try to avoid colliding with the truck. [R. p. 79.]

Frederick sustained physical injuries as a result of the collision and incurred medical expenses of $171,909.87 that were not paid by her health insurer. [R. p. 73.] She also claimed she was also unable to work from the date of the accident until the date of trial (January 29, 2018). [R. p. 70.] However, she stopped receiving medical treatments for her injuries in December of 2016, and there was no evidence of a permanent impairment or disability.

ARGUMENT

I. The Court of Appeals erred in affirming the trial court's decision not to grant a new trial or a new trial *nisi remittitur*, because the record evidence did not support the verdict, which was either grossly excessive or merely excessive.

In affirming the trial court's decision to deny McDowell's motions for a new trial or a new trial *nisi additur*, the Court of Appeals focused on the nature of Frederick's injury, but erroneously failed to consider the comparatively limited amount of the financial damages. Therefore, this Court should grant the current petition and review the Court of Appeals' decision.

Frederick presented only the following special damages at trial: $171,909.87 in outstanding medical bills and $53,460 in lost wages. Thus, the total amount of specials submitted to the jury was $225,369.87. Although that is not an insignificant number, it cannot justify the $5,000,000 verdict. The other evidence also fails to support that award. When the totality of the evidence is viewed fairly, the amount of the verdict is clearly excessive. Therefore, the Court of Appeals erred in failing to reverse.

Frederick sustained a broken femur and ankle, which required surgical repair, and she had an extended recovery period. As a result, she incurred a little over $170,000 in medical bills, and she lost just income during the time when she could not work. But all of those damages were in

the past by the time this trial occurred. There was no evidence that Frederick would sustain any future damages. That absence of evidence makes the verdict unsupported and excessive.

Frederick testified she was still experiencing some pain as of the trial date. Yet, there was no evidence that her pain would continue into the future. Frederick's treating surgeon never expressed an opinion that she would have future problems with pain. [R. pp. 162-196.] As a result, the jury had no evidentiary basis to determine whether and to what extent a person who had sustained those types of injuries would have pain in the future. Similarly, there was no evidence that Frederick had any permanent impairment or disability.

That lack of evidence opened the door for speculation by the jury. It is very likely the jury heard Frederick say she was still having pain at the time of trial and then made the leap on its own to a conclusion that her pain would continue. But any such conclusion was based on guesswork, not evidence, making the verdict invalid. *See Carlyle v. Tuomey Hosp.*, 305 S.C. 187, 193, 407 S.E.2d 630, 633 (1991) ("Neither the existence, causation nor amount of damages can be left to conjecture, guess or speculation.").

There was also no evidence that Frederick would have any future lost income. In fact, Frederick's attorney argued that she would be able to work, and he disavowed any claim for future lost income. [R. p. 143.]

The absence of evidence regarding future damages is significant for two reasons. First, it demonstrates the trial court's error in charging the jury on the mortality tables. A party objecting to a jury charge is entitled to a new trial if the substance of the charge was both erroneous and prejudicial. *See Burroughs v. Worsham*, 352 S.C. 382, 574 S.E.2d 215 (Ct. App. 2002). Here, that portion of the charge was both. It was erroneous because without any actual evidence of future damages, there was no basis for the court to give that charge. It was prejudicial because it invited

the jury to speculate on what future damages Frederick would have. Thus, the jury charge on that issue, in and of itself, warrants a new trial.

Second, the absence of future damages evidence reveals the reversible error in the trial court's decision not to grant a new trial. If unsupported future damages are removed, all that remains are the following: (1) serious but non-permanent injuries; (2) a course of treatment that lasted roughly a year-and-a-half; (3) pain during that period; (4) a finite amount of medical bills; and (5) a finite amount of lost wages. Those factors alone cannot possibly support a verdict that was more than twenty-two times the amount of the specials. Therefore, McDowell is entitled to a new trial absolute or new trial *nisi remittitur*, and the Court of Appeals erred in concluding otherwise.

Becker v. Wal-Mart, 339 S.C. 629, 635, 529 S.E.2d 758, 761 (Ct. App. 2000), is instructive on this issue. At trial, Becker presented the testimony of multiple experts and submitted $30,538.44 in medical bills. *Id.* After the jury returned a verdict for $1,750,000, Wal-Mart moved for a new trial absolute or a new trial *nisi remittitur*. *Id.* at 634, 529 S.E.2d at 760. The trial judge denied the motion for a new trial absolute, but granted a new trial *nisi remittitur*. *Id.* The Court of Appeals affirmed.

Becker is significant because it found a verdict to be excessive despite evidence that Becker was permanently impaired and would continue to have damages in the future. A treating physician assigned Becker a 4% impairment rating to her lower extremity and testified her foot would never fully heal. That evidence did not prevent a finding of excessiveness.

The record in the present case contains no evidence of any impairment, disability or other future damages. Thus, if the verdict for Becker, who had those kinds of damages, was excessive, then the current verdict must be as well.

The Court of Appeals erroneously cited *Hawkins v. Pathology Associates, P.A.*, 330 S.C. 92, 498 S.E.2d 395 (Ct. App. 1998), as support for its decision. There, the Court of Appeals did conclude that a $3,500,000 verdict was reasonable under the circumstances. Yet, in *Hawkins*, the decedent lived her final seven months undergoing a painful course of treatment all the while knowing her condition was terminal. That knowledge of impending and certain death created a much different scenario than the one in the present case. There was no evidence presented at trial that Frederick was ever told her injuries were permanent. It is not minimizing those injuries or her course of treatment to acknowledge that they were much less serious – particularly in a psychological sense – than the terminal condition involved in *Hawkins*. Therefore, *Hawkins* does not support the Court of Appeals' decision.

If the specials are removed from consideration, the jury awarded Frederick $4,775,000 for intangible damages for a 20-month period. That amount is "shockingly disproportionate to the injuries and indicates that passion, caprice, prejudice, or other considerations not reflected by the evidence affected the amount awarded." *Becker*, *supra*. And even if it does not meet that standard, it is certainly "merely excessive" so as to warrant a new trial *nisi remittitur*. Therefore, this Court should grant the current petition to review and reverse the result below.

II. The Court of Appeals erred in affirming the denial of McDowell's motions for directed verdict and judgment notwithstanding the verdict.

The trial court determined that the substantive law of North Carolina applied because the subject accident occurred in that state. [R. pp. 47-48.] *See Nash v. Tindall Corp.*, 375 S.C. 36, 39, 650 S.E.2d 81, 83 (Ct. App. 2007) ("'Under traditional South Carolina choice of law principles, the substantive law governing a tort action is determined by the lex loci delicti, the law of the state in which the injury occurred.'") (quoting *Boone v. Boone*, 345 S.C. 8, 13, 546 S.E.2d 191, 193 (2001)).

North Carolina law recognizes the defense of contributory negligence. "Contributory negligence, as its name implies, is negligence on the part of the plaintiff which joins, simultaneously or successively, with the negligence of the defendant alleged in the complaint to produce the injury of which the plaintiff complains." *Jackson v. McBride*, 270 N.C. 367, 372, 154 S.E.2d 468, 471 (1967). "[A] plaintiff's contributory negligence is a bar to recovery from a defendant who commits an act of ordinary negligence." *Mohr v. Matthews*, 237 N.C. App. 448, 452, 768 S.E.2d 10, 13 (Ct. App. 2014). "The negligence of the plaintiff … need not be the sole proximate cause of the injury; if such negligence contributes as one of the proximate causes of the injury then it is sufficient to bar any recovery." *Industries, Inc. v. Tharpe*, 47 N.C. App. 754, 761, 268 S.E.2d 824, 829 (Ct. App. 1980) (emphasis in original).

At all necessary times, McDowell moved for a directed verdict on the ground that the only reasonable conclusion based on the evidence was that Frederick's own negligence contributed to cause the accident. The trial court denied those motions and later denied McDowell's motion for judgment notwithstanding the verdict based on the same argument. Those decisions were erroneous.

"In an action for personal injury, the [directed verdict] motion should be granted in favor of the defendant 'if the jury could have drawn no conclusion from the evidence but that … the contributory negligence of [the plaintiff] was a proximate cause of the [injury.]'" *Williams v. Odell*, 90 N.C. App. 699, 701, 370 S.E.2d 62, 64 (Ct. App. 1988) (quoting *Shay v. Nixon*, 45 N.C. App. 108, 109-10, 262 S.E.2d 294, 296 (1980)). Even under this standard, North Carolina's appellate courts have upheld directed verdicts based on contributory negligence on numerous occasions. *See, e.g., Williams v. Davis*, 157 N.C. App. 696, 580 S.E.2d 85 (Ct. App. 2003); *Hutton v. Logan*, 152 N.C. App. 94, 566 S.E.2d 782 (Ct. App. 2002); *Culler v. Hamlett*, 148 N.C. App. 372, 559

S.E.2d 195 (Ct. App. 2002); *Kutz v. Koury Corp.*, 93 N.C. App. 300, 305, 377 S.E.2d 811, 814 (Ct. App. 1989); *Williams v. Odell*, 90 N.C. App. 699, 370 S.E.2d 62 (Ct. App. 1988); *Helvy v. Sweat*, 58 N.C. App. 197, 292 S.E.2d 733 (Ct. App. 1982); *Riddick v. Whitaker*, 13 N.C. App. 416, 185 S.E.2d 602 (Ct. App. 1972); *Sadler v. Purser*, 12 N.C. App. 206, 182 S.E.2d 850 (Ct. App. 1971); *Anderson v. Mann*, 9 N.C. App. 397, 176 S.E.2d 365 (Ct. App. 1970).[2]

Although Frederick and McDowell presented competing versions of exactly how the accident occurred, the differences between their accounts are not germane to the contributory negligence defense. For this issue, the material facts are not actually in dispute.

McDowell's expert testified that a sight-line of at least 700 feet existed, and a driver traveling at Frederick's rate of speed could have stopped her vehicle within 213 feet after spotting a hazard in the road.[3] [R. pp. 117-125.] Frederick did not challenge those opinions, and she admitted on the stand that she could see a safe distance down the road before the accident occurred. [R. p. 77.] Frederick further testified she never attempted to apply her brakes before the collision. [R. pp. 55, 79.]

In light of this evidence, the only reasonable conclusion or inference is that Frederick's own negligence contributed to cause the accident. Had she been maintaining a proper lookout, she could have seen McDowell's truck in time to take evasive action. Her failure to do that constitutes negligence. *See Riddick v. Whitaker*, 13 N.C. App. 416, 419, 185 S.E.2d 602, 604 (Ct. App. 1972)

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[2] The same result was possible in South Carolina when this state still recognized the doctrine of contributory negligence. *See, e.g., Mishoe v. DNP Amusement*, 307 S.C. 251, 414 S.E.2d 584 (Ct. App. 1991) (affirming a directed verdict for the defendant based on contributory negligence).

[3] North Carolina's appellate courts have found that undisputed physical evidence that supports a finding of contributory negligence can establish the defense as a matter of law, even if there is conflicting testimony about the event in question. *See, e.g., Helvy v. Sweat*, 58 N.C. App. 197, 292 S.E.2d 733 (Ct. App. 1982).

(directed verdict for the defendant was proper because the evidence showed the plaintiff "either saw the oncoming vehicle and ignored it or failed to see what she should have seen").

For purposes of this analysis, it is not necessary to debate whether or to what extent McDowell was negligent. "The term 'contributory negligence' *ex vi termini* implies or presupposes negligence on the part of the defendant." *Rodgers v. Thompson*, 256 N.C. 265, 274, 123 S.E.2d 785, 790 (1962). Thus, it does not matter why McDowell's truck was in the other lane of travel. The Court can assume that some act of negligence caused McDowell to cross the center line prior to the accident. The real issue is whether the evidence demonstrates that Frederick's negligence contributed with McDowell's conduct to cause the accident. The only reasonable answer to that question is yes.

Significantly, the Court of Appeals' opinion did not acknowledge, discuss or attempt to distinguish any of the North Carolina cases referenced above. Those cases are on point, and they support McDowell's position on appeal. Therefore, the Court of Appeals should have considered and applied those cases, and its failure to do so constitutes error that this Court should address by granting the current petition.

III. The Court of Appeals erred by failing to reverse based on the trial court's decision to admit evidence of the full amount of medical bills, as that decision was erroneous and prejudicial.

As noted above, the trial court ruled that North Carolina law, including Rule 414 of the North Carolina Rules of Evidence, would apply to the trial. [R. pp. 47-48.] Nevertheless, Frederick offered into evidence an exhibit that violated Rule 414 by revealing to the jury the full amount of her medical bills. McDowell's trial counsel made a timely objection, which was overruled. [R. p. 72.] That decision was both erroneous and prejudicial to McDowell, it and should have served as a basis for the Court of Appeals to reverse and remand for a new trial.

As a threshold matter, the Court of Appeals erroneously concluded that it could not review this issue because the actual exhibit was not in the Record on Appeal. Yet, the Court did not cite any authority stating the inclusion of a challenged exhibit – as opposed to the information the exhibit contained and conveyed – is required for appellate review. The Court cited only Rule 210(h), SCACR, and two cases[4] as support for its conclusion. However, none of those authorities stand for the proposition that inclusion of the actual exhibit is required under these circumstances – i.e. where the exhibit in and of itself is not the subject of the objection, but only the information contained in it.

The Court of Appeals referenced Rule 210(h), SCACR, which merely states that "the appellate court will not consider any fact that does not appear in the Record on Appeal" (emphasis added). The Court of Appeals also cited *Helms* only for the proposition that the appellant has the burden of providing a "sufficient record."[5] Here, McDowell did precisely that. McDowell did not focus any arguments on the specific wording of the exhibit. Instead, McDowell focused on the fact – which does appear in the Record on Appeal – that the exhibit contained both the amount of unpaid medical bills ($171,909.87, R. p. 73) and the total billed amount of the bills ($268,809.14, R. p. 140). That fact, which the Record clearly establishes, is the crux of this issue on appeal. Indeed, it is the only fact that matters for purposes of this issue. Thus, the necessary "facts" appeared in the Record, and there was more than a sufficient basis for appellate review.

The Court of Appeals' opinion did not cite any authority that establishes – or even suggests – a rule that actual exhibits always must be included in the Record on Appeal. Although there are

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[4] *Helms Realty, Inc. v. Gibson-Wall Co.*, 363 S.C. 334, 611 S.E.2d 485 (2005) and *Vaught v. A.O. Hardee & Sons, Inc.*, 366 S.C. 475, 623 S.E.2d 373 (2005)

[5] Likewise, the Court of Appeals cited *Vaught* only to show the applicable standard of review, and that opinion does not address or impose any requirement to include an actual exhibit in the Record on Appeal, as opposed to the relevant information conveyed through it.

no doubt scenarios in which an exhibit's inclusion would be necessary (e.g. when the specific wording of the exhibit was the issue on appeal, or where the exhibit was a photograph being challenged for being prejudicial), the current case does not fall into that category. McDowell's burden was only to include the facts necessary for appellate review. McDowell met that burden by including in the Record on Appeal the two monetary amounts contained in the exhibit.

Rule 414 of the North Carolina Rules of Evidence was amended in 2011, in large part to create an exception to the collateral source rule with regard to medical bills. The amended, and current, version of Rule 414 states:

> 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. This rule does not impose upon any party an affirmative duty to seek a reduction in billed charges to which the party is not contractually entitled.

Rule 414, North Carolina Rules of Evidence (emphasis added). The effect of this rule has been summarized as follows:

> For all claims arising on or after October 1, 2011, the General Assembly created a new rule of evidence (Rule 414) which limits the amount that can be claimed for an injured person's medical bills to "the amounts actually paid to satisfy the bills" and "the amounts actually necessary to satisfy the bills that have been incurred but not satisfied." Prior to this legislative change and for all claims arising prior to October 1, 2011, an injured person could claim the total amount of the bill as part of his damages. Under this new provision, which is commonly referred to "billed vs. paid," the injured person cannot include any amounts written off by Medicaid, Medicare, private health insurance, or a similar plan. For example, assume Joe incurs a $7,500 hospital bill following a car accident. Joe submits the bill to his health insurance company, which pays $2,000 towards the bill, and Joe pays a $500 co-payment. The remaining $5,000 is written off by the insurance company. Under "billed vs. paid," Joe only can claim $2,500 (the insurance payment plus the co-payment) for his accident-related medical bills.

McCabe, John M. *1 Personal Injury Practice in North Carolina* 1.4 (H)(2).

The plain language of Rule 414 limits not only what medical expenses a plaintiff can claim as damages, but also what evidence of medical expenses a plaintiff can present at trial. The opening phrase ("Evidence offered to prove past medical expenses shall be limited to …") clearly demonstrates that the rule limits what a plaintiff can introduce as evidence, not just the amount that plaintiff can seek as damages. There is no other logical way to read the rule.

This point is significant because it demonstrates the trial court's error in allowing Frederick to present the challenged evidence. The exhibit did contain the amount of medical bills that were still unpaid, but it also contained the total billed amount of Frederick's medical expenses. Although Frederick's counsel attempted to explain to the jury that she was claiming only the lower, "unpaid" amount as damages, the jury was still able to see – and, thus, consider – the total amount of medical expenses. That is precisely what Rule 414 is supposed to prevent.

Frederick claims the evidence was proper because McDowell had the ability to cross-examine her about the amounts of medical bills that were actually paid and/or still outstanding. Yet, Frederick has not cited any authority for the proposition, and the plain language of Rule 414 does not support it. The rule does not state that a plaintiff can present evidence of both amounts, with the defendant having a right to cross-examine the plaintiff about the difference. Rather, the rule expressly limits evidence of medical expenses to the amount actually paid. Nothing in the four corners of the rule suggests that it is anything other than a prohibition on presenting the full, billed amount of medical bills to a jury.

The decision to admit the exhibit was also prejudicial to McDowell. The total, billed amount of Frederick's medical expenses was $268,809.14. [R. p. 140.] That is almost $100,000 more than the reduced amount that Rule 414 allowed Frederick to present. In a case where the only

numbers given to the jury were medical expenses and past lost wages, that is far more than a trivial difference. By allowing the jury to hear a higher number, the trial court created a very real risk of the jury basing its verdict on damages that were not properly recoverable under the controlling law. That, in turn, prejudiced McDowell's defense as to damages.

Frederick has suggested that her attorney minimized that risk by stating and emphasizing the lower number in his closing argument. Although Frederick's attorney did identify the lower amount being claimed as damages, he also repeated the larger number. [R. p. 140.] Thus, the closing argument did not provide the kind of clarity. Furthermore, the judge's charge to the jury did not explain the impact of Rule 414 or the irrelevance of the total, billed amount of medical expenses. Accordingly, the prejudicial impact of the error remained intact.

There is no way to prove that the inadmissible higher number actually impacted the jury's verdict. But in situations like this one, certainty cannot be a realistic requirement. It is enough to demonstrate, as McDowell has, that the erroneous decision allowed the jury to see evidence of nearly $100,000 in specials that Frederick was not entitled to claim or recover under the controlling law. Regardless of whether the jury used that higher number in its deliberations, the error was facially prejudicial. Therefore, the Court of Appeals erred in failing to reverse, and this Court should grant McDowell's petition for a writ of certiorari on this issue.

IV. The Court of Appeals erred in failing to reverse based on the trial court allowing Frederick's expert to use and rely upon the subjective opinions and information contained in the accident report completed by the investigating law enforcement officer.

Frederick presented testimony by engineer Ken Richardson in support of her liability position as to how the accident occurred. In developing his opinions, Richardson admitted that he relied in large part on calculations made and conclusions drawn by the investigating North Carolina law enforcement officer. The trial court permitted Richardson to express those opinions

despite the lack of any basis for determining the reliability of those underlying subjective opinions. That decision was prejudicial error, and the Court of Appeals should have reversed on that basis. Its failure to do so warrants review by this Court.

As a threshold matter, an irregularity regarding the trial transcript must be addressed. Counsel for McDowell made a timely order for a copy of the trial transcript, as well as the transcript of the hearing on the post-trial motions. The court reporter, Hattie O. Gordon,[6] sent counsel copies of those transcripts. Although the transcripts otherwise appear to be complete, the volume containing Richardson's testimony has several large gaps. Pages 139, 141 and 142 contain the following statement: "WHEREUPON, testimony not included in this record due to an audio problem that was experienced." [R. pp. 101, 103-104.] As a result, significant portions of Richardson's testimony (both direct and cross-examination) do not appear in the transcript. The absence of that testimony is not due to any act or omission by McDowell or his counsel. Rather, they appear to stem from problems with the audio recording of that part of the trial.

Addressing an analogous scenario, the Court of Appeals has stated that "[w]hen portions of stenographic notes are lost prior to transcription, it is appropriate for the [court] to accept affidavits of counsel and the court reporter to determine what transpired." *Adams v. H.R. Allen, Inc.*, 397 S.C. 652, 656, 726 S.E.2d 9, 12 (Ct. App. 2012). A "reconstructed record" assembled from such other sources is acceptable in those circumstances, as long as it "allow[s] for meaningful appellate review." *Id.* (citing *State v. Ladson,* 373 S.C. 320, 321, 644 S.E.2d 271, 271 (Ct. App. 2007)).

[6] Counsel for McDowell is informed and believes that Ms. Gordon retired from her position as a court reporter after producing the transcripts in this case.

Here, for purposes of this appellate issue, it is not difficult to develop a "reconstructed record" of Richardson's testimony. An affidavit by McDowell's trial counsel demonstrates that he made a timely objection to Richardson's conclusions that were based on the investigating officer's opinions, and that the trial court overruled that objection. [R. pp. 42-43.] Richardson's deposition in this case then reveals the nature and bases of his opinions. Although that deposition does not precisely replicate Richardson's trial testimony, it does provide sufficient information to determine the issue on appeal – i.e. whether it was error to allow him to express opinions based on the investigating officer's conclusions.

Richardson acknowledged that he relied upon "information in the police report, which tells me an approximate location of impact, as well as motion post-impact." [R. p. 198-199.] Richardson used that information as a basis for forming his opinions about the vehicles' respective speeds. [R. p. 198-199.] Richardson also relied on the investigating officer's opinions about the post-collision resting positions for the two vehicles. Most significantly, Richardson used the officer's accident report as the basis for his opinion that McDowell's vehicle was "sliding along the road toward Ms. Frederick at the point of impact." [R. pp. 198-199.] That conclusion was a vital component of Richardson's overall opinion, which was that Frederick's version of the accident made more sense from an engineering standpoint than McDowell's. Although Richardson claimed he could have developed that theory in other ways, he conceded that without the officer's conclusions in the accident report, his opinion would not have "the same strength" and "certainly wouldn't have the science to back it up, as far as mathematical calculation and that sort of thing." [R. pp. 198-199.]

Despite relying heavily on the police officer's opinions and conclusions, Richardson admitted he knew nothing about that officer. Richardson never spoke to the officer, or even attempted to contact the officer. Richardson had no knowledge about what training, if any, the

officer had in accident reconstruction, and he did not know whether or not the officer conducted a proper investigation. [R. pp. 208-209.] In short, Richardson had no information that would allow him to evaluate the reliability and credibility of the officer's opinions.

More significantly, the trial court also lacked that crucial information. This, in turn, made it impossible for the trial court to exercise its gatekeeping function with regard to Rule 702, SCRE. Because the trial court could not possibly have performed that function in this situation, it was error to admit the challenged testimony of Richardson.

"[E]xpert testimony receives additional scrutiny relative to other evidentiary decisions." *Watson v. Ford Motor Co.*, 389 S.C. 434, 446, 699 S.E.2d 169, 175 (2010). As part of that heightened scrutiny, "the trial court must evaluate the substance of the testimony and determine whether it is reliable." *Id.* "The trial court must examine the substance of the testimony to determine if it is reliable, regardless of whether the expert evidence is scientific, technical or other specialized knowledge." *Id*. at 449, 699 S.E.2d at 177. If the proposed testimony does not meet that reliability test, it must be excluded. *Id*. at 446-47, 699 S.E.2d at 175.

Here, the trial court did not properly evaluate the reliability of Richardson's testimony. Richardson based his opinions about how the accident occurred on the opinions and conclusions of the investigating police officer. He did so without conducting any investigation to determine whether the officer was qualified to reach those conclusions, or whether the officer performed the investigation correctly. Rather, Richardson simply accepted the officer's conclusions at face value and then used them as the bases for his own opinions.

Under those circumstances, the trial court could not possibly have determined Richardson's testimony was reliable. The court did not know who the investigating officer was, what qualifications the officer did or did not have, or exactly how the officer reached the conclusions

upon which Richardson relied. Accordingly, the record fails to reveal any basis to support the trial court's apparent conclusion that the basis for Richardson's opinions, and, thus, his testimony, met the reliability threshold of Rule 702.

The lack of any rigorous scrutiny as to the reliability of Richardson's opinions was particularly erroneous in light of this Court's decision in *Hamrick v. State*, 426 S.C. 638, 828 S.E.2d 596 (2019). In *Hamrick*, the Court reversed a trial court's decision to allow an investigating law enforcement officer to testify as to reconstruction of an accident.[7] The Court concluded that the officer, who testified that he had taken some courses on accident reconstruction, was not qualified to give expert testimony on that subject. Explaining its decision, the Court stated:

> Accident reconstruction is a highly technical and specialized field in which experts employ principles of engineering, physics, and other knowledge to formulate opinions as to the movements and interactions of vehicles and people, under circumstances lay people—even trained officers—simply cannot understand. A law enforcement officer who attended several classes on the subject does not possess the necessary qualifications to satisfy the "qualified as an expert" element of the Rule 702 foundation.

426 S.C. at 649, 828 S.E.2d at 602. Thus, Rule 702 prohibited the officer from providing his opinion as to the point of impact in the subject accident, and the trial court's decision to admit that testimony was prejudicial error.

Hamrick demonstrates the degree of scrutiny required to evaluate a police officer's qualifications in accident reconstruction and, thus, the reliability of that officer's conclusions. A party seeking to introduce such evidence must demonstrate that the officer is fully qualified in that "highly technical and specialized field." As *Hamrick* makes clear, that is neither an easy standard to satisfy, nor one the trial court should apply lightly.

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[7] Although the Court focused on the "qualification" test of Rule 702, rather than on reliability, the reasoning of *Hamrick* is still instructive for the present case.

Here, the trial court made no effort to evaluate the officer's qualifications or the reliability of the officer's conclusions. Nor was any such evaluation even possible. There was no evidence in the record that would have allowed the trial court to make that determination. It necessarily follows that the trial court erred in essentially skipping that crucial step and admitting expert testimony that constituted an effort to repackage the conclusions of a law enforcement office whose qualifications were completely unknown.

Any attempt to separate Richardson's testimony from the officer's conclusions for purposes of Rule 702 admissibility must fail. Richardson expressly and exclusively relied on the officer's findings as the bases for his own opinions about where and how the accident occurred. Without the officer's findings, Richardson could not have reached the opinions he provided. In other words, this is not a situation in which an expert took information from a source of undetermined reliability and then subjected that data to additional, independent tests to ensure it was correct before using it to form opinions. Richardson simply accepted the officer's conclusions "as is" and based his opinions on them without further tests or studies. As a result, the officer's conclusions and Richardson's opinions are inextricably linked. If those conclusions are not reliable, then the resulting opinions are also unreliable.

Rule 703, SCRE, also provided no basis for admitting Richardson's testimony. "Under Rule 703, SCRE, an expert may rely on inadmissible evidence <u>if the trial judge 'examines the reliability of the inadmissible evidence and excludes opinions not deserving of reliance in the specific instance and/or those that rely on grossly unreliable data</u>.'" *Jamison v. Morris*, 385 S.C. 215, 228, 684 S.E.2d 168, 175 (2009) (emphasis added). Thus, Richardson could rely on the officer's conclusions, but only if the trial court examined those conclusions and found them to be reliable. This takes the analysis right back to the starting point. Even under Rule 703, the trial court

was still required to ensure that the officer's conclusions had the requisite reliability. The lack of information about the officer's qualifications and/or methodology made that an impossible task. Assuming the trial court made a determination on reliability – implicit or otherwise – any such ruling was without any evidentiary basis. The decision was, therefore, erroneous, as it was controlled by an error of law – i.e. the failure to follow the requirements established by Rules 702 and 703, SCRE.

Significantly, the Court of Appeals' opinion overlooked McDowell's arguments concerning the trial court's gatekeeping function under Rule 702, SCRE. In fact, the opinion made no reference at all to that rule or to the gatekeeping role. The Court of Appeals also failed to acknowledge or discuss the impact of *Hamrick* and/or *Jamison*. Those omissions constituted error, and this Court should grant the current petition in order to conduct that analysis.

The trial court's decision to allow Richardson's challenged testimony was also prejudicial. Richardson used the officer's unreliable conclusions as the bases for his opinions on where and how the collision occurred. As a result, Richardson was able to put an "expert stamp" on Frederick's theory of liability. That is sufficient to establish the necessary prejudice to McDowell.

Hamrick v. State, *supra,* supports the existence of prejudice. In *Hamrick*, a key issue was whether a point of impact between a vehicle and a construction worker occurred inside the designated construction zone or within the criminal defendant's lane of travel. 426 S.C. at 644-45, 828 S.E.2d at 599. The trial court allowed the investigating police officer to state an opinion as to the point of impact. *Id.* As discussed above, this Court concluded that decision was erroneous because the record did not support a conclusion that the officer was qualified to give an expert opinion in the field of accident reconstruction. *Id*. at 649, 828 S.E.2d at 602. The Court then proceeded to conclude that the error was prejudicial. As the Court explained:

> We quickly dispense with any suggestion the trial court's error was harmless. Officer Harris's opinion testimony was critical to the State's ability to prove an "act forbidden by law" or that Hamrick "neglect[ed] any duty imposed by law in the driving of the motor vehicle," and on that basis prove Hamrick "proximately cause[d] great bodily injury" to Garland. § 56-5-2945(A). While the State also presented evidence Hamrick was driving five miles per hour over the speed limit and failed to keep a proper lookout, the burden of proving proximate cause would have been much more difficult for the State to meet if the point of impact was in the lane of travel. Therefore, we find the error in admitting Officer Harris's opinion testimony regarding the point of impact could not have been harmless.

Id. at 650, 828 S.E.2d at 602 (emphasis added).

The same situation exists here. Frederick relied on Richardson's opinion as evidence that the collision took place while McDowell's truck was still moving forward, a fact that, if true, could support Frederick's version of how the accident happened. Frederick also offered her own testimony on that point, but her ability to meet her burden of proof would have been much more difficult with Richardson's opinions to bolster her testimony. Therefore, just as the erroneous decision to admit the testimony in *Hamrick* was prejudicial, it is equally so in this case.

The trial court should not have admitted Richardson's challenged opinions. Those opinions were based on conclusions by a police officer whose qualifications and methodology were completely unknown, both to Richardson and to the trial court. This meant there was no way for the trial court even to conduct an inquiry about whether or not the conclusions were reliable, let alone conclude that they were. As a result of the court's erroneous decision to admit that testimony, Frederick was able to support her liability arguments with expert testimony that should have been excluded under Rule 702. The Court of Appeals completely failed to address the impact of Rule 702 on this issue, and this Court should grant the current petition in order to review that decision and perform this necessary analysis.

CONCLUSION

For the reasons set forth above, this Court should grant the current petition and review the erroneous decision by the Court of Appeals.

Respectfully submitted,

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CERTIFICATION

Pursuant to Rule 242(d)(1), SCACR, counsel for the Petitioner hereby certifies that a Petition for Rehearing was made and finally ruled upon in the Court of Appeals.

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