

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.

APPENDIX

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SC Court of Appeals

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FINAL APPELLANT'S BRIEF

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STATEMENT OF THE ISSUES ON APPEAL

- I. Did the trial court err in failing 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 trial court err in not granting McDowell a directed verdict or judgment notwithstanding the verdict, where unchallenged evidence demonstrated that Frederick's own negligence contributed to cause the accident, and under North Carolina law, which is controlling in this case, Frederick was therefore barred from any recovery?
- III. Did the trial court err in admitting evidence of the full amount of medical bills, where allowing the jury to see that full amount violated the controlling law of North Carolina?
- IV. Did the trial court err in 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, where that information, and the resulting testimony, did not comply with the standard for admission of evidence under the applicable rules?

STATEMENT OF THE CASE

This case arose from an automobile accident that occurred in North Carolina on April 29, 2015. Both drivers involved in the accident were South Carolina residents. The Respondent Daisy Frederick ("Frederick") filed her Summons and Complaint in the Court of Common Pleas for Marlboro County on April 1, 2016. [R. pp. 10-14.] The Appellant 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 would apply because the subject accident occurred in that state. Frederick has not challenged that ruling on appeal. [R. pp. 47-48.]

At trial, Frederick testified on her own behalf. She also presented testimony by (1) McDowell, (2) Christine Howard, her mother, (3) Dr. Stephen Sims, one of her treating physicians, and (4) 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 scene, 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 without objection. Based on his examination of the accident site, Roberts testified that 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.] Frederick did not challenge or dispute either of those conclusions.

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 basis or need for an award of future medical bills or lost wages, as there was no record evidence to support any such damages. Indeed, Frederick's attorney expressly told the jury that future lost wages were not warranted, saying, "I don't think it's necessary to give her lost wages for the rest of her life or anything like that cause [sic] she's going to find work." [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, and even though the attorney could only argue that Frederick would "probably" have pain in the future. [R. pp. 145-146.]

After the closing arguments were concluded, counsel for McDowell again renewed the directed verdict motions based on contributory negligence and the absence of any evidence to support awards for future damages. [R. p. 147.] The judge denied those

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

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.] Following that verdict, the judge granted the parties 10 days to make post-trial motions. [R. pp. 160-161.]

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 he moved for a directed verdict at trial. [R. pp. 18-20.] Alternatively, McDowell moved a new trial absolute and/or a new trial *nisi remittitur* based on the following grounds: (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 an exhibit that showed the full amount of Frederick's medical bills, (5) the erroneous decision to charge the mortality table given 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 conducted a hearing on the post-trial motions on August 21, 2019. [R. pp. 210-221.] However, the judge did not rule on the motions until May 12, 2020, when he filed an order denying them. [R. pp. 3-5.] Because the order contained an inaccurate statement about the law applied to the case, McDowell made a timely motion under Rule 59(e), SCRCR, asking the judge to amend the previous order and also to reconsider his rulings. [R. p. 27.] The judge denied the motion to reconsider, but did file an amended

order that corrected the earlier misstatement. [R. pp. 6-9.] McDowell then filed a timely Notice of Appeal in this Court.

STATEMENT OF THE FACTS

On August 29, 2015, the Appellant Daniel Lee McDowell (“McDowell”) was traveling from his home in South Carolina to his workplace in Wadesboro, North Carolina. [R. pp. 49, 83.] McDowell was operating on his normal schedule, was not late for work, and was not in a hurry. [R. p. 91.] It had been raining that day, and the roads were wet. [R. pp. 91-92.] McDowell was traveling approximately 40 miles per hour. [R. p. 92.] There is no evidence that McDowell’s speed exceeded the posted speed limit for that road.

McDowell 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 from the shock of the spinout, McDowell placed his truck in reverse, checked for traffic, and tried to back up into his original lane of travel. [R. pp. 92-93.] Before he could complete that maneuver, another vehicle collided with his truck. [R. p. 93.]

The other vehicle was a car being driven by the Respondent Daisy Frederick (“Frederick”). At the time of the collision (around 3:00 pm), Frederick, who had been up since 5:00 am, was on her way back to her home in Cheraw, South Carolina, after working a full shift at her job in North Carolina. [R. pp. 49-55.] According to Frederick, as she approached an area where the road curved, she saw a truck appear in her lane of travel. [R. pp. 54-55.] Frederick testified that she did not see the truck until it was about three car lengths away from her vehicle. [R. pp. 54-55.] However, there was uncontested evidence

that the line of sight in that area of the road was at least 700 feet, and Frederick admitted that she could see a safe distance down the road and certainly farther than three car lengths. [R. pp. 77-79, 117-122.] 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. Specifically, she broke her left femur and her right ankle, and she also had numerous cuts and abrasions on her arms, back and neck. [R. p. 62.] Surgical procedures were necessary to repair the damage to her leg and ankle, and she had an extended recovery period following those procedures that involved physical therapy. [R. pp. 63-65.] As a result, she 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 her treating surgeon did not conclude that Frederick had any permanent impairment or disability or that she would require any future medical care. [R. pp. 80,162-196.]

STANDARDS OF REVIEW

(A) New Trial, New Trial Absolute and New Trial Nisi Remittitur

Under South Carolina common law, “[a] trial judge may grant a new trial upon the facts if the judge determines the verdict is contrary to the fair preponderance of the evidence.” *McEntire v. Mooregard Exterminating Service, Inc.*, 353 S.C. 629, 633, 578 S.E.2d 746, 748 (Ct. App. 2003). The question of whether or not to grant a new trial upon the facts is one addressed to the sound discretion of the trial judge, and the appellate court reviews that decision on an abuse of discretion standard. *Id.* at 633, 578 S.E.2d at 748.

A trial court must grant a new trial absolute “if the verdict is so grossly excessive that it shocks the conscience of the court and clearly indicates the amount of the verdict was the result of caprice, passion, prejudice, partiality, corruption, or other improper motive.” *Knoke v. S.C. Dept. of Parks, Recreation & Tourism*, 342 S.C. 136, 141, 478 S.E.2d 256, 258 (1996). When a verdict is “grossly excessive and the amount awarded is so shockingly disproportionate to the injuries as to indicate that the jury acted out of passion, caprice, prejudice, or other consideration not founded on the evidence, it becomes the duty of [the appellate court], as well as the trial court, to set aside the verdict.” *Sanders v. Prince*, 304 S.C. 236, 238, 403 S.E.2d 640, 642 (1991). “The grant or denial of new trial motions rests within the discretion of the circuit court, and its decision will not be disturbed on appeal unless its findings are wholly unsupported by the evidence or the conclusions reached are controlled by error of law.” *Brinkley v. S.C. Dept. of Corrections*, 386 S.C. 182, 185, 687 S.E.2d 54, 56 (Ct. App. 2009).

A trial court has the authority to grant a new trial *nisi remittitur* when it finds the amount of the verdict to be merely excessive. *RRR, Inc. v. Toggas*, 378 S.C. 174, 182, 662 S.E.2d 438, 442 (Ct. App. 2008). “Compelling reasons, however, must be given to justify invading the jury’s province in this manner.” *Id.* at 183, 662 S.E.2d at 442-43. Nevertheless, “[t]he circuit court has wide discretionary power to reduce the amount of a verdict which, in its judgment, is excessive.” *Id.* at 183-84, 662 S.E.2d at 443. An appellate court reviews a decision to grant or deny a motion for a new trial *nisi remittitur* on an abuse of discretion standard. *Id.*

The decision to admit or exclude evidence is within the sound discretion of the trial court. *Hollins v. Wal-Mart Stores, Inc.*, 381 S.C. 245, 250-51, 672 S.E.2d 805, 807 (Ct.

App. 2008). Therefore, an appellate court will not reverse the trial court's decision "absent an abuse of discretion." *Id.* at 251, 672 at 807. "An abuse of discretion occurs when the trial court's ruling is based on an error of law." *State v. McDonald*, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000).

(B) Directed Verdict / Judgment Notwithstanding the Verdict

"In ruling on a motion for directed verdict and JNOV, a court must view the evidence and all reasonable inferences in the light most favorable to the non-moving party." *Swinton Creek Nursery v. Edisto Farm Credit, ACA*, 334 S.C. 469, 476, 514 S.E.2d 126, 130 (1999). The trial court should deny the motion where either the evidence yields more than one inference or its inference is in doubt. *Jinks v. Richland County*, 355 S.C. 341, 345, 585 S.E.2d 281, 283 (2003). An appellate court will reverse the trial court's ruling on a directed verdict motion only where there is no evidence to support the ruling or where the ruling is controlled by error of law. *Hinkle v. National Cas. Ins. Co.*, 354 S.C. 92, 96, 579 S.E.2d 616, 618 (2003); *Clark v. S.C. Dept. of Pub. Safety*, 362 S.C. 377, 382-83, 608 S.E.2d 573, 576 (2005).

ARGUMENT

I. The trial court erred in failing to grant a new trial or a new trial nisi remittitur because the evidence submitted at trial did not support the verdict, which was grossly excessive or merely excessive in light of the record evidence.

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 certainly not an insignificant number, it cannot justify the \$5,000,000 verdict returned in this case. The other evidence of intangible damages also fails to support that award. To the contrary, when the totality of

the evidence is viewed fairly, the amount of the verdict is clearly excessive. Therefore, the trial court erred in failing to grant a new trial or a new trial *nisi remittitur*, and this Court should reverse.²

There is no dispute that Frederick sustained serious injuries in the accident. She had a broken femur and a broken ankle, which required more than one surgery to repair, and she had an extended recovery period that required additional care and physical therapy. As a result, she incurred a little over \$170,000 in medical bills, and she lost just over \$50,000 in income during the time when she could not work. Those facts do appear in the record, and McDowell does not claim otherwise. But all of those damages were in the past by the time this trial occurred. There was no evidence whatsoever that Frederick would sustain or experience any compensable damages in the future. That absence of evidence makes the verdict unsupported and excessive, and it entitles McDowell to relief on appeal.

Frederick testified that she was still experiencing some pain as of the trial date. Yet, there was no evidence even to suggest, let alone prove, that her pain would continue into the future. Frederick's treating surgeon, whose video deposition was played at trial, never expressed an opinion that she would have future problems with pain. [R. pp. 162-196.] In fact, he was not even asked to give that opinion. No other medical experts testified, which means the medical evidence was completely silent on the issue of future pain. As a result, the jury had no evidentiary basis to determine whether and to what extent a person who

² McDowell moved for a new trial pursuant to the "thirteenth juror doctrine," a new trial absolute based on a grossly excessive verdict, and a new trial *nisi remittitur* based on a merely excessive verdict. McDowell does not abandon, and expressly preserves, all of those grounds for relief in this appeal. However, because the supporting arguments are the same for all three grounds, McDowell will present those arguments collectively in this section. This will avoid repetition of arguments and authorities.

had sustained those types of injuries would have pain in the months or years following the trial.

That lack of evidence is crucial because it opened the door for impermissible speculation by the jury. It is very likely that 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 necessarily based on guesswork, not evidence. This fact renders 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.”).

The same reasoning applies to the issue of future medical care and related expenses. Frederick’s surgeon did not testify that she would need any accident-related medical care in the future, and Frederick did not present any other testimony, medical or otherwise, to that effect. As a result, there was no life care plan, and Frederick submitted no evidence of future treatments or expenses to the jury. She did not testify that she had any plans or intentions to seek such care in the future. To the contrary, she testified that she had not seen a medical provider for her injuries since December 2016, which was more than a year before the trial began. [R. p. 80.]

Similarly, there was no evidence that Frederick had any permanent impairment or disability as a result of her injuries. The treating surgeon did not even hint at the existence of any permanent condition, and he certainly did not give Frederick a disability or impairment rating. Again, this means that the jury could not have permissibly considered any impairment or disability when arriving at its verdict.

There was also no evidence that Frederick would have any future lost income. She did not present a vocational rehabilitation expert to opine that she could not work in the future, nor did her treating surgeon give that type of opinion. Frederick herself did not even claim that she would not be able to return to work in the future. In fact, during his closing argument, Frederick's attorney stated that she would be able to work, and he disavowed any claim for future lost income. [R. p. 143.]

The total 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 erroneous and prejudicial. 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 damages Frederick would experience for the years remaining in her life expectancy, even though no evidence of such damages existed. Thus, the jury charge on that issue, in and of itself, entitles McDowell to 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 or a new trial *nisi remittitur*. If future damages are removed from the equation, as they must be based on the lack of evidence, 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 and then ended; (3) pain during that period; (4) a finite amount of medical bills; and (5) a finite amount of lost wages. Although those factors are

not insignificant, they cannot possibly support a verdict that was more than twenty-two times the amount of the combined total specials.

Given specials of roughly \$225,000, the verdict of \$5,000,000 was grossly excessive. Without any evidence of a permanent impairment or disability, there is simply no way to explain such a verdict without concluding that the jury based its decision on factors other than the record evidence. Perhaps the jurors heard the charge regarding the mortality table and concluded, erroneously, that they were obligated to give Frederick an award for unspecified and speculative future damages. Perhaps the jurors sought to punish McDowell even though no claim for punitive damages was before them. Or perhaps the jurors simply allowed sympathy for a young single mother to sway their decisions. Regardless of what actually motivated the jury, it could not have been only the evidence presented at trial. No reasonable jury could have awarded such an excessive amount based on such a comparably small amount of special damages and no evidence of any additional damages. Therefore, the trial court erred in refusing to grant a new trial absolute. *See James v. Horace Mann Ins. Co.*, 371 S.C. 187, 193, 638 S.E.2d 667, 670 (2006) (“If the amount of the verdict is grossly inadequate or excessive so as to be the result of passion, caprice, prejudice, or some other influence outside the evidence, the trial court must grant a new trial absolute.”) (emphasis added); *Becker v. Wal-Mart Stores, Inc.*, 339 S.C. 629, 635, 529 S.E.2d 758, 761 (Ct. App. 2000) (“The trial court must set aside a verdict only when it is shockingly disproportionate to the injuries suffered and thus indicates that passion, caprice, prejudice, or other considerations not reflected by the evidence affected the amount awarded.”).

Even if the verdict were considered not to be grossly excessive, it was nonetheless merely excessive for purposes of a new trial *nisi remittitur*. South Carolina's courts have loosely defined "merely excessive" verdicts as those that are "unduly liberal" under the circumstances. *See Becker*, 339 S.C. at 635, 529 S.E.2d at 761. As previously discussed, McDowell asserts that the verdict amount was so excessive as to shock the conscience of the court and, thus, justify a new trial absolute. But assuming *arguendo* it did not meet that standard, it would clearly be "merely excessive" so as to warrant a new trial *nisi remittitur*. This is a lower standard that the present circumstances undoubtedly satisfy.

Becker v. Wal-Mart, supra, is instructive on this issue. The following facts from *Becker* were relevant to the eventual appeal:

On October 12, 1995, Becker was shopping in a Wal-Mart store on Hilton Head Island. Becker, seventy-three at the time, was pushing a shopping cart down an aisle in the appliance section when a box containing a space heater fell from a shelf to her left and struck her left foot. Becker immediately experienced numbness as a result, and the assistant manager noticed a red mark on her foot. At the time, Becker refused medical attention and left the store after completing a company incident report. Over the next thirty-six hours, however, Becker's injury progressively worsened. On October 14, Becker sought help from her former family physician, who referred her to several specialists. In time it was determined that Becker had developed "reflex sympathetic dystrophy," or RSD, a painful disorder involving the peripheral and sympathetic nerves of the extremity.

As a result of the RSD, Becker endured constant, intense pain in her foot over several months, eventually necessitating the surgical implantation of an epidural "portacath" to obtain relief. She also suffered from depression associated with the pain. Becker achieved some improvement, however, and finally reached a plateau at which the pain eased to a chronic, lower level. One treating physician analogized her discomfort factor as "sort of like having a chronic [foot] fracture that just won't heal, hasn't healed, and won't ever heal" Becker was ultimately assigned a four per cent impairment rating to the lower extremity, which corresponded to a two per cent impairment rating to the whole body.

339 S.C. at 633, 529 S.E.2d at 760. 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.*

Becker is significant because it found a verdict to be excessive despite the existence of 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 that her foot would never fully heal. Despite that evidence of future damages, the trial court found the verdict amount to be excessive, and this Court affirmed.

As discussed above, 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 also be excessive. Consequently, *Becker* supports McDowell's position on appeal and warrants a finding that the verdict were merely excessive, even if this Court affirms the trial court's decision that it was not grossly excessive.

In summation, Frederick sustained serious injuries, but ones that were successfully treated. She presented no evidence of any permanent impairments or disabilities. She presented no evidence of any need for future medical care. She presented no medical evidence that she would continue to experience pain in the future. She presented no evidence of future lost wages and, in fact, disclaimed any such damages at trial. Rather than offering those kinds of evidence, Frederick submitted only claims about past pain and

suffering and specials totaling a little over \$225,000. That is a large number, but not nearly large enough, without more, to justify a \$5,000,000 verdict.

If the specials are removed from consideration, the jury basically awarded Frederick \$4,775,000 for intangible damages such as pain and suffering for a 20-month period (i.e. from the day of the accident to the date of trial). That amount is “shockingly disproportionate to the injuries suffered and thus 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, the trial court erred in denying McDowell’s post-trial motions, and this Court should reverse and remand with instructions to grant a new trial absolute or a new trial *nisi remittitur*.

II. The trial court erred in not granting McDowell a directed verdict or judgment notwithstanding the verdict because unchallenged evidence demonstrated that Frederick’s own negligence contributed to cause the accident.

During a pre-trial conference, the trial court determined that the substantive law of North Carolina applied to the case because the subject accident occurred in that state. [R. pp. 47-48.] This decision was correct. *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 the close of Frederick’s case, and again at the close of all evidence, 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 and should be reversed.

“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).³

Although Frederick and McDowell presented competing versions of exactly how the accident occurred, the differences between their respective accounts are not germane to the contributory negligence defense. For this issue, the key facts are not actually in dispute. To the contrary, they were plainly established through undisputed testimony.

McDowell's expert testified that even in the worst case scenario, 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.⁴ [R. pp. 117-125.] Frederick's attorney did not challenge those opinions, and Frederick admitted on the stand that she could see a safe distance down the road before the accident occurred. [R. p. 77.] Frederick further testified that she did not see McDowell's truck until it was three car lengths away, and she never attempted to apply her brakes. [R. pp. 55, 79.]

In light of the undisputed facts regarding the line of sight and the ability to stop a vehicle well short of that distance, the only reasonable conclusion or inference from

³ 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).

⁴ 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).

Frederick's testimony is that her own negligence contributed to cause the accident. Had she been maintaining a proper lookout, she certainly could have seen McDowell's truck in time to stop her car or take some other 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) (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"); *accord Kutz v. Koury Corp.*, 93 N.C. App. 300, 305, 377 S.E.2d 811, 814 (Ct. App. 1989) (directed verdict was proper in a premises liability case because the invitee plaintiff "had the duty to see that which could be seen in the exercise of ordinary prudence").

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. As discussed above, the only reasonable answer to that question is yes. The evidence shows that Frederick had plenty of time and road to see McDowell's vehicle and take action to avoid a collision. Her failure to do that constitutes negligence that contributed to the accident. Consequently, her claim against McDowell is barred under North Carolina law.

Contributory negligence can be a harsh doctrine, and, of course, South Carolina law no longer recognizes it. But South Carolina law does adhere to the established rule that the substantive law of the location of the incident applies in tort cases. Under that rule, North Carolina law – including contributory negligence – applies to this case. The trial court was correct in deciding to apply North Carolina law, but incorrect in how it applied the doctrine of contributory negligence to the evidence presented at trial. Therefore, this Court should reverse and remand with instructions for the trial court to grant McDowell judgment notwithstanding the verdict.

III. The trial court erred in admitting evidence of the full amount of medical bills because allowing the jury to see that full amount violated the controlling law of North Carolina.

During a pre-trial conference, the trial court ruled that North Carolina law, including Rule 414 of the North Carolina Rules of Evidence, would apply to the trial because the subject accident occurred in North Carolina. [R. pp. 47-48.] However, during Frederick's testimony, she offered into evidence an exhibit that violated Rule 414. McDowell's trial counsel made a timely objection, which the trial judge overruled. [R. p. 72.] That decision was both erroneous and prejudicial to McDowell. Therefore, this Court should reverse and remand for a new trial.

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 in question did contain what was purported to be 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 has previously argued that the challenged exhibit 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 did not cite any authority for the proposition to the trial court, and the plain language of Rule 414 does not support it. The rule does not state that a plaintiff can present evidence of both the full, billed amount and the amount actually paid, 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. Thus, any reliance on an argument that McDowell could have handled this issue through cross-examination is without merit.

In addition to being legally erroneous, the decision to admit the exhibit was clearly 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 higher number to go to the jury on an exhibit, 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 might argue that her attorney minimized that risk by stating and emphasizing the lower number in his closing argument. Although the 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 that was necessary in light of the erroneous decision to admit the exhibit. 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.

Of course, there is no way to prove that the inadmissible higher number actually impacted the jury's verdict. But in situations like this one, that cannot possibly be a requirement. It is enough to demonstrate, as McDowell has, that the erroneous decision allowed the jury to see evidence of nearly \$100,000 in unrecoverable specials. Regardless of whether the jury used that higher number in its deliberations, the error was facially prejudicial. Therefore, this Court should reverse and remand for a new trial in which only the lower amount of medical bills can be presented to the jury, in accordance with Rule 414.

IV. The trial court erred in 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 office. 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 this Court should reverse.

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,⁵ 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, this Court 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)).

⁵ 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 give this Court 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.

In his deposition, 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 that 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.

In the present case, the trial court did not properly evaluate the reliability of Richardson's testimony. As discussed above, 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 that 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 the Supreme Court's recent 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.⁶ 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.

⁶ 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.

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.

As previously noted, the trial court in the present case made no effort to evaluate the officer's qualifications or the reliability of the officer's conclusions. Nor could the court have done so. 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 officer's conclusions.

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. The trial court erred in failing to recognize that point.

Rule 703, SCRE, also provided no basis for admitting Richardson's testimony. "Under Rule 703, SCRE, an expert may rely on inadmissible evidence 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.'" *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.

The trial court's decision to allow Richardson's challenged testimony was not only erroneous, but 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, the Supreme 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 in the present case. 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. Accordingly, the trial court's decision constituted prejudicial error, and this Court should reverse and remand for a new trial.

CONCLUSION

The trial court committed multiple legal and evidentiary errors that were prejudicial to McDowell. Those errors entitle McDowell to a new trial. Yet, even if the Court determines there were no such errors, a new trial is still warranted because the staggeringly high amount of the verdict, as compared to the relatively small amount of damages in evidence, plainly demonstrates that the verdict was motivated by passion, prejudice, sympathy or something else beyond the actual evidence. At the very least, the verdict amount was "merely excessive," such that the trial court should have granted McDowell's motion for a new trial *nisi remittitur*.

Therefore, the Court should reverse, vacate the verdict, and remand with instructions to grant judgment in McDowell's favor. Alternatively, the Court should reverse, vacate the verdict and remand for a new trial, or with a directive for the trial court to grant a new trial *nisi remittitur*.

Respectfully submitted,

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RULE 211(b) CERTIFICATION

The undersigned, an attorney in this matter for the Appellant, certifies that this Final Appellant's Brief complies with Rule 211(b), SCACR.

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THE STATE OF SOUTH CAROLINA
In the 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.

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IN THE STATE OF SOUTH CAROLINA)
COUNTY OF MARLBORO)

IN THE COURT OF COMMON PLEAS
FOR THE 4TH JUDICIAL CIRCUIT
CASE NO: 2016-CP-34-00072

DAISY FREDERICK,

Plaintiff,

v.

DANIEL LEE McDOWELL,

Defendant.

**ORDER DENYING DEFENDANT'S
POST-TRIAL MOTIONS**

INTRODUCTION

This matter involves a motor vehicle accident that occurred on or about April 29, 2015 in Anson County, North Carolina. Plaintiff Daisy Frederick was a resident of Chesterfield County, South Carolina, and Defendant Daniel Lee McDowell was a resident of Marlboro County, South Carolina. The case was filed in Marlboro County on April 1, 2016 and came before this Court for trial on January 29, 2018. Because the collision occurred in North Carolina, this Court applied the North Carolina Rules of Evidence. The jury ultimately returned a verdict in favor of the Plaintiff in the amount of \$5,000,000.00 (five million dollars and zero cents).

On February 14, 2018, Defendant filed a number of post-trial motions. Namely, Plaintiff filed motions titled (1) Motion for Judgment Not Withstanding the Verdict; and (2) Motion for New Trial Absolute, "Thirteenth Juror," or New Trial Nisi Remittur. Defendant proceeded to file a supplemental brief in support of his motions on August 21, 2019.

CONCLUSION

Defendant's post trial motions are respectfully **DENIED**.

The Honorable Paul M. Burch

_____, South Carolina

_____, 2020



Marlboro Common Pleas

Case Caption: Daisy Frederick VS Daniel McDowell

Case Number: 2016CP3400072

Type: Order/Other

So Ordered

s/Paul M. Burch, Judge #2048

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IN THE STATE OF SOUTH CAROLINA)
COUNTY OF MARLBORO)

IN THE COURT OF COMMON PLEAS
FOR THE 4TH JUDICIAL CIRCUIT
CASE NO: 2016-CP-34-00072

DAISY FREDERICK,

Plaintiff,

v.

DANIEL LEE McDOWELL,

Defendant.

**AMENDED ORDER DENYING
DEFENDANT'S POST-TRIAL MOTIONS**

INTRODUCTION

This matter involves a motor vehicle accident that occurred on or about April 29, 2015 in Anson County, North Carolina. Plaintiff Daisy Frederick was a resident of Chesterfield County, South Carolina, and Defendant Daniel Lee McDowell was a resident of Marlboro County, South Carolina. The case was filed in Marlboro County on April 1, 2016 and came before this Court for trial on January 29, 2018. The jury ultimately returned a verdict in favor of the Plaintiff in the amount of \$5,000,000.00 (five million dollars and zero cents).

On February 14, 2018, Defendant filed a number of post-trial motions. Namely, Defendant filed motions titled (1) Motion for Judgment Not Withstanding the Verdict; and (2) Motion for New Trial Absolute, "Thirteenth Juror," or New Trial Nisi Remittur. Defendant proceeded to file a supplemental brief in support of his motions on August 21, 2019.

CONCLUSION

Defendant's motions titled (1) Motion for Judgment Not Withstanding the Verdict; and (2) Motion for New Trial Absolute, "Thirteenth Juror," or New Trial Nisi Remittur, which were heard in Marlboro County on August 12, 2019, are respectfully **DENIED**.

The Honorable Paul M. Burch

_____, South Carolina

_____, 2020



Marlboro Common Pleas

Case Caption: Daisy Frederick VS Daniel McDowell

Case Number: 2016CP3400072

Type: Order/Other

So Ordered

s/Paul M. Burch, Judge #2048

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IN THE STATE OF SOUTH CAROLINA)
COUNTY OF MARLBORO)

IN THE COURT OF COMMON PLEAS
FOR THE 4TH JUDICIAL CIRCUIT
CASE NO: 2016-CP- 34- 2016-4034-00072

DAISY FREDERICK,

Plaintiff(s),

v.

DANIEL LEE MCDOWELL

Defendant(s).

SUMMONS
(Jury Trial Demanded)

TO: THE DEFENDANT(S) ABOVE NAMED:

YOU ARE HEREBY SUMMONED and required to Answer the Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your Answer to said Complaint upon the Plaintiff or her attorneys, Eric M. Poulin/ Roy T. Willey, IV/ Katie M. Wilensky, at their office, 62 Columbus St. Charleston, SC 29403, within (30) days after the service hereof, exclusive of the day of such service and if you fail to Answer the Complaint within the time aforesaid, Plaintiff will apply to the court for the relief demanded in the Complaint.

Dated at Charleston, South Carolina on the 24 day of March, 2016.

ANASTOPOULO LAW FIRM, LLC


Eric M. Poulin
S.C. Bar No.: 100209
Roy T. Willey, IV
S.C. Bar No.: 101010
Katie M. Wilensky
S.C. Bar No.: 101897
62 Columbus St.
Charleston, SC 29403
(843) 614-8888

This 24 day of March, 2016
Charleston, South Carolina

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CLERK OF COURT
MARLBORO COUNTY, S.C.

IN THE STATE OF SOUTH CAROLINA)
COUNTY OF MARLBORO)

IN THE COURT OF COMMON PLEAS
FOR THE 4TH JUDICIAL CIRCUIT
CASE NO: 2016-CP-34- 2016434 00072

DAISY FREDERICK,

Plaintiff(s),

v.

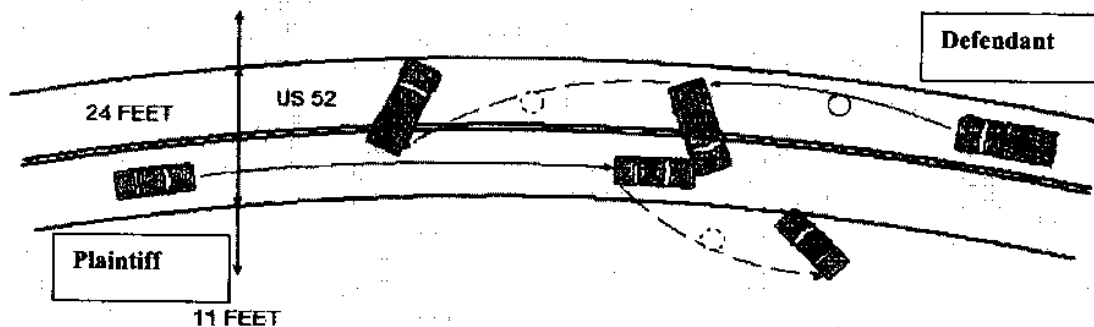
DANIEL MCDOWELL

Defendant(s).

COMPLAINT
(Jury Trial Demanded)

The Plaintiff, complaining of the Defendant, alleges and says as follows:

CASE SYNOPSIS



On April 29, 2015, Daisy Frederick was lawfully travelling southbound on US 52. Unbeknownst to her, Daniel Lee McDowell was travelling northbound on US 52, but was not travelling as carefully. Daniel's car crossed over the center line, directly into Daisy's lane. The two vehicles collided, leaving Daisy's car off the side of the road facing northeast and leaving Daisy catastrophically injured.

SPECIFIC AVERMENTS

1. That the Plaintiff, Daisy Frederick, (herein referred to as "Plaintiff") is a citizen and resident of Chesterfield County, State of South Carolina.
2. That upon information and belief, Defendant Daniel McDowell (herein referred to as

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"Defendant") is a citizen and resident of Marlboro County, State of South Carolina.

3. That the motor vehicle collision that is the subject of this action occurred in Anson County, State of North Carolina.
4. That this Court has jurisdiction over the parties and the subject matter of this action.
5. That on or about April 29, 2015 the Plaintiff was lawfully traveling southbound on US Hwy 52 in a 2006 Chrysler SUV 4D with VIN# 3A4FY48B96T238080 and South Carolina license plate CIM466.
6. That on or about April 29, 2015, Defendant was traveling northbound on US Hwy 52 in a 2005 Dodge Dakota Laramie 4D with South Carolina license plate KIE448 and VIN# 1D7HE58N75S102043.
7. That on or about April 29, 2015, Defendant crossed left of center and struck the Plaintiff, causing her to go off the side of the road.
8. That at all times material hereto, Defendant had a duty to operate his vehicle in a safe and prudent manner and to avoid injuring other motorists.
9. That the collision and the resulting injuries and damages to Plaintiff were caused directly and proximately by one or more of the following negligent, grossly negligent, negligent *per se*, careless, reckless, willful, wanton and unlawful acts, and/or omissions of the Defendant in any one or more of the following respects:
 - a. In failing to keep a proper lookout while operating the vehicle;
 - b. In failing to maintain control of the vehicle;
 - c. In failing to stay in his lane of traffic;
 - d. In failing to slow down to a controllable speed to stay in his lane of traffic;
 - e. In failing to keep a safe distance from Plaintiff;

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- f. In failing to use due care;
- g. In failing to properly observe the road and traffic conditions;
- h. In failing to obey traffic laws and/or signs;
- i. In failing to use his horn, if he had any;
- j. In traveling too fast for conditions;
- k. In failing to properly maintain the vehicle;
- l. In failing to yield the right of way;
- m. In failing to apply his brakes or use his steering mechanism to avoid the collision;
- n. In negligently and carelessly operating the vehicle in a high and excessive rate of speed under the circumstances then and there existing;
- o. In operating the vehicle at a high rate of speed and far in excess of the reasonable and prudent speed under the circumstances and conditions then and there existing;
- p. In operating the vehicle without using due care and without regard for safety and rights of Plaintiff;
- q. In operating the vehicle in a negligent, grossly negligent, careless, reckless, willful, wanton and unlawful manner so as to create a dangerous situation;
- r. In failing to exercise the degree of care and caution that a reasonable and prudent person would have exercised under the circumstances then and there prevailing;
- s. In negligently and carelessly operating the vehicle in such a manner to cause the vehicle to strike Plaintiff and cause personal injuries;
- t. In driving while distracted;
- u. In failing to immediately report an accident involving personal injury;
- v. In any other acts that represent a breach of the statutory or common laws of the State of South Carolina; and
- w. In any other such manner that Plaintiff may become aware of through discovery and/or at trial.

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10. That as a direct and proximate result of the negligence, gross negligence, carelessness, recklessness, willfulness and wantonness of the Defendant, as is set forth more fully above, Plaintiff was injured, has endured pain and suffering, has suffered mentally and emotionally, and has incurred, and will incur, various medical expenses, and has otherwise been damaged and injured.
11. That as a direct and proximate result of the negligence, gross negligence, carelessness, recklessness, willfulness and wantonness of the Defendant, as is set forth more fully above, Plaintiff was jerked, thrown and slammed within the interior of her vehicle by the force of the Defendant's vehicle, causing her to sustain serious and painful personal injuries including, but not limited to, pain and suffering, and injuries to her femur, ankle, back, arm, and chest.
12. That as a direct and proximate result of the negligence, gross negligence, carelessness, recklessness, willfulness and wantonness of the Defendant, as is set forth more fully above, Plaintiff has been damaged and injured in the following respects:
 - a) Plaintiff has been required to expend a significant amount of money for her medical care, treatment and attendant services;
 - b) Upon information and belief, the nature of Plaintiff's injuries will require her to expend a significant amount of money for her medical care, treatment and attendant services in the future;
 - c) Plaintiff has been unable to work and has been deprived of her income;
 - d) Upon information and belief, the nature of Plaintiff's injuries will deprive her of employment opportunity and income in the future;
 - e) The pain of her injuries has resulted in her loss of enjoyment of life and change in her personality, all to permanent detriment to her health and physical well-being; and
 - f) Upon information and belief, the Plaintiff was required to expend

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significant amounts of money to replace and repair property damage caused in the accident.

13. That Defendant's acts and omissions, as is set forth more fully above, show willful misconduct, malice, wantonness and an entire want of care, raising a presumption of the Defendant's conscious indifference to the consequences of such acts and omissions.
14. That because of the Defendant's acts and omissions and the proximate harm resulting to Plaintiff, Plaintiff should be awarded punitive damages in an amount to be determined by the trier of fact, in order to punish and penalize the Defendant and to deter the Defendant and others from similar behavior.
15. That upon information and belief, Plaintiff is entitled to judgment against the Defendant for actual, compensatory and exemplary or punitive damages for her personal injuries and property damages set forth herein in an amount that is fair, just and reasonable under the circumstances, plus whatever costs, interest and attorney fees that she may be entitled, to be determined by a jury.

WHEREFORE, the Plaintiff prays for judgment against the Defendant for an amount to be ascertained by the jury at the trial of this action, for all damages, punitive and actual, and disbursements of this action, and both prejudgment and post judgment interest, and for such other and further relief, in law or in equity, as this court may deem just and proper.

ANASTOPOULO LAW FIRM, LLC


Eric M. Poulin
S.C. Bar No.: 100209
Roy T. Willey, IV
S.C. Bar No.: 101010
Katie M. Wilensky
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62 Columbus St.
Charleston, SC 29403

This 24 day of March, 2016
Charleston, South Carolina

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CLERK OF COURT
CHARLESTON COUNTY, S.C.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF MARLBORO	)	Docket No.: 2016-CP-34-00072
DAISY FREDERICK,	)	
	)	
Plaintiff,	)	
	)	
v.	)	ANSWER
	)	(Jury Trial Demanded)
DANIEL LEE MCDOWELL,	)	
	)	
Defendant.	)	

Defendant answers and respectfully shows unto the Court:

FOR A FIRST DEFENSE

1. Defendant demands a jury trial.
2. Defendant denies the allegations set forth in Plaintiff's "Case Synopsis."
3. Upon information and belief, the allegations set forth in Paragraphs 1, 2 and 3 of the Complaint are admitted.
4. The allegations set forth in Paragraph 4 of the Complaint are admitted.
5. Upon information and belief, it is admitted that on or about April 29, 2015, Plaintiff was traveling on US Highway 52 in a 2006 Chrysler SUV 4D with VIN number 3A4Y48B96T238080 with South Carolina license plate CIM466. The remaining allegations of Paragraph 5 are denied.
6. The allegations of Paragraph 6 are admitted.
7. The allegations set forth in Paragraph 7 of the Complaint are denied and strict proof is demanded thereof.
8. Answering the allegations set forth in Paragraph 8 of the Complaint, it is admitted that the Defendant has a duty to operate his vehicle in a safe and prudent manner which he did on the date of this accident.

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9. The allegations set forth in Paragraphs 9, including sub-parts, 10, 11, 12, including sub-parts, 13, 14 and 15 are denied and strict proof is demanded thereof.

10. Except as specifically admitted, qualified, or explained, Defendant denies the allegations and demands strict proof of each allegation.

AS AN ADDITIONAL DEFENSE

11 FURTHER ANSWERING, any injury and damage sustained by Plaintiff may have been caused by the negligence or willfulness of Plaintiff, combining, concurring, and contributing with the negligence or willfulness, if any, by others. Because Plaintiff's negligence or willfulness may be greater than the alleged negligence or willfulness of one or more adverse parties, Plaintiff may be barred from recovery.

AS AN ADDITIONAL DEFENSE

12. FURTHER ANSWERING, any injury and damage sustained by Plaintiff may have been caused by the negligence or willfulness of Plaintiff, combining, concurring, and contributing with the negligence or willfulness, if any, by others. Therefore, the Court should reduce any recovery awarded to Plaintiff for the alleged injuries and damage based upon the percentage of negligence or willfulness attributed to Plaintiff.

AS AN ADDITIONAL DEFENSE

13. FURTHER ANSWERING, Defendant pleads the doctrine of sudden emergency as a complete defense to Plaintiff's claims.

AS AN ADDITIONAL DEFENSE

14. FURTHER ANSWERING, Defendant pleads the doctrine of contributory negligence as a complete defense to Plaintiff's claims.

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15. FURTHER ANSWERING, any award of punitive damages would violate the constitutional safeguards provided by the Due Process Clause of the Fourteenth Amendment of the United States Constitution and under the Due Process Clause of Article I, Section 3 of the South Carolina Constitution because the determination of punitive damages does not bear any reasonable relationship to the amount of actual damages, if any, suffered by or awarded.

WHEREFORE, having answered, Defendant asks this Court to dismiss the Complaint and to grant such other and further relief as this Court deems just and proper.

TURNER PADGET



David R. Sligh
Post Office Box 2116
Myrtle Beach , South Carolina 29578
Direct: 843-213-5519
Fax: 843-213-5619

Myrtle Beach , South Carolina
May 23, 2016

ATTORNEYS FOR DEFENDANT

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STATE OF SOUTH CAROLINA
COUNTY OF MARLBORO

IN THE COURT OF COMMON PLEAS
Civil Action No.: 2016-CP-34-00072

DAISY FREDERICK,
Plaintiff,

vs.

DANIEL LEE MCDOWELL,
Defendant.

DEFENDANT'S POST-TRIAL MOTIONS

Defendant Daniel Lee McDowell (hereinafter "Defendant") respectfully renews his Motion for a Directed Verdict previously made to the Court at the end of the plaintiff's case and renewed at the end of all of the evidence and requests that this Court enter judgment for the Defendant notwithstanding the verdict on plaintiff's claims for negligence and damages. This Motion is made pursuant to Rule 50(b), SCRPC, on the basis that there exists no legally sufficient evidentiary basis for a verdict in Plaintiff's favor, and therefore, the Defendant is entitled to a judgment as a matter of law, or alternatively, for a new trial.

Alternatively, pursuant to Rule 59(a), SCRPC, and the Thirteenth Juror Doctrine, Defendant respectfully moves the Court for a new trial absolute, or in the alternative, for a new trial *nisi remittitur*. As stated with more particularity below, Defendant's Motion is based upon the singular, cumulative and prejudicial impact of the evidentiary and legal rulings by the Court, and the excessiveness of the verdict. Defendant files this Motion as an alternative to his Motion for Judgment Notwithstanding the Verdict and reserves all grounds raised therein.

I. Motion for Judgment Not Withstanding the Verdict

LEGAL STANDARDS

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Rule 50(b) SCRCP provides, "A party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and have judgment entered in accordance with their motion for a directed verdict." In ruling on the Motion following a jury verdict, the Court may "allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed." In ruling on motions for directed verdict and/or JNOV, the trial court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the motions. Strange v. South Carolina Dep't of Highways and Pub. Transp., 314 S.C. 427, 429-30, 445 S.E.2d 439, 440 (1994).

The decision to grant a motion for a judgment notwithstanding the verdict rests within the sound discretion of the trial court and is reviewed *de novo* for an abuse of discretion Clark v. S.C. Dep't of Public Safety, 362 S.C. 377, 382-83, 608 S.E.2d 573, 576 (2005); Steinke v. South Carolina Dep't of Labor, Licensing & Regulation, 336 S.C. 373, 386, 520 S.E.2d 142, 148 (1999); Abu-Shawareb v. S.C. State Univ., 364 S.C. 358, 613 S.E.2d 757 (Ct.App.2005); Welch v. Epstein, 342 S.C. 279, 300, 536 S.E.2d 408, 418 (Ct.App.2000). An appellate court will reverse only where there is no evidence to support the trial court's ruling, or where the ruling was controlled by an error of law. Id.

GROUND

Defendant moves pursuant to Rule 50(b), SCRCP, for judgment notwithstanding the verdict on the following grounds and incorporates by reference all grounds and arguments raised in its Motion for a Directed Verdict previously made to the Court at the end of the plaintiff's case and renewed at the end of all of the evidence:

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1. The only reasonable inference to be drawn from the evidence is that Plaintiff was negligent in not keeping a proper lookout on the basis that she first noticed Defendant's vehicle when it was 3 car lengths from her despite the undisputed facts that the line of sight at the location of the accident was at least 700 feet and she never attempted to brake prior to impact. Therefore, Plaintiff was negligent as a matter of law and judgment should be directed in favor of Defendant on its affirmative defense of contributory negligence. Alternatively, the Court should grant judgment notwithstanding the verdict in favor of Defendant on the issue that Plaintiff breached a duty in regard to her failure to keep a proper lookout.
2. Plaintiff presented no testimony or evidence via expert or otherwise that Plaintiff was permanently impaired or suffered from any permanent or future disability. Further there was no testimony regarding the cost or necessity of future medical treatment so this element of damage should not be allowed. Thus, the Court should grant judgment notwithstanding the verdict on the elements of damage associated with permanent impairment, disability, and future medical costs, treatment, and expenses.

II. Motion for New Trial Absolute, Thirteenth Juror Doctrine, or New Trial Nisi Remittur

LEGAL STANDARD

Pursuant to South Carolina common law, "a trial judge may grant a new trial upon the facts if the judge determines the verdict is contrary to the fair preponderance of the evidence." McEntire v. Mooregard Exterminating Services, Inc., 353 S.C. 629, 578 S.E.2d 746 (Ct. App. 2003). "The thirteenth juror doctrine is a vehicle by which the trial court may grant a new trial absolute when it finds that the evidence does not justify the verdict. This ruling has also been termed granting a new trial upon the facts." Folkens v. Hunt, 300 S.C. 251, 387 S.E.2d 265 (Ct. App. 1988).

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(1990). “The effect is the same as if the jury failed to reach a verdict.” Id. The judge, as the thirteenth juror, “hangs” the jury. Id. Neither the judge nor the jury is required to give reasons for this outcome. Id. Because the result of the “thirteenth juror” vote by the judge is a new trial rather than an adjustment to the verdict, no purpose would be served by requiring the trial judge to make factual findings. Id. Unlike a motion for directed verdict, the trial judge weighs the evidence under the thirteenth juror doctrine and need not view it in the light most favorable to the opposing party. Moreover, the question of whether to grant a new trial upon the facts is one addressed to the discretion of the trial judge. McEntire, 353 S.C. at 633, 578 S.E.2d at 748.

The trial court *must* grant a new trial absolute “if the verdict is so grossly excessive that it shocks the conscience of the court and clearly indicates the amount of the verdict was the result of caprice, passion, prejudice, partiality, corruption, or other improper motive.” Knoke v. South Carolina Dep’t of Parks, Recreation and Tourism, 324 S.C. 136, 141, 478 S.E.2d 256, 258 (1996).

The trial judge alone has the power to grant a new trial *nisi* when he finds the amount of the verdict to be merely inadequate or excessive. O’Neal v. Bowles, 314 S.C. 525, 431 S.E.2d 555 (1993). “The trial court has wide discretionary power to reduce the amount of a verdict which in his or her judgment is excessive.” Becker v. Wal-Mart Stores, Inc., 339 S.C. 629, 637–38, 529 S.E.2d 758, 762–63 (Ct. App. 2000). When the verdict indicates the jury was unduly liberal in determining damages, the trial court alone has the power to grant a new trial nisi remittitur. Allstate Ins. Co. v. Durham, 314 S.C. 529, 530, 431 S.E.2d 557, 558 (1993). In considering a motion for new trial nisi, the trial court must evaluate the adequacy of the verdict in light of the evidence presented. Becker, 339 S.C. at 683, 529 S.E.2d at 763. The granting of

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motion for a new trial *nisi* is within the trial judge's discretion and will not be reversed on appeal absent an abuse of discretion. Id.

GROUND

The Defendant bases his Motion for New Trial Absolute and New Trial Nisi Remittitur on the following grounds:

1. The verdict in favor of the Plaintiff is unsupported by the evidence and against the manifest weight of the evidence, and, thus, the Court should invoke its authority under the "thirteenth juror" doctrine, and grant a new trial. Folkens v. Hunt, 387 S.E.2d 265 (S.C. 1990);
2. Because Plaintiff failed to prove that Plaintiff's injuries resulted in any permanent or future impairment by way of competent expert testimony, the jury's verdict is based upon speculation, conjecture, and matters outside the evidence and proof adduced at trial, and therefore, the Court should grant a new trial based on the "thirteenth juror" doctrine and/or the grossly excessive amount of the verdict;
3. Plaintiff's expert witness, Kendrick Richardson, should not have been able to testify regarding his reliance on and usage of the subjective opinions and information contained in the investigating police officer's accident report as this information was hearsay, the police officer never testified at trial, his hearsay opinions were unreliable which violated the court's gatekeeping function for expert testimony under Rule 702, SCRE, and were non-compliant with Rule 703, SCRE, for admission and lacked proper foundation. Mr. Richardson's opinions which were based on this police officer testimony should have been excluded by the Court. Therefore, the Court

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should grant a new trial based on the “thirteenth juror” doctrine and/or the grossly excessive amount of the verdict.

4. Exhibit 10 was improperly admitted through the testimony of Plaintiff in violation of Rule 414 of the North Carolina Rules of Evidence as the Exhibit contained evidence of the total amount of the medical bills even though this is prohibited by Rule 414. The total amount of medical expenses is not relevant and is more prejudicial than probative of the issues in this case and served only to confuse the jury and improperly bring insurance into the jury’s deliberations. For this reason, the Court should invoke the “thirteenth juror” doctrine and/or the grossly excessive amount of the verdict to grant a new trial.
5. The Court improperly charged the jury in relation to the mortality tables and permanent injury and permanent disability despite no evidence in the record to support an award of this type of damages. This allowed the jurors to improperly speculate on the cost of future medical treatment, the extent of disability, or the extent of any permanent impairment Plaintiff may have despite no factual basis for the jury to rely upon. For this reason, the Court should invoke the “thirteenth juror” doctrine and/or the grossly excessive amount of the verdict to grant a new trial.
5. In light of the evidence presented at trial, the amount of the jury’s verdict is grossly excessive and shocking to the conscience of the Court. Based on the grossly excessive verdict, it is clear the jury reached its decision as a result of passion, caprice, prejudice, or other factors not found in the record. This is further evidenced by the question posed by the jury virtually immediately upon commencing deliberations which demonstrates that the jury was improperly considering liability

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insurance and its impact on their verdict. Furthermore, punitive damages were not charged to the jury and the verdict, along with the question posed by the jury, clearly suggests that the jury intended to punish the defendant rather than compensate Plaintiff for damages. Therefore, Defendant is entitled to a new trial absolute.

6. Even if the Court determines the amount of the verdict is not “grossly excessive,” it is nonetheless “merely excessive” in light of the evidence presented, and, accordingly, the verdict should be reduced pursuant to the trial judge’s remittitur power. See Holroyd v. Requa, 603 S.E.2d 417 (S.C. Ct. App. 2004). Therefore, the Court should grant a new trial nisi remittitur in the event the Court declines to grant a new trial absolute.
7. The jury’s consideration of, and deliberation involving, any extraneous or inappropriate facts, standards, or legal principles, whether external or internal in origin, denied defendant’s rights to fundamental fairness and due process in this trial by jury, as provided by the law of South Carolina, the South Carolina Constitution, and the Fifth, Fourteenth, and Sixth Amendments of the United States Constitution. Therefore, a new trial is warranted.
8. All grounds set out in Defendant’s Motion for Directed Verdict made at the close of Plaintiffs’ case-in-chief, renewed at the close of all evidence and in Defendant’s Motion for Judgment Notwithstanding the Verdict are incorporated herein.
9. Defendant further asserts that even if the Court believes no one stated ground, in and of itself, warrants a new trial absolute or a new trial *nisi remittitur*, the cumulative effect of these grounds was to deny Defendant a fair trial under South Carolina law. Therefore, the Court should still grant a new trial absolute or, in the alternative, a new

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MARLBORO COUNTY, S.C.

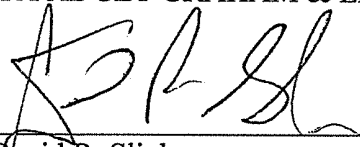
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trial *nisi remittitur*. See State v. Freeman, 319 S.C. 110, 459 S.E.2d 867 (Ct. App. 1995).

For all these reasons, Defendant moves for judgment notwithstanding the verdict, or in the first alternative, a new trial absolute, or in the second alternative, for a new trial *nisi remittitur*.

TURNER PADGET GRAHAM & LANEY P.A.

By:


David R. Sligh
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Myrtle Beach, South Carolina 29578
Telephone: (843) 213-5500
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ATTORNEYS FOR DEFENDANT DANIEL LEE
MCDOWELL

February 9, 2018

A CERTIFIED TRUE COPY



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MARLBORO COUNTY, S.C.

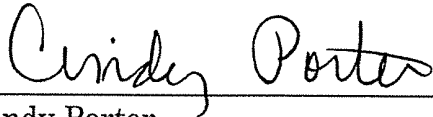
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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF MARLBORO	)	Docket No.: 2016-CP-34-00072
	)	
DAISY FREDERICK,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CERTIFICATE OF SERVICE
	)	
DANIEL LEE MCDOWELL,	)	
	)	
Defendant.	)	

On February 9, 2018, I mailed a copy of Defendant's Post-Trial Motions of Defendant Daniel Lee McDowell to the following attorney:

Eric Poulin
Anastopoulos Law Firm
62 Columbus St.
Charleston South Carolina 29403

Attorneys for Plaintiff


Cindy Porter

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MARLBORO COUNTY

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CLERK OF COURT
MARLBORO COUNTY, S.C.

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF MARLBORO	)	Civil Action No.: 2016-CP-34-00072
DAISY FREDERICK,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Defendant's Rule 59(e) Motion
	)	
DANIEL LEE MCDOWELL,	)	
	)	
Defendant.	)	
_____	)	

Defendant Daniel Lee McDowell ("Defendant" or "McDowell") notices his motion and moves pursuant to Rule 59(e), SCRCF, for the Court to reconsider, alter and/or amend its Order filed on May 12, 2020. Counsel for Defendant received written notice of that Order on May 12, 2020, and this motion is filed within the time period allowed by Rule 59(e), SCRCF.

Defendant makes this motion on the following specific grounds:

1. Defendant believes that the Order's intent, by simply concluding that the "Defendant's post-trial motions are respectfully denied," was to deny each and every issue raised by Defendant in his post-trial motions filed on February 14, 2018, including those raised at the hearing on Defendant's motions on August 12, 2019, and in the supplemental brief filed on August 21, 2019. All of those issues were clearly raised to the Court, and the most logical reading of the Court's Order is that it considered, ruled upon and denied all of those issues. However, in the event that this was not the Court's intent, Defendant respectfully requests that the Court amend its Order to include rulings specific to each of the issues raised.

2. The Court's Order incorrectly states that "this Court applied the North Carolina Rules of Evidence." At the trial, the Court ruled that the substantive law of North Carolina

would apply since the accident occurred in North Carolina and that Rule 414 of the North Carolina Rules of Evidence was a substantive law. Defendant respectfully requests that the Court strike that sentence from the Order and/or amend the sentence to accurately reflect the Court's previous ruling.

3. Defendant respectfully requests that the Court reconsider its previous decision and grant the relief sought in Defendant's post-trial motions. In making this request, Defendant incorporates by reference and relies upon all the issues, arguments and authorities previously raised in submitted in support of those motions.

Defendant bases this motion upon the applicable law, the post-trial motions and supplemental brief, and the oral argument of counsel.

Counsel for Defendant asserts that prior consultation is not required for a Rule 59(e) motion pursuant to the second paragraph of Rule 11(a), SCRPC.

Respectfully submitted,

TURNER PADGET GRAHAM & LANEY P.A.

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ATTORNEYS FOR DEFENDANT DANIEL LEE
MCDOWELL

May 21, 2020

IN THE STATE OF SOUTH CAROLINA)
COUNTY OF MARLBORO)

IN THE COURT OF COMMON PLEAS
CASE NO: 2016-CP-34-00072

DAISY FREDERICK,

Plaintiff,

v.

DANIEL LEE McDOWELL,

Defendant.

**PLAINTIFF'S RESPONSE IN
OPPOSITION TO DEFENDANT'S
POST-TRIAL MOTIONS**

TO: THE HONORABLE COURT AND ALL COUNSEL OF RECORD:

Pursuant to Rules 50 and 59 of the *South Carolina Rules of Civil Procedure*, Plaintiff Daisy Frederick ("Plaintiff") submits the following Memorandum of Law in opposition to Defendant Daniel Lee McDowell's ("Defendant") Post-Trial Motions. Plaintiff's Memorandum is supported by applicable rules, decisions of the court, and any arguments of counsel at the hearing on this matter.

INTRODUCTION

This matter was heard before Your Honor during the week of January 29, 2018. The trial lasted three days and the jury returned with a verdict for Plaintiff. Now, Defendant moves the Court to abandon the jury's determination and grant him judgment as a matter of law, or in the alternative, a new trial. Plaintiff opposes those requests and respectfully asks the Court to deny Defendant's motions and uphold the jury's verdict.

LEGAL STANDARD

"A party who has moved for a directed verdict may move to have the verdict and judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict." SCRCP 50(b). When considering a motion for directed verdict, the trier of fact is to be removed from the case and the evidence is to be viewed in the light most favorable to the party opposing the motion. *See* Wright v. Wright, 344 S.C. 1, 26 S.E.2d 881 (S.C. 1964).

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CLERK OF COURT
MARLBORO COUNTY, S.C.

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court must consider the evidence and the inferences in the light most favorable to the non-moving party. *Williams Carpet Contractors, Inc. v. Skelly*, 400 S.C. 320, 325, 734 S.E.2d 177, 180 (Ct. App. 2012). **"A jury's verdict should be affirmed if it is possible to do so and carry into effect the jury's clear intention."** *Daves v. Cleary*, 355 S.C. 216, 234, 584 S.E.2d 423, 432 (Ct. App. 2003)(emphasis added).

"A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the State." Rule 59, SCRPC. A trial court may act as a thirteenth juror if it finds the evidence does not warrant the verdict, in doing so, it may grant a new trial. *Youmans ex rel. Elmore v. S.C. Dep't of Transp.*, 380 S.C. 263, 287, 670 S.E.2d 1, 13 (Ct. App. 2008). "The jury's determination of damages is entitled to substantial deference. The denial of a new trial motion is within the discretion of the trial court and, absent an abuse of discretion, it will not be reversed on appeal." *Clark v. S.C. Dep't of Pub. Safety*, 353 S.C. 291, 309–10, 578 S.E.2d 16, 25 (Ct. App. 2002)(emphasis added), aff'd, 362 S.C. 377, 608 S.E.2d 573 (2005).

A trial judge may grant a new trial upon the facts if the judge determines the verdict is contrary to the fair preponderance of the evidence." *McEntire v. Mooregard Exterminating Services, Inc.* 353 S.C. 629, 578 S.E.2d 746 (Ct. App. 2003). The thirteenth juror doctrine may be utilized only when the trial court finds that the evidence does not justify the verdict. *Folkens v. Hunt*, 300 S.C. 251, 387 S.E.2d 265 (1990). Further, a trial court must grant a new trial absolute "if the verdict is so grossly excessive that it shocks the conscience of the court and clearly indicates the amount of the verdict was the result of caprice, passion, prejudice, partiality,

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CLERK OF COURT
MALDEN COUNTY, S.C.

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corruption, or other improper motive.” *Knoke v. SC Dep’t of Parks, Recreation, and Tourism*, 324 S.C. 136, 478 S.E.2d 256 (1998).

ARGUMENT

As a preliminary issue, this Court determined that North Carolina substantive and procedural law governed this matter because the subject collision occurred inside the North Carolina border. Therefore, the introduction of medical damages was performed pursuant to North Carolina Rule of Evidence 414 which, contrary to the South Carolina Rules, allows the jurors to consider any offset of medical expenses by insurance or other reductions. Further, the jury was charged with North Carolina’s contributory negligence law; had the jury found Plaintiff a mere one percent negligent, she would not have recovered. Given the above, North Carolina law dictated the prosecution of this case. However, Defendant’s Post-Trial Motion relies on both North and South Carolina law. As such, Plaintiff’s Memorandum in Opposition will follow the same outline.

I. The Court should deny Defendant’s Motion for Judgment Notwithstanding the Verdict because (1) the Plaintiff was not negligent as a matter of law; (2) Plaintiff presented evidence of her pain and suffering; and (3) no evidence exists that the jury considered “improper elements of damage” in rendering its verdict.

Defendant first contends that the only reasonable inference to be drawn from the evidence presented at the trial of this case is that “Plaintiff was negligent in not keeping a proper lookout” and therefore was negligent as a matter of law. Defendant’s assertion is without merit and made without support. Plaintiff presented evidence that she was properly traveling in her own lane with her eyes on the road. She testified that she first noticed Defendant’s vehicle when it was approximately three (3) cars lengths away from her. Defendant argues that because he presented line-of-sight testimony through a witness, Plaintiff was negligent. Defendant fails to

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CLERK OF COURT
HARLSON COUNTY, S.C.

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mention that his witness's testimony was contested by that of the Plaintiff, and that it is in the province of the jury to determine what weight and credibility (if any) to apply to each witness's testimony. Because there existed competing testimony, a jury question was created. Accordingly, Defendant's argument that Plaintiff was negligent as a matter of law is incorrect and his motion should be denied.

Defendant next argues that this Court should grant judgment notwithstanding the verdict on the elements of "damage associated with permanent impairment, disability, and future medical costs, treatment, and expenses." Defendant's argument is again without merit. Plaintiff testified as to her ongoing pain and suffering – both physical and mental. She testified that such pain and suffering has not ceased. Further, the verdict form presented to the jury – which was drafted by counsel for the Defendant – asked the jury only to determine the amount of total damages sustained by the Plaintiff. Defendant's argument that the jury improperly awarded damages based on permanent impairment, disability, and future medical costs fails and should be denied.

II. The Court should Deny Defendant's Motion for New Trial Absolute, Thirteenth Juror Doctrine, or New Trial *Remittur* because (1) the jury's verdict was supported by the evidence; (2) the jury's verdict was not based upon speculation or conjecture; (3) Plaintiff's expert's testimony was proper; (4) the amount of medical expenses was properly admitted into evidence; and (5) the jury's verdict was not grossly excessive or shocking.

Defendant makes various assertions that this Court should act as a thirteenth juror or grant a New Trial Absolute, all of which are without merit. Defendant first argues that the jury's verdict is unsupported by the evidence. This is patently false. It is incontrovertible that the jury has the right and ability to ascertain the amount of damages to award. Plaintiff presented

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CLERK OF COURT
HARRIS COUNTY, S.C.

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evidence of her medical damages and the tremendous costs associated therewith, her lost wages, her pain and suffering, and her mental anguish. Her treating orthopedic surgeon testified to the severity of her injuries and the pain associated with the same. Damages witnesses further testified as to the effects the injuries proximately caused by the Defendant had upon Plaintiff's well-being, lifestyle, and ability to care for and provide for her children. The jury's award was not based upon speculation or conjecture, but instead based upon the evidence presented to it. Further, in light of the evidence of damages presented to the jury, its verdict was not grossly excessive nor does it shock the conscience. Defendant's motion therefore should be denied.

Defendant's argument that Plaintiff's expert, Kendrick Richardson, improperly relied upon subjective opinions also must fail. Pursuant to Rule 703, SCRE, "[t]he facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence." Defendant's assertion that an accident reconstructionist and engineer cannot base his opinions on the data perceived by others is a misreading of our state's rules of evidence. Rule 703, SCRE allows an expert to rely upon such evidence even when those facts or data are not admissible into evidence, so long as they are reasonably relied upon by experts in that field of expertise. Accident reconstructionists routinely rely on police reports if they are available; indeed, Defendant's own two experts explicitly reviewed said report and relied upon the same. Defendant's argument therefore fails.

Defendant further argues that Plaintiff's medical bills were improperly admitted into evidence in violation of Rule 414 of the North Carolina Rules of Evidence. Again, Defendant's argument misstates applicable law. Rule 414 allows the Defendant to cross-examine the Plaintiff

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CLERK OF COURT
MARLBOROUGH COUNTY, N.C.

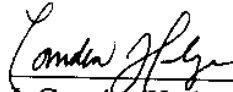
on the amount of medical bills paid by her and those charged to her, and it allows Defendant to question the Plaintiff as to whether or not any of those bills were paid by insurance. Defendant did not make such a cross-examination or explore these issues with the Plaintiff, despite his having the right to do so in accordance with the North Carolina Rules of Evidence. The medical bills submitted to the jury explicitly indicated the amount owed by the Plaintiff and indicated what had been paid by insurance. Defendant's argument must fail accordingly.¹

CONCLUSION

For the above-stated reasons, Defendant's post-trial motions should be denied and the jury's verdict should be upheld.

Respectfully Submitted,

ANASTOPOULO LAW FIRM, LLC



J. Camden Hodge, Esquire
SC Bar Number: 100638
Roy T. Willey, IV, Esquire
SC Bar Number: 101010
Eric M. Poulin, Esquire
SC Bar Number: 100209
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(843) 614-8888

Charleston, South Carolina
February 27, 2018

ATTORNEYS FOR PLAINTIFF

¹ Plaintiff further notes that Defendant has not preserved this issue.

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CLERK OF COURT
MARLBORO COUNTY, S.C.

STATE OF SOUTH CAROLINA)
)
 COUNTY OF MARLBORO) IN THE COURT OF COMMON PLEAS
)
) Civil Action No.: 2016-CP-34-00072

DAISY FREDERICK,)
)
 Plaintiff,)
)
 vs.) **SUPPLEMENTAL BRIEF IN SUPPORT OF**
) **DEFENDANT'S POST-TRIAL MOTIONS**
 DANIEL LEE MCDOWELL,)
)
 Defendant.)
)

Defendant Daniel Lee McDowell (hereinafter “Defendant”) respectfully submits this supplemental brief in support of his post-trial motions filed on February 9, 2018 and heard on August 12, 2019.

Following the completion of this trial and after the filing of the post-trial motions, the South Carolina Supreme Court issued its opinion in Hamrick v. State, 828 S.E.2d 596 (S.C. 2019). Defendant incorporates this case and the arguments below into the previous grounds and arguments made in relation to his post-trial motions.

In Hamrick, the trial court was determined to have improperly allowed the investigating police officer to provide his subjective opinions about the point of impact in a motor vehicle collision. In support of his expert qualifications, the investigating officer testified that he has taken a few classes in accident reconstruction. The Supreme Court found that “[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. Id. at 602.

In the instant case, there was no evidence whatsoever about the qualifications of the investigating officer. Thus, following the logic in Hamrick, it would be improper for the

subjective opinions of the investigating officer about the point of impact and the distance the vehicles travelled to be introduced through another expert when there is no evidence to evaluate the reliability of the investigating officer's opinions. To hold otherwise would allow parties to usurp the gatekeeping function of the trial judge by utilizing experts that generically testify that they rely on the reports of investigating officers.

Respectfully submitted,

TURNER PADGET GRAHAM & LANEY P.A.

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Fax: (843) 213-5555

ATTORNEYS FOR DEFENDANT DANIEL LEE
MCDOWELL

August 21, 2019

IN THE STATE OF SOUTH CAROLINA)
COUNTY OF MARLBORO)

IN THE COURT OF COMMON PLEAS
FOR THE 4TH JUDICIAL CIRCUIT
CASE NO: 2016-CP-34-00072

DAISY FREDERICK,

Plaintiff(s),

v.

DANIEL LEE McDOWELL,

Defendant(s).

**PLAINTIFF'S REPLY TO
DEFENDANT'S SUPPLEMENTAL
BRIEF**

TO: THE HONORABLE COURT AND ALL COUNSEL OF RECORD

Following a verdict in this matter in Plaintiff's favor, Defendant filed multiple post-trial motions. The motions were heard by the court on August 12, 2019. On August 21, 2019, Defendant submitted a supplemental brief in support of his position. Plaintiff's succinct reply follows.

Brief Summary of the Case

This case involves a motor vehicle collision. The Defendant admits that he lost control of his vehicle and entered the oncoming lane of travel. Plaintiff contends that Defendant was still moving forward when the collision occurred. Therefore, Plaintiff contends that Defendant was at fault for causing the collision because she did not have time to avoid it.

Defendant contends that he had already come to a complete stop and, in fact, was backing up to return to his lane of travel when the collision occurred. As such, Defendant contends that Plaintiff had ample opportunity to see him, and to stop her car to avoid the collision, rendering Plaintiff contributorily negligent.

Importantly, it is undisputed that the collision occurred in Plaintiff's lane of travel. Plaintiff and Defendant each called an expert accident reconstructionist. The following diagram was created by **Defendant's Expert** and entered into evidence by the **Defendant** during the trial of this action:



Defendant's own expert and exhibit concede that the point of impact occurred in Plaintiff's lane of travel. The dispute in the case was not the point of impact, but rather the one central question: was Defendant moving in a forward or backward direction at the time of impact?

Brief Summary of Defendant's Argument

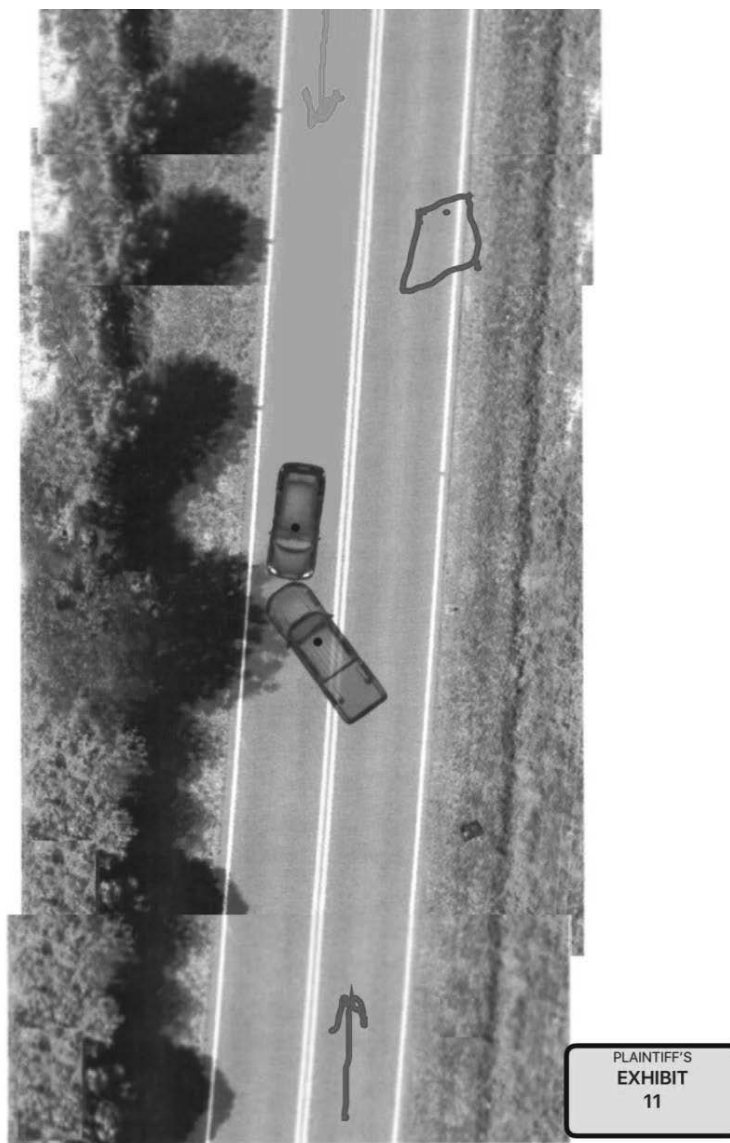
Defendant argues that the court erred in allowing Plaintiff's expert to opine on this central question, arguing that Plaintiff's expert's opinion was based upon the subjective opinions of the responding officer with respect to the point of impact. Defendant reasons, under the Hamrick case, that if the responding officer would not have been allowed to himself testify as to the subjective opinions, Plaintiff's expert should not have been allowed to rely upon such opinions.

Plaintiff's Reply

Defendant's argument is in error because Plaintiff's expert did **not rely** upon any subjective opinions of the responding officer. As noted above, the point of impact was not disputed in this case. Plaintiff's expert opined that the Defendant was moving forward at the time of the collision and based this opinion not on the responding officer's investigation, but rather on the position of the vehicles post-impact. Plaintiff's expert testified that, under the basic laws of physics, Defendant's vehicle could not have come to rest in front of Plaintiff's vehicle had it been moving backward. Therefore, if Defendant's vehicle came to rest in front of Plaintiff's vehicle, it must have been moving forward.

As an initial matter, while the responding officer may not have been qualified to conduct a full accident reconstruction, he was certainly qualified to take note of where the vehicles came to rest post impact. This is a simple observation that could be made by any fact witness. It is not an opinion, requiring specialized knowledge, but rather a factual observation made by a person with direct knowledge.

In any event, the responding officer's factual observation was immaterial because the Defendant, himself, agreed. During the course of the trial, Plaintiff presented Defendant with a copy of Defendant's expert's own drawing. The Defendant personally took the pen and drew a square where his vehicle came to rest in relation to the point of impact. That drawing was then entered into evidence:



It bears repeating that this was the Defendant's own testimony. It is also worth noting that the Defendant's expert was questioned on this diagram and the Defendant's own expert conceded that if the Defendant's vehicle came to rest where the Defendant himself testified that it did, Defendant's vehicle must have been moving in a forward direction at the time of the collision.

Conclusion

In conclusion, Plaintiff's expert did not rely upon any subjective opinions of the officer. Instead, Plaintiff's expert relied upon the objective testimony regarding the location at which the vehicles came to

rest following the collision. The Defendant himself confirmed the post-impact location of the vehicles and, **based upon the Defendant's own recollection, the Defendant's expert agreed with Plaintiff's expert that the Defendant must have been moving in a forward direction at the time of impact.** Therefore, the Court did not err in allowing Plaintiff's expert to offer an opinion on this subject and the Defendant's motion should be denied.

Respectfully Submitted,

ANASTOPOULO LAW FIRM, LLC

BY: **s/ Eric M. Poulin**

Eric M. Poulin

S.C. Bar No.: 100209

Roy T. Willey, IV

S.C. Bar No.: 101010

J. Camden Hodge

SC Bar No: 100638

32 Ann Street

Charleston, South Carolina 29403

(843) 614-8888

ATTORNEYS FOR THE PLAINTIFF

Charleston, South Carolina
August 21, 2018

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE FOURTH JUDICIAL CIRCUIT
COUNTY OF MARLBORO	)	
Daisy Frederick,	)	Civil Action No.: 2016-CP-34-00072
	)	
Plaintiff,	)	
	)	
vs.	)	AFFIDAVIT OF DAVID SLIGH
	)	
Daniel Lee McDowell,	)	
	)	
Defendant.	)	

DAVID SLIGH personally appeared before me and, after being duly sworn, made the following statements under oath:

1. I am above the age of eighteen (18) years and am fully qualified to give this affidavit. All statements made in this affidavit are based on my own personal knowledge.
2. I am an attorney licensed to practice law in the State of South Carolina.
3. Throughout the trial in the above-captioned case, I was attorney of record for the defendant, Daniel Lee McDowell.
4. During the trial of this case, the plaintiff presented testimony by her expert, Ken Richardson.
5. At the appropriate time, I objected to portions of Richardson's testimony. Specifically, I objected to Richardson's ability to testify about his opinions that were based on opinions and/or conclusions reached by the North Carolina law enforcement officer who investigated the vehicular accident at issue in this case. The trial judge overruled that objection and admitted the challenged testimony.

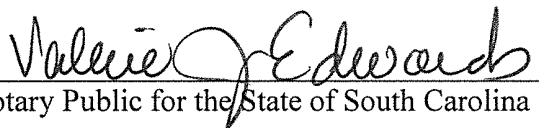
6. At all appropriate times, I included the inadmissible testimony by Richardson as one of the grounds for the defendant's motions for directed verdict, judgment notwithstanding the verdict, and for a new trial. The trial judge denied those motions.

After making these statements, DAVID SLIGH said nothing further.



DAVID SLIGH

Sworn before me this 15th day of October, 2020.)



Notary Public for the State of South Carolina)

My commission expires: 5.2.22)

STATE OF SOUTH CAROLINA)
) COURT OF COMMON PLEAS
COUNTY OF MARLBORO) 2016-CP-34-00072

DAISY FREDERICK)
) PLAINTIFF)
 vs.) TRANSCRIPT OF RECORD)
)
DANIEL LEE McDOWELL)
) DEFENDANT)

January 29-31, 2018
Bennettsville, South Carolina
VOLUME 01 OF 03

B E F O R E:

THE HONORABLE PAUL M. BURCH, JUDGE; and a jury.

A P P E A R A N C E S:

ERIC M. POULIN, ESQUIRE
Attorney for the Plaintiff

CAMDEN HODGE, ESQUIRE
Attorney for the Plaintiff

DAVID R. SLIGH, ESQUIRE
Attorney for the Defendant

CHRISTINE HOWARD, Plaintiff's Mother
DR. STEPHEN H. SIMMS, Via Video Deposition
KENDRICK E. RICHARDSON, Engineer

HATTIE O. GORDON
Circuit Court Reporter

1 wreck as long as I'm not 100 percent responsible. Okay,
2 now I'm back in South Carolina. If my car is in a wreck,
3 you know, it's -- that's not through anyone held no
4 justifiable expectation for a South Carolina residence who
5 spends most of their time in South Carolina driving up
6 there as the Defendant did. Different laws for different
7 states.

8 Now, going back to our choice of law here in South
9 Carolina and the -- whether we would find North Carolina
10 laws both on the medical issue we had talked about a
11 second and contributory negligence. Whether we would find
12 these palpable or cases or document cases or whether apply
13 North Carolina law against good morals I would implore the
14 Court to remember that in South Carolina several years ago
15 we had contributory negligence.

16 We had a system set up where if the Plaintiff was
17 found at least 1 percent at fault they couldn't recover at
18 all. And I didn't know this or didn't remember this until
19 digging into it a little bit deeper. Your Honor may
20 remember better than I. But what we actually tried to do
21 is we actually tried to change the contributory laws first
22 only as to car wrecks. Our Legislature passed a specific
23 statute, saying that -- and they didn't abolish all
24 contributory negligence to begin with. They said,
25 "Particularly car wreck cases."

1 It is not fair at all to the Plaintiff to have
2 contributory negligence because in almost every wreck you
3 could say one party or the other is at least 1 percent at
4 fault, and that would bar the claim. The Legislature
5 said, "We're not going to have contributory anymore in car
6 wrecks." Well, the Supreme Court came back and said,
7 "Nah, that's not really constitutional. You can't just
8 narrowly target one area of the law."

9 But shortly thereafter based on the Legislature's
10 desire to do that our Supreme Court adopted the modified
11 comparative negligence standard that we have today. And
12 the reason they did that is for the protection of both
13 parties. So we have a double policy in South Carolina to
14 protect the plaintiff because comparative negligence is a
15 harsh reality. I mean one percent at fault and you get
16 nothing.

17 Now, we don't have full comparative negligence. We
18 don't say if a defendant is 5 percent at fault for causing
19 the wreck they have to pay 5 percent of the verdict. We
20 have a mark off which makes the cutoff at 51 percent.
21 That's to protect the defendant. Our courts -- our
22 legislature has looked at this and said this is the most
23 just way to protect our citizens in this case.

24 In this case we're dealing with two citizens of this
25 state who may or may not have known this law. If they

1 contents of this case. I think I would probably agree
2 that the statute of limitations or statute of repose is
3 substantive type law. I don't think that has any bearing
4 on -- I don't think that that -- what's the word I'm
5 looking for? Similar. I don't think that's a good
6 analogy to a rule of evidence, and I don't think that this
7 case really has any bearing on the argument we're having
8 on this issue.

9 THE COURT: All right. Gentleman, we've got dissent
10 between me and my learned consult, but looking at this
11 case, Rogers v. Lee, also taking into consideration public
12 policy and good morals, and what I heard from you that's
13 enough to override this decision, and we already discussed
14 previously in chambers the general attitude of your
15 appellate court here lately.

16 I'll admit this is a difficult one to determine with
17 all the issues, but I'm going to follow this case under
18 the South Carolina choice of law principal. The
19 substantive law that governs the Court's actions
20 determined by the State in which the injury occurred.
21 That's it. I sure have mixed emotions about it. So I
22 have to side with the defense on that.

23 So with that ruling do you'll want to take a few
24 minutes and discuss where you stand on any of this or
25 we'll break for lunch?

1 MR. POULIN: Your Honor, just to clarify any ruling
2 are you also holding that evidentiary ruling with respect
3 to the medical bills, substantive rule and also apply in
4 North Carolina?

5 THE COURT: Yes.

6 MR. POULIN: Okay.

7 MR. SLIGH: Your Honor, I know this is probably my
8 concern, North Carolina has patterned their jury
9 instructions that are available have. All the stuff about
10 public opinions in the charge.

11 THE COURT: Something y'all might want to discuss
12 concerns me about that medical bill issue. If you think
13 that it will protect the record in this case you can keep
14 in mind that you could go ahead and expand that out and
15 that could be corrected later on by me. And also it
16 wouldn't be fatal on appeal cause as I understand it an
17 appellate court could -- they could remand for specific
18 rulings on such a motion.

19 They could rule -- they could remand it back to me
20 for further hearings about reducing the damages or they
21 would have the inherit authority to reduce damages if
22 there is enough evidence there for them to review it. So
23 what I'm trying to say is if you expanded that out and
24 follow South Carolina law, for instance, in presenting the
25 evidence about the medical bills a motion for remittitur

- 1 A. I'm 23.
- 2 Q. Okay. Your family is here in the courtroom with you?
- 3 A. Yes, sir.
- 4 Q. I think your mother, Christine?
- 5 A. My baby girl is shy. That's her playing with her
- 6 grandma, Wilamena.
- 7 Q. Who do you live with now?
- 8 A. Just me and my kids.
- 9 Q. Okay. Are you the sole caretaker for your kids?
- 10 A. Yes, sir, I am.
- 11 Q. Okay. And your single as far as supporting your
- 12 children?
- 13 A. Yes, sir.
- 14 Q. Okay. Do you have any other siblings?
- 15 A. Yes, sir.
- 16 Q. What are their names and ages?
- 17 A. My sister, Ashley. She's 26.
- 18 Q. Any brothers?
- 19 A. T.K. He's 24. Twan, he's 29.
- 20 Q. Okay. And before this incident happened on April the
- 21 29th of 2015 what did your family like to do for fun?
- 22 A. We like to go to the beach and take the kids to the
- 23 park.
- 24 Q. What beach did y'all go to?
- 25 A. Myrtle Beach.

- 1 Q. Could your kids swim?
- 2 A. No, sir, but they thought they could.
- 3 Q. They tried?
- 4 A. Yes, sir.
- 5 Q. Daisy, were you working at the time of this wreck?
- 6 A. Yes, sir, I was.
- 7 Q. Okay. Where were you working?
- 8 A. In Wadesboro, North Carolina.
- 9 Q. Please describe for the jury what your job
- 10 description was and what you did at that job?
- 11 A. I had to spin yarn from cotton.
- 12 Q. Okay. Was that a physically demanding job?
- 13 A. Yes, sir, it was.
- 14 Q. Did it require for you to stand for hours a day?
- 15 A. Yes, sir.
- 16 Q. And what was your salary at that job?
- 17 A. I was making \$9.25 an hour.
- 18 Q. Okay. How many hours a week were you working?
- 19 A. I'd say about 40.
- 20 Q. And how many days a week?
- 21 A. Six.
- 22 Q. What shift did you work?
- 23 A. I worked on second.
- 24 Q. Okay. What time did second shift start, Daisy?
- 25 A. 6:00 a.m.

1 Q. And what time did it run to?

2 A. 3:00 p.m.

3 Q. And did you enjoy working?

4 A. Yes, I did.

5 Q. What did you enjoy about the job?

6 A. The learning experience. I like doing something that
7 I never did before. Also having the opportunity to make
8 money so I can provide for my two babies.

9 Q. You were a full time single mother during the entire
10 time you were working?

11 A. Yes.

12 Q. Now, Daisy, I want you to take the jury through a
13 typical day in your life, in general, family life, before
14 this wreck. Can you do that for us?

15 A. Yes, sir.

16 Q. Okay.

17 A. Originally I had to get up real early. I'd say about
18 5:00 a.m. and get the kids up and make sure they were
19 clean. I had to make them breakfast and get ready to take
20 to grandma's house. She kept them while I was at work?

21 Q. What time did you get to work?

22 A. About 6:00.

23 Q. Okay. You worked until about seven o'clock p.m; is
24 that correct?

25 A. Yes, sir.

1 Q. And would you normally drive from Cheraw to
2 Wadesboro; is that correct?

3 A. Yes, sir.

4 Q. Okay. About how long did it take you?

5 A. I was about 15-miles. So I'd say about 25 minutes.

6 Q. I know before the wreck you had your full time job
7 that started at 6:00 a.m. and you cared for two children.
8 What would you like to do generally to relax?

9 A. I like to exercise and go to the gym. I had a gym
10 membership.

11 Q. Why was exercise important to you?

12 A. Because I have two small kids and they have a lot of
13 energy.

14 Q. And did you and your family go to church?

15 A. Yes, sir.

16 Q. What church is that?

17 A. A church in Morven, North Carolina, New Testament
18 Church.

19 Q. Now, Daisy, I know this is part you remember.
20 Something happened on April 29th of 2017, the day of this
21 wreck?

22 A. Yes, sir.

23 Q. Something you will never forget?

24 A. No.

25 Q. Walk the jury through what happened that day before

1 you got in this wreck. Can you do that?

2 A. Yes, sir. I was at work, and went to the parking lot
3 and took my phone out and called my grandma. When I get
4 off of work I come pick up my babies.

5 Q. You check with you grandma?

6 A. Yes, sir.

7 Q. Now, the day of this accident what were you driving?

8 A. My mother's P.T. Cruiser?

9 Q. She helps you out, to and from work and take caring
10 of your kids?

11 A. Yes, sir.

12 Q. Okay. That P.T. Cruiser you were driving, did it
13 have any problems before the accident?

14 A. No, sir.

15 Q. Okay. Now, Daisy, was anything in the car with you
16 on the day of the wreck?

17 A. Yes, sir. My son's car seat was in there.

18 Q. Okay. But there weren't any children in the car?

19 A. No, sir.

20 Q. Okay. Now, can you explain to the jury what route
21 you took to get to work on that day?

22 A. I took Highway 52.

23 Q. Okay. That's Highway 52 going northbound towards
24 Morven; is that correct?

25 A. Yes, sir.

- 1 Q. Okay. And that's approximately about 35-miles? Is
2 that what you testified to, Daisy?
- 3 A. Yes, sir.
- 4 Q. And had you ever driven that route to work before?
- 5 A. Yes, sir.
- 6 Q. Please describe what Highway 52 looks like.
- 7 A. It was a two lane road.
- 8 Q. Now, on April 29th of 2015 you got off of work about
9 3:00 p.m; is that correct?
- 10 A. Yes, sir.
- 11 Q. And the first thing you did was to turn on your phone
12 and check on your children?
- 13 A. Yes, sir.
- 14 Q. Okay. And about what was the weather like on that
15 afternoon?
- 16 A. It was raining.
- 17 Q. Okay. Daisy, I know this is a hard part. Tell me
18 how you remember that wreck happening. Take your time.
- 19 A. I was coming from work, and I was on Highway 52
20 coming up, and I had seen -- when I come around the curve
21 I seen a pick up truck slide in my lane.
- 22 Q. Okay, Daisy, were you driving northwards?
- 23 A. Yes, sir.
- 24 Q. Okay. Back towards Cheraw?
- 25 A. Yes, sir.

- 1 Q. Okay. And do you recall the speed limit?
- 2 A. No, sir.
- 3 Q. Okay. You were doing the speed limit?
- 4 A. I was probably doing under the limit. It was bad
- 5 weather. I was barely doing the speed limit. If it's bad
- 6 weather I try to go slower.
- 7 Q. You told the jury about a slight curve. It wasn't a
- 8 sharp curve?
- 9 A. No, sir.
- 10 Q. Plenty of distance to see forward?
- 11 A. Yes, sir.
- 12 Q. Now, Daisy, was the truck that hit you, was it still
- 13 moving at the time you collided with it?
- 14 A. Yes, sir.
- 15 Q. It wasn't moving in reverse?
- 16 A. No, sir.
- 17 Q. It wasn't stopped and in the middle of the road?
- 18 A. No, sir.
- 19 Q. Now, Daisy, how far away was that truck when you
- 20 first saw it?
- 21 A. I estimate about three car lengths away.
- 22 Q. Now, Daisy, were you listening to the radio?
- 23 A. No, sir. It didn't work.
- 24 Q. Were you talking on your phone?
- 25 A. No, sir.

1 Q. Were you texting?

2 A. No, sir.

3 Q. Were you looking at your e-mail?

4 A. No, sir. I don't have the phone on when I get into
5 the car. If I'm with somebody driving somewhere and they
6 try to look at it I take their phone. I like to be safe
7 so.

8 Q. I think that's a good rule. Now, Daisy, did you have
9 your lights on because of the rain?

10 A. Yes, sir.

11 Q. What about your windshield wipers?

12 A. Yes, sir.

13 Q. Now, Daisy, what part of Mr. McDowell's truck struck
14 you?

15 A. The front of his bumper.

16 Q. Now, was his truck over the center line and skidded
17 in your lane?

18 A. Yes, sir.

19 Q. Okay, were you startled when it slid completely in
20 your lane of travel?

21 A. Yes, sir.

22 Q. Okay. Now, Daisy, did you have any way to avoid the
23 collision?

24 A. No, sir.

25 Q. Okay. Did you contribute to this collision in any

1 way?

2 A. No, sir.

3 Q. Now, where did your car end up after the collision?

4 A. I ended up on the right hand side, but I was knocked

5 into the wrong direction.

6 Q. So your car was facing the wrong direction of travel

7 which you were travelling?

8 A. Yes, sir.

9 Q. Now, where did Mr. McDowell's truck end up after the

10 wreck?

11 A. It slid back on the left hand side, but it was facing

12 the wrong direction he was in.

13 Q. So the truck slid in its own lane?

14 A. Yes, sir.

15 Q. But facing the wrong direction that he was going --

16 A. Yes, sir.

17 Q. --- into oncoming traffic. Now, Daisy, you

18 understand that you're under oath today?

19 A. Yes, sir.

20 Q. You put your hand on the bible and swore to tell the

21 truth, the whole truth and nothing but the truth?

22 A. Yes, sir.

23 Q. Do you take the oath seriously?

24 A. Yes, sir, I do.

25 Q. Okay. You have testified and you're telling the jury

1 how that collision occurred?

2 A. Yes, sir.

3 Q. Will you ever forget it?

4 A. No, sir.

5 Q. Now, Daisy, what was that first thing you remember
6 happening after the collision?

7 A. I remember looking down at my legs cause I just felt
8 some -- felt like shooting pain like any leg was stinging.

9 Q. And do you remember calling for your children?

10 A. Yes, sir. I remember calling for my son. I thought
11 he was in the back of the car. I had got a glance of the
12 car seat and when I seen the car seat I thought they was
13 with me. So I kept trying to turn around and see if they
14 were okay. But I didn't hear nothing so I kind of thought
15 something had happened to them.

16 I kept trying to turn around and a lady and father
17 came running up to the car. They had lived close by on
18 some property close by, and they had kept asking who I was
19 calling for and I told her my kids. I wanted to make sure
20 they were all right. And she looked back and nobody was
21 back there. She was like it's an empty car seat.

22 Q. Now, daisy, did you get out of your car after the
23 collision?

24 A. No, sir, I couldn't.

25 Q. Okay. Can you tell jury why not?

1 A. Because both of my legs was broken, and I was
2 trapped.

3 Q. So you were actually trapped in the car?

4 A. Yes, sir. The front end of the car had came down and
5 crushed my legs, and the door was crush and it was
6 damaged.

7 Q. Could you use your arms?

8 A. No, sir. My arms was split open. It was shredded.

9 Q. Shredded with glass in the collision?

10 A. Yes, sir. The window busted and it had glass in my
11 arm and on my neck and my back.

12 Q. Okay. Now, did you lose consciousness? Did you pass
13 out?

14 A. No, sir, I didn't. I didn't want to pass out. I
15 thought if I passed out I might die.

16 Q. Now, Daisy, after this collision did Mr. McDowell
17 ever come to help you?

18 A. No, sir, he didn't.

19 Q. He never came to your car?

20 A. No, sir.

21 Q. He never checked on you?

22 A. No, sir.

23 Q. Okay. Now, Daisy, how long did it take for the
24 ambulance to show up? Do you remember?

25 A. It took about 20 minutes, I think.

- 1 Q. And you're sitting in that car by yourself with the
2 woman during the entire time?
- 3 A. Yes, sir.
- 4 Q. Okay. How did the ambulance and the police get you
5 out of the car?
- 6 A. They had to cut me out of the car.
- 7 Q. Now, do you know what they cut you out with?
- 8 A. It looked like a chainsaw. I know it was wasn't a
9 chainsaw. It just looked like it.
- 10 Q. Did it take a long time to get out?
- 11 A. Yes, sir. It took a while.
- 12 Q. Did they have to pull you out of the car?
- 13 A. Yes, sir.
- 14 Q. Now, I'm going to ask you to describe for the jury
15 what kind of pain that made you feel?
- 16 A. I didn't want to move because it hurt to move.
- 17 Q. Now, were you put in an ambulance after the
18 collision?
- 19 A. Yes, sir.
- 20 Q. Okay. You are, and I'm assuming that ambulance took
21 you to the hospital, correct?
- 22 A. Yes, sir. It took me to the nearest one.
- 23 Q. Was it a small hospital in Anson County.
- 24 A. Yes, sir.
- 25 Q. Now, what happened after you got to that Anson County

1 hospital?

2 A. I remember them taking me to the ambulance and taking
3 me inside the hospital and putting me on the bed. And I
4 think I remember somebody pulling me on my foot and me
5 yelling for them to stop.

6 Q. Now, did you stay in that Anson County hospital for
7 the rest of the day?

8 A. No, sir, I didn't.

9 Q. Where did you go next?

10 A. I went to CMC in Charlotte. They had to airlift me
11 there.

12 Q. Okay. They airlifted you by helicopter?

13 A. Yes, sir.

14 Q. Have you ever been in a helicopter before?

15 A. No, sir.

16 Q. Can you tell the jury a little bit about that
17 experience?

18 A. It didn't make me feel good. I never want to be in a
19 helicopter again.

20 Q. Were you still in pain?

21 A. Yes.

22 Q. Now, Daisy, can you please tell the jury what you
23 remember about that first day in the Charlotte hospital?

24 A. I remember them taking me out of the helicopter and
25 taking me into the hospital and putting me in a regular

1 hospital room and putting me on the bed. And I remember
2 them, the doctors coming in looking at me.

3 And they had to cut my clothes off so they could see
4 all of my injuries. And while the doctors were doing that
5 I remember my mother and my brother walking in and looking
6 at me. And my mother came in. When she came in she cried
7 for 15 minutes and then she came closer and started
8 patting me on the head telling me everything was going to
9 be okay. And, my brother, I remember he started crying
10 and my brother, he's not one to cry easy. So I knew that
11 I was in pain, but I wasn't crying until I seen him
12 crying. That hurt me cause he was crying.

13 Q. Daisy, you lost a lot of blood at that point?

14 A. Yes, sir, I did.

15 Q. Did they have to give you a blood transfusion?

16 A. Yes, sir. I had to have two blood transfusions.

17 Q. Now, Daisy, let me ask you about your injuries in
18 this collision.

19 A. My left leg, I had broken by femur bone. It was
20 shattered. And my right ankle was crushed. And my arm
21 was -- it had a gash. It was split open and my neck and
22 any back and split in my arm.

23 Q. Now, Daisy, the femur bone is the hardest bone in the
24 left leg from your thigh to your knee; is that correct?

25 A. Yes, sir.

1 Q. Now, Daisy, does what I handed you look like a
2 picture of two of the x-rays of your leg that you took
3 when you were at Charlotte Medical Center?

4 A. Yes, sir.

5 Q. And that is a true and accurate representation of the
6 picture you took?

7 A. Yes, sir.

8 MR. HODGE: Your Honor, at this time I move, if I
9 can, this into evidence?

10 MR. SLIGH: No objection.

11 THE COURT: In without objection.

12 (WHEREUPON, Plaintiff's Exhibit No. 8 was marked for
13 identification and received into evidence.)

14 BY MR. POULIN:

15 Q. Daisy, did you have to have surgery as a result of
16 this accident?

17 A. Yes, I did.

18 Q. Now, did they put you to sleep to do that?

19 A. Yes, sir.

20 Q. Okay. Now, how did that make you feel?

21 A. It made me feel scared because there was a
22 possibility I might not wake up.

23 Q. Is that the first time you've ever been put to sleep?

24 A. Yes, sir.

25 Q. Do you ever want to do it again?

1 A. No, sir. No, sir.

2 Q. Now, during that surgery did they put in a throat
3 tube?

4 A. Yes, sir.

5 Q. How did that make you feel?

6 A. It made me feel -- I can remember I had a sore throat
7 afterwards.

8 Q. Now, Daisy, on that first surgery did they put some
9 type of contraption on your leg?

10 A. Yes, sir.

11 Q. Okay. Can you tell the jury what that looked like?

12 A. It looked like some part of a robot. It had a rod
13 sticking out with the screw sticking out and had a long
14 pin sticking through the bottom over my leg from one end
15 to the other.

16 Q. And were those rods and screws actually sticking out
17 of your leg?

18 A. Yes, sir.

19 Q. They were completely visible to you?

20 A. Yes, sir.

21 Q. Daisy, if you can remember, is that a picture you
22 took of your neck when you were at Charlotte Medical
23 Center after the first surgery?

24 A. Yes, sir.

25 Q. That's a true and accurate representation of the

1 picture that you did?

2 A. Yes, sir.

3 MR. HODGE: Your Honor, at this time I'd like to move
4 this into evidence?

5 MR. SLIGH: No objection, Your Honor.

6 THE COURT: In without objection.

7 (WHEREUPON, Plaintiff's Exhibit No. 9 was marked for
8 identification and received into evidence.)

9 BY MR. POULIN:

10 Q. Now, Daisy, your mother and brother were the first
11 ones that came to visit you at the hospital. Were your
12 children able to visit you?

13 A. No, sir.

14 Q. Okay. And did you not want your children there?

15 A. I didn't want them to see me like that. They were
16 small kids. I didn't want them to see my injuries and the
17 stuff sticking out of me and scaring them. They feed off
18 of my energy.

19 So if I have negative energy they feed off of that.
20 If I have positive energy they feed off of that. And I
21 didn't want them to see me crying or in pain.

22 Q. Okay. How old were your children at the time?

23 A. My son was two and my baby girl, she was five months.

24 Q. And you're still in a tremendous amount of pain at
25 the time; is that correct?

1 A. Yes, sir.

2 Q. Okay. Did you have to take pain medication as a
3 result of this?

4 A. Yes, sir.

5 Q. How did you feel about taking pain medication?

6 A. I didn't want to take them. I didn't want to be on
7 them a long period of time because I didn't want to get
8 addicted to them.

9 Q. You had to have another surgery while you were in
10 Charlotte Medical Center?

11 A. Yes, sir, I did.

12 Q. And, Daisy, how many times were you at Charlotte
13 Medical Center during the first period of hospitalization?

14 A. Like probably three weeks.

15 Q. When you were not in the hospital could you put any
16 kind of weight on your leg?

17 A. No, sir, I couldn't get up out off the bed or even
18 walk.

19 Q. And, Daisy, did you complete any physical therapy
20 when you were not in the hospital?

21 A. Yes, sir. I had to have physical therapy before I
22 got out the hospital.

23 Q. Is that physical therapy easy?

24 A. No, sir.

25 Q. Can you explain to the jury what that physical

1 therapy entailed?

2 A. I had to be able to left myself up and slide my bum
3 to the edge of the bed to the wheelchair without bearing
4 any weight on either one of my legs.

5 Q. Could you get out of bed on your own at the time?

6 A. No, sir.

7 Q. Could you turn and reposition yourself without
8 assistance at that time?

9 A. No, sir.

10 Q. Could you use the bathroom by yourself at that time?

11 A. No, sir. I had to be on the bed pan.

12 Q. Could you bath yourself?

13 A. No, sir.

14 Q. Did you have the chance to talk to your children?

15 A. Yes, sir.

16 Q. Now, how did you talk to your children? Was that in
17 person?

18 A. No, sir. Not face to face. We talked online, video
19 chat.

20 Q. That was because they could see your face but not
21 your broken body; is that correct?

22 A. Yes, sir.

23 Q. Okay. Now, Daisy, could you please walk the jury
24 through your first day home after this accident?

25 A. My brother and sister had to come pick me up from the

1 hospital and wheel me out in the wheelchair. And he had
2 to lift me in the car cause I couldn't get up. And they
3 drove me all the way home from Charlotte back to Cheraw,
4 South Carolina.

5 And when I got home I remember all of my family was
6 there. My brothers and my sister, my nieces, my grandma,
7 and my babies.

8 Q. And how did that make you feel?

9 A. It felt good cause I haven't seen them in a while.

10 Q. And at that point in time you still weren't able to
11 walk?

12 A. That's correct.

13 Q. Okay. And you were living with your mother at the
14 time? You went back to your mother's home; is that
15 correct?

16 A. Yes, sir.

17 Q. Okay. Now were you in a wheelchair?

18 A. Yes, sir.

19 Q. Now, was your mother's home equipped with a ramp,
20 widened doors or anything to make it easier for you to get
21 in that home?

22 A. No, sir. With me not being able to walk my brothers
23 had to carry me.

24 Q. And did your family eventually build a ramp and widen
25 some of the rooms for you so you could get in and out

1 easily?

2 A. Yes, sir. They built a ramp there to the patio door.

3 Q. Now, the first months when you were at home after
4 getting away from Charlotte Medical Center could you use
5 the bathroom by yourself at that point?

6 A. No, sir, I was still on the bedpan at that point.
7 And then a few months later, the doctors, they assigned me
8 to a bedside toilet.

9 Q. And, Daisy, I know this is personal, but did you have
10 the physical ability to, when it would get full, and empty
11 it, those bedpans?

12 A. No, sir. I relied on family members to do it.

13 Q. Could you wipe yourself?

14 A. No, sir.

15 Q. How did that make you feel?

16 A. Uncomfortable.

17 Q. And you're an independent woman?

18 A. Yes, sir.

19 Q. How did it make you feel to be dependent on your
20 family and take their time and their love to take care of
21 you?

22 A. I didn't like it, but I knew that I needed some help.
23 It wasn't nothing I could do about it.

24 Q. Now, would you let your son somehow help at all?

25 A. Yes, he would. I would let him wash my back. He

1 always wanted to help do something. He wanted to empty
2 the bedpan, but we wouldn't let him do that because he
3 might spill it and then my mom's house would have smelled
4 like poop if he would have spilled it.

5 Q. Now, Daisy, during these months you were home after
6 being released from Charlotte Medical Center for the first
7 time did you have to go through physical therapy?

8 A. Yes, sir.

9 Q. Tell the jury a little bit about that, please?

10 A. Nine months I was on bed rest, and then they started
11 me with physical therapy. And I was in a wheelchair while
12 I was going to physical therapy. And they had to teach me
13 how to walk all over again. Take steps or just stand up
14 for a while.

15 Q. Okay. Almost nine months that you were bedridden?

16 A. Yes, sir.

17 Q. Unable to work?

18 A. Yes, sir.

19 Q. Did your employer give you any kind of salary during
20 that time period?

21 A. No, sir.

22 Q. Did you have any side finances for your two children
23 as a single mother?

24 A. No, sir.

25 Q. Now, Daisy, how long did it take for you to learn to

1 walk again?

2 A. A year and a half.

3 Q. Did you have a chance to leave your home or mother's
4 home during that time period?

5 A. No, sir.

6 Q. Now, Daisy, let me state -- do you recall receiving
7 medical bill from the treatment ---

8 A. Yes, sir.

9 Q. --- that you received? Okay. Daisy, if you can take
10 a couple of minutes and look through that packet that I
11 handed you.

12 MR. SLIGH: Your Honor, may we approach?

13 (WHEREUPON, a bench conference was held off the
14 record in the presence of the jury, but out of the
15 hearing of the jury.)

16 BY MR. POULIN:

17 Q. Now, Daisy, have you had a chance to look through
18 that packet that I handed you?

19 A. Yes, sir.

20 Q. Now, does that look like a true and accurate copy of
21 the medical bills that you received for the treatment you
22 received due to your injuries that were caused in this
23 case?

24 A. Yes, sir.

25 Q. Okay. And Daisy, you do have health insurance in

1 South Carolina, correct?

2 A. Yes, sir.

3 Q. Okay. And most of your treatment occurred in North
4 Carolina, correct?

5 A. Yes, sir.

6 Q. Okay. Now, because you had some health insurance
7 your bills were discounted to some extent, correct?

8 A. Yes, sir.

9 Q. Okay. Now, Daisy, can you tell the jury what the
10 amount of discounted medical bills that you have in this
11 case? The total number of bills that are outstanding that
12 haven't been paid?

13 A. \$171,909.87.

14 Q. Repeat that number, please.

15 A. \$171,909.87.

16 MR. HODGE: Your Honor, at this time we would move
17 the medical bills, the discounted amount, into evidence?

18 MR. SLIGH: Your Honor, I object on the basis of
19 Rules of Evidence 414 from the previous discussion. I
20 believe that this exhibit as presented contains
21 information that violates that rule.

22 THE COURT: I'm going to overrule your objection
23 based on your right to cross-examine and based on what we
24 already discussed about North Carolina law. I will take
25 care of the charge if necessary.

1 MR. SLIGH: Thank you, Your Honor.

2 MR. HODGE: Thank you, Your Honor.

3 (WHEREUPON, Plaintiff's Exhibit No. 10 was marked for
4 identification and received into evidence.)

5 BY MR. HODGE:

6 Q. Now, Daisy, could you work after this accident, after
7 learning how to walk after a year?

8 A. No, sir, I couldn't.

9 Q. Okay. But you have tried to find work, didn't you?

10 A. Yes, sir.

11 Q. Okay. Were you able to try to find work?

12 A. I tried to go back to my old job.

13 Q. Were you physically able to complete that job?

14 A. No, sir.

15 Q. Was this because you were unable to walk with the
16 same strength and ability as before the accident?

17 A. Yes, sir. I couldn't stand for a long period of time
18 or left anything heavy.

19 Q. And, now, you applied for other jobs after learning
20 how to re-walk?

21 A. Yes, sir.

22 Q. Were you able to perform any of those jobs given your
23 physical injury and limitations?

24 A. No, sir.

25 Q. You didn't want to just sit at home, correct?

1 A. No, sir.

2 Q. Okay. Daisy, I appreciate your time to share your
3 story with me and the jury. If you can answer any
4 questions opposing counsel may have. Thank you.

5 A. You're welcomed.

6 CROSS-EXAMINATION

7 BY MR. SLIGH:

8 Q. Good morning, Miss Frederick?

9 A. Good morning.

10 Q. Bear with me just a second, please, ma'am. Ms.
11 Frederick, you were on April 29th of 2015 you were coming
12 home from work and in Wadesboro -- you work in Wadesboro,
13 right?

14 A. Yes, sir.

15 Q. And you'd been working at Wadesboro Manufacturing?

16 A. Yes, sir.

17 Q. You'd been there about two weeks before this
18 accident?

19 A. Yes, sir.

20 Q. All right. And you had to be at work at 6:00 a.m; is
21 that right?

22 A. Yes, sir.

23 Q. All right. And what time did you have to leave home
24 in order to get there at 6:00 a.m.

25 A. No later than 5:20.

- 1 Q. Okay. And so what time would you have to wake up?
- 2 A. 5:00 a.m.
- 3 Q. And in April of 2015 how old were you?
- 4 A. I was 21.
- 5 Q. About 21?
- 6 A. Yes, sir.
- 7 Q. Okay. And so how long have you been driving at that
- 8 point? How long have you had a driver's license.
- 9 A. A few years.
- 10 Q. A few years. How old were you when you first got it?
- 11 A. Probably 19.
- 12 Q. Okay. And did was your eyesight that day? Was there
- 13 anything wrong with your eyesight?
- 14 A. No, sir.
- 15 Q. And you didn't have to wear glasses or anything like
- 16 that?
- 17 A. No, sir.
- 18 Q. And let me ask you. Have you been back to this
- 19 collision sight since the accident happened?
- 20 A. No, sir.
- 21 Q. Okay. And so you have not had an opportunity to walk
- 22 around or look at it or anything like that?
- 23 A. No, sir.
- 24 Q. And have you driven down Highway 52 since this
- 25 accident?

1 A. Yes, sir.

2 Q. And have -- all right. So you're coming down Highway
3 52 and you're on your way back to Cheraw on that day; is
4 that correct?

5 A. Yes, sir.

6 Q. And you were travelling about 40 miles per hour;
7 isn't that right?

8 A. I don't recall.

9 Q. Okay. You recall your deposition in this case? When
10 me and you met the first time, right?

11 A. Yes, sir.

12 Q. Okay. And actually we were in this court house, you
13 remember that?

14 A. Yes, sir.

15 Q. All right. And you were put under oath with the
16 court reporter present, kind of like today?

17 A. Yes.

18 Q. And that day you swore to tell the truth, correct?

19 A. Yes, sir.

20 Q. All right. And on that day you told me that you were
21 travelling 40 miles per hour; you remember that?

22 A. No, sir.

23 Q. Okay.

24 (WHEREUPON, Court's Exhibit No. 2 was marked for
25 identification and received into evidence.)

1 MR. SLIGH: Your Honor, permission to approach the
2 witness?

3 THE COURT: Sure.

4 BY MR. SLIGH:

5 Q. All right. Ms. Frederick, I've handed you the
6 transcript that was made from that deposition. I'm going
7 to direct you to page. See on that cover page it says,
8 "Taken November 16th of 2016?"

9 A. Yes, sir.

10 Q. Okay. And if you would going to Page 39, please,
11 ma'am, and let me know when you get there.

12 A. I'm there.

13 Q. Okay. If you would go down to Line 18. I ask the
14 question, "How fast were you going at the time of the
15 accident," and your answer was, "About 40. I remember
16 cause I don't like to go the speed limit when it's
17 raining." Did I read that correctly?

18 A. Yes, sir, you did.

19 Q. And that was your testimony back on November the 16th
20 of 2016 that you were going about 40 miles per hour?

21 A. Yes, sir.

22 Q. Okay. All right. And as you were travelling down
23 Highway 52 you could see a safe distance down the road,
24 correct?

25 A. Yes, sir.

- 1 Q. It was raining, but it was light outside, correct?
- 2 A. Yes, sir. And it wasn't clear. It wasn't fog or
- 3 anything.
- 4 Q. But you could see plenty ---
- 5 A. Yes, sir.
- 6 Q. --- as far as you needed down the road?
- 7 A. Yes, sir.
- 8 Q. All right. And you will agree with me that as a
- 9 driver that you've got to keep a proper lookout, correct?
- 10 A. Yes, sir.
- 11 Q. All right. And you've got to pay attention at all
- 12 times to what's going on around you; isn't that right?
- 13 A. Yes, sir.
- 14 Q. And you could -- well, you said you didn't see
- 15 Mr. McDowell's truck until it was three car lengths from
- 16 you; isn't that correct?
- 17 A. Yes, sir.
- 18 Q. All right. On that stretch of roadway you could see
- 19 a whole lot further than three car lengths in front of
- 20 you, couldn't use?
- 21 A. Yes, sir.
- 22 Q. Okay. So you can't tell me why you didn't see his
- 23 truck until it got up to three car lengths from you, can
- 24 you? You can't explain that, can you?
- 25 A. Come around the curve. When I came around the curve

1 it was like three car lengths.

2 Q. Well, ma'am, you just said that you could see much
3 further down the road than three car lengths?

4 A. Yes, sir.

5 Q. So you could see a lot further than three car lengths
6 but you only saw his vehicle when it got that close to
7 you, correct?

8 A. Yes, sir. When it was coming towards me.

9 Q. You never -- the first time you ever saw his truck
10 was when he was three car lengths from you, correct?

11 A. Yes, sir.

12 Q. Never saw it at any time before then?

13 A. No, sir.

14 Q. Didn't notice it coming down the road?

15 A. No, sir.

16 Q. Okay. And you never hit the breaks before impact; is
17 that correct?

18 A. No, sir.

19 Q. Is it correct that -- I think there may be a
20 misunderstanding. Did you hit the breaks?

21 A. No, sir.

22 Q. And why not?

23 A. It wasn't something that I could avoid. It happened
24 so fast. It was just too fast of impact.

25 Q. So by the time you saw his truck you didn't have time

1 to hit your breaks?

2 A. No, sir, because it was already sliding.

3 Q. And upon impact did your airbag come out?

4 A. Yes, sir.

5 Q. Okay. Tell us what that was like?

6 A. It felt like it knocked the wind out of me.

7 Q. Did it obscure your vision?

8 A. No, sir.

9 Q. Okay. It didn't?

10 A. No, sir.

11 Q. All right?

12 A. I was still clear headed.

13 Q. And a bunch of smoke came out of the airbag?

14 A. I don't recall that.

15 Q. Now, you haven't had any medical treatment in
16 relation to your accident since December of 2016? Isn't
17 that about right?

18 A. I'm not sure because I remember I had to go back to
19 Charlotte CMC for -- it was for my angle.

20 Q. Dr. Simms in Charlotte finished up his treatment with
21 you in December of 2016. Does that sound right?

22 A. I think so.

23 Q. Okay. And so and my point is you're not still
24 continuing to have to go back to the doctor consistently
25 for your treatment?

1 A. Yes, I still go.

2 Q. You still go?

3 A. Yes, sir.

4 Q. All right. But you're not in physical therapy right
5 now?

6 A. No, sir.

7 Q. And you, at the time of this accident, I forgot to
8 ask you this earlier, you were living with your mother; is
9 that correct?

10 A. Yes, sir.

11 Q. Okay. And then -- now, you and your children, you'll
12 live in a different house away from your mother now?

13 A. Yes, sir.

14 Q. And you're able to take care of them and do
15 everything that you need to do with them?

16 A. Yes, sir.

17 MR. SLIGH: One second, Your Honor. That's all I
18 have. Ms. Frederick, I really appreciate it.

19 THE WITNESS: You're welcomed.

20 REDIRECT EXAMINATION

21 BY MR. HODGE:

22 Q. Daisy, real briefly. Let's clear something up for
23 the jury. Did this accident occur coming out of a curve?

24 A. Coming, yes, sir.

25 Q. Okay. So it wasn't on a long, long stretch away?

1 A. No, sir.

2 Q. And you could not see Mr. McDowell's car for three
3 car lengths away?

4 A. Yes, sir.

5 Q. And you actually -- let's get back to the treatment
6 for one second. You had a third surgery long after that
7 initial three week stay at Carolina Medical Center, is
8 that correct?

9 A. Yes, sir.

10 MR. SLIGH: Your Honor, that exceeds the scope of
11 redirect. Move to strike.

12 MR. HODGE: Your Honor, he asked about her treatment.

13 THE COURT: Overruled.

14 MR. SLIGH: Thank you, Your Honor.

15 BY MR. HODGE:

16 Q. And, Daisy, are you still in pain as we sit here
17 today?

18 A. Yes, sir.

19 Q. And do you take opioid pain pills?

20 A. I take some pain pills.

21 Q. That's to control the pain you're in today?

22 A. Yes, sir.

23 Q. Okay. Do you still do some physical therapy on your
24 own to make you stronger?

25 A. Yes, sir. I go to the gym.

1 MR. HODGE: Nothing further, Your Honor.

2 MR. SLIGH: I don't have anything further, Your
3 Honor.

4 THE COURT: You may step down. Thank you. Be
5 careful of that step.

6 MR. POULIN: Your Honor, we're going to be calling
7 Mr. McDowell to the stand.

8 THE COURT: Come around and be sworn, please.

9 DANIEL MCDOWELL, after being duly sworn,
10 testified as follows:

11 THE WITNESS: My name is Daniel Lee McDowell.

12 DIRECT EXAMINATION

13 BY MR. POULIN:

14 Q. All right, sir. We're going to move and jump right
15 into the wreck. You were on your way to work at the time
16 of the wreck; is that correct?

17 A. Yes, sir.

18 Q. And you were coming from your house?

19 A. Yes, sir.

20 Q. Okay. You woke up about two o'clock that afternoon?

21 A. That is correct.

22 Q. So you got up, got ready for work and then headed on
23 out?

24 A. Yes, sir.

25 Q. Okay. You took your medicine that morning?

1 A. The wreck reason it could be water on the road.

2 Q. I want you to refer back to your deposition there,
3 and turn with me to Page 16?

4 A. Yes, sir.

5 Q. Okay. And on Page 16, Line Seven, the question was,
6 "You had some water on the road? Is that what you said,"
7 and your answer was?

8 A. Yes.

9 Q. Okay. So you -- that your best understanding of why
10 you lost control is that you hit a puddle on the road?

11 A. I hit some water.

12 Q. How does water get on the road if it does not puddle?

13 A. It was raining. The road doesn't have to have a
14 puddle on it for it to be wet.

15 Q. Okay. So there was just water on the road? There
16 was not a puddle?

17 A. Water on the road, yes, sir.

18 Q. Okay. That was pooled up in an area or how --
19 explain to me how you get water on a road that is not a
20 puddle?

21 A. It was raining. The entire road was wet.

22 Q. Yeah, but you told us that it had stopped raining.
23 It was just misting at the time of the wreck?

24 A. That's what I just said. It was not raining, yes,
25 sir.

- 1 Q. So the road was wet?
- 2 A. Yes, sir.
- 3 Q. But there was no water on the road? No puddle?
- 4 A. No, there was not a puddle that I can recall.
- 5 Q. Okay. So I'm trying to understand how you lost
- 6 control of your vehicle?
- 7 A. My best understanding is I lost control cause the
- 8 road was wet.
- 9 Q. Did you have good tires on you vehicle?
- 10 A. Yes, sir.
- 11 Q. Did you have any trouble with traction as you were
- 12 driving that day?
- 13 A. No, sir.
- 14 Q. So you don't think you hydroplaned?
- 15 A. I can't speak on hydroplane because I don't know that
- 16 I hit a puddle of water. I don't know exactly what you
- 17 mean by hydroplane.
- 18 Q. Okay. Well, why don't you tell me when you first
- 19 realized that you had lost control? After you realized
- 20 you lost control? Did your back end slide over? Did your
- 21 front end slide over?
- 22 A. The rear of my vehicle first started sliding around.
- 23 Yes, sir.
- 24 Q. All right. The rear of your vehicle first started
- 25 sliding around?

- 1 A. Yes, sir.
- 2 Q. All right. You have no idea how that happened or why
- 3 that happened?
- 4 A. No, sir, I do not.
- 5 Q. Okay. Were you driving straight at the time you lost
- 6 control or were you still in part of the curve when you
- 7 lost control?
- 8 A. I was coming around the curve.
- 9 Q. So your truck turned sideways to your left hand side?
- 10 A. Counter clockwise.
- 11 Q. Counter clockwise. So that this corridor right here
- 12 is the road. You're coming down the road. You spin out
- 13 and your truck ends up facing about this direction here?
- 14 A. Yes, sir.
- 15 Q. All right. And you say you sort of half in your
- 16 lane, half in the other lane, the oncoming lane?
- 17 A. Thereabouts.
- 18 Q. Okay. So in other words your truck is kind of
- 19 perpendicular this way and part of your truck is in this
- 20 lane and sticking in the other?
- 21 A. Yes, sir.
- 22 Q. And during little spin out procedure that you went
- 23 through did your truck ever leave the roadway at any
- 24 point?
- 25 A. No, sir.

1 Q. Now, this road is sort of back country road. Would
2 you agree with me on that?

3 A. Yes, sir.. It's highway.

4 Q. Just one lane in each direction?

5 A. Yes, sir.

6 Q. Pretty narrow shoulder? Doesn't have any of those
7 big, wide shoulders that you see on the interstate, does
8 it?

9 A. No, sir.

10 Q. Did you ever make it onto the shoulder?

11 A. No, sir.

12 Q. Okay. So I mean how, from one white line to the over
13 white line, how far are we talking on the road? How wide
14 is the road? About from me to you, maybe?

15 A. The road would be wider than that.

16 Q. Wider than that. About from me to you?

17 A. Say 25 feet, 26 feet. Somewhere in there.

18 Q. A little wider than two car lengths, right?

19 A. Yes.

20 Q. Or two car widths?

21 A. Yes, sir.

22 Q. It's your testimony that you're driving down the road
23 at 55 miles per hour and you lose ---

24 A. Fifty miles per hour.

25 Q. Fifty miles per hour.

- 1 A. Yes, sir.
- 2 Q. That you spin out?
- 3 A. Yes, sir.
- 4 Q. And that you lose control of your vehicle?
- 5 A. Yes, sir.
- 6 Q. And that it turns 90 degrees in the opposite
- 7 direction?
- 8 A. Yes, sir.
- 9 Q. And that you're able to stop your vehicle without
- 10 ever leaving the roadway?
- 11 A. Yes, sir.
- 12 Q. Okay. So you now after your truck stops you say you
- 13 sat there for 15 to 20 seconds?
- 14 A. Yes, sir.
- 15 Q. And tried to get your bearings? And then you checked
- 16 your windows and mirrors?
- 17 A. Yes, sir.
- 18 Q. Put your truck in reserve and started backing up
- 19 again?
- 20 A. Yes, sir.
- 21 Q. And so during that 15 to 20 seconds that you sat
- 22 there in the roadway if you look out your front window you
- 23 basically see like a tree line?
- 24 A. Yes, sir.
- 25 Q. And then if you're looking out your right and left

1 side windows you would see the roadway on either side?

2 A. Yes, sir.

3 Q. And if you looked out the right hand side of the
4 vehicle to the direction that Ms. Frederick would have
5 been coming from -- she told us that that was about a mile
6 or mile and a half down the road?

7 A. Seemed like it to me.

8 Q. And it's your testimony that you had already put the
9 truck in reverse and was backing up at the time of the
10 collision?

11 A. Yes, sir.

12 Q. I think you told us that you were maybe going two
13 miles per hour in reverse?

14 A. Yes.

15 Q. All right. Now, even though you told us that you
16 could see for about a mile, mile and a half, out the right
17 hand windshield you did not see Daisy's vehicle until she
18 was 20 or 30 feet from you; is that correct?

19 A. Yes, sir.

20 Q. So you look out the right hand window, and the first
21 time you see Daisy is 20 or 30 feet from your truck?

22 A. Yes, sir.

23 Q. All right. Now, after the impact you say your truck
24 flipped three times?

25 A. That's what it felt like to me.

1 MR. POULIN: May I publish this to the jury, Your
2 Honor?

3 MR. SLIGH: No objection, Your Honor.

4 THE COURT: You may.

5 BY MR. POULIN:

6 Q. So on the diagram the red truck; that would be your
7 truck?

8 A. Yes.

9 Q. All right. And prior to the wreck you would have
10 been coming up in that direction in that lane; is that
11 correct?

12 A. Yes, sir.

13 Q. And then this P.T. Cruiser that is depicted on here
14 would have been Ms. Frederick's car, correct?

15 A. Yes, sir.

16 Q. Okay. And just prior to the wreck she would have
17 been coming in that direction depicted by the green arrow?

18 A. Yes, sir.

19 Q. What I'm going to do is hand you this pen so I'd like
20 to make sure I got it up to work for you here. All right.
21 And just so we can sort of help get our bearings a little
22 better here if you could sort of draw maybe a -- like a
23 rectangle where you think your truck ended up after the
24 impact. So once it stopped spinning and flipping and
25 everything like that?

1 medication." Yes.

2 Q. And so did you mean that you had taken your
3 prescription medication time in that 24 hours before the
4 accident?

5 A. Yes, sir.

6 Q. And so is that -- and so your testimony here today is
7 that same answer?

8 A. Yes, sir.

9 Q. All right. When you were working second shift what
10 time did you typically leave the house?

11 A. I usually leave the house at 2:15.

12 Q. On April 29 of 2015 were you running late for work?

13 A. No, sir.

14 Q. And as far as you know it was a regular day?

15 A. Yes, sir.

16 Q. And were you in a hurry?

17 A. No, sir, I was not.

18 Q. What kind of vehicle were you riding in that day?

19 A. I was riding my Dodge pick up truck.

20 Q. Was there any mechanical issues that you knew about
21 with your vehicle?

22 A. No, sir, it was not.

23 Q. All right. Did you have your lights on?

24 A. I had running lights on.

25 Q. Tell us about the weather conditions that day?

1 A. It had been raining briefly as I was coming. I was
2 going down the road like I say it was misty. It wasn't
3 raining.

4 Q. Had it been raining at any point during your drive?

5 A. Yes, sir.

6 Q. And at what point did it stop?

7 A. It stopped by the time I crossed the state line.

8 Q. And what were the conditions of the road generally
9 that day?

10 A. I think they were wet.

11 Q. And so you would have been driving north on Highway
12 52 towards Wadesboro?

13 A. That is correct.

14 Q. And you said you were travelling roughly 40 miles per
15 hour?

16 A. Yes, sir.

17 Q. And did it feel like that was an appropriate speed
18 for those conditions?

19 A. Yes, sir.

20 Q. Was there anything distracting you that day?

21 A. No, sir, there was not.

22 Q. Tell us more specifically about that section of the
23 roadway where the accident happened. Describe the road?

24 A. It was a basic two lane curve coming to a straight
25 away, and the first curve curves to the right and the

1 second curve curves to the left and comes to a straight
2 away.

3 Q. And the collision happened coming out of which curve?

4 A. The second curve.

5 Q. All right. Now, tell us as much detail as you can
6 exactly how you remember the collision happening?

7 A. Well, I was coming out of the curve. Like I said the
8 truck had lost -- turned sideways on the highway. I was
9 sitting in the lane. I looked and my brakes kind of moved
10 the truck a little bit. I looked both ways, placed my
11 truck in reverse, turned and looked to make sure nothing
12 was coming from the other way. I started to back up. I
13 turned and looked out of the right hand window and there
14 she was.

15 Q. Now, when the collision happened did your airbag come
16 out?

17 A. Yes, sir, it did.

18 Q. And when your vehicle came to rest what was your --
19 describe for the jury what your condition was?

20 A. Regarding my injuries?

21 Q. Yes, sir.

22 A. My face was all cut up. My lip was it busted. My
23 lip in shattered. My arm was impaled with glass. My jaw
24 was dislocated. My right hand was complete dislocated.
25 His right shoulder was dislocated. And had ribs, ligament

1 and tendons, and I was stationary, just laying there.

2 Q. Okay. Did you know -- were you able to make any
3 attempt the get out of your vehicle at the point?

4 A. No, sir, I didn't.

5 Q. There has been some testimony about what you felt
6 during the collision. And you had an air bag come out in
7 your face, correct?

8 A. Yes, sir.

9 Q. And you had all the injuries that you just named?

10 A. Yes, sir.

11 Q. And were in pain?

12 A. Yes, sir.

13 Q. Were you disoriented?

14 A. Yes, sir.

15 Q. And so do you -- so you told us what you felt
16 happened. Do you have any confidence about the motion or
17 direction of the vehicle?

18 A. I can't say with confidence exactly what happened.
19 All I know is what I felt.

20 Q. And as far as the relative position in the roadway of
21 the vehicle after the accident you don't have any
22 confidence? You don't have any memory or recollection of
23 it?

24 A. No, sir.

25 Q. I want to talk to you a little bit? A little bit

1 more in detail about the location where the accident
2 happened. Now, there, how often did you drive that
3 stretch of road?

4 A. Referring to that day?

5 Q. For how long prior to this accident?

6 A. It's been about two and a half years at the time.

7 Q. And so there is this roadway that you're familiar
8 with?

9 A. Yes, sir.

10 Q. Okay. What about after the accident? Did you have
11 an opportunity to go back to the scene of the accident
12 afterwards?

13 A. Yes, I have been back there.

14 Q. Okay. All right. When was the first opportunity you
15 had to come back to the accident scene?

16 A. Me and his wife on way back home to get me we stopped
17 by there.

18 Q. So was that the same day as the accident?

19 A. Yes, sir. That night or evening.

20 Q. Okay. And so you were able to observe the scene
21 then?

22 A. Yes, sir.

23 Q. And then were you able -- did you go back at any
24 other point?

25 A. Yes, sir.

1 Q. All right. And why did you go back?

2 A. Some of the stuff in my vehicle was missing. I don't
3 know if it got thrown out of the vehicle or I lost it. It
4 was gone and I was looking to see if I can find anything
5 from my vehicle that would be laying there.

6 Q. So you walked around the scene of the accident?

7 A. Yes, sir.

8 (WHEREUPON, Defendant's Exhibit No. 1 was marked for
9 identification and received into evidence.)

10 BY MR. SLIGH:

11 Q. I'm going to hand you a couple of photographs here,
12 Mr. McDowell. And this first photograph, does that depict
13 the location where this accident took place?

14 A. Yes, sir.

15 Q. Okay. And what -- this photo tells you what?

16 A. That's right where my truck was sitting. This is
17 where the -- that would be off the left hand side of the
18 road, the trees and power lines. That would be off the
19 left hand side.

20 Q. That's the power lines in the upper right hand
21 corner?

22 A. Yes, sir.

23 MR. SLIGH: Mark this, please, ma'am.

24 (WHEREUPON, Defendant's Exhibit No. 2 was marked for
25 identification.)

1 MR. SLIGH: Your Honor, permission to publish this to
2 the jury.

3 THE COURT: Yes, sir.

4 BY MR. SLIGH:

5 Q. And the power lines are about right in that corner?

6 A. Yes, sir.

7 Q. All right. I'm going to hand you another photograph,
8 overhead photograph. And does that photograph depict the
9 area where the accident took place?

10 A. Yes, sir.

11 Q. Can you tell me more specifically where the accident
12 took place in that photograph?

13 A. Yes, sir.

14 Q. Can you do that?

15 A. Yes, sir.

16 Q. Okay. If you would just put an X with that marker
17 approximately where the accident took place?

18 (WHEREUPON, the witness marks on the exhibit.)

19 MR. SLIGH: Mark this, please, ma'am.

20 (WHEREUPON, Defendant's Exhibit No. 3 was marked for
21 identification.)

22 MR. SLIGH: Your Honor, at this time we're going to
23 move Defendant's Exhibit Numbers Two and Three in
24 evidence?

25 MR. POULIN: No objection.

1 THE COURT: In without objection, Defendant's Two and
2 Three.

3 (WHEREUPON, Defendant's Exhibit Nos. 2 and 3 were
4 admitted into evidence.)

5 BY MR. SLIGH:

6 Q. All right. Now, at the time of the collision, Mr.
7 McDowell, was your vehicle moving forward?

8 A. No, sir.

9 Q. Were you at a complete stop?

10 A. No, sir. I was in reverse.

11 Q. Okay. But you were not moving forwards?

12 A. No, sir.

13 MR. SLIGH: I think that's all I have.

14 MR. POULIN: I don't think I have anything else for
15 him, Your Honor.

16 THE COURT: All right. You may step down. All
17 right. We need to take a brief recess. Jury step back to
18 the jury room. Take a break. All right. We will be in
19 recess about ten minutes.

20 (WHEREUPON, the jury panel was excused from the
21 courtroom at 11:24 a.m.)

22 (WHEREUPON, Court was in recess at 11:24 a.m.)

23 THE COURT: Ready?

24 MR. POULIN: We're ready.

25 MR. SLIGH: Yes, sir, Your Honor.

1 THE COURT: Bring them in.

2 (WHEREUPON, Court reconvened at 11:47 a.m.)

3 (WHEREUPON, the jury panel enters the courtroom at
4 11:47 a.m.)

5 THE COURT: All right, sir.

6 MR. HODGE: Your Honor, the Plaintiff calls Ken
7 Richardson to the stand.

8 THE COURT: Come up and, please, be sworn, please.

9 KENDRICK RICHARDSON, after being duly sworn,
10 testified as follows:

11 THE WITNESS: My name is Kendrick E. Richardson.

12 DIRECT EXAMINATION

13 BY MR. HODGE:

14 Q. Good morning, Mr. Richardson. Would you please tell
15 the jury your expertise specifically what you're going to
16 testify about?

17 A. Sure. I'm a mechanical engineer. I went to Clemson
18 University. I graduated from there back in 1987 with a
19 bachelor of science, working a few years. I went back to
20 Clemson and got a master's in science in 1994. And
21 started the company that I have now at this time which is
22 a consulting company.

23 I've taken course work in accident reconstruction,
24 vehicle dynamics. What we do is we apply engineering in
25 situations like this. We work on industrial accidents

1 where maybe a machine doesn't meet production or
2 specifications of how it's designed or someone gets hurt
3 on the machine due to lack of guarding or guarding has
4 been removed or things have been changed.

5 I also work on car wrecks and truck wrecks looking
6 for causation, how fast that were going, what happened
7 first, second, third. Those types of things.

8 Q. Have you ever taught accident reconstruction to law
9 enforcement here in South Carolina?

10 A. I have.

11 Q. Okay. Have you ever been qualified as an expert in
12 the accident reconstruction here in South Carolina?

13 A. I have. I've testified in court about 64, 65 times.
14 Most of these being in South Carolina. Some other states
15 and some federal, but about 50 in South Carolina.

16 MR. HODGE: Your Honor, at this time I would move to
17 have Mr. Richardson qualified as an expert in accident
18 reconstruction?

19 MR. SLIGH: I don't have any objection to that.

20 THE COURT: So qualified without objection.

21 MR. HODGE: Thank you.

22 BY MR. HODGE:

23 Q. Now, Mr. Richardson, your job here today isn't to
24 determine the credibility of the witnesses but to
25 determine to a reasonable degree of scientific certainty

1 using your experience and basic science to determine what
2 version of events is more likely to happen than not; is
3 that correct?

4 A. Yeah, I'm not going to start pointing people out and
5 saying they're credible or not credible. But I am going
6 to pick through what they said and apply some engineering
7 and physics to it and see what story make senses.

8 Q. Mr. Richardson, you're here today. What have you
9 been relying on to form them?

10 MR. SLIGH: Your Honor, I hate to interrupt counsel,
11 but I've just got a matter of law to take up with you real
12 quick. Ask that we approach.

13 THE COURT: Sure.

14 (WHEREUPON, a bench conference was held off the
15 record in the presence of the jury, but out of the
16 hearing of the jury.)

17 THE COURT: Ladies and gentlemen of the jury, if you
18 would step back to your room for a second. I have to take
19 care of some matters of law.

20 (WHEREUPON, the jury panel was excused from the
21 courtroom at 11:53 a.m.)

22 COLLOQUY

23 WHEREUPON, testimony not included in this record due
24 to an audio problem that was experienced.)

25 THE COURT: Counsel.

CROSS-EXAMINATION

BY MR. SLIGH:

Q. Good afternoon, Mr. Richardson.

A. Good afternoon.

Q. Nice to see you again. All right. The -- I'm going to start with your opinion about the slope in the puddling of water issue?

A. Right.

Q. At least as of the time I took your deposition in, I think it was at the summer or fall of 2017, you hadn't been out to the accident scene?

A. No, and I still haven't. I used the information your experts got.

Q. You relied totally on this information and you haven't personally been out to the scene?

A. Correct.

Q. Okay. And part of your opinion that you offered in your deposition was that the roads were -- the shoulder of the road was properly maintained?

A. Right. I looked for dirt berms and stuff like that. You can have construction on the shoulder. Water inside the road goes through forcing the water to stay in the road.

Q. You don't have any idea what the time of this accident was? All of your data is from two years later?

1 A. I wasn't there at the time of the accident, however,
2 the grass is pretty thick and lush, but I wasn't there.

3 Q. You weren't there, and you don't know what the
4 conditions were? What could have changed between the
5 documented evidence you reviewed and the time of the
6 accident; is that correct?

7 (WHEREUPON, testimony not included in this record due
8 to an audio problem that was experienced.)

9 BY MR. SLIGH:

10 Q. Okay. Now, let's talk about the opinion about
11 flipping over?

12 A. Okay.

13 Q. And, now, an accident like we're here about today,
14 the accident happened really fast?

15 A. Sure.

16 Q. Almost instantaneously?

17 A. The wreck would collide out to its final rest is
18 going to be a couple seconds after getting out after
19 impact.

20 Q. You mentioned idle by impact. You would expect
21 somebody to be disoriented and confused, both
22 Ms. Frederick and Mr. McDowell?

23 A. Sure. You've got air bags going off. Lots of thing
24 happenings.

25 Q. And tell me about the -- describe for the jury when

1 an air bag goes off?

2 (WHEREUPON, testimony not included in this record due
3 to an audio problem that was experienced.)

4 BY MR. SLIGH:

5 Q. Now, in Exhibit?

6 A. Eleven.

7 Q. Eleven. Thank you, sir. The position, the relative
8 position, of the vehicle as in impact right there.

9 A. Sure.

10 Q. You -- that's your -- do you agree with the relative
11 position to the vehicle?

12 A. That's what I think I testified to, the area of
13 impact and then ---

14 Q. I wasn't clear with my question. I'm sorry, Mr.
15 Richardson. I apologize. I'm talking about the drawing
16 right there and the position of the vehicles at impact. I
17 think that's all I have. Thank you, Mr. Richardson.

18 MR. POULIN: Thank you.

19 MR. HODGE: No redirect, Your Honor. We're good.

20 THE COURT: Ladies and gentlemen of the jury, we'll
21 break for lunch now and ask that you be back here at two
22 o'clock. And y'all enjoy your lunch.

23 (WHEREUPON, the jury panel was excused from the
24 courtroom at 12:39 p.m.)

25 THE COURT: All right. Anything before we go to

COLLOQUY

1
2 MR. SLIGH: Your Honor, in the past we make our
3 directed verdict motion at the end of the trial. We had
4 one judge in the past tell us that we need to preserve
5 that right at the close of our case. Just doing that for
6 the record. Would you rather us do that now. I'm fine
7 with it. I think it's more appropriate to do it at the
8 end of the trial.

9 THE COURT: Whatever you want to do.

10 MR. SLIGH: We would just preserve our right. If I
11 can put a couple of motions on the record before you bring
12 the jury in.

13 THE COURT: All right.

14 MR. SLIGH: Your Honor, at this time I'd like to move
15 for directed verdict pursuant to Rule 50 on several
16 grounds. First is on the issue of contributory
17 negligence. As we discussed the law of North Carolina
18 contributory negligence applies only reasonable inference
19 based upon evidence put up by the Plaintiff. She was
20 negligent in not keeping a proper lookout in that she
21 could only see three car lengths in front of her. And at
22 least we are requesting the Court's directed verdict on
23 the issue.

24 Secondly, we move for directed verdict on the
25 issue of punitive damages and move to strike the

1 Plaintiff's claim for punitives. There is no such
2 evidence to support a punitive damages verdict.

3 Lastly, Your Honor, there was no testimony regarding
4 permanent impairment of or permanent disability and that
5 element be struck. There is not anything in their claim
6 of future medical treatment. There was no testimony
7 regarding that, and, thank you, Your Honor.

8 MR. HODGE: Your Honor, briefly. There is no
9 testimony as it applies to contributory negligence. There
10 is no testimony from anyone in this trial that -- but that
11 Ms. Frederick was driving in her correct lane and that
12 Mr. McDowell was completely in the left lane. I think
13 right there that creates an issue for the jury for at the
14 best directing a verdict of contributory negligence in
15 favor of the Plaintiff. I think that's clear enough at
16 this point.

17 I think there is also no argument that the
18 Defendant -- or that the Plaintiff was driving too fast.
19 Nothing from the Defendant's mouth. Nothing from the
20 Plaintiff's mouth. We'll see what the expert says, but at
21 this point none of that is in evidence. Again, at this
22 point that would be a jury question.

23 Also, as to the issue of punitives, we agree. We are
24 not going to argue that. Make it easy.

25 As to permanent injuries, Ms. Frederick did testify

1 that she is still in pain as we sit here in the courtroom
2 today. Ms. Frederick's doctor testified that, yes, she
3 had a long recovery and that recovery is not finished.
4 And that it was difficult and painful. I think on that
5 issue that is squarely -- and scaring as well which we
6 have both the doctor and Ms. Frederick. So taking that
7 out of the hands of the jury would be improper.

8 We ask that the directed verdict on th that issue be
9 denied. The directed verdict as to contributory
10 negligence, based on the Defendant's argument, be denied
11 and that it be actually granted in favor of the Plaintiff
12 given that there is no testimony that she was traveling
13 too fast for conditions. She was traveling in her correct
14 lane. There is no dispute from the doctor or any other
15 witness that she was in the wrong lane.

16 As to sudden emergency, which I believe he also
17 brought up, that sudden emergency was brought on by the
18 sole negligence of the Defendant. Ms. Frederick cannot
19 create a sudden emergency on her own as a matter of law.
20 Therefore, we ask that the Court grant a verdict on that
21 issue as well. Thank you.

22 THE COURT: I'm trying to pattern my thought in
23 making this as simple as possible. All motions are denied
24 before the Court at this time except the punitive damages
25 motion. Does that clear the record?

1 MR. SLIGH: Thank you, Your Honor.

2 MR. HODGE: Thank you, Your Honor.

3 THE COURT: All right. We've got all the jurors.

4 You ready?

5 MR. SLIGH: Yes, sir, Your Honor.

6 MR. POULIN: Yes, sir, Your Honor.

7 (WHEREUPON, the jury panel enters the courtroom at
8 10:40 a.m.)

9 THE COURT: All right. We've got everybody, all the
10 jurors. Okay. Good morning, everybody. Thank you once
11 again for your patience. I know we're a little bit late
12 getting started, but it wasn't a matter of us sitting back
13 there drinking coffee and eating donuts or anything like
14 that. As I was trying to straighten out a scheduling
15 matter that doesn't have anything to do with this case.
16 Counsel.

17 MR. SLIGH: Thank you, Your Honor. The Defendant
18 calls Mr. Don Roberts.

19 DONALD ROBERTS, after being duly sworn,
20 testified as follows:

21 CLERK OF COURT: Have a seat and state your full
22 name, please.

23 THE WITNESS: My name is Donald A. Roberts.

24 DIRECT EXAMINATION

25 BY MR. SLIGH:

1 Q. Good morning, Mr. Roberts. Can you introduce
2 yourself to the jury and tell them where you live and what
3 you do for a living?

4 A. Yes. My name is Don Roberts. I work for a company
5 called Delta Forensic Engineering. We specialize in motor
6 vehicle accident reconstruction. We've got about 30
7 people, and we just do it full time. We investigate over
8 500 accidents in a year. I'm out of -- we're based out of
9 Charlotte. I live in Charlotte, North Carolina and I
10 think that answers your question.

11 Q. Yes, and thank you. Can you tell us or tell the jury
12 a little bit about your educational background?

13 A. Yes. I graduated from the U.S. Naval Academy back in
14 1980. I have a degree in mechanical engineering. A
15 bachelor's degree in mechanical engineer. I spent a
16 career in the military in a nuclear submarine force. For
17 my later career they sent me back to graduate school.
18 They've got a post graduate school up there in California.
19 So I spent two years there and got my master's degree in
20 mechanical engineering and then I was sent back to the
21 Naval Academy to teach in the engineering department. And
22 I finished out my military career there. That's the
23 formal education.

24 Q. Can you tell the jury a little bit about your
25 professional background? Your professional degrees and

1 experience as it relates to your expertise?

2 A. So I've got -- I'm licensed as a mechanical engineer
3 in multiple states. I received training after I got out
4 of the military. I received training in accident
5 reconstruction back in 2001. They were looking for a
6 professional engineer. That company that I initially
7 worked for was out of Columbia, South Carolina. And then
8 my office would -- I was located in the satellite office
9 in Charleston.

10 So I started my career there and received my initial
11 training from that company. Spent six months training in
12 the field of accident reconstruction working with the
13 senior engineers there. Went to formal schools including
14 going to Northwestern University. Got an accident
15 reconstruction course.

16 I attended that back in 2001. Then each year I'm
17 required, as a professional engineer, I'm required to
18 receive continuing education. So for the past 17 years
19 all of my continuing education has been in various aspects
20 of accident reconstruction.

21 Q. Mr. Roberts, now can you tell the jury a little bit
22 about your experience specifically as it relates to the
23 study of human factors and as it pertains to human
24 perception and response times?

25 A. Human factor is a portion of accident reconstruction.

1 I consider it the heart and soul of accident
2 reconstruction because drivers respond to accidents in
3 various ways. They brake. They can steer away to avoid a
4 hazard. So it becomes a part of -- it's really the heart
5 and soul of accident reconstruction. Understanding how
6 drivers react to certain hazards and situations. And I
7 have specific training in that. I received that all the way
8 back to 2001 and then again formal training.

9 Went to courses in it and various courses in human
10 factor and driver's perception and response. How they
11 respond to these accidents.

12 The last one I attended was back in 2001. Again, at
13 Northwestern University. It was a course in human factors
14 dedicated or specializing in driver's perception and
15 response. So it basically -- it's an important aspect of
16 accident reconstruction. Understanding how drivers
17 respond to accidents, how long it takes them to respond to
18 accidents.

19 MR. SLIGH: Your Honor, at this time I would offer
20 Mr. Roberts as an expert in the accident reconstruction,
21 motor vehicle crash dynamics and human factor and human --
22 as it pertains specifically to human perception and
23 response?

24 MR. POULIN: No objection, Your Honor.

25 THE COURT: So qualified without objection.

1 MR. SLIGH: Thank you, Your Honor.

2 BY MR. SLIGH:

3 Q. Now, Mr. Roberts, you were hired by me in this case;
4 is that right?

5 A. That's correct.

6 Q. Okay. Tell us what you were tasked with doing?

7 A. Initially I was tasked to -- there were some
8 questions about what the visibility out there at the
9 collision site was. So I was tasked with looking at how
10 far the drivers could see out there. What we call the
11 line of sight, the distance that they could see cause I
12 think you all recognize that there was a curve in the
13 road. There was trees and foliage there that restricted
14 some visibility. So I looked at that.

15 And I was also asked to look into aspects of what --
16 because it was wet out and potentially raining, roadway is
17 wet, what is the braking or stopping distance. How long
18 or how far does it take the vehicle to stop on the wet
19 pavement. These were the -- initially what I was asked to
20 do, and subsequently look at driver's perception and
21 response.

22 Q. Now, did you perform a full accident reconstruction
23 in regard to this case?

24 A. I did not, and the reason for that is to perform an
25 accident reconstruction I mean that includes looking at

1 vehicles, calculating vehicle speeds, whether drivers were
2 able to avoid situations, where the two vehicles collided
3 in the roadway itself. We rely, as an engineer or an
4 accident reconstructionist, we rely upon physical
5 evidence. And what I mean by that is looking at the
6 physical evidence for an accident reconstruction typically
7 consists of looking in the roadway, looking at tire marks
8 in the roadway. We want to know where vehicles came to
9 rest, and we need to be able to determine what we call the
10 point of impact, were they came together.

11 If we can't determine where that came to rest and
12 determine where they collided with each other then we
13 can't do it, a full construction. And in this situation
14 it was difficult to do that. I got involved two years
15 after the fact, number one. There was no roadway evidence
16 out there. No scrape marks, gouges in there, no tire
17 marks remaining in the roadway that was visible out there
18 when I went out there. I spent several hours out there on
19 the roadway. So there was no physical evidence in that
20 respect.

21 We did -- the vehicles were either destroyed or
22 salvaged and gone somewhere else. I didn't have the
23 opportunity to look at the vehicles other than photographs
24 of the damage. I think we had about a half dozen
25 photographs of each vehicle and were able -- somewhat able

1 to look at damage patterns and how the two vehicles come
2 together. But I didn't have enough physical evidence out
3 there to conduct a comprehensive accident reconstruction.

4 And I don't think I claim that there wasn't
5 sufficient evidence out there for anyone to really conduct
6 a comprehensive accident reconstruction unless there is
7 additional information that come forwards. There are no
8 photographs we received, you know, from the investigating
9 officer out there. So it just wasn't enough information
10 to do a comprehensive investigation.

11 Q. Now, Mr. Roberts, did you prepare a presentation for
12 us to assist us with your testimony here today?

13 A. Yes, I did.

14 MR. SLIGH: Your Honor, if it pleases the Court, I
15 think, logistically, Mr. Roberts can come down and then
16 probably address the jury. I apologize for the
17 positioning here and being on top of the jury, but that's
18 kind of what we've got.

19 THE COURT: No problem. Watch your step.

20 MR. SLIGH: This may take one second to get the
21 television warmed up.

22 BY MR. SLIGH:

23 Q. Okay. All right. Did you go out to the accident
24 scene?

25 A. I did last May. I was out at the accident site for

1 several hours.

2 Q. All right. What did you see while you were out
3 there?

4 A. Well, just to give you an overview of the things this
5 is -- so Highway -- I guess investigating the accident we
6 actually used --

7 Q. Mr. Roberts, please keep your voice up. Step back.

8 A. I'm sorry. We use fairly sophisticated technology to
9 document the roadway these days, and so this is a
10 photograph taken with the drone that I had out there. And
11 just -- we also have lazer scanners that we do three
12 dimensional maps of the roadway. But this is -- just
13 gives you an overview of the accident site.

14 This is showing the curve where the accident
15 happened. Ms. Frederick's P.T. Cruiser was traveling from
16 the bottom of the screen going this direction. And
17 Mr. McDowell's pick up truck was coming the opposite
18 direction in here. So I mention that we use -- well, I
19 mentioned that we use drone technology, but that's not the
20 only thing we do.

21 I just took a video and a windshield mounted camera
22 just to familiarize the jury with the accident site
23 itself. I've got another short video showing what each --
24 what was available and seen by each driver. And so this
25 is the first one showing the direction that Ms. Frederick

1 was traveling towards the accident site. And you will see
2 that it starts out on a straight stretch of roadway.
3 Pause it here momentarily.

4 So we can see the curve coming up. It's a long
5 stretch of roadway initially. I paused it right here.
6 You can see there is a couple of orange cones. That's
7 where Mr. McDowell had stated that the collision occurred.
8 There wasn't any physical evidence for me to confirm
9 that's where the accident took place. So I couldn't tell
10 where in the curve it is, but you can see there is
11 restricted visibility over there.

12 The tree lines over there restrict a driver's
13 visibility. So one of the things I wanted to determine
14 was how far you can see, and that was one of the reasons
15 for going out there and using a drone. So this is -- let
16 me just continue with the video. You can see it's a
17 fairly -- it's not a drastic curve, and we're ready out of
18 the curve so the collision already occurred by this point.

19 And I'll show you what. This is view that
20 Mr. McDowell would have had. So I will play this for you.
21 Initially, he was going to come around the curve to the
22 right, and you will see the curve to the left. Is -- the
23 collision occurred in this curve to the left coming right
24 up in here somewhere in here.

25 Again, there is some restricted visibility. Turns

1 out worse case a driver can see at least 700 feet. Worse
2 case no matter where the collision occurs within that
3 curve. A driver can see at least 700 feet, and there is
4 other portions of the curve where a driver can see much
5 further than that. So that's a video I have.

6 Q. All right. Can you tell us what about documenting
7 the site when you were out there?

8 A. Well, documentation of the site, you can see this is
9 one of the -- another one of the drone photographs that I
10 took out here. This is the bed of my truck, and I'm
11 standing right here controlling the drone over. But you
12 can see it takes a very -- it's takes a very detailed
13 picture, very high mega pixel picture. But the camera is
14 directed straight down, okay.

15 And what we do is go up and down that roadway and
16 actually after we preprogram that drone to go up and down
17 that roadway, back and forth, and literally it takes about
18 600 to 700 photos with the drone in about a 20 or 30
19 minute period flying.

20 What we're able to do now, since we have all of these
21 photographs, and in a normal photograph you get
22 distortion. And we can take these 600 photographs that we
23 took with the drone and put them in a pretty sophisticated
24 piece of computer software and it stitches together. It
25 makes what we call a mosaic and removes the distortions

1 because it has so many photographs to use. And this is
2 what we call the mosaic imagine of this.

3 And we can actually take the measurements from there.
4 We can look at how this tree line would have affected the
5 distance a driver could see. How many restriction it has.
6 One of the things I did. You notice the photographs were
7 pointed straight down. One of the problems with that is
8 so I can't get a true three dimensional image using that,
9 those photographs, cause I had that camera pointed
10 straight down.

11 And so that prevented me from looking at slopes and
12 elevations. But I didn't need to do that to evaluate. I
13 basically just needed to look straight down. That's what,
14 basically, I did. And in addition to that, in addition to
15 taking videos and the drone, we had a 3D laser scanner out
16 there. It was more of a verification that is actor, the
17 drone compared to the lazer imagines with the mosaic in
18 there. Just to confirm the accuracy of the roadway.

19 And then I also walked up and down looking for
20 physical evidence remaining from the accident. Even
21 though it was two years after the accident in serious
22 collisions often times you would have what we call gouge
23 marks where a portion of the vehicle digs into the roadway
24 and digs up chunks of asphalt in the roadway. So I was
25 looking for that. And I didn't find anything that I could

1 find related to the accident. So it's limited. I spoke
2 to you earlier about doing a limited reconstruction or not
3 being able to do a comprehensive reconstruction. That's
4 one of the reasons cause I couldn't find precisely where
5 along the curve that accident, the collision, even
6 occurred.

7 Q. Mr. Roberts, you were not here yesterday for
8 Mr. Richardson's testimony, but you referenced creating a
9 3D model utilizing the aerial photos that you took. Is it
10 possible to accurately determine slopes from using the
11 data from your aerial photos that you took on that day?

12 A. Not on the method I did because that camera was
13 pointed straight down. There is methodology that we can
14 use to create a 3D image if we were to put that camera
15 on an angle and that's where you run the drone back and
16 forth. But if we were able to do it, put the drone down
17 at a lower altitude angle of the camera, we can get enough
18 photographs to actually create a 3D image. I did not do
19 that that day. So I can't tell you elevation changes
20 especially down to the level where you are trying to look
21 at slopes or roadways is what I did.

22 Q. All right. Did you look at any damage to the
23 vehicles? Were you able to do that?

24 A. I did. Again, the vehicles were no longer available
25 at the time I got brought into this case, but we did have

1 some photographs of the damage. And this is Ms.
2 Frederick's P.T. Cruiser that she was driving. You can
3 see the damage is primarily to the driver's side front
4 corner area. You can see the passenger side don't have
5 any direct collision damage. Although there is what we
6 would call induced damages. Body gets pull over towards
7 the driver's side.

8 So I did go through the photographs of both vehicles.
9 The this is the Dodge Dakota that Mr. McDowell was
10 driving. Again, you can see the damage is to the
11 passenger side front in this case. There is some more.
12 You can see that the entire wheel assembly got torn off
13 apparently during the collision. But that's what I looked
14 at as far as damage on the vehicles.

15 And one of the reasons we do that is it allows us to
16 do what we call damage matching and determine the
17 orientation. How these vehicles came together in the
18 accident when they initially collided with each other.

19 Q. And so, ultimately, you use the damage to the
20 vehicles for what purpose?

21 A. To basically determine the orientation, how the
22 vehicles were with respect to each other at that point of
23 impact. And how we do that is this is actually computer
24 modeled. This is a scale model of a P.T. Cruiser looking
25 directly from above and the Dodge Dakota. These are all

1 scaled properly and, obviously, they're not damaged right
2 here, but what I'm trying to show is that based on the
3 damage patterns we see that this is the -- about how the
4 two vehicles would have come together to create these
5 types of damages on the two vehicles.

6 Q. All right. Now, that you know the orientation of the
7 vehicles does that help you determine where in the roadway
8 the accident occurred?

9 A. It doesn't help us determine where precisely were in
10 the roadway it occurred. For me to take these and place
11 it precisely in the roadway where in this curve the
12 collision occurred I need to find some physical evidence
13 in terms of tire marks or gouge marks or something in the
14 roadway which I did not have. And for that I couldn't do
15 a complete reconstruction of this.

16 You know, based on the testimony of both
17 Miss Frederick and Mr. McDowell I think they both stated
18 that it did occur within her travel lane. So I just don't
19 know where along this curve it occurs. So I placed it in
20 multiple locations right there. You can see I put it in
21 three different locations. I mean, I don't know precisely
22 along this curve where it occurred.

23 I believe it that, you know, this is representative
24 of where in the lane of travel it occurred, but that is
25 based on both their testimonies saying -- I think they

1 were both in agreement that the pick up truck went over
2 the center line, and that would be basically place her
3 towards the center of the lane of travel when the
4 collision occurred. But that's the only basis I have for
5 placing those vehicles in the accident scene.

6 The other thing that I've done is I've scaled these,
7 made them the appropriate size of the roadway itself. So
8 the vehicles are to scale they fit on the roadway how they
9 were in proportion, proper proportion, to the roadway
10 itself.

11 Q. After your analysis did you form an opinion about the
12 minimum line of sight at that location on the roadway?

13 A. I did. What we looked at -- again, I didn't know
14 where in the curve the collision occurred, but looking at
15 this tree line you can actually take a measurement right
16 off this. And what I did was look at worse case scenario.
17 What was the minimum distant the drivers would have been
18 able to see each other.

19 And what it turns out is it was 700 feet. So looking
20 down this roadway this shows a photograph of the approach
21 what -- the view Ms. Frederick would have approaching this
22 curve. Worse case, this tree line, you can still see at
23 least 700 feet down the roadway.

24 Q. Okay. Now, were you able to tell us how long it
25 would take her to brake in order to stop her vehicle?

1 A. Right. We look at distance when it comes to
2 breaking. So it is basically we have formulas that
3 looking at from the friction that tires can make on a wet
4 roadway. There has been testing on that, published data
5 on that. It's not a very -- it's not specific. So we
6 come up with a range. I can actually create a table
7 depending on how slick the roadway was.

8 Generally, a wet roadway is going to give us
9 somewhere between a what we call -- between a friction
10 rate of .45 to .65. And based on that and based on her
11 initial speed, I think she was 40, she was going around
12 40, I looked at -- I did it in five mile per hour
13 increments starting at 40 going all the way up to 55 miles
14 per hours and did the calculations.

15 If she's going 40 and -- I mean 40 miles per hour
16 initially worse case on the slippery, slickest roadway out
17 there she is going to be able to bring it to a stop in a
18 little over 118 feet. That's how long it would take.
19 Once a driver gets on the brake hard, as you would
20 under -- if you had a hazard out there where you have to
21 get on the brake hard for an emergency situation, she
22 would be able. What that P.T. Cruiser should be able to
23 stop in one 100 -- a little over a 118 feet if the initial
24 speed is 40 miles per hour.

25 And, again, okay, she's going 55. It takes 224 feet

1 to stop, maximum. So that's what I looked at, evaluate.

2 Q. Is there another component to the distance it takes
3 for somebody to get a vehicle to stop?

4 A. There is. And that gets into the human factor side.
5 We call it driver's perception and response time. There
6 is a time -- period of time where a hazard becomes
7 visible, first becomes visible. Then there is a decision
8 process. It's the time from when the hazard first becomes
9 visible the driver has to decide what -- how can I avoid
10 that accident. Do I swerve. Do I hit my brakes. Do I do
11 nothing to avoid it.

12 And then the time ends when the driver physically
13 takes his foot off the brakes. It's a braking situation.
14 They take their foot from the accelerator peddle, hits the
15 brake and the vehicles just starts to slow down. There is
16 a little bit of lag time from the time you press the
17 brakes until the vehicle actually reacts and starts to
18 decelerate. So we call that perception response time.

19 So in addition to that braking was distance that was
20 talked about earlier we do have a distance travelled when
21 a person first sees the hazard until they start braking
22 right here. That vehicle is still going forward at 40 to
23 50 miles per hour. Somewhere in that timeframe, so it
24 covers a certain distance.

25 So I did an analysis on -- for this type of

1 situation. Most drivers where published data shows us is
2 that most drivers will be able to respond. In other
3 words, perception response time. Most drivers are going
4 to be able to respond to this type of hazard in 1.6
5 seconds. That's how long it takes.

6 The next thing you have to look at is how far does
7 that vehicle travel in that 1.6 seconds.

8 Q. All right.

9 A. We have to figure out what this distance is and how
10 far it's travelling. And at 40 miles per hour the vehicle
11 travelling 9.4 feet in 1.6 seconds. So we have to add
12 that to the additional braking distance. So initially we
13 said that the braking distant was 118.5. I'll just round
14 that up to 119 feet right there.

15 And we have to add these two distances right here,
16 and we get 213 feet. So if there was a hazard in
17 Ms. Frederick's lane of travel and the visibility out
18 there is 700 feet it would take here 213 feet to bring
19 that vehicle to a stop if we included both braking time
20 and perception response time. Okay.

21 And I also did an analysis, and I don't know if she
22 was travelling 20 miles per hour. I didn't have enough
23 physical evidence to do that calculation. So, I said
24 worse case let's say she was going the speed limit at 55
25 miles per hour out there. Distance travelled during that

1 period if she's going 55 miles per hour is 129 feet. Her
2 braking distance is going to be longer than if she's going
3 40 miles per hour. It take longer to stop at the higher
4 speeds. So worse case it would be 240 feet or a total
5 distance of 353 feet.

6 Q. All right. Mr. Roberts, would we just recap your
7 opinion really quick for the jury?

8 A. Sure. We come up with the sight distance. Available
9 sight distance was a minimum of 700 feet due to the
10 curvature of the roadway and the street. So you have --
11 both drivers would have been able to see 700 feet ahead at
12 a minimum. Other vehicles, obstacles, those sorts of
13 things and so forth.

14 At 40 miles per hour the braking distance is less
15 than 120 feet. If you're going 55 miles per hour the
16 braking distance is 224 feet maximum. And then, finally,
17 if we add in there P.R.T. the total distance is 213 feet
18 to stop that vehicle. And included here is the P.R.T. if
19 she's going 40 miles per hour. And if she's going 55 it
20 would be 313 feet. And that basically summarizes the
21 opinions that I got in this case.

22 Q. Now, are the opinions that you've given today, are
23 those opinions being given to a reasonable degree of
24 engineering certainty?

25 A. They are.

1 Q. And would the curvature of the road explain why Ms.
2 Frederick could not see Mr. McDowell's vehicle until it
3 got three car lengths from her?

4 A. No. I mean a three car lengths is roughly -- a car
5 length on average is 15 to 16 feet in length. So you're
6 looking at 45 to 50 feet with three car lengths. So,
7 realistically, she should have been able to see any
8 approaching vehicles starting at about 700 hundred feet.
9 Not 45 to 50 feet away.

10 Q. And one last question, Mr. Roberts. Are you being
11 compensated for your time here today and for your
12 services?

13 A. Absolutely.

14 Q. I believe that's all I have. Please answer any
15 questions opposing counsel might have.

16 CROSS-EXAMINATION

17 BY MR. POULIN:

18 Q. Mr. Roberts, good morning?

19 A. Good morning.

20 Q. We had a chance to meet a while ago and I came to
21 your office and took your deposition in this case. So
22 it's good to see you again. I gather that you've
23 testified in quite a few cases? Either at trial or
24 through deposition?

25 A. Through the years, but I mean that we don't testify

1 that often. To tell you the truth I've been doing this
2 for 17 years, and I've probably testified in either
3 deposition or trial 60 or 70 times. We do it three or
4 four times a year. So if I sound nervous I probably am up
5 here.

6 Q. Okay. But you've been through quite a few
7 cross-examinations in your days?

8 A. Yes, sir.

9 Q. Okay. Well, there is no reason to be nervous. I
10 think this is probably going to be one of the easiest
11 cross-examinations that you've ever been through. If I
12 understand your testimony correctly I think that we all
13 agreed on just about every important point in this case.
14 The mean the line of sight, that's just a measurement,
15 right?

16 A. That's all it is.

17 Q. Anybody can get out there with a tape measure and
18 measure how far the line of sight is?

19 A. Correct.

20 Q. I've got no reason to disagree with you on that.
21 Reaction time, there is a little bit of science that goes
22 into that. The studies and everything that's done, been
23 done in the past. But that's pretty generally accepted in
24 the scientific community, right?

25 A. It is. I mean it's depending on the situation. It

1 varies depending on the type of situation. I don't think
2 the numbers that I've used are out of any one's normal
3 range.

4 Q. So I don't think so either, and that's why we haven't
5 brought in anyone to disagree with you. Same thing with
6 braking distance. Braking distance, and we can go, find a
7 wet road, get in a P.T. Cruiser, set it at 40 miles per
8 hour, slam on the brakes and see how long it takes to
9 stop, correct?

10 A. Correct.

11 Q. So that's pretty well established?

12 A. I agree.

13 Q. Nobody is arguing with anybody on that point. Now, I
14 did a little bit of a math calculation in my head to help
15 me figure out some of this stuff. I came up with I think
16 at 40 miles per hour the vehicle would travel about 58 and
17 a half feet per second or so? Does that sound about
18 correct to you on that?

19 A. That's close. I don't disagree with that.

20 Q. I actually plugged it into Google. It says 58.667
21 feet per second at 40 miles per hour.

22 A. Okay.

23 Q. Close enough that we can agree on that?

24 A. Yes, sir.

25 Q. Okay. So we agree on all of that. I guess the key

1 question in this case, however, is how close were Daisy
2 and Mr. McDowell when his vehicle entered her lane, and
3 that's the question we don't know the answer to, correct?

4 A. That is correct. I mean the physical evidence out
5 there doesn't support -- the one physical evidence to make
6 that determination out there, and it wasn't documented.

7 Q. So in other words no matter how long it takes
8 somebody to perceive a threat, another vehicle in the
9 roadway, hit the brakes and stop, you wouldn't even start
10 running that analysis in your head until the threat came
11 into existence, right?

12 A. Right. And the threat typically comes into existence
13 and so we start that driver's perception response time in
14 a situation look this depending on, you know, which driver
15 is correct.

16 If it says as Mr. McDowell says then he was would
17 have been sitting in that lane of travel the entire time,
18 the entire 700 feet. If it says as Ms. Frederick states
19 that vehicle would have been coming down the center line
20 and as soon as that vehicle starts going over the center
21 line that's the point where you've got a hazard, a visible
22 hazard, and that's when you start the P.R.T. clock.

23 Q. And if you start that clock the vehicle comes over
24 the center line, and if the two cars are close enough then
25 there is no way to stop in time; is that right?

1 A. Absolutely. There is situations on a head on
2 collision where someone comes over the center line. There
3 will not be sufficient time for a driver to react and get
4 on the brakes and avoid the accident.

5 Q. Okay. Based on the physical evidence that was
6 available for you to review in this case, just the
7 physical evidence, you're not able to say with any degree
8 of scientific certainty exactly how close these cars were
9 when Mr. McDowell crossed the center line; is that
10 correct?

11 A. That is correct.

12 Q. And we do have different testimony from each party,
13 but you're not here to offer an opinion about which
14 version of events the jury should believe; is that
15 correct?

16 A. No, I believe that's a function of the jury.

17 Q. Okay. Again, Ms. Frederick's ability to have done
18 anything to avoid this wreck would depend entirely on how
19 close the two vehicles were when Mr. McDowell entered her
20 lane, correct?

21 A. Correct. I means if it's as Mr. McDowell states that
22 he over there stopped it should have been an avoidable
23 situation. If it's as Miss Frederick states that the
24 vehicle doesn't come over until immediately before it's
25 unavoidable. It's not avoidable.

1 Q. Okay. Some other things that I think we all agreed
2 on even Mr. McDowell. We all agree that Mr. McDowell lost
3 control of his vehicle at some point, correct?

4 A. I agree.

5 Q. Okay. And I think we all agree, at least Mr.
6 McDowell and Ms. Frederick agree. We don't disagree that
7 the wreck; that the impact happened in Ms. Frederick's
8 lane, correct?

9 A. Right. And I base that -- I mean my only basis was
10 the testimony of both the drivers.

11 Q. Okay. What -- explain to us what it means to
12 hydroplane. What happens when a car hydroplanes?

13 A. Hydroplane, basically, the tire roadway interaction,
14 you're getting less friction. You're basically riding on
15 a film of water. The tires are riding on a film of water.
16 And that's based on -- there are three main factors that
17 -- whether a vehicle is going to hydroplane is:

18 Number One, the initial speed of the vehicle.

19 Number Two, how heavy it's raining or whether there
20 is pooling of water on the roadway.

21 And, Number Three, the tread depth.

22 Those are the three factors that you need to know to
23 evaluate whether a vehicle is hydroplaning.

24 Q. Okay. And I guess the faster a vehicle is going and
25 the deeper or the more amount of water on the road, the

1 more likely it is to have a hydroplane event?

2 A. Right. Along with tread depth of the tires those,
3 less the tread depth, the more likelihood you have of a
4 hydroplaning situation.

5 Q. And then I guess, the less amount of water on the
6 road then the slower you're going the less likely you are
7 to happen?

8 A. I agree.

9 Q. Now, I want to turn to Mr. McDowell's story for a
10 minute. Mr. McDowell's story, as I understand it, is he's
11 going down the road and he loses control for one reason or
12 another and kind of spins out counterclockwise, almost 90
13 degrees he said, and he comes to a stop in the road and
14 sits there for 15 or 20 seconds. Is that your
15 understanding of what his story is?

16 A. From reading his deposition testimony that's my
17 understanding.

18 Q. He testified that he was going about 50 miles per
19 hour?

20 A. Yes.

21 Q. Now, if that story is true, based on all your
22 experience and your investigations of multiple wrecks and
23 everything like that, if that story is true that he was
24 able to spin out at 50 miles per hour and come to a stop
25 in the road without ever leaving the roadway he got pretty

1 lucky. Would you agree with me on that?

2 A. I don't know if it's luck. I mean it's entirely
3 possible that that occurred.

4 Q. Sure, it's possible, but it's more likely that
5 somebody would go off the road if they lost control at 50
6 miles per hour. Would you agree with that?

7 A. I don't necessarily agree with that. No.

8 Q. Okay. On a narrow road like this?

9 A. Vehicles basically going to continue going. Even
10 though it's rotating it's still going to be going in the
11 initial direction. So what you have, you have a curve
12 that curved to the left. The vehicle is turning to the
13 left. So it wants to go to the outside -- well, the
14 turning -- rotating -- the vehicle wants to take it inside
15 of the curve, but the initial direction wants it to take
16 to the outside of the curve. So they're going to cancel
17 each other out.

18 So I think that there very well may be a likelihood
19 the vehicle comes to a stop in the roadway in that
20 particular -- in this particular situation.

21 Q. Okay.

22 A. I doesn't surprise me that it would come to a stop in
23 the roadway.

24 Q. I mean have you ever just Googled, 'car hydroplane
25 videos'? You ever watch cars just hydroplane?

1 A. I've seen them, yes.

2 Q. Okay.

3 A. They're generally going to go straight in their
4 original direction of travel. You know, as if the vehicle
5 is rotating as it regains some traction it's going to go
6 towards the inside of the curve. The original direction
7 of travel is going to take it back towards the outside,
8 and they would tend to cancel each other out. And,
9 therefore, the possibility that the vehicle remains in the
10 roadway.

11 Q. Okay. Is there a way to turn your video back on?
12 Can we get your screen turned back on?

13 A. Which one would you like?

14 Q. Mr. McDowell's viewpoint, the video. Maybe we can
15 just watch the video through from start to finish.

16 (WHEREUPON, video played for the jury.)

17 BY MR. POULIN:

18 Q. Okay, sir, were you driving about 50 miles per hour
19 in that video?

20 A. Fifty-four.

21 Q. And so it's your testimony that if a driver were to
22 lose control and spin out at that speed on that narrow
23 road that it's more likely than not that they would be
24 able to come to a stop right in the middle of the road
25 without running off?

1 A. I didn't say more likely than not. I said it was
2 possible that he remained in the roadway. If we go back
3 there, back a little bit, and I can try to explain the
4 dynamics of this.

5 Q. I think you answered my question. So you cannot say
6 it's more likely than not?

7 A. I can't. You're correct. All all I can say is it's
8 possible.

9 Q. I think we agree on that. So we've found another
10 thing we agree on?

11 A. All right.

12 Q. All right. And based on the evidence that you were
13 able to review you have no scientific opinion about the
14 actual speed Ms. Frederick was going prior to impact,
15 correct?

16 A. Right. I don't have any means -- didn't have any
17 means of calculating that speed based on the amount of
18 evidence that we had.

19 Q. In other words you have no scientific or physical
20 evidence to be able to say that perhaps Ms. Frederick was
21 speeding or anything like that?

22 A. That is correct. I can't say that she was speeding
23 out there that day.

24 Q. Okay. And without knowing how close the vehicles
25 were to each other when Mr. McDowell lost control you have

1 no scientific opinion about whether or not Ms. Frederick
2 could have done anything to avoid the collision; is that
3 correct?

4 A. Correct. I don't know how close they were together,
5 although, I mean I don't believe that the vehicle first
6 crosses the center line three to four seconds -- I mean
7 three to four car lengths beforehand because the reason
8 behind that is if Mr. McDowell is traveling 52 -- I mean
9 50 miles per hour that vehicle is travelling roughly 80
10 feet per second.

11 So that vehicle can't go from initially crossing the
12 center line to the point of impact the damage we saw over
13 three to four car length period. It's going to take
14 longer than that.

15 Q. So, but there ---

16 A. So a driver in her position will have some
17 opportunity to see it and likely some opportunity at least
18 to start an avoidance. Not necessarily avoid it. There
19 is absolutely a lot of situations where a driver can't
20 avoid the collision, but at least she would have had the
21 opportunity to see it and potentially start to slow down.

22 Q. But you have no idea how much of an opportunity she
23 would have had without knowing how close those vehicles
24 were when he entered her lane?

25 A. Without having any additional physical evidence

1 calculating speeds I don't think anyone can determine
2 that.

3 Q. All right, sir. I've got a couple more questions for
4 you. I'm going to show you a picture of what's been
5 marked previously as Plaintiff's Exhibit Number 11. All
6 right. That's actually if you ignore the yellow or the
7 green and the red drawings that's actually sort of a
8 picture that you put together, right, with the cars in the
9 roadway?

10 A. It looks like a close up of right at scale drawing
11 that I created.

12 Q. Okay. And Mr. McDowell's vehicle would have been
13 going in the direction of the red arrow?

14 A. Correct.

15 Q. Prior to the wreck?

16 A. Correct.

17 Q. And Ms. Frederick's P.T. Cruiser would have been
18 going in the direction of the green arrow prior to the
19 wreck?

20 A. That's correct.

21 Q. Okay. And Mr. McDowell's testimony, if we are to
22 believe that, is that he was either stopped in the roadway
23 or in reverse, correct?

24 A. Correct.

25 Q. Okay. If that was true would it be possible,

1 physically possible, for his vehicles to have ended up
2 where that red square is on the picture?

3 A. No.

4 Q. Okay. That's all the questions that I have for you.
5 Thank you.

6 MR. SLIGH: Nothing further, Your Honor.

7 THE COURT: You may step down.

8 THE WITNESS: Thank you, Your Honor.

9 COLLOQUY

10 THE COURT: Ladies and gentlemen of the jury, y'all
11 step back to your room.

12 (WHEREUPON, the jury panel was excused from the
13 courtroom at 11:30 a.m.)

14 THE COURT: All right, anything for the record?

15 MR. SLIGH: No, Your Honor. That's our last witness.
16 I'll rest when the jury comes back out.

17 MR. HODGE: Your Honor, at this time we just
18 respectfully renew our motion for a directed verdict.

19 THE COURT: Heard nothing to change my mind, so same
20 ruling.

21 MR. SLIGH: And, Your Honor, I'm going to also renew
22 at this time the same motion for directed verdict on
23 comparative contributory negligence and also as it relates
24 to damages. The same ones I made before.

25 THE COURT: Heard nothing to change my mind on your

1 loss of enjoyment of life, all that type of stuff.

2 Let's just talk about medical bills first. This is
3 an exhibit that's going to go back with you. I think it's
4 probably Exhibit Number 10. I can't remember. You're
5 going to know which one it is. It's the thickest one with
6 the medical bills in it. All right. And here is an
7 interesting thing about this case. Daisy's medical bills
8 were R268,809.14. But she's -- I'm not asking you to
9 reimburse her for that amount cause it wouldn't be right
10 for us to stand up here and ask you for that amount cause
11 she had health insurance.

12 Health insurance paid some of those bills. We're not
13 going to ask y'all to -- when I tell y'all this is a fix.
14 All this money goes to somebody else I'm not going to ask
15 you to sit here and ask you to pay money that's not going
16 to somebody else. That wouldn't be right.

17 What actually happened is she had health insurance,
18 and I'm sure that most of you know how health insurance
19 works. When health insurance pays the bill they don't
20 usually pay the whole bill. They pay a small portion of
21 it, but they adjust the rest of it away and that just goes
22 away and nobody ends up paying it. Okay.

23 So I'm going to walk you through this very briefly.
24 I'm going to show you what's going on here. The problem
25 in this case is that her health insurance is in South

1 Carolina, and most of her treatment was in North Carolina.
2 That's where the wreck happened. So a lot of her bills,
3 all all of the bills are in the exhibit. We actually
4 put -- it's up here somewhere. Here we go. All of the
5 bills are actually back there by provider. You will be
6 able to see what the insurance paid and what the adjuster
7 didn't pay if you care to look through it.

8 We summarized it for you on the second page to try to
9 make it easier for you. But a lot of her bills didn't
10 even get paid at all. Okay. \$163,997.07. She still owes
11 for two doctors according to these bills in this exhibit.
12 So that still has to be paid. Now, insurance did pay some
13 of this. So, basically, they took -- you know, they took
14 \$118,000 worth of bills or something and they paid \$79,012
15 on it and they adjusted the rest of it off.

16 So the adjustment is gone. Goes away. Nobody has to
17 pay that because that's the benefit of having insurance.
18 But here is a little known fact that many of you may not
19 know. When somebody else hits you and is responsible for
20 causing your injuries and insurance, health insurance,
21 pays your bill and you're able to recover from that other
22 person you have to pay health insurance back. You don't
23 have to pay them back for the whole amount. The part they
24 adjusted you will get credit for, but the part that has to
25 be paid has to be paid back.

1 If you were to get sick or something health insurance
2 pays your bill and you don't have to pay them back.
3 That's why you have health insurance. But there are what
4 we call secondary payor which means that somebody else is
5 responsible. They have got to pay first before health
6 insurance. She's got \$163,997.07 in bills that she still
7 owes to the hospital, and she's got \$7,912.80 that she is
8 going to have to pay back to her insurance. The \$100,000
9 that's been adjusted, that's gone. Don't have to worry
10 about that, and you don't have to allow money in your
11 verdict for that.

12 So if we did the math right for you medical bills in
13 this case that she either still owes to the hospital or is
14 going to have to pay back to insurance is \$171,909.87.
15 That's what it's going to take to fix that in your
16 verdict. All that money goes to somebody else. None of
17 that goes to Daisy.

18 So the next thing we have to talk about is lost
19 wages, okay. We know that she hasn't been able to work
20 in -- you know, we know that she was wheelchair bound at
21 least for a year. Had first surgery as she was getting
22 back up on her feet she. She had the first two. Got back
23 on her feet and she had to go back and have another one.
24 We know that she had just started a new job she loved.
25 She was making \$8.25 an hour. Working 45 hours a week.

1 Working -- I did the math for you. It's been 144 weeks
2 from today since the wreck in April 29th 2015. You don't
3 have to trust me. Most of you have a calculator or ask
4 for one. They will bring it in for you. I think I did
5 the math right. If I was off by a little bit please don't
6 think that I was up here trying to mislead you.

7 But if I did the math right that would come out to be
8 \$53,460. Now, she's still not working at this moment.
9 She's trying. She told us that she's looking for work.
10 She's been applying at various different places. So
11 you're allowed to increase that number a little bit for
12 future lost wages. I don't think it's necessary to give
13 her lost wages for the rest of her life or anything like
14 that cause she's going to find work. She's a strong girl.

15 And you may not even find it necessary to give her
16 any more lost wages than what she's already lost, but
17 that's okay if that's what you do. But that's your
18 starting point. You know, \$53,00 or something like that.
19 You get the numbers. You heard the testimony. That can
20 help with things that can't be helped.

21 Now, we go to the hard part and talk about those
22 other things to make up for the things that can't be
23 fixed, can't be helped. And we heard the testimony in
24 this case. Daisy, you know, from the very get go, airbag
25 comes out. She's dazed, confused. She looks around

1 behind her and sees an empty car seat where her baby
2 usually rides. And she thinks something happened to her
3 little baby. That's how this whole ordeal started for
4 her.

5 And she's stuck in the car scared. The one lady
6 comes to try to help her out. You heard her and her mom.
7 The lady is on the phone talking to her mom trying to tell
8 her mom what's going on. Daisy just wants to see her mom.
9 She's crying, yelling, "Mom, mom, mom." That's how this
10 all started. That's day one. That's hour one, and nobody
11 know at that where that was going to go to. But I think
12 everyone found out pretty quickly.

13 She goes to the hospital that day. Airlifted to the
14 next hospital. They've got breathing tubs in her.
15 They've got blood transfusions in her. She got basically
16 no bone left in either one of her legs. Fractures,
17 shattered. Gets a rod all the way down her leg on the one
18 side. Gets Frankenstein type contraption on the other
19 side that's even only a temporary fix until they can put
20 a -- until they can go in and place some rods and screws
21 in there. In pain the whole time. She can't see her
22 babies the whole time. The word is out that the kids get
23 sick and that sort of thing, so they're not allowed in the
24 hospital room.

25 Three weeks in the hospital. And three weeks, you

1 know, in excruciating pain. That's probably -- you know,
2 that when you're in the hospital you're sort of in that
3 mindset of I'm sick. I'm here. They're making me better.
4 It's a little, maybe, easier to deal with mentally and
5 emotionally. But when you get out of the hospital and go
6 back and try to live your everyday life that's when it
7 really hits you the limitations that you're under.

8 We heard -- I mean I -- everybody has dreams and
9 aspirations and hopes and things that they want to do in
10 life especially younger parents. They're aspirations and
11 dreams revolve around their children. And we all work
12 hard every day to get to where we want it be at. And
13 every day you're either moving forward or backwards on
14 your dreams and on your resolutions. A bunch of you
15 probably made New Year's resolutions and every day you're
16 either moving forward or backwards.

17 A year. An entire year of your soul and your
18 complete ability to move. You're limited to getting
19 yourself out of the wheelchair and putting yourself in
20 bed. And getting up out of bed and putting yourself in
21 the wheelchair. That's a long, long time. That's a long
22 hard road to go. To not be able to play with your kids.
23 To not be able to work. To not be able to accomplish your
24 dreams. She was in pain the whole time, and she's still
25 in pain today. And she's probably going to be in pain for

1 the rest of her life.

2 Her doctor, you know, she's got all kinds of hardware
3 in her leg, so how do we put a number on it. It's hard.
4 There is no right way to do it. I can't tell you how to
5 do it. I can't tell you what I think the number should
6 be. I can just give you some ideas on how to get there,
7 and one of the ways that I always tell jurors that you can
8 try to do is you can try to break it down into smaller
9 increments. It's a lot to wrap your head around.

10 Is you've got all these different types of damages,
11 the pain and the mental anguish and all that. And then
12 you've got -- you know, it's a lot. You can break it down
13 into smaller pieces. One way that you can look at it, and
14 that's why I've tried to go through some of this with Mr.
15 McDowell is because you are trying to figure out, you
16 know, on a day to day basis how bad is the pain and try to
17 put a dollar figure on it.

18 You can't really put a dollar figure on it. So, for
19 example, I asked Mr. McDowell, "If I gave you \$1,000 every
20 day to keep your pain or I could take your pain away would
21 you -- what would you do?" And he said, "I would let the
22 pain go away." In other words, "\$1,000 a day is not
23 enough to compensate me for the pain that I have" is what
24 he said.

25 Now, the flip side of that is let's say in my old

1 ease.

2 (WHEREUPON, the jury panel was excused from the
3 courtroom at 1:22 p.m.)

4 (WHEREUPON, Court was in recess at 1:22 p.m. and
5 reconvenes at two o'clock.)

6 MR. SLIGH: Cameron and I tried to figure out the
7 best way to do this. We's handed you a stack that
8 includes, I guess, both of our requests to charge. And
9 we'll try to go through -- I guess I'll start first and go
10 through the ones that I object to that have been already
11 handed up.

12 THE COURT: Okay.

13 MR. SLIGH: That's on the record and argue and switch
14 to you.

15 MR. HODGE: That will be fine.

16 MR. SLIGH: All right. Your Honor, there is a charge
17 submitted in regard -- well, I'll tell you what. If I can
18 back up. Just for the record I'd like to renew my motion,
19 previously made motions, for directed verdict that I made
20 at the close of the Plaintiff's case.

21 On the same grounds, in regard to no evidence of
22 permanent impairment or permanent injury as well as on the
23 issue of contributory negligence, as a matter of law. I
24 just want to put that on the record, Your Honor.

25 THE COURT: All right. I deny those motions.

1 MR. SLIGH: Thank you, Your Honor.

2 THE COURT: Y'all want to be heard? I didn't think
3 so.

4 MR. POULIN: We respectfully renew our pretrial and
5 posttrial motions. Thank you, Your Honor.

6 MR. SLIGH: Your Honor, on the permanent injury, just
7 for the same reason -- this is 106.14. It's the charge on
8 personal injury includes the mortality table. And the
9 nature of our objection is one same one I made. There is
10 no evidence about the permanent condition. All we have is
11 Dr. Simms saying, "I haven't seen her in nine or ten
12 months.

13 And the best he did was -- I don't know what
14 difficult means, but I would certainly was wrong, and I
15 would imagine she had some difficulties and probably still
16 does in her recovery. There is nothing talking about
17 her -- no opinion testimony about what her future
18 condition is expected to be.

19 So in light of that we think that a on charge
20 permanent injury is inappropriate and that would include
21 the mortality table. So that's the first one, Your Honor.

22 MR. HODGE: Your Honor, real quickly on that issue on
23 permanent injuries. We renew our same arguments that we
24 made and ask you to make the same ruling.

25 MR. SLIGH: By my calculation, Your Honor, I think

1 definition. Did the Plaintiff by his own or her own
2 negligence contribute to his or her injuries. You will
3 answer this issue only if you have answered the first
4 answer on this verdict form.

5 So the issue is actually Question Number Two, and you
6 would, as I said, you would answer this only if you had
7 answered that Question Number Two. On this issue the
8 burden of proof is on the Defendant. This means that the
9 Defendant must prove by the greater weight of the evidence
10 that the Plaintiff was negligent and that such negligence
11 was the proximate cause of the Plaintiff's own injury.

12 The test of what is negligence as I have already
13 defined to you and explained to you is the same for the
14 Plaintiff as for the Defendant. If the Plaintiff's
15 negligence joins with the negligence of the Defendant in
16 proximately causing the Plaintiff's own injury it is call
17 contributory negligence and the Plaintiff cannot recover.

18 Ordinarily, a person has no duty to anticipate
19 negligence on the part of others. In the absence of
20 anything which gives or should give notice to the contrary
21 he or she has a right to assume and to act on the
22 assumption that others will observe the rules of the road
23 and obey the law. However, the right to rely on this
24 assumption is not absolute.

25 And if the circumstances existing at the time are

1 Plaintiff. This means that the Plaintiff must prove by
2 the greater weight of the evidence the amount of actual
3 damages proximately cause by the negligence of the
4 Defendant.

5 Actual damages are the fair compensation to be
6 awarded to a person or any past, present or future injury
7 proximately caused by the negligence of another. In
8 determining the amount if any you will award the Plaintiff
9 you will consider the evidence you have heard as to each
10 of the following types of damages: I am in no way
11 insinuating or suggesting to you what of these may be
12 present or what are not present. You have to make a
13 decision based on the evidence that was presented to you.
14 Let me be clear about that.

15 Medical expenses, loss of earnings, pain and
16 suffering, scars or disfigurement, partial lost or use of
17 part of the body, permanent injury. The total of all
18 damages are to be awarded in one lump sum. I'm now going
19 to explain to you the law of damages as it relates to
20 these medical expenses.

21 Medical expenses include all hospital, doctor, drug,
22 bills. Let me go over that again. Medical expenses,
23 include all hospital, doctor, drug bills incurred by the
24 Plaintiff as a proximate result of negligence of the
25 Defendant.

1 Loss of earning. Damages for personal injury also
2 include fair compensation for the past, present, and
3 future lost of time from employment, loss from an
4 inability to perform ordinary labor or the reduced
5 capacity to earn money experienced by the Plaintiff as a
6 proximate result of the negligence of the Defendant.

7 In determining this amount you should consider the
8 evidence as to the Plaintiff's age and occupation, the
9 nature and extent of the Plaintiff's employment, the value
10 of the Plaintiff's services, the amount of the Plaintiff's
11 income at the time of his or her injury from salary, wages
12 or other compensation.

13 The affect of Plaintiff's disability or disfigurement
14 on his or her earning capacity, the Plaintiff's loss of
15 profits from his or her business or profession, the loss
16 of capacity to earn money. The fact that a person --
17 strike that. That is not applicable.

18 Pain and suffering. Damages for personal injury also
19 include fair compensation for the actual past, present,
20 future physical pain and mental suffering experienced by
21 the Plaintiff as a proximate result of the negligence of
22 the Defendant. There is no fixed formula for placing a
23 value on physical pain and mental suffering. You will
24 determine what is fair compensation by applying logic and
25 common sense to the evidence.

1 I charge you, now, that the age of the Plaintiff is
2 23 years of age. At this particular point in time the
3 life expectancy as established by this statute is 54.1
4 years. As to personal injury damages, future worth and
5 present values any amount you allow for future damages for
6 medical expenses, loss of earnings, pain and suffering,
7 scarring and disfigurement, loss of use of part of the
8 body, permanent injury, must be reduced to its present day
9 value, present value, because a smaller sum received now
10 is equal to a larger sum received in the future.

11 All right. Counsel, I'm going to need y'all to
12 approach on one issue before I complete this.

13 (WHEREUPON, a bench conference was held off the
14 record in the presence of the jury, but out of the
15 hearing of the jury.)

16 THE COURT: All right. I'm going to give a more
17 complete charge on the damages issue. Once, again, I
18 insinuate and do not suggest to you in any way what may be
19 present in the evidence here. That is your duty to find
20 the facts and apply these charges as you should find as
21 the jury.

22 All right. Make sure I'm clear, now. Go back over
23 this verdict form. It's entitled, 'Verdict Form' or
24 'Verdict, Special Interrogatory'. One, "Do you find that
25 the Defendant, Daniel Lee McDowell, was negligent in that

1 such negligence proximately caused damages to Plaintiff,
2 Daisy Frederick." Possible responses are yes. If you
3 answer yes, you go to Question Two. If your answer no
4 then you're stop and deliberate not further.

5 Two, "Do you find that the Plaintiff, Daisy
6 Frederick, by her own negligence contributed to her injury
7 or damage." Two possible answers there yes. And if you
8 answer yes you stop and deliberate no further. If you
9 answer no then you go to Question Three.

10 Question Three, "Please state the total amount of
11 damages if any sustained by the Plaintiff." And there is
12 a blank space there.

13 Mr. Foreman, it will be your duty to sign, once the
14 verdict is reached. It will be your duty to sign where it
15 says, 'foreperson'. We didn't put the date on here, but
16 you would need to date it outside your signature. When
17 you have completed your deliberations and questionnaire
18 you will notify the bailiff. We will receive the verdict
19 in Court.

20 Okay. Please do not deliberate this case until we
21 send the exhibits and the verdict form back to you. Okay.
22 Give me just a second. All right. If y'all will step
23 back to your room and relax a few minutes. Let me check
24 in with counsel, attorneys, respective counsel, on these
25 matters. And after I do that we'll check off the

1 exhibits. Make sure everything is present, and we will
2 send the exhibits and the verdict form back to you. So
3 please do not deliberate until we send the exhibits and
4 this form back to the jury room.

5 Y'all may step back.

6 (WHEREUPON, the jury panel was excused from the
7 courtroom at 3:12 p.m.)

8 THE COURT: All right. Gentlemen, I hope I covered
9 everything that you handed up. Anything you want to renew
10 or not that you hadn't noted or exceptions or additions?

11 MR. POULIN: Your Honor, this is just to the
12 exceptions we already raised and that type of thing. Of
13 course, would renew. I may have missed this, but I don't
14 think you heard it either, and maybe in all this shuffling
15 you told the jury that the verdict had to be unanimous.

16 MR. SLIGH: I have the same thought, Your Honor.

17 THE COURT: You're right. I didn't say that.

18 MR. POULIN: So that would be the only addition.

19 MR. SLIGH: I didn't hear it either. I was looking
20 for what you read. It may have been missed. But, Your
21 Honor ---

22 THE COURT: You are right.

23 MR. SLIGH: --- just to renew the motions that I
24 previously made in regards to permanent injury with
25 respect to the argument and my directed verdict motion and

1 my motion in our charge conference; that would be the
2 mortality tables. The charge of that as well as the
3 charge about permanent injury and permanent pain and
4 suffering.

5 In addition, the loss of use of part of the body.
6 There is the charge extent of past, present and future
7 disability. There is no evidence for the jury to
8 reasonably make a determination on that. My opposition is
9 you improperly charged the jury on that. Thank you, Your
10 Honor.

11 THE COURT: So noted. But I took the extra step
12 twice, at least twice. I told them that they have to
13 determine if any of those factors are there. All right.
14 Let's bring them back in here. Get them back. Once I do
15 that will it be okay just to send everything back?

16 MR. POULIN: It's good for the Plaintiff, Your Honor.

17 THE COURT: Well, if y'all check -- no. Hold on.

18 (WHEREUPON, the jury panel enters the courtroom at
19 3:06 p.m.)

20 THE COURT: Mr. Foreman, ladies and gentlemen of the
21 jury, I left out just a portion of the charge I need to
22 give you. Your verdict, whatever your verdict may be,
23 must be the jury's unanimous verdict. All 12 deliberating
24 jurors must be in agreement on the verdict. Okay.

25 With that said I am going to go ahead and have Mr.

1 Bailiff give you the verdict form. And, counsel, if y'all
2 will come forward and coordinate with Madam Court Reporter
3 and make sure all the exhibits are present. If they are
4 then Mr. Bailiff will hand them off to Mr. Foreman and
5 they can go to work. Everything accounted for?

6 MR. POULIN: Yes, sir, Your Honor.

7 MR. SLIGH: Yes, sir, Your Honor.

8 THE COURT: Mr. Foreman, ladies and gentlemen, y'all
9 may retire to the jury room and begin your deliberations.

10 (WHEREUPON, the jury panel was excused from the
11 courtroom to begin deliberations at 3:07 p.m.)

12 COLLOQUY

13 THE COURT: Counsel, I'd be remiss if I didn't say
14 this. I really appreciate y'all working together to get
15 this case presented. It's always a lot easier on the
16 Court when I have excellent counsel representing their
17 respective clients and work with each other to get the
18 case presented and also to represent your respective
19 clients. Your courtesy and the due diligence that y'all
20 have shown here presenting your cases, your respective
21 cases, the arguments.

22 And, you know, after 26 years of doing this when you
23 get a little wrinkle about having to apply North Carolina
24 law in here I want to assure y'all and I want to thank
25 y'all for helping me with that cause you get used to doing

1 things in a set way, and if y'all hadn't helped me with it
2 I probably would have been in a situation. I really been
3 trying to piece all this together. So thank y'all so much
4 for doing those charges and getting that lined up.

5 MR. SLIGH: Thank you, Your Honor.

6 THE COURT: All right. Everybody can relax. Y'all
7 had anything to eat?

8 MR. POULIN: No, sir.

9 THE COURT: I can offer you some stale french fries.

10 (WHEREUPON, Court is in recess at 3:12 and reconvenes
11 at 3:31 p.m.)

12 QUESTION FROM THE JURY

13 THE COURT: We're going back on the record with a
14 jury question..

15 (WHEREUPON, the jury panel enters the courtroom at
16 3:31 p.m.)

17 THE COURT: Mr. Foreman, ladies and gentlemen of the
18 jury, we are in receipt of your question, and I'm going to
19 be as concise as possible in responding to that. The
20 issue of insurance is not to be considered by the jury in
21 reaching your verdict. Okay. You may return to your jury
22 room.

23 (WHEREUPON, the jury panel was excused from the
24 courtroom at 3:32 p.m.)

25

1 (WHEREUPON, Court's Exhibit No. 5 was marked for
2 identification and received into evidence.)

3 THE COURT: Anything for the record?

4 MR. POULIN: Your Honor, for the record I would just
5 mark -- if we could mark as a Court's Exhibit the entire
6 charge that I handed Your Honor. I did mark out in red
7 the parts that everyone agreed would not allow as to the
8 health insurance.

9 Of course, Plaintiff would have requested that the
10 entire charge be given.

11 THE COURT: I'm going to tell you why I kept
12 adjusting it there. I got to reading it there that third
13 time and I didn't want to come out and say, 'not proper'.
14 I mean that was like bringing them out here and saying,
15 "It's improper for y'all." I didn't want to do that.
16 That's why I adjusted back to what I normally do.

17 That will be fine if you want to make it a Court's
18 Exhibit. Anything from the Defense?

19 MR. SLIGH: No, sir, Your Honor. I think your charge
20 was fine.

21 (WHEREUPON, Court's Exhibit No. 6, 7 AND 8 were
22 marked for identification and received into
23 evidence.)

24 THE COURT: All right. Back at ease.

25 (WHEREUPON, Court was in recess at 3:35 p.m. and

1 reconvened at 4:23 p.m.)

2 (WHEREUPON, the jury panel enters the courtroom at
3 4:25 p.m.)

4 VERDICT OF THE JURY

5 CLERK OF COURT: Okay.

6 THE COURT: Signed and dated. You may publish the
7 verdict.

8 CLERK OF COURT: Case Number 2016-CP-34-072, Daisy
9 Frederick v. Daniel Lee McDowell.

10 Do you find that the Defendant, Daniel Lee McDowell,
11 was negligent and that such negligence proximately caused
12 damages to Plaintiff, Daisy Frederick. Yes.

13 Do you find that Daisy Frederick by her own
14 negligence contributed to injury or damage. No.

15 Please state the total amount of damages if any
16 sustained by the Plaintiff. Verdict is for \$5 million.
17 Signed, Robert David Sauls. January 31, 2018. Is this
18 your verdict so say you all?

19 (WHEREUPON, the jury panel responded, 'I do'.)

20 THE COURT: Thank you. Anything further of the jury,
21 gentlemen?

22 MR. POULIN: Not from the Plaintiff, Your Honor.

23 MR. SLIGH: Nothing from the Defendant, Your Honor.

24 COLLOQUY

25 THE COURT: All right. First of all, I want to thank

1 you for your patience with the Court. We had some delays.
2 We kept you back there in the room for some extended
3 periods of time. We had other matters, as I explained to
4 you, we have to work in. I have to handle matters of law,
5 and this take time. Thank you so much for being willing
6 to come and serve for jury service.

7 If you are drawn again this year for jury service you
8 would not serve if you're drawn. If you're drawn in 2019
9 or 2020 the exemption would be available, but I would
10 encourage you to come and help if at all possible.

11 Good news, this term of court as far as jury service
12 is over. We're going to be back for other matters
13 concerning non-jury tomorrow and looks like Friday. But
14 we will not need a jury for that. At this time I'm going
15 to turn it over to Madam Clerk to explain to you how your
16 expense check will come.

17 And, once again, please, do not hold Joy or myself
18 responsible for the jury pay. That is strictly a County
19 Council decision. We do not control those purse strings.
20 Madam Clerk.

21 (WHEREUPON, the jury panel was excused from the
22 courtroom at 4:30 p.m.)

23 THE COURT: All right. Anything for the record or
24 you just want to follow the Ten Day Rule?

25 MR. SLIGH: Your Honor, if I can get ten days that

1 will be great?

2 MR. POULIN: No objection.

3 THE COURT: If y'all will exchange whatever
4 beforehand, and if you need to file something just file it
5 and we'll work with the Clerk's Office and go from there.

6 MR. SLIGH: Thank you, Your Honor.

7 THE COURT: Once, again, thank y'all.

8 END OF TRANSCRIPT OF RECORD

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STATE OF SOUTH CAROLINA)
COUNTY OF MARLBORO)

IN THE COURT OF COMMON PLEAS
FOR THE 4TH JUDICIAL CIRCUIT
CASE NO. 2016-CP-34-00072

DAISY FREDERICK,)
)
Plaintiff,)
)
vs.)
)
DANIEL LEE MCDOWELL,)
)
Defendant.)
-----)

 COPY

VIDEO DEPOSITION

OF

STEPHEN H. SIMS, M.D.

Taken by Plaintiff

Charlotte, North Carolina

October 9, 2017

Reported by: Candace E. Thomas, CSR

Cain & Crane Court Reporters, LLC

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* * *

E X H I B I T S

(NONE)

* * *

1 On October 9, 2017, commencing at 8:06 a.m., the
2 video deposition of STEPHEN H. SIMS, M.D., was taken
3 by Notice, pursuant to the South Carolina Rules of
4 Civil Procedure, on behalf of Plaintiff, at CMC
5 Orthopaedics, 1025 Morehead Medical Drive, Suite 300,
6 Charlotte, North Carolina.

7 * * *

8 P R O C E E D I N G S

9 THE VIDEOGRAPHER: Good morning. This is
10 tape one in the deposition of Stephen H. Sims, M.D.,
11 in the matter of Daisy Frederick versus Daniel Lee
12 McDowell. This case was filed in the Court of Common
13 Pleas for the 4th Judicial Circuit, Marlboro County,
14 South Carolina, Case Number 2016-CP-34-00072.

15 Today is October 9, 2017, and the time is
16 approximately 8:06 a.m. I'm Terry Losardo, the
17 videographer. The court reporter is Candace Thomas.
18 We represent Cain & Crane Court Reporters of
19 Charlotte, North Carolina.

20 Would counsel please introduce yourselves
21 and your affiliations, and the witness will be sworn.

22 MR. HODGE: Camden Hodge for the plaintiff,
23 Daisy Frederick.

24 MR. SLIGH: David Sligh for Defendant Daniel
25 McDowell.

1 Whereupon,

2 STEPHEN H. SIMS, M.D.,
3 having been first duly sworn, was examined and
4 testified as follows:

5 DIRECT EXAMINATION

6 BY MR. HODGE:

7 Q. Good morning, Doctor.

8 A. Good morning.

9 Q. Again, my name is Camden Hodge. I'm here on
10 behalf of Daisy Frederick who I believe you treated
11 in April or May of 2015.

12 A. Okay.

13 Q. If you wouldn't mind stating your full name
14 and position for the record.

15 A. Yeah. Stephen H. Sims, and I'm an
16 orthopedic trauma surgeon at Carolinas Medical
17 Center.

18 Q. Thank you, Dr. Sims. And there are a few
19 rules that I'm required to read to you pursuant to
20 South Carolina's Rules of Civil Procedure.

21 First, have you ever had your deposition
22 taken before?

23 A. Yes.

24 Q. Okay. So we'll try to be quick and painless
25 today. The only real rule that I'll ask you today

1 is, first, let's give verbal responses, of course.
2 It's hard for the court reporter to take down
3 "uh-huhs" and "huh-uhs." It's something that we're
4 used to doing, and I'm bad about it, as well, but if
5 we can try to do that and, also, not to speak over
6 each other. That will make for a cleaner record.
7 Okay?

8 A. Okay.

9 Q. The second thing that I ask is, if I ask a
10 question that's confusing or doesn't make much sense,
11 if you need clarification, please ask me. We'll try
12 to make it as crystal clear as we can. Otherwise,
13 I'm going to assume that you understood my question
14 and gave me a full and truthful answer. Is that
15 fair?

16 A. Fair.

17 Q. Okay. Dr. Sims, did you do anything to
18 prepare for today's deposition?

19 A. I did glance over her record before coming
20 over here this morning.

21 Q. And, Dr. Sims, I believe you just went over
22 your current position and title. Could you state
23 that for the record one more time, please.

24 A. Yeah. I'm an orthopedic trauma surgeon at
25 Carolinas Medical Center in Charlotte, North

1 Carolina.

2 Q. Okay. And could you please walk me briefly
3 through your education beginning with college?

4 A. I went to college, undergraduate, at Clemson
5 University. I graduated with a BS Degree in zoology.
6 And then I did four years of medical school at the
7 Medical University of South Carolina in Charleston,
8 South Carolina. I graduated with an M.D. Degree.
9 And I then went to the Medical College of Virginia in
10 Richmond, Virginia, where I did an internship in
11 general surgery, and then I did a second year of
12 general surgery, and I did four years of orthopedic
13 training, orthopedic surgery training. I then became
14 board certified in orthopedic surgery, did a --
15 subsequently did a fellowship in orthopedic trauma
16 surgery which was done in Los Angeles and in Hanover,
17 Germany.

18 Q. Yes, Doctor. And how long have you been
19 practicing medicine now?

20 A. I've been here practicing since 1989, I
21 think, so 20 -- just short of 30 years, I guess.

22 Q. Yes, sir. And do you still retain your
23 board certification to this day?

24 A. Yes.

25 MR. HODGE: At this time, I would like to

1 qualify Dr. Sims as an expert in orthopedic trauma
2 and surgery.

3 MR. SLIGH: No objection from the defendant.

4 BY MR. HODGE:

5 Q. Okay. Now, Dr. Sims, do you recall treating
6 Ms. Daisy Frederick in 2015? Any independent
7 recollection?

8 A. I apologize, but I don't. It's been a while
9 since I've seen her.

10 Q. Okay. Well, we're here in conjunction with
11 some injuries she received out of a car accident that
12 occurred on April 29, 2015. If you hear me today
13 reference the collision or the wreck or the accident,
14 that's what I'm going to be referring to. Okay?

15 A. Okay.

16 Q. Okay. And I'm going to represent to you
17 that Ms. Frederick was admitted and first presented
18 to this hospital on April 29, 2015. Okay?

19 A. Okay.

20 Q. And I'll also represent to you that she was
21 discharged on May 16 of 2015.

22 All right. Now I want to briefly walk her
23 through -- or walk through her arrival to the
24 emergency department and also her hospital course.
25 Is that okay?

1 A. Sure.

2 Q. Okay. What I'm going to pass to you now is
3 labeled Bates number 45.

4 MR. HODGE: That's Carolinas Medical Center,
5 David.

6 BY MR. HODGE:

7 Q. And does this look like a fair and accurate
8 copy of Ms. Frederick's admission record to the
9 emergency room?

10 A. Yeah, this would be the -- at least one page
11 of it.

12 Q. That's right. Now, it appears that she
13 arrived to CMC via helicopter; is that correct?

14 A. That's correct.

15 Q. Okay. And does this ER note indicate how
16 the collision occurred?

17 A. It says, "Evidently the driver of the other
18 vehicle lost control of his car and struck her head
19 on."

20 Q. Okay. And did Ms. Frederick arrive at the
21 hospital in full spinal precautions?

22 A. Yes.

23 Q. And could you please explain to the jury
24 what full spinal precautions are?

25 A. That's just a safety thing. When somebody

1 has a high-energy trauma, they will put a cervical
2 collar on, one of those neck braces. They usually
3 will put them on a backboard so that they can't move
4 their spine. And they do that until they can assess
5 their spine and make sure there's not an injury that
6 might result in a spinal cord injury.

7 Q. Okay. And from that note, could you tell
8 the jury whether or not Ms. Frederick was given any
9 medications or fluids on the way to the hospital?

10 A. Yes. She was given -- it says ten
11 milligrams of morphine, and she received one liter of
12 fluids which I would assume was just lactated
13 ringers, solution, which is an IV fluid.

14 Q. Okay. And could you explain to the jury why
15 Ms. Frederick would be given fluids?

16 A. They do that with the presumption that
17 people might have some blood loss and drop their
18 blood pressure and try to replace that fluid so that
19 their blood pressure will remain normal.

20 Q. And that's given intravenously; is that
21 correct?

22 A. Yes.

23 Q. Okay. Now, could you explain to the jury
24 what morphine is, please?

25 A. Morphine is an opioid narcotic. It's used

1 almost exclusively for pain control.

2 Q. Okay. And what kind of pain is that meant
3 to treat? I understand that pain is a subjective
4 thing, but is that something for minor aches and
5 pains or pain associated with severe trauma?

6 A. It's meant to treat people with significant
7 pain.

8 Q. Okay. And, now, it's my understanding from
9 my review of these records that while she was in the
10 emergency department, Ms. Frederick was evaluated by
11 the orthopedic trauma surgeon group. Is that your
12 understanding, as well?

13 A. Yes.

14 Q. Okay. And do you recall if that was you
15 personally that did that review of Ms. Frederick?

16 A. I don't think I saw her initially in the
17 emergency room, but I may have. I can't recall if I
18 saw her in the emergency department or after she was
19 brought to the holding area of the operating room.

20 Q. Okay. And I'm going to pass to you what's
21 labeled as Bates number 103, Dr. Sims.

22 A. Okay.

23 Q. And if you could take just a short chance to
24 review that to yourself, if you don't mind.

25 A. Sure. Okay.

1 Q. Now, from reading that note, could you
2 please tell the jury what the findings from your team
3 were from that initial evaluation of Ms. Frederick?

4 A. Yeah. I could do it better if I had page
5 two, but I can do it from page one, I think. She had
6 a femoral shaft fracture which is the thigh bone, the
7 one that goes from your hip to your knee, that big
8 bone, and she had a fracture of her distal -- the
9 lower end of her tibia and fibula that went into the
10 joint, something we call a Pilon fracture.

11 Q. Okay. And could you please explain to the
12 jury what a left-sided distal femur fracture is?

13 A. Again, she had -- so she had a break in the
14 femoral shaft, and, again, that's the thigh bone.
15 It's the one that runs from your hip to your knee,
16 that big bone. And it is broken in sort of the mid-
17 distal portion, kind of, but it's in the shaft of it.

18 Q. And what kind of force does it take to
19 fracture the femur?

20 A. It's a high-energy -- it's a big bone, very
21 large bone. It takes a lot of -- it takes high-
22 energy force to break that bone in a normal, young,
23 healthy person.

24 Q. All right. And one of the strongest bones
25 in the body; is that correct?

1 A. Uh-huh.

2 Q. And, again, I understand that pain is
3 relative and subjective, but what sort of pain is
4 normally associated with a break in a femur?

5 A. Yeah. I mean, people would have -- you
6 would expect them to have quite a bit of pain,
7 certainly have significant pain from an injury like
8 that.

9 Q. Doctor, I'm handing to you what's labeled
10 Bates number 7 here.

11 A. Okay.

12 Q. If you could take a quick moment to review
13 that, please.

14 A. Okay.

15 Q. And does it indicate under her medical
16 decision-making that Ms. Frederick arrived as an
17 Adult Trauma Code 2? Is that correct?

18 A. That's correct.

19 Q. And could you explain to the jury what an
20 Adult Trauma Code 2 patient would be?

21 A. Yeah, I probably can't tell you exactly.
22 This is the general surgery trauma team's note. But
23 we have Trauma Code 1 which is the people that are in
24 extremis, the ones that mobilizes -- these are done
25 to mobilize the correct people to be present. If

1 that code goes out, the general surgery trauma
2 surgeons are there, the ER physicians are there, and
3 they have nursing and respiratory therapy, and it
4 brings a whole group of people there that are ready
5 to respond to somebody who will need a lot of help to
6 get through that first bit of time.

7 Trauma Code 2s are just a little less
8 injured, but significantly injured, and that still
9 will bring the general surgery trauma team there and
10 the ER doctors there and everybody. It brings the
11 whole group of people present and ready to go.

12 And they have trauma alerts which are --
13 don't actually bring everybody in place, but just
14 like it says, there's something that might escalate
15 into something a little bit more. So everybody at
16 least is aware that that person is there.

17 Q. So a full-team effort in a true emergency?

18 A. Yeah. Sort of all hands on deck, sort of,
19 kind of response.

20 Q. And does that note indicate to you that
21 Ms. Frederick was evaluated in the ED by the
22 orthopedic surgery team?

23 A. Yes. It says the patient was evaluated in
24 the emergency department by the orthopedic surgery
25 who performed a bedside reduction of her fractures.

1 Q. And it appears that she was actually
2 admitted to the hospital, as well; is that correct?

3 A. That's correct.

4 Q. Okay. And why would somebody with a femur
5 fracture and tibia fracture be admitted to the
6 hospital?

7 A. For a lot of reasons. First is, again, it
8 is a high-energy injury, takes a lot of force, so
9 always the concern is for other associated injuries,
10 chest injuries and abdominal injuries and brain
11 injuries. So they are admitted and observed and
12 usually have repeat labs and often repeat x-rays and
13 watched very closely to make sure that they don't
14 have other injuries.

15 Secondly is, they have a lot of pain. They
16 can't get out of bed or be mobilized, so they need to
17 come into the hospital.

18 And, thirdly, they need to have surgery
19 performed, and that needs to be done sometime in the
20 reasonably near future so that they can be mobilized
21 out of bed.

22 Q. And, Doctor, I'm going to hand you what's
23 labeled Bates number 110.

24 A. Okay.

25 Q. If you could take a brief moment to review

1 that for me, please.

2 A. Okay. Okay.

3 Q. And does it appear to be a true and accurate
4 copy of your surgical note from April 30 of 2015?

5 A. It does.

6 Q. Okay. So you were called on to perform
7 surgery on Ms. Frederick the day after her collision;
8 is that correct?

9 A. Yes.

10 Q. Okay. And could you please explain to the
11 jury what Ms. Frederick's preoperative diagnoses
12 were?

13 A. Yeah. She had the femoral shaft fracture
14 that we talked about on the left side. Again, the
15 big thigh bone. She had a fracture of her lower end
16 of her tibia and fibula that went into her joint.
17 Again, what we call a Pilon fracture, which is, kind
18 of the end of the bone kind of gets crushed, and it's
19 different from a normal ankle fracture. And she had
20 some lacerations and wounds about her elbow as well
21 as on her forearm that were cleaned up and sutured,
22 as well.

23 Q. Doctor, could you briefly describe what the
24 tibia and fibula are to the jury, please?

25 A. Yeah. They're the bones that go from your

1 knee to your foot, basically. The tibia is the shin
2 bone. The fibula is the little bone that runs beside
3 it. And her break, again, was at the very end of it
4 down near the ankle part. So the lower six inches or
5 so had multiple breaks that kind of went down into
6 the joint.

7 Q. Now, Doctor, could you please explain to the
8 jury the surgical course for Ms. Frederick? What
9 kind of surgery did she undergo, and could you please
10 explain that surgery to the jury, as well?

11 A. I'll do the best I can.

12 Q. I appreciate that.

13 A. She had an intramedullary rod placed in her
14 femur. What that means is, we align the bone by kind
15 of pulling on it, and we make an incision up over her
16 hip area, and then we open the canal to the bone by
17 drilling a hole in the top of the bone. We put a
18 wire down the inside of the bone down to the fracture
19 site and then line the bones up and pass it across
20 the other side. Then we pass these reamers that kind
21 of core out the inside of the bone to a big enough
22 size to be able to place a rod in there. Then we
23 place a rod over the wire, and it goes down and
24 crosses the fracture site. And then we put screws at
25 the top and bottom part of it to kind of lock it in

1 place so that it can't spin or rotate. And that's
2 the fixation for the femur fracture.

3 Q. So plenty of hardware, it sounds like?

4 A. Yeah, she got a big long rod and some screws
5 for that.

6 And then for her Pilon fracture or that
7 distal tibia, the lower end of her shin bone, those
8 fractures require plate and screws. They usually
9 swell a lot, and I think that was the case with her,
10 as well, it sounds like. So we really can't make
11 incisions in that area early on, because they don't
12 heal very well, so she was treated with an external
13 fixator.

14 And what that means is, we come up on the
15 upper end of the shin bone and drill two holes and
16 put pins that stick out of the skin. We put one
17 through her foot, as well. And then we kind of
18 stretch it out. That gets their length back and kind
19 of aligns the leg grossly. And then we wait anywhere
20 from ten days to three weeks or four weeks or
21 whatever it takes for the swelling to settle down
22 sufficiently and her skin to look good enough that we
23 think we can safely make incisions without having as
24 high a risk for treatment of that.

25 So she had an external fixator, which is

1 what that's called, placed on that tibia to support
2 that fracture at the same time.

3 Q. So this reduction is just one in a course of
4 treatment and possible surgeries that Ms. Frederick
5 would need?

6 A. That's right. And that would be a temporary
7 treatment that we would be planning for a more
8 definitive treatment at a later time.

9 Q. Of course. And this is done under general
10 anesthesia; in other words, Ms. Frederick was put to
11 sleep?

12 A. Yes.

13 Q. Okay. And would this require a breathing
14 tube to Ms. Frederick?

15 A. Yes.

16 Q. And what's the concern there?

17 A. Well, that's how they ventilate people
18 during surgery. So they do that for a couple of
19 reasons. One is, the medicines they give them,
20 they're paralyzed and completely asleep, so they
21 don't breath. So if you don't breathe for them, they
22 don't survive. And then secondly, it protects their
23 airway during surgery so that they don't aspirate or
24 get fluid down into their lungs that might cause a
25 pneumonia or problem like that.

1 Q. And would a catheter be placed, as well?

2 A. Usually. And I don't know that I can tell
3 you for sure that one was, but you may have a note of
4 that somewhere. But that would be the usual course.

5 Q. Okay. And what were Ms. Frederick's post-
6 operation diagnoses?

7 A. Same as her preoperative diagnoses. She had
8 left femoral shaft fracture, distal third femoral
9 shaft fracture. She had this intraarticular fracture
10 or break that involved the joint of her distal tibia
11 and fibula on the right side, the opposite side. And
12 then she had the lacerations and wounds about her
13 forearm and arm.

14 Q. So she still had an intense hospital course
15 in front of her?

16 A. Yes.

17 Q. Okay. Now, is it your opinion to a
18 reasonable degree of medical certainty that this
19 surgery and the treatment that she received at CMC
20 was necessitated by the collision that occurred on
21 April 29 of 2015?

22 A. Yes.

23 Q. Okay. And is it your opinion to a
24 reasonable degree of medical certainty that the
25 treatment rendered by you was caused by the

1 collision?

2 A. Yes.

3 Q. Okay. Bear with me for a second, Doctor.

4 A. Sure.

5 Q. Now let's briefly talk about a few aspects
6 of Ms. Frederick's hospital course. I'm passing to
7 you a trauma floor note from April 30 of 2015. This
8 is Bates labeled number 82. If you could take a
9 moment to review that to yourself.

10 A. Okay. All right.

11 Q. Now, does that indicate that her pain was
12 adequately controlled at the time?

13 A. This is a note from Dr. Thomas Gavigan who
14 was a general surgery resident at Carolinas Medical
15 Center. It says -- in his subjective portion of his
16 note, he says he was called from the nurse about
17 inadequate pain control of her right lower extremity,
18 and it says, "Patient continues to complain of
19 significant pain in her right lower extremity."

20 Q. And that's not unusual in your professional
21 practice; is that correct?

22 A. That's not unusual, yeah.

23 Q. Okay. And could you tell the jury how that
24 pain was treated?

25 A. It says she was given a Dilaudid PCA which

1 is patient controlled analgesia. What that means is
2 -- Dilaudid is a I guess hydromorphone which is kind
3 of a souped-up morphine, basically. It's more
4 potent. It takes a lower dose to get the same
5 effect. And they give them a thing where they can
6 push the button, and they can dose themselves with
7 pain medicine instead of having to ask the nurses to
8 bring it and waiting and the thing that goes on after
9 that.

10 Q. And to be more colloquial, this is the
11 serious stuff, correct?

12 A. Sure, yeah.

13 Q. Okay. And now in reviewing this note, does
14 it indicate to you that Ms. Daisy was given a blood
15 transfusion?

16 A. Yes. It says in 24 hours, she has received
17 two units of packed red blood cells for a hemoglobin
18 of seven. So she did get two units of blood. It's
19 like two pints of blood, basically.

20 Q. And why would a patient need a blood
21 transfusion after a trauma?

22 A. From blood loss. So they bleed from broken
23 bones, usually, and they can bleed significantly from
24 it. So a femur fracture, the bone itself will
25 actually bleed quite a bit. There may be other

1 sources of blood loss, but that probably was the
2 major source of her blood loss.

3 Q. Okay. Doctor, I want to briefly turn to
4 hospital day course number five for Ms. Frederick,
5 and that's labeled Bates number 100. If you could
6 please take a moment to review that to yourself.

7 A. Okay.

8 Q. Let's add one to the mix, Doctor.

9 A. Okay. Okay.

10 Q. And does that indicate to you that
11 Ms. Frederick was I believe "not surgically stable"
12 at the time?

13 A. I read that somewhere. You'll have to tell
14 me where I read it.

15 Q. Let's look maybe at the bottom of Bates
16 label 102 under her impression and plan.

17 A. Yeah. It says, "Dispo to be determined, as
18 not surgically stable yet."

19 Q. Okay. And could you please explain to the
20 jury what "not surgically stable" means?

21 A. I don't have any idea what it meant here. I
22 would say it was probably not a completely accurate
23 statement. I don't know what "surgically stable"
24 means, but it means she's not ready for discharge is
25 what they were basically trying to get to.

1 Q. Okay. Let's turn to the second surgery that
2 was performed on Ms. Frederick on May 11 of 2015.
3 This is your surgical note. If you could take a
4 brief look at that.

5 A. Okay. Okay.

6 Q. And could you please explain to the jury why
7 Ms. Frederick required a second surgery almost 15
8 days into her hospital course?

9 A. Yes. As we said earlier, those fractures
10 around the lower end of the tibia, because in that
11 area, there is just skin, there is no muscle tissue
12 that surrounds the bone. So if the skin doesn't
13 heal, then you can have a really bad problem with
14 infections and require coverage of some kind. It can
15 be very complicated. So when it's very big and
16 swollen, we worry about making incisions.

17 So initially she had that external fixator
18 applied which was a temporary device to allow us to
19 await the soft tissue swelling to settle down and the
20 soft tissues and skin to look like they were at a
21 point where surgery could be done safely, which was,
22 it sounds like, about 15 days later when she was
23 taken back to the operating room and had a more
24 definitive surgery where we make incisions, align the
25 bones, put them back in place, put screws and medical

1 plates in there to hold them in place, and then
2 eventually take the external fixator off.

3 Q. And this is the surgery that is eventually
4 going to allow her to heal and perform rehabilitation
5 and physical therapy and hopefully move on with her
6 life; is that correct?

7 A. That would be the hope, yeah.

8 Q. Let's look briefly at Ms. Frederick's
9 discharge note dated May 16 of 2015.

10 A. Okay.

11 Q. If you could take a brief moment to read
12 that to yourself.

13 A. Okay.

14 Q. And, again, this is dated May 16 of 2015; is
15 that correct?

16 A. That's correct.

17 Q. So that's 17 days after Ms. Frederick was
18 initially admitted to CMC; is that correct?

19 A. Yes.

20 Q. Okay. And now based on this discharge
21 summary, have we discussed each of the surgical
22 procedures that Ms. Frederick underwent while under
23 CMC's care?

24 A. I think so, yes.

25 Q. And, again, to a reasonable degree of

1 medical certainty, those surgeries and the treatment
2 she received at this hospital were necessitated by
3 the injuries she received in the collision?

4 A. Yes.

5 Q. And does this indicate to you that she also
6 underwent physical therapy while she was in the
7 hospital?

8 A. Yes.

9 Q. Now, at the time of discharge, was
10 Ms. Frederick weightbearing?

11 A. No.

12 Q. And could you please explain to the jury
13 what "weightbearing" means?

14 A. Yeah. Like it sounds, basically it's
15 putting your foot on the ground and putting weight on
16 it. So the break where she had that Pilon fracture
17 that we put back in place with plates and screws are
18 lots of little pieces, and we don't allow people to
19 put weight on that usually for at least three months
20 after surgery.

21 The femur fracture, in isolation, we do let
22 people put weight on that, but with the combination
23 of an injury on the other leg, you really can't just
24 hop on that one leg, because that would be too much
25 force. So usually what we allow people to do is just

1 to sort of transfer themselves, put that one leg with
2 the femur fracture on the ground enough to help
3 herself transfer from the bed to a chair.

4 Q. So in layman's terms, she's more or less
5 immobile, say, for the use of a wheelchair or some
6 other assistive device outside of simple transfers
7 from, say, sitting to standing?

8 A. Right. She would be able to hopefully
9 eventually independently but probably with some
10 assistance transfer herself from the bed to a
11 wheelchair and a wheelchair back to the bed,
12 basically.

13 Q. Okay. Did she have any other restrictions
14 at the time of discharge?

15 A. Let's see here. We did send her out with
16 some blood thinner, as well, but as far as
17 restrictions, I didn't see anything else. She did
18 still have the external fixator in place and a splint
19 on her leg, as well.

20 Q. Okay. Could you please explain to the jury
21 what an external fixator is?

22 A. Yeah. That's that contraption that we put
23 on it at the first surgery that has the pins stick
24 out of the skin. Usually we take that off at the
25 time we put plates and screws in, because we feel

1 like we have to get enough fixation at that point in
2 time. In her case, because of the way the break was,
3 it was decided to leave that on, sort of belt and
4 suspenders, to give it a little bit of extra support
5 with plans to take that off at a later time.

6 Q. So not to put too fine a point on it, but
7 Ms. Frederick still had these pins coming out of her
8 skin at the time of discharge?

9 A. That's correct, yes.

10 Q. And was the plan to have her come back in a
11 couple of weeks to follow up with you to see whether
12 or not things were healing appropriately?

13 A. Yes.

14 Q. Okay. And if you could briefly look at the
15 medications she was discharged with, as well, at the
16 time.

17 A. Uh-huh.

18 Q. And could you tell the jury what oxycodone
19 is?

20 A. Oxycodone is Percocet or Norco, kind of the
21 trade names for it, but it is an opioid narcotic pain
22 medication.

23 Q. So, again, a strong narcotic pain
24 medication?

25 A. Yes, yes.

1 Q. And does that indicate to you that
2 Ms. Frederick was going to continue experiencing pain
3 in those weeks after her surgery?

4 A. Yes.

5 Q. Now, does this discharge note indicate to
6 you that Ms. Frederick would need home health
7 services at any point?

8 A. You'll have to tell me where it's on here.
9 Ordinarily we would have arranged for some assistance
10 at home in the form of maybe some home physical
11 therapy. But is there something -- if you see it on
12 this page, you can tell me where it is.

13 Q. If you could hand me that real quickly,
14 Doctor.

15 A. Yeah.

16 Q. Is this the only one I gave you?

17 A. Here's the second page.

18 Q. I appreciate that. I'm looking at the top
19 highlighted portion of -- that Bates number 159 of
20 her discharge summary. Does that indicate to you
21 that Ms. Frederick was discharged with orders for
22 home health, as well?

23 A. Yeah. This is a -- I guess this is a note
24 from a home health -- a home health certification
25 saying that she would need home care, as well.

1 Q. Okay. And does it indicate to you in the
2 middle of that page, as well, whether or not
3 Ms. Frederick required a wheelchair at the time?

4 A. It says a wheelchair with elevated leg rest
5 and removable arm.

6 Q. And could you please explain to the jury
7 what a removable arm device is going to be?

8 A. Just so they can take the arm -- like this
9 armrest would be, you could just pull it off, and it
10 makes it easier for people then to transfer. If she
11 was trying to get from that chair to another chair or
12 to a bed, it would just be easier to do that without
13 the armrest there.

14 Q. And would you expect a patient such as
15 Ms. Frederick to have to need assistance with her
16 activities of daily living at least in the course of
17 her treatment -- or, excuse me, recovery?

18 A. Yes, I would.

19 Q. Okay. And would that include transfers,
20 say, from a sitting position to a standing position?

21 A. Yeah. I mean, I can't recall specifically
22 with her, but people eventually might become
23 independent with their ability to do that, but they
24 would probably at least need somebody close by, and
25 early on, they usually need somebody to actually

1 assist them to do it.

2 Q. Okay. And that's because either they would
3 be too weak to make that transfer on their own, or,
4 also, there's a risk of falls and further injury; is
5 that correct?

6 A. That is absolutely correct.

7 MR. HODGE: Doctor, I appreciate your time
8 here today. If you could please answer any questions
9 that opposing counsel may have.

10 THE WITNESS: Sure. Thank you.

11 CROSS-EXAMINATION

12 BY MR. SLIGH:

13 Q. Doctor, again, my name is David Sligh, and I
14 represent Daniel McDowell.

15 You referenced early on in your testimony
16 today that you're having to rely on the records here.
17 You obviously treat a bunch of patients, and you
18 can't remember everything about each and every one;
19 is that correct?

20 A. That's correct.

21 Q. All right. And you've -- as we sit here
22 today, you've not been able to testify as to how
23 Ms. Frederick is doing currently; is that correct?

24 A. According to my notes that I looked at
25 before I came, I think the last time we saw her was

1 in December of last year, if I remember correctly. I
2 don't have the notes in front of me, but you can
3 correct me if that's not right.

4 Q. Okay. And so you've not seen her very
5 recently in order to evaluate her current condition;
6 is that correct?

7 A. I guess it's been about nine or ten months
8 since I've seen her.

9 Q. All right. And the surgical procedures that
10 you performed in the hospital during her hospital
11 stay, those were successful in that they accomplished
12 what you intended to accomplish, correct?

13 A. Yes.

14 Q. Okay. And there were no out-of-the-ordinary
15 complications from those procedures in the hospital;
16 is that correct?

17 A. That's correct. We didn't talk about it,
18 but I think she actually didn't heal her femur
19 fracture and required another surgery at a later time
20 for that. That's not common. About 95 percent of
21 people heal their femur fractures without the need
22 for a second surgery on the femur, and I think she
23 actually required that. So that would be a little
24 out of the ordinary. But as far as her postoperative
25 course and hospitalization, things went fine.

1 MR. SLIGH: Okay. That's all the questions
2 I have. Thank you, Doctor.

3 THE WITNESS: Okay.

4 REDIRECT EXAMINATION

5 BY MR. HODGE:

6 Q. Real briefly, Doctor. From your testimony
7 from your review of Ms. Frederick's records, she did
8 see you up until December of 2016; is that correct?

9 A. That's correct, yes.

10 Q. And that's more than a year after her
11 initial discharge and the first two surgeries that
12 she received with you, as well?

13 A. Yeah. I have to do the math in my head,
14 but, yeah, that was -- she followed up with us for a
15 significant time, yeah.

16 Q. And the fact that she did have follow-up for
17 more than a year and also required a third surgery,
18 that indicates to you to a reasonable degree of
19 medical certainty that her post-hospital course and
20 her recovery was long and difficult; is that correct?

21 A. I don't know what "difficult" means, but I
22 will say it certainly was long, and I would imagine
23 that she had some difficulties and probably still
24 does through her recovery, yeah.

25 MR. HODGE: I appreciate that, Doctor. No

1 more questions.

2 MR. SLIGH: Nothing else. Thank you.

3 THE WITNESS: Thank you.

4 THE VIDEOGRAPHER: This concludes the
5 deposition of Dr. Stephen H. Sims. The total number
6 of tapes is one. The time is approximately 8:44 a.m.
7 We're now off the record.

8 (Whereupon, at 8:44 a.m., the taking of the
9 deposition ceased. Signature was waived.)

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1 STATE OF NORTH CAROLINA)
) CERTIFICATE OF TRANSCRIPT
2 COUNTY OF UNION)

3
4 I, Candace E. Thomas, CSR and Notary Public
5 in and for the aforesaid county and state, do hereby
6 certify that the foregoing 34 pages are an accurate
7 transcript of the video deposition of Stephen H.
8 Sims, M.D., which was reported by me, on behalf of
9 Plaintiff, in machine shorthand and transcribed by
10 computer-aided transcription.

11 The deponent and parties did waive the
12 signing of the deposition by the deponent.

13 I further certify that I am not financially
14 interested in the outcome of this action, a relative,
15 employee, attorney or counsel of any of the parties,
16 nor am I a relative or employee of such attorney or
17 counsel.

18 This 16th day of October 2017.

19
20 
21 CANDACE E. THOMAS
Certified Shorthand Reporter
Notary Public 19940880107

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS

:

COUNTY OF MARLBORO) Case No. 2016-CP-34-00072

DAISY FREDERICK,)

)

Plaintiff(s),)

DEPOSITION OF:

-VS-

)

KENDRICK E. RICHARDSON

)

DANIEL LEE MCDOWELL,)

)

Defendant(s),)

Given before John P. Crawford, Jr., Court

Reporter and Notary Public, at Turner Padgett Graham &

Laney, PA, 40 Calhoun Street, Suite 200, South Carolina,

on Tuesday, October 17th, 2017, commencing at 10:30 a.m.

Job No. CS2712084

1 on items, I guess, really item sixty-four of the
2 police report, that is the foundation for all of
3 your opinions in this case, correct?

4 A. That, along with the diagram, not the foundation
5 for all the opinions, but that along with the
6 diagram let's me know that or informs me that
7 there is a point of impact with post-impact
8 travel in the directions we just discussed, which
9 is consistent with Mr. McDowell continuing to
10 move along the roadway as he slides into Ms.
11 Frederick's path.

12 Q. Okay. But, all of the opinions you've formed in
13 this case regarding the movement of the vehicles
14 rely, if you didn't have that piece of
15 information in the police report about the
16 distance, then you couldn't formulate these
17 opinions, correct?

18 A. Not to the same strength, no. But, we could still
19 address and do a differential diagnosis type of
20 analysis on the two stories and look for whose
21 story is consistent with facts and who is not,
22 and come out with a, and you know, come up to an
23 opinion of who is more likely to be reliable.
24 But, it certainly wouldn't have the science to
25 back it up, as far as mathematical calculations

1 and that sort of thing.

2 Q. And without that piece of information about the
3 distance, then both stories are possible,
4 correct?

5 A. No. Mr. McDowell's description of the accident is
6 not possible. He's claiming he rolled three
7 times, and he didn't roll, the vehicle didn't
8 overturn. You can see it in the photographs. It
9 doesn't have that kind of damage to it. He's
10 claiming a mile and a half of visibility, and yet
11 looking and saying that Ms. Frederick just was
12 not there and then suddenly she appeared, well
13 cars don't suddenly appear. That's not factual or
14 reliable. He claims to have hit a puddle of water
15 and that caused him to lose control, but that's
16 the reason I went and looked at this issue using
17 Exhibit Number Two, to just see the road has got
18 good drainage. When you look at the photos,
19 there's not a dam of dirt or overgrown material
20 blocking water from getting off the road. It's
21 not, there's nothing that would call a puddle for
22 at least three hundred feet prior. And so, when I
23 look at those issues, they're just a lot of
24 mistakes and things in Mr. McDowell's testimony
25 they are not consistent with the facts.

1 Q. Do you know what he meant by roll?

2 A. Well, he said roll. He said side-to-side, so
3 barrel roll, basically.

4 Q. All right.

5 A. It flipped three times, side over side, and
6 landed in the road. That's what he said, so.

7 Q. Did you evaluate the credibility of Ms. Frederick
8 in her deposition?

9 A. I did. Sure.

10 Q. Okay.

11 A. I looked at her testimony, as well.

12 Q. And all parts of her testimony were factually
13 accurate or appear to be factually accurate to
14 you?

15 A. Appear to be. You know, she said it was raining,
16 Mr. McDowell says it wasn't, at the moment of
17 impact. No real way for me to address that. She
18 says she saw the truck slide into her lane in
19 front of her, you know, right at the time of
20 impact, and that's certainly consistent with the
21 impact location, as well as Mr. McDowell's
22 testimony. She talks about having spun backwards
23 and onto the shoulder, and she didn't move
24 backwards back up the road, but she did rotate
25 such that her vehicle traveled backwards as it

1 was going over the shoulder. So, that's not an
2 inconsistency. She says she's going about forty,
3 and that's possible. You know, past that, I just
4 didn't see anything that was really abnormal or
5 impossible in her testimony, whereas I did see
6 some in Mr. McDowell's testimony.

7 Q. What about, did you evaluate the distances that
8 she gave?

9 A. Give me a specific, because I don't member
10 exactly what she said. I she had a few car
11 lengths or something listed.

12 Q. But, in any event, you didn't make note of any,
13 you found her to be credible in relation to any
14 distances she put or she testified about you, you
15 didn't make note otherwise, correct?

16 A. I didn't make any notes about any distances that
17 were specifically wrong. However, obviously she's
18 not out there measuring at the time, so she was
19 taking a guess somewhat at the distances.

20 Q. Right.

21 A. As everybody does.

22 Q. Including Mr. McDowell?

23 A. Sure. Distances. I'm looking for events that are
24 wrong because that really makes, you know, it's
25 hard to get, it's easy to get a distance wrong,

1 but it's harder, much harder to get an event
2 wrong. So, saying things like, you know, like I
3 rolled over three times when you didn't, that's a
4 description of the event that's incorrect, as
5 opposed to, I said it was twelve feet but it's
6 really thirteen or whatever.

7 Q. But, in an event like a significant automobile
8 accident, what you perceive going through that
9 process, your recollection of what you were
10 perceiving, in your experience, that doesn't
11 necessarily square with reality, does it?

12 A. Generally, people are pretty good about the
13 events that take place, you know, unless somebody
14 is trying to hide something. That's when I see a
15 big variation in stories. Usually, if a story is
16 completely not consistent with how something
17 happened from a factual standpoint, it tells me
18 that's not, whether it's conscious or whether
19 it's subconscious to explain away the situation
20 that usually starts being kind of obvious. But,
21 you know, again, so I'm comparing what they're
22 saying to whether or not it's physically
23 possible.

24 Q. If the distances provided in the police report
25 are wrong or incorrect, then your analysis is

1 incorrect; isn't that right?

2 A. The actual math used would be affected by changes
3 in his distances. However, as long as the
4 direction of post-impact travel is correct,
5 that's really the thing that is really critical
6 to this case, because it tells me whether or not
7 Mr. McDowell was still sliding toward Ms.
8 Frederick at impact. If he continued sliding the
9 same way, she obviously can't hit him in the
10 front and knock him behind her, so he had to have
11 speed along the roadway to do that.

12 Q. All right. And you've got no -- let's back up. If
13 you were asked to go perform an accident
14 reconstruction immediately after an accident or
15 very shortly thereafter, you would photograph the
16 scene and document the location of the vehicles
17 and the debris. What other things would you do in
18 addition to that?

19 A. Just collect every piece information I could
20 find.

21 Q. Right.

22 A. You know, sometimes you'll get lucky and have a
23 convenience store with a camera running,
24 sometimes the investigating officer takes a bunch
25 of photos before everything gets moved. It just

1 varies, but generally collect information that's
2 available to me.

3 Q. And then, there's other opportunities where you
4 get involved later and you're able to rely on an
5 investigative team that has come to the scene and
6 documented with photographs, with digital
7 mapping, and tools of that nature, correct?

8 A. Sure.

9 Q. All right. And in this case, you don't have any
10 physical, independent evidence of what the
11 accident scene looked like; is that correct?

12 A. Well, the scene looks like a road, but I think
13 you're really asking me what it looked like from
14 an evidentiary standpoint.

15 Q. Exactly.

16 A. And that's what I was intending to answer. No, I
17 can't look at the accident scene some years later
18 and figure out where impact was and where final
19 rest was. There's just no record of it.

20 Q. Right. And so, you can't perform an independent
21 reconstruction of this accident, just because we
22 don't have the information available; isn't that
23 correct?

24 A. No. That's not correct. What I've done here is to
25 use the information measured by the officer and

1 performed analysis based on those to get post-
2 impact speeds and the range of potential pre-
3 impact speeds using mathematical and accident
4 reconstruction processes.

5 Q. Let me ask my question again. I think you were
6 answering a different one. In order for you to
7 perform an independent accident reconstruction,
8 and maybe this is just a difference in
9 terminology, but I understood you to say that if
10 you were to reconstruct the accident, you would
11 document all of the available evidence, and then
12 that evidence, as a trained professional, tells
13 you certain things about the forces involved and
14 how the accident occurred, correct?

15 A. Sure. And when you're saying independent, you are
16 talking about, you are asking me was I able to do
17 a reconstruction based on what I collected or are
18 you saying using the information available in
19 this case?

20 Q. Well, you can't, and nobody at this point unless
21 some information that we don't know about shows
22 up, you can't start from the beginning by looking
23 at the raw information and then form your own
24 final conclusion from the raw information,
25 correct?

1 A. Sure. I can't stand in the road and see the point
2 of impact because there's no record of it. I
3 can't stand in the road and see final rest
4 because there's no record of that. The vehicles,
5 it's my understanding, have been long gone,
6 destroyed or salvaged or whatever, so I can't go
7 look at those. What I can do is look at the
8 available photographs of the scene, the available
9 measurements of the scene, the available
10 photographs of the vehicles, and incorporate
11 those into analysis with the caveat that that is
12 the basis of the analysis.

13 Q. Okay. And determining a point of impact, that's a
14 scientific exercise, correct?

15 A. I'm kind of struggling with the question. It's a
16 kind of yes and no, the answers to it. So, you
17 know, a car runs into a pole and there's a big
18 dent in the pole, it's not hard to go out and
19 look at it, yeah, it hit the pole. It's not that
20 much science involved. You look at the front of
21 the car and it's got a pole-shaped dent, and it's
22 like, here is where it hit the pole. No real
23 science involved in that. If you're doing
24 something more complicated where you're looking
25 at, you know, the forces as they passed through

1 the vehicle, perhaps acceleration rates, seatbelt
2 modules or the airbag modules or whatever aspect,
3 and you need a lot more information to do that,
4 and it becomes much more of a scientific process.

5 Q. Right. And so, there's two different versions of
6 how this collision happened. There's Mr.
7 McDowell's version, and there's Ms. Frederick's
8 version, correct?

9 A. Correct.

10 Q. And both of those are, regardless of how you
11 characterize that type of collision, both of
12 those would be, that would be a scientific
13 process to evaluate point of impact for
14 collisions those two types, correct? I understand
15 your point about the phone pole.

16 A. As I understated your question, I'm a little
17 confused by it, so I'm going to try to straighten
18 it out with my answer.

19 Q. Okay.

20 A. We've got two scenarios, one is that Mr. McDowell
21 was not sliding along the road and had stopped in
22 the road for some period of time, and the other
23 is that he is sliding into Ms. Frederick's path.
24 It's fairly easy to look at that, if you have a
25 piece of information showing that Mr. McDowell

1 continued sliding along the road in that original
2 direction post-impact. As far as whether he slid
3 eighty-eight feet or twenty-three feet or hundred
4 twelve feet, it doesn't really matter, as long as
5 his inertia is maintained in that direction. It
6 tells me that he had speed in the direction. You
7 know, if it's six inches, that doesn't count,
8 obviously, because it's getting too sensitive.
9 But, that piece alone let's us determine which
10 story is the legitimate story.

11 Q. But, an officer had to go read the debris field,
12 make a determination based upon a debris field
13 and scuff marks, and so he had to formulate an
14 opinion based upon what he saw at the scene of
15 accident, correct?

16 A. Sure. He had to look at the evidence and say,
17 hey, here is where they hit and then measure
18 distances from that.

19 Q. Right. And you don't know, other than just the
20 general description of, I looked at the debris
21 field and I looked at scuff marks, you don't know
22 if he was looking at the right thing or not, do
23 you?

24 A. I've not spoken to him, so you're correct. I
25 think if you really want to know exactly what he

1 looked at and what his basis was and all that,
2 you'll just have to ask him.

3 Q. Right. And you don't know the nature of his
4 training in accident reconstruction?

5 A. I don't even know his name. I'm sure it's on the
6 report, but I haven't even looked for it.

7 Q. Okay.

8 A. Except for details on his findings, you just have
9 to ask him.

10 Q. In item number two in Exhibit Number Five to your
11 deposition, Mr. Frederick's description of the
12 accident is consistent with the factual
13 information and the police report. What do you
14 mean by the factual information?

15 A. Meaning when I go through her deposition, I don't
16 see anything that is inconsistent with how a
17 wreck of this nature would happen, or from
18 looking at the photographs of the scene and the
19 vehicles, I don't see anything inconsistent with
20 that. You know, for example, Mr. McDowell said he
21 rolled three times, but I can look at the
22 photographs and tell he didn't roll. So, there's
23 an inconsistency, based on factual information.

24 Q. In item three, when you say final rest positions,
25 just so I'm clear, those are relative to the

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EXHIBITS

NO EXHIBITS WERE MARKED OR ADMITTED INTO THE RECORD

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COLLOQUY

1
2 MR. SLIGH: Your Honor, David Sligh for the
3 Defendant. The Defendant is Daniel Lee McDowell. This is
4 my first filed motion, and I'm not sure if you've got a
5 copy of it in the file or not. Your Honor, these motions
6 and the basis for them are pretty well set out in the
7 filed motions.

8 I'm going to be a little briefer than I might be
9 otherwise because this is already in the Court's record in
10 what's been filed.

11 The first motion, post-trial motion, this arises out
12 of a trial that took place back in February of 2018, Your
13 Honor, in which a \$5 million verdict was rendered in favor
14 of the Plaintiff. Our initial motion is pursuant to Rule
15 50(b). It's a renewal of our directed verdict motions,
16 and there are two grounds for that, Your Honor.

17 The first ground, and of course, the standards of law
18 contained within our motion, but the first one, if Your
19 Honor will recall, is -- this is -- this case was decided
20 under the substance of law of North Carolina because this
21 was an automobile accident that took place in North
22 Carolina and the law of contributory negligence of North
23 Carolina applied.

24 And our argument at the directed verdict stage was to
25 incorporate all the arguments that were made back then and

1 incorporate those into this argument. But the only
2 reasonable inference that can be drawn from the evidence
3 is that the Plaintiff was negligent; that she testified
4 that she only saw the vehicle when it was three car
5 lengths in front of her. The undisputed fact was that the
6 line of sight at the location of the accident was 700
7 feet, and she never attempted to brake prior to the
8 impact.

9 So based upon North Carolina, law contributory
10 negligence, she was negligent as a matter of law and
11 failed to keep a proper lookout.

12 The second ground, as it relates to the Rule 50(b)
13 motion as set forth in the memo is that the Plaintiff
14 presented no evidence of, be an expert or otherwise, of
15 permanent impairment or any future disability. There was
16 no testimony of cost of future medical treatment, what her
17 prognosis was, her impairment ratings, any things along
18 those lines. And so the Court should have directed the
19 verdict as to those elements of damages, and the jury
20 should not have been charged as to those elements of
21 damages.

22 And so we are requesting that the Judge grant -- the
23 Court grant judgment notwithstanding the verdict on those
24 elements of damages associated with permanent impairment,
25 disability, future medical costs, treatment and expenses.

1 As for the Rule 59(a) motion, Your Honor, a motion
2 for new trial absolute, 13th juror doctrine and new trial
3 ny si remediator, we've got a number of grounds to show as
4 to that.

5 Your Honor, our argument is that the verdict -- the
6 amount of the verdict was unsupported by the evidence and
7 was against the mass weight of the evidence. The
8 Plaintiff failed to prove that the Plaintiff's injuries
9 resulted in any permanent or future impairment by way of
10 any competent expert testimony. We heard testimony from
11 Dr. Simms, the treating orthopedic surgeon. No questions
12 were asked about her future prognosis, impairment rating,
13 level of disability. None of that was within evidence.

14 Dr. Simms hadn't treated the Plaintiff for many, many
15 months prior to his deposition. So he was unable to
16 testify as to her current condition. As, so, in light of
17 that fact, the verdict was -- had to have been based upon
18 speculation or conjecture and matters outside the evidence
19 which was produced at the trial, and it was grossly
20 excessive.

21 The next ground is in regard to Plaintiff's expert
22 witness, Kenneth Richardson. Mr. Richardson was an
23 accident reconstructionist who testified at the time. And
24 the crux of his opinions, the foundational component of
25 all his opinions, was the North Carolina Traffic Collision

1 Report that was filled out by the investigating officer.

2 The investigating officer was -- did not testify at
3 trial. There was no evidence put forth other than the
4 report itself which came in only through Mr. Richardson.
5 And the North Carolina report is different from the South
6 Carolina report because it actually includes some data in
7 there that is of a subjective opinion of the investigative
8 officer.

9 He had to analyze the scene of the collision,
10 determine a point of impact and then he determined how far
11 the vehicle travelled and in what direction past the point
12 of impact. And our argument to the Court at the time of
13 trial and again today is that this is a subjective opinion
14 that we have no basis or understanding of the basis for
15 the opinion of how this police officer came up with this
16 information, what his training and background was, any of
17 that information. No photographs, backup data. Nothing.
18 All it was was a single number contained in the police
19 report.

20 And so under the Court's gatekeeping function, under
21 Rule 703 of the Rules of Evidence, there was no in ischia
22 of liability attached to this subjective opinion. And Mr.
23 Richardson took the single number that we know virtually
24 nothing about and used it as the entire basis for his
25 opinions about where the vehicles were at the point of

1 collision when they travelled.

2 The next ground, Your Honor, relates to Exhibit 10
3 which was introduced by the Plaintiff. And, Your Honor,
4 this was a evidentiary exhibit summary of medical bills,
5 and it was admitted under -- over objection. This exhibit
6 included both the gross amount of the bills as well as
7 what was actually owed.

8 The Court ruled that 404 of the North Carolina Rules
9 of Evidence applied to this, and it should have -- and our
10 position is that the jury should have only been able to
11 consider and view and look at the amount of medical bills
12 that were -- still are owed as opposed to what to pay to
13 satisfy those as opposed to the gross amount of the bills.
14 So they were allowed to consider all those numbers
15 together. Your Honor, we think that also contribute to
16 and led to the existence of the verdict.

17 The next ground is in relation to the mortality
18 tables. The Court went on and charged the jury on the
19 mortality tables as it relates to future and permanent
20 impairment and disability. And this volts into what I've
21 already talked about, Your Honor, with the fact that, you
22 know, there was no evidence to support those elements of
23 damage. Therefore, the Court should not have charged the
24 jury on the mortality tables and all the other components
25 of damages that are related to disability and future

1 and/or permanent impairment.

2 So in light of all of those issues and the
3 accumulation of those issues, Your Honor, we think the
4 verdict was grossly excessive. It was clear that the jury
5 reached its decision as the result of passion or prejudice
6 or other facts not found in the record. This was
7 evidenced by the question the jury posed virtually
8 immediately after starting its deliberations which showed
9 that liability insurance had impact on the verdict.
10 That's the first thing they went to.

11 Punitive damages were not charged to the jury, and so
12 the verdict combined with the question suggested the jury
13 did this to punish the Defendant rather than to compensate
14 the Plaintiff for the damages.

15 And so for all these grounds we believe the Defendant
16 is entitled to a new trial absolute. Alternatively, Your
17 Honor, if you think that these -- the verdict was not
18 grossly excessive and merely excessive then we think that
19 the Court should use its remedial power to significantly
20 and substantially reduce this verdict. And this will
21 include all of the grounds that we've made on the -- as it
22 relates to the motion for the new trial absolute.

23 I believe, Your Honor, again, all these grounds are
24 set forth in the motion that we filed with the Court back
25 on -- the end of February, 2018, and will incorporate the

1 arguments that we've made during the course of the trial
2 at the various stages in regard to directed verdict.

3 Thank you.

4 MR. HODGE: Good morning, Your Honor. May it please
5 the Court. Camden Hodge on behalf of Plaintiff Daisy
6 Frederick, and we do incorporate as Mr. Sligh did each
7 argument made at the trial also March 2nd 2019 response
8 that was made with regards to Mr. Sligh's memo. And I
9 think the standard of law here is important starting here
10 with 50(b) motion; and that is the jury's verdict should
11 be affirmed if possible to do so and carry to effect the
12 jury's clear intention.

13 And the intention in this case was certainly clear.
14 It was not to punish the Defendant, but instead to
15 compensate the Plaintiff for her injuries, both physical
16 and otherwise.

17 And when I start with the Defendant's first argument
18 that they should have been granted directed verdict as a
19 matter of law as to the Plaintiff's negligence. And, Your
20 Honor, that argument must fail for a number of reasons.

21 First, the Plaintiff did present expert testimony
22 that was directly in contradiction to the defenses raised
23 as to liability by the Defendant. That also contradicted
24 the Defense's expert accident reconstructionist's
25 testimony. And if you will recall during the trial of

1 this case, of course, under Rule 414 of North Carolina's
2 Rules of Evidence, the jury can consider any offset of
3 medical expenses by insurance or other reductions. And
4 that is precisely what the jury did in this case:

5 The Rule 414 what it does is it explicitly allow the
6 Defendant to cross-examine the Plaintiff on the amount of
7 medical bills paid by her and those charged to her. And
8 it allows the Defendant to question the Plaintiff whether
9 any or all of those bills were paid by insurance. Those
10 bills were admitted into evidence, and the Defense made
11 the decision on their own not to make such
12 cross-examination and not explore those issues with the
13 Plaintiff.

14 They had the right to do so under North Carolina law.
15 They did not. And the medical bills submitted to the jury
16 explicitly indicated the amount owed by the Plaintiff.
17 And included the amount that had been paid by insurance.
18 For that reason Rule 414, Your Honor's analysis was
19 correct, and I believe should be upheld today.

20 I also note for the record that I do not believe that
21 that argument was preserved by the directed verdict made
22 at trial. However, I would need to look at the transcript
23 to see that. Thank you, Your Honor.

24 THE COURT: Anything else?

25 MR. SLIGH: Your Honor, just very briefly. Just for

1 the record. Mr. Richardson, the accident
2 reconstructionist, did not perform an accident
3 reconstruction. It is, his testimony, is clear that there
4 wasn't sufficient data to do that; that he was not
5 performing an accident reconstruction which is a
6 distinguishing element as to the parameters under which he
7 could rely on any subjective opinion.

8 MR. HODGE: He is obviously an accident
9 reconstructionist, and was qualified as such by this
10 Court. And if you will recall his testimony was as to
11 whose version of events was plausible; the Plaintiff's,
12 the Defendant's, or the Defendant's expert. And based on
13 each and every piece of evidence that Mr. Richardson
14 considered he determined that only the Plaintiff's
15 testimony could be true, and that is in and of itself an
16 accident reconstruction. Thank yo,u, Your Honor.

17 THE COURT: All right. That cover everything y'all
18 wanted heard today?

19 MR. HODGE: Yes, sir, Your Honor. We also have a
20 motion for an offer of fees and costs pursuant to a
21 judgment which was filed if Your Honor does deny the
22 Defendant's motions. We ask for time to submit an
23 affidavit of costs for the Defense to review that as well.

24 THE COURT: All right. Gino and I will go over this
25 file and look at everything y'all talked about this

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED

Feb 25 2021

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.

The undersigned hereby certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

Respectfully submitted,

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FINAL REPLY BRIEF

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ARGUMENT

I. Frederick's arguments ignore the significance of the absence of any evidence of future damages.

In her brief, Frederick does not attempt to demonstrate that she presented any evidence of future damages at trial. This amounts to a tacit admission that no such evidence exists or was presented at trial. Frederick submitted evidence of past medical treatments and pain, evidence of past lost wages, and testimony that she still experienced some pain as of the trial date. There was no other evidence of damages, let alone any that were likely to occur in the future. Again, Frederick does not appear to dispute that fact in her brief.

Instead, Frederick argues that her past damages – particularly her long course of recovery – were sufficient to justify the \$5,000,000 verdict. That position cannot withstand any serious scrutiny. As noted in the Appellant's Brief, if Frederick's specials are removed from consideration, the jury awarded her \$4,775,000 for intangible damages such as pain and suffering during a 20-month period (i.e. from the day of the accident to the trial date). That constitutes roughly \$8,000 per day for the entire period, even though the undisputed medical evidence showed that Frederick's condition improved from her post-accident status during that time. Such a large amount is "shockingly disproportionate to the injuries suffered and thus indicates that passion, caprice, prejudice, or other considerations not reflected by the evidence affected the amount awarded." *Becker v. Wal-Mart Stores, Inc.*, 339 S.C. 629, 635, 529 S.E.2d 758, 761 (Ct. App. 2000).

Even if the amount of the verdict was not "shockingly disproportionate" to the claimed injuries, there can be no doubt that it was "merely excessive." There is simply no way to justify a \$5,000,000 verdict based on the actual evidence presented at trial.

Therefore, the jury must have based its verdict on improper considerations.¹ Accordingly, McDowell was entitled, at a minimum, to a new trial *nisi remittitur*. The trial court erred in failing to grant McDowell that relief, or to grant him a new trial absolute.

Frederick's exclusive reliance on the evidence of past damages, and the lower amount of pain at the time of trial, also fails because it ignores the trial court's erroneous decision to charge the state mortality tables. As discussed in the Appellant's Brief, that decision invited the jury to award future damages, even though there was no evidence to support them. Why else would the mortality table be relevant? Frederick presented no evidence of any permanent impairment or other problems that were likely to occur in the future. Yet, the trial court allowed the jury to consider and award such damages by including the mortality tables in the jury instructions. That decision was a prejudicial error that led to a verdict that was excessive, if not shockingly so.

Essentially, Frederick's arguments on this issue try to have it both ways. She claims the past damages were sufficient to support the verdict, and although she never explicitly concedes the point, she does not make a serious effort to show any evidence of future damages. But Frederick fails to explain why, if that is true, there was any justifiable basis for the trial court to charge the mortality tables. Nor can she do so. There was no reason for the trial court to include those tables in the charge in the absence of future damages evidence, and the tables' erroneous inclusion had a clear and definite impact on the verdict.

¹ Frederick takes issue with the use of the word "perhaps" in the Appellant's Brief, suggesting that McDowell bases his entire position on speculation as to the jury's motives. This is inaccurate. The word "perhaps" appears multiple times in a single paragraph as a rhetorical device to offer theories of what the jury might have thought. But the point was not to speculate that one or more of those possibilities must be what actually happened. Rather, the point was to demonstrate that while many improper bases are possible, there is no legitimate basis to justify the amount of the verdict.

It turned this from a case about past damages into a case about past and future damages. For that reason, the trial court erred in not granting McDowell the requested post-trial relief. This Court should reverse and remand with instructions to grant McDowell a new trial or a new trial *nisi remittitur*.

In addition, Frederick fails to present any arguments that would distinguish the cases cited in the Appellant's Brief on the excessiveness of the verdict. (*See* Appellant's Brief, pp. 12-15.) The absence of any such rebuttal is particularly significant with regard to *Becker v. Wal-Mart Stores, Inc.*, 339 S.C. 629 , 529 S.E.2d 758 (Ct. App. 2000). In that case, a new trial *nisi remittitur* was warranted when the jury awarded a verdict of \$1,750,000 based on medical bills of \$030,538.44. This was true even though the plaintiff presented evidence of future damages – i.e. a 4% permanent impairment rating. If a new trial *nisi remittitur* was appropriate in that case, which contained an element of future damages, then the same remedy should apply here, where a jury awarded a much larger sum despite the absence of any evidence of future damages. Frederick's brief offers nothing to dispute that conclusion. McDowell respectfully submits that this is because no credible distinguishing factor exists. *Becker* is on point, and it supports McDowell's position in this appeal.

II. Frederick has also failed to address controlling or persuasive case law in some of the other issues on appeal.

Just as Frederick ignores *Becker v. Wal-Mart Stores, Inc.*, on the issue of the excessive verdict, she also overlooks the relevant case law cited and discussed in the Appellant's Brief on other issues. Thus, the Court should rely on those authorities to reverse the result below and grant McDowell either judgment as a matter of law or a new trial.

On pages 16-18 of the Appellant's Brief, McDowell presented numerous examples of cases in which North Carolina's appellate courts have applied the doctrine of contributory negligence as a matter of law in a defendant's favor. Some of those cases involved analogous facts to those at issue in the present case. In her brief, Frederick does not acknowledge or discuss any of those cited cases. Instead, she cites other North Carolina authority for the general proposition that a contributory negligence defense is usually an issue for the jury. This is not a point in dispute, as McDowell noted as much in the Appellant's Brief. Yet, as the decisions cited in the Appellant's Brief demonstrate, that is not always the case. There have been plenty of occasions in which North Carolina's courts have treated this issue as a matter of law, and those cases support the same result here.

No reasonable jury could view the record evidence and conclude that Frederick's own negligence did not contribute to the accident, at least in some small part. Frederick admitted that she had an adequate line of sight to have observed McDowell's vehicle from a safe distance away prior to the accident, and yet, she did not actually see the vehicle until it was only about three car lengths away. [R. pp. 55, 77-79.] Those facts demonstrate that Frederick failed to maintain a proper lookout, and that her negligence in that regard contributed to the accident. Therefore, the cases cited in the Appellant's Brief are on point, and McDowell is entitled to reversal of the result below and the entry of judgment as a matter of law in his favor.

Similarly, Frederick makes no attempt to distinguish or explain away the impact of the Supreme Court's decision in *Hamrick v. State*, 426 S.C. 638, 828 S.E.2d 596 (2019), on the issue related to admissibility of her expert's opinions. As discussed in the Appellant's Brief, the trial court admitted opinions by Frederick's expert witness that were

primarily based on the conclusions and opinions of the investigating police officer. *Hamrick* demonstrates that this decision by the trial court was erroneous because there was no showing that the underlying opinions and conclusions were reliable, or that the trial judge undertook the proper steps to evaluate reliability.

Despite the existence of that very recent (and on point) Supreme Court case, Frederick chooses not to address it in her appellate arguments. Her brief acknowledges in its Statement of the Case that McDowell cited *Hamrick* in support of his post-trial motions. In the actual argument sections, however, the Respondent's Brief is silent as to *Hamrick* or its significance on this issue. Thus, Frederick has failed to rebut McDowell's analysis of, or reliance on, *Hamrick*, and that case serves as a sufficient basis for this Court to reverse and remand for a new trial.

CONCLUSION

McDowell's arguments on appeal are not meant to suggest that Frederick did not sustain significant injuries in this vehicular accident. But there is a clear and substantial difference between "significant" injuries and those that would justify a \$5,000,000 verdict when the medical specials were only around \$225,000. To justify a verdict of that amount, there would need to be evidence of future damages such as a permanent impairment, anticipated future medical expenses, or lost earning capacity. None of those things were present in this case. Nor was there evidence of any other kind of future damages that Frederick would be likely to sustain. Her course of medical treatment was long, and no doubt arduous, but it was also successful. She had fortunately overcome her injuries at the time of trial, and there was no legitimate basis for the jury to consider or award future damages. Yet, that is precisely what the trial court invited the jury to do by charging the

mortality tables. That error led to the predictable result of a verdict that was at a minimum excessive, if not shockingly so.

In emphasizing this point on reply, McDowell does not intend to abandon his other appellate issues or to suggest that they are any less meritorious. For example, McDowell strongly contends he is entitled to judgment as a matter of law based on the contributory negligence defense. Thus, McDowell reiterates his entitlement to all of the relief requested in the Appellant's Brief. But even if the Court were to reject those other issues, the Court should still reverse and remand for a new trial or new trial *nisi remittitur* based on the plainly excessive nature of the verdict.

Respectfully submitted,

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RULE 211(b) CERTIFICATION

The undersigned, an attorney in this matter for the Appellant, certifies that this Final Reply Brief complies with Rule 211(b), SCACR.

RECEIVED
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**STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

Appeal from Marlboro County
Court of Common Pleas

The Honorable Paul M. Burch, Circuit Court Judge

Case No. 2016-CP-34-00072

Appellate Case No. 2020-000989

Daisy Frederick,

Respondent,

v.

Daniel Lee McDowell,

Appellant.

Final Brief of Respondent

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STATEMENT OF ISSUES ON APPEAL

- I. Did the trial court err in denying McDowell's request for a new trial absolute or new trial *nisi remittitur*, where the jury reached a reasonable verdict based upon the evidence?
- II. Did the trial court err in denying McDowell's request for a directed verdict or judgment notwithstanding the verdict, where the jury reached the reasonable conclusion that Frederick's alleged "negligence" did not contribute to the cause of the accident?
- III. Did the trial court err in admitting Frederick's medical bill exhibit which properly showed the amount of medical bills paid?
- IV. Did the trial court err in allowing Frederick's expert to rely upon objective opinion testimony regarding the location at which the vehicles came to rest following the collision?

STATEMENT OF THE CASE

This matter stems from an automobile collision that occurred on or about April 29, 2015 in North Carolina between Daisy Frederick (“Frederick” or “Respondent”) and Daniel Lee McDowell (“McDowell” or “Appellant”). At the time of the collision, both Frederick and McDowell were residents of the state of South Carolina. Accordingly, Frederick’s Summons and Complaint were filed in the Court of Common Pleas for Marlboro County on or about April 1, 2016. (R. pp. 10 -15). McDowell thereafter filed his Answer on or about May 25, 2016. (R. pp. 15-17).

This case came before the Honorable Paul M. Burch for trial on January 29, 2018. After a pre-trial hearing and over Frederick’s objection, Judge Burch ruled that the substantive law of North Carolina would apply to the trial of the case given that the subject accident occurred in that state. (R. pp. 45-48). The decision to apply North Carolina substantive law is not the subject of this appeal.

During the trial of this case, Frederick presented testimony from Appellant McDowell; Frederick’s mother, Christine Howard; Stephen Sims, M.D.; expert witness Ken Richardson; as well as Frederick’s own testimony. McDowell admitted that he lost control of his vehicle and his vehicle entered the oncoming lane of travel (R. pp. 84-86). Frederick contended, by and through herself and her expert witness, that Defendant was still moving forward when the collision occurred. (R. pp. 55-57). Put simply, Frederick contended that McDowell was at fault for causing the collision because she did not have time to avoid it. (R. pp. 55-57). McDowell, on the other hand, contended that he had already come to a complete stop and, in fact, was backing up to return to his lane of travel when the collision occurred. (R. pp. 84-89). As such, he contended that Frederick had ample opportunity to see him and to stop her car to avoid the collision, rendering

Frederick contributorily negligent. (R. pp. 15-17). Importantly, and as set forth herein, it is undisputed that the collision occurred in Frederick's own lane of travel; in fact, McDowell himself testified to that fact. (R. pp. 90-97).

Frederick also took the stand on her own behalf at trial. In addition to the testimony discussed above, Frederick testified to her extensive injuries, excruciating healing process, pain and suffering, mental anguish, emotional distress, and lost wages. (R. pp. 51-81). As set forth above, she testified that she was traveling the speed limit when McDowell came to rest in her lane of travel and that McDowell was moving forward when the collision occurred – not in reverse. (R. pp. 54-57). Frederick further provided extensive testimony regarding her injuries, pain and suffering, mental anguish, and emotional distress, including pain that was continuing during the time of trial and ongoing exercises she was undergoing to strengthen her healing limbs. (R. pp. 51-81). This included testimony of a difficult, delayed, months-long treatment and healing process after surgical procedures and the implantation of hardware. (*Id.*). Notably, and as discussed *infra*, she testified that her pain was still present at the time of trial and that she was undergoing exercises to strengthen her body and return it to normal. Testimony regarding Frederick's damages, including her pain and suffering, was bolstered by her mother (Christine Howard), and one of her treating surgeons (Stephen Sims, M.D.).

At the close of Plaintiff's case, counsel for McDowell moved for a directed verdict on the following grounds: (1) the only reasonable inference from the evidence was that Frederick's negligence contributed to the cause of the accident and she was therefore barred from any recovery; (2) no evidence supported 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. 105-106). The court properly denied McDowell's motion on all grounds save for punitive damages.

McDowell's own case consisted only of testimony by Don Roberts, an engineer who was admitted as an expert witness. Roberts presented line-of-sight testimony that McDowell relies on in asserting that Frederick was contributorily negligent. (R. pp. 108-139). More importantly, Roberts conceded that the point of impact occurred in Plaintiff's lane of travel and conceded that if the McDowell's vehicle came to rest where McDowell himself testified that it did, McDowell's vehicle must have been moving in a forward direction at the time of impact. (*Id.*).

During closing argument, Frederick's counsel stated that Plaintiff had \$171,909.87 in medical bills to pay to medical providers and insurance, and suffered lost wages in the amount of \$53,460.00. (R. pp. 142-143). In accordance with North Carolina's billed v. paid rule, Rule 414, NCRCF, Frederick's counsel explicitly told the jury not to consider any amounts written off by health insurance or other payer. (*Id.*). Frederick's pain and suffering and noneconomic damages also were discussed.

After defense counsel presented his closing argument, he again renewed his directed verdict motions based upon contributory negligence and an alleged absence of evidence to support awards for future damages. The jury then was charged. Defense counsel objected to charges concerning permanent disability, future damages, and statutory life expectancy. Interestingly, in doing so, defense counsel stated that he would imagine that Frederick had health difficulties and "probably still does in her recovery," (R. pp. 148) which should not be surprising given Frederick testified on her own behalf that she was still in pain at the time of trial. Judge Burch included a charge concerning contributory negligence. (R. pp. 149). Further, Judge Burch explicitly explained the portion of the verdict form regarding contributory negligence. (R. pp. 153). Following jury instructions and deliberations, the jury returned a verdict in Frederick's favor for \$5,000,000.00.

McDowell filed post-trial motions on February 14, 2018, seeking a judgment notwithstanding the verdict on plaintiff's claims for negligence and damages and alternatively, pursuant to Rule 59(a), SCRCP and the Thirteenth Juror Doctrine, McDowell moved for a new trial absolute or for a new trial nisi remittitur. (R. pp. 18-26). Frederick filed her Memorandum in Opposition to Defendant's Post-Trial Motions on or about February 7, 2018. (R. pp. 29-33). McDowell then filed a "Supplemental Brief in Support of Defendant's Post-Trial Motions" on or about August 21, 2019 – more than one and a half years after filing his post-trial motions. (R. pp. 35-36). In doing so, McDowell relied on *Hamrick v. State*, 828 S.E.2d 596 (S.C. 2019) in support of his proposition that Frederick's expert improperly relied on the "subjective opinions" of the investigating office. Frederick filed her Reply on or about August 21, 2019, detailing that Frederick's expert witness did not rely on subjective opinions, but instead on simple factual observations that could be made by any fact witness and, that in any event, those factual observations were immaterial given that McDowell and McDowell's expert both agreed where the vehicles came to rest post collision. (R. pp. 37-41).

STATEMENT OF FACTS

The facts of this case are largely undisputed. On or about August 25, 2019, Frederick was traveling southbound on Highway 52 and McDowell was traveling northbound. As the two vehicles approached each other, McDowell lost control of his vehicle and crossed the center line, entering Frederick's lane of travel. McDowell testified that after losing control of his vehicle, he placed his truck in reverse, checked for traffic, attempted to back up into his original lane of travel after taking approximately 20 seconds to compose himself, but could not complete that maneuver before the collision occurred.

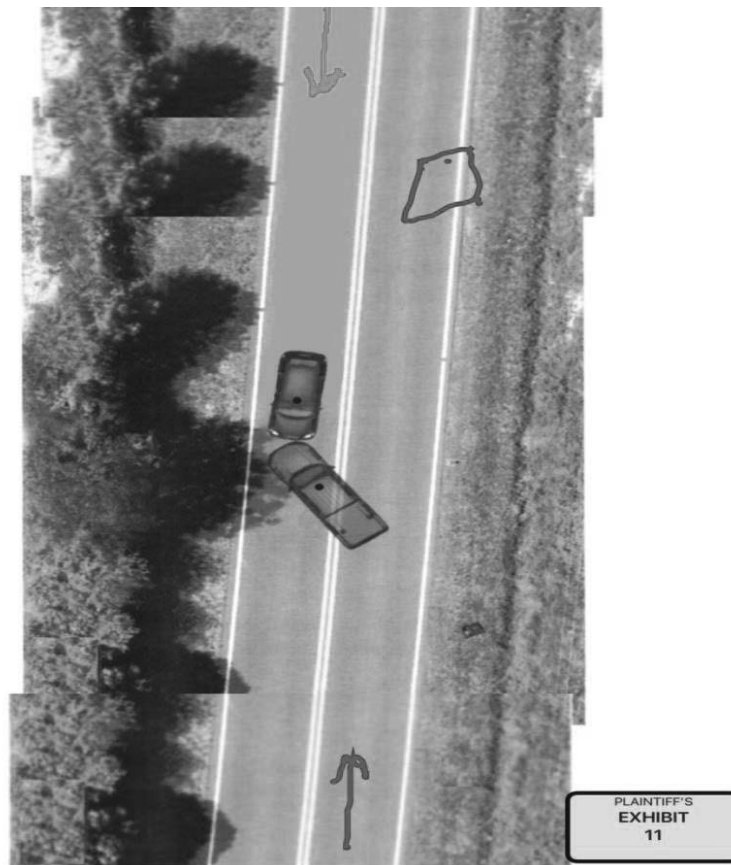
Importantly, it is undisputed that the collision occurred in Frederick's lane of travel. Frederick and McDowell each called an expert accident reconstructionist. The following diagram was created by McDowell's own expert Don Roberts and entered into evidence by the McDowell during the trial of this action:

THIS SPACE INTENTIONALLY LEFT BLANK



Put simply, McDowell's own expert and exhibit concede that the point of impact occurred in Frederick's lane of travel. As stated above, the dispute in the case was not the point of impact, but rather the central question of whether McDowell was moving forward or backward at the time of impact.

During the course of the trial, Frederick's counsel presented McDowell with a copy of his own expert's drawing, above. (R. pp. 128-139). McDowell personally took a pen and drew a square indicating where his vehicle came to rest in relation to the point of impact. That drawing was then entered into evidence:



It bears repeating that this was McDowell's own testimony. It is also worth noting that McDowell's own expert was questioned on this diagram and his expert testified that if McDowell's

vehicle came to rest where McDowell himself testified that it did, McDowell's vehicle must have been moving in a forward direction at the time of the collision.

Frederick's expert engineer, Ken Richardson, also testified during Frederick's case. (R. pp. 43-44);(R. pp. 198-210). Mr. Richardson testified that McDowell was moving forward at the time of the collision. He based this testimony on the position of the vehicles post-impact. Specifically, he testified that under the basic laws of physics, Defendant's vehicle could not have come to rest in front of Frederick's vehicle had it been moving backward. Therefore, if McDowell's vehicle came to rest in front of Frederick's vehicle, it must have been moving forward.

As stated above, during the trial of this case Frederick provided extensive testimony regarding her injuries, pain and suffering, and mental anguish, including pain that was continuing during the time of trial and ongoing exercises she was undergoing to strengthen her healing limbs. (R. pp. 59-75);(R. pp. 82-84). This included testimony of a difficult, delayed, months-long treatment and healing process after surgical procedures and the implantation of hardware. (Id). Notably, and as discussed *supra*, she testified that her pain was still present at the time of trial and that she was undergoing exercises to strengthen her body and return it to normal. Testimony regarding Frederick's damages, including her pain and suffering, also was offered by her mother (Christine Howard), and one of her treating surgeons (Stephen Sims, M.D.).

STANDARDS OF REVIEW

I. New Trial, New Trial Absolute, and New Trial Nisi Remittitur

"When a party moves for a new trial based on a challenge that the verdict is either excessive or inadequate, the trial judge must distinguish between awards that are merely unduly liberal or conservative and awards that are actuated by passion, caprice or prejudice." *Welch v. Epstein*, 536

S.E.2d 408, 420 (S.C. App. 2000), citing *Allstate Ins. Co. v. Durham*, 314 S.C. 529, 431 S.E.2d 557 (1993). The trial court must set aside a verdict only when it is shockingly disproportionate to the injuries suffered and thus indicates that passion, caprice, prejudice, or other considerations not reflected by the evidence affected the amount awarded. *Vinson v. Hartley*, 324 S.C. 389, 477 S.E.2d 715 (Ct.App.1996). In other words, to warrant a new trial absolute, the verdict reached must be so “grossly excessive” as to clearly indicate the influence of an improper motive on the jury. *Rush v. Blanchard*, 310 S.C. 375, 426 S.E.2d 802 (1993). In deciding whether to assess error when a new trial motion is denied, this Court must consider the testimony and reasonable inferences therefrom in the light most favorable to the nonmoving party. *Vinson, supra*.

A trial court may act as a thirteenth juror if it finds the evidence does not warrant the verdict; in doing so, it may grant a new trial. *Youmans ex rel. Elmore v. S.C. Dep’t of Transp.*, 380 S.C. 263, 287, 670 S.E.2d 1, 13 (Ct. App. 2008). “The jury’s determination of damages is entitled to substantial deference. The denial of a new trial motion is within the discretion of the trial court and, absent an abuse of discretion, it will not be reversed on appeal.” *Clark v. S.C. Dep’t of Pub. Safety*, 353 S.C. 291, 309–10, 578 S.E.2d 16, 25 (Ct. App. 2002) *aff’d*, 362 S.C. 377, 608 S.E.2d 573 (2005).

A motion for new trial nisi remittitur asks the trial court in its discretion to reduce the verdict because it is merely excessive, although not motivated by considerations such as passion, caprice or prejudice. *O’Neal v. Bowles*, 314 S.C. 525, 431 S.E.2d 555 (1993). However, “compelling reasons...must be given to justify invading the jury’s province in this matter.” *RRR, Inc. v. Toggas*, 378 S.C. 174, 183, 182 S.E.2d 438, 442 (Ct.App. 2008). An appellate court reviews a decision to grant or deny a motion for a new trial nisi remittitur on an abuse of discretion standard. *Id.* The decision as to whether to admit or exclude evidence is within the sound discretion of the

trial Court. *Hollins v. Wal-Mart Stores, Inc.*, 381 S.C. 245, 250-51, 672 S.E.2d 805, 807 (Ct.App. 2008). Therefore, an appellate court will not reverse the trial court's decision absent an abuse of discretion. *Id.*

II. Directed Verdict/JNOV

“A party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict.” SCRCP 50(b). When considering a motion for directed verdict, the trial court must consider the evidence and the inferences in the light most favorable to the non-moving party. *Williams Carpet Contractors, Inc. v. Skelly*, 400 S.C. 320, 325, 734 S.E.2d 177, 180 (Ct. App. 2012). The trial court should deny the motion where either the evidence yields more than one inference or its inference is in doubt. *Jinks v. Richland County*, 355 S.C. 341, 345, 585 S.E.2d 281, 283 (2003). “A jury’s verdict should be affirmed if it is possible to do so and carry into effect the jury’s clear intention.” *Daves v. Cleary*, 355 S.C. 216, 234, 584 S.E.2d 423, 432 (Ct. App. 2003)(emphasis added).

ARGUMENT

I. The trial court properly denied Defendant’s motions for new trial and new trial nisi remittitur, as the evidence submitted at trial supported the jury’s verdict and the verdict was not grossly or merely excessive.

Given the evidence presented at the trial of this case, it is clear that the jury’s verdict was neither grossly nor merely excessive. The injuries sustained by Frederick in the collision were devastating. Indeed, the force of the collision broke both her femur and ankle, requiring a blood transfusion, three surgeries, physical therapy, and additional care. She testified to the tremendous amount of physical pain she was still in at the time of the trial of the case. Frederick explained to the jury how it made her feel to be dependent on her family to take care of her basic health needs,

the year and a half long struggle to learn to walk again, and how difficult it was for her as a single mother to lose over \$53,000.00 in wages during her recovery. Frederick's mother, Christine Howard, testified to the pain her daughter felt when Frederick's daughter, Shayna, failed to recognize her when she returned home from the hospital. Ms. Howard further testified to the embarrassment and anguish her daughter felt at having to rely on her to change bedpans and take baths. Frederick's mother provided further testimony that her daughter continues to be terrified of the rain and turned to scripture to calm down. *Id.* One of her treating physicians, Dr. Sims, testified that Frederick's injuries caused significant pain. (R. pp. 162-195).

Frederick presented \$171,909.87 in outstanding medical bills and \$53,460.00 in lost wages to the jury, along with the intangible damages she extensively testified to at trial. The Appellant's assertion that the jury had no evidentiary basis to arrive at their verdict is false. As set forth above, Frederick, her mother, and her surgeon testified to her physical and intangible injuries in great detail. Appellant argues that it is "very likely" that the jury heard Frederick's testimony and "made the leap on its own" to a conclusion that her pain would continue, calling the jury's verdict "guesswork." Appellant fails to recognize that his own argument – based on assumption and speculation that the jury "very likely" made conclusions he has no evidence of – is precisely the type of guesswork he argues against in his Initial Brief.

Indeed, Appellant's argument is littered with statements of what the jury "perhaps" heard, or "perhaps" had considered, or "perhaps" that it sympathized with a severely injured single mother. "Perhaps" is not the standard needed to justify invading the jury's province and overturning its verdict. Appellant has not advanced a viable argument that the jury's verdict was based on passion, prejudice, or caprice, or some other influence outside of the evidence. *O'Neal, supra*. Certainly, Appellant has not set forth the required "compelling reasons" which "must be

given to justify invading the jury's province in this matter." *Toggas, supra*. Instead, he argues that because there was "no evidence whatsoever that Frederick would sustain or experience any compensable damages in the future," the jury's verdict was excessive.

The appellate court's task here is not to weigh the evidence, but merely determine if there is any evidence to support the damages award. See *Hutson v. Cummins Carolinas, Inc.*, 280 S.C. 552, 314 S.E.2d 19 (Ct.App.1984). Actual damages are properly called compensatory damages, meaning to compensate, to make the injured party whole, to put him in the same position he was in prior to the damages received insofar as this is monetarily possible. See *Clark v. Cantrell*, 339 S.C. 369, 529 S.E.2d 528 (2000). The goal is to restore the injured party, as nearly as possible through the payment of money, to the same position he was in before the wrongful injury occurred. *Clark*, 339 S.C. at 378, 529 S.E.2d at 533. Actual or compensatory damages include compensation for all injuries which are naturally the proximate result of the alleged wrongful conduct of the defendant. See *Rogers v. Florence Printing Co.*, 233 S.C. 567, 106 S.E.2d 258 (1958). "While money cannot return an injured plaintiff to his pre-injury state, it can compensate for both pecuniary, e.g., medical and nursing care, lost wages, impaired earning capacity, and other expenses, and nonpecuniary, e.g., pain and suffering, mental anguish, humiliation, and other losses, both past and future." 11 S.C. Jur. Damages § 16 (Nov. 2020 Update)(emphasis added).

Here, Appellant attempts to sweep Frederick's nonpecuniary damages under the rug and asks this Court to invade the province of the jury to find that the jury's verdict was grossly excessive. Appellant has not provided the requisite compelling reasons to do so, nor has he shown that the verdict was shockingly disproportionate to the injuries suffered and thus indicates that passion, caprice, prejudice, or other considerations not reflected by the evidence affected the amount awarded. *Vinson, supra*. The jury was entitled to consider the pain and suffering Frederick

underwent before and up to trial. *Bussey v. Charleston & W. C. R. Co.*, 52 S. C. 438, 446, 30 S. E. 477, 481 (1898); *see also Kapuschinsky v. United States*, 259 F. Supp. 1 (D. S. C. 1966). Likewise, the jury had the right to consider Plaintiff's mental anguish. *Boan v. Blackwell*, 343 S.C. 498, 541 S.E.2d 242 (2001). Indeed, "damages are given for mental anguish where the evidence shows, for example, that the injured person suffered shock, fright, emotional upset, and/or humiliation as the result of the defendant's negligence." 11 S.C. Jur. Damages § 21 (November 2020 Update)(emphasis added).

Here, Appellant has conveniently disregarded the evidence of nonmonetary damages Frederick presented at the trial of this case and instead focuses solely on her special damages of over \$225,000.00. At trial, Frederick of course provided evidence of special damages in an amount of over \$225,000.00, and she also provided extensive evidence regarding her non-pecuniary damages. When coupled together, it is clear that the jury's verdict was not grossly excessive, but instead based upon the evidence presented during the trial of the case. Because the Appellant has not shown that the verdict was the result of passion, caprice, prejudice, or some other influence outside the evidence, the trial court's denial of a new trial absolute was proper, and the jury's verdict must be affirmed.

Likewise, the Appellant has failed to advance a cogent argument that the jury's verdict was merely excessive so as to warrant the granting of a new trial nisi remittitur. To reiterate, Appellant has not met his burden of showing compelling reasons to justify invading the jury's province to grant a new trial nisi remittitur. *See Proctor v. Dep't of Health & Envtl. Control*, 368 S.C. 279, 320, 628 S.E.2d 496, 518 (Ct.App.2006) (stating "compelling reasons must be given to justify invading the jury's province by granting a new trial nisi remittitur" and noting "[t]he consideration for a motion for a new trial nisi remittitur requires the trial judge to consider the adequacy of the

verdict in light of the evidence presented”). *Curtis v. Blake*, 709 S.E.2d 79, 82 (S.C. App. 2011) is instructive. In *Curtis*, the appellant argued that a new trial nisi remittitur should have been granted because the award of actual damages was “almost one hundred the times the cost of Curtis’s medical treatment and lost wages.” *Id.* at 83. The Court of Appeals noted that appellant’s argument failed to fully consider Curtis’s nonmonetary damages, including fright while driving. *Id.* Accordingly, the trial court’s denial of appellant’s motion for new trial nisi remittitur was affirmed. *Id.* The same outcome is countenanced here. Put simply, Appellant has not shown compelling reasons as to why the jury’s province should be invaded and their verdict disregarded.

II. The trial court did not err in denying McDowell’s request for directed verdict or JNOV, as the jury reached the reasonable conclusion that Frederick’s alleged “negligence” did not contribute to the cause of the accident.

McDowell’s argument can be boiled down to a single sentence: Frederick was negligent by not keeping a proper lookout and therefore is barred from recovery. His argument ignores the testimony provided by Frederick and her expert, Ken Richardson. Further, it seeks to invalidate the jury’s ability of passing upon the credibility of witnesses and the accuracy of their testimony, which may very rarely be taken from jury. *Ingram v. Davis*, 125 S.E. 920 (S.C. 1924). The jury has the inviolate right to pass upon the credibility of a witness. Put differently, in a “case tried before a jury, it is the jury that must decide what part of the witness's testimony it wants to believe and what part it wants to disbelieve.” *Small v. Pioneer Mach., Inc.*, 329 S.C. 448, 494 S.E.2d 835 (S.C. App. 1997). “The fact finder is imbued with broad discretion in determining credibility or believability of witnesses. Quintessentially, an operative factor in evaluating credibility of a witness is inconsistency.” *Id.*

Here, as discussed *supra*, Frederick presented evidence that she was properly traveling in her own lane with her eyes on the road. She was driving under the speed limit, had her headlights

on, using her windshield wipers, and not using her phone. Frederick testified that she first noticed McDowell's vehicle when it was approximately three (3) cars lengths away from her. McDowell argues that because he presented line-of-sight testimony through Don Roberts, Plaintiff was negligent. McDowell fails to mention that his witness's testimony was contested by that of the Frederick, who testified that there was no way she could have avoided the collision. Further, McDowell's argument ignores the testimony of Ken Richardson, who testified that McDowell's car was moving forwards at the time of the collision. Mr. Richardson testified that Frederick's testimony and recollection likely was more reliable, even without reference to the information contained in the police report. (R. pp. 197-209).

It is in the province of the jury to determine what weight and credibility (if any) to apply to each witness's testimony. Because there existed competing testimony, a jury question was created as to whether Frederick was contributorily negligent. A directed verdict motion should be granted as to contributory negligence only "if the jury could have drawn no conclusion from the evidence but that...the contributory negligence of [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)(internal quotations omitted)(emphasis added). Here, ample evidence was presented to the jury to make the determination that Frederick was not contributorily negligent. Despite Appellant's protestations, the only reasonable conclusion the jury could have reached from Frederick's testimony and the evidence presented in this case was not that Frederick's own negligence contributed to the accident. Accordingly, a question for the jury was present and the trial court properly denied Appellant's motion for directed verdict and JNOV.

III. The trial court did not err in admitting Frederick's medical bill exhibit which properly showed the amount of medical bills actually paid to satisfy those bills.

Rule 414, NCRE states 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. 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. (emphasis added).

Appellant argues that the plain language of Rule 414 limits what a plaintiff can introduce as evidence. This is a strained and inaccurate reading of the rule, as despite Appellant's contention, Rule 414 only limits the evidence offered to prove past medical expenses. Frederick's exhibit contained the purported amount of medical bills that were still unpaid. Frederick's counsel explained to the jury that she was claiming only the unpaid amount of damages. The trial court charged the jury regarding the same. (R. pp. 150-153).

As counsel for the Appellant correctly noted, there is no way to determine whether the "higher number" contained within the medical exhibit in any way impacted the jury's decision. There is no evidence that the admission of the same was facially prejudicial. No actual prejudice has been shown. Accordingly, the trial court's decision must be affirmed.

IV. The trial court did not err in allowing Frederick's expert to rely upon objective opinion testimony regarding the location at which the vehicles came to rest following the collision, as he did not rely on any subjective opinions of the investigating officer.

Appellant argues that Frederick's expert, Ken Richardson, relied in large part on "calculations made and conclusions drawn by the investigating North Carolina law officer," and that the trial court committed "prejudicial error" by allowing him to rely on "subjective opinions." Appellant's assertion that Mr. Richardson improperly relied on subjective opinions of the investigating officer in forming his own expert opinions is incorrect. Indeed, Mr. Richardson relied on the objective testimony regarding the location at which the vehicles came to rest following the collision – information confirmed by the Defendant himself. Appellant attempts to argue that under

Hamrick, if the responding officer would not have been allowed to himself testify as to the subjective opinions, Mr. Richardson should not have been allowed to rely upon such opinions. This is incorrect because Plaintiff's expert did not rely upon any subjective opinions of the responding officer.

As discussed, *ad nauseum* herein, the point of impact was not disputed in this case. Mr. Richardson opined that McDowell was moving forward at the time of the collision and based this opinion not on the responding officer's investigation, but rather on the position of the vehicles post-impact. As an initial matter, while the responding officer may not have been qualified to conduct a full accident reconstruction, he was certainly qualified to take note of where the vehicles came to rest post impact. This is a simple observation that could be made by any fact witness. It is not an opinion, requiring specialized knowledge, but rather a factual observation made by a person with direct knowledge. Regardless, the responding officer's factual observation was immaterial because McDowell – on the stand at the trial of this case – agreed as to where the vehicles came to rest. McDowell's own expert further testified that, if McDowell's vehicle did in fact come to rest where McDowell himself testified that it did, Defendant's vehicle must have been moving in a forward collision at the time of the accident.

Appellant's argument ignores his own testimony. The trial court's ruling should be upheld on this basis alone. Moreover, even if Mr. Richardson did rely on subjective opinions (which he did not), reversal still would not be warranted. Pursuant to Rule 703, SCRE, "[t]he facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence." Defendant's assertion that an accident reconstructionist and engineer

cannot base his opinions on the data perceived by others is a misreading of our state's rules of evidence. Rule 703, SCRE allows an expert to rely upon such evidence even when those facts or data are not admissible into evidence, so long as they are reasonably relied upon by experts in that field of expertise. Accident reconstructionists routinely rely calculations within police reports if they are available; indeed, Defendant's own two experts explicitly reviewed said report and relied upon the same. Defendant's argument therefore fails, and the trial court's ruling must be upheld.

CONCLUSION

For the reasons set forth herein, the Court should affirm the rulings of the trial court and the jury's award.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

March 26, 2021
Charleston, SC

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

Daisy Frederick, Respondent,

v.

Daniel Lee McDowell, Appellant.

Appellate Case No. 2020-000989

Appeal From Marlboro County
Paul M. Burch, Circuit Court Judge

Unpublished Opinion No. 2022-UP-303
Submitted June 1, 2022 – Filed July 20, 2022

AFFIRMED

R. Hawthorne Barrett, of Turner Padget Graham &
Laney, PA, of Columbia, and David Richard Sligh, of
Sligh Law Firm, P.A., of Conway, both for Appellant.

Eric Marc Poulin and Roy T. Willey, IV, both of
Anastopoulo Law Firm, LLC, of Charleston; James
Camden Hodge, of Anastopoulo Law Firm, LLC, of
Greenville; and Alexis Wimberly McCumber, of Athens,
Georgia, all for Respondent.

PER CURIAM: Daniel McDowell appeals the jury's verdict awarding Daisy Frederick \$5,000,000 and the trial court's denial of his post-trial motions. On appeal, he argues the trial court erred (1) in failing to grant a new trial absolute or new trial nisi remittitur due to the excessiveness of the verdict, (2) in denying his motions for a directed verdict and judgment notwithstanding the verdict (JNOV) because Frederick was contributorily negligent, (3) in admitting evidence of the full amount of the medical bills in violation of North Carolina law,¹ and (4) in allowing Frederick's expert to rely on the accident report prepared by the investigating law enforcement officer. We affirm.

1. We hold the trial court did not abuse its discretion in denying McDowell's motions for a new trial and new trial nisi remittitur. Frederick had a broken left femur, crushed lower tibia and fibula in her right leg, lacerations and wounds on her arm, and significant blood loss. Frederick's doctor stated her recovery was long and that she likely still had some difficulties. She had three separate surgeries to repair her broken legs, was bedbound for nine months, spent the next year and a half relearning how to walk, and needed assistance for bathing and toileting. Frederick testified about the tremendous pain she experienced from the accident, which continued through the date of the trial, her worry for her children immediately after the accident and not being able to see them while she was in the hospital, her fear of dying or becoming addicted to pain killers, and the uncomfortableness of being dependent on her family for assistance. We hold the jury's verdict was not shockingly disproportionate to the severe injuries Frederick suffered or excessive when considering the evidence presented of Frederick's medical expenses, pain and suffering, mental anguish, and loss of enjoyment of life. *See Burke v. AnMed Health*, 393 S.C. 48, 56, 710 S.E.2d 84, 88 (Ct. App. 2011) ("A trial judge . . . has the power to grant a new trial absolute . . . when the verdict 'is shockingly disproportionate to the injuries suffered and thus indicates that passion, caprice, prejudice, or other considerations not reflected by the evidence affected the amount awarded.'" (quoting *Becker v. Wal-Mart Stores, Inc.*, 339 S.C. 629, 635, 529 S.E.2d 758, 761 (Ct. App. 2000))); *id.* (stating the granting or denial of a new trial motion "rests within the discretion of the circuit court, and its decision will not be disturbed on appeal unless its findings are wholly

¹ Although the accident occurred in North Carolina, this case was tried in Marlboro County because both parties were South Carolina residents. *See Nash v. Tindall Corp.*, 375 S.C. 36, 39, 650 S.E.2d 81, 83 (Ct. App. 2007) (explaining "the substantive law governing a tort action is determined by . . . the law of the state in which the injury occurred" and procedural matters are decided by the law of the forum (quoting *Boone v. Boone*, 345 S.C. 8, 13, 546 S.E.2d 191, 193 (2001))).

unsupported by the evidence or the conclusions reached are controlled by error of law." (quoting *Brinkley v. S.C. Dep't of Corrs.*, 386 S.C. 182, 185, 687 S.E.2d 54, 56 (Ct. App. 2009)); *id.* at 57, 710 S.E.2d at 89 ("The denial of a motion for a new trial nisi is within the trial court's discretion and will not be reversed on appeal absent an abuse of discretion." (quoting *James v. Horace Mann Ins. Co.*, 371 S.C. 187, 193, 638 S.E.2d 667, 670 (2006))); *Proctor v. Dep't of Health & Envtl. Control*, 368 S.C. 279, 320, 628 S.E.2d 496, 518 (Ct. App. 2006) ("The trial court alone has the power to grant a new trial nisi when [it] finds the amount of the verdict to be merely inadequate or excessive."); *Mims v. Florence Cnty. Ambulance Serv. Comm'n*, 296 S.C. 4, 7, 370 S.E.2d 96, 99 (Ct. App. 1988) ("The amount of damages a jury may award for physical pain and suffering and for mental pain and suffering is incapable of exact measurement and is therefore left for determination by the jury."); *Harper v. Bolton*, 239 S.C. 541, 548, 124 S.E.2d 54, 57 (1962) ("Pain and suffering have no market price. They are not capable of being exactly and accurately determined, and there is no fixed rule or standard whereby damages for them can be measured."); *Hawkins v. Pathology Assocs. of Greenville, P.A.*, 330 S.C. 92, 98, 112, 498 S.E.2d 395, 399, 406 (Ct. App. 1998) (holding jury's verdict of \$3,500,000 in a survival action to be reasonably reflective of the pain, physical and mental suffering, and lack of quality of life a patient endured during her seven-month fight with cancer following a misdiagnosed Pap smear).

Because the jury returned a general verdict, it is impossible for this court to determine if the award included future damages and therefore whether McDowell was prejudiced by the trial court's allegedly erroneous charge of the mortality tables. *See Pearson v. Bridges*, 344 S.C. 366, 372 n.5, 544 S.E.2d 617, 619 n.5 (2001) (noting that because the jury returned a general verdict, "[t]here is simply no way to determine if the jury allocated any money for future medical expenses"); *Stokes v. Spartanburg Reg'l Med. Ctr.*, 368 S.C. 515, 520, 629 S.E.2d 675, 678 (Ct. App. 2006) ("An erroneous jury charge will not result in a verdict being reversed unless the charge prejudiced the appellant's case.").

2. We hold the trial court did not err in denying McDowell's motions for a directed verdict and JNOV because the record contains evidence that the accident was not proximately caused by a lack of due care by Frederick, leaving the issue for the jury to decide. Testimony from Frederick, McDowell, and their respective experts established to the jury two possible circumstances for the accident. McDowell's expert acknowledged that the accident was not avoidable if Frederick's account was true. *See RFT Mgmt. Co. v. Tinsley & Adams L.L.P.*, 399 S.C. 322, 331-32, 732 S.E.2d 166, 171 (2012) ("When reviewing the trial court's ruling on a motion

for a directed verdict or a JNOV, [the appellate c]ourt must apply the same standard as the trial court by viewing the evidence and all reasonable inferences in the light most favorable to the nonmoving party."); *id.* at 332, 732 S.E.2d at 171 ("The trial court must deny a motion for a directed verdict or JNOV if the evidence yields more than one reasonable inference or its inference is in doubt."); *id.* ("In deciding such motions, neither the trial court nor the appellate court has the authority to decide credibility issues or to resolve conflicts in the testimony or the evidence."); *Daisy v. Yost*, 794 S.E.2d 364, 366 (N.C. Ct. App. 2016) ("In order to prove contributory negligence on the part of a plaintiff, the defendant must demonstrate: '(1) [a] want of due care on the part of the plaintiff; and (2) a proximate connection between the plaintiff's negligence and the injury.'" (quoting *West Constr. Co. v. Atlantic Coast Line R.R. Co.*, 113 S.E. 672, 673 (N.C. 1922))).

3. This court cannot review McDowell's argument that the trial court erred in admitting into evidence an exhibit that showed the entire amount of Frederick's medical bills in violation of Rule 414 of the North Carolina Rules of Evidence because McDowell failed to include the contested exhibit in the record on appeal and the court cannot tell if its admission prejudiced the jury's verdict. *See* Rule 210(h), SCACR ("[T]he appellate court will not consider any fact that does not appear in the Record on Appeal."); *Helms Realty, Inc. v. Gibson-Wall Co.*, 363 S.C. 334, 339, 611 S.E.2d 485, 487-88 (2005) (explaining the appellant has the burden of providing a sufficient record); *Vaught v. A.O. Hardee & Sons, Inc.*, 366 S.C. 475, 480, 623 S.E.2d 373, 375 (2005) ("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.").

4. We hold the trial court did not abuse its discretion in admitting Frederick's expert's testimony because the expert relied on objective, factual information in the law enforcement accident investigation report, which Rule 703, SCRE allows. *See State v. Jones*, 423 S.C. 631, 636, 817 S.E.2d 268, 270 (2018) ("The admissibility of an expert's testimony is a matter within the trial court's sound discretion and the determination will not be reversed on appeal absent an abuse of discretion."); *Watson v. Ford Motor Co.*, 389 S.C. 434, 446, 699 S.E.2d 169, 175 (2010) (explaining that under Rule 703 "an expert witness is permitted to state an opinion based on facts not within his firsthand knowledge or may base his opinion on information made available before the hearing so long as it is the type of information that is reasonably relied upon in the field to make opinions").

AFFIRMED.²

WILLIAMS, C.J., and KONDUROS and VINSON, JJ., concur.

² We decide this case without oral argument pursuant to Rule 215, SCACR.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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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.

PETITION FOR REHEARING

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The Appellant Daniel Lee McDowell respectfully submits this Petition for Rehearing pursuant to Rule 221, SCACR.

STATEMENT OF THE CASE

This case arose from an automobile accident that occurred in North Carolina on April 29, 2015. Both drivers involved in the accident were South Carolina residents. The Respondent Daisy Frederick (“Frederick”) filed her Summons and Complaint in the Court of Common Pleas for Marlboro County on April 1, 2016. [R. pp. 10-14.] The Appellant 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 would apply because the subject accident occurred in that state. Frederick has not challenged that ruling on appeal. [R. pp. 47-48.]

At trial, Frederick testified on her own behalf. She also presented testimony by (1) McDowell, (2) Christine Howard, her mother, (3) Dr. Stephen Sims, one of her treating physicians, and (4) 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 scene, 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 without objection. Based on his examination of the accident site, Roberts testified that 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.] Frederick did not challenge or dispute either of those conclusions.

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 basis or need for an award of future medical bills or lost wages, as there was no record evidence to support any such damages. Indeed, Frederick's attorney expressly told the jury that future lost wages were not warranted, saying, "I don't think it's necessary to give her lost wages for the rest of her life or anything like that cause [sic] she's going to find work." [R. p. 143, lines 12-14.] The attorney did request an award for

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

future pain, even though there was no medical evidence to support such a claim, and even though the attorney could only argue that Frederick would “probably” have pain in the future. [R. pp. 145-146.]

After the closing arguments were concluded, counsel for McDowell again renewed the directed verdict motions based on contributory negligence and the absence of any evidence to support awards for future damages. [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.] Following that verdict, the judge granted the parties 10 days to make post-trial motions. [R. pp. 160-161.]

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 he moved for a directed verdict at trial. [R. pp. 18-20.] Alternatively, McDowell moved a new trial absolute and/or a new trial *nisi remittitur* based on the following grounds: (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 an exhibit that showed the full amount of Frederick’s medical bills, (5) the erroneous decision to charge the mortality table given 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 conducted a hearing on the post-trial motions on August 21, 2019. [R. pp. 210-221.] However, the judge did not rule on the motions until May 12, 2020, when he filed an order denying them. [R. pp. 3-5.] Because the order contained an inaccurate statement about the law applied to the case, McDowell made a timely motion under Rule 59(e), SCRCPP, asking the judge to amend the previous order and also to reconsider his rulings. [R. p. 27.] The judge denied the motion to reconsider, but did file an amended order that corrected the earlier misstatement. [R. pp. 6-9.] McDowell then filed a timely Notice of Appeal in this Court.

This Court declined to hold oral arguments and issued an unpublished opinion affirming the result in the trial court on July 20, 2022.

STATEMENT OF THE FACTS

On August 29, 2015, the Appellant Daniel Lee McDowell (“McDowell”) was traveling from his home in South Carolina to his workplace in Wadesboro, North Carolina. [R. pp. 49, 83.] McDowell was operating on his normal schedule, was not late for work, and was not in a hurry. [R. p. 91.] It had been raining that day, and the roads were wet. [R. pp. 91-92.] McDowell was traveling approximately 40 miles per hour. [R. p. 92.] There is no evidence that McDowell’s speed exceeded the posted speed limit for that road.

McDowell 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 from the shock of the spinout, McDowell placed his truck in reverse, checked for traffic, and tried to back up into his original lane of travel. [R. pp. 92-93.] Before he could complete that maneuver, another vehicle collided with his truck. [R. p. 93.]

The other vehicle was a car being driven by the Respondent Daisy Frederick (“Frederick”). At the time of the collision (around 3:00 pm), Frederick, who had been up since 5:00 am, was on her way back to her home in Cheraw, South Carolina, after working a full shift at her job in North Carolina. [R. pp. 49-55.] According to Frederick, as she approached an area where the road curved, she saw a truck appear in her lane of travel. [R. pp. 54-55.] Frederick testified that she did not see the truck until it was about three car lengths away from her vehicle. [R. pp. 54-55.] However, there was uncontested evidence that the line of sight in that area of the road was at least 700 feet, and Frederick admitted that she could see a safe distance down the road and certainly farther than three car lengths. [R. pp. 77-79, 117-122.] 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. Specifically, she broke her left femur and her right ankle, and she also had numerous cuts and abrasions on her arms, back and neck. [R. p. 62.] Surgical procedures were necessary to repair the damage to her leg and ankle, and she had an extended recovery period following those procedures that involved physical therapy. [R. pp. 63-65.] As a result, she 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 her treating surgeon did not conclude that Frederick had any permanent impairment or disability or that she would require any future medical care. [R. pp. 80,162-196.]

ARGUMENT

I. The Court misapprehended the evidence submitted at trial, which did not support the grossly or merely excessive verdict.

In affirming the trial court's decision to deny McDowell's motions for a new trial or a new trial *nisi additur*, this Court focused on the nature of Frederick's injury, but overlooked or misapprehended the relatively limited amount of the financial damages. The Court's opinion failed to mention or address the specifics of McDowell's arguments based on the amounts of those claimed damages, including the authority cited in support of his position. Therefore, the Court overlooked or misapprehended a key component of this appellate issue, and it should now grant a rehearing.

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 certainly not an insignificant number, it cannot justify the \$5,000,000 verdict returned in this case. The other evidence of intangible damages also fails to support that award. To the contrary, when the totality of the evidence is viewed fairly, the amount of the verdict is clearly excessive. Therefore, this Court erred in failing to reverse and remand with instructions to grant a new trial or a new trial *nisi remittitur*.²

Frederick undoubtedly sustained serious injuries in the accident. She had a broken femur and a broken ankle, which required more than one surgery to repair, and she had an extended recovery period that led to additional care and physical therapy. As a result, she incurred a little over \$170,000 in medical bills, and she lost just over \$50,000 in income during the time when she could not work. Those facts do appear in the record, and McDowell does not claim otherwise. But

² For these same reasons, the Court erred in failing to reverse and remand with instructions to grant a new trial pursuant to the "thirteenth juror doctrine."

all of those damages were in the past by the time this trial occurred. There was no evidence whatsoever that Frederick would sustain or experience any compensable damages in the future. That absence of evidence makes the verdict unsupported and excessive.

Frederick testified that she was still experiencing some pain as of the trial date. Yet, there was no evidence even to suggest, let alone prove, that her pain would continue into the future. Frederick's treating surgeon, whose video deposition was played at trial, never expressed an opinion that she would have future problems with pain. [R. pp. 162-196.] In fact, he was not even asked to give that opinion. No other medical experts testified, which means the medical evidence was completely silent on the issue of future pain. 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 months or years following the trial.

That lack of evidence is crucial because it opened the door for impermissible speculation by the jury. It is very likely that 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 necessarily based on guesswork, not evidence. This fact renders 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.").

The same reasoning applies to the issue of future medical care and related expenses. Frederick's surgeon did not testify that she would need any accident-related medical care in the future, and Frederick did not present any other testimony, medical or otherwise, to that effect. As a result, there was no life care plan, and Frederick submitted no evidence of future treatments or expenses to the jury. She did not testify that she had any plans or intentions to seek such care in

the future. To the contrary, she testified that she had not seen a medical provider for her injuries since December 2016, which was more than a year before the trial began. [R. p. 80.]

Similarly, there was no evidence that Frederick had any permanent impairment or disability as a result of her injuries. The treating surgeon did not even hint at the existence of any permanent condition, and he certainly did not give Frederick any kind of impairment rating. Again, this means that the jury could not have permissibly considered any impairment or disability when arriving at its verdict.

There was also no evidence that Frederick would have any future lost income. She did not present a vocational rehabilitation expert to opine that she could not work in the future, nor did her treating surgeon give that type of opinion. Frederick herself did not even claim that she would not be able to return to work in the future. In fact, during his closing argument, Frederick's attorney stated that she would be able to work, and he disavowed any claim for future lost income. [R. p. 143.]

The total 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 erroneous and prejudicial. 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 damages Frederick would experience for the years remaining in her life expectancy, even though no evidence of such damages existed. Thus, the jury charge on that issue, in and of itself, entitles McDowell to a new trial.

This Court overlooked or misapprehended the issue involving the erroneous jury charge, stating only that the general verdict made it impossible to determine whether the jury intended to award future damages. McDowell respectfully asserts that the excessive amount of the verdict, especially when seen in light of the relatively low economic damages, at the very least strongly indicates that the verdict included future damages. For this reason, the Court should grant a rehearing to examine and address this issue in more depth.

Second, the absence of future damages evidence reveals the reversible error in the trial court's decision not to grant a new trial or a new trial *nisi remittitur*. If future damages are removed from the equation, as they must be based on the lack of evidence, 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 and then ended; (3) pain during that period; (4) a finite amount of medical bills; and (5) a finite amount of lost wages. Although those factors are not insignificant, they cannot possibly support a verdict that was more than twenty-two times the amount of the combined total specials.

Given specials of roughly \$225,000, the verdict of \$5,000,000 was grossly excessive. Without any evidence of a permanent impairment or disability, there is simply no way to explain such a verdict without concluding that the jury based its decision on factors other than the record evidence. Perhaps the jurors heard the charge regarding the mortality table and concluded, erroneously, that they were obligated to give Frederick an award for unspecified and speculative future damages. Perhaps the jurors sought to punish McDowell even though no claim for punitive damages was before them. Or perhaps the jurors simply allowed sympathy for a young single mother to sway their decisions. Regardless of what actually motivated the jury, it could not have been only the evidence presented at trial. No reasonable jury could have awarded such an excessive amount based on such a comparably small amount of special damages and no evidence of any

additional damages. Therefore, McDowell is entitled to a new trial absolute, and this Court erred in concluding otherwise. *See James v. Horace Mann Ins. Co.*, 371 S.C. 187, 193, 638 S.E.2d 667, 670 (2006) (“If the amount of the verdict is grossly inadequate or excessive so as to be the result of passion, caprice, prejudice, or some other influence outside the evidence, the trial court must grant a new trial absolute.”) (emphasis added); *Becker v. Wal-Mart Stores, Inc.*, 339 S.C. 629, 635, 529 S.E.2d 758, 761 (Ct. App. 2000) (“The trial court must set aside a verdict only when it is shockingly disproportionate to the injuries suffered and thus indicates that passion, caprice, prejudice, or other considerations not reflected by the evidence affected the amount awarded.”).

Even if the verdict were considered not to be grossly excessive, it was nonetheless merely excessive for purposes of a new trial *nisi remittitur*. South Carolina’s courts have loosely defined “merely excessive” verdicts as those that are “unduly liberal” under the circumstances. *See Becker*, 339 S.C. at 635, 529 S.E.2d at 761. As previously discussed, here the verdict amount was so excessive as to shock the conscience of the court and, thus, justify a new trial absolute. But assuming *arguendo* it did not meet that standard, it would clearly be “merely excessive” so as to warrant a new trial *nisi remittitur*. This is a lower standard than the present circumstances undoubtedly satisfy.

Becker v. Wal-Mart, supra, is instructive on this issue. The following facts from *Becker* were relevant to the eventual appeal:

On October 12, 1995, Becker was shopping in a Wal-Mart store on Hilton Head Island. Becker, seventy-three at the time, was pushing a shopping cart down an aisle in the appliance section when a box containing a space heater fell from a shelf to her left and struck her left foot. Becker immediately experienced numbness as a result, and the assistant manager noticed a red mark on her foot. At the time, Becker refused medical attention and left the store after completing a company incident report. Over the next thirty-six hours, however, Becker's injury progressively worsened. On October 14, Becker sought help from her former family physician, who referred her to

several specialists. In time it was determined that Becker had developed "reflex sympathetic dystrophy," or RSD, a painful disorder involving the peripheral and sympathetic nerves of the extremity.

As a result of the RSD, Becker endured constant, intense pain in her foot over several months, eventually necessitating the surgical implantation of an epidural "portacath" to obtain relief. She also suffered from depression associated with the pain. Becker achieved some improvement, however, and finally reached a plateau at which the pain eased to a chronic, lower level. One treating physician analogized her discomfort factor as "sort of like having a chronic [foot] fracture that just won't heal, hasn't healed, and won't ever heal" Becker was ultimately assigned a four per cent impairment rating to the lower extremity, which corresponded to a two per cent impairment rating to the whole body.

339 S.C. at 633, 529 S.E.2d at 760. 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.*

Becker is significant because it found a verdict to be excessive despite the existence of 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 that her foot would never fully heal. Despite that evidence of future damages, the trial court found the verdict amount to be excessive, and this Court affirmed.

As discussed above, 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 also be excessive. Consequently, *Becker* supports McDowell's position on appeal and warrants a finding that the verdict were merely excessive. This

Court failed to address or consider *Becker*'s impact, and it should now grant a rehearing in order to conduct that analysis.

Although the Court cited numerous cases in the section of its opinion dealing with this issue, only one of them specifically addresses the reasonableness of a verdict amount; the others were cited primarily to show the applicable standard of review. In *Hawkins v. Pathology Associates, P.A.*, 330 S.C. 92, 498 S.E.2d 395 (Ct. App. 1998), this Court did conclude that a \$3,500,000 verdict was reasonable under the circumstances of that case. By citing and relying upon *Hawkins*, however, the Court overlooked or misapprehended a key distinguishing fact. In *Hawkins*, the decedent whose death led to the survival claim at issue lived her final seven months undergoing a painful course of treatment all the while knowing her condition was terminal and that she would not be able to care for her children even again. 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, or that she ever thought, her injuries were permanent or that she would never recover from them. 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, the Court overlooked a significant distinguishing factor and erred in relaying upon *Hawkins* as controlling or persuasive authority.

In summation, Frederick sustained serious injuries, but ones that were successfully treated. She presented no evidence of any permanent impairments or disabilities. She presented no evidence of any need for future medical care. She presented no medical evidence that she would continue to experience pain in the future. She presented no evidence of future lost wages and, in fact, disclaimed any such damages at trial. Rather than offering those kinds of evidence, Frederick

submitted only claims about past pain and suffering and specials totaling a little over \$225,000. That is a large number, but not nearly large enough, without more, to justify a \$5,000,000 verdict.

If the specials are removed from consideration, the jury basically awarded Frederick \$4,775,000 for intangible damages such as pain and suffering for a 20-month period (i.e. from the day of the accident to the date of trial). That amount is “shockingly disproportionate to the injuries suffered and thus 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 erred in affirming the result in the trial court, and it should grant a rehearing to more fully examine this issue.

II. The Court overlooked or misapprehended unchallenged evidence demonstrated that Frederick’s own negligence was a contributing cause of the accident.

During a pre-trial conference, the trial court determined that the substantive law of North Carolina applied to the case because the subject accident occurred in that state. [R. pp. 47-48.] This decision was correct. *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 the close of Frederick’s case, and again at the close of all evidence, 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, and this Court should have reversed on that basis.

“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).³

Although Frederick and McDowell presented competing versions of exactly how the accident occurred, the differences between their respective accounts are not germane to the contributory negligence defense. For this issue, the key facts are not actually in dispute. To the contrary, they were plainly established through undisputed testimony.

McDowell's expert testified that even in the worst case scenario, 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.⁴ [R. pp. 117-125.] Frederick's attorney did not challenge those opinions, and Frederick admitted on the stand that she could see a safe distance down the road before the accident occurred. [R. p. 77.] Frederick further testified that she did not see McDowell's truck until it was three car lengths away, and she never attempted to apply her brakes. [R. pp. 55, 79.]

In light of the undisputed facts regarding the line of sight and the ability to stop a vehicle well short of that distance, the only reasonable conclusion or inference from Frederick's testimony is that her own negligence at least contributed to cause the accident. Had she been maintaining a proper lookout, she certainly could have seen McDowell's truck in time to stop her car or take some other evasive action. Her failure to do that constitutes negligence. *See Riddick v. Whitaker*,

³ 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).

⁴ 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).

13 N.C. App. 416, 419, 185 S.E.2d 602, 604 (Ct. App. 1972) (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”); *accord Kutz v. Koury Corp.*, 93 N.C. App. 300, 305, 377 S.E.2d 811, 814 (Ct. App. 1989) (directed verdict was proper in a premises liability case because the invitee plaintiff “had the duty to see that which could be seen in the exercise of ordinary prudence”).

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. As discussed above, the only reasonable answer to that question is yes. The evidence shows that Frederick had plenty of time and road to see McDowell’s vehicle and take action to avoid a collision. Her failure to do that constitutes negligence that contributed to the accident. Consequently, her claim against McDowell should have been barred under North Carolina law.

Significantly, this Court’s 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 should have considered and applied those cases, and its failure to do so constitutes a sufficient ground to grant the current position and reconsider this issue in light of those authorities.

Contributory negligence can be a harsh doctrine, and, of course, South Carolina law no longer recognizes it. But South Carolina law does adhere to the established rule that the substantive law of the location of the incident applies in tort cases. Under that rule, North Carolina law – including contributory negligence – applies to this case. The trial court was correct in deciding to apply North Carolina law, but incorrect in how it applied the doctrine of contributory negligence to the evidence presented at trial. This Court erred in failing to reverse on this issue, and it should grant a rehearing.

III. This Court should grant a rehearing to consider the trial court’s error in admitting evidence of the full amount of medical bills in violation of North Carolina because a sufficient basis for addressing this issue appears in the Record on Appeal.

During a pre-trial conference, the trial court ruled that North Carolina law, including Rule 414 of the North Carolina Rules of Evidence, would apply to the trial because the subject accident occurred in North Carolina. [R. pp. 47-48.] However, during Frederick’s testimony, she offered into evidence an exhibit that violated Rule 414. McDowell’s trial counsel made a timely objection, which the trial judge overruled. [R. p. 72.] That decision was both erroneous and prejudicial to McDowell and should serve as a basis for reversal.

As a threshold matter, this Court 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 cases⁵ as support for its conclusion. As discussed below, however, none of those

⁵ *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)

authorities stand for the proposition that inclusion of the actual exhibit is required under these circumstances.

Rule 210(h), SCACR, states that “the appellate court will not consider any fact that does not appear in the Record on Appeal” (emphasis added), and *Helms* was merely cited for the proposition that the appellant has the burden of providing a “sufficient record.”⁶ Here, McDowell did precisely that. McDowell did not focus any arguments on the specific wording or formatting 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). The fact that the exhibit contained those two monetary amounts, 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, which provided more than a sufficient basis for appellate review.

The Court’s opinion does not cite any authority that establishes – or even suggests – a rule that actual exhibits must always be included in the Record on Appeal in order for appellate review to take place. Although there are 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 graphic or 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. Only the fact that the jury was allowed to see both amounts matters for purposes of this appellate issue. Accordingly, the Court had the only facts it needed to

⁶ Likewise, *Vaught* was cited 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.

conduct an appellate review, and the Court should now grant a rehearing to address the merits of this issue.

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.

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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 has argued that 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 controlling or persuasive 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 the full, billed amount and the amount actually paid, 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. Thus, any reliance on an argument that McDowell could have handled this issue through cross-examination is without merit.

In addition to being legally erroneous, the decision to admit the exhibit was clearly 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 higher number to go to the jury on an exhibit, 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 might claim that her attorney minimized that risk by stating and emphasizing the lower number in his closing argument. Although the 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 that was necessary in light of the erroneous decision to admit the exhibit. 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.

Of course, 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 possibly be a 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 were unrecoverable under the controlling law. Regardless of whether the jury used that higher number in its deliberations, the error was facially prejudicial. Therefore, this Court should grant a rehearing on this issue and reverse and remand for a new trial.

IV. This Court 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 office. 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 this Court should have reversed on that basis. Accordingly, the Court should now grant a rehearing on this issue.

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,⁷ 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, this Court 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)).

⁷ 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 give this Court 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.

In his deposition, 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 that 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.

In the present case, the trial court did not properly evaluate the reliability of Richardson's testimony. As discussed above, 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 that 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 the Supreme 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.⁸ 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

⁸ 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.

“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.

As previously noted, the trial court in the present case made no effort to evaluate the officer’s qualifications or the reliability of the officer’s conclusions. Nor could the court have done so. 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 officer’s conclusions.

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. The trial court erred in failing to recognize that point.

Rule 703, SCRE, also provided no basis for admitting Richardson’s testimony. “Under Rule 703, SCRE, an expert may rely on inadmissible evidence 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.’” *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, this Court's opinion overlooked McDowell's arguments concerning the trial court's gatekeeping function under Rule 702, SCRE. In fact, the opinion made no reference to that rule or to the gatekeeping function. The Court also failed to acknowledge or discuss the impact of *Hamrick* and/or *Jamison* on this issue. For that reason, the Court should grant the current petition and reexamine this issue in the light of those authorities.

The trial court's decision to allow Richardson's challenged testimony was not only erroneous, but 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, the Supreme 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 in the present case. 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. This Court failed to address the impact of Rule 702 on this issue, and it should now grant a rehearing to do so.

CONCLUSION

For the reasons set forth above, this Court should grant the current petition, rehear the issues on appeal, and reverse and remand for a new trial or the entry of judgment as a matter of law in McDowell's favor.

Respectfully submitted,

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RECEIVED

Aug 24 2022

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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Aug 24 2022

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.

**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,

s/Eric M. Poulin

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The Honorable Jenny Abbott Kitchings
Clerk or Court, S.C. Court of Appeals
Post Office Box 11629
Columbia, SC 29211

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

RECEIVED OF COUNSEL
Aug 24 2022
SC Court of Appeals

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*)

MAILING: 32 Ann Street, Charleston, South Carolina 29403

**Charleston, SC | North Charleston, SC | Columbia, SC | Florence, SC | Greenville, SC | Myrtle Beach, SC
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THE STATE OF SOUTH CAROLINA
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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 my 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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August 31, 2022

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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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.

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; Anastopoulos Law Firm, LLC; 32 Ann St., Charleston, SC 29403.

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August 31, 2022

The South Carolina Court of Appeals

Daisy Frederick, Respondent,

v.

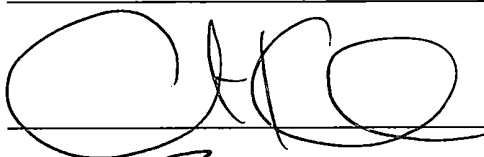
Daniel Lee McDowell, Appellant.

Appellate Case No. 2020-000989

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

 C.J.

 J.

 J.

Columbia, South Carolina

cc:

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FILED
Sep 22 2022

Alexis Wimberly McCumber, Esquire
The Honorable Paul M. Burch