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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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

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Appellate Case No.: 2020-00989

Supreme Court Case No.: 2022-001480

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Daisy Frederick,……Respondent,

v.

Daniel Lee McDowell,……..Petitioner.

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# RESPONDENT'S RETURN TO PETITIONER'S PETITION FOR WRIT OF CERTIORARI

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Pursuant to Rule 242, SCACR, Respondent Daisy Frederick (herein "Frederick") respectfully asks this Court to deny Petitioner Daniel Lee McDowell's ("McDowell") Petition for Writ of Certiorari.

## COUNTER-STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

I. Did the Court of Appeals err in affirming the trial court's denial of McDowell's motions for a new trial or a new trial *nisi remittitur*, where Frederick presented extensive evidence of prior and ongoing damages?

II. Did the Court of Appeals err in affirming the trial court's denial of McDowell's motions for a directed verdict and for judgment notwithstanding the verdict, where contributory negligence was a question for the jury?

III. Did the Court of Appeals err in affirming the trial court's decision to admit an exhibit that allegedly violated Rule 414 of the North Carolina Rules of Evidence, where McDowell failed to preserve the issue for review?

IV. Did the Court of Appeals err in affirming the trial court's decision to admit Frederick's expert's testimony, where the expert used objective information from the police report and where McDowell's own testimony conclusively established that he was moving forward at the time of the wreck?

## COUNTER-STATEMENT OF THE CASE

This case arose from an automobile accident that took place in North Carolina on or about April 29, 2015. Frederick filed a summons and complaint on April 1, 2016, and McDowell answered on May 25, 2016. [R. pp. 9–14, 15–17.]

Trial began on January 29, 2018. [R. p. 44.] The parties' accounts of the accident differed. McDowell claimed that he was in Frederick's lane for about "15 to 20 seconds" and was then

backing out of the lane when Frederick hit him; Frederick testified that McDowell was "about three car lengths away" when he suddenly swerved into her lane. [R. pp. 54–56, 88–89.]

The parties did not disagree as to where the accident occurred or the orientation of the vehicles when they collided. Regarding post-impact location, McDowell drew his vehicle's ultimate resting point on his expert's model. [R. pp. 90, 138.]

Both parties used experts to bolster their accounts. Frederick's expert relied on a police report for a key piece of information: "the direction of post-impact travel," [R. pp. 203, 207–08.] He ultimately concluded that Frederick's account was "the legitimate story." [R. pp. 207–08.] Ironically, McDowell's expert confirmed that Frederick's account was indeed "the legitimate story." Examining the ultimate resting point that McDowell drew on the expert's model, the expert agreed that there was only one way for the vehicle to end up in that position: the vehicle had to have been moving forward.

As a result of the crash, Frederick (a twenty-three-year-old mother of two [R. pp. 52, 152]) suffered serious injuries. At trial, she presented significant evidence of future pain, future medical treatment, future lost wages, and permanent injury. She testified that at the time of trial, nearly three years after the wreck, her pain was serious enough to require pain medication. [R. p. 82.] 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.[1] [R. pp. 73, 80–82.] Furthermore, at deposition, Frederick's treating physician testified that due to Frederick's severe injuries, medical personnel had to place a rod and screws in her thigh, and a plate and screws near her ankle.

[1] McDowell claims that Frederick's counsel "disavowed any claim for future lost income." Pet. for Writ of Cert. at 6. 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).]

[R. pp. 178–79.] Therefore, Frederick sustained permanent internal scarring. Presumably, she also sustained permanent external scarring.

In addition, Frederick presented evidence of major medical expenses. [R. pp. 140–42.] She offered an exhibit to prove the amount of pending expenses. [R. pp. 140–42.] Although the exhibit contained the full amount of medical bills, Frederick specifically disclaimed any expenses that her health insurance had written off. [R. pp. 140–42.] Her counsel heavily stressed this point during closing argument, [R. pp. 140–42]; furthermore, in response to a jury question, the judge clarified the matter further, stating that "[t]he issue of insurance is not to be considered . . . in reaching [the] verdict." [R. p. 157].

Frederick presented evidence not only of physical injuries and medical expenses, but of severe pain and suffering, both physical and mental. 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. pp. 58–59, 62–63, 66, 70–71.]

After all testimony, the trial judge gave detailed instructions on damages, including on future damages. [R. pp. 150–152.] At least twice, he clarified that these instructions were not a suggestion that Frederick suffered any particular type of damage, instructing the jury to make its own decision regarding each type of damages. [R. pp. 150–152.] McDowell objected to the instructions, [R. p. 155]; however, he never objected to the verdict form.

The jury returned a verdict of five million dollars, little more than twenty-two times Frederick's special damages. [R. pp. 142–43, 159.] On August 12, 2019, the court heard McDowell's post-trial motions, [R. pp. 210–21], and on May 12, 2020, it denied those motions,

[R. pp. 3–5]. On July 20, 2022, in a well-reasoned per curiam opinion, the Court of Appeals affirmed both the jury verdict and the denial of McDowell's post-trial motions. *Frederick v. McDowell*, No. 2020-000989, 2022 WL 2826718 (S.C. Ct. App. July 20, 2022). And on September 22, 2022, the Court of Appeals denied McDowell's petition for rehearing. [Appendix at 351.] This petition followed.

## ARGUMENT

### I. The Court of Appeals did not err in affirming the trial court's denial of McDowell's motions for a new trial or a new trial *nisi remittitur*, where Frederick presented extensive evidence of prior and ongoing damages.

McDowell alleges that Frederick presented no evidence of future damages, and that the jury could not have delivered such a large verdict without positing future damages. Pet. For Writ of Cert. at 5–8. Contrary to McDowell's assertion, 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, this Court should deny McDowell's petition.

In a 2011 case, *Wilder v. Blue Ribbon Taxicab Corp.*, the Court of Appeals 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). Here, Frederick's pain, scarring, need for medical treatment, and difficulty working lasted until trial, nearly three years after the wreck. Contrary to McDowell's suggestion, these issues would not, and did not, vanish the day after trial; they have dogged Frederick's future. Therefore, Frederick's testimony as to ongoing damages provided ample evidence of future damages.

Given this evidence, the trial court properly charged the mortality tables. *See* Pet. for Writ of Cert. at 7–8. "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 repeatedly clarified that his instructions were not a suggestion that Frederick had suffered a particular type of damage, and that the jury was to make its own decision based on the evidence. Even if there had been no evidence of permanent injury, the judge's clear instruction rendered any possible error harmless.

Assuming arguendo that Frederick presented no evidence of future damages, the verdict was, as the Court of Appeals correctly noted, "not shockingly disproportionate" to Frederick's past damages. *Frederick*, 2022 WL 2826718 at *1. Frederick presented substantial evidence of serious injuries, significant medical expenses, and "pain and suffering, mental anguish, and loss of enjoyment of life." *Ibid.* Thus, the Court of Appeals correctly declined to order a new trial absolute.

The Court of Appeals also correctly declined to order a new trial *nisi remittitur*. *See* Pet. for Writ of Cert. at 5–8. *Becker v. Wal-Mart Stores, Inc.*, on which McDowell 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 the plaintiff's four-percent impairment rating. *Id.* at 633–34, 529 S.E.2d at 760–61.

Here, Frederick was twenty-three years old at the time of trial, more than fifty years younger than the *Becker* plaintiff. 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 Frederick's special damages. *Becker* does not dictate a different result.

Instead, *Hawkins v. Pathology Assocs. of Greenville, P.A.*—on which the Court of Appeals correctly relied, *Frederick*, 2022 WL 2826718 at *1—supports the original award. *Hawkins*, 330 S.C. 92, 498 S.E.2d 395 (Ct. App. 1998). McDowell tries to distinguish *Hawkins* from Frederick's case, alleging that the Court of Appeals overlooked the fact that the *Hawkins* plaintiff suffered, and knew that she suffered, from a terminal condition. Pet. for Writ of Cert. at 8. But in distinguishing the case, McDowell trivializes Frederick's mental anguish. Most significantly, 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 Frederick's past damages.

Because the award was proportionate to Frederick's 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), the Court of Appeals correctly declined to apportion the verdict between past and future damages, *Frederick*, 2022 WL 2826718 at *2. McDowell, 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.")

## II. Did the Court of Appeals err in affirming the trial court's denial of McDowell's motions for a directed verdict and for judgment notwithstanding the verdict, where contributory negligence was a question for the jury?

As the Court of Appeals correctly pointed out, the evidence did not establish that 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 McDowell admits, the parties presented different accounts of the incident. Pet. for Writ of Cert. at 10. Contrary to his contention, the differences between the two scenarios *are* "germane to the contributory negligence defense." *See ibid*. Indeed, as the Court of Appeals stated, McDowell's own "expert acknowledged that the accident was not avoidable if Frederick's account was true." *Frederick*, 2022 WL 2826718 at *2.

McDowell belabors the point that, because Frederick could have seen obstructions seven hundred feet ahead, she had ample opportunity to stop or take evasive action. Pet. for Writ of Cert. at 10. However, the line of sight is relevant only to McDowell's account. Effectively, McDowell claimed that his vehicle was a conspicuous obstruction for some time (fifteen to twenty seconds), and that therefore, Frederick's failure to see him until she was "three car lengths away" was negligence.

According to Frederick, however, McDowell suddenly swerved into her lane right in front of her. If that account is true, Frederick would not have been responsible for the accident even if she had had a clear ten-mile line of sight. She had no reason to stop or engage in evasive action until McDowell became a hazard, not just a fellow user of the road. And by then, it was too late.

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

**III. Did the Court of Appeals err in affirming the trial court's decision to admit an exhibit that allegedly violated Rule 414 of the North Carolina Rules of Evidence, where McDowell failed to preserve the issue for review?**

McDowell alleges that the trial court erred in admitting an exhibit which allegedly violated Rule 414 of the North Carolina Rules of Evidence. Pet. for Writ of Cert. at 11–15. However,

although McDowell summarized the challenged exhibit on appeal, he failed to include the exhibit itself. Therefore, the Court of Appeals 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 McDowell 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, Frederick did not offer the exhibit to prove her *past* expenses, but only the amount pending. [R. pp. 140–42.] Therefore, the trial court did not err in admitting it. And even if the court erred, the error was harmless. As the Court of Appeals 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)). Frederick complied with the rule's intent by claiming only her unpaid medical bills and specifically disclaiming any expenses that her health insurance had written off. Her counsel and the trial judge also stressed the same point. Therefore, there was no probability, let alone a reasonable one, that the jury's verdict was influenced by the alleged error, and this Court should deny McDowell's petition on this ground.

## IV. Did the Court of Appeals err in affirming the trial court's decision to admit Frederick's expert's testimony, where the expert used objective information from the police report and where McDowell's own testimony conclusively established that he was moving forward at the time of the wreck?

McDowell alleges that Frederick's expert relied on evidence of unproven reliability—that is, an investigating officer's accident reconstruction—to conclude that McDowell was moving forward at the time of the wreck. Pet. for Writ of Cert. at 15–18. Naturally, he argues that the court's admission of that testimony was error. Pet. for Writ of Cert. at 15–16. However, the court did not err in admitting the expert's testimony. Even if it did err, that error was harmless because McDowell's own testimony established that he was moving forward. Therefore, this Court should deny McDowell's petition on this ground.

Frederick's expert relied on the police report for one main point: "the direction of post-impact travel." Because the parties did not disagree as to the location of the accident 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 of a wrecked vehicle; even an untrained high-school student could make the same observation.

Even if 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 would not need to be admissible by themselves. *See id.*

*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, the expert's use of the police report is irrelevant. McDowell's own drawing established his vehicle's post-impact location, and his expert agreed that based on that drawing, the vehicle was moving forward at the time of the accident. McDowell's drawing and his expert's subsequent analysis proved to be the death knell of McDowell's theory of liability. On this ground, too, this Court should deny McDowell's petition.

## CONCLUSION

For the reasons set forth above, the Court should deny McDowell's petition for writ of certiorari.

Respectfully submitted,

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