

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

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**Dec 21 2022**

**S.C. SUPREME COURT**

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

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Appellate Case No.: 2022-001480

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Daisy Frederick,.....Respondent,

v.

Daniel Lee McDowell,.....Petitioner.

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**REPLY IN SUPPORT OF PETITION  
FOR WRIT OF CERTIORARI**

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The Petitioner Daniel Lee McDowell respectfully submits this Reply in support of his Petition for Writ of Certiorari.

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

One of McDowell's primary argument 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. 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. In *Wilder*, the plaintiff sustained injuries in an automobile accident and testified in a damages hearing that she still had some pain three years later.<sup>1</sup> 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 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. First the plaintiff in *Wilder* testified that she experienced pain in certain specific circumstances – i.e. when "standing or sitting for long periods of time." 396 S.C. at 147, 719 S.E.2d at 708. She also described her pain, calling it "dull because it just feels like by back is going to give out." *Id.* In the

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<sup>1</sup> *Wilder* involved a default judgment award rather than a jury trial.

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.<sup>2</sup>

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, the total verdict was more than twenty times the amount of the specials, and that was based on “evidence” that was far more scant 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.

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. Yet, 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

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<sup>2</sup> The Respondent also testified that she sometimes took “pain pills,” but offered no specifics as to what kinds of pills she took, the specific reasons for taking the pills, or how often she felt the need to take them. [R. p. 82.]

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 the jury might have included 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.”).

The Respondent further argues 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. Indeed, the Respondent makes that exact argument in her Return to the Petition. McDowell respectfully asserts that the Respondent’s position cannot withstand any real scrutiny, as a 22/1 ratio of verdict amount to specials must be considered at least excessive, if not grossly so.

The Respondent also argues that the Court of Appeals correctly relied on *Hawkins v. Pathology Assocs. of Greenville, P.A.*, 330 S.C. 92, 498 S.E.2d 395 (Ct. App. 1998), in reaching its decision. In his Petition, McDowell presented reasons why *Hawkins* is distinguishable. The Respondent acknowledges that position, but claims that it “trivializes Frederick’s mental anguish.” [Return, p. 6.] Yet, it is not “trivializing” the Respondent’s mental condition to point out that recovering from an injury, even a serious one, is not the same as facing a terminal diagnosis. As to the Respondent’s assertion that she “was terrified that her little children had been injured or

killed and that she herself would die or become a drug addict,”<sup>3</sup> the Return does not cite or refer to any specific testimony or other record evidence to support that claim. Therefore, this Court should not consider that argument.

The Respondent also claims the verdict must stand because McDowell did not request a special verdict form at trial. That assertion misses the point of McDowell’s argument on appeal. McDowell does not argue that the verdict cannot stand because some specific amount of future damages is (or would be) excessive. Rather, McDowell asserts that the general verdict is itself excessive and improper because it necessarily included an award for future damages, even though there was no basis for such damages in the evidence. In other words, if future damages are excluded from the realm of possibility, as they must be based on the record evidence in this case, all that remains are the past specials, which cannot possibly support the size of the verdict. Thus, the presence or absence of a special verdict form at trial is irrelevant to this issue.

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. Assuming that could be considered to be “evidence” of future pain, it is so sparse that it cannot possibly justify the amount of the jury’s verdict. And without any consideration of future damages, the evidence presented at trial of past medical bills and pain cannot possibly support the verdict amount. Accordingly, the Court should grant McDowell’s rehearing petition on this issue.

## **II. The record supports a finding of contributory negligence as a matter of law.**

The Respondent argues that the two differing versions of exactly how the accident occurred precluded a finding of contributory negligence as a matter of law. Specifically, the Respondent

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<sup>3</sup> Return, p. 6.

claims that under her version of the accident, the length or amount of her line of sight prior to the collision is irrelevant. Yet, the Respondent's line of sight was directly relevant to the question of whether she was contributorily negligent for failing to notice McDowell's vehicle until it was three car lengths away, even though she could see much farther down the road. The Respondent could not explain that discrepancy at trial,<sup>4</sup> and the lack of any such explanation supports a finding, as a matter of law, that the Respondent shared at least some fault for the accident. Therefore, this Court should grant the current Petition to review the Court of Appeals' decision on this issue.

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

The Respondent naturally supports the Court's conclusion that the issue of the North Carolina rule regarding the amounts of medical bills that can be presented to a jury was not preserved for review because the actual exhibit did not appear in the Record on Appeal. For the reasons stated in the McDowell's Petition, that conclusion is erroneous. McDowell will not repeat his arguments on the issue preservation question.<sup>5</sup> 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 purpose 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

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<sup>4</sup> See Appendix, pp. 78-79.

<sup>5</sup> The Respondent does not present any new arguments on this issue in her Return, but merely relies upon the authorities referenced by the Court of Appeals, which McDowell addressed in his Petition. For that reason, no additional arguments by McDowell are necessary.

Carolina rule, 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 her attorney stated in his closing that the Respondent 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 under the controlling law. 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.

This is also an issue for which the South Carolina bench and bar need guidance from this Court. Our state does not have a rule or statute analogous to North Carolina's on this issue, and there is no indication that any such rule is forthcoming. Yet, accidents like the one in this case (i.e. two South Carolina residents in an accident that occurred in North Carolina) are not at all uncommon. Hundreds, if not thousands, of South Carolinians travel to North Carolina on a daily basis for work, leisure or other activities. If South Carolinians are involved in accidents with each other across the border, the North Carolina law regarding the admissibility of the amount of medical bills is controlling. When the cases arising from such accidents are litigated in South

Carolina's courts, the judges and attorneys involved need to know exactly how that law should be applied. This Court should grant the current Petition to review this issue and provide that guidance.

**IV. The Respondent's arguments fail to demonstrate a lack of error on the issue of the admission of the challenged opinions of the Respondent's expert.**

As fully argued in McDowell's Petition, the Court of Appeals erred in affirming the circuit court's decision to allow the Respondent's expert to rely on opinions of the investigating law enforcement officer. McDowell will not repeat those arguments here. Rather, McDowell merely wishes to point out that the Respondent, like the Court of Appeals, has failed to give proper weight to this Court's decision in *Hamrick v. State*, 426 S.C. 638, 828 S.E.2d 596 (S.C. 2019).

In her Return, the Respondent devotes only two sentences to addressing *Hamrick* – a case the Court of Appeals did not reference or discuss at all. The Respondent claims that *Hamrick* is not relevant because it “dealt with the admissibility of the underlying police opinion, *not* with an expert opinion that reasonably relied on a police report.” [Return, p. 9 (emphasis in original).] This argument misses the larger point that in order for an expert opinion to be admissible, a trial judge must conclude it is sufficiently reliable. In cases like the present one, where an expert essentially adopted the police officer's opinion as his own, the reliability of that underlying opinion becomes a crucial issue that a trial judge must decide. No such analysis or decision occurred in this case, which is why the circuit court committed reversible error. Accordingly, this Court should grant McDowell's Petition and review the Court of Appeals' decision 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 McDowell's Petition, issue a writ of certiorari to the Court of Appeals, and review all of the issues on appeal.

Respectfully submitted,

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December 21, 2022