

THE STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED

Sep 11 2023

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

S.C. SUPREME COURT

Appellate Case No.: 2022-001480

Daisy Frederick,.....Respondent,

v.

Daniel Lee McDowell,.....Petitioner.

PETITIONER'S BRIEF

R. Hawthorne Barrett (SC Bar No.: 16973)
Turner Padgett Graham & Laney, P.A.
P.O. Box 1473
Columbia, SC 29202
(803) 227-4219
tbarrett@turnerpadgett.com

Attorney for Petitioner

TABLE OF CONTENTS

Table of Authorities.....i

Statement of the Issue on Appeal.....1

Statement of the Case.....1

Statement of the Facts.....4

Standard of Review.....5

Argument.....7

The Court of Appeals erred in affirming the trial court decision not to grant a new trial or a new trial *nisi additur*, because the record evidence does not support the verdict, which was either grossly excessive or merely excessive.....7

Conclusion.....17

TABLE OF AUTHORITIES

Becker v. Wal-Mart Stores, Inc.,
339 S.C. 629, 529 S.E.2d 758 (Ct. App. 2000).....11-13, 16

Brinkley v. S.C. Dept. of Corrections,
386 S.C. 182, 687 S.E.2d 54 (Ct. App. 2009).....6

Burroughs v. Worsham,
352 S.C. 382, 574 S.E.2d 215 (Ct. App. 2002).....9

Carlyle v. Tuomey Hosp.,
305 S.C. 187, 407 S.E.2d 630 (1991).....8

Hawkins v. Pathology Associates, P.A.,
330 S.C. 92, 498 S.E.2d 395 (Ct. App. 1998).....14-15

James v. Horace Mann Ins. Co.,
371 S.C. 187, 638 S.E.2d 667 (2006).....11

Knoke v. S.C. Dept. of Parks, Recreation & Tourism,
342 S.C. 136, 478 S.E.2d 256 (1996).....6

McEntire v. Mooregard Exterminating Service, Inc.,
353 S.C. 629, 578 S.E.2d 746 (Ct. App. 2003).....5-6

Morris v. BB&T Corp.,
438 S.C. 582, 885 S.E.2d 394 (2023).....16

O’Neal v. Bowles,
314 S.C. 525, 431 S.E.2d 555 (1993).....13

RRR, Inc. v. Toggas,
378 S.C. 174, 662 S.E.2d 438 (Ct. App. 2008).....6

Sanders v. Prince,
304 S.C. 236, 403 S.E.2d 640 (1991).....6

STATEMENT OF THE ISSUE ON APPEAL

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

STATEMENT OF THE CASE

This case arose from an automobile accident that occurred in North Carolina on April 29, 2015. The Respondent Daisy Frederick ("Frederick") filed her Summons and Complaint on April 1, 2016. [R. pp. 10-14; App. pp. 48-53.] The Petitioner Daniel Lee McDowell ("McDowell") filed and served a timely Answer on May 25, 2016. [R. pp. 15-17; App. pp. 54-56.] The parties then conducted full discovery.

The case was called to trial before the Honorable Paul M. Burch on January 29, 2018. During a pre-trial hearing, Judge Burch ruled that the substantive law of North Carolina applied because the subject accident occurred there. Frederick did not challenge that ruling [R. pp. 47-48; App. pp. 86-87.]

At trial, Frederick testified on her own behalf. She also presented testimony by other witnesses, including engineer Ken Richardson. During his testimony, Richardson was permitted to testify about measurements and other conclusions drawn by the North Carolina law enforcement officer who responded to the accident, even though that officer did not testify. McDowell's attorney made timely objections to that testimony, which were overruled. [R. pp. 42-43, 101; App. pp. 81-82; 140.]

Following the testimony of those witnesses, counsel for McDowell moved for a directed verdict. [R. pp. 104-106; App. pp. 143-145.] 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; App. pp. 143-145.] The judge granted the motion as to punitive damages, but denied it on the other two grounds. [R. pp. 106-108; App. pp. 143-145.]

Because he had already testified during Frederick's case, McDowell's case consisted only of testimony by engineer Don Roberts, who was admitted as an expert. Based on his examination of the accident site, Roberts testified there was a line-of-sight of at least 700 feet from the place on the roadway where Frederick's vehicle was before the accident occurred. [R. pp. 117-122; App. pp. 156-161.] 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; App. pp. 161-166.]

McDowell's counsel renewed the motions for a directed verdict at the close of the evidence. [R. p. 139; App. p. 178.] The judge again denied the motions. [R. p. 139; App. p. 178.]

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; App. pp. 180-182.] However, Frederick's attorney did not refer to any claim for future medical bills or lost wages. Frederick's attorney expressly told the jury that future lost wages were not warranted. [R. p. 143, lines 12-14; App. p. 182.] The attorney did request an award for future pain, even though there was no medical evidence to support such a claim, and Frederick gave only general testimony about still having some pain as of the time of trial. [R. pp. 145-146; App. pp. 184-185.]

After the closing arguments, counsel for McDowell again renewed the directed verdict motions, which the judge denied. [R. p. 147; App. p. 186.] 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; App. pp. 193-194.]

The jury deliberated for little more than one hour before returning a verdict in Frederick's favor for \$5,000,000. [R. p. 159; App. p. 198.] McDowell filed timely post-trial motions on February 14, 2018. [R. pp. 18-26; App. pp. 157-165.] McDowell sought a judgment notwithstanding the verdict for the same reasons raised in his directed verdict motions at trial. [R. pp. 18-20; App. pp. 57-59.] Alternatively, McDowell moved a new trial absolute and/or a new trial *nisi remittitur* based on: (1) the absence of evidence to support the verdict, (2) the lack of any medical evidence to support a claim for permanent impairment or disability, (3) improper testimony by Frederick's expert about the subjective

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

opinions and information contained in the police report for the accident, (4) the improper admission of the full amount of Frederick's medical bills, (5) the erroneous decision to charge the mortality table given 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; App. pp. 157-165.]

The trial judge heard the post-trial motions on August 21, 2019. [R. pp. 210-221; App. pp. 249-260.] However, the judge did not rule until May 12, 2020, when he filed an order denying all the motions. [R. pp. 3-5; App. pp. 42-44.] Because the order contained an inaccurate statement about the law that was applied to the case, McDowell made a timely motion under Rule 59(e), SCRCP, asking the judge to amend the previous order. [R. pp. 27-28; App. pp. 66-67.] The judge filed an amended order that corrected the earlier misstatement of the controlling law. [R. pp. 6-9; App. pp. 45-47.] McDowell then filed a timely Notice of Appeal.

The Court of Appeals issued an opinion on July 20, 2022, in which it affirmed the trial court's rulings. McDowell filed and served a timely Petition for Rehearing on August 4, 2022. [App. pp. 300-329.] The Court of Appeals denied that petition in Order filed on September 22, 2022. [App. p. 351.] McDowell then filed a timely petition in this Court seeking a writ of certiorari, which the Court granted in part and denied in part in an Order filed on August 10, 2023.

STATEMENT OF THE FACTS

On August 29, 2015, McDowell was traveling from his home in South Carolina to his workplace in North Carolina. [R. pp. 49, 83; App. pp. 88, 122.] McDowell was traveling approximately 40 miles per hour. [R. p. 92; App. p. 131.] He came to a portion of the two-

lane road that had a slight curve to the right followed by another slight curve to the left and then a straight away. [R. p. 92; App. p. 131.] 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; App. pp. 131-132.] After composing himself, McDowell tried to back up into his original lane of travel. [R. pp. 92-93; App. pp. 131-132.] Before he could do so, another vehicle collided with his truck. [R. p. 93; App. p. 132.]

The other vehicle was being driven by Frederick. According to Frederick, as she approached a curve in the road, she saw a truck appear in her lane of travel. [R. pp. 54-55; App. pp. 93-94.] Frederick said she saw the truck when it was about three car lengths away from her vehicle. [R. pp. 54-55; App. pp. 93-94.] Yet, Frederick never applied her brakes or took any other measure to try to avoid colliding with the truck. [R. p. 79; App. p. 118.]

Frederick sustained physical injuries as a result of the collision and incurred medical expenses of \$171,909.87 that were not paid by her health insurer. [R. p. 73; App. p. 112.] 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; App. p. 109.] However, she stopped receiving medical treatments for her injuries in December of 2016, and there was no evidence – medical or otherwise – of any permanent impairment or disability.

STANDARD OF REVIEW

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 also 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.*

ARGUMENT

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

Frederick presented only the following special damages at trial: \$171,909.87 in outstanding medical bills and \$53,460 in lost wages. Thus, the total amount of specials submitted to the jury was \$225,369.87. Although that is not an insignificant number, it cannot justify the \$5,000,000 verdict 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, if not grossly so. Therefore, the trial court should have granted a new trial or a new trial *nisi remittitur*, and the Court of Appeals erred in affirming the trial court's decision.

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 involved 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 the 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 was severe or that it 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; App. pp. 201-235.] 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 future expenses to the jury. She also did not testify that she had any plans or intention 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; App. p. 119.]

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. The only reasonable inference to draw from the surgeon's testimony was that the surgeries and related treatments fully resolved the injuries Frederick sustained in the accident. Again, this means that the jury could not have permissibly considered any impairment or disability when arriving at its verdict. As far as the record evidence demonstrated, no such impairment or disability existed.

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 did not make any arguments in favor of a claim for future lost income. [R. p. 143; App. p. 182.]

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. That speculation likely contributed to the excessive nature of the resulting verdict.²

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) successful treatments that resolved the injuries; (5) a finite amount of medical bills; and (6) 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 decision.

² McDowell acknowledges that this Court granted his petition solely on the issue of whether the lower courts erred in refusing to grant a new trial or new trial *nisi remittitur* based on the amount of the verdict. However, McDowell nonetheless asserts that the error in charging the mortality tables is relevant to the issue before the Court because it suggests one explanation for the excessive amount of the verdict.

Regardless of what actually motivated the jurors, they could not have based their decision solely on the evidence presented at trial. No reasonable jury could have awarded such an excessive amount based on a comparably small amount of past special damages and no evidence of any additional or future damages. Therefore, the trial court erred in refusing to grant a new trial absolute, and the Court of Appeals should have reversed. *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 still be “merely excessive” so as to warrant a new trial *nisi remittitur*. This is a lower standard that the present circumstances 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* that reduced the amount of the verdict to \$525,000. *Id.*

The Court of Appeals affirmed that decision. On appeal, the plaintiff argued that the amount of the specials and the impairment rating assigned to her justified the amount of the verdict. The plaintiff also relied heavily on an argument that the verdict was based largely on the jury's award for pain and suffering – a decision that was completely within the jury's discretion. The Court of Appeals rejected that argument, however, explaining:

Although we agree that a jury's assessment of a plaintiff's pain and suffering is entitled to substantial deference, this deference does not abrogate the authority of the trial court to grant a new trial nisi upon finding "the amount of the verdict to be merely inadequate or excessive."

339 S.C. at 639, 529 S.E.2d at 763 (quoting *O'Neal v. Bowles*, 314 S.C. 525, 527, 431 S.E.2d 555, 556 (1993)). Thus, the Court of Appeals concluded that the trial court had properly granted a new trial *nisi additur*.

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. Thus, a clear basis existed for a verdict that included a substantial amount for future pain and suffering, medical expenses, etc. Despite that evidence of future damages, the trial court found the verdict amount to be excessive, and the Court of Appeals affirmed.

As discussed above, the record in the present case demonstrates that Frederick does not have any impairment or disability resulting from the accident. No medical professional testified that she would need or receive any accident-related medical treatments in the future, or that she would experience pain and suffering in the future. Her own attorney stated that she would be able to work in the future, thereby eliminating any basis for future financial losses. 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 was merely excessive, even if this Court affirms the lower courts' decision that it was not grossly excessive.

The Court of Appeals erroneously cited *Hawkins v. Pathology Associates, P.A.*, 330 S.C. 92, 498 S.E.2d 395 (Ct. App. 1998), as support for its decision. There, the Court of Appeals did conclude that a \$3,500,000 verdict was reasonable under the circumstances. Yet, in *Hawkins*, the decedent lived her final seven months undergoing a painful course of treatments all the while knowing her condition was terminal. That knowledge of impending and certain death created a much different scenario than the one in the present case. As the following passage demonstrates, the decedent's mental state as she faced the terminal diagnosis and the reality that her children would have to grow up without her weighed heavily on the Court of Appeals' decision:

[Decedent] spent seven months engaged in a painful battle for her life, which she knew from the beginning she would lose. In addition to the excruciating physical pain she suffered, she endured the mental anguish of spending the last several months of her life unable to care for her two small children. For seven months she knew she was terminally ill and that her children would have to grow up without their mother. The evidence further demonstrated her consternation over the loss of a normal relationship with her husband. We find the jury's verdict to be reasonably reflective of the pain, physical and mental suffering, and lack of quality of life Mrs. Hawkins endured during her fight with cancer.

330 S.C. at 112, 498 S.E.2d at 406 (emphasis added).

There was no evidence presented at trial that Frederick was ever told her injuries were permanent, and obviously this case did not involve a terminal condition or a fatality. It is not minimizing Frederick's injuries or her course of treatment to acknowledge that they were much less serious – particularly in a psychological sense – than the terminal condition involved in *Hawkins*. Therefore, *Hawkins* does not support the Court of Appeals' decision.

In addition, the verdict at issue in *Hawkins* is important to consider. The jury in *Hawkins* returned a verdict of \$1,100,000 for the wrongful death claim and \$3,500,000 for the survival claim.³ The opinion in *Hawkins* does not discuss the amount of specials that were presented to the jury, which means there was no discussion of whether the ratio of those specials to the survival claim verdict was grossly or merely excessive. Here, such an excessive ratio clearly exists. That is another factor that distinguishes *Hawkins*.

Perhaps more significant, however, is the actual amount of the challenged verdict in *Hawkins*. That verdict (\$3,500,000), which arose from a seven-month period of time in which the decedent languished under the fear and sorrow of a terminal diagnosis, is a million-and-a-half dollars less than the verdict in the present case, which arose from a successful course of treatments that resolved Frederick's injuries. The two cases are not at all similar, and the Court of Appeals erred in relying on *Hawkins* to reach its decision.

Frederick sustained serious injuries, but ones that were successfully treated. The record contains no disputes as to that fact. Frederick presented no evidence of any permanent impairments, disabilities or medical problems that would continue to plague her. 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 that kind 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.

³ The survival claim verdict appears to have been the primary focus of the motion for a new trial *nisi additur*, which the trial court denied.

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 must be considered “merely excessive” so as to warrant a new trial *nisi remittitur*. Therefore, the Court of Appeals erred in failing to reverse the trial court’s denial of McDowell’s post-trial motion.

It is true that the trial judge operated under an abuse of discretion standard, and the Court of Appeals reviewed the decision on that same basis. This Court, of course, follows the same generally lenient standard of review, but that basic fact does not end the inquiry. As this Court has recently explained, “[t]he exercise of discretion is ... to follow a thought process that begins with the trial court's clear understanding of the applicable law, continues with the court's sound analysis of the situation before it in light of the law, and ends with the trial court's ruling that follows the law and is supported by the facts and circumstances.” *Morris v. BB&T Corp.*, 438 S.C. 582, 587, 885 S.E.2d 394, 397 (2023) (emphasis added).

Here, the trial court’s decision is not supported by the facts and circumstances. The jury returned a verdict for actual damages only that was more than twenty-two times the amount of the specials presented at trial. There was no evidence of any permanent injuries or impairments, no evidence of any need for future medical care, and no indication whatsoever that Frederick would incur any compensable damages in the future. Those facts and circumstances cannot justify such an excessive verdict amount. Therefore, even under

the abuse of discretion standard of review, the Court of Appeals erred in failing to reverse the trial court's decision.

CONCLUSION

The verdict in this case was either grossly or merely excessive. The record does not contain any evidence, facts or circumstances to support a \$5,000,000 verdict for the types of temporary injuries and the special damages presented at trial. Therefore, the trial court erred in denying McDowell's motion for a new trial or new trial *nisi remittitur*, and the Court of Appeals likewise erred in affirming that result. This Court should now reverse and remand to the trial court with instructions to grant either a new trial or a new trial *nisi remittitur*.

Respectfully submitted,

s/ R. Hawthorne Barrett

R. Hawthorne Barrett (S.C. Bar No. 16973)

Turner, Padgett Graham & Laney, P.A.

P.O. Box 1473

Columbia, SC 29202

(803) 227-4219

tbarrett@turnerpadgett.com

Attorney for Petitioner