THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM ORANGEBURG COUNTY
Honorable Edgar W. Dickson, Circuit Court Judge

Case No.: 2015-CP-38-01234
S.C. Ct. App. Filed August 2, 2023
Appeal Case No.: 2019-001921

Tekayah Hamilton, individually and as parent and guardian ad litem for Robert, Jr., a minor child under the age of eighteen..... Respondent,

v.

The Regional Medical Center, ...Petitioner.

PETITION FOR WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for the Appellant certifies that the Petition for Rehearing was made and finally ruled on by the South Carolina Court of Appeals on September 21, 2023.

QUESTIONS PRESENTED

1. Did the Court of Appeals err in allowing Plaintiff's expert Monica Stobbs to give an opinion on the standard of care for pediatric nursing and pediatric IV administration.

2. Did the Court of Appeals err when they overlooked and/or misapprehended the issue as to Respondent Tekayah Hamilton's verdict.

3. Did the Court of Appeals err in affirming the jury verdict as it was shockingly disproportionate to the evidence admitted at trial.

STATEMENT OF THE CASE

This matter arises out of an IV infiltration to a minor child which occurred on or about October 26, 2014. On October 7, 2015, Tekayah Hamilton filed a Summons and Complaint alleging medical malpractice in the Orangeburg County Court of Common Pleas on behalf of herself individually, and as a parent and guardian ad litem for Robert Lee M., Jr., a minor child under the age of eighteen. The Defendants, The Regional Medical Center and Jamie Downing, RN, answered the Complaint on November 30, 2015. Defendant Jamie Downing, RN, was dismissed from the action on June 29, 2016, pursuant to the Tort Claims Act. The action came to a Jury Trial beginning May 7, 2018, in front of Judge Edgar Dickson in Orangeburg County, South Carolina. The Defendant presented three pretrial motions in *limine*. (See attached Motions). The first Motion was that Monica Stobbs, Plaintiff's expert, was not qualified to testify to the standard of care for pediatric nursing, as she had never started or managed a pediatric IV and she did not review any literature regarding the subject. Defendant

asserts this witness lacked any expertise, skill, training, or knowledge in managing a pediatric patient's IV.

Petitioner also moved to exclude photographs of the minor child's hands on the ground that the probative value of the photographs was substantially outweighed by the danger of unfair prejudice. The third motion was to exclude hearsay testimony of the Plaintiff. The Trial Court denied the Defendant's motions as to excluding the witness and the photographs. On May 9, 2018, the Jury returned a verdict for the Plaintiff, Robert Lee Middleton , Jr., in the amount of $1,127,280.00 and for Tekayah Hamilton in the amount of $135,477.00.

On May 17, 2018, Petitioner filed two post-trial motions. Petitioner filed a Notice of Motion and Motion for JNOV or in the alternative Motion for New Trial and a Post Trial Motion For Reduction to Statutory Cap. Plaintiff filed a Memorandum in opposition to Defendant's motions on June 13, 2018. On June 27, 2018, Defendant filed response to the Plaintiff's Memorandum in Opposition. On October 25, 2019, the Trial Court issued its Order Granting Defendant's Motion for Reduction to Statutory Cap and Denying Defendants Motion for JNOV or in the alternative a new trial.

Petitioner appealed to the Court of Appeals which was affirmed by opinion dated August 2, 2023. Petitioner filed a petition for rehearing, which was denied by order issued September 21, 2023.

On May 17, 2018, Defendant filed two post trial motions. Defendant filed a Notice of Motion and Motion for JNOV or in the alternative Motion for New Trial and a Post Trial Motion For Reduction to Statutory Cap. Plaintiff filed a Memorandum in opposition to Defendant's motions on June 13, 2018. On June 27, 2018, Defendant filed response to the Plaintiff's Memorandum in Opposition. On October 25, 2019, the Trial Court issued its Order Granting Defendant's Motion for Reduction to Statutory Cap and Denying Defendants Motion for JNOV or in the alternative a new

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ARGUMENTS

1. THE COURT ERRED IN ALLOWING PLAINTIFF'S EXPERT MONICA STOBBS TO GIVE AN OPINION ON THE STANDARD OF CARE FOR PEDIATRIC NURSING AND PEDIATRIC IV ADMINISTRATION.

Petitioner contends Monica Stobbs, R.N., should not have been allowed to testify to the standard of care for pediatric nursing IV management, because she has never cared for a pediatric patient; never administered an IV to a neonate; and did not review any literature to formulate her opinions. In order to be qualified as an expert witness they must have the "knowledge, skill, experience, training or education" in order to testify. S.C.R.E. 702 "To be competent to testify as an expert, 'a witness must have acquired by reason of study or experience or both such knowledge and skill in a profession or science that he is better qualified than the jury to form an opinion on the particular subject matter.'"*Gooding v. St. Francis Xavier Hosp.*, 326 S.C. 248, 253, 487 S.E.2d 596, 598 (quoting *O'Tuel v. Villani*, 318 S.C. 24, 28, 455 S.E.2d 698, 701 (Ct. App. 1995); *see also Botehlo v. Bycura*, 282 S.C. 578, 587, 320 S.E.2d 59, 65 (1984) (orthopedic surgeon was not qualified to testify on the standard of care for podiatrist where orthopedic surgeon had no training in podiatry, was not familiar with any journals or periodicals in podiatry, and was not familiar with the surgical procedure performed. Similar to the facts in *Botehlo,* 282 S.C. 578, Ms. Stobbs, while a registered nurse, had never administered IV therapy or cared for a pediatric patient with IV therapy, similar to how the orthopedic surgeon was not familiar with the procedure performed by the podiatrist. Likewise, Ms. Stobbs had not reviewed any literature regarding IV therapy in pediatric patients, the same as the orthopedic surgeon not having reviewed any journals or periodicals for podiatry. (R. pp. 44-45) The

only distinction is that here Ms. Stobbs is a nurse. In her entire nursing career, Ms. Stobbs had not started nor managed an IV on a pediatric patient. Using the requirements of the *Botehlo* case, Ms. Stobbs was not qualified to give an expert opinion on pediatric IV therapy. *id.* As such, she should have never have been qualified as an expert on the use of starting and managing pediatric IV. The Court overruled Defendant's objection and allowed Monica Stobbs to be qualified as an expert (Tr. P. 78). The Court also erred in qualifying the witness in the broad scope of nursing care, when the crux of the case was the management of a pediatric IV, rather than a broad scope of general nursing. Petitioner asserts the Court of Appeals erred as well. Nursing has the specific practices for pediatric patients and children's hospitals recognized this difference.

Petitioner asserts this qualification was in error and prejudiced TRMC, as this should have resulted in a directed verdict as Plaintiff could not meet its burden of proof. Petitioner asserts the Court of Appeal's opinion was improper. The literature does not support the Court of Appeals as there is a difference between children and adults.

"To warrant reversal based on the admission or exclusion of evidence, the complaining party must prove both the error of the ruling and the resulting prejudice. To show prejudice, there must be a reasonable probability that the jury's verdict was influenced by the challenged evidence or the lack thereof." *State v. Douglas*, 367 S.C. 498, 508 (S.C. Ct. App. 2006) (internal citations omitted).

"The test for qualification of an expert is a relative one that is dependent on the particular witness's reference to the subject. "*State v. Davis*, 367 S.C.498, 508 (S.C. Ct. App. 2006) (internal citations omitted). Here the witness had no experience with pediatric IV management.

"A court's ruling on the admissibility of an expert's testimony constitutes an abuse of discretion where the ruling is manifestly arbitrary, unreasonable, or unfair. The Appellant must show prejudice for the Court of Appeals to reverse a judgment." (internal citations omitted). *Fields v. Regional Medical Center of Orangeburg*, 581 S.E.2d 489, 354 S.C. 445 (S.C. Ct. App. 2003) at 451.

"It is incumbent that any party offering the expert manifest that the witness possesses the necessary learning, skill, or practical experience to enable him to give opinion testimony. The test is a relative one, depending on the particular witness's reference to the subject." (internal citations omitted.

Plaintiff was also allowed to question Monica Stobbs repeatedly on whether the IV was flushed with saline on October 28, 2014, at 0427 a.m. (Tr. Pgs. 101, 102). As stated above, Monica Stobbs never administered an IV to a pediatric patient, which was the core issue in this case. (Tr. P. 103). She never started or managed a pediatric IV at any facility she worked at. (Tr. P. 107, 108, 109, 110) and (R.pp. 119-20). She also did not conduct any research in the literature regarding pediatric IV's. (Tr. P. 111) and (R.pp. 145-6).

Petitioner asserts it was prejudiced by the admission of this testimony as she had no more qualification to give this testimony, than a lay person as she had no knowledge, training, or experience to assist the jury pursuant to Rule 702, SCRE. Her lack of knowledge that "children are little adults," was also contrary to the literature and confused the jury as she testified to this fact.

Ms. Stobbs' expert opinion is premised on her belief that the standard of care for IV management is the same for pediatric patients as it is for adults. (Stobbs Depo. Pg. 13 ll. 13-18 Exhibit

1). There is a clear distinction between IV management in adults than pediatric patients. [1] Veins in infants are "*obviously* smaller" and they can be "threadlike." [2]

Ms. Stobbs testified to the fact she never treated a pediatric patient with IV therapy, indicating her lack of skill and experience in the subject matter.

Her entire expert opinion was based on her speculative belief that pediatric patients are simply little adults. She stated "[t]aking care of an IV is an IV whether it's a baby or an adult." (Stobbs Depo. Pg. 13 ll. 15-16). And that the standard of care is the same, it is simply "nursing 101." (Stobbs Depo. Pg. 26 ll. 17). She is under the belief that she "should get blood return from a vein whether it's a baby or whether it's an adult." (Stobbs Depo. Pg. 32 & 33 ll. 24-7 Exhibits 3 & 4). This is directly contrary to the literature.[3]

Because Ms. Stobbs lacked any experience, skill, training, knowledge, or education and her testimony has premised on her experience managing adult patients, Ms. Stobbs was not qualified to

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[1] THE INFUSION NURSES SOCIETY: IN FUSION THERAPY IN CLINICAL PRACTICE, 2ND. EDS HANKINS J, LONSWAY RA, HENDRICK C AND PERDUE MB. SAUNDERS, ST. LOUIS, MO 2001, 561 "CHILDREN PRESENT A WIDE VARIETY OF PHYSICAL CHARACTERISTICS DIFFERENT FROM THOSE IN ADULTS. IN ADDITION, PREMATURE INFANTS AND NEWBORNS VARY GREATLY FROM OLDER CHILDREN IN THEIR ANATOMY AND PHYSIOLOGY. THESE CHARACTERISTICS AFFECT THE ABILITY OF NEONATES AND INFANTS TO COPE WITH ENVIRONMENTAL STRESS AND TO MANAGE THE METABOLISM, ABSORPTION, DISTRIBUTION, AND EXCRETION OF MEDICATIONS AND SOLUTIONS. ALTHOUGH BODY SYSTEMS IN INFANTS AND CHILDREN ARE DIFFERENT FROM THOSE IN ADULTS, FOR THE PURPOSE OF THIS TEXT, ONLY THOSE RELATED TO INFUSION THERAPY ARE ADDRESSED IN DETAIL." (EXHIBIT 5).

[2] ID. AT 562 "THE SIZE OF VENOUS AND ARTERIAL VESSELS IN THE INFANT AND CHILD ARE OBVIOUSLY SMALLER THAN THOSE IN THE ADULT. ALTHOUGH THE VESSELS ARE ANATOMICALLY POSITIONED IN THE SAME LOCATIONS THROUGHOUT LIFE, THEIR SOMETIMES-THREADLIKE CHARACTERISTICS AND TENDENCY TO HIDE MAKE THEM DIFFICULT TO LOCATE IN THE YOUNG PATIENT." (EXHIBIT 6).

[3] ID. AT 422 "CHECKING FOR A BLOOD RETURN, OR BACKFLOW OF BLOOD, IS NOT A RELIABLE METHOD FOR DETERMINING THE ABSENCE OF AN INFILTRATION. A BLOOD RETURN MAY NOT BE PRESENT WHEN SMALL VEINS ARE USED BECAUSE THEY MAY NOT PERMIT BLOOD FLOW AROUND THE CANNULA; ONE MAY THINK THE INFUSION HAS INFILTRATED WHEN IT HAS NOT." (EXHIBIT 7)

give an expert opinion on IV therapy in pediatric patients, as she could not assist the jury as she is not qualified on the subject matter. Petitioner was prejudiced by qualifying her as an expert in this matter.

2. THE COURT OF APPEALS' OPINION OVERLOOKED AND/OR MISAPPREHENDED THE ISSUE OF THE VERDICT AS TO RESPONDENT TEKAYAH HAMILTON'S VERDICT.

The jury awarded Respondent Tekayah Hamilton, mother of the minor Respondent, $135,477.00. Appellant argued that Respondent Tekayah Hamilton's verdict was grossly or, at the very least, merely excessive as she was only entitled to past and future medical costs, which totaled $20,854.00. Trial Tr. 412:24-413:12; Def.'s Post Trial Mot. for Reduction to Statutory Cap. *See*, *Patton v. Miller,* 420 S.C. 471, 804 S.E.2d 252 (2017) (a parent is the proper party in interest with respect to past and future medical expenses while the child is a minor); *Wright v. Colleton Cnty. Sch. Dist.*, 301 S.C. 282, 289-90, 391 S.E.2d 564 (1990) (finding that a parent may recover medical expenses separately from the child's claim). Respondent Tekayah Hamilton testified she has no plans for surgery (*Id.* at 170:3-4) or steroid injections (157:2-22), and the only evidence of actual damages, past and future medical expenses, were in the amount of $20,854 (412:24-413:12). She was not entitled to any damages for pain and suffering. Therefore, the verdict rendered by the jury for Respondent Tekayah Hamilton in the amount of $135,477.00, which was $114,623 more than the actual damages, was grossly excessive or, at the very least, merely excessive as compared to the evidence presented at trial. Thus, Appellant argued that a new trial absolute, or in the alternative, a new trial nisi, should be granted.

Although the Court's Opinion makes note of Appellant's argument as to the excessive verdict for Respondent Tekayah Hamilton (Opinion pp. 19-20), the Court's ruling does not address the specific issues Appellant raised with regards to the verdict awarded for Respondent Hamilton.

Specifically, the Court of Appeals does not address the issue that 1) Respondent Hamilton's actual damages, both past and future, were only in the amount $20,854; 2) Hamilton testified she has no plans for surgery or steroid injections; 3) Hamilton was not entitled to pain and suffering; and yet, 4) Hamilton was awarded $135,477.00.

"An abuse of discretion occurs if the trial court's findings are wholly unsupported by the evidence or the conclusions reached are controlled by an error of law." *Welch*, 342 S.C. at 302 (citing *Krepps v. Ausen,* 324 S.C. 597, 479 S.E.2d 290 (Ct.App.1996)); *see, e.g.*, *Stevens v. Allen*, 336 S.C. 439, 446, 520 S.E.2d 625 (Ct. App. 1999). "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. 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." *Welch*, 342 S.C. at 302 (citations omitted). s*ee, e.g.*, *Stevens*, 336 S.C. at 447; *Duncan v. Hampton Cnt. Sch. Dist. No. 2*, 235 S.C. 535, 517 S.E.2d 449, 455 (Ct. App. 1990); *Sullivan v. Davis*, 317 S.C. 462, 467, 454 S.E.2d 907, 912 (Ct. App. 1995); *Zorn v. Crawford*, 252 S.C. 127, 138, 165 S.E.2d 640, 646 (1969). "If the amount of the verdict is grossly excessive so as to be the result of passion, caprice, prejudice or some other influence outside the evidence, the trial judge must grant a new trial absolute, not a new trial *nisi remittitur." Welch*, 342 S.C. at 303 (citing *O'Neal v. Bowles,* 314 S.C. 525, 431 S.E.2d 555 (1993)).

Again, Respondent Hamilton, if entitled to any verdict, was *only* entitled to actual damages, not pain and suffering, and the only evidence of actual damages, both past and future, presented to the jury were in the amount of $20,854. However, the jury awarded Ms. Hamilton $135,477.00, which is $114,623 more than her actual damages. The verdict, therefore, is *clearly* grossly excessive,

shockingly disproportionate, and wholly unsupported by and contradictory to the evidence presented at trial. The jury *must* have been moved by passion or prejudice. *See, Beasley v. Ford Motor Co.*, 237 S.C. 506, 513, 117 S.E.2d 863, 867 (1961) (The term "passion and prejudice" does not "necessarily imply bad faith, wrongful purpose, or moral delinquency," but rather, results when the award is "against the overwhelming weight of the evidence."); *Nelson v. Charleston W.C. Ry. Co.*, 231 S.C. 351, 362, 98 S.E.2d 798, 802 (S.C. 1957) (the existence of passion and prejudice could be established either by the size of the verdict alone or by comparing the amount of the verdict with the evidence before the trial court); *Smalls v. Springs Indus., Inc.* 292 S.C. 481, 486, 357 S.E.2d 452, 455 (1987) (size of verdict alone to establish passion or prejudice); *see,* 15 Am. Jur., *Damages* § 205, p. 623. There is no authority for her being awarded more than her actual damages.

Moreover, the verdict for Respondent Hamilton is "without any rational support whatever in the evidence and is so grossly excessive as to show that the jury was actuated by considerations not founded on the evidence and/or the instructions of the court." *Joyner v. St. Matthews Builders*, 263 S.C. 136, 140-41, 208 S.E.2d 48, 50 (1974) (granting a new trial due to the "actual damages" being so manifestly and grossly excessive"). Given the complete lack of any cognizable basis to support the damages award, it is clear that in awarding these amounts, the jury did not pay attention to the jury instructions. "[I]t is fundamental that a jury must abide by the judge's charge, be it right or wrong. Where the jury renders a verdict in disregard of his charge, it is error for the judge not to grant a new trial upon motion." *Southeastern Mobile Homes Inc., v. Walicki*, 282 S.C. 298, 302, 317 S.E.2d 773 (Ct. App. 1984). Appellant is left to conclude that, in light of the excessive verdict as compared to the evidence of actual damages, the jury arrived at its award as a result of passion, caprice, or other improve motives Therefore, it was an abuse of

discretion for the Trial Court not to grant Appellant's motion for a new trial absolute based on the grossly excessive verdict.

In the alternative, at the *very* least, the verdict, which again was $114,623.00 more than Ms. Hamilton's actual damages, should be considered excessive. The verdict for Ms. Hamilton was, at minimum, "unduly liberal," and "when the verdict indicates the jury was unduly liberal in determining damages, the trial court alone has the power to reduce the verdict by the granting of a new trial *nisi remittitur.*" *Welch*, 342 S.C. at 303; *see, e.g., .g., RRR, Inc v. Toggas*, 378 S.C. 174, 183, 662 S.E.2d 438 (Ct. App. 2008); *Howard v. Roberson*, 376 S.C. 143, 154, 654 S.E.2d 877 (Ct. App. 2007); *Becker v. Walmart Stores, Inc.*, 339 S.C. 629, 636, 529 S.E.2d 758 (Ct. App. 2000). All that could be awarded to Respondent Hamilton was actual damages, and when evaluating the adequacy of the verdict ($135,477.00) in light of the evidence presented ($20,854.00 actual damages), the verdict, at a bare minimum, was merely excessive and unduly liberal, and thus a new trial *nisi*, should have been granted in absence of a new trial absolute. *See, Welch*, 342 S.C. at 303 (citing *Waring v. Johnson,* 341 S.C. 248, 533 S.E.2d 906 (Ct.App.2000) ("In considering a motion for new trial *nisi,* the trial court must evaluate the adequacy of the verdict in light of the evidence presented."). Thus, given that the verdict for Respondent Hamilton was wholly unsupported by the facts and she is limited by law to actual damages, a new trial absolute or in the alternative a new trial nisi should have been granted. The Court of Appeals failed to address this issue and make a specific ruling as to this specific issue on appeal in its order dated August 2, 2023, or its order denying rehearing, dated September 21, 2023.

3. THE COURT OF APPEALS ERRED IN AFFIRMING THE JURY VERDICT AS IT WAS SHOCKINGLY DISPRORTIONATE TO THE EVIDENCE ADMITTED AT TRIAL.

Petitioner is entitled to a new trial on the grounds that the Jury's verdict was grossly excessive and contrary to the evidence. The only evidence of damages were $20,854, some pain and suffering and a scar while the jury returned a verdict for $1,127,280.00. No testimony from the mother of future medical costs was proffered. Petitioner is left to conclude that the jury arrived at its award as a result of passion, caprice or other improper motives, particularly in light of the excessive verdict compared to the evidence of actual damages.

"If the amount of the verdict is grossly inadequate or excessive so as to be the result of passion, caprice or some other influence outside the evidence, the trial judge must grant a new trial absolute." *O'Neal v. Bowles,* 314 S.C. 525 (1993). "The trial judge must grant a new trial absolute if the amount of the verdict is grossly inadequate or excessive so as to shock the conscious of the court." *Chapman v. Upstate RV & Marina,* 364 SC, 82 (Ct. App. 2005).

Given that the only evidence of damages was the medical bills of which were $20,854.00, the jury's verdict for $1,127,280.00 is grossly excessive and shocks the conscious. It is 54 times the amount of the actual damages. This would seem to support the view that the Jury did not pay attention to the jury instructions. Petitioner asserts that they are therefore entitled to trial *de novo* on the basis that the jury's award was grossly excessive.

CONCLUSION

Based on the foregoing discussion, the Petitioner The Regional Medical Center respectfully requests that this Court grant its petition for a writ of certiorari.

Respectfully submitted,

October 18, 2023

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