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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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

Appellate Case No. 2022-001480

Daisy Frederick.....Respondent,

vs.

Daniel Lee McDowell.....Petitioner.

RESPONDENT'S BRIEF

Brian Critzer (S.C. Bar No. 103159)
Kaye Hearn (S.C. Bar No. 2891)
WYCHE, P.A.
807 Gervais Street, Suite 301
Columbia, SC 29201
(803) 254-6542
bcritzer@wyche.com
khearn@wyche.com

Attorneys for the Respondent

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STATEMENT OF ISSUE ON APPEAL

Did the Court of Appeals properly affirm the trial court's denial of Petitioner Daniel McDowell's motion for a new trial absolute or a new trial nisi remittitur where Respondent Daisy Frederick presented ample evidence of damages and the amount of the verdict is not shockingly disproportionate to the severe injuries Frederick suffered?

STATEMENT OF THE CASE

This is an appeal from the trial court's May 12, 2020 denial of McDowell's motion for a new trial absolute, or in the alternative, for a new trial nisi remittitur. (App. pp. 42-44).

The underlying case arose from an automobile collision which occurred in North Carolina on April 29, 2015, when McDowell's vehicle crossed the center line and collided with Frederick's vehicle in her lane of traffic. (App. p. 93, lines 8-21). Frederick had to be cut from her vehicle and sustained a badly broken left femur, a crushed right ankle, together with various other physical injuries as well as mental anguish. Because both parties were South-Carolina residents, Frederick filed a summons and complaint in South Carolina on April 1, 2016. (App. pp. 48-53).

Frederick alleged that McDowell's negligence caused the collision. (App. pp. 48-53). McDowell denied the allegations and asserted the additional defenses of contributory negligence, comparative negligence, and sudden emergency under North Carolina law. (App. pp. 54-56).

Following a three-day trial, the jury returned a five-million-dollar verdict for Frederick on January 31, 2018. (App. p. 83; p. 198, lines 10-23). Thereafter, on February 14, 2018, McDowell filed written motions for JNOV, for a new trial absolute, for a new trial based on the Thirteenth Juror Doctrine, and for a new trial nisi remittitur. (App. p. 57-64). On August 12, 2019, the court heard McDowell's post-trial motions, which it denied by written order dated May 12, 2020. (App. pp. 249; pp. 42-44). On May 21, 2020, McDowell filed a second, arguably successive post-trial

motion, purportedly pursuant to Rule 59(e), SCRCP, which the trial court denied on June 12, 2020. (App. pp. 66-67; pp. 45-47).

McDowell filed and served his Notice of Appeal on July 10, 2020, arguing the trial court erred in four particulars: (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 directed verdict and judgment notwithstanding the verdict (JNOV) because Frederick was contributorily negligent; (3) in admitting evidence of the full amount of medical bills in violation of North Carolina law; and, (4) in allowing Frederick's expert to rely on the accident report prepared by the investigating law enforcement officer. (App. p. 7).

On July 20, 2022, the Court of Appeals affirmed in an unpublished opinion. (App. pp. 295-299). McDowell timely filed a Petition for Rehearing, which was denied on September 22. (App. pp. 300, 351).

McDowell filed a Petition for Writ of Certiorari on October 20, 2022. On August 10, 2023, this Court granted the Petition only as to the issue of whether the trial court erred in denying McDowell's post-trial motions for a new trial absolute or a new trial nisi remittitur and denied the Petition on the remaining grounds. Accordingly, the sole issue before this Court on certiorari is the propriety of the trial court's decision to deny McDowell's motion for a new trial absolute or a new trial nisi remittitur.

STATEMENT OF FACTS

In April of 2015, Frederick, age twenty-one, was driving to her grandmother's house to pick up her children, a two-year-old boy and a five-month-old girl, when she approached a slight curve. (App. p. 104, lines 22-23; p. 88, line 9 - p. 90, line 20, 114, lines 3-4; p. 90, line 17 - p. 93,

line 25). Suddenly, McDowell's vehicle, which was "about three car lengths away," swerved into Frederick's lane and collided with her vehicle. (App. p. 93, line 19 - p. 95, line 21).

With legs "crushed" and arms "shredded," Frederick was trapped in her vehicle for some time, and was ultimately removed by a "chainsaw-looking" device commonly known as the "jaws of life." (App. p. 97, line 22 - p. 99, line 11). Surprisingly, Frederick never lost consciousness and feared she would die before being rescued from her vehicle. (App. p. 98, lines 12-15). In her disoriented state, she thought her children were in the car, and she was afraid that they, too, had been injured or killed, although thankfully, she was reassured by Good Samaritans that the car seat in the back seat of her vehicle was empty. (App. p. 97, lines 9-20). Significantly, McDowell never approached Frederick's vehicle to check on her condition. (App. p. 98, lines 16-22).

Thereafter, Frederick was transported by ambulance to a local hospital and subsequently airlifted to a major medical center in Charlotte. (App. p. 100, lines 6-11). According to her doctor, (whose video deposition was played at trial (Pet'r. B. pp. 7-8)) Frederick had a broken left femur, a crushed lower tibia and fibula on her right side, and major "lacerations and wounds about her elbow" and "on her forearm." (App. p. 216, lines 10-21; p. 220, lines 7-13). She lost so much blood that she needed two blood transfusions. (App. p. 101, lines 13-16; p. 222, lines 13-25). While in the hospital, she did not allow her children to visit because they would have been distressed to see her in serious pain, "crying," and with visible "injuries and . . . stuff sticking out of" her. (App. p. 104, lines 11-23). She required strong pain medication—including "a souped-up morphine"—although she genuinely feared the possibility of addiction. (App. p. 104, line 24 - p. 105, line 8; p. 221, line 11 - p. 222, line 12).

It took at least three surgeries to stabilize Frederick's fractures. (App. p. 217, line 7 - p. 218, line 24; p. 224, line 9 - p. 225, line 2; p. 232, lines 17-23). Medical personnel placed a rod

and screws in her left thigh, and a plate and screws in her right ankle. (App. p. 217, lines 13-25; p. 224, line 22 - p. 225, line 2). In order to place the rod, they had to "core out the inside of her bone." (App. p. 217, lines 13-22).

However, this substantial medical intervention did not instantly return Frederick to her prior healthy and vibrant life. Frederick, formerly the breadwinner for her children, was forced to have her family care for her. (App. p. 107, line 13 - p. 108, line 23). For months after leaving the hospital, she needed substantial assistance with toileting. (App. p. 108, lines 3-14). She spent nine months bedridden, then a year and a half learning how to walk again. (App. p. 109, line 10 - p. 110, line 2). Having to rely on others for basic needs was especially difficult for her since she was a self-described "independent woman." (App. p. 108, lines 15-23).

After months of treatment and physical therapy, Frederick progressed to a point that she could start applying for jobs. Her prior occupation, which involved spinning yard from cotton in a mill, was physically demanding. Sadly, her extensive injuries prevented her from returning to her former employment, and although she applied for other jobs, her inability to stand for long periods of time or lift any heavy objects rendered her unable to perform those jobs for which she was otherwise qualified. (App. p. 112, lines 6-24).

During his October 9, 2017 video deposition, Frederick's doctor testified that her recovery was long, and stated that she was "probably" still having difficulties. (App. p. 233, lines 16-24). He was right. At the time of trial, thirty-three months[1] after the wreck, Frederick's pain still required medication. (App. p. 121, lines 16-22). She still underwent medical treatment and

[1] Petitioner erroneously asserts that only twenty months passed between collision and trial. (Pet'r. B. p. 16). However, the collision occurred on April 29, 2015, and trial began on January 29, 2018. Thus, the time period between collision and trial was actually 32 months or nearly three years.

undertook physical therapy on her own. (App. p. 119, line 23 - p. 120, line 3; p. 121, lines 23-25). And she still was unable to find a job to support her children.[2] (App. p. 112, lines 6-24). By that point, she had $171,909.87 in medical bills and $53,460 in lost wages—special damages totaling approximately $225,000. (App. p. 181, line 12 - p. 182, line 8). There was no objection to her testimony about still being in pain and needing pain medication at the time of trial. (App. p. 121, lines 25).

The trial court instructed the jury on damages, including future damages. (App. p. 189, line 5 - p. 191, line 10), and charged the mortality tables. (App. p. 191, lines 1-4). The trial judge clarified—at least twice—that the charges were not a suggestion that Frederick suffered any particular type of damage; rather, he instructed the jury to decide for itself as to each type of damages. (App. p. 189, lines 7-14; p. 191, lines 16-21). McDowell objected to the charges; however, he never objected to the verdict form or requested any type of special verdict, and the jury ultimately returned a general verdict. (App. p. 193, line 20 - p. 194, line 9).

The trial court permitted McDowell to file his post-trial motions within ten days. (App. p. 199, line 23 - p. 200, line 5). As relevant here, McDowell contended the verdict was excessive and therefore sought a new trial absolute or alternatively a new trial nisi remittitur. (App. pp. 57-64). The trial court held a hearing and denied McDowell's motions. (App. pp. 252, 42). Rather than file a notice of appeal, McDowell filed another post-trial motion, this time captioned as a Rule 59(e) motion, reiterating his arguments from his original post-trial motions. (App. pp. 66-67). The

[2] According to McDowell, Frederick's "own attorney stated that she would be [able] to work in the future, thereby eliminating any basis for future financial losses." (Pet'r. B. p. 13). However, McDowell's contention is somewhat disingenuous, as what Frederick's attorney stated was that Frederick would surely find work at some point and that, therefore, the jury did not need "to give her lost wages for the rest of her life." Counsel also said that Frederick had been unable to find work up to the date of trial and that, therefore, the jury could consider some award for future lost wages. (App. p. 182, lines 7-17). There was no objection to this argument.

Court issued an amended order denying McDowell's successive motion, which is virtually identical to the original order. (App. p. 45). Thereafter, fifty-nine days after the trial court issued its original order denying McDowell's post-trial motions, McDowell finally filed and served a notice of appeal.

The Court of Appeals held that "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." (App. pp. 296-97). The Court of Appeals also held that because the jury returned a general verdict it was impossible to determine whether the jury's verdict even incorporated future damages. Accordingly, even assuming without deciding that the trial court erred in charging mortality tables, there was no showing that such an error prejudiced McDowell. (App. p. 297).

As a threshold matter, Frederick asserts the second, successive post-trial motion filed by McDowell did not stay the time for filing and serving the notice of appeal, and that therefore, this appeal should be dismissed consistent with longstanding South Carolina precedent.[3] Alternatively, the decision of the Court of Appeals should be affirmed.

STANDARD OF REVIEW

Generally, when reviewing a trial court's decision on a motion for a new trial absolute or a new trial nisi remittitur, our appellate courts "employ a highly deferential standard of review." *Burke v. AnMed Health*, 393 S.C. 48, 55, 57, 710 S.E.2d 84, 88, 89 (Ct. App. 2011). This is partly

[3] Frederick also notes that even apart from the successiveness of McDowell's second post-trial motion, it appears McDowell's notice of appeal was not timely made because his initial post-trial motion was outside the ten-day period. The jury's verdict was rendered on January 31, 2018 and McDowell concedes at every stage that his first post-trial motion was not filed until February 14, 2018, clearly outside the ten-day time limit. These concessions appear in his Rule 59(e) motion (App. p. 66), his final brief before the court of appeals (App. p. 10), his petition for certiorari (p. 3), and his brief before this Court (p. 3).

because of "the unique position of the trial judge to hear the evidence firsthand, evaluate the credibility of the witnesses, and assess the impact of the wrongful conduct on the plaintiff in terms of damages." *Id.* An appellate court does not "sit . . . to determine whether [it] agree[s] with the verdict" or "to decide whether [it] agree[s] with the trial court's decision not to disturb it." *Id.*

Appellate review of a trial court's decision to deny a motion for a new trial absolute or a new trial nisi remittitur is also governed by a highly deferential standard of review. *Rush v. Blanchard*, 310 S.C. 375, 380, 426 S.E.2d 802, 805 (1993) ("The decision to grant a new trial is left to the sound discretion of the trial court and ordinarily will not be disturbed on appeal."). Absent an abuse of discretion, an appellate court will not reverse the trial court's decision to deny a new trial absolute or new trial nisi remittitur. *Cock-N-Bull Steak House v. Generali Ins. Co.*, 321 S.C. 1, 9, 466 S.E.2d 727, 731 (1996).

ARGUMENT

I. This appeal should be dismissed on jurisdictional grounds because McDowell filed successive post-trial motions and therefore, the notice of appeal was not timely filed.

It is well settled that the notice of appeal in a civil action must be served on a respondent within thirty days after receipt of the entry of an order of judgment. Timely post-trial motions for JNOV, for a new trial, or to alter or amend the judgment stay the time for appeal until such time as notice of the entry of an order granting or denying the post-trial motions is received; however, the time to serve a notice of appeal is not extended where the subsequent motions are merely restatements of prior motions. Therefore, as a threshold matter, Frederick seeks dismissal of this case because McDowell filed successive post-trial motions prior to serving his notice of appeal, the second of which did not stay the time for appealing.

South Carolina jurisprudence on this issue is clear. Beginning with *Coward Hund* in 1999, South Carolina appellate decisions have recognized, consistent with federal authority and the clear language of Rule 203(b)(1), SCAR, that only a *timely* Rule 59(e) motion stays the time for appeal. *Coward Hund Construction Co. v. Ball Corp*., 336 S.C. 1, 2-3, 518 S.E.2d 56, 57 (Ct. App. 1999) (holding where a party filed a second post-trial motion seeking clarification of an issue previously raised in an initial post-trial motion, the subsequent notice of appeal was not timely). While *Coward Hund* concerned successive Rule 59(e) motions, its holding was later extended to the precise situation presented here: an initial post-trial motion seeking JNOV, a new trial absolute, and a new trial nisi remittitur, followed by a subsequent post-trial motion captioned under the guise of Rule 59(e), yet virtually a duplicate of the earlier motion. *Collins Music Co. v. IGT*, 353 S.C. 559, 564, 570 S.E.2d 524, 526 (Ct. App. 2002) ("The time for filing appeal is not extended by submitting the same motion under a different caption.").

In *Quality Trailer Prods. v. CSL Equip. Co*., this Court expressly approved the rationale of the above decisions of the Court of Appeals. 349 S.C. 216, 220, 562 S.E.2d 615, 617-18 (2002) ("We agree with the rationale of *Coward Hund* and hold that successive new trial motions or motions for JNOV do not toll the time for serving notice of appeal. The time for filing appeal is not extended by submitting the same motion under a different caption."). The procedural posture of *Quality Trailer* is strikingly similar to the situation presented here. In *Quality Trailer*, following a jury verdict, the defendant made timely post-trial motions for JNOV and for a new trial. By written order, those motions were denied. Thereafter, the defendant filed a motion captioned as a motion to "Alter, Amend, or Reconsider Judgment and Findings Denying Defendant's Motion for Judgment Notwithstanding the Verdict and Motion for New Trial." Finding that the second motion literally recited the same arguments previously raised and previously ruled upon by the trial court,

this Court held that the second motion was not, despite its caption, an appropriate Rule 59(e) motion. 349 S.C. at 220, 562 S.E.2d at 618 ("It was simply a successive motion for JNOV and new trial, and thus did not toll the time for serving the notice of appeal."). Thus, *Quality Trailer* agreed with *Collins Music* in taking *Coward Hund* a step further, extending it to a situation beyond successive Rule 59(e) motions to one nearly identical to that presented here—where an initial timely post-trial motion for JNOV and new trial is followed by a virtually identical second motion captioned as a Rule 59(e) motion for reconsideration.

Thereafter, in *Elam v. S.C. Dot*, 361 S.C. 9, 602 S.E.2d 772 (2004), this Court reaffirmed the rationale of *Coward Hund* and *Collins Music* but clarified the limits of this jurisprudence. In *Elam*, immediately following a verdict in favor of the plaintiff, SCDOT made **oral** motions for JNOV, a new trial absolute, and a new trial nisi remittitur. *Id.* at 13, 602 S.E.2d at 774. The trial judge denied the motions in an oral ruling from the bench, and a Form 4 order was thereafter filed. SCDOT thereafter filed a *timely* written motion pursuant to Rule 59(e), SCRCP, and that motion was denied in a written order by the trial judge. On appeal, the Court of Appeals *sua sponte* raised the issue of the timeliness of SCDOT's appeal in light of *Quality Trailer.* This Court granted certiorari following an order of the Court of Appeals dismissing the appeal as untimely. Noting that our rules should neither be written nor interpreted "to create a trap for the unwary lawyer or party," this Court held that the Court of Appeals had impermissibly extended *Coward Hund* and *Collins Music* to deprive SCDOT of an opportunity to file a Rule 59(e) motion. *Id.* at 25, 602 S.E.2d at 780. Finding that the situation presented in *Elam* was neither factually similar to *Coward Hund* because it involved a first, not a second Rule 59(e) motion nor to *Quality Trailer* or *Collins Music* because SCDOT did not simply resubmit a virtually identical motion raising the same issues on which it had previously obtained a ruling, it reversed the dismissal of the appeal. *Id.* at 26-27,

602 S.E.2d at 781. In other words, this Court held that our procedural rules permit a party one "bite of an apple" in filing a post-trial motion, and that in *Elam,* the defendant did not receive its proverbial one-bite.

Respondent submits that a close examination of the procedural facts of the instant case establish that it is factually similar to both *Collins Music* and *Quality Trailer*, and that the rationale of those decisions require dismissal of the underlying appeal. Following a jury verdict in favor of Frederick, McDowell filed written post-trial motions on February 14, 2018, seeking JNOV, a new trial absolute, a new trial based on the thirteenth juror doctrine, or a new trial nisi remittitur. (App. pp. 57-64). These motions were denied by written order dated May 12, 2020. Thereafter, by motion dated May 21, 2020, McDowell filed a Rule 59(e) motion seeking reconsideration of the prior written order. (App. pp. 66-67). Significantly, this motion specifically stated that it "incorporates by reference and relies upon all the issues, arguments and authorities previously raised in (sic) submitted in support of those motions." (App. p. 67). Even more telling, the motion specifically stated:

> 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.

(App. p. 66). Thus, McDowell not only rehashes the very same arguments previously made in his earlier post-trial motions by incorporating them by reference, he candidly admits that the trial court's prior written order considered and ruled upon all of those issues. McDowell's second post-trial motion, masquerading as a Rule 59(e) motion, was nothing more than a request to revisit the

grounds and arguments made in the earlier motions, which had already been denied in a written order. This is precisely the same situation presented in *Collins Music*, whose holding was specifically approved by this Court in *Elam*. McDowell was essentially asking the trial court to revisit or, at the least, to clarify its prior ruling. McDowell, in making this successive request for precisely the same relief he had already sought in his initial post-trial motion, compromised his right to appeal from the underlying judgment because the finality of the judgment was restored in the trial court's first post-trial order. McDowell cannot save his right to appeal by arguing that he requested a clarification from the trial court. To be sure, the trial judge was not required to provide a detailed analysis on each ground for JNOV or new trial previously raised and ruled upon; that was made crystal clear in *Collins Music*. 353 S.C. at 565, 579 S.E.2d at 527 (stating a trial judge is not required to provide a detailed analysis of all grounds raised and it is sufficient if it was clear from the order that all grounds raised were considered).

Nor does the fact that McDowell raised an issue about a sentence in the initial post-trial order concerning the application of the North Carolina Rules of Evidence prevent McDowell's second post-trial motion from being successive. That issue was not an issue on appeal and is a proverbial red herring; its resolution had absolutely no effect on the underlying judgment.[4] As this Court specifically stated in *Elam*: "An appeal may be barred due to untimely service of the notice of appeal when a party—instead of serving a notice of appeal—files a successive Rule 59(e) motion, *where the trial judge's ruling on the first Rule 59(e) motion does not result in a substantial*

[4] While McDowell contended before the court of appeals that the trial court erred in permitting Frederick to enter certain evidence of medical expenses under Rule 414 of the North Carolina Rules of Evidence, this does not change the fact that the court's original order had no bearing on any issues on appeal. There was no need to file a successive post-trial motion to "correct" the court's order because under either the trial court's original order or under McDowell's argument, the result is the same—that Rule 414 of the North Carolina Rules of Evidence applied.

alteration of the original judgment." 361 S.C. at 20, 602 S.E.2d at 778. (emphasis added). This is precisely the situation here. By no means could the mention of the North Carolina Rules of Evidence in the initial post-trial order be considered a substantial alteration of the judgment, and in the familiar words of Chief Judge Alexander Sanders: "whatever doesn't make any difference, doesn't matter." *McCall v. Finley*, 294 S.C. 1, 4, 362 S.E.2d 26, 28 (Ct. App. 1987).

The procedural posture of this case is markedly different than that presented to this Court in *Elam,* where the appellant only had his proverbial first bite of the apple when he filed his first, written post-trial motion. The facts presented here are much more aligned with the facts in *Quality Trailer* and *Collins Music*. Significantly, in *Elam*, this Court, in reaffirming the principles of *Quality Trailer* and *Collins Music*, took great pains to note that they both involved "written JNOV/new trial motions, a written ruling by the trial court, followed by a first, written, virtually identical Rule 59(e) motion." 361 S.C. at 19, 602 S.E.2d at 777. The parallels between the facts in *Quality Trailer* and *Collins Music* and this case are striking and require this Court to dismiss this appeal as untimely. This Court has no subject matter jurisdiction over the appeal because the notice of appeal was not timely filed.

II. Based on extensive evidence of prior and ongoing damages, the Court of Appeals correctly affirmed the trial court's denial of Petitioner's motions for a new trial absolute or a new trial nisi remittitur.

McDowell argues that because there is insufficient evidence of Frederick's future damages, the jury's verdict is excessive. However, the basic premise in his argument is simply wrong. Even assuming, *arguendo*, there was no evidence of future damages, that does not render the verdict excessive. First, there clearly was competent, unobjected to evidence presented of Frederick's future damages. It was undisputed that the implantation of a rod and screws in her leg and ankle were permanent. She also testified without objection to her continuing pain and need for pain medication at the time of trial. Second, even without the above-mentioned testimony, the evidence

of Frederick's pain and suffering from the time of the collision to the time of trial—a period of nearly three years—is more than enough to sustain the verdict awarded by the jury. Finally, and perhaps most importantly, this was a general verdict. There was no request by McDowell for a special verdict nor was there any objection to the verdict form submitted. Accordingly, it is impossible to discern from this verdict whether the jury even considered future medical expenses and pain and suffering as an element of damages. Given these three facts, McDowell's argument is unavailing, and the decision of the Court of Appeals to affirm the verdict should be upheld.

A. Ample evidence of past damages supports the jury's decision.

There is no dispute that Frederick suffered significant injuries that began at the moment of impact. As Frederick testified, she was "trapped" in her vehicle, the front end of McDowell's car "crushed her legs," and her arms were "split open" and "shredded" from the glass that had shattered from a window. (App. p. 98, lines 1-14). Glass also pierced her neck and back. (App. p. 98, lines 10-11). She had to be forcibly removed from her vehicle by first responders with a tool that "looked like a chainsaw." (App. p. 99, lines 6-9). Despite her substantial injuries, she never lost consciousness, and therefore not only suffered conscious pain and suffering throughout her removal from the vehicle and transport to the hospital, but also severe emotional distress. (App. p. 98, lines 12-15). The confusion brought on by her traumatic injuries caused her to believe that one or more of her children were in the car with her at the time of the collision. The jury heard her testify that she initially thought her infant son was with her, and that she even called out for him. Indeed, two Good Samaritans at the scene asked who she kept calling for. (App. p. 97, lines 10-21). When Frederick told them she was calling for her children, they were able to reassure her that the car seat in the back seat was empty, and that her children, thankfully, were not with her.

Once emergency personnel freed her, she was transported by ambulance to the local hospital, but due to the severity of her injuries, she then had to be airlifted to a hospital in Charlotte. (App. p. 99, line 20 - p. 100, 25).[5] There, family members attempted to comfort her, but as they wept upon seeing her, she, too, began weeping. She endured multiple blood transfusions, and she had rods and screws protruding from her leg as a result of her badly fractured femur. She underwent multiple surgeries, was bedridden for nearly nine months, and did not see her children in person out of fear they would be traumatized by seeing her in that condition. (App. p. 101, line 3 - p. 109, line 16). She depended on others for nearly everything—she was wheelchair bound, she could not bathe or use the bathroom by herself,[6] and she had to undergo substantial physical therapy to learn how to walk again. (App. p. 107, line 17 - p. 109, line 14). She could no longer provide for her children by working "a physically demanding job" that required her "to stand for hours a day," (App. p. 89, lines 12-15). Rather than being able to care for and play with her two-year-old son, her toddler helped wash her back. (App. p. 108, lines 24-25). At trial, she testified of her continued pain, her continued need for pain medication, and her inability to perform physically demanding jobs. Significantly, this testimony came in without objection.

[5] The jury also heard that her airlift to Charlotte was the first time she had ever been in a helicopter, which exacerbated her anxiety and mental distress. (App. p. 100, lines 12-21). She also had never been anesthetized for surgery prior to this accident, and she testified that she feared that she might not wake up. (App. p. 102, line 18 - p. 103, line 1). For obvious reasons, McDowell conveniently ignores any psychological impacts Frederick sustained from the crash, but the jury could properly rely on this evidence in assessing whether Frederick suffered any permanent damages. This Court cannot accept McDowell's argument about the lack of evidence of permanent impairment without impermissibly reweighing the evidence.

[6] The jury heard how Frederick suffered the indignity of using a bedpan for a period of time, followed by the use of a bedside toilet for many months. (App. p. 108, lines 3-18). Frederick testified that even her toddler wanted to help empty her bedpan, which she did not allow. (App. p. 109, lines 1-4).

It is well settled that all facts must be viewed in the light most favorable to the nonmoving party. *Hamilton v. Reg'l Med. Ctr.*, Op. No. 6008 (S.C. Ct. App. filed Aug. 2, 2023) (Howard Adv. Sh. No. 30 at 27, 47) (citation omitted) (noting the reviewing court "consider[s] the testimony and reasonable inferences therefrom in the light most favorable to the nonmoving party."). Likewise, the issue of damages—especially the amount awarded—is a quintessential jury question and its verdict is entitled to broad discretion. *See Rush*, 310 S.C. at 379, 426 S.E.2d at 805 ("The jury's determination of damages, however, is entitled to substantial deference."). These principles highlight why an appellate court will rarely reverse the trial court's decision. *Elam*, 361 S.C. at 27, 602 S.E.2d at 781.

The law recognizes a distinction between an "unduly liberal verdict" and one that is "actuated by passion, caprice, or prejudice." *Riley v. Ford Motor Co.*, 414 S.C. 185, 192, 777 S.E.2d 824, 828 (2015) (quoting *Allstate Ins. Co. v. Durham*, 314 S.C. 529, 530-31, 431 S.E.2d 557, 558 (1993)). An appellate court will not set aside a jury verdict "for its possibly undue liberality. *Easler v. Hejaz Temple A. A. O. N. M. S.*, 285 S.C. 348, 356, 329 S.E.2d 753, 758 (1985). Instead, to find a verdict grossly excessive, the verdict "must be deemed the result of the jury's disregard of the facts and the court's instructions." *Craven v. Cunningham*, 292 S.C. 441, 443-44, 357 S.E.2d 23, 25 (1987); *see O'Neal v. Bowles*, 314 S.C. 525, 527, 431 S.E.2d 555, 556 (1993); *Kunst v. Loree*, 424 S.C. 24, 46, 817 S.E.2d 295, 306 (Ct. App. 2018) (citing *Miller v. City of West Columbia*, 322 S.C. 224, 231, 471 S.E.2d 683, 687 (1996)).

The above evidence alone supports the jury's verdict, as the law has never required proof of damages to a mathematical certainty. *Piggy Park Enters., Inc. v. Schofield*, 251 S.C. 385, 392, 162 S.E.2d 705, 708 (1968) ("Proof of the amount of loss with absolute or mathematical certainty is not required, and it does not matter that the determination of damages depends to some extent

on the consideration of contingent events.") (internal citation omitted). Nor could it since "[p]ain and suffering have no market price." *Harper v. Bolton*, 239 S.C. 541, 548, 124 S.E.2d 54, 57 (1962). Therefore, these categories of damages "must be left to the judgment of the jury," *id.* at 548, 124 S.E.2d at 57, because "[t]he amount of damages a jury may award for physical pain and suffering and for mental pain and suffering is incapable of exact measurement." *Mims v. Florence Cnty. Ambulance Serv. Comm'n*, 296 S.C. 4, 7, 370 S.E.2d 96, 99 (Ct. App. 1988) (citations omitted).

Frederick's intangible damages of pain, suffering, and mental distress easily justified the jury's verdict and cannot be said to be "the result of the jury's disregard of the facts and the court's instructions." *Craven*, 292 S.C. at 443-44, 357 S.E.2d at 25. The trial court, too, acted within its discretion in declining to set aside the jury's verdict, as it presided over the three-day trial and was very much cognizant of the "evidentiary atmosphere at trial." *Hamilton v. Reg'l Med. Ctr.*, Op. No. 6008 (S.C. Ct. App. filed Aug. 2, 2023) (Howard Adv. Sh. No. 30 at 27, 47) (noting "appellate courts give great deference to the trial court because the trial court 'possesses a better-informed view of the damages than' an appellate court because the trial court 'heard the evidence and is more familiar with the evidentiary atmosphere at trial.') (quoting *Vinson v. Hartley*, 324 S.C. 389, 405-06, 477 S.E.2d 715, 723 (Ct. App. 1996)). Therefore, given the standard of review, this Court should not disturb the trial court's decision to deny the motion for a new trial absolute or new trial nisi remittitur.

B. McDowell wrongly asserts there is no evidence of future damages, but even if the evidence is lacking, McDowell did not object to the use of a general verdict form.

According to McDowell, Frederick presented no evidence of future damages, and the jury could not have returned such a large verdict without including future damages. As discussed, the second premise is untrue: the award was clearly not out of proportion to Frederick's past damages,

which extended, at the very least, over a three-year period. The first premise is also false. Frederick presented evidence of future damages that supports the jury's award.

Specifically, McDowell alleges that Frederick presented no evidence of future pain; future medical care or expenses; permanent impairment or disability; or future lost income. (Pet'r. B. pp. 7-9.) It is clear that Frederick's pain, continuing medical treatment, and inability to find gainful employment commensurate with her qualifications were ongoing at trial, nearly three years after the wreck. Moreover, to suggest that her injuries were not permanent is to ignore the unrefuted evidence of cored-out bone, artificial implants, the use of screw and rods, and scarring. "[T]he standard of admissibility for evidence of future damages is 'any evidence which tends to establish the nature, character, and extent of injuries which are the natural and proximate consequences of the defendant's acts . . . if otherwise competent.'" *Pearson v. Bridges*, 344 S.C. 366, 372, 544 S.E.2d 617, 620 (2001) (citation omitted).

It is true that a plaintiff must show that "future damages are 'reasonably certain' to occur." *Id.* at 371-72, 544 S.E.2d at 619 (citing *Haltiwanger v. Barr,* 258 S.C. 27, 186 S.E.2d 819 (1972)). However, reasonable certainty is a jury question, *id.* at 373, 544 S.E.2d at 620—and in personal-injury cases, "[a] wide latitude is allowed the jury," *Haltiwanger*, 258 S.C. at 33, 186 S.E.2d at 821. *See Doremus v. Atl. Coast Line R. Co.*, 242 S.C. 123, 148, 130 S.E.2d 370, 382 (1963) (holding that although the jury may have had "difficulty . . . determining future damages," future damages were justified if the jury "could infer . . . with reasonable certainty" "that the earning capacity of the m[i]nor plaintiff [would] . . . be to some extent impaired"). Most certainly, the jury was not required to park its collective commonsense at the door and could use its common knowledge that severe injuries such as those suffered by Frederick have lasting consequences.

Frederick's evidence of ongoing injuries far surpasses the evidence in cases where the appellate courts of this state have permitted the issue of future damages to be presented to the jury. *See, e.g.*, *Wilder v. Blue Ribbon Taxicab Corp.*, 396 S.C. 139, 148, 719 S.E.2d 703, 708 (Ct. App. 2011) (noting the issue of future damages was for the jury and stating: "[a]lthough sparse, [the plaintiff] presented some evidence of permanent injury and entitlement to damages for future pain and suffering by testifying she continued to experience pain nearly three years after the accident"); *Gethers v. Bailey*, 306 S.C. 179, 180-81, 410 S.E.2d 586, 586-87 (Ct. App. 1991) (holding the permanence of the plaintiff's injury was a jury issue where the plaintiff's pain had continued until trial despite the fact that the plaintiff's doctor "could not say with a reasonable degree of medical certainty that [the plaintiff] either would or would not have a complete recovery with no more pain in her foot"). Most certainly, there was sufficient evidence presented for the jury to consider future damages, and this Court should not disturb the jury's verdict because it is amply supported in the evidence.[7]

Moreover, it is impossible to know whether the jury considered the issue of future damages in light of the general verdict returned, and this Court should not accept McDowell's invitation to speculate as to what damages the jury considered. *See Pearson*, 344 S.C. at 372 n.5, 544 S.E.2d at 619 n.5 ("[W]e note the jury returned a general verdict in this case in the amount of $ 755,000. Dr.

[7] The evidence of ongoing damages also means that the trial court properly charged the mortality tables, although as McDowell concedes, this is not an issue that the Court granted certiorari on. This Court should reject McDowell's backdoor attempt to inject an issue about the mortality tables into this appeal. Regardless, McDowell cannot show prejudice because the charge was not erroneous, and the trial judge 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. *See Keaton v. Greenville Hosp. Sys.*, 334 S.C. 488, 498, 514 S.E.2d 570, 575 (1999) ("Jury instructions must be considered as a whole, and if, as a whole, they are reasonably free from error, isolated portions which might be misleading do not constitute reversible error.") (internal citation omitted).

Pearson never requested a special verdict form separating the elements of damage, and, therefore, there is no way of knowing whether any allowance was made for future medical expenses. . . . There is simply no way to determine if the jury allocated any money for future medical expenses."); *Graham v. Town of Latta*, 417 S.C. 164, 196, 789 S.E.2d 71, 87 (Ct. App. 2016) (relying in part on the use of a general verdict to uphold a damages award) (J. Cureton, concurring); *see also Weaver v. Lentz*, 348 S.C. 672, 681, 561 S.E.2d 360, 365 (Ct. App. 2002) (citations omitted) (upholding a jury verdict where "the court ha[d] no way to determine what significance the jury ascribed to" certain "elements of damages"). Accordingly, this is yet another ground that supports affirming the trial court, and it is consistent with this state's approach when reviewing general verdicts. *See generally Cole v. Raut*, 378 S.C. 398, 407, 663 S.E.2d 30, 34 (2008) ("[A]ppellate courts in this State 'exercise every reasonable presumption in favor of the validity of a general verdict.'") (quoting *Gold Kist, Inc. v. Citizens & S. Nat'l Bank*, 286 S.C. 272, 282, 333 S.E.2d 67, 73 (Ct. App. 1985)).

C. McDowell misconstrues case law in asking this Court to set aside the jury's verdict.

Lastly, McDowell misconstrues case law in his attempt to claim that this verdict is grossly excessive. Surprisingly, McDowell relies on *Becker v. Wal-Mart Stores, Inc.*, but that decision actually undermines his argument. In *Becker*, "a box containing a space heater fell from a shelf . . . and struck [Becker's] left foot," causing a nerve disorder in that foot. 339 S.C. 629, 633, 529 S.E.2d 758, 760 (Ct. App. 2000). Becker, who was seventy-three at the time of the incident (and seventy-six by the time of trial), endured several months of intense pain; "depression associated with the pain;" a surgical implantation to relieve the pain; and, finally, chronic, low-level pain resulting in a four-percent impairment rating to her foot, "which corresponded to a two per cent impairment rating to the whole body. *Id.* At trial, the jury returned a verdict of $1,750,000—more

than fifty-seven times Becker's medical expenses of $30,538.44. *Id.* at 633-34, 529 S.E.2d at 760-61.

The trial court granted the defendant's motion for a new trial nisi remittitur and reduced the verdict to $525,000 (slightly more than seventeen times special damages). *Id.* at 634, 529 S.E.2d at 761. In doing so, the trial court considered "the amount of Becker's medical expenses, the 'moderate' nature of the diagnosed condition resulting from her injury, her resulting impairment rating of four per cent, her age, and her statutory life expectancy." *Id.* at 637, 529 S.E.2d at 762. The Court of Appeals affirmed under an abuse-of-discretion standard, and it noted Becker's pain, a surgical implantation, and "depression associated with the pain." *Id.* at 633, 529 S.E.2d at 760.

In short, the *Becker* Court, employing a deferential standard of review, affirmed a reduction of the verdict to approximately seventeen times special damages for a woman who was never bedridden, who did not have to learn to walk again, and who did not have vulnerable dependents under her care. By contrast, Frederick was bedridden for months, relying on her family for her most basic needs. She then spent eighteen months learning to walk again. She also clearly suffered significant mental distress as a result of her injuries and her anxiety in not being able to care for or provide financially for her children.

Additionally, Frederick also worried she would die from her injuries, initially believed her children were with her in the vehicle, and was fearful she would become addicted to the pain medication. Frederick also endured multiple surgical procedures, suffered scarring (which the court charged as a basis for recovery in an unobjected-to portion of the charge) (App. p. 189, lines 15-16), and had difficulty finding work due to her injuries and her prolonged period of recovery. Given these considerations, a verdict slightly more than twenty-two times Frederick's special

damages is not "clearly" an excessive ratio. *Becker* does not support McDowell's position; rather, it undermines it.

McDowell also contends the Court of Appeals erred in relying on *Hawkins v. Pathology Assocs. of Greenville, P.A.*, 330 S.C. 92, 498 S.E.2d 395 (Ct. App. 1998), but this argument is equally unavailing. McDowell valiantly but vainly attempts to distinguish *Hawkins* from Frederick's case. (Pet'r. B. p. 13). First, he alleges that the Court of Appeals overlooked the fact that for seven months, Hawkins suffered, and knew that she suffered, from a terminal condition that would leave her two young children motherless. (Pet'r. B. p. 13). However, it is McDowell who overlooks the considerable mental distress suffered by Frederick. Her fear of death and addiction, as well as the ensuing years of incapacity and dependence for a formerly independent woman, were real and were properly considered by the jury in assessing a verdict. The fact that Frederick had made remarkable progress by the time of trial does not diminish the very serious trauma she suffered.

McDowell claims that *Hawkins* is distinguishable because there is no comparison between the size of the verdict and the amount of special damages and because the verdict is larger here. (Pet'r. B. p. 15). The determination of whether a verdict is excessive cannot be reduced to a mathematical certainty, so the absence of any discussion on the ratio in *Hawkins* is of little significance. As to McDowell's argument that the *Hawkins* verdict was one-and-a-half million less than Frederick's, he ignores the inevitable impact of inflation on the value of money in the years since *Hawkins*.[8] *See Smoak v. Seaboard Coast Line R. Co.*, 259 S.C. 632, 639, 193 S.E.2d 594,

[8] Indeed, as one commentator opined, "If we could ask Benjamin Franklin about life in modern-day America, he would most likely say that death, taxes, and inflation are all certain and inevitable realities." Death, Taxes, and Inflation, *The Rational Walk* (June 2, 2023), https://rationalwalk.com/death-taxes-and-

597 (1972) ("A comparison of today's verdict to those of yesterday is of only minimal value . . . . In determining whether a verdict is excessive, the buying power of the verdict involved must be considered.").

Here, if inflation is taken into account, the verdict in *Hawkins*, rendered in 1996, was actually larger than the verdict here. *See Hawkins Richard B Administrator of vs. Cox Eugene C*, Greenville Cnty. 13th Judicial Circuit Pub. Index, available after login at https://urlis.net/judgment9604143 (last visited Oct. 18, 2023). Meanwhile, Frederick's verdict was rendered in 2018, and $3,500,000 in 1996 was worth $5,603,280.20 in 2018. *Inflation Calculator*, Federal Reserve Bank of Minneapolis, https://www.minneapolisfed.org/about-us/monetary-policy/inflation-calculator (last visited Oct. 18, 2023).[9]

inflation/#:~:text=If%20we%20could%20ask%20Benjamin%20Franklin%20about%20life,and%20inflation%20are%20all%20certain%20and%20inevitable%20realities.

[9] Just recently, the Court of Appeals again refused to find that a trial court erred in denying a motion for a new trial based on the excessiveness of the verdict. *Hamilton v. Reg'l Med. Ctr.* Op. No. 6008 at 47. In *Hamilton*, a five-week-old boy suffered a third-degree burn to his hand because an IV antibiotic "infiltrated outside of his vein." *Id.* at 28. The boy was unable to crawl for a while, and he had to visit a wound-care center fifteen times. *Id.* at 30. By the time of trial, the wound had substantially healed; however, the boy still had significant scar tissue, and his hand tended to itch, hurt, and cramp. *Id.* The jury awarded the boy $1,127,280, approximately fifty-four times his actual damages ($20,854). *Id.* at 46. The trial court denied the medical center's post-trial motion for JNOV, a new trial absolute, or, in the alternative, a new trial nisi remittitur. *Id.* at 32.

On appeal, the Court of Appeals rejected the medical center's arguments that "little testimony was given regarding any pain and suffering"; that "very little has been done or is planned in regards to treatment"; and that "although there is scar tissue and the scar is permanent, the hand is fully functioning, and the wound is 'well-healed' and 'stable' and will not get worse." *Id.* at 46. The Court of Appeals provided the proper deference to the trial court and concluded the verdict was not excessive, even before the trial court reduced the verdict pursuant to the Tort Claims Act. *Id.* at 47-48. If the *Hamilton* trial court acted within its discretion in upholding a verdict fifty-four times special damages, the trial court in the present case certainly acted within its discretion in upholding a verdict twenty-two times special damages, where Frederick suffered not only comparable injuries but also considerable mental anguish.

In sum, under *Becker* and *Hawkins*, the jury's award was proportionate to Frederick's past damages. Because a reviewing court will not disturb a verdict, especially one involving intangible damages, "unless the verdict is . . . so grossly excessive . . . that it must" have resulted from "jury's disregard of the facts and the court's instructions," *Craven*, 292 S.C. at 443-44, 357 S.E.2d at 25, this Court should not reverse the trial court's denial of a new trial absolute or a new trial nisi remittitur.

CONCLUSION

First and foremost, this Court should apply settled jurisprudence and dismiss this appeal as untimely because McDowell filed successive post-trial motions. Alternatively, should this Court proceed to the merits, the Court of Appeals should be affirmed. Under the requisite standard of review, this Court should conclude that, given the evidence of Frederick's serious and permanent injuries, as well as the mental anguish she suffered and her inability to return to work, the trial court did not err in upholding the jury award. Accordingly, this Court should dismiss this appeal on jurisdictional grounds or affirm the Court of Appeals.

Respectfully submitted,

s/ Brian Critzer
Brian Critzer (S.C. Bar No. 103159)
Kaye Hearn (S.C. Bar No. 2891)
WYCHE, P.A.
807 Gervais Street, Suite 301
Columbia, SC 29201
(803) 254-6542
bcritzer@wyche.com
khearn@wyche.com

Attorneys for Respondent.