THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

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

Appellate Case No.: 2022-001480

Daisy Frederick,.....Respondent,

v.

Daniel Lee McDowell,.....Petitioner.

REPLY BRIEF

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I. The appeal in this case was timely, and the Court has jurisdiction to consider the appeal.

Despite not having raised or even hinted at this issue in the Court of Appeals, Frederick now argues that the appeal in this case was untimely. This Court should reject that argument, which relies on a misreading of the scope and intent of this Court's previous decisions.

At the conclusion of the trial, McDowell requested ten days to submit post-trial motions, and the trial court granted that request. On February 14, 2018, McDowell filed Defendant's Post-Trial Motions. [App. pp. 58-64.] In that pleading, McDowell relied upon Rule 50(b), SCRCP, and Rule 59(a), SCRCP, to request a judgment notwithstanding the verdict, a new trial absolute, or a new trial *nisi remittitur*. The trial court denied those motions in an order filed on May 12, 2020. [App. pp. 42-44.] However, despite the detailed and specific grounds and arguments contained in the written post-trial motions, the order merely stated that the motions were denied. [Id.] The order also contained an erroneous statement that the trial court had applied the North Carolina Rules of Evidence during the trial. [Id.]

Faced with that error, as well as uncertainty about whether the trial court had considered and ruled upon all the issues raised in the post-trial motions, McDowell filed a timely motion pursuant to Rule 59(e), SCRCP. [App. pp. 66-67.] McDowell did use that motion to request that the trial court reconsider its denial of the post-trial motions, but the Rule 59(e) motion also sought amendment of the erroneous statement in the previous order, and it requested clarification of the issues on which the trial court had ruled. [Id.] The Rule 59(e) motion did not "cut and paste" or otherwise rehash the arguments and issues

previously set forth in Defendant's Post-Trial Motions. It was not only a motion to reconsider, but also truly a motion to "alter or amend" the order.

On June 12, 2020, the trial court filed what it captioned an *Amended* Order Denying Defendant's Post-Trial Motions. [App. pp. 45-47 (emphasis added).] Significantly, although most of the Amended Order was the same as the previous order, it deleted the reference to the application of the North Carolina Rules of Evidence at trial. [Id.] Thus, the trial court did one of the things that the Rule 59(e) motion requested: It amended the original order to remove an erroneous statement. It is undeniable that McDowell filed his Notice of Appeal within thirty days of written notice of that Amended Order.

Frederick contends the Rule 59(e) motion did not stay the time for an appeal because it was an unnecessary repetition of the post-trial motions pursuant to Rules 50(b) and 59(a), SCRCP. Frederick cites and discusses the somewhat complicated history of cases on this issue, but no such lengthy analysis is required. This Court's most direct explanation of the standards in such situations makes it clear that McDowell followed the proper procedure, and that his Notice of Appeal was timely.

In *Elam v. S.C. Dept. of Transp.*, 361 S.C. 9, 602 S.E.2d 772 (2004), this Court clarified the rules regarding the interplay of post-trial motions, Rule 59(e) "motions to reconsider" and the timeliness of appeals. The Court concluded that, subject to exceptions not present in the case at bar, "a party is usually free to file an initial Rule 59(e) motion, regardless of whether the previous JNOV/new trial motions were made orally or in writing, without unnecessary concern the repetition of an issue or argument made in a previous motion will result in a subsequent appeal being dismissed as untimely." 361 S.C. at 21, 602 S.E.2d at 778. The Court continued: "we view the use or oral or written JNOV/new trial

motions, followed by an initial Rule 59(e) motion as part and parcel of a party's 'single bite at the apple' in presenting his case to the trial court." *Id.* This is exactly what McDowell did in the present case.

Although the Court in *Elam* cautioned parties to consider the "exceptions to the general rule" that were discussed in three previous cases,[1] those exceptions are inapplicable here. As the Court noted, *Coward Hund* involved two written Rule 59(e) motions, whereas McDowell filed only a single Rule 59(e) motion (as did the appellant in *Elam*). 361 S.C. at 26, 602 S.E.2d at 781. *Quality Trailer* and *Collins Music* involved the resubmission of "a virtually identical, written Rule 59(e) motion raising the same issues on which it had already obtained by virtue of a previous, written JNOV/new trial motion." *Id.* McDowell filed a Rule 59(e) motion that did seek reconsideration of the denial of the earlier pre-trial motions, but that also sought an amendment of the order to correct an erroneous statement about the application of the North Carolina Rules of Evidence, and that further requested clarification of the issues ruled upon by the trial court. A comparison of Defendant's Post-Trial Motions and the Rule 59(e) Motion demonstrates that the two submissions were in no way "virtually identical," and each served its intended and necessary purpose.

It is also important to note and consider the Court's rationale for the general rule that allows a party to file one Rule 59(e) motion after the denial of motions for JNOV and/or a new trial. As the Court explained:

> [C]ivil procedure and appellate rules should not be written or interpreted to create a trap for the unwary lawyer or party, but a careful consideration of this issue has led us to

[1] *Coward Hund Const. Co. v. Ball Corp.*, 336 S.C. 1, 518 S.E.2d 56 (Ct. App. 1999); *Quality Trailer Prods., Inc. v. CSL Equipment Co.*, 349 S.C. 216, 562 S.E.2d 615 (2002); *Collins Music Co. v. IGT*, 353 S.C. 539, 579 S.E.2d 524 (Ct. App. 2002)

> conclude that is precisely the effect of an unwarranted expansion of *Quality Trailer*. ...
>
> If a party is unsure whether he properly raised all issues and obtained a ruling, he must file a Rule 59(e) motion or an appellate court may later determine the issue or argument is not preserved for review. But in filing the motion, he may unwittingly forfeit the right to appeal if an appellate court later determines the Rule 59(e) motion was unnecessary because he already had raised the issue and obtained a ruling. We strive to avoid an interpretation of procedural rules which routinely would place a party between the proverbial rock and hard place.

361 S.C. at 25, 602 S.E.2d at 780-81.

The "proverbial rock and hard place" is exactly where McDowell and his trial counsel found themselves upon receipt of the trial court's original order. That order contained an erroneous statement that could impact issues on appeal because some of those issues were based on the *South Carolina* Rules of Evidence, while others were based on North Carolina *substantive* law. Thus, leaving that error uncorrected created real and unfair risks for McDowell. The order also denied the motions without specifying which grounds and arguments the trial had considered and ruled upon. That omission created a good faith concern that a Rule 59(e) motion was necessary in order to make sure that all of McDowell's issues were preserved for appeal.[2] Punishing McDowell for choosing a cautious path in that "rock and hard place" scenario would go against this Court's reasoning as stated in *Elam*.

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[2] The Court in *Elam* apparently gave enough consideration to the appellant's intention in filing the 59(e) motion that it warranted a mention. *See Elam*, 361 S.C. at 25, 602 S.E.2d at 781, n. 5 ("We are presented in this case with a party which believed a Rule 59(e) motion was necessary and appropriate.").

This appeal was timely, and the cases cited in the Respondent's Brief do not lead to any other conclusion. The general rule set forth in *Elam* clearly applies to this case, and the Court should reject Frederick's argument and proceed to consider the merits of the appellate issue on which the Court granted McDowell's petition.

II. This Court should reverse and remand with instructions for the trial court to grant a new trial absolute or new trial *nisi additur*.

McDowell respectfully asserts that the arguments and authorities set forth in the Petitioner's Brief demonstrate that the record does not contain sufficient evidence to support the runaway verdict at trial. For the sake of brevity, McDowell will attempt to avoid repeating those arguments or authorities in this Reply. However, McDowell will respond to the arguments and cases raised in the Respondent's Brief.

Frederick argues that the jury's broad discretion in determining the amount of damages supports the verdict even if only her pre-trial damages are considered. The Petitioner's Brief addresses that issue, and McDowell relies on the arguments contained in the previous brief. Yet, it is important to note that "broad discretion" does not equal "unfettered power." Juries have wide latitude in determining damages, but they still must act within the bounds of reasonableness under the record evidence. Otherwise, there would be no need or basis for the remedies of a new trial absolute as to damages, or a new trial *nisi remittitur*. The existence of those remedies demonstrates that while courts might allow juries to operate on a long leash, they do not allow juries to run completely free. Thus, Frederick's reliance on the concept of a jury's discretion, without more, is insufficient.

Frederick also misapprehends the primary focus of McDowell's arguments as to future damages. The issue does not really deal with the insufficiency of evidence of future

damages, as Frederick seems to suggest. Rather, the issue deals with the *absence* of evidence of future damages.

As previously argued, Frederick failed to present evidence that would justify or support an award for any future damages, either economic or non-economic. Frederick fails to demonstrate otherwise in her brief. For example, Frederick contends: "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." [Resp. Brief, p. 17.] However, she does not reference any actual *evidence* to support that statement. This is because no such evidence was presented at trial.[3]

The closest Frederick came to offering any evidence of "future" damages was vague testimony that she still experienced some pain and took "some pain pills." [App. p. 121, line 20.] But she did not explain the nature or severity of her pain, she did not identify the "pain pills" she took, and did not say how often she needed them. She also offered no medical testimony that future pain was likely or to be expected, or that she would continue to need medication.

The absence of any such testimony distinguishes this case from those cited by Frederick regarding this issue. In *Wilder v. Blue Ribbon Taxicab Corp.*, 396 S.C. 139, 719 S.E.2d 703 (Ct. App. 2011), the plaintiff provided descriptions of the type and severity of the pain she was still experiencing as of the time of the default damages hearing. Frederick did not do that. And in *Gethers v. Bailey*, 306 S.C. 179, 410 S.E.2d 586 (Ct. App. 1991),

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[3] Frederick testified as to her inability to find a job when her medical treatments ended, but she never directly stated that she was unable to work at the time of trial. She also failed to present any expert testimony – medical or otherwise – to support that contention. Furthermore, there was no testimony regarding the nature, scope or frequency of any "ongoing medical treatment" as of the trial date.

the plaintiff presented testimony by her physician that she had a permanent impairment for which the physician assigned an impairment rating. Frederick's doctor testified at trial, but gave no opinion whatsoever as to any permanent impairment, disability or need for future medical treatments. Thus, those cases do not support Frederick's position.

Frederick's arguments regarding the general verdict form also miss the point of McDowell's position. This is not a question of whether an award of future damages was too large. Rather, the problem is that there was no evidence at all to support *any* award of future damages. Given the unduly high verdict amount, one of two things happened – either the jury awarded some amount for future damages, despite the absence of any supporting evidence, or the jury awarded a facially unreasonable and excessive amount based solely on the pre-trial damages. This is why speculation about the jury's motives is unnecessary. In either scenario, the verdict was improper and this Court should reverse.

In her brief, Frederick cites *Becker v. Wal-Mart Stores, Inc.*, 339 S.C. 629, 529 S.E.2d 758 (Ct. App. 2000), and *Hawkins v. Pathology Assocs. of Greenville, P.A.*, 330 S.C. 92, 498 S.E.2d 395 (Ct. App. 1998). McDowell discussed those cases in the Petitioner's Brief and will not repeat those arguments here. For present purposes, McDowell will only reply to Frederick's assertions about those cases.

Frederick argues that *Becker* actually supports her position based on the ratio of the plaintiff's claimed specials to the amount of the verdict after the trial court reduced it, a decision that the Court of Appeals affirmed. That argument misses *Becker*'s real relevance to the present case. Regardless of the numbers involved, *Becker* demonstrates that a jury's discretion to determine damages for intangibles such as pain and suffering is *not* unlimited and that courts can intervene to reduce verdicts even when there is evidence of things such

as permanent impairments, disabilities or other ongoing damages. The present case does not involve any of those things. Thus, if a verdict reduction was proper in *Becker*, the same result is even more warranted here.

Addressing *Hawkins*, Frederick attempts to minimize the differences between her "fear of death" and the seven months that the plaintiff in *Hawkins* was forced to live with the terrifying certainty of a terminal diagnosis. For one thing, Frederick does not cite any evidence from trial regarding an actual fear of death during the course of her medical treatments. But even if such subjective testimony existed, the record would still be devoid of any evidence that a doctor ever told Frederick her life was in danger during that period. One can acknowledge the apprehension that Frederick might have felt, while still recognizing that such a personal feeling, not based on any medical diagnosis, is not nearly as serious as the dread and fear that accompanied the *Hawkins* plaintiff being given only a few short months to live. Fearing a possibility and facing a terminal certainty simply are not the same things.

Frederick also cites *Hamilton v. Regional Med. Ctr.*, 440 S.C. 605, 891 S.E.2d 682 (Ct. App. 2023), as an example of a very large verdict based on fairly small medical bills. Specifically, Frederick refers to a verdict for a minor of $1,127,280 in a case involving medical bills of only $20,854. [Resp. Br., p. 22, n. 9.] Although the jury in that case did reach that verdict, there is more to the story that the Respondent's Brief omits. After the verdict, the defendant hospital filed a motion for a new trial / new trial *nisi remittitur*, but it also asked the trial judge to reduce the minor's verdict to $300,000 pursuant to the Tort Claims Act. The trial judge granted that request – a decision the plaintiff apparently did

not appeal. Thus, when the case reached the Court of Appeals, the actual verdicts on review were $300,000 for the minor and $135,477 for his mother in her individual capacity.

The Court of Appeals did review the denial of the motions for new trial / new trial *nisi remittitur*, but the real issue was not whether a verdict for the minor in excess of $1,000,000 was proper, but rather, whether the actual, reduced amount of $300,000 passed muster. Although the Court referenced the unreduced verdict amount for the minor in its discussion, that amount no longer existed in any real sense by the time of the appeal. Accordingly, *Hamilton* does not serve as an example of a seven-figure verdict supported by only $20,000 in medical bills. Any attempt to read *Hamilton* in that manner improperly ignores that case's procedural history.

The Respondent's Brief does not identify or discuss any record evidence that could reasonably support such a massive verdict amount. The kinds of evidence referenced in the case law as proper bases for such verdicts are absent here. Frederick presented no evidence of the kinds of disabilities or permanent impairments that existed in *Becker*. Frederick perhaps had a general "fear of death" during her treatments, but even if such testimony is in the record,[4] it cannot compare to the terror created by the terminal medical diagnosis the plaintiff received in *Hawkins*. The cases most relevant to the present case all demonstrate that the jury's verdict cannot stand. Given the actual record evidence, the verdict is at least merely excessive, if not grossly so.

Frederick did sustain serious injuries, and the jury had discretion to decide an amount of damages. But that discretion was not unlimited, and the jury exceeded its

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[4] The Respondent's Brief refers to testimony that Frederick feared possible addiction to pain medication, but not that she feared for her life during her course of treatments.

discretion and authority by reaching a patently unreasonable verdict. The trial court should have reined in the jury based on the verdict amount by granting McDowell's motions and allowing a new trial. The Court of Appeals likewise erred in affirming the denial of those motions.

CONCLUSION

Despite Frederick's last minute argument to the contrary, this appeal was commenced in a timely manner. The Court of Appeals had jurisdiction to hear this appeal, as does this Court. The Court's analysis in *Elam v. S.C. Dept. of Transp.* allows for no other result.

As to the merits, the record evidence in this case does not – and cannot – reasonably support a verdict of $5,000,000. The lower courts erred in failing to recognize that the verdict amount was either grossly or merely excessive and that McDowell is entitled to a new trial absolute or a new trial *nisi remittitur*. This Court should now reverse and remand with instructions to grant McDowell one of those remedies.

Respectfully submitted,

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