THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM EDGEFIELD COUNTY
Doyet A. Early, III, Circuit Court Judge

Case No. 2009-CP-19-0276

Cecelia Jackson, Personal Representative of the
Estate of William Peterson, ... Appellant,

v.

Edgefield Medical Clinic, P.A., ... Respondent.

INITIAL BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Rules

STATEMENT OF THE CASE

This is a medical malpractice action. The Appellant Cecelia Jackson, as the Personal Representative of the Estate of William Peterson ("Estate"), asserted medical malpractice claims against the Respondent Edgefield Medical Clinic, P.A. ("EMC") and four of its physicians, Dr. Tami Massey, Dr. Benjamin Nicholson, Dr. George Rainsford, and Dr. Eleanor Leaphart. In addition, the Estate sued Trinity Mission Health and Rehab of Edgefield, LLC, which is the nursing home facility where the decedent William Peterson resided during the relevant time period.[1]

EMC and its physicians provided medical care at the Trinity nursing home. While a resident at the nursing home, Mr. Peterson developed a decubitus ulcer or pressure ulcer on his left hip. In May 2006, Mr. Peterson developed a methicillin-resistant staphylococcus aureau ("MRSA") infection in the pressure ulcer. A wound culture was ordered, the results of which showed the MRSA infection. The Estate alleges that EMC and its physicians were negligent in failing to timely diagnose and treat the MRSA infection, including a failure to transfer Mr. Peterson to the hospital for more intensive care.

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[1] Trinity settled prior to trial, and a set-off was granted for that settlement amount. (Tr. 498-499). That set-off resulted in a reduction of the verdict against EMC to zero.

The case proceeded to trial on March 17, 2014, before Circuit Judge Doyet A. Early, III and a jury. At the end of the Estate's case-in-chief, the Defendants, including EMC, moved for a directed verdict, which was granted in part. Judge Early granted a directed verdict on the Estate's claim for conscious pain and suffering damages. The jury ultimately returned a verdict in favor of the Estate against EMC for actual damages in the amount of $27,086.00.[2]

The Estate filed several post-trial motions including a motion for new trial nisi additur. Those motions were denied by form order issued by Judge Early on April 10, 2014.

The Estate subsequently filed a timely appeal. No Rule 59(e) motion, however, was filed.

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[2] At the close of all the evidence, the Estate agreed to dismiss the remaining physician defendants. (Tr. 438-439). The case was presented to the jury with EMC as the sole remaining defendants.

ARGUMENTS

I. The trial court was correct in directing a verdict on the Estate's claim for conscious pain and suffering damages.

The Appellant Cecelia Jackson, as the Personal Representative of the Estate of William Peterson ("Estate"), contends that Circuit Judge Doyet A. Early, III erred in directing a verdict on the Estate's claim for conscious pain and suffering damages. The Estate contends on appeal that it presented sufficient evidence of conscious pain and suffering to withstand a directed verdict motion and to allow that claim for damages to be submitted to the jury. Specifically, the Estate points to evidence that the decedent, William Peterson, was "anxious, restless, struggling to breathe and moaning to the touch." The Estate further argues for the first time on appeal that Judge Early erred in directing a verdict *sua sponte* on the claim for conscious pain and suffering damages. The Estate's position lacks merit on several bases.

A. Directed Verdict Was Not *Sua Sponte*

As a threshold procedural issue, the Estate argues that Judge Early entered the directed verdict *sua sponte* and that there is no authority that allows a trial

judge to grant a directed verdict on his/her own motion. The Estate is in error on both points.

First, Judge Early did not *sua sponte* direct a verdict on the claim for conscious pain and suffering damages. The record reflects that the Defendants, including Edgefield Medical Clinic ("EMC"), made motions for a directed verdict. During the course of discussing those motions after the Estate completed its case-in-chief, Judge Early inquired about the existence of evidence of conscious pain and suffering. (Tr. 254). After the Estate's counsel made an initial response, counsel for Dr. Massey made a motion for directed verdict on the claim for conscious pain and suffering damages. (Tr. 255-256). Counsel for EMC and the other EMC physicians then joined in that motion for directed verdict and made additional arguments in support of that motion. (Tr. 256). All counsel, including counsel for EMC, then entered into a lengthy colloquy with Judge Early regarding the issue after which Judge Early granted the directed verdict. (Tr. 256-264). Therefore, Judge Early did not grant a directed verdict on his own motion. The Defendants, including EMC, made a motion for directed verdict that was ultimately granted.

Nonetheless, contrary to the Estate's position, there is authority allowing the trial court to *sua sponte* raise a motion for directed verdict. In the case of *Ellis v. Niles*, 324 S.C. 223, 479 S.E.2d 47 (1996), the Supreme Court affirmed a directed

verdict in a medical malpractice action where the trial judge *sua sponte* directed a verdict for the defendant physician before the plaintiff had even completed her case-in-chief. This Court had earlier reversed the directed verdict because it was "uncomfortably uncertain" what the remaining testimony would have been. By footnote, this Court "express[ed] no opinion whether, absent concrete stipulations by the plaintiff regarding remaining testimony, or an admission that all evidence relevant to an essential element has been presented, the trial court may properly direct a verdict on its own motion before the close of the plaintiff's case in chief." *Ellis v. Niles*, 316 S.C. 516, 450 S.E.2d 631, 634, n.5 (Ct. App. 1994). Yet, in reversing, the Supreme Court found that the directed verdict could be reviewed because, in part, there was no objection by the plaintiff to the procedure followed at trial. The Supreme Court, moreover, took the additional step of vacating this Court's opinion and ultimately never expressed any issue with the fact that the trial judge directed the verdict on its own motion.

The same is clearly true in this case. While the Estate complains that Judge Early erred in inquiring about the existence of evidence of conscious pain and suffering and then directing a verdict on the issue, the Estate never made any contemporaneous objection at trial. The Estate argues on appeal that a trial judge lacks authority under Rule 50(a), SCRCP, to direct a verdict on his/her own motion. Yet, none of those arguments were made to Judge Early at or before he

granted the directed verdict. In fact, the record clearly reflects that no contemporaneous objection was made at trial.[3] Furthermore, in *Ellis*, the trial judge did not allow the plaintiff to complete its case-in-chief; here, the Estate had the opportunity to present its evidence in full. Moreover, as discussed above, Judge Early asked some questions about the evidence, but he in no way made a *sua sponte* motion. The Defendants, including EMC, made the motion for directed verdict that was ultimately granted. In short, the Estate's procedural argument should be rejected.

B. Analysis of Judge Early's Directed Verdict Ruling

As to the merits of its argument, the Estate contends that Judge Early's ruling "failed to acknowledge the broad variety of injuries pain and suffering damages are intended to cover or the many ways in which these injuries may be proved." *See*, Appellant's Brief, p. 6. That is not the case. Contrary to the Estate's professed understanding, Judge Early did not focus on the absence of evidence that Mr. Peterson experienced pain or discomfort, although he did note during the colloquy

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[3] The Estate even submitted a written memorandum of law in asking Judge Early to reconsider his directed verdict ruling. That memorandum includes no objection to the procedure followed nor any discussion as to whether a trial judge has authority under Rule 50(a) to direct a verdict on his/her own motion. (R. ___).

with counsel that the record contains little or no evidence of such. Instead, Judge Early focused on causation and the requirement that a medical malpractice plaintiff must present evidence of the causal link between the claimed pain and suffering and the breach of the standard of care.[4] For instance, during the colloquy with counsel, Judge Early inquired as follows:

> What is he moaning from? Is he moaning from the overall condition? Is he moaning from the decubitus ulcer? Where is the evidence that he's moaning from these doctors failing to treat this decubitus ulcer, this bedsore?

(Tr. 257). Judge Early further stated to the estate's counsel that "you've said all along you're not criticizing the fact that he got the ulcer, that's something that happens in these settings." (Tr. 257-258). He noted Mr. Peterson's dire medical condition (i.e,. he is "on death's doorstep") and reiterated the development of the ulcers were not a breach of the standard of care. (Tr. 258). Judge Early also noted that the ulcers could have caused pain and discomfort, but there was no evidence that any complications following the development of the MRSA infection resulted in pain and suffering. (Tr. 259, 261-262). Judge Early ultimately concluded that

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[4] South Carolina law requires a plaintiff in a medical malpractice case to "show that the defendants' departure from such generally recognized practices and procedures was the proximate cause of the plaintiff's alleged injuries and damages." *David v. McLeod Regional Medical Center*, 367 S.C. 242, 626 S.E.2 1, 4 (2006). "[T]he expert testimony as to proximate cause must provide a *significant causal link* between the alleged negligence and the injuries suffered, rather than a tenuous and hypothetical connection." *Martasin v. Hilton Head Health System, L.P.*, 364 S.C. 430, 613 S.E.2d 795, 800 (Ct. App. 2005). (Emphasis added).

the record contained no evidence by which the jury could find or even infer that any conscious pain and suffering resulted from the alleged negligence, that being the failure to timely diagnose and treat the MRSA infection. (Tr. 263-264). Later, at the close of the trial, when the Estate asked him to reconsider his directed verdict ruling, Judge Early declined, but he did offer the following additional discussion of his earlier ruling:

> And then the cause of action is a survival action and alleging that the doctors failed to diagnose not the bedsore particularly itself, but the -- where the bedsore had increased to the stage that it had MRSA. And I'm just of the opinion that the record is void of any evidence dealing with the failing to diagnose the MRSA and any associated pain and suffering with that alleged failure to diagnose. I mean, he was paralyzed and he had the bedsore anyway. There's no criticism of getting the bedsore or the treatment of the bedsore, but they're having to debride it and do all that. Notwithstanding whether he got the MRSA or not, they were doing that before the MRSA showed up. *So, I mean, all that, if there were pain and suffering -- I don't think there was any evidence that showed it was proximately caused by the failure to diagnose and treat.*

(Tr. 433-434). (Emphasis added).

This review of Judge Early's ruling reflects that the Estate's focus in this appeal is entirely incorrect. The Estate contends that Judge Early granted a directed verdict because there was no evidence that Mr. Peterson experienced any pain or discomfort. The Estate argues that there was evidence that he was anxious, restless, struggling to breathe and moaning to the touch. But, even if that is

correct, that is not the issue. As the highlighted language above shows, Judge Early granted a directed verdict on the issue of causation. He found that there was no evidence to support a finding that the alleged failure to timely diagnose and treat the MRSA infection proximately caused any conscious pain and suffering.

C. Proximate Cause Ruling Was Not Appealed

Given that Judge Early's directed verdict ruling was based on the absence of evidence of proximate causation, the Estate's appeal on its initial issue should be barred because the Estate, in actuality, never appealed that ruling. The Estate offers the following issue for appeal:

> Whether the circuit court erred in directing a verdict against a nursing home resident's estate when the evidence showed the resident was anxious, restless, struggling to breathe, and moaning to the touch following his doctor's allegedly negligent medical treatment.

That issue on appeal makes no mention of Judge Early's ruling on the absence of evidence of proximate cause. Thus, the Estate never appeals the actual basis for the directed verdict, and consequently the appeal on the proximate cause issue is not preserved.

Even if this Court construes Judge Early's directed verdict ruling as being two-pronged, the appeal is still barred by application of the "two-issue" rule. The

Estate argues that Judge Early granted a directed verdict on the basis that there was no evidence of conscious pain and suffering. That would be, at best, one part of the ruling. There can be no reasonable dispute, per the above analysis of the record, that Judge Early also premised his directed verdict ruling on the absence of evidence of proximate cause. Thus, there would be two issues, one of which was appealed and the other was not. In applying the "two-issue" rule, the Supreme Court explained that "where a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become the law of the case." *Jones v. Lott*, 387 S.C. 339, 692 S.E.2d 900, 903 (2010). Similarly, in *Folkens v. Hunt*, 290 S.C. 194, 348 S.E.2d 839 (Ct. App. 1986), this Court held that "[a]n alternative ruling of a lower court that is not excepted to constitutes a basis for affirming the lower court and is not reviewable on appeal." 348 S.E.2d at 845. Such a ruling becomes the law of the case. *Id.* Here, there is no question – given the statement of issues on appeal and the analysis contained in the brief – that the Estate did not appeal Judge Early's proximate cause ruling. The ruling on proximate cause, whether right or wrong, is unappealed and constitutes the law of the case. The application of the "two-issue" rule, therefore, bars the appeal from the directed verdict on the claim for conscious pain and suffering damages.

D. No Expert Evidence Presented to Show Significant Causal Link

Nonetheless, even if the proximate cause ruling has been properly appealed by the Estate, there has been no showing that there was evidence in the Estate's case-in-chief to show the "significant causal link," as required under South Carolina law, between the alleged negligence and the evidence of conscious pain and suffering as may be claimed in a survival action. *Martasin v. Hilton Head Health System, L.P.*, 364 S.C. 430, 613 S.E.2d 795, 800 (Ct. App. 2005). As Judge Early correctly recognized, the Estate never argued that EMC is liable for the development of Mr. Peterson's decubitus ulcers or the care attributable to those pressure wounds. Likewise, the Estate never argued that EMC is liable for the initial development of the MRSA infection. Instead, the Estate's theory was specifically confined to the alleged failure to timely diagnose and treat the MRSA infection, including a failure to transfer Mr. Peterson to the hospital for more intensive care. In fact, Dr. Jeffrey Levine, the Estate's medical expert, very clearly testified that he was not criticizing the EMC physicians for Mr. Peterson developing the pressure ulcers. (Tr. 184-185). He agreed that nursing home patients can develop pressure ulcers or bed sores even where the appropriate steps in their care are taken. (Tr. 184). Dr. Levine further agreed that Mr. Peterson had a number of risk factors for developing the pressure ulcers. (Tr. 185-187).

Moreover, Dr. Levine was not critical that the MRSA infection developed. Instead, he opined that the EMC physicians were negligent specifically in failing to timely diagnose the MRSA infection and in getting him timely treatment including a transfer to a hospital. (Tr. 160-161). Dr. Levine specifically opined that the infection should have been diagnosed by May 7, 2006, when the results of the culture showing the infection were first available. (Tr. 168-169, 206-207).

In contesting the directed verdict motion, the Estate's counsel argued that there is evidence that Mr. Peterson was "grimacing" on May 15th. (Tr. 254-255). He argued that there was evidence that Mr. Peterson was "anxious," "restless," and "moans when touched" in a nursing note from May 15th. (Tr. 256). Counsel also argued that Mr. Peterson later underwent skin grafts, for which pain and suffering may be inferred. (Tr. 254-255). However, and most critically, there was never any expert testimony from Dr. Levine (or any expert) relating such symptoms specifically to the alleged negligence by the EMC physicians.[5] As far as the record reflects, those symptoms could be just as likely to have resulted from the pressure ulcers or the MRSA infection or some other pre-existing ailment. Critically, Dr. Levine was never asked any questions nor did he offer any opinions on causation with respect to any of the "pain and suffering" that the Estate claims should have

[5] As one example, Dr. Levine never even mentioned "skin grafts" during his entire testimony, let alone offered any opinion that the skin grafts performed at Select Specialty

survived the directed verdict. In fact, Dr. Levine never testified that any "pain and suffering" was most probably caused by the alleged failure to timely diagnose the MRSA infection, as opposed to other pre-existing medical conditions or ailments.[6] In effect, Dr. Levine never testified that there was "pain and suffering" that was not causally related to the development of the pressure ulcers or the MRSA infection or some other ailments, all of which were admittedly not breaches of the standard of care. In short, there is no evidence of a "significant causal link" between the alleged negligence and any claimed "pain and suffering" experienced by Mr. Peterson. Judge Early was, therefore, correct in directing a verdict on the Estate's claims for conscious pain and suffering.

II. The trial court was correct in denying the Estate's motion for new trial nisi additur.

The jury returned a verdict in the amount of $27,086.00 in actual damages. The Estate moved for a new trial nisi additur, which Judge Early denied by a form order. The Estate now argues that Judge Early committed error in denying the

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Hospital were causally related to the alleged negligence of the EMC physicians as opposed to care that would have been normally needed for the pressure ulcers.

[6] Dr. Levine readily admitted that prior to the development of the MRSA infection, Mr. Peterson suffered from numerous ailments including dementia, a declining mental status, as well as paralysis of his lower extremities including muscle contractures. He had also developed the pressure ulcers that had been subject to debridement procedures, was incontinent of bowel and bladder, and had nutritional issues. (Tr. 185-187).

motion for new trial nisi additur because the jury awarded only a portion of the decedent's medical expenses. The Estate's position lacks merit on both procedural and substantive bases.

As a threshold matter, this Court will need to determine whether the Estate has properly preserved this issue for appellate review. Judge Early denied the Estate's motion for new trial nisi additur by a form order which includes no substantive analysis for the ruling. (R. ___). The Estate, in fact, complains that "the circuit court's reasoning for denying Appellant's motion is not clear from the Form 4 order." *See*, Appellant's Brief, p. 20. Despite recognizing that Judge Early's reasoning is not set forth in the form order, the Estate did not file a Rule 59(e) motion nor take any action to obtain a substantive ruling that would allow for appellate review. If the Estate intended to appeal that order, as it has done, then it had the obligation to make certain an appropriate record is presented. That includes making certain that the trial court's rulings are clear and capable of meaningful review.

This Court has previously explained the importance of preservation rules. The Supreme Court has repeatedly stressed "the long-established preservation requirement that the losing party generally must both present his issues and arguments to the lower court and obtain a ruling before an appellate court will review those issues and arguments." *I'On v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716, 724 (2000). "Without an initial ruling by the trial court, a

reviewing court simply would not be able to evaluate whether the trial court committed error." *Ellie, Inc. v. Miccichi*, 358 S.C. 78, 594 S.E.2d 485, 498 (Ct. App. 2004). (Emphasis in original). Here, Judge Early denied the motion for new trial nisi additur, but as the Estate complains, he did so by form order. Yet, the Estate made no request by way of a Rule 59(e) motion to preserve that ruling for appellate review.[7]

Nonetheless, even if this Court concludes that the issue is sufficiently preserved for review, it is clear that no abuse of discretion resulted from the denial of a new trial additur. It is well settled that "[t]he jury's determination of damages ... is entitled to substantial deference." *Wright v. Craft*, 372 S.C. 1, 640 S.E.2d 486, 505 (Ct. App. 2006). "Compelling reasons must be given to justify invading the jury's province by granting a new trial to adjust damages." *Id. See also, Luckok v. Vena*, 391 S.C. 262, 705 S.E.2d 71, 72 (Ct. App. 2010) (recognizing the "long-standing requirement that a judge must offer compelling reasons for invading the jury's province by granting a motion for additur").

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[7] In *Bailey v. Segars*, 346 S.C. 359, 550 S.E.2d 910 (Ct. App. 2001), this Court held that a form order stating only that the appellant's post-trial motions for JNOV and new trial were denied was adequate to enable appellate review because a hearing was held and the appellate court had a transcript of those proceedings. *See also, Elam v. South Carolina Department of Transportation*, 361 S.C. 9, 602 S.E.2d 772, 782-83 (2004) (Waller, J., dissenting) ("[i]ssues are preserved for appeal even where a JNOV motion is denied in a form order, if the issues have been adequately raised and argued to the court and *the record on appeal contains transcripts of the court proceedings*"). (Emphasis added). Here, the record on appeal does not include a transcript because no hearing was held on the post-trial motions.

This Court applies an abuse of discretion standard for reviewing a circuit court's decision to deny a new trial nisi additur. As this Court has explained, "[i]t is within a trial judge's province to grant a new trial nisi if he finds the amount of the verdict to be merely inadequate or excessive." *Carson v. CSX Transportation, Inc.*, 400 S.C. 221, 734 S.E.2d 148, 158 (2012). In fact, the Supreme Court has explained that "[t]he trial judge *alone* has the power to grant a new trial nisi when he finds the amount of the verdict to be merely inadequate or excessive." *O'Neal v. Bowles*, 314 S.C. 525, 431 S.E.2d 555, 556 (1993). (Emphasis in original). *See also*, *Vinson v. Hartley*, 324 S.C. 389, 477 S.E.2d 715, 723 (Ct. App. 1996). Therefore, "on appeal of the denial of a motion for a new trial nisi, this Court will reverse when the verdict is grossly inadequate or excessive requiring the granting of a new trial absolute." *Carson*, 734 S.E.2d at 159. The appellate court thus has no authority to reverse if the verdict is merely inadequate or excessive.

The Estate must therefore show that "the amount of the verdict is *grossly* inadequate ... so as to be the result of passion, caprice, prejudice, or some other influence outside the evidence." *Carson*, 734 S.E.2d at 159. (Emphasis in original). The Estate has not, however, presented any evidence to suggest that the jury was influenced by passion, caprice, prejudice or any improper motives. Instead, the Estate simply argues that the total medical expenses claimed exceeded the $27,086.00 awarded by the jury. That is not sufficient to show that the verdict

was *grossly inadequate*.

To the contrary, it is well settled that "[t]he jury's verdict will not be overturned if any evidence exists that sustains the factual findings implicit in its decision." *Wright v. Craft*, 372 S.C. 1, 640 S.E.2d 486, 505 (Ct. App. 2006). Again, the jury's determination of damages is entitled to "substantial deference." *Id.* Likewise, "[t]he trial judge who heard the evidence and is more familiar with the evidentiary atmosphere at trial possesses a better-informed view of the damages than this Court" and as a result, "great deference is given to the trial judge." *Vinson*, 477 S.E.2d at 723. Furthermore, "[i]n deciding whether to assess error to a court's denial of a motion for a new trial, [the court] must consider the testimony and reasonable inferences to be drawn therefrom in the light most favorable to the nonmoving party." *Id.*

As the Estate argues, the jury was presented evidence of several medical bills, including $383 from Edgefield Medical Clinic, $57,220 from Aiken Regional Medical Center, and $146,911.96 from Selective Specialty Hospital. (R. ___). The jury was told by the Estate's counsel in his closing argument that those bills should be discounted for the costs of daily care that Mr. Peterson would have received at the Trinity nursing home. (Tr. 462-464). In addition to those discounts on the total medical expenses claimed, the jury could have reasonably concluded as well that a substantial amount of the remaining medical expenses was not causally

related to the negligence found by the jury and/or would have still been incurred absent that negligence.

As discussed at length above, the Estate never argued that EMC is liable for the development of the decubitus ulcers or the care attributable to those pressure wounds. Likewise, the Estate never argued that EMC is liable for the initial development of the MRSA infection. Instead, the Estate's theory was specifically confined to the alleged failure to timely diagnose and treat the MRSA infection, including a failure to transfer Mr. Peterson to the hospital for more intensive care.

Based on the Estate's theory of liability, it was reasonable for the jury to conclude that a majority of the medical expenses claimed by the Estate would have been incurred anyway for treatment of the pressure ulcers and the MRSA infection. On appeal, the Estate argues that "Dr. Levine also testified that the ARMC admission and Select Specialty Hospital admission would likely not have been necessary if EMC had complied with the standard of care." *See*, Appellant's Brief, p. 19. That is not correct because Dr. Levine's testimony was indefinite and arguably inconsistent on this very point. In his original opinions, Dr. Levine testified that Mr. Peterson should have been transferred to the hospital for intensive care when the infection should have been initially diagnosed, that being May 7, 2006. (Tr. 160-161). He later stated again that, in addition to antibiotic treatment, "the patient might benefit from a hospitalization" and if the family agreed, "then

you do that." (Tr. 170). Therefore, the jury could have reasonably concluded that Mr. Peterson would have incurred some hospital bills for the treatment of the MRSA infection even if the EMC physicians would have done as Dr. Levine opined and diagnosed the inflection on May 7, 2006, and immediately transferred him to the hospital for care.

The jury also heard testimony that Select Specialty Hospital provided advanced wound care for the pressure ulcers. (Tr. 172). There was, however, never any testimony presented that the development of sepsis proximately caused the care provided at Select Specialty Hospital.[8] The jury could have reasonably concluded that the care at Select Specialty Hospital was unrelated to any delay in treating the MRSA infection. Importantly, the Estate had the burden of proof on the causation issue, and the jury may have simply concluded, given the lack of evidence, that the Estate had not proven that the care at Select Specialty Hospital was causally related to the negligence found.

In fact, Dr. Levine was asked only in a conclusory manner whether it would have been necessary to transfer Mr. Peterson to Select Specialty Hospital "if he had been treated as you advised." (Tr. 172). Dr. Levine answered: "So if his wounds weren't that bad, he probably wouldn't have needed that." (Tr. 172). Dr. Levine was not definitive with that opinion – he never states that the wounds would not

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[8] Sepsis was described by Dr. Levine as a blood infection. (Tr. 164).

have been "that bad" (whatever that means) if timely care had been provided. No attempt was made with any follow-up questioning for Dr. Levine to clarify that opinion or to explain whether the wounds would have been "that bad" or not. The jury quite simply could have chosen within its appropriate discretion to conclude that the liability for the medical expenses from Select Specialty Hospital had not been proven by a preponderance of the evidence.[9]

In sum, the Estate has not shown the lack of a reasonable basis for the jury to have concluded that a proper measure of damages is $27,086.00. As discussed at length above, this case involves substantial and complex issues of causation, and it is very likely, given the lack of evidence presented, that the jury could have concluded that a majority of the claimed medical expenses were not shown to be causally related to the negligence of EMC or that Mr. Peterson would have incurred those expenses despite the negligence because those expenses pertain to treatment for the pressure ulcers and/or the MRSA infection that initially

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[9] At any rate, even if Dr. Levine had offered a definite opinion that the medical expenses from Specialty Selective Hospital were causally related, the jury was free to reject any portion of his opinions it chose. In other words, the jury would not have been required to accept all of Dr. Levine's opinions. It is well settled that "the jury is free to accept or reject in whole or in part the testimony of any witness, including an expert witness." *Sauers v. Polin Brothers Homes, Inc.*, 328 S.C. 601, 493 S.E.2d 503, 505 (Ct. App. 1997). "The jury is also free to accept a portion of a witness's testimony and reject a portion. All of this is basic law generally included in every jury charge and is the upon which this court must base its decisions." *Smith v. Safeco Life Ins. Co.*, 303 S.C. 131, 399 S.E.2d 427, 429 (Ct. App. 1990). *See also, State v. Commander*, 384 S.C. 66, 681 S.E.2d 31 (Ct. App. 2009). The jury in this case was, in fact, given these very charges. Judge Early instructed the jury that it could believe all or part of any witness' testimony. (Tr. 481-482). He also advised the jury that "you do not have to accept an expert's opinion even though it is uncontradicted." (Tr. 483).

developed. Moreover, the Estate has certainly not shown that the verdict was grossly inadequate or that the verdict was the result of passion, caprice, prejudice, or some other influence outside the evidence. Therefore, for all of these reasons, the trial court's denial of the new trial nisi additur motion should be affirmed.[10]

[10] In the unlikely event that the Court agrees with the Estate's position and remands for a new trial absolute, the new trial must include both issues of liability and damages. *See*, S.C. Code Ann. § 15-33-125. The Estate did not move for nor was it entitled to a directed verdict on liability. *Carson v. CSX Transportation, Inc.*, 400 S.C. 221, 734 S.E.2d 148, 158, n. 10 (2012) (recognizing that Section 15-33-125 "prohibits this Court from directing a new trial on damages under these circumstances").

CONCLUSION

Based on the foregoing discussion and analysis, the Respondent Edgefield Medical Clinic, P.A. respectfully requests that this Court affirm the rulings of Circuit Judge Doyet A. Early granting in part the Respondent's motion for directed verdict and denying the Appellant's motion for new trial nisi additur.

Respectfully submitted,

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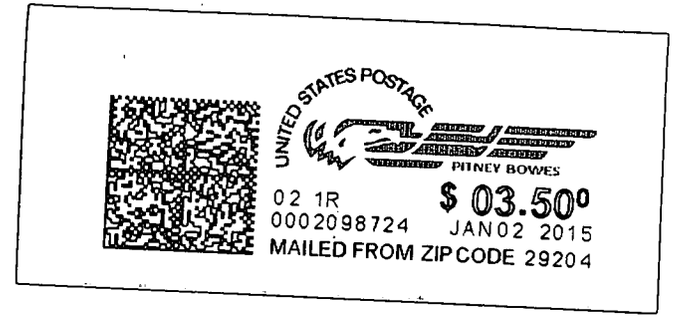

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