THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable D. Garrison Hill

C.A. No. 2011-CP-23-6665

Demetria Orange, as Next Friend of
J.B., a minor, [redacted] Respondent,

v.

Greenville Hospital System and Greenville
Hospital System Partners In Health, Defendants

Of which [redacted], Greenville Hospital System is Appellant.

BRIEF OF APPELLANT GREENVILLE HOSPITAL SYSTEM

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1. DID THE TRIAL COURT ERR IN GRANTING A NEW TRIAL *NISI ADDITUR* IN THIS CASE WITHOUT PROVIDING COMPELLING REASONS FOR DOING SO?

STATEMENT OF THE CASE

This medical malpractice action was filed on October 7, 2011.[1] (R. at 20-27). The complaint alleges negligence on the part of employees of Greenville Hospital System ("GHS") and Greenville Hospital System Partners in Health ("PIH") in the delivery of Ja'Qulynne B. ("J.B.") in 2004. (*Id.*). GHS and PIH answered on April 3, 2012, asserting the following defenses: general denial, application of the Tort Claims Act (S.C. Code Ann. §§ 15-78-10, *et seq.*), and application of charitable immunity (S.C. Code Ann. §§ 33-56-180, *et seq.*). (R. at 36-40).

The matter was tried before a jury the week of October 28, 2013. After six days of testimony and nearly two days of deliberation, the jury returned a general verdict in favor of Guardian as against GHS in the amount of $337,500.[2] The jury returned with a defense verdict in favor of PIH. (R. at 3-4).

The trial court gave the parties ten days to file post-trial motions. (R. at 712:13-17). Guardian served motions for a new trial absolute and new trial *nisi additur* in the range of $800,000 to $1,200,000 on November 15, 2013. (R. at 41-61). The trial court heard the motions on December 9, 2013 and granted a new trial *nisi additur* by written

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[1] The complaint was amended on October 30, 2012 to reflect that the next friend of the plaintiff in this action is the legal guardian (Demetria Orange, "Guardian") rather than the birth mother (Alana McClure, "Mother") of the minor child that is the subject of this action. (R. at 28-35).

[2] Given J.B.'s age, the trial court correctly limited the scope of the recovery to exclude pre-majority medical expenses. *See Hughey v. Ausborn*, 249 S.C. 470, 475, 154 S.E.2d 839, 841 (1967) (holding that in a minor's personal injury action, the amount the parent paid for the minor's medical care is not an element of damage); *Trident Reg'l Med. Ctr. v. Evans*, 317 S.C. 346, 352, 454 S.E.2d 343, 346 (Ct. App. 1995) (holding that parents are responsible for the support of their minor children); *see also* Restatement, Torts 2d § 703, comment h (noting that only the parent is entitled to recover expenses incurred in treating the child's illness or injury, which includes not only expenses already incurred, but also future medical expenses that are likely to be incurred during the child's minority).

order dated August 13, 2014. (R. at 7-17). The order set the *additur* amount at $650,000. GHS and PIH served a motion to alter or amend on August 27, 2014. (R. at 71-72). The trial court denied the motion by order dated August 28, 2014, but clarified that the defense verdict as to PIH remained intact and was not subject to the *additur*. (R. at 18-19).

GHS served a Notice of Appeal as to the post-trial orders on September 16, 2014. Guardian served a Notice of Cross-Appeal as to the same two orders on September 29, 2014.

FACTS

The general facts surrounding J.B.'s birth are not contested. J.B. was Mother's second child. (R. at 398:16-21). Mother experienced no significant problems with her first labor and delivery. (*Id.*). Her older child was born by vaginal delivery at thirty-five weeks and weighed six pounds thirteen ounces at birth. (R. at 222:23-223:5). Mother suffered from several medical conditions prior to and during both pregnancies, including diabetes, hypertension, and mental health issues. (*See* R. at 397:10-399:8).

On November 18, 2004, Mother had an ultrasound that showed that J.B. weighed approximately 7.9 pounds. (R. at 224:7-15). Following that ultrasound, the decision was made to induce Mother due to concerns relating to the size of the baby and Mother's diabetes and blood pressure. (R. at 373:2-374:15). Prior to induction, an amniocentesis and non-stress test were performed on the baby to make sure she was sufficiently developed for delivery. (R. at 374:20-375:19). These tests, together with the November 18 ultrasound, indicated that induction was safe for mother and baby. (R. at 373:2-376:2).

Mother was induced for a trial of labor on the afternoon of November 24. (R. at 374:5-23, 599:5-7). Mother began pushing at around 2:00 A.M., labored down for some time, and began pushing again at 3:47 A.M. (R. at 601:1-602:8). J.B.'s head delivered, but her body did not immediately follow. (R. at 606:4-607:9).[3] At that time, Dr. Brandi Alt attempted several measures to deliver the baby's impacted shoulder including downward axial traction, the McRoberts maneuver, and the application of suprapubic pressure. (R. at 606:4-608:4). When those measures failed, Dr. Alt cut an episiotomy to allow for the performance of rotational maneuvers which are designed to rotate the baby into a different position for delivery. (R. at 608:8-609:4). At that time, Dr. William Merritt, an upper level resident, entered the delivery room and took over management of the delivery. (R. at 609:2-8). Dr. Merritt expanded the episiotomy, repeated downward axial traction, performed the McRoberts maneuver, applied suprapubic pressure, and rotated the baby's shoulder at which time the baby was able to be delivered. (R. at 614:1-9).

J.B. was born with a brachial plexus injury that has resulted in decreased function in her right arm. (*See* R. at 646:21-653:15).[4] J.B. was almost nine at the trial of this case. The jury heard about her medical history until that time, including testimony relating to prior surgeries and testimony from Mother and Guardian about why she had not received additional surgeries. (R. at 145:22-148:19, 158:20-159:14, 160:21-162:10, 402:20-404:4, 413:24-414:21). The jury also heard testimony from J.B.'s guardians relating to her

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[3] This indicated shoulder dystocia, a complication of a vaginal delivery in which the baby's anterior shoulder becomes impacted behind the mother's public symphysis. (R. at 260:25-261:13).

[4] Although GHS contested that its employees caused the injury, causation is not relevant to GHS's appeal of the trial court's post-trial orders granting a new trial *nisi additur*.

ability to cope with her disability and her performance in school. (R. at 162:11-164:12). Lastly, the jury observed J.B. and watched her demonstrate what function she has in her right arm. (R. at 646:21-653:15).

STANDARD OF REVIEW

GHS has not appealed the verdict in this case. Instead, it has appealed the trial court's post-trial ruling granting a new trial *nisi additur*.

A trial court may grant a new trial *nisi additur* if it finds the amount of the verdict to be inadequate. *Green v. Fritz*, 356 S.C. 566, 570, 590 S.E.2d 39, 41 (Ct. App. 2003). While the granting of such a motion rests within the sound discretion of the trial court, substantial deference must be afforded to the jury's determination of damages and the trial court must provide compelling reasons for invading the province of the jury. *Id.*; *see also Bailey v. Peacock*, 318 S.C. 13, 14, 455 S.E.2d 690, 691 (1995) ("Compelling reasons, however, must be given to justify invading the jury's province in this manner."); *Pelican Bldg. Centers of Horry-Georgetown, Inc. v. Dutton*, 311 S.C. 56, 61, 427 S.E.2d 673, 676 (1993). Generally, "[a]n abuse of discretion occurs when the trial court's decision is based upon an error of law or upon factual findings that are without evidentiary support." *Fields v. J. Haynes Waters Builders, Inc.*, 376 S.C. 545, 555, 658 S.E.2d 80, 85-86 (2008).

ARGUMENTS

On appeal, GHS raises a single, narrow issue: did the trial court err in granting a new trial *nisi additur* in this case without providing compelling reasons for doing so? As will be shown below, the trial court's order granting a new trial *nisi additur* lacked compelling reasons and amounted to an abuse of discretion.

I. The trial court erroneously found that GHS did not present evidence refuting Guardian's damages.

As an initial matter, this is not a case with a liquidated amount of economic damages because Guardian was not allowed to pursue pre-majority medical expenses. (*See* R. at 678:11-14). All of the economic damages, if any, will necessarily be incurred at some point in the future after J.B. turns eighteen. GHS did not present any rebuttal witnesses on this point, nor was it required to do so. Instead, it refuted Guardian's claimed damages through cross-examination of Guardian's witnesses. *See Jackson v. Jackson*, 234 S.C. 291, 299, 108 S.E.2d 86, 90 (1959) ("We think the trial Judge . . . fell into error when he based his ruling upon the fact that the appellant did not put up any witnesses in his behalf. He overlooked the settled rule of law that the appellant's defense could be supplied by the witnesses for the respondent."); *Greenville Cnty. v. Stover*, 198 S.C. 240, 247, 17 S.E.2d 535, 537 (1941) ("[P]roof of a defendant's defense can be supplied by a plaintiff. . . ."); *Eargle v. Sumter Lighting Co.*, 110 S.C. 560, 566, 96 S.E. 909, 911 (1918) ("It is immaterial from whose witnesses—whether plaintiff's or defendant's—the evidence in support of an element of damage or of the cause of action or defense may come. Either party has the right to make out or to strengthen his case or defense on the examination of the witnesses of his adversary.").

Guardian's damages evidence at trial fell into three categories: (1) future treatment and care; (2) lost earning capacity; and (3) non-economic damages. GHS cross-examined the witnesses on each of these topics producing concessions, limitations, and other testimony that the jury may have deemed credible in reaching its verdict.

A. Future Treatment

With regard future treatment, Guardian presented the testimony of Karen Shelton, who was qualified as an expert in "nursing care life plans." (R. at 465:15-19). Nurse Shelton opined to future medical expenses, possible surgery, equipment, and other therapies. (R. at 718-723). Nurse Shelton did not assign a total value to these items. (R. at 488:5-12). She testified that was "the job of the economist." (*Id.*). Guardian's expert economist testified that the present value of these services as of trial was $162,833. (R. at 583:1-3, 729).

However, this testimony was directly refuted by Nurse Shelton herself over the course of cross-examination. During cross, the jury heard that many of the recommendations included in the life care plan came from a physiatrist who had never treated J.B. and, indeed, had only seen her once in 2010. (R. at 490:8-492:6). There was no testimony from any doctor currently treating J.B. to suggest that any of the treatment, care, or accessories outlined in the life care plan were medically necessary. (R. at 492:12-14).

With respect to the surgeries included in Nurse Shelton's life care plan, the jury also heard that J.B. and her Mother and grandmother opposed any future surgeries. (R. at 161:8-19, 413:24-414:21). For that matter, Guardian was unable to say whether J.B. would elect to have additional surgeries. (R. at 158:20-159:14, 161:20-21). Nurse Shelton admitted on cross that she had not heard any testimony that surgery would

actually be performed. (R. at 492:15-18). The jury further heard that from J.B.'s birth in 2004 until the date of trial nearly nine years later, neither J.B. nor her custodial guardians had availed themselves of many of the services (or accessories) included in the life care plan. These services include physical therapy and occupational therapy (J.B.'s last known session occurred when she was three). (R. at 494:3-20). According to Guardian's expert economist, the present value of the therapy component of the life care plan alone amounted to $127,754 (or 78.45% of the total). (R. at 729). Given this testimony, it is easy to see why the jury may not have awarded all of these claimed damages.

B. Lost Earning Capacity

This category was based on the testimony of Dr. Charles Vander Kolk, who was qualified as an expert in vocational rehabilitation and psychology. (R. at 426:13-18). Dr. Vander Kolk opined that J.B. would suffer a diminution in her lifetime earning capacity because of her birth injury. (R. at 444:18-24). That opinion was based largely on his assumption that she would work in a manual labor job based on his assumption that she would not graduate from college. (R. at 446:16-19). Guardian's expert economist testified that the present value of that lost income was $197,463. (R. at 583:1-3).

Dr. Vander Kolk's stated reason for assuming she would not graduate from college was based on: (1) a standardized test that J.B. took as a second grader and (2) the fact that J.B.'s custodial parents did not themselves graduate from college. (R. at 453:12-17, 454:16-458:21). However, the evidence also showed that Dr. Vander Kolk did not interview J.B., only talked to Guardian for an hour and a half by telephone, did not talk to J.B.'s teachers, did not talk to J.B.'s doctors, and did not review all of J.B.'s school records and test results. (R. at 450:11-454:12).

Moreover, Dr. Vander Kolk did not testify conclusively that J.B. would not attend college. (R. at 446:16-19). In fact, Dr. Vander Kolk testified as to J.B.'s guardians, "on the positive side, I think they will encourage her to go to college. They would like her to succeed in college." (R. at 455:11-25). This testimony is consistent with that of J.B.'s guardians that J.B. is a great student (R. at 162:22-163:143:1) and that they will encourage her to go to college (R. at 163:10-11, 521:18-21). Guardian testified of J.B., "[s]he's very smart. And she's just—nothing stops her. She's a go-getter when it comes to her school work. As you can see, she's past her goal." (R. at 157:8-10). The jury was entitled to consider all of this testimony and reach its own conclusions about J.B.'s future prospects.

C. Noneconomic Damages

This leaves that last category of damages, noneconomic damages. Dr. Trevor Resnick, a pediatric neurologist, testified to J.B.'s usage of her right arm and the fact that the arm is not likely to improve as she ages. (R. at 655:7-12). J.B. herself demonstrated during this testimony what she can and cannot do with her right arm. (R. at 648:11-653:23). J.B.'s family testified to J.B.'s general quality of life and abilities. Among other things, they testified that J.B. is an active little girl who rides her bike, plays soccer, throws a ball, takes swimming lessons and otherwise believes she can do most of the things other children do. (R. at 157:4-158:3, 163:12-164:12, 502:10-503:13, 521:4-21). They also testified that, despite her injury, she is a happy, healthy, popular, and well-adjusted little girl. (*Id.*).

II. The trial court's order disregards the burden of proof and the role of the jury.

The trial court's order includes a lengthy discussion relating generally to new trials *nisi*. (R. at 7-12). Following that discussion, the trial court found that "the jury failed to award Plaintiff noneconomic damages." (R. at 12). The trial court then put forth its own summary of the evidence and incorrectly found that "[n]o testimony or evidence was offered by defense counsel to refute any of Plaintiff's economic damages. No testimony was presented by anyone on behalf of the defense to question any of the future treatment, care or cost figures in the life care plan or lost earnings." As shown above, this simply was not the case. The jury was free to consider all of the testimony and evidence in reaching a fair verdict, including that adduced by GHS in cross-examining Guardian's witnesses.

The trial court correctly charged the jury on the burden of proof and that the burden was on Guardian to produce evidence to support her case. (Tr. at 661:4-7). The trial court further charged the jury that they would need to "gauge and evaluate the credibility of all the evidence" and that they were not required to believe everything the witnesses said. (R. at 662:22-663:12). With respect to experts, the trial court admonished,

> Expert witness[es] are to be viewed the same as you—the same as you view other witnesses in this one important respect, and that is that you are the sole judge of their credibility. You're not required to accept their testimony, and you may give it such weight as you think it deserves.

(R. at 672:24-673:25). With respect to damages, the trial court charged as follows:

> If you find the Plaintiff is entitled to a verdict for actual damages, your verdict should include an amount that covers any past, present, and future damages proximately caused by the Defendant. Any future damages must be reasonably certain to occur in the future as a result of the Defendant's acts.

> Now, actual damages need not be proven to a mathematical certainty, or be based on evidence of the precise amount of damages the Plaintiff has suffered. Instead, the evidence must allow you to determine what amount is just, fair, and reasonable. Any future damages must be reasonably calculated to have resulted from the alleged injury or damage sustained in this case. And future damages must be reduced to their present cash value.

(R. at 677:7-21). The trial court further instructed that "the existence, the causation, or the amount of damages cannot be left to guesswork or speculation." (R. at 681:4-11).

Given this charge, the amount of time before any economic damages will occur, and the testimony recited above, the jury was not required to accept Guardian's claimed economic damages in their entirety. Quite simply, there is no evidence that the jury failed to deliberate and decide as charged. In fact, the trial court noted that it had "no proof of juror misconduct of any type." (R. at 8)

Curiously and contrary to the charge, the trial court's order simply assumes that the jury did not make an award of noneconomic damages. The trial court also mentions the possibility that the jury could have discounted all of the economic damages and made its entire award based on noneconomic damages. (R. at 15).

The trial court then appears to take the position that GHS needed to refute the Guardian's damages testimony beyond mere speculation. (*Id.*). This statement, however, sets the burden of proof on its head and amounts to an error of law. A plaintiff has the sole burden of proving his or her damages beyond conjuncture, guess, or speculation. *See Carlyle v. Tuomey Hospital*, 305 S.C. 187, 193, 407 S.E.2d 630, 633 (1999); *Gray v. S. Facilities, Inc.*, 256 S.C. 558, 570-71, 183 S.E.2d 438, 444 (1971). A defendant does not have any burden in challenging a plaintiff's damages theory or claimed damages.

Therefore, the trial court's reasoning contains an error of law and amounts to an abuse of discretion.

The trial court downplayed the most obvious scenario, which is that the jury included some component of both economic and noneconomic damages in its award. Such a result would have been completely warranted based on the evidence and the portions of the jury's charge excerpted above regarding credibility of witnesses and burden of proof. Given the general verdict form, it is impossible to know how the jury reached its award.

III. Given these errors, the trial court's order does not present compelling reasons supporting the grant of a new trial *nisi additur.*

The right to a trial by jury is guaranteed by the South Carolina Constitution. S.C. Const. art. I, 14 ("The right of trial by jury shall be preserved inviolate."). This right "includes the right to have the jury determine the amount of damages." *Riley v. Ford Motor Co.*, 408 S.C. 1, 17-18, 757 S.E.2d 422, 431 (Ct. App. 2014), *cert. granted* Sept. 24, 2014, *citing Hatchell v. McCracken,* 243 S.C. 45, 51, 132 S.E.2d 7, 10 (1963) (stating "[t]here [is] no question as to the legal right ... to have the amount of damages ... determined by a jury").

In this case, notwithstanding the fundamental right to a jury trial, the trial court's order concludes:

> It is enough to say that an award of $337,500.00 on this record is not adequate. This finding is based on the compelling reason that it does not reasonably compensate a 10-year-old child for her grievous, life-altering injuries and make her whole, to the extent money damages can. The award was less than her economic damages, and made no apparent provision for her substantial noneconomic damages. This is more than a mere disagreement with the jury's verdict. It is the firm conclusion of this court—which saw and heard the witnesses, watched [J.B.] demonstrate her deformity to the jury, scrutinized the exhibits, and observed the trial

> unfold over many days—that the jury's award failed to account for the profound magnitude of her loss.

(R. at 17). These grounds are insufficient as a matter of law to justify the grant of a new trial *nisi additur*. As argued above, the jury's verdict was consistent with the charge and the evidence and the trial court did not make any direct finding to the contrary.

As stated by the South Carolina Supreme Court,

> Inadequacy of a jury's verdict will not, *per se,* entitle litigants to a new trial or a new trial *additur*. A reviewing court will not interfere with the amount of a verdict unless the verdict is either so grossly excessive or inadequate that it 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, 357 S.E.2d 23, 25 (1987) (citations omitted). Mere disagreement with an award of noneconomic damages does not amount to a compelling reason for granting a new trial *nisi additur*. *Riley*, 408 S.C. at 19-20, 757 S.E.2d at 432 ("In other words, the jury awarded noneconomic damages, but the trial court disagreed as to whether the amount was sufficient. We find this is not a compelling reason to invade the province of the jury."); s*ee Krepps v. Ausen,* 324 S.C. 597, 608, 479 S.E.2d 290, 295 (Ct. App. 1996) (stating "the trial court may not impose its will on a party by substituting its judgment for that of the jury"). This rule mirrors more general precedent suggesting noneconomic damages are a matter falling peculiarly within the province of the jury. *See Kalchthaler v. Workman*, 316 S.C. 499, 503, 450 S.E.2d 621, 623 (Ct. App. 1994).

In a case with disputed damages, "the mere listing of [Plaintiff's] claimed damages by the trial judge in his order does not constitute compelling reasons for invading the jury's province." *Green*, 356 S.C. at 571, 590 S.E.2d at 41 (Ct. App. 2003). This requirement "is imposed to balance the wide discretion given to a trial judge in

ruling on a new trial motion with the substantial deference courts must give to a jury's determination of damages." *Luchok v. Vena*, 391 S.C. 262, 264-65, 705 S.E.2d 71, 72-73 (Ct. App. 2010) (reversing grant of new *trial additur* for lack of compelling reasons where verdict did not cover chiropractic bills in case of conflicting evidence). The *Luchok* court further found that the trial court's determination that "charges for chiropractic treatment of Plaintiff's injuries were reasonable and necessary" did not present a compelling reason because "[t]he judge is not entitled to make that determination as a matter of law when the evidence is conflicting." *Id.*

Here, there was conflicting evidence in this case as to J.B.'s future treatments and prospects. GHS contends the trial court's order in this case is based on nothing more than its disagreement with the amount of the verdict, and therefore, suffers from the same error found in the above cases and should be reversed.

CONCLUSION

For all of the above reasons, the trial court's order granting a new trial *nisi additur* is not supported by articulated, compelling reasons. The economic damages claimed by Guardian have not yet been incurred and may never be incurred. The outlook for J.B.'s future is uncertain, but it appears the jury considered the charge and the evidence in reaching an appropriate, present value award. The fact that the trial court believes the award is insufficient does not present compelling reasons for granting a new trial *nisi additur*. Accordingly, the order granting a new trial *nisi additur* should be reversed and the jury's verdict reinstated.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the final respondent's brief in this matter complies with Rule 211(b), SCACR and the April 15, 2014 Order of the South Carolina Supreme Court relating to personal data identifiers.

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PROOF OF SERVICE

I certify that I have served the *Final Reply Brief of Appellant Greenville Hospital System; Final Brief of Appellant Greenville Hospital System, Certificate of Appellant, and Certificate of Compliance* on Respondent on September 17, 2015, by mailing a copy of the same via United States Mail, postage prepaid, to the following:

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