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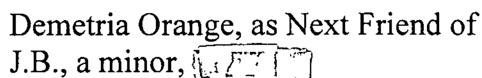
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

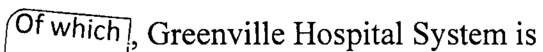
The Honorable D. Garrison Hill

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

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

v.

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

Of which, Greenville Hospital System is Appellant.

REPLY BRIEF OF APPELLANT GREENVILLE HOSPITAL SYSTEM

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

ARGUMENTS IN REPLY 1

I. GHS EFFECTIVELY CROSS-EXAMINED GUARDIAN'S WITNESSES, AND THE JURY WAS ENTITLED TO CONSIDER THAT EVIDENCE. THUS, THIS WAS A CASE OF CONTESTED DAMAGES. 1

II. THE TRIAL COURT DID NOT MAKE ANY FINDING THAT THE JURY DISREGARDED THE FACTS OR THE TRIAL COURT'S INSTRUCTIONS. 3

III. GUARDIAN HAS NOT PRESENTED ANY ALTERNATE SUSTAINING GROUNDS. 4

CONCLUSION 5

TABLE OF AUTHORITIES

CASES

Bailey v. Peacock, 318 S.C. 13, 14, 455 S.E.2d 690, 691 (1995) 1
Broome v. Watts, 319 S.C. 337, 342, 461 S.E.2d 46, 49 (1995) 5
Craven v. Cunningham, 292 S.C. 441, 443, 357 S.E.2d 23, 25 (1987) 4
Eargle v. Sumter Lighting Co., 110 S.C. 560, 566, 96 S.E. 909, 911 (1918) 3
Green v. Fritz, 356 S.C. 566, 570, 590 S.E.2d 39, 41 (Ct. App. 2003) 1
Greenville Cnty. v. Stover, 198 S.C. 240, 247, 17 S.E.2d 535, 537 (1941) 3
Haselden v. Davis, 353 S.C. 481, 484, 579 S.E.2d 293, 295 (2003) 5
Hughey v. Ausborn, 249 S.C. 470, 475, 154 S.E.2d 839, 841 (1967) 5
Jackson v. Jackson, 234 S.C. 291, 299, 108 S.E.2d 86, 90 (1959) 5
ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche, 327 S.C. 238, 241, 489 S.E.2d 470, 472 (1997) 5
Trident Reg'l Med. Ctr. v. Evans, 317 S.C. 346, 352, 454 S.E.2d 343, 346 (Ct. App. 1995) 5

RULES

Rule 8(c), SCRCP 5

Respondent Demetria Orange ("Guardian") has not appealed any aspect of the trial in this matter, including but not limited to jury selection and the trial court's ruling excluding evidence of pre-majority medical expenses from the jury's consideration. These aspects of the trial are the law of the case and are not subject to review by this Court. Additionally, Appellant Greenville Hospital System ("GHS") has not appealed the verdict, but rather has limited its appeal to the trial court's grant of a new trial *nisi additur* and whether it was supported by compelling reasons.[1] Thus, the underlying facts surrounding the delivery of Ja'Qulynne B. ("J.B.") in 2004 are not at issue in this appeal.

ARGUMENTS IN REPLY

I. GHS effectively cross-examined Guardian's witnesses, and the jury was entitled to consider that evidence. Thus, this was a case of contested damages.

As argued by GHS, the jury's verdict is entitled to deference absent articulated and compelling reasons. *See Bailey v. Peacock*, 318 S.C. 13, 14, 455 S.E.2d 690, 691 (1995); *Green v. Fritz*, 356 S.C. 566, 570, 590 S.E.2d 39, 41 (Ct. App. 2003). The trial court's order granting a new trial *nisi additur* includes findings that GHS did not refute "any of Plaintiff's economic damages" and that the jury's award did not include noneconomic damages. (R. at 12-14, 17). When the full testimony of Guardian's witnesses is considered, these findings by the trial court are either the result of an error of law or are factually unsupportable. Either way, they do not present compelling reasons for granting a new trial *nisi additur* and amount to an abuse of discretion requiring reversal.

[1] In the event this Court affirms the trial court's order, GHS reserves its right to contest liability in any subsequent new trial of this matter.

Both the trial court and Guardian completely discount the role of cross-examination in this case. As argued by GHS in its Appellant's brief, GHS did not have the burden of proof, was not required to put forward witnesses to refute Guardian's case, and the testimony it elicited on cross was evidence to be considered by the jury. Due to J.B.'s age, the economic damages for medical treatment in this case will all be incurred in the future after she reaches the age of majority. For purposes of this appeal, GHS does not argue that J.B. will not suffer damages; however, the amount of damages and the speculative nature of some components of the claimed economic damages were contested at trial.

Counsel for GHS asked numerous witnesses questions relating to whether certain events were likely to occur in the future, including surgeries, therapies, and J.B.'s future prospects. GHS previously recounted the testimony of nursing life care planer Karen Shelton, economist Oliver Wood, vocational rehabilitation professional and psychologist Charles Vander Kolk, Dr. Trevor Resnick, and J.B.'s family and why it showed J.B. might not actually incur all of the damages to which the experts testified. In her Respondent's brief, Guardian references the deposition testimony of Dr. John Grossman, which was played for the jury at trial. (R. at 164:20-165:17). However, that testimony is again subject to multiple inferences. Based on a single examination of J.B. in 2011 that lasted ten to twenty minutes and of which he had no recollection (R. at 732:2-734:20), Dr. Grossman testified that J.B. would benefit from "additional treatment of the shoulder deformity," but he was unable to say what that might entail without additional testing. (R. at 739:7-740:25). He specifically stated he could not testify to "anything of substance

what will be required" without additional information. (R. at 740:9-13). Thus, this testimony is similar in nature to that presented by other witnesses.

Guardian spends the bulk of her brief discussing the testimony that was more favorable to her damages case. GHS does not dispute that she presented this evidence; however, all of this testimony was to be considered and weighed by the jury in its deliberations.[2] This was not a one-sided story, and the jury was entitled to consider everything before it. Given the lack of certainty among the witnesses, it is easy to see how the jury might not have accepted all of the claimed economic damages as proven beyond mere speculation.

II. The trial court did not make any finding that the jury disregarded the facts or the trial court's instructions.

As further argued by GHS in its Appellant's brief, the trial court's charge correctly informed the jury about the burden of proof, the requirement that damages be proven beyond guesswork or speculation, and how to evaluate witness testimony. Nothing about the charge or the evidence presented required the jury to accept Guardian's damages testimony *in toto*. Given this charge, the jury reached a verdict in favor of Guardian as against GHS in the amount of $337,500. The trial court erred in his order granting a new trial *nisi additur*, which appears to contradict the charge to the jury and find that GHS did not present evidence that would allow the jury to reach the verdict it reached. (R. at 12-15). The trial court's statements that the damages were not disputed

[2] GHS cited numerous cases in its Appellant's Brief relating to whether a defendant is required to put up its own witnesses in support of its case. The answer is an unequivocal no. *See Jackson v. Jackson*, 234 S.C. 291, 299, 108 S.E.2d 86, 90 (1959); *Greenville Cnty. v. Stover*, 198 S.C. 240, 247, 17 S.E.2d 535, 537 (1941); *Eargle v. Sumter Lighting Co.*, 110 S.C. 560, 566, 96 S.E. 909, 911 (1918). That these cases arose at a different procedural stage does not render them inapposite here. Quite simply, the trial court disregarded this well-settled and basic premise in determining that the evidence in this case as to damages was uncontested and unrefuted.

are not supported by the law or the record and cannot form the basis for compelling reasons to invade the province of the jury.

In addition, the trial court did not find that the jury disregarded its instructions. To the contrary, the trial court ruled that "[t]he verdict was not so grossly inadequate as to be the result of passion, caprice, prejudice, or other extraneous influence." (R. at 8). The trial court further found there was "no proof of juror misconduct of any type." (*Id.*). These findings alone show why the grant of a new trial *nisi additur* was in error. *See Craven v. Cunningham*, 292 S.C. 441, 443, 357 S.E.2d 23, 25 (1987). "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." Absent any finding that the jury disregarded the facts or the trial court's charge, the verdict should have been allowed to stand.

III. Guardian has not presented any alternate sustaining grounds.

The sole issue on appeal is whether the trial court erred in granting a new trial *nisi additur*. Respondent has suggested that the trial court's evidentiary ruling relating to pre-majority medical expenses provides an alternate sustaining ground; however, this ruling is unrelated to the orders on appeal. The jury did not hear this evidence; thus, it did not factor into the jury's verdict or the new trial analysis.

Given this lack of connection between the exclusion of evidence relating to pre-majority medical expenses and the trial court's granting of a new trial *nisi additur*, it is not an alternate sustaining ground, but rather an issue that Guardian should have raised by cross-appeal if she wished to challenge it.[3] An unappealed ruling, right or wrong, is

[3] Guardian voluntarily dismissed a cross-appeal in this matter by order dated June 9, 2015.

the law of the case. *ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche*, 327 S.C. 238, 241, 489 S.E.2d 470, 472 (1997). As such, the result with respect to the order granting a new trial *nisi additur* should not change even if this Court disagrees with the trial court's handling of pre-majority medical expenses.

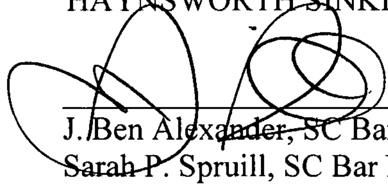
Further, the argument that Guardian was entitled to recover J.B.'s pre-majority medical expenses lacks merit. Ordinarily, a plaintiff in a personal injury action may recover the reasonable value of the medical services provided. *Haselden v. Davis*, 353 S.C. 481, 484, 579 S.E.2d 293, 295 (2003). However, a minor may not recover medical expenses from a tortfeasor in her own personal injury action because that damage belongs solely to the parent or guardian responsible for paying for the medical services. *See Hughey v. Ausborn*, 249 S.C. 470, 475, 154 S.E.2d 839, 841 (1967); *Trident Reg'l Med. Ctr. v. Evans*, 317 S.C. 346, 352, 454 S.E.2d 343, 346 (Ct. App. 1995). This rule is not an affirmative defense or an avoidance that would "bar the action," but rather a limitation on recoverable damages. Thus, it is not required to be pled as an affirmative defense. *See* Rule 8(c), SCRCP; *Broome v. Watts*, 319 S.C. 337, 342, 461 S.E.2d 46, 49 (1995) ("First, Rule 8(c) does not list set-off as an affirmative defense which must be pled in order to be pursued at trial. Second, the set-off which was granted in this case does not fall within the 8(c) catchall of 'any other matter constituting an avoidance or affirmative defense.'").

CONCLUSION

For all of the above reasons and those presented in its Appellant's brief, GHS contends the the trial court's order granting a new trial *nisi additur* should be reversed and the jury's verdict reinstated.

Respectfully submitted,

HAYNSWORTH SINKLER BOYD, PA



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of whom, Greenville Hospital System is Appellant.

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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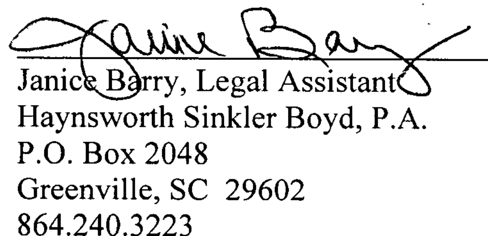

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