THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas
The Honorable D. Garrison Hill

Appellate Case No. 2014-001973

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 the Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

1. WHETHER THE TRIAL COURT CORRECTLY EXERCISED ITS DISCRETION TO GRANT A NEW TRIAL *NISI ADDITUR* THAT WAS SUPPORTED BY THE COMPELLING REASONS AND THE EVIDENCE?

STATEMENT OF THE CASE

This case involves a little girl who suffered a severe and debilitating injury to her arm at birth. Her arm visibly droops, and she cannot raise it more than about halfway. For these injuries, the jury, after finding that Appellant was negligent, awarded her slightly less than her economic damages. Respondent filed a motion for new trial absolute and new trial *nisi additur*. The Court denied the motion for new trial absolute but granted the *additur* in an eleven page order that meticulously explained the compelling reasons and rationale for granting the motion.

For the sake of brevity, Respondent agrees with and incorporates by reference Appellant's Statement of the Case, with the following additions and exceptions. Respondent notes that the first attempt to try this case ended in a mistrial after numerous selected jurors were dismissed for cause after the trial had begun. (R. p. 109, lines 16-21). Jury selection in the second trial had to be conducted a second time when the trial court determined Appellant used its peremptory strikes in a constitutionally impermissible manner, namely, striking jurors based upon race. (R. p. 124, lines 14-23). Thus, the jury that ultimately decided this case was the third jury picked. Second, Appellant states in footnote 2 that the court correctly limited the scope of recovery to exclude pre-majority tort-related medical expenses. Respondent agrees that the judge excluded from possible recovery those tort-related medical expenses incurred pre-majority, but disagrees with Appellant's assertion that this decision was correct.

STATEMENT OF FACTS

A. The Management and Delivery of J.B.

By all accounts, Alana McClure's pregnancy with was known by her healthcare providers to be a high risk pregnancy. (R. p. 182, l. 5-25), (R. p. 263, l. 22-p. 264, l. 4). More specifically, she was at risk for encountering shoulder dystocia.[1] (R. p. 183, l. 14-p. 184, l. 7), (R. p. 247, l. 4-7). Alana was an obese diabetic, fetal weight was estimated at the 97th percentile, Alana was of short stature, and there was testimony that she experienced significant weight gain during her pregnancy. *Id.* All these factors increased the likelihood shoulder dystocia would be encountered. Despite all these factors and Alana's classification as a patient with a high risk pregnancy, Appellant left a second year resident with zero prior experience handling a shoulder dystocia to manage, care for, and deliver the baby in this high risk pregnancy. (R. p. 263, l. 22-p. 264, l. 4). At no point prior to the delivery of the injured infant did the attending physician become involved in the management and delivery of Alana's baby. (R. p. 269, l. 21-p. 270, l. 3), (R. p. 270, l. 9-18).

After labor was induced, it became clear that the infant was having difficulty descending through the birth canal. Labor progression was slow. (R. p. 266, l. 14-24), (R. p. 267, l. 10-25). The mother's cervical dilation had not changed in eight hours, indicating that the baby was having difficulty coming down the birth canal. (R. p. 268, l. 12-19). This was so even though the nurses had already maxed out the Pitocin[2] dosage at 20 milliunits per minute per the attending physician's initial order, further indicating that the baby was large in proportion to the mother's pelvis. (R. p. 202:6-21) (R. p. 248, l. 24-p. 249, l. 9). For ten to twelve hours, Alana's cervical dilation did not change even with the continued increased dosing of Pitocin, and at no point during this period of

[1] Shoulder dystocia occurs when the baby's head delivers, but its body does not.
[2] Pitocin is a drug given to the mother to cause her to have contractions and makes the mother's contractions stronger and more frequent. (R. p. 192, lines 4-16), (R. p. 228, line 24-p. 229, line 3).

time did the attending physician, "the captain of this team," ever come into the room to check on her patient. (R. p. 314, l. 23-p. 315, l. 11).

During this period of time, the nurses failed to follow the physician's order and administered the Pitocin beyond what was directed by the physician. (R. p. 197, l. 3-6). At some time, a *resident* instructed the nurses to increase Pitocin beyond the initial order. (R. p. 197, l. 19-24). At this point, the amount of Pitocin being given to the mother was doubled from the initial order and was not discontinued until the baby got stuck. (R. p. 198, l. 6-21). Despite this being a high risk pregnancy, despite their being indications of a fit problem, and despite Pitocin being given to this child too quickly and at double the maximum rate, the attending physician never entered the labor and delivery room during this period of time. (R. p. 200, l. 19-p. 202, l. 21).

The attending physician was never present during the labor and delivery of this high risk patient, from the period from the time Pitocin was first administered, to the delivery of this child with a permanent brachial plexus birth injury. (R. p. 270, l. 13-18). The least experienced physician, the new second-year resident, was left to try to deliver this baby, and the resident had to manage her first shoulder dystocia without any help from her attending physician. (R. p. 313, l. 14-22). She explained that to try deliver this baby, she used her "body weight in a downward fashion" to resolve the shoulder dystocia. (R. p. 325, l. 19-p. 326, l. 18). The second year resident made her first ever attempts to complete what are called "rotational maneuvers" to deliver the stuck baby, but was unsuccessful. (R. p. 608, l. 8-p. 609, l. 4). An upper level resident came in to assist and after applying additional traction and performing additional maneuvers, the baby delivered. (R. p. 614, l. 1-9). Dr. Merritt acknowledged that although the injury occurred after the head delivered and during the time when either he or Dr. Alt were attempting delivery, he couldn't tell whether the injury occurred with him or Dr. Alt. (R. p. 640, l. 1-6).

Finally, Appellant referenced the fact that the mother had been diagnosed with a mental illness in its initial brief. There is no evidence whatsoever that Alana's mental illness had any causal relationship to the shoulder dystocia or J.B.'s injury. (R. p. 184, l. 21-25). Said differently, any mental illness the mother might have had had no effect on the likelihood that shoulder dystocia would be encountered, the proper management of the shoulder dystocia, or the permanent injury suffered by J.B. to his brachial plexus.

Nevertheless, Alana's illness among other factors led to the Orange's accepting J.B. and her sister into their home as their own children when it was determined that Alana should no longer be allowed to care for them. The Oranges took in J.B. and her sister after being contacted by the State to see if they would be willing to do so. They agreed and took in the two girls.

B. J.B.'s Injury and Its Effect

Dr. Resnick, the chief of the department of neurology at Miami Children's Hospital, offered testimony concerning J.B.'s limitations. Dr. Resnick explained that J.B. "clearly, had torn nerves resulting in neuroma. You don't get a neuroma formation unless the nerves are torn.[3]" (R. p. 647, l. 1-3). Dr. Resnick conducted a neurological examination of J.B. to determine what muscles and nerves had been affected and to what extent. (R. p. 647, l. 22-p. 648, l. 4).

J.B. was introduced in the courtroom and Dr. Resnick had J.B. illustrate her limitations. (R. p. 648, l. 5-17). Dr. Resnick went through a series of motions and maneuvers with J.B. to show her range of motion and where she did and did not have weaknesses. (R. p. 648, l. 22-p. 653, l. 22). Starting with the shoulder, Dr. Resnick demonstrated how J.B. held her right arm with flexion at the elbow and slightly abducted from the side of her body, indicating a specific pattern of muscle weakness caused by her injury. *Id.* Looking at the arm, Dr. Resnick demonstrated that the muscles

[3] A neuroma is "a blob of neuronal tissue with fibrosis in the region where the tear is." It results after there has been a tearing of the nerves in the brachial plexus and the body tries to heal itself.

in her right arm were smaller than the muscles in her left. *Id.* Dr. Resnick then demonstrated how J.B. could not raise her right arm higher than "almost horizontal" because of her nerve damage. *Id.* Dr. Resnick showed the court how J.B. lacked all ability to externally rotate her right arm. *Id.* He then showed how she lacked the ability to supinate with her right arm. This is the motion that is required to unscrew a bottle top or use a screwdriver. Finally, Dr. Resnick showed that J.B. was incapable of putting her right hand behind her back or behind her head. *Id.* So, anything that requires J.B. to do this, like brushing her hair or raising her hand, she cannot do or will have significant difficulty doing. *Id.* On cross, Respondent made no effort to discredit Dr. Resnick's representation of J.B.'s limitations.[4]

Demetria Orange, with whom J.B. currently lives, offered testimony describing the surgery J.B. underwent when she was a baby, and the body cast she wore for several months thereafter. (R. p. 145, l. 22-25). J.B. has already undergone two surgeries. (R. p. 160, l. 21-23). Demetria went through a number of photos and video showing J.B., her limitations, her surgery at Shriners Children's Hospital, the body cast she was placed in for months after her surgery, and the physical differences between J.B.'s injured arm and her uninjured arm. Demetria described how J.B. could not crawl, but "scooted" and how she would fall down because of balance issues caused by her arm. (R. p. 146, l. 11-p. 147, l. 6). Through video, the judge and jury saw J.B. using her injured arm to "assist" her uninjured arm and how J.B.'s active and passive range of motion was limited, including her inability to put her hand behind her head, (R. p. 147, l. 7-23). Demetria explained, "[J.B.] does things in her own way. She doesn't necessarily do it like it's supposed to be done, but

[4] Dr. Grossman, one of the world's leading surgeons who treat brachial plexus birth injuries, offered testimony by de bene esse deposition. He too explained the severity of J.B.'s injury, but he also discussed what surgeries she would need in the future. Appellants offered no surgeon or any other witness to refute any of the testimony offered by Dr. Grossman.

she figures it out." (R. p. 148, l. 4-6). Demetria explained J.B. had difficulty with everyday tasks like putting on jewelry and tying her shoes. (R. p. 149, l. 5-10).

Demetria next explained that at school, the older J.B. gets the more noticeable her injury is to those around her, and her classmates now ask her questions about her arm. (R. p. 155, l. 12-22). She explained J.B. has certain hygiene issues related to toileting because of J.B.'s inability to "clean herself good." (R. p. 156, l. 10-13). Other issues include difficulty zipping, putting on a belt, (R. p. 156, l. 14-18) doing her hair, trying to swim. (R. p. 157, l. 5-9).

As to future surgeries, Demetria explained that now since J.B. is getting older, she wants J.B. to be involved with the decision-making. (R. p. 159, l. 1-4). Demetria noted that a physician explained that an additional surgery would require that he "saw the bone in half," which gave her some pause. (R. p. 159, l. 5-9). Appellant suggested to Demetria that J.B.'s biological mother refused a third surgery, but Demetria explained she didn't know that. (R. p. 161, l. 14-17). And while Appellant tried to make it seem as if J.B. didn't want the surgery because she was scared, Demetria explained, "J.B. says no to a flu shot, so . . . ." (R. p. 161, l. 18-19).

Alana, J.B.'s biological mother, described J.B.'s first few years. She explained the difficulty she had feeding and dressing J.B. and that she and whoever watched J.B. had to be trained how to hold J.B., bathe her, and carry her. (R. p. 402, lines 3-13). Alana explained the three different types of therapy J.B. had to regularly receive, occupational, physical, and speech.[5] (R. p. 403, l. 11-17). Alana explained how after the second surgery J.B. had to keep her right arm in a "statue of liberty pose, because there was a bar holding up her arm." (R. p. 404, l. 5-8).

Kelly Williams, a family friend, described her interactions with J.B. She described a sleep-over she hosted. Kelly described how because of J.B.'s injury, she kept spilling her drink on the

[5] Alana explained the speech therapy was not because J.B. would not talk it was because she couldn't eat. (R. p. 403, l. 16-17).

carpet. (R. p. 417, l. 13-p. 418, l. 4). J.B. then sat at the younger children's table. Kelly explained how J.B., after taking her seat with the younger children, said she wished she was normal. *Id.*

Dr. Vanderkolk, a vocational expert with a PhD in rehabilitation counseling psychology, offered testimony in this case. Dr. Vanderkolk explained that his job is to work with individuals with disabilities, recognize their problems, focus on their strengths, help them adjust to their disability, and then help them with their vocational path. (R. p. 421, l. 4-21). Dr. Vanderkolk completed a vocational assessment of J.B. To form his opinions, Dr. Vanderkolk reviewed J.B.'s medical records, interviewed the significant persons in J.B.'s family, assessed the nature and extent of the disability, and looked at the extent to which his disability will impact his earnings. (R. p. 425, l. 18-p. 426, l. 11). Dr. Vanderkolk assessed J.B.'s physical limitations, noted that it is a visible disability noticeable to others when she is in public, and noted that the nature of her injury limited her ability to use both of her arms in any job that she takes. (R. p. 427, l. 19-p. 428, l. 20). Dr. Vanderkolk noted J.B. has limited range of motion, that her arm is "turned in," and that she had limited bimanual dexterity. *Id.* These limitations will affect J.B.'s ability to perform any job she takes, from assembling small parts at a bench to using a keyboard. *Id.* He noted that this would limit the speed with which she could complete tasks. (R. p. 428, l. 21-24). He explained that the involuntary movement of her hand which caused it to open up when gripping something would impair her ability to perform work-related tasks. (R. p. 429, l. 3-9). Dr. Vanderkolk also evaluated her test scores and grades and determined her mental ability to be average. (R. p. 429, l. 16-p. 431, line 1). Further, he discussed the extent to which self-image, rejection, and depression impacts those with disabilities and how these things would affect J.B. (R. p. 435, l. 13-p. 436, l. 12).

Based upon this information, Dr. Vanderkolk assessed the range of jobs that would be available to J.B. (R. p. 433, l. 14-18). He researched the range of careers that would have been

available to her had she not been disabled, what basic abilities and aptitudes would have been required in those fields, and how J.B.'s ability to work in that range of jobs has been impacted by her injury. (R. p. 437, l. 13-p. 440, l. 17). Despite significant evidence that someone with a disability like J.B.'s would not find work at all, Dr. Vanderkolk assumed that J.B. would in fact find work and stay employed. (R. p. 443, l. 24 to 444, l. 9). However, he noted that her loss of income would be in the range of 25 to 45 percent. (R. p. 444, l. 18-24).

While this was Dr. Vanderkolk's opinion to a reasonable degree of medical certainty, he also explained how his numbers would have differed under different scenarios. For instance, Dr. Vanderkolk provided testimony on what affect her injury would have on her earning capacity if she were to obtain a four year college degree. (R. p. 447, l. 20-p. 449, l. 7). He explained that if she were to obtain a college degree, her overall income would have been higher, and she would have experienced a lower *percentage* loss of earnings. However, the lower percentage of the higher income would put the total dollar value of her economic loss very close to the overall economic loss she would experience if she does not obtain a four year degree. (R. p. 448, l. 19-23).

Karen Shelton, a registered nurse and certified life care planner, prepared the life care plan for J.B. in this case. (R. p. 462, l. 2-9). She explained she had worked with around thirty children with brachial plexus birth injuries similar to that of J.B.'s. (R. p. 464, l. 14-19). In preparing her life care plan for this case, Nurse Shelton reviewed the medical records, including the treatment records, reviewed the depositions of physicians who evaluated J.B., spoke with J.B. and her custodians, and met with Dr. Nelson. (R. p. 466, l. 13-24). This child was evaluated by Dr. Resnick, the chief of pediatric neurology at Miami Children's Hospital, Dr. Grossman, one of the leading pediatric nerve surgeons in the country, and Dr. Nelson, a well-respected pediatric physiatrist.[6] (R.

[6] A physiatrist is a rehabilitation doctor who evaluates the patient's muscles, nerves, and bones. (R. p. 473, lines 13-19).

p. 468, l. 1-9). Nurse Shelton's report was based upon these physician's evaluations and recommendations. She even attended J.B.'s appointment with Dr. Nelson in person "to get a general overview of what Dr. Nelson found [J.B.] would need in the future." (R. p. 468, l. 1-5).

Nurse Shelton explained that the life care plan included a surgery recommended by J.B.'s evaluating physicians and the post-surgery physical therapy sessions that would be needed in connection with this surgery. (R. p. 470, l. 14-p. 471, l. 15). A second surgery was noted on the life care plan, but no monetary cost was assigned to it or factor into the cost projections. (R. p. 471, l. 6-13). Finally, Nurse Shelton explained that for those items where she did include the costs, she did not add up and show the total amount. (R. p. 488, l. 5-7). Nurse Shelton explained that she is not an economist and is not the person to do things like calculate inflation or discount numbers to present day values. (R. p. 488, l. 9-12).

Samuel Orange, the custodial father figure for J.B., also testified at trial. He explained he teaches J.B., "Whatever you put your mind to, you can do it." (R. p. 503, l. 1-8). However, Sam also talked about her limitations and how others notice them. He described for the jury how she'd come to him in tears and asked him why when she's in public strangers ask her about her arm. (R. p. 503, line 19-p. 504, l. 8). Outside the presence of the jury, Sam proffered testimony that medical bills to date to treat J.B.'s injury totaled $100,055.89. Sam was not asked any questions on cross related to future surgeries.

Dr. Oliver Wood offered expert witness testimony for Respondent related to the economic losses J.B. has sustained and will sustain in the future. Dr. Wood looked at J.B.'s life expectancy based upon South Carolina Code Ann. § 19-1-150, J.B.'s diminished earning capacity, and her medical needs to determine the total value of the economic loss in this case. (R. p. 577, l. 2-p. 578, l. 16). Dr. Wood determined the present value of future medical costs to be $162,833. (R. p. 582,

l. 11-14). He determined the present value of loss of future earnings J.B. will experience to be $197,463. (R. p. 582, l. 18-25). Thus, the total loss was $362,296. (R. p. 583, l. 1-3). No amount of the $100,055.89 already spent on J.B.'s care was included. No amount of money was included for pain, suffering, grief, distress, disfigurement, or humiliation. He also explained that even though Nurse Shelton noted the price data for some of the surgeries recommended for J.B., their costs were not included in Dr. Wood's total loss valuation. (R. p. 584, l. 8-19).

STANDARD OF REVIEW

"A new trial *nisi additur* may be ordered when the verdict is merely inadequate or excessive. *Patterson v. Reid*, 318 S.C. 183, 185, 456 S.E.2d 436, 438 (Ct. App. 1995) (citing *O'Neal v. Bowles*, 318 S.C. 525, 526-27, 431 S.E.2d 555, 556 (1993). Additionally, "The grant or denial of new trial motions rests within the discretion of the trial judge, and his decision will not be disturbed on appeal unless his findings are wholly unsupported by the evidence or the conclusions reached are controlled by error of law." *Proctor v. Dep't of Health & Envtl. Contr'l*, 368 S.C. 279, 319-20, 628 S.E.2d 496, 518 (Ct. App. 2006) (citing *Chapman v. Upstate RV & Marine*, 364 S.C. 82, 88-89, 610 S.E.2d 852, 856 (Ct. App. 2005). "However, compelling reasons must be given to justify invading the jury's province by granting a new trial . . . ." *Id.* Finally, "Great deference is given to the trial judge 'who heard the evidence and is more familiar with the evidentiary atmosphere at trial,' and who thus 'possesses a better-informed view of the damages than [the appellate court]'" *Id.*

"While the trial judge may not impose his will on a party by substituting his judgment for that of the jury, he may give the party an option in the way of additur or remitter, or, in the alternative, a new trial." *Vinson v. Hartley*, 324 S.C. 389, 406, 477 S.E.2d 715, 723 (Ct. App. 1996). In determining whether to grant an additur, the trial court must "consider the adequacy of the verdict in light of the evidence presented." *Id.* A new trial *nisi additur* may be ordered "when

the verdict is merely insufficient based on the evidence." *Waring v. Johnson*, 341 S.C. 248, 257, 533 S.E.2d 906, 911 (Ct. App. 2000). Moreover, the appellate Court's "review is limited to the consideration of whether evidence exists to support the trial court's order." *Folkens v. Hunt*, 300 S.C. 251, 255, 387 S.E.2d 265, 267 (1990). "As long as there is conflicting evidence, this Court has held the trial judge's grant of a new trial will not be disturbed." *Norton v. Norfolk S. Ry. Co.*, 350 S.C. 473, 567 S.E.2d 851 (2002).

ARGUMENT

I. The Trial Court, Familiar with and Informed by the Evidence, Properly Used its Discretion and Granted Appellant's Motion for New Trial *Nisi Additur*, and Supported its Decision with Compelling Reasons

A. The trial court supported its decision to grant a new trial *nisi additur* with "compelling reasons."

As reflected in the record, Respondent through numerous witnesses, including J.B. herself, showed the judge and jury the significant limitations of a little girl who suffered a severe injury at birth. This injury affects her physical appearance, her ability to move her right arm, and her ability to perform any task that requires the use of two arms. At only ten years old she already experiences the humiliation associated with appearing different. (R. p. 503, l. 19-p. 504, l. 8).

Based upon the evidence of record, the trial court entered a well-written, eleven page order granting a new trial *nisi additur* which set forth compelling reasons to support the Court's decision. The order noted that J.B. "had already endured two surgeries" but that she "still suffers from severe shoulder deformity and disability" and that "she can only rotate her right arm 80 degrees; 180 degrees is normal." (R. p. 8). Significantly, the judge, from his own observations, noted, "Her right arm visibly droops, and she can only raise it about halfway." *Id.*.

The trial court noted that awarding damages just below J.B.'s projected economic loss "did not adequately compensate her given the damages evidence, which included undisputed proof of

physical pain and suffering, permanent disability and injury to her right arm and shoulder, disfigurement, and emotional pain and suffering by a child." (R. pp. 12-14).

The trial court highlighted the testimony of Dr. Charles Vanderkolk, who prepared the vocational loss analysis in this case. The Court referenced the extent to which J.B.'s future job prospects have been hindered by her injury as well as loss of earning capacity. (R. p. 13). He noted the testimony provided by Nurse Shelton regarding J.B.'s future medical needs. (R. p. 14). Finally, the trial court explained that the economist, Dr. Oliver Wood, discounted these numbers to present value and explained the present value of the total financial loss was $360,296.00. (R. p. 14).

The trial Court noted that defense counsel offered no evidence "to refute any of Plaintiff's economic damages." (R. p. 14). Moreover, "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." (R. p. 14). Finally, the court stated that in light of this, a verdict of less than the projected economic loss made the award appear even more inadequate. *Id.*

The trial court explained that defense counsel's cross-examination of plaintiff's damage expert witnesses merely asked these witnesses to speculate about J.B.'s outcome if she possibly overcame her limitations and outperformed her physician's expectations. (R. p. 15). However, after sitting through the entire trial and viewing the credibility of these experts firsthand, the Court determined that such speculative "what-if" questions, without any actual countervailing evidence, could not form the factual basis of a determination of damages. (R. p. 15). Ultimately, the trial judge, based upon his personal observations of the trial, determined that the jury "could not simultaneously ignore the obvious disfigurement and other noneconomic damages that J.B. has suffered and will continue to suffer for the next 70 years." (R. p. 15). The trial court noted, "This finding is based upon the compelling reason that [the award] does not reasonably compensate a

10-year-old child for her grievous, life-altering injuries and make her whole, the extent money damages can." (R. p. 17). The trial court then stated, "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." *Id.*

B. Appellant's rehash of the damages testimony, the absence of any refuting evidence, and its cross that merely put speculative hypothetical questions to the expert witnesses elucidates exactly why the trial court appropriately exercised its discretion in granting a new trial *nisi additur*.

Included among the trial judge's compelling reasons for finding the verdict inadequate was that Appellant did next to nothing to refute the damage testimony submitted by Respondent. The judge sat through the entirety of this trial and soaked in all the evidence presented. He saw first-hand this ten year old child's arm that "visibly droops," and can only rotate 80 degrees where 180 degrees is normal. The judge heard testimony describing how her injury has and will affect her both physically and mentally. In opposition to Respondent's damage testimony Appellant presented nothing. In light of what the trial judge personally viewed, he determined the $337,500.00 award, which was less than the total economic damages, did "not reasonably compensate a 10-year-old child for her grievous, life-altering injuries and make her whole, to the extent money damages can." (R. p. 16).

Appellant misconstrues this as the trial judge requiring Appellant to "refute" Respondent's testimony through affirmative evidence. The trial judge never stated there was such a requirement. He simply stated that, among his compelling reasons, was the fact that there was "undisputed proof of physical pain and suffering, permanent disability, and injury to her right arm and shoulder, disfigurement and emotional pain and suffering by a child." (R. pp. 12-13). The trial judge then noted, "No testimony or other evidence was offered by defense counsel to refute any of Plaintiff's

economic damages." *Id.* This is not a statement that the defendant is required to refute evidence by presenting testimony. It is the trial judge stating that he considered the fact that no evidence was offered by Respondent on the issue of damages as relevant to its decision to grant an *additur*. The court simply stated that "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," and that "in this light, the verdict of $337,500 appears even more inadequate. . . ." (R. p. 14). Thus, Appellant's position that the trial court "required" the defendant submit evidence to refute damages is a straw-man argument as the judge never made this assertion.

Nevertheless, Respondent still notes that the cases cited by Appellant on this issue are inapposite. *Jackson v. Jackson*, 234 S.C. 291, 293-94 108 S.E.2d 86, 87 (1959) involved an appeal of the trial court's directing a verdict in favor of the plaintiff. It did not involve a motion for new trial *nisi* or even a motion for a new trial absolute. The court described the standard for granting a directed verdict as available only "in those instances only where reasonable minds could draw but one inference from the evidence" and where there "is an entire absence of evidence to support a contrary conclusion." *Id.* Obviously, this is a far greater standard to overcome than what is required to grant a new trial *nisi additur*. Additionally, controlling statutes in that case required that the plaintiff prove that the injury resulted from either intentional or reckless misconduct. *Id.* Moreover, to prove liability in that case, the jury had to consider the veracity of the plaintiff's testimony which the Opinion noted was more than once "at variance" from the officer eyewitnesses. *Id.* Therefore, it was for the jury to determine if this particular passenger knew or should have known the driver was intoxicated yet continued to be a passenger. The Court noted that because there was testimony

to support this, directed verdict was inappropriate. *Id.* This is a vastly different factual scenario than the one before this Court.[7]

Finally, despite mischaracterizing or misunderstanding the trial court's Order and citing to cases clearly inapposite to the issues present in this case, Appellant fails to accurately represent precisely what Appellant elicited from Respondent's witnesses in cross-examination. As to Nurse Shelton, Appellant notes she offered testimony of J.B.'s future medical needs and medical expenses. Appellant also correctly notes that Nurse Shelton stated that she did not list the sum total of all the items for which she had provided the costs. Curiously, Appellant then contends Nurse Shelton refuted her own testimony. As proof, Respondent mentions that on cross Nurse Shelton based her life care plan upon the recommendations provided by Dr. Nelson. However, this is exactly what Nurse Shelton said on direct. (R. p. 466, l. 13-24), (R. p. 468, l. 1-9), (R. p. 468, l. 1-5). In addition to receiving input from Dr. Nelson, a highly respected physiatrist, Nurse Shelton had the benefit of reviewing reports from the chief of pediatric neurology at Miami Children's Hospital and also one of the most experienced and respected surgeons who perform nerve and shoulder surgeries on children with brachial plexus birth injuries. Appellants contend that because Nurse Shelton did not need to speak with J.B.'s current physicians, (although Respondent fails to explain what insight these treating physicians would have been able to offer that the leading physicians who did contribute to Nurse Shelton's plan could not), she somehow refuted her own testimony. Nurse Shelton never claimed to have spoken with the prior surgeons or therapists who treated J.B., only that she reviewed their medical records.

[7] The other two opinions cited by Respondent on this issue are also factually inapposite and concern issues related to granting a directed verdict. *See Greenville Cty v. Stover*, 198 S.C. 240, 17 S.E.2d 535 (1941); *Eargle v. Sumter Lighting Co.*, 110 S.C. 560 (1918).

Next, Appellant makes it appear as if J.B. and her entire family were against her receiving any additional surgeries. This too is not reflected in the record. Nurse Shelton was asked whether she knew J.B.'s mom said "she was not interested in having the surgery done?" (R. p. 492, l. 23-25). To this question, Nurse Shelton simply explained that she hadn't heard that. (R. p. 492, l. 23-p. 493, l. 8). In fact, Nurse Shelton explained that when she spoke to Demetria, "she indicated she wanted to do what was absolutely best for Jackie, including surgery." (R. p. 493, l. 6-8). Moreover, the testimony which purportedly showed Demetria was against future surgeries does no such thing. It shows that there was talk of additional surgeries, that additional surgeries had not yet been performed,[8] and that Demetria had not heard whether the biological mother was or was not in support of an additional surgery. (R. p. 161, l. 8-17). To support its assertion that J.B. herself opposed additional surgeries, Appellant quotes the following: "Q. and J.B. said no; right, because she was scared? A. Yes. J.B. says no to a flu shot, so." (R. p. 161, l. 18-19). When defense counsel suggested to Demetria that she previously said "maybe," she responded, "I definitely, it's definitely open." (R. p. 161, l. 20-21). Finally, Respondent asked the biological mother, who does not have custody, whether she previously said no to a surgery offered to her daughter that "would be largely cosmetic." (R. p. 414, l. 9-17). Alana confirmed that she said no to this largely cosmetic surgery that was previously offered. That has no relevance to the surgeries recommended by Dr. Grossman to improve J.B.'s function.

While Respondent tried to make it seem as if J.B. and her family had intentionally not availed J.B. to the recommended treatments by stating that "she has not chosen any of these options," Nurse Shelton explained "chosen" was a poor word and that J.B.'s inability to receive the recommended treatments was more likely the result of either financial constraints or her prior

[8] Respondent strains to understand how a future surgery could have already been performed.

family situation. (R. p. 494, l. 17-p. 495, l. 9). Then Nurse Shelton explained that Dr. Nelson moved from Charlotte to Austin, Texas. (R. p. 495, l. 14-19). This certainly would have made repeat visits to Dr. Nelson impractical.

Appellant next criticizes Dr. Vanderkolk's opinions. Dr. Vanderkolk relied upon his extensive experience and training to evaluate J.B. and reached his expert opinions, to a reasonable degree of certainty. He explained J.B.'s vocational loss due to how her injuries would impact the range of jobs that would otherwise have been available to her. The reliability of his methodology went unchallenged. Moreover, the severity of J.B.'s disability and its permanent nature also went unchallenged. Nevertheless, he explained how his analysis would be affected if J.B. were to overachieve. For instance, Dr. Vanderkolk explained how her earning capacity would be impacted if J.B. did in fact receive a four year college degree. (R. p. 447, l. 20-p. 449, l. 7). He explained that if she were to obtain a college degree, her overall income would be higher, and she would have experienced a lower *percentage* loss of earnings due to her injury. However, he noted that the lower percentage of the higher incomes places the total dollar value of her economic loss very close to the overall economic loss she'd experience if she did not obtain a four year degree. (R. p. 448, l. 19-23). Accordingly, the significance of Respondent's argument on this point is negligible.

Finally, Appellant's attempt to diminish the pain, suffering, grief, and humiliation this child has already suffered, and will continue to suffer, is as callous as it is disingenuous. Appellant presents J.B. as a "happy, healthy, popular, and well-adjusted little girl," who can ride a bike, play soccer, throw a ball, and swims. The trial judge explained how the court was presented with a little girl whose "right arm visibly droops, and she can only raise it about halfway." (R. p. 8). He heard unchallenged testimony from surgeons, neurologists, and physiatrists that this child's injuries are severe and permanent. He watched this child first-hand exhibit severity of her injury in the

courtroom. He saw the photographs of this child in her body cast after one of her surgeries. (R. p. 160, l. 21-23). The court heard testimony that as a baby she could not crawl. (R. p. 146, l. 11-p. 147, l. 6). He learned J.B.'s injury results in hygiene issues due to her inability to "clean herself good." (R. p. 156, l. 10-13). He learned classmates were starting to ask questions. (R. p. 155, l. 12-22). He heard testimony from her custodial father that J.B. came to him in tears and asked him why people ask her about her arm. (R. p. 503, l. 19-p. 504, l. 8). He heard testimony about J.B. repeatedly spilling her drink at a friend's house and then having to sit at a table with the younger children and how she said she wished she was normal. (R. p. 417, l. 13-p. 418, l. 4). After seeing this over the course of a week, the trial court determined that "an award of $337,500.00 on this record is not adequate." (R. p. 17).

C. Case precedent addressing motions for new trial *nisi additur* support the trial court's use of its discretion to grant an *additur* in this case.

Respondent continues forward with its argument that the trial court altered or disregarded the burden of proof in its Order. However, as discussed *supra*, citing to cases which discuss when a judge may grant directed verdict to a plaintiff has no bearing on the standard by which a judge may grant a new trial *nisi additur*. *Carlyle v. Tuomey Hospital*, 305 S.C. 187, 193, 407 S.E.2d 630, 633 (1999), which stood for the proposition that a bill containing charges for penile reconstruction that was unrelated the tortious act should not have been admitted, is also irrelevant to this case. There was no dispute in this case as to whether any of the damages were proximately caused by Appellant's negligent acts. The same is true for Appellant's citation to a case which sought to determine when injury to reputation of real property may be recovered. *Gray v. S. Facilities, Inc.*, 256 S.C. 558, 570-71, 183 S.E.2d 438, 444 (1971). *Gray* provides no guidance to this Court.

In arguing that the trial judge abused his discretion in granting the motion for new trial *nisi additur*, Appellant cites to *Riley v. Ford Motor Co.*, 401 S.C. 1, 757 S.E.2d 422 (Ct. App. 2014).

However, the Court of Appeals in *Riley* limited its "holding to the facts of this case." *Id.* at 20, 757 S.E.2d at 433. Moreover, in March of 2015, the court of appeals affirmed the granting of a new trial *nisi additur* in the unpublished opinion *Beason v. Lowden*, 2015 S.C. App. Unpub. LEXIS 148 (Ct. App. March 11, 2015). In this opinion, the trial court granted a new trial *nisi additur* that was over four times the jury verdict. *Id.* In *Beason*, economic damages were disputed. The jury entered a verdict of $17,000 where economic damages totaled approximately $41,000. *Id.* The trial court granted the motion for new trial *nisi additur* after finding the verdict was "significantly insufficient and inadequate to compensate [Beason] for the injuries which the evidence established." *Id.* The court of appeals affirmed, and noted that "The trial court has the power to grant a new trial *nisi additur* when it finds the amount of the verdict to be merely inadequate." *Id.* citing *Ligon v. Norris*, 371 S.C. 625, 635, 640 S.E.2d 467, 472 (Ct. App. 2006). The Court in *Beason* then noted that the defendant "presented no medical evidence to contradict [the treating physician's] testimony." *Id.* Ultimately the Court concluded the jury verdict did not bear "any logical relationship to the evidence submitted at trial" and was "significantly insufficient and inadequate to compensate [plaintiff] for the injuries which the evidence established." *Id.* This is precisely the analysis and reasoning employed by the trial judge in the case at hand, despite the fact that the trial judge in this case did not have the benefit of reviewing the *Beason* opinion when he entered his Order, as *Beason* had not yet been decided.

A number of cases have upheld the granting of new trials *nisi additur* upon less. In *Graham v. Whitaker*, 282 S.C. 393, 321 S.E.2d 40 (1984) the Court upheld an *additur* several times the jury verdict, based upon the reasoning that "it cannot seriously be argued that plaintiff herein was adequately compensated or even nearly so, for the injuries she sustained." *Id.* at 405. Similarly, in *Waring v. Johnson*, 341 S.E.2d 248, 260, 533 S.E.2d 906, 913 (Ct. App. 2000), the Court affirmed

the granting of an *additur* and noted, "The jury failed to consider Waring's pain and suffering in reaching its verdict." In *Waring*, the Court upheld the doubling of the jury verdict in order to adequately compensate the plaintiff for pain and suffering. The Court noted that Waring "visited numerous doctors for years after the accident," "underwent surgery for a condition . . . aggravated by the wreck," and "found herself unable to continue her previous active lifestyle." *Id.* The Court then concluded, "Indubitably, Waring is entitled to an award for pain and suffering." *Id.*[9]

Luchok v. Vena, 391 S.C. 262, 705 S.E.2d 71 (Ct. App. 2010), presented the situation where damages evidence at trial was "hotly contested." The court determined that where there is sharply conflicting evidence on damages, and only the plaintiff testified concerning her need for the treatment for which she sought recovery and no medical testimony was presented, it was inappropriate for the trial judge to grant a motion for new trial *nisi additur*. *Id.* In fact, Luchok was not even tried on liability, but solely on contesting the damages claimed. *Id.* Clearly, this is not the case currently before this Court. The trial judge in this case highlighted the absence of any refuting evidence concerning J.B.'s injuries as well as the numerous medical expert witnesses and medical records which showed J.B. injuries and damages. In this case, there was no "sharply conflicting evidence" as to damages. The same is true of *Green v. Fritz*, 356 S.C. 566, 590 S.E.2d 39 (2003), another decision addressing another of Judge Manning's granting of an *additur*. *Fritz* was factually similar to *Luchok* where compelling reasons were not presented and where thirteenth juror concepts were inappropriately blended into the *additur* analysis. *Id.*

[9] Numerous other cases have upheld the granting of a motion for new trial *nisi additur*. *See e.g.*, *Stroud v. Stroud*, 299 S.C. 394, 385 S.E.2d 205 (Ct. App. 1989); *Boan v. Blackwell*, 343 S.C. 498, 541 S.E.2d 242 (2001); *Jones v. Ingles Supermarkets, Inc.*, 293 S.C. 490, 361 S.E.2d 775 (Ct. App. 1987); *Chiappetta v. Orr*, 293 S.C. 250, 359 S.E.2d 530 (Ct. App. 1987); *Patterson v. Reid*, 318 S.C. 183, 456 S.E.2d 436 (Ct. App. 1995); *Thomas v. Seay*, 295 S.C. 455, 369 S.E.2d 660 (Ct. App. 1988); *Kalchthaler v. Workman*, 316 S.C. 499, 450 S.E.2d 621 (Ct. App. 1994).

In this case, no opposing physicians, surgeons, neurologists, or physiatrists were called by Appellant to argue this child's injuries, limitations, of future needs are not what the medical records or Respondent's expert physicians stated them to be. No opposing life care planner was hired to dispute the numbers or care needed as presented by Nurse Shelton. No opposing vocational report was submitted. No opposing economist was hired to testify the numbers presented by the Respondent were inflated. Finally, Respondent did not call a single lay witness to testify that this child's limitations were not as severe as the Plaintiff purported them to be. No lay witness was called to offer conflicting or mitigating testimony which showed that this child had not suffered pain, humiliation and grief as a result of her injuries. No witness was called to testify that this child would not continue to suffer the same in the future. Moreover, Appellant's representation of what it established through cross-examination of Respondent's witness is grossly inflated and inaccurate. In truth, Appellant's cross-examination merely established that additional future surgeries had not yet been performed (hence the "future" aspect of these surgeries) and that hypothetically, if this child gets better, outperforms, or overachieves, despite offering no evidence to this effect, she might not be as impaired as the expert witnesses opine she will continue to be.

That the Defendant offered no evidence to refute either the economic or non-economic losses sustained by this child is clearly relevant to assessing the adequacy of a verdict. It is not an abuse of discretion to include as a compelling reason that Appellant offered no evidence to refute or even call into question the damage testimony presented by Respondent. For these reasons, the trial court's order granting Respondent's motion for new trial *nisi additur* should be affirmed.

Finally, to the extent Appellant is challenging the granting of an *additur* as unconstitutional, this issue was not raised to the lower court. Therefore, it has been waived. "Constitutional arguments are no exception to the preservation rules, and if not raised to the trial

court, the issues are deemed waived on appeal." *Herron v. Century BMW*, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011).

II. Additional sustaining ground for affirming and in support of the trial court's granting of Respondent's motion for new trial *nisi additur*:

Respondent should have been permitted to introduce evidence of past medical bills incurred for J.B.'s treatment as well as those medical expenses she would continue to incur until her 18th birthday.

Respondent sought to introduce medical expenses incurred for J.B.'s treatment. (R. p. 511, l. 4-6). Appellant objected on the basis that only the mother and not the child in the child's own name could recover for pre-majority tort related medical expenses. Respondent contended Appellant was raising an affirmative defense not pled and therefore Appellant had waived this argument. Respondent argued the mother had impliedly waived or equitably assigned her right to recover to her child by not seeking recovery in her own name. Finally, Respondent argued the court should abrogate the common law doctrine which precluded a child from recovering for her own medical expenses. At that time, Sam proffered that the medical bills incurred to date totaled $100,055.89. (R. p. 505, l. 7-p. 516, l. 13). Charts of Dr. Wood were proffered that showed J.B.'s total loss, including pre-majority medical expenses, were $576,321.00. (R. p. 593, l. 12-p. 594, l. 3). The court excluded evidence of pre-majority medical expenses. (R. p. 515, l. 22-25). The jury was charged a minor may not recover past medical expenses for her action. (R. p. 678, l. 11-14).

Respondent contends the granting of a new trial *nisi additur* was appropriate since the jury did not hear any testimony concerning J.B.'s already incurred medical expenses and those expenses that J.B. would incur up to her eighteenth birthday. The exclusion of these expenses caused economic losses to be presented to the jury as $214,025 than they would have been.

An argument that pre-majority medical expenses may not be sought in the name of a minor is an affirmative defense. "An affirmative defense conditionally admits the allegations of the

complaint, but asserts new matter to bar the action." *FMI, Inc. v. REMAX, Inc.* 286 S.C. 343, 346-47, 333 S.E.2d 360 (Ct. App. 1985). *See also Black's Law Dictionary* 482 (9th ed. 2009) (an affirmative defense is a "defendant's assertion of facts and arguments that, if true, will defeat plaintiff's or prosecution's claim, even if all the allegations in the complaint are true."). South Carolina courts will deem an affirmative defense not pled as waived, especially when the appellant has been prejudiced by the defendant's failure. In holding that a charitable hospital had to plead the limitation on liability afforded to a charitable entity, the South Carolina Court of Appeals stated that the hospital's "failure to raise its charitable status as an affirmative defense affected both the parties to the action and the manner in which the case was tried to the jury, including what issues were or were not presented to them for resolution." *James v. Lister*, 331 S.C. 277, 282-83, 500 S.E.2d 198, 201 (Ct. App. 1998). In this case, Appellant never raised this defense in its pleadings. Therefore, the trial judge should have deemed this argument waived.

Even if the argument were not waived, Respondent's biological mother waived her right to recover these expenses to the benefit of her child through both implied waiver and equitable assignment. "A parent can waive his or her right to recover for damages properly belonging to the parent, [for example] medical expenses, if these damages are awarded in the child's action." *Betz v. Farm Bureau Mut. Ins. Agency of Kansa*, *supra* (*citing* 59 *Am. Jur. 2d Parent and Child* § 109 (1987). While a child's medical expenses are usually part of the parent's cause of action, "this general rule is not an absolute bar, as when the parents do not assert a claim, or have waived a claim for these expenses." *McNeil v. United States*, *supra* (*citing* 67A *C.J.S. Parent and Child* § 142) (*see also* 67A *C.J.S. Parent and Child* § 331 (2007)). South Carolina recognizes the doctrine of implied waiver. See *Lyles v. BMI Inc.*, 292 S.C. 153, 158-59, 355 S.E.2d 282, 285 (Ct. App. 1987). ("A waiver is an intentional relinquishment of a known right. It may be either express or

implied." (citations omitted)). As Alana waived her right to the benefit of her child, it was error for the trial court to have excluded these expenses. Similarly, South Carolina recognizes the doctrine of equitable or implied assignment. "An equitable assignment is such an assignment as gives the assignee a title which, though not cognizable at law, will be recognized and protected in equity." *Player v. Player*, 240 S.C. 274, 278, 125 S.E.2d 636, 638 (1962). Therefore, a parent may impliedly assign his or her claim for tort-related pre-majority medical expenses by acting as the child's "Next Friend" in a suit in which the child demands pre-majority medical expenses caused by the defendant's tortious conduct, as was done in this case.

Finally, as the necessaries doctrine is an anachronism which no longer serves the policy reasons for which it was originally created, it should be abrogated. While a child may now be held responsible for payment of his own medical bills, he cannot recover for them in his own name. *See Greenville Hospital System v. Smith*, 269 S.C. 653, 239 S.E.2d 657 (1977). The doctrine exists today as a creditor's remedy but does not even protect creditors, as the child is prevented from collecting money from a tort-feasor which could then be used to pay the creditors. *See Trident Reg'l Med. Ctr. V. Evans*, 317 S.C. 346, 351, 454 S.E.2d 343, 346 (Ct. App. 1995) (noting that the necessaries doctrine remains primarily as a creditor's remedy). Today, the doctrine neither protects children, as was its original intent, nor protects creditors, which is the only purported reason for its continued existence. It currently serves only to shield-tort feasors and therefore should be abrogated. Since the rule has no place in modern law, the jury in this case should have been permitted to hear testimony of the expenses this child has already incurred to treat her arm as well as the continued costs up to her eighteenth birthday.

Even if J.B.'s medical bills were not recoverable, the jury should have been allowed to hear the costs associated with previous treatment of J.B.'s injuries. Excluding these bills affected the

jury's perception of the true cost of treating an injury like J.B.'s. It was important for the jury to see that the estimated future costs were in line with previous bills incurred by J.B. The amount of past bills illustrated the reasonableness of the future costs noted in the life care plan.

CONCLUSION

Judge Hill's decision that the verdict rendered did "not reasonably compensate a 10-year-old child for her grievous, life-altering injuries and make her whole, to the extent money damages can," was well supported by compelling reasons. Ultimately, the trial judge who "saw and heard witnesses, watched J.B. demonstrate her deformity to the jury, scrutinized the exhibits, and observed the trial unfold over many days" determined that the "jury's award failed to account for the profound magnitude of her loss." (R. p. 17). His decision was supported by compelling reasons and his granting a new trial *nisi additur* was well within his discretion. For the reasons stated herein, the trial court's grant of Respondent's motion for new trial *nisi additur* was within the court's discretion and supported by the record and South Carolina case precedent. The Order should therefore be affirmed.

Respectfully Submitted,

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October 1, 2015

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas
The Honorable D. Garrison Hill

Appellate Case No. 2014-001973

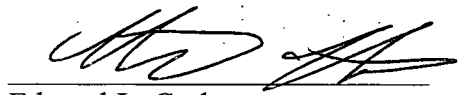
Demetria Orange, as Next Friend of
J.B., a minor, Respondent,

v.

Greenville Hospital System and Greenville
Hospital System Partners In Health, Defendants,
Of which, Greenville Hospital System is the Appellant.

CERTIFICATE OF COUNSEL

The undersigned counsel for Respondent certifies that this Final Brief of Respondent complies with Rule 211(b).



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PROOF OF SERVICE

I hereby certify that one copy of the ***Respondent's Final Brief*** in the above-referenced matter was served by U.S. Mail, postage prepaid, on October 1, 2015 addressed to the following counsel of record:

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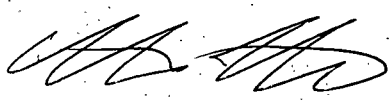
BY: 

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