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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ORANGEBURG COUNTY COURT OF COMMON PLEAS

Honorable Edgar W. Dickson, Circuit Court Judge

Appellate Case No. 2019-001921

Tekayah Hamilton, individually and as parent and guardian ad litem for Robert Lee Middleton, Jr., a minor child under the age of eighteen,.. ..... Respondent

v.

The Regional Medical Center, ...Appellant

REPLY BRIEF OF THE REGIONAL MEDICAL CENTER

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April 2, 2021

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CASES

STATUTES AND OTHER AUTHORITIES

I. THIS CASE IS ABOUT PEDIATRIC NURSING AND IV ADMINISTRATION AND MONITORING AND RESPONDENT'S EXPERT MONICA STOBBS FAILED TO MEET THE REQUIREMENTS OF RULE 702, SCRE, AND GOODING AS IT PERTAINED TO PEDIATRICS

In its brief, Respondent falsely states that Appellant is incorrect about this case being about pediatric nursing, and instead, characterizing it as "IV management safety practice of doing and documenting a saline flush before administering medication." (Br. of Resp. 8) Respondent falsely characterizes Appellant's discussion of blood return and IV management irrelevant on the basis that this case is about whether a flush was done, (Br. of Resp. 6), and that Appellant's arguments regarding Nurse Downing's qualifications are mute or "does not make a difference." (Br. of Resp. 7.) on the basis that the standard of care is the same for pediatrics and adults.

This case *is* about pediatric nursing, and there *are* differences between pediatrics and adults and the care provided to each during IV administration and monitoring. App. Br. 11. There are various physiological differences that vary greatly among infants, children, and adults. App. Br. 11 fn 1, 2, 3. Veins in infants are "obviously smaller" and can be "threadlike." App. Br. 11 fn 2. "Vein fragility and the high acuity levels of young patients can increase the likelihood of infiltration and extravasation, resulting in significant morbidity." App. Br. 11-12, fn 3. Since infants, children, and adults are all different, there are different procedures in place, different equipment used, and different techniques utilized in the IV administration. Trial Tr. 331:4-17, 332:7-12, 15-20, Mar. 17, 2019. It requires a certain skill. *Id.* at 332:7-9.

As this matter was about pediatric nursing, not general nursing, to testify as to the standard of care regarding *pediatric* standard of care for IV administration and monitoring, Nurse

Stobbs was required, by Rule 702 of the South Carolina Rules of Evidence, to possess the "knowledge, skill, experience, training or education" as it pertained to *pediatrics*. Rule 702, SCRE. "To be competent to testify as an expert, 'a witness must have acquired by reason of study or experience or both such knowledge and skill in a profession or science that he is better qualified than the jury to form an opinion on the particular subject matter.'" *Gooding v. St. Francis Xavier Hosp.*, 326 S.C. 248, 253, 487 S.E.2d 596, 598 (1997) (quoting *O'Tuel v. Villani*, 318 S.C. 24, 28, 455 S.E.2d 698, 701 (Ct. App. 1995); *see, e.g.*, *State v. Douglas*, 367 S.C. 498, 508-509, 626 S.E.2d 59 (Ct. App. 2006); *Botehlo v. Bycura*, 282 S.C. 578, 586, 320 S.E.2d 59, 65 (Ct. App. 1984). Nurse Stobbs fails to meet the requirements of both Rule 702 and Gooding as to *pediatric* nursing and IV administration. App. Br. 12-15. Nurse Stobbs has never cared for a pediatric patient; has never started or managed a pediatric IV; does not have any education or knowledge as to pediatric nursing or IV administration; and did not perform any research, independent study, or review any medical literature in preparation of formulating her opinions. App. Br. 13. Moreover, Nurse Stobbs actually testified in direct contradiction with the medical literature regarding obtaining blood return, as well as testimony from Nurse Downing and Cynthia Hurley, both of whom actually practice in pediatrics. App. Br. 13-14. This argument is not irrelevant, as it is further proof of Nurse Stobb's lack of experience or knowledge regarding *pediatric* nursing and IV administration.

Respondent incorrectly states in its brief that Nurse Stobbs "is qualified in the field of IV management." Resp. Br. 11. Nurse Stobbs was qualified as to *general nursing*, not the field of IV management. Trial Tr. 10:4-6, Dec. 22, 2020; Trial Tr. 78:1-9, Mar. 17, 2019. Moreover, Respondent argues that she was "not required to specifically practice in pediatric IV

management." Resp. Br. 11. However, the argument is not that Nurse Stobbs has to specifically practice in pediatrics. The issue is not over a *defect* in amount or quality of experience or knowledge. App. Br. 13. Rather, the issue is whether Nurse Stobbs possessed *any* of the required "knowledge, skill, experience, training or education" "acquired by reason of study or experience or both" such that she is "better qualified than the jury to form an opinion on" *pediatric* nursing and *pediatric* IV administration and monitoring. Rule 702, SCRE; *Gooding*, 326 S.C. at 253, 487 S.E.2d at 598; App. Br. 12-13. Nurse Stobbs must have gained knowledge or experience in *pediatric* nursing and IV administration by some means to be qualified to testified as to the standard of care of the same. She has no such knowledge or experience in *pediatric* nursing and IV administration, and therefore was not qualified to testified as to the standard of care for *pediatric* nursing and IV administration. App. Br. 12-15.

Respondent is incorrect that Appellant's arguments against the qualification of Nurse Stobbs goes to the weight and not admissibility of her testimony. Br. of Resp. 8. Similar to the orthopedic surgeon in *Botehlo*, Ms. Stobbs has had no personal experience or training at all in pediatric nursing or IV administration. App. Br. 13. Respondent is incorrect in that *Botehlo* is not easily distinguishable from the facts of this matter. Resp. Br. 10. In *Botehlo*, the court held that an orthopedic surgeon was not qualified to testify on the standard of care for podiatrist where the orthopedic surgeon 1) had no training in podiatry, 2) was not familiar with any journals or periodicals in podiatry, and 3) was not familiar with the surgical procedure performed. *Botehlo v. Bycura*, 282 S.C. 578, 586, 320 S.E.2d 59, 65 (Ct. App. 1984). Similar to *Botehlo*, Nurse Stobbs 1) has had no training, education, or any experience at all in *pediatric* nursing or IV administration; 2) was not familiar with any medical literature regarding *pediatric* nursing or IV

administration and had not performed any research, independent study, or review any medical literature as to *pediatric* nursing and IV administration in preparation of formulating her opinions; and 3) has never cared for a *pediatric* patient and has never started or managed a *pediatric* IV. App. Br. 13; Trial Tr. 79:24-25, 108:22-110:21, 103:14-104:8,108:22-110:21, 111:14-23, Mar. 17, 2019; Stobbs Dep. 13:9-24, 26:15-24. Thus, similar as to how the orthopedist in *Botehlo* "not versed at all in the practice of podiatry," *McMillan v. Durant*, 312 S.C. 200, 204, 439 S.E.2d 829, 832 (1993) (referring to *Botehlo*), Nurse Stobbs is not versed at all in the practice of *pediatric* nursing and IV administration.

Respondent relies on *McMillian, Lee, Graves,* and *Creed* for its argument that Nurse Stobbs lack of experience in pediatrics is not sufficient in prohibiting her from testifying as to the standard of care for pediatric nursing and IV administration. Resp. Br. 8-10; *McMillan v. Durant*, 312 S.C. 200, 439 S.E.2d 829 (1993); *Lee v. Suess*, 318 S.C. 283, 457 S.E.2d 344 (1995); *Graves v. CAS Med. Sys.*, 401 S.C. 63, 735 S.E.2d 650 (2012); *Creed v. Columbia*, 310 S.C. 342, 426 S.E.2d 785 (1993). However, these cases are easily distinguishable.

Unlike *McMillian*, where a neurosurgeon was qualified to testify as to the appropriate standard of care of nursing on the basis that he taught nursing courses at a university, *McMillan*, 439 S.E.2d at 833, and *Lee*, where a plastic surgeon who was qualified to testify as to where he was a professor who taught family practitioner residents how to identify skin cancers and perform biopsies, *Lee*, 457 S.E.2d at 346, Nurse Stobbs has not had any experience teaching any courses regarding pediatric nursing or pediatric IV administration. In fact, she has no experience —knowledge or skill, training or education—whatsoever in pediatric IV administration. App. Br. 12-13.

Unlike in *Graves,* where the doctor stayed current on sudden infant death syndrome (SIDS) literature and routinely encountered SIDS in her practice, *Graves*, 401 S.C. at 78, Nurse Stobbs was unfamiliar with the medical literature regarding pediatric IV administration and management and had not done any research during her time spent prepping for this trial. App. Br. 13. Further, not only does she not "routinely encounter" pediatrics in her practice, she has *never* treated a single pediatric patient during her *entire* career. App. Br. 12-13. She has never started or monitored an IV in a single pediatric patient in her nursing career. App. Br. 12-13.

This case is also not similar to *Creed.* In *Creed*, the general practitioner who was qualified to give an opinion on the plaintiff's mental and emotional injuries had personally examined the plaintiff and referred him to a neuro-psychologist as a part of his course of treatment. *Creed*, 426 S.E.2d at 786. In the present matter, Nurse Stobbs did not personally treat, examine, or care for the minor Respondent and did not refer him to an outside specialist as a part of his course of treatment. In fact, she has not personally treated or care for *any* pediatric patient. App. Br. 12-13.

Additionally, in its brief, Respondent maintains that Appellant relies on *Gooding* but that *Gooding* supports Respondent's position. Resp. Br. 10. However, the present matter is also distinguishable from *Gooding.* In *Gooding*, the EMT who was qualified to testify as to intubation procedure had personal, hands-on experience with intubation and had intubated over 100 patients. *Gooding*, 326 S.C. at 251. This case is about *pediatric* IV management, and Nurse Stobbs has had *no experience whatsoever* in pediatric IV management or pediatric nursing. App. Br. 12-13.

Respondent's expert Nurse Stobbs was the only witness it produced as it pertained to two critical issues. The jury returned a verdict that was excessive in light of the testimony and evidence presented at trial. Thus, the issue concerning her qualification or lack of *does* matter and *does* make a difference. App. Br. 15-16.

In its brief, Respondent incorrectly argues that Appellant's argument regarding Nurse Stobbs' testimony on the pediatric standard of care for IV administration and monitoring was not preserved for appeal. Resp. Br. 11-12. In its Motion in limine, counsel for Appellant made it known to the court that he felt like this was a situation in which Respondent was attempting to have her qualified in pediatric nursing. Trial Tr. 8:13-17, 8:20-9:19, Dec. 22, 2020. The Trial Court specifically indicated Ms. Stobbs would be qualified in general nursing and not pediatrics, as it acknowledged she had no prior experience with regards to pediatrics. Trial Tr. 8:18-19, 9:20-10:6, Dec. 22, 2020. In its decision, the Trial Court stated that it would qualify her for nursing care but not neonatal. Trial Tr. 10:5-6, Dec. 22, 2020. Respondent incorrectly maintains the position that Appellant's argument was not preserved but it was never objected to during trial. Br. of Resp. 11. However, during the qualification of Nurse Stobbs at trial, counsel for Appellant contemporaneously objected and stated on the record that Nurse Stobb's qualification was "subject to my prior objection." Trial Tr. 78:5-6, Mar. 17, 2019.

Nurse Stobbs was qualified as an expert in nursing, *general* nursing, not pediatrics or neonatal and not in the "field of IV management" as stated in Respondent's brief (Resp. Br. 11). Trial Tr. 10:4-6, Dec. 22, 2020; Trial Tr. 78:1-9, Mar. 17, 2019. As suspected, Nurse Stobbs did in fact testify during trial regarding the standard of care for *pediatric* nursing and IV

administration and care. All supporting arguments and authority as it pertains to Nurse Stobb's testimony regarding pediatric nursing and IV administration and monitoring have already been discussed in this brief, as well as Appellant's Initial Brief. *See* Rule 702, SCRE; *Gooding,* 326 S.C. 248, 487 S.E.2d 596; *Botehlo*, 282 S.C. 578, 320 S.E.2d 59; App. Br. 9-16.

II. GROSS NEGLIGENCE IS THE STANDARD THAT APPLIES IN THIS MATTER AND RESPONDENT FAILED TO MEET THEIR BURDEN

Gross negligence is the standard that applies in this case. App. Br. 17; Trial Tr , 214:12-215:16, 434:10-17, Mar. 17, 2019. *Stewart* is the governing law in this matter. *See Stewart v. Richland Mem'l Hosp.*, 350 S.C. 589, 592, 567 S.E.2d 510, 511 (Ct. App. 2002). As defined by S.C. Code Ann. § 15-78-30(j) and *Smith v. TRMC,* Appellant is a governmental entity, and therefore this matter is strictly governed by the confines of the South Carolina Torts Claims Act. App. Br. 17; *see Smith v TRMC,* 713 S.E.2d 656 (Ct. App. 2011); S.C. Code Ann. §15-78-200. The South Carolina Torts Claims Act limits liability of a governmental entity unless there is gross negligence. S.C. Code Ann. § 15-78-60(25); App. Br. 17. Respondent argues that gross negligence is the applicable standard because "because it concerns a nurse's administration of medication and not 'supervision, protection, control, confinement, or custody' of a patient." Br. of Resp. 15, fn 2. However, although Stewart involved the custody of an inmate, it also involved the monitoring of him as a patient. *Stewart,* 350 S.C. 589, 591-592; Trial Tr. 213:14-22, Mar. 17, 2019. Therefore, the gross negligence standard is applicable in cases involving the monitoring of patients, and thus, as the Trial Court agreed, is applicable in this case.

Respondent is incorrect in its presumption that Appellant is arguing that the words "gross negligence" must have been used for the evidence of the same to exist. Resp. Br. 15. Appellant's

position is that Respondent failed to establish *any* evidence of gross negligence, and thus, they failed to meet their burden and a directed verdict should have been returned in favor of Appellant. App. Br. 18.

Respondent believes the issue in this matter is whether the IV was flushed before administering ampicillin, and Respondent's theory is based on "if it wasn't documented, it wasn't done." Resp. Br. 3. However, this theory is directly contradictory to the testimony as to the policies and procedures of pediatric nursing and IV administration at The Regional Medical Center (RMC) and is based on a complete misread of the policy itself. In its brief, Respondent maintains that there was evidence that RMC "consciously failed to do or document a saline flush." Resp. Br. 16. Respondent bases assertion by stating "RMC's policies require a saline flush prior to administering medication and documentation of that flush." Resp. Br. 16. However, this is factually incorrect and blatantly mischaracterizing the testimony as to what the policy requires.

Both Nurse Downing and Cynthia Hurley testified numerous times that flushing a site is part of the assessment with administering a medication, and there is no way to give the medication without flushing the IV first. Trial Tr. 272 25-273:8, 273:18-274:1, 276:22-25, 277:5-10, 280:2-281:1, 364:2-19, 365:9-13, Mar. 17, 2019. It is considered a part of the process and therefore it is not to be documented separately. *Id.* at 284:19-21. Even Respondent acknowledged in its brief that Nurse Downing testified it is her practice to flush prior to administering medication (Resp. Br. 3); that Downing testified flushing prior to administration of medication is "ingrained in you in nursing school" and "it makes no sense not to" flush (Resp. Br. 16); and that Downing testified there is "no way to really tell if the site is open and flowing without flushing it" (Resp. Br. 17).

The issue comes down to the fact that there are two types of flushes and different policies and procedures for each: 1) flushes done when administering medication, and 2) four-hour flushes that are automatically populated in the MAR computer system. The flushes that are given prior to and after administering medication are considered a part of the process for administering medication, and they are not to be documented separately in the MAR system. Trial Tr. 284:19-21, 336:19 -337:2, Mar. 17, 2019. In fact, there is not a flow sheet or space in which to document it. *Id.* at 284:19-21. In contrast, the flushes that task automatically in four-hour increments in the computer MAR program automatically populate when the ordering physicians puts in the order for the IV. *Id.* at 285:18-23. Although the timing of these flushes could align with the administration of medication, these flushes are not associated with medication administration. *Id.* at 275:23. These four-hour flushes are a part of an intermittent, not continuous, IV schedule, as was the case here, and are to be documented pursuant to RMC policy. *Id.* at 274:6-19, 274:23-275:1, 275:19-276:9, 364:14-19. Per RMC policy, infants are to be flushed in four-hour increments, which is a different in adult IV administration. *Id.* at 331:4-8. Nurse Downing and Cynthia Hurley both testified several times that although these four hour flushes automatically populate in the system to be tasked at a certain time, it is not always appropriate to do those flushes at that time. It would not be appropriate when a nurse has already flushed the IV prior to that time as part of the process of administering a medication. *Id.* at 331:1-3, 365:18-19. If a medication is already being administered when the four-hour flush tasks, it would not be appropriate to flush at that time and would instead be appropriate once that medication has finished being administered. *Id.* at 285:2-7. It would also not be appropriate to flush if it has infiltrated. *Id.* at 285:7-9, 343:4-8.

The very notable and important distinctions between these two flushes that were discussed at length during trial. Respondent is basing its position on that Downing did not remember doing a flush prior to administering the ampicillin and "if something is not documented, then it was not done." Resp. Br. 17. Respondent is misreading the RMC policy, mischaracterizing the testimony, and attempting to make it seem like Nurse Downing did not follow the correct policy, when in fact, she and Appellant's expert Cynthia Hurley, testified that she did, in fact, follow RMC policy and procedure. Although Nurse Stobbs could not recall specifically flushing at that particular time due the length of time that has transpired, she testified that flushing prior to administering medication is a part of the process, is "ingrained in you in nursing school,"and "it makes no sense not to" flush. *Id.* at 280:21-281:1. Moreover, she testified it was not documented because it was not supposed to be, as it was considered a part of the process for administering medication, and there was not a place in the computer system to document it separately. *Id.* at 272:25-273:8, 273:12-14.

Not only did Nurse Downing testify that she complied with the policy and that at no time she did see an infiltratin score of 5, Trial Tr. 303:25-305:21, Mar. 17, 2019, Cynthia Hurley, in her testimony, gave a detailed description and timeline of the flushes that Nurse Downing performed in her treatment and care of the minor. Nurse Downing began working at 6:45 pm and got a report saying the patient's hand was flushing well. Trial Tr. 327:12, Mar. 17, 2019. At 7:30 pm, Nurse Downing wrote her nurse's note and documents indicate the patient was resting in his mother's arms and the IV flushing properly. *Id.* at 328:6, 333:25-334:3, 336:11-16. The first IV check was at 7:44. *Id.* at 328:7, 21-24. A four-hour flush was tasked at 8 pm, but a previous nurse had already flushed when administering an antibiotic, so it did not make sense to do it at the time

and was instead done at 9:19 p.m. *Id.* at 330:9-331:10. At 10:05 pm Nurse Downing performed an IV check and flush. *Id.* at 333:4-10. At 11:08 p.m. Nurse Downing administered ampicillin, which would have included a flush before and after administration of medication. *Id.* at 336:19-337:2. At 11:23 p.m. she checked the IV; it was documented that the IV infiltration score was 0, phlebitis score was 0, and there were no problems. *Id.* at 337:8-338:8. Nurse Downing went in again at 11:44 p.m. for another IV administration and flush. *Id.* at 338:10-17. Vitals were taken at 11:59 p.m. and were normal. *Id.* at 338:19-21.

A four-hour flush was tasked at midnight; however, it tasked after Claraforan, an antibiotic, was given at 11:44 p.m. *Id.* at 339:1-9. Since it had just been flushed during that process of administering that medication, the IV was flushed after the completion of the administration of Claraforan. *Id.* at 339:1-12. It would have made no sense to give it at midnight. *Id.* at 365:18-19 . Nurse Downing checked the IV at 12:37 a.m. and performed the flush at 1:04 a.m. *Id.* at 339:11-12. The minor had a phlebitis score of zero, infiltration zero, no signs of complication, and was sleeping. *Id.* at 307:4-9, 339:15-23.

Nurse Downing then checked on the minor as a part of her periodic nursing rounds. *Id.* at 339:24-340:3. At 2:30 a.m. a note was made in the nursing charts that the patient was asleep, no signs of distress, and will continue to monitor. *Id.* at 341:7-12. At 2:41 a.m. Nurse Downing performed another IV check. *Id.* at 340:9-12. At 2:43 vitals were assessed by a nursing assistant and were confirmed to be okay by Nurse Downing at 2:49 a.m. *Id.* at 340:22-341:6. At 4:04 Nurse Downing performed another IV assessment that showed an infiltration score of zero and phlebitis score of zero. *Id.* at 341:14-24. Cynthia Hurley testified that this 4:04 a.m. assessment "certainly met the standard of care." *Id.* at 350:9-14.

Ampicillin medication was administered at 4:27 a.m.. *Id.* at 341:25-342:4. Nurse Downing testified that when she gave the medication, she assessed the site and it was 0 and flushing well. *Id.* at 292:12-14. A four-hour flush tasked at 4:45 a.m., but Nurse Downing and Cynthia Hurley both testified that it was not appropriate to flush at that time because medication was already infusing and was not appropriate to flush after the medication was finished being administered because the IV had infiltrated. *Id.* at 285:4-5, 342:22 -343:8. The medical records indicate at 4:50 a.m. Nurse Downing had a discussion with the Respondent Tekeyah Hamilton about the infiltration, discharged the IV antibiotics, stopped the pump from administering anymore ampicillin, removed dressing, removed peripheral IV removed, noted catheter intact, and called the physician. *Id.* at 343:21-345:3, 346:17-21. Nurse Downing testified that she went in as soon as the alarm sounded, and "you do the best you can" with regards to charting real time because "[o]obviously, at the moment the more pressing circumstance would be to assess the patent and follow proper procedures for removing an IV." *Id.* at 286: 22-287:5. Cynthia Hurley testified that Nurse Downing took the appropriate course of action. *Id.* at 343:14-20.

At 5:16 and 5:17 a.m., vitals were confirmed and the IV was removed. *Id.* at 347:3-4. At 6 am the patient was assessed and was asleep. *Id.* at 347:7-10. At 6:22 and 6:26 a.m. vitals were confirmed, and at 6:45 a.m., Nurse Downing gave a shift report to another nurse as her shift was ending. *Id.* at 347:13-14.

Cynthia Hurley testified that not only did Nurse Downing abide by the standard of care and do everything she was supposed to do, but she actually exceeded the standard of care. *Id.* at 347:19, 352:8 - 354:13, 356:20-357:4, 371:22-23. Ms. Hurley testified that according to RMC's policy, "The phlebitis and infiltration scale is to be utilized to address IV site conditions a

minimum of once per shift. That's all she had to do." *Id.* at 353:11-18. However, Nurse Downing checked on the minor and the IV about every hour and gave seven flushes during her twelve hour shift when the policy required one flush every four hours. *Id.* at 353:11-14. Nurse Downing assessed the IV 19:44, 20:54, 22:05, 23:23, 0:37, 1:00, 2:42 and 4:04. *Id.* at 354:3-10. She only had to do one of these assessment per RMC policy. *Id.* at 331:6-8; 354:11-13. This is evidence that Nurse Downing not only followed protocol, but she *exceeded* it and exceeded the standard of care required.

Contrary to Respondent's brief, Respondent did not put forth any evidence of conscious failure to act or intentionality. In fact, Nurse Stobbs had no opinion as to the intentional conduct of Nurse Downing. Br. of App. 19. Respondent failed to put forth evidence that Nurse Stobbs failed to abide by RMC policy, and in fact, there was much testimony to the contrary. Furthermore, Nurse Stobbs agreed that just because there is an IV infiltration does not mean there is negligence and that it is a known risk and admitted to having had IVs infiltrate without having been negligent herself. Br. of App. 19. This is not a situation of "competing evidence" such that "evidence yields more than one reasonable inference or its inference is in doubt" as suggested in Respondent's brief. *See* Resp. Br. 15 & 17. Respondent did not put forth "any evidence. . .to support the jury verdict." *See* Resp. Br. 17. Respondent did not put forth any evidence establishing gross negligence, and therefore did not meet their burden and the jury's verdict is not supported by the evidence. A directed verdict or JNOV should have been granted.

III. RESPONDENT TEKAYAH HAMILTON'S VERDICT AWARD WAS EXCESSIVE AS SHE WAS LIMITED TO PAST AND FUTURE MEDICAL DAMAGES

As discussed previously, this case is subject to the limitations of the South Carolina Torts Claims Act. In *Wright*, the court in finding that a parent may recover medical expenses separately from the child's claim, provided that parent's claim for loss of services and medical expenses resulting from the injury of a minor child is within the tort claims act statutory definition of "loss." *Wright v. Colleton Cnty. Sch. Dist.*, 301 S.C. 282, 289-90, 391 S.E.2d 564 (1990).

Respondent relies on *Doe v. Greenville County School District.* Resp. Br. 32-34. *Doe v. Greenville Cnty. Sch. Dist.*, 375 S.C. 63, 651 S.E.2d 305 (2007). In *Doe*, the parents argued that the trial court erred in dismissing their claim for loss of consortium as it pertained to their child. The Supreme Court disagreed. What Respondent is relying on in the case is a text pertaining to a description of what was allowed at common law.

> At common law, a father possessed the right to maintain an action for the injuries of his minor child. This right was based upon the concept that a father was entitled to compensation for the loss of services and earning capacity of his minor child. Additionally, the father could recover for other pecuniary losses, including medical expenses incurred as a result of the injury.

Id. at 68 (internal citations omitted). The Court went on to explain that in *Taylor*, the Court, in declining to recognize a cause of action for loss of parental consortium, "held that the determination of which relationships may give rise to a loss of consortium claim in South Carolina is one best left to the discretion of the legislature."*Id.* at 69 (quoting *Taylor v. Medenica,* 324 S.C. 200, 222, 479 S.E.2d 35, 47 (1996)). The Court further explained that in *Kirkland*, the South Carolina District Court adopted the *Taylor* analysis and found "that South Carolina law did not provide a cause of action for loss of consortium of a child or for filial consortium." *Id.* (quoting *Kirkland v. Sam's East, Inc.*, 411 F.Supp.2d 639, 641 (D.S.C.2005)). The Court in *Doe*

extended *Taylor* and held "that South Carolina law does not recognize claims for loss of filial consortium" as "[s]uch rights did not exist under the common law, and the legislature has not provided such a right by statute." *Id.*

> ...our common law only allowed a parent to maintain an action for the loss of a child's services and earning capacity. These common law claims did not include the intangible losses of aid, companionship, and society which have traditionally defined loss of consortium claims. Accordingly, in absence of some action from the legislature, this Court has no authority upon which it could rely in finding that South Carolina law recognizes claims for loss of filial consortium.

Id. 69-70.

In 2017 the Court was presented with the issue of whether a minor may bring an action for her own medical expenses. *Patton v. Miller,* 420 S.C. 471, 804 S.E.2d 252 (2017). The Court stated that this invoked the"real party in interest" requirement of Rule 17(a) of the South Carolina Rules of Civil Procedure (at 479-80) and found that a parent is the proper party in interest with respect to past and future medical expenses while the child is a minor. *Id.* at 479-80.

Based on previous argument regarding Respondent's failure to establish evidence of gross negligence, Appellant maintains its position that a directed verdict, JNOV, or in the alternative, a new trial, should have been granted, as the verdict rendered was shockingly disproportionate, wholly unsupported by and contradictory to the evidence presented. However, in the event the court disagrees, Appellant believes its motion for a new trial *nisi remittitur* should have been granted, as the verdict was, at the very least, merely excessive in light of the evidence presented, and the damages are subject to the above limitations.

Loss of services is not at issue in this case. Therefore, Respondent Tekeyah Hamilton is limited to past and future medical damages only. Respondent presented past and future medical

costs in the amount $20,854.00. Trial Tr. 412:24 - 413:12, Mar. 17, 2019. This included $4,699 TRMC bills; $635 for Dr. Devito; future surgery $2500; $12,000 future hospital charge; and $1,020 for steroidal injection. *Id.* As loss of service is not at issue in this matter, these past and future medical bills, which total $20,854.00, is all Respondent Tekayah Hamilton is entitled to recover. Therefore, the jury verdict for Respondent Tekayah Hamilton in the amount of $135,477.00 must be reduced to $20,854.00.

IV. OTHER ARGUMENTS: PHOTOGRAPHS, REQUEST TO ADMIT, TESTIMONY OF CYNTHIA HURLEY. EXCESSIVE DAMAGES REGARDING MINOR

For sake of brevity, as a response to Respondent's arguments as to photographs of minor's hand, Request to Admit, testimony of Cynthia Hurley regarding gross negligence, and excessive verdict rendered to minor, please see Appellant's Initial Brief.

CONCLUSION

For the reasons stated, Appellant respectfully requests the Appellate Court to reverse the decision of the Trial Court and dismiss this action with prejudice or, in the alternative, reverse the decision of the Trial Court and grant Appellant a new trial.

Respectfully submitted,

April 2, 2021

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1220 Senate St.
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RE: Tekayah Hamilton, individually and as parent and guardian ad litem for Robert Lee Middleton, Jr., a minor child under the age of eighteen v. The Regional Medical Center
Case No.: 2015-CP-38-01234
Appellate Case No.: 2019-001921

Dear Ms. Kitchings:

Enclosed for filing, please find the Initial Brief of The Regional Medical Center and, Designation of Matter and Proof of Service with the needed corrections as referenced in your letter dated April 6, 2021, in this matter.

Yours Truly,

Michael C. Tanner

MCT/ls

cc: Jonathan F. Krell, Esquire (via e-mail jonathan@uricchio.com) and U. S. Mail
David Williams, Esquire (via e-mail david@williamsattys.com and williamsdr@williamsattys.com and U. S. Mail
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Jenny Abbott Kitchings
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