THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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May 20 2021
SC Court of Appeals

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas

Edgar W. Dickson, Circuit Court Judge

Appellate Case No. 2019-001921

Tekayah Hamilton, individually and as parent and guardian ad litem for Robert Lee M. Jr., a minor child under the age of 18, ……..……Respondent,

v.

Regional Medical Center,..……...Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

This is an appeal from a jury verdict for the Plaintiffs in a medical negligence trial arising out of an IV infiltration burn injury of a five-week-old boy. The lower court granted in part and denied in part the Defendant's post-trial motions.

On October 7, 2015, Respondent Tekayah Hamilton, individually and as parent and guardian ad litem for Robert Lee M., Jr., a minor child under the age of eighteen, (collectively "Hamilton") filed this action against Appellant the Regional Medical Center ("RMC") for medical negligence. (R. pp. 17-23). RMC filed an answer generally denying the allegations. (R. pp. 29-33).

The parties tried the case from May 7-9, 2018, before the Honorable Edgar W. Dickson. (R. p. 60). The jury returned a verdict finding RMC gross negligently and awarding Tekayah $135,477.00 and her child $1,127,280.00. (R. p. 535).

On May 17, 2018, RMC filed two post-trial motions. It filed a post-trial motion for judgment notwithstanding the verdict or, alternatively, for a new trial or a new trial *nisi remittitur*. (R. pp. 536-49). RMC also filed a motion to reduce the child's damages to the $300,000.00 statutory cap pursuant to S.C. Code § 15-78-120(a) (2005) and to reduce Tekayah's damages to the amount of the medical expenses. (R. pp. 552-54). Hamilton filed a memorandum in opposition to the motions. (R. pp. 556-71).

On October 25, 2019, the lower court granted the motion to reduce the child's damages to $300,000.00 and denied all other motions. (R. pp. 2-10). On November 19, 2019, RMC filed a notice of appeal. (R. p. 585).

FACTS

On October 25, 2014, Robert Lee M., Jr., ("R.J.") was admitted to RMC for a high fever. (R. p. 97). Five days later, R.J. left the hospital with a third-degree burn injury to his right hand because the IV antibiotics RMC administered infiltrated and burned his hand rather than entering his vein. (R. pp. 117, 233). R.J. was five weeks old. (R. p. 97).

Jamie Downing is an RMC nurse who treated R.J. during his hospital admission. She had worked as a nurse for less than three months and been allowed to work on her own for about two weeks when she treated R.J. (R. pp. 271-72).

RMC did not initially know the cause of R.J.'s fever but started him on an IV antibiotic therapy in case he had an infection. (R. p. 97). RMC's policies state that, before putting medication into an IV, the nurse is required to flush the IV with normal saline. (R. pp. 98-99, 301, 495). The saline flush is a way for the nurse to make sure the IV is properly in the vein so that the medicine will go into the vein and not the skin. (R. pp. 110, 159). Infiltration occurs when medication inserted into an IV goes somewhere besides the vein and can cause injury. (R. pp. 110, 144).

In the early morning of October 28, 2014, Downing administered the antibiotic ampicillin into R.J.'s IV. (R. p. 101). About twenty minutes later, R.J.'s hand was swollen with a dark spot and he was "really crying" so much that Tekayah buzzed the nurses' station. (R. pp. 163-64, 299). Tekayah described R.J.'s hand as turning black with a lump full of fluid on it that burst the next day. (R. pp. 165-66, 168). The antibiotic Downing gave R.J. through the IV caused a third-degree burn to his right hand because it infiltrated outside of his vein. (R. pp. 112, 117, 289 lns. 2-5).

The parties disputed whether Downing flushed the IV with saline before she administered the ampicillin. R.J.'s medical records do not document a saline flush before the antibiotic. (R. p. 101). RMC's policies state: "Flushing the INT with saline is to be documented on the eMAR [electronic medical record]." (R. p. 495 no. 12). Downing testified RMC's policies "are direct instructions" and there is "not room for interpretation" of them. (R. p. 273). Hamilton's expert witness testified: "If it's not documented, it wasn't done." (R. pp. 104 ln. 25, 111, 159). Downing does not remember administering a saline flush prior to ampicillin that morning but testified it is her practice to flush prior to giving medication. (R. p. 288).

R.J. left RMC on October 30, 2015, with a burn injury that required fifteen visits to a wound care center. (R. p. 168). Dr. Peter DeVito, an expert in plastic surgery, examined R.J. in February 2015, when he was four months old. (R. p. 231, 233). He testified R.J.'s burn injury was "too contaminated for a skin graft" and took "a lot of wound care to heal." (R. p. 233, 235). The burn resulted in keloid scar tissue. (R. p. 233). A keloid is a "tumor of scar tissue" that "invades" the skin surrounding it and causes painful burning and itching symptoms. (R. p. 233).

On October 7, 2015, Hamilton filed this action against RMC for medical negligence. (R. pp. 17-23).

RMC filed two pre-trial motions relevant to this appeal. First, it moved to exclude Monica Stobbs, Hamilton's nursing expert, from testifying at trial. (R. pp. 522-25). RMC argued Nurse Stobbs was not qualified to testify about IV therapy for pediatric patients because she had not administered IV therapy to a pediatric patient and did not review literature specifically about IV therapy for a pediatric patient. (R. pp. 522-25, 44-45). Hamilton argued that Nurse Stobbs testified the administration and monitoring of an IV is the same for a pediatric and adult patient, and RMC's argument goes to Nurse Stobbs' credibility rather than her qualifications. (R. p. 43). The lower court ruled it would qualify Nurse Stobbs as a nursing care expert and RMC could "make all the hay you want to" about her pediatric experience. (R. pp. 45-46).

Second, RMC argued three photographs of R.J.'s hand should be excluded because they are inflammatory. (R. pp. 48-49). The lower court reviewed the photos and denied the motion. (R. pp. 50-51).

On May 7-9, 2018, the parties tried the case before the Honorable Edgar W. Dickson. (R. p. 60). The parties' experts disagreed as to whether Downing performed a saline flush before administering the antibiotic to R.J. and whether the IV management standard of care is the same for adult and pediatric patients.

Nurse Stobbs testified the standard of care for IV management is the same for pediatric and adult patients. (R. pp. 94-95, 114, 119-20, 126, 141-42). The nurse must flush the IV with saline before administering medication to ensure that the IV is going into the vein. (R. pp. 110, 112, 115-16). This is required by RMC's policies and procedures. (R. p. 495). Nurse Stobbs testified that RMC breached the standard of care because Downing did not do a saline flush before administering the medication to R.J. on October 28. (R. pp. 116-17, 159).

After deliberating for three hours, the jury returned a verdict finding RMC's gross negligence caused R.J.'s injuries. (R. pp. 444, 447, 455-56, 535). The jury awarded Tekayah $135,477.00 and R.J. $1,127,280.00. (R. p. 535).

RMC filed two post-trial motions. First, it moved for JNOV or, in the alternative, a new trial. Relevant to this appeal, RMC argued: (1) Nurse Stobbs was not qualified to testify about pediatric IV management, (2) Hamilton did not establish RMC's gross negligence, (3) the lower court should have excluded photographs of R.J.'s hand, (4) the lower court should have allowed RMC's expert, Cynthia Hurley, to testify that RMC was not grossly negligent, (5) the lower court should not have allowed Hamilton to publish to the jury her responses to RMC's requests to admit, and (6) the lower court should grant a new trial absolute or *nisi remittitur* because the verdict is disproportionate to the evidence. (R. pp. 536-49).

Second, RMC moved to reduce R.J.'s damages to the $300,000.00 statutory cap in the South Carolina Tort Claims Act and to reduce Tekayah's damages to $20,854.00, the amount of the medical expenses. (R. pp. 552-54).

Hamilton filed a memorandum in opposition to the motions. (R. pp. 556-71). On October 25, 2019, the lower court issued an Order granting RMC's motion to reduce R.J.'s damages to the statutory cap of $300,000.00 but denying the motion to reduce Tekayah's damages. (R. pp. 5-7). The court denied the motion for JNOV and in the alternative a new trial absolute or *nisi remittitur* in its entirety. (R. pp. 7-10).

STANDARD OF REVIEW

Because there are multiple standards of review applicable to this appeal, the standard of review is addressed in the argument section for each issue.

ARGUMENT

The evidence in this case came down to a factual dispute about Downing's conduct and a battle of the experts. This is commonplace. The jury believed and accepted Hamilton's presentation of the facts. Over the course of the trial, based on the evidence admitted, the principal breach of the standard of care presented to the jury was that RMC, through Downing, failed to perform a saline flush before administering the IV medication. (R. p. 395). The issue Respondents presented to the jury was "did the nurse at The Regional Medical Center fail to flush?" (R. p. 395 lns. 12-13). This makes all of RMC's discussion about blood returns and other IV management irrelevant.

The majority of the issues on appeal are subject to an abuse of discretion standard, and the evidence in the record and the applicable law demonstrate that the lower court properly exercised its discretion. As to the remaining issue of RMC's motion for a JNOV, there is ample evidence that RMC breached the standard of care. RMC's disagreement with Hamilton's expert is nothing more than a jury issue. This Court should affirm.

I. THE LOWER COURT CORRECTLY QUALIFIED NURSE STOBBS AS AN EXPERT AND ALLOWED HER TO TESTIFY ABOUT THE STANDARD OF CARE.

The lower court properly exercised its discretion to qualify Nurse Stobbs as a nursing expert. (R. p. 93). "The qualification of an expert witness and the admissibility of the expert's testimony are each matters largely within the trial judge's discretion." *McMillan v. Durant*, 312 S.C. 200, 204, 439 S.E.2d 829, 831 (1993). "[W]e will not reverse absent an abuse of that discretion." *Graves v. CAS Med. Sys.*, 401 S.C. 63, 74, 735 S.E.2d 650, 655 (2012). "An abuse of discretion occurs when the circuit court's rulings either lack evidentiary support or are controlled by an error of law." *Id.* at 74, 735 S.E.2d at 831 (internal quotation marks omitted).

RMC does not dispute Nurse Stobbs' qualifications as a nurse or ability to testify about IV management. Instead, it argues mainly that this case is about pediatric nursing such that pediatric nursing and not "general nursing" is the issue. (Br. of App. pp. 11-12). RMC then argues that Nurse Stobbs is not qualified to testify about pediatric nursing IV management and, in doing so at trial, she testified outside of the scope of her nursing qualifications. (Br. of App. p. 10). The lower court correctly rejected these arguments, and this Court should affirm.

A. The applicable standard of care is the same regardless of whether the patient is an adult or a child.

RMC's first argument is irrelevant because it does not affect the applicable standard of care. It is undisputed that in pediatric **and** adult IV management, the standard of care is to flush the IV with saline before administering a medication. (R. pp. 276, 278, 345-46, 374).

The difference between an adult and pediatric patient that RMC complains about is that a pediatric vein is smaller than an adult vein. (Br. of App. p. 11). That physiological difference does not change the standard of care to flush an IV site before administering medication or to follow RMC's policy to document a saline flush. Therefore, in response to all of RMC's arguments about Nurse Stobbs, its complaint does not make a difference for the evidence in this case. *McCall v. Finley*, 294 S.C. 1, 4, 362 S.E.2d 26, 28 (Ct. App. 1987) ("[W]hatever doesn't make any difference, doesn't matter."). The Court may affirm the qualification of Nurse Stobbs on this basis alone.

RMC is incorrect that this case is about pediatric nursing. (Br. of App. pp. 10-12). This case is about the IV management safety practice of doing and documenting a saline flush before administering medication. (R. pp. 395, 420). Nurse Stobbs testified "the same safety practices" and "rules" are used for every patient "whether it's a baby or an adult."[1] (R. pp. 94-95). Downing

[1] Nurse Stobbs maintained that the age of a patient does not alter IV management "in terms of the safety practices." (R. p. 126). She testified that a vein is the same in an adult and a child. (R. pp. 119-20). Physiological differences in adults and children mean "their body size may be different"

and Hurley testified that a saline flush is always required before administering medication. (R. pp. 276, 278, 345-46, 374). Even if there existed a relevant difference in the IV management of pediatric and adult patients, it was for the jury to decide if and how that affected the applicable standard of care. *Madison v. Babcock Ctr., Inc.*, 371 S.C. 123, 140, 638 S.E.2d 650, 659 (2006) ("The factfinder may consider relevant standards of care from various sources in determining whether a defendant breached a duty owed to an injured person in a negligence case."). The lower court did not err in qualifying Nurse Stobbs as a nursing expert when nursing IV management principles apply to the facts of the case.

B. The lower court correctly held Nurse Stobbs' testimony satisfies Rule 702, SCRE.

RMC argues the lower court erred in qualifying Nurse Stobbs to testify about IV management in a case involving a pediatric patient because she did not treat pediatric patients and her testimony is, according to RMC, contrary to literature. (Br. of App. pp. 12-14). The lower court correctly exercised its discretion in ruling that RMC's arguments go to the weight and not the admissibility of her testimony. (R. pp. 45-46).

A person may be qualified as an expert based on "knowledge, skill, experience, training, or education." Rule 702, SCRE. "The test for qualification is a relative one that is dependent on the particular witness's reference to the subject." *Lee v. Suess*, 318 S.C. 283, 285, 457 S.E.2d 344, 346 (1995). In deciding whether to admit expert testimony, the court makes three inquiries: whether (1) "the subject matter is beyond the ordinary knowledge of the jury, thus requiring an expert to explain the matter to the jury," (2) the expert has "acquired the requisite knowledge and skill to qualify as an expert in the particular subject matter, although he ***need not be a specialist in***

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but "does not mean that their vein would be different." (R. p. 141). "[T]he management for IV therapy in terms of safety practices and what the rules are, it's exactly the same." (R. p. 142 lns. 11-13).

the particular branch of the field," and (3) the substance of the testimony is reliable. *Graves v. CAS Med. Sys.*, 401 S.C. 63, 74, 735 S.E.2d 650, 655 (2012) (internal quotation marks omitted) (emphasis added). RMC disputes only the second inquiry.

An expert witness is not required to be a specialist in the particular branch of his or her profession involved in a case. On the contrary, "[a] physician is not incompetent to testify merely because he is not a specialist in the particular branch of his profession involved. The fact that he is not a specialist goes to the weight of his testimony, not its admissibility." *Creed v. Columbia*, 310 S.C. 342, 345, 426 S.E.2d 785, 786 (1993) (internal citation omitted). Our courts regularly apply this principle in the medical negligence context.

For example, in *Creed*, a "general practitioner" was qualified "to give an opinion on [the plaintiff's] mental and emotional injuries." *Id.* 344-45, 426 S.E.2d at 786.

A neurosurgeon was qualified to testify about the appropriate standard of nursing care. *McMillan v. Durant*, 312 S.C. 200, 204-05, 439 S.E.2d 829, 831-32 (1993); *see also Lee v. Suess*, 318 S.C. 283, 285, 457 S.E.2d 344, 345 (1995) (describing *McMillan* as holding "a medical practitioner's experience teaching in a particular specialty and his professional interaction with practitioners of that specialty are facts sufficient to support his qualification as an expert").

A plastic surgeon was qualified to testify as an expert in the field of family practice because the surgeon taught family practitioner residents. *Lee*, 318 S.C. at 285, 457 S.E.2d at 345-46. The expert's "limited exposure to the field of family practice merely goes to the weight of his testimony and not its admissibility." *Id.* at 286, 457 S.E.2d at 346.

A neonatologist was qualified to testify about sudden infant death syndrome, even though she testified "that she would not consider herself a SIDS expert," because "an expert need not be

a specialist in the particular branch of the field." *Graves v. CAS Med. Sys.*, 401 S.C. 63, 78, 735 S.E.2d 650, 657 (2012) (internal quotation marks omitted).

All of these cases support the lower court's decision to qualify Nurse Stobbs as an expert regardless of her lack of hands-on experience with pediatric IV patients because that criticism goes to the weight of her testimony and not its admissibility. Nurse Stobbs worked for over thirty years as a nurse. (R. p. 92). For twenty-one of those years, she worked at Massachusetts General Hospital, "which is Harvard's Hospital" and "the number one hospital in the country." (R. p. 92 lns. 3-6). She was certified in IV therapy, administered "thousands" of IVs in her career, and primarily provided IV therapy to her patients. (R. p. 92). She was amply qualified to testify about IV management in this case.

RMC relies on *Botehlo v. Bycura*, 282 S.C. 578, 320 S.E.2d 59 (Ct. App. 1984), for its assertion that Nurse Stobbs must have treated pediatric patients to be qualified to testify about IV management. (Br. of App. p. 12). In *Botehlo*, this Court ruled that an orthopedic surgeon was not an expert in podiatric standards of care, in part, because he "testified that he is not familiar with the standards of professional care generally observed by podiatrists" and "was not familiar with the surgical procedure [the defendant] performed on [the plaintiff]." *Id.* at 587, 320 S.E.2d at 65. In *McMillan v. Durant*, 312 S.C. 200, 439 S.E.2d 829 (1993), the Supreme Court described the orthopedist expert in *Botehlo* as "not versed at all in the practice of podiatry." *Id.* at 204, 439 S.E.2d at 832. This case is easily distinguishable.

Nurse Stobbs testified the standard of care for IV management is the same for a baby or an adult. (R. p. 95 lns. 1-6). Her thirty years of experience in administering thousands of IVs is evidence that supports the lower court's decision to find her familiar with the standards of professional care, unlike the expert in *Botehlo*.

RMC also relies on *Gooding v. St. Francis Xavier Hosp.*, 326 S.C. 248, 487 S.E.2d 596 (1997). (Br. of App. pp. 12-14). However, *Gooding* supports Hamilton's position. In a medical malpractice action against an anesthesiologist regarding an intubation procedure, the Supreme Court held an EMT/paramedic who intubated over 100 patients and taught intubation procedures was qualified in the field of intubation. *Id.* at 251, 253, 487 S.E.2d at 597-98. It explained "[t]here was no requirement that [plaintiff]'s expert witness be an anesthesiologist in order to testify about intubation procedures." *Id.* at 253, 487 S.E.2d at 598. In this case, Nurse Stobbs is qualified in the field of IV management and she is not required to specifically practice in pediatric IV management to testify about IV management procedures.

RMC's disagreement with Nurse Stobbs' opinions (Br. of App. p. 13) are (and were in this case) subjects for cross-examination. The lower court properly exercised its discretion to qualify Nurse Stobbs as a nursing expert, and this Court should affirm.

C. RMC did not preserve an argument about the scope of Nurse Stobbs' testimony and, regardless, she testified according to her qualifications as a nursing expert.

RMC's argument that Nurse Stobbs' testimony exceeded the scope of her qualifications is unpreserved, abandoned, and legally incorrect.

"Our law is clear that a party must make a contemporaneous objection that is ruled upon by the trial judge to preserve an issue for appellate review." *State v. Sheppard*, 391 S.C. 415, 420-21, 706 S.E.2d 16, 19 (2011). RMC never objected during trial that any of Nurse Stobbs' testimony exceeded the scope of her qualifications. It cites to only two pages of the pre-trial motion *in limine* hearing and does not specify what trial testimony is allegedly outside of the scope of her expertise. (Br. of App. p. 15). "Making a motion *in limine* to exclude evidence at the beginning of trial does not preserve an issue for review because a motion *in limine* is not a final determination. The moving party, therefore, must make a contemporaneous objection when the evidence is

introduced." *State v. Moses*, 390 S.C. 502, 511, 702 S.E.2d 395, 400 (Ct. App. 2010) (internal quotation marks omitted). The issue is unpreserved.

The issue is also abandoned because RMC does not cite legal authority and makes only a conclusory, one-paragraph argument. (Br. of App. pp. 14-15). *See Bryson v. Bryson*, 378 S.C. 502, 510, 662 S.E.2d 611, 615 (Ct. App. 2008) ("An issue is deemed abandoned and will not be considered on appeal if the argument is raised in a brief but not supported by authority."); *Glasscock, Inc. v. United States Fid. & Guar. Co.*, 348 S.C. 76, 81, 557 S.E.2d 689, 691 (Ct. App. 2001) ("South Carolina law clearly states that short, conclusory statements made without supporting authority are deemed abandoned on appeal and therefore not presented for review.").

Finally, RMC's argument on the merits is incorrect. The lower court qualified Nurse Stobbs "as an expert in nursing." (R. p. 93). Nurse Stobbs repeatedly testified that her opinions on IV management applied to adults and children, making RMC's attempt to separate the two irrelevant. Her testimony was consistent with her qualifications and area of expertise.

D. Even if error, the admission of Nurse Stobbs' testimony was harmless.

Even if the Court finds the lower court erred in qualifying Nurse Stobbs or that her testimony exceeded the scope of her qualification, it should still affirm because any such error was harmless. "The key factor for determining whether a trial error constitutes reversible error is whether it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *State v. Tapp*, 398 S.C. 376, 389, 728 S.E.2d 468, 475 (2012) (internal quotation marks omitted). The court does "not weigh the evidence when determining this." *In re Bilton*, 432 S.C. 157, 167, 851 S.E.2d 442, 447 (Ct. App. 2020). "No definite rule of law governs this finding; rather, the materiality and prejudicial character of the error must be determined from

its relationship to the entire case." *In re Care & Treatment of Gonzalez*, 409 S.C. 621, 636, 763 S.E.2d 210, 217 (2014) (internal quotation marks omitted).

Any alleged error did not contribute to the verdict because Nurse Stobbs' testimony on the standard of care was cumulative to other evidence. "The admission of improper evidence is harmless where the evidence is merely cumulative to other evidence." *Judy v. Judy*, 384 S.C. 634, 646, 682 S.E.2d 836, 842 (Ct. App. 2009).

Hamilton's theory of liability was RMC's failure to perform and document a saline flush before administering the medication to R.J. (R. pp. 395, 398-99, 405, 420). RMC's policies and procedures admitted into evidence establish the standard of care to flush with saline and document it on the medical record. (R. pp. 491-98). RMC's expert, Cynthia Hurley, testified that the standard of care is to perform a saline flush prior to administering medication. (R. pp. 345-46, 374). Nurse Stobbs testified R.J.'s medical records do not document a saline flush prior to Downing administering the medication, and RMC does not argue that she is unqualified to read medical records. Nurse Stobbs' standard of care testimony was cumulative to other evidence.

RMC attacked Nurse Stobbs' experience and credibility throughout the trial. (R. pp. 87-88, 118-27, 139-42). It criticized Nurse Stobbs for saying something allegedly contrary to articles on IV management. However, Ms. Downing testified that she had never reviewed those articles prior to RMC's attorney giving them to her and that reviewing such articles it not common practice for a nurse. (R. p. 291). RMC disputed Nurse Stobbs' qualifications in its closing argument:

> She's never practiced clinical pediatric nursing. She's never started an IV on a child. And more importantly, the issue in this case, she's never maintained, managed and monitored an IV. **She is not qualified**.
>
> . . .
>
> [Y]ou have one nurse who's never been an expert before, Ms. Stobbs, who's never practiced in this area. She can't tell you what pediatric nursing is. She can't tell

> you what the literature is. . . . She'd been a nurse for over thirty-three years and guess how many pediatric IVs she started? The same amount as me, none.
>
> . . .
>
> [S]he has never done this the first shift in her life.
>
> . . . [Downing started more pediatric IVs] a lot more than Nurse Stobbs who, again, has started zero.
>
> . . .
>
> My witness [Hurley] is more qualified to be an expert [than Stobbs]. My expert is certainly more qualified to be an expert. They could have got a true expert. Ask yourself, why don't they have a pediatric expert? Why don't they have an expert that was qualified for monitoring and managing pediatric IVs? It is because they couldn't get one? Again, use your common sense.

(R. pp. 409-11, 417) (emphasis added). The lower court charged the jury it could disregard an expert's opinion if it decided "an expert witness's opinion is not based on sufficient education or experience or if you decide that the reasons given in support of the opinion are not sound." (R. p. 430).

Given the cumulative nature of Nurse Stobbs' challenged testimony and RMC's blatant attack on her qualifications, any error in qualifying her and admitting her testimony was harmless and RMC suffered no prejudice.

II. THE LOWER COURT CORRECTLY DENIED RMC'S MOTIONS FOR DIRECTED VERDICT OR JNOV BECAUSE THERE IS EVIDENCE OF GROSS NEGLIGENCE.

The lower court correctly denied RMC's motions for directed verdict and JNOV because there is evidence that, viewed in a light most favorable to Hamilton, supports a reasonable inference of gross negligence.[2]

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[2] A "governmental entity is not liable for a loss resulting from: . . . responsibility or duty including but not limited to supervision, protection, control, confinement, or custody of any . . . patient, . . . of any governmental entity, except when the responsibility or duty is exercised in a grossly negligent manner." S.C. Code Ann. § 15-78-60(25) (2005). Hamilton argued at trial that a medical

"When reviewing the trial court's ruling on a motion for a directed verdict or a JNOV, this Court must apply the same standard as the trial court by viewing the evidence and all reasonable inferences in the light most favorable to the nonmoving party." *RFT Mgmt. Co., L.L.C. v. Tinsley & Adams L.L.P.*, 399 S.C. 322, 331-32, 732 S.E.2d 166, 171 (2012). "In considering a JNOV, the trial judge is concerned with the existence of evidence, not its weight. When considering a JNOV, neither an appellate court, nor the trial court has authority to decide credibility issues or to resolve conflicts in the testimony or the evidence." *Curcio v. Caterpillar, Inc.*, 355 S.C. 316, 320, 585 S.E.2d 272, 274 (2003) (internal quotation and alteration marks omitted). "The trial court must deny a motion for a directed verdict or JNOV if the evidence yields more than one reasonable inference or its inference is in doubt. " *RFT Mgmt. Co.*, 399 S.C. at 332, 732 S.E.2d at 171 (internal quotation marks and citation omitted).

RMC's assertion that Hamilton "failed to provide *any* evidence or testimony of gross negligence" is wholly without merit and seems based on an incorrect assumption that a witness must have used the words "gross negligence" for evidence of it to exist. (Br. of App. pp. 18-19).

Our Courts define "gross negligence in a number of ways." *Hollins v. Richland Cnty. Sch. Dist. One*, 310 S.C. 486, 490, 427 S.E.2d 654, 656 (1993). "[I]t is the failure to exercise slight care." *Bass v. S.C. Dep't of Soc. Servs.*, 414 S.C. 558, 571, 780 S.E.2d 252, 259 (2015) (internal quotation marks omitted). "Gross negligence is the intentional, conscious failure to do something which is incumbent upon one to do or the doing of a thing intentionally that one ought not to do."

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malpractice, not a gross negligence, standard applies to this case because it concerns a nurse's administration of medication and not "supervision, protection, control, confinement, or custody" of a patient. (R. pp. 66-67, 323, 444-45). Given the jury's verdict and RMC's arguments, Hamilton argues based on the gross negligence standard. (R. p. 564 n.3). However, this case should not be construed as establishing that the gross negligence standard in S.C. Code Ann. § 15-78-60(25) applies to a nurse's administration of medication.

Faile v. S.C. Dep't of Juvenile Justice, 350 S.C. 315, 331, 566 S.E.2d 536, 544 (2002) (internal quotation marks omitted). Gross negligence is "also defined [] as a relative term that means the absence of care that is necessary under the circumstances." *Id.* at 332, 566 S.E.2d at 544 (internal quotation marks omitted). While "[g]ross negligence is ordinarily a mixed question of law and fact," "[i]n most cases, [it] is a factually controlled concept whose determination best rests with the jury." *Id.* at 332, 566 S.E.2d at 545 (internal quotation marks omitted).

Under any definition of gross negligence, there is evidence of it in the record. There is evidence that RMC consciously failed to do or document a saline flush and that it was incumbent upon RMC to do those things. RMC's policies **require** a saline flush prior to administering medication and documentation of that flush. (R. pp. 491-98, 103-04, 159). Nurse Stobbs testified that Downing failed to do or document a flush before administering the medication to R.J. (R. pp. 117, 159). If RMC (and nursing standards of care) required a saline flush prior to administering medication, then the inference in a light most favorable to Hamilton is that the failure to do it shows an absence of care that is necessary under the circumstances. *See Jinks v. Richland Cnty.*, 355 S.C. 341, 348, 585 S.E.2d 281, 285 (2003) (citing to evidence that the defendant failed to follow its policies as evidence of gross negligence).

Downing testified that a saline flush prior to administering medicine is "ingrained in you in nursing school" and "it makes no sense not to" flush. (R. pp. 288-89, 301). Downing testified there is "no way to really tell if the site is open and flowing without flushing it." (R. pp. 310-11). If it makes no sense not to do a flush, then the failure to do it is the failure to exercise slight care.

Evidence that, once the IV infiltrated and began to harm R.J., RMC failed to respond to Tekayah's call for help for at least twenty minutes is also evidence that it failed to exercise slight care and consciously failed to care for a patient. (R. pp. 163-64, 293).

RMC's evidentiary arguments merely show differing inferences to be drawn from the evidence. However, competing evidence is not a permissible basis to reverse the denial of a motion for JNOV. The Court must "examin[e] the record to discern whether there was any evidence put forward at trial to support the jury verdict." *Bass v. S.C. Dep't of Soc. Servs.*, 414 S.C. 558, 574, 780 S.E.2d 252, 260 (2015). Evidence that a defendant "acted with slight care" along with "evidence in the record that [the defendant] acted with gross negligence" is sufficient to support a jury's verdict of gross negligence. *Id.* at 574, 780 S.E.2d at 260.

Finally, to the extent RMC is arguing that a witness must have testified using the words "gross negligence" (Br. of App. p. 19), there is no legal support for the proposition that an expert must use magic words. *See, e.g.*, *Stallings v. Ratliff*, 292 S.C. 349, 353, 356 S.E.2d 414, 417 (Ct. App. 1987) ("The issue of breach of duty does not turn on a ritual incantation of certain magic words by an expert witness."). The substance of the testimony and the jury's consideration of it are what matter. Further, as discussed below in Argument section IV, expert testimony on a legal conclusion is improper.

Hamilton presented evidence that Downing did not remember doing a saline flush before she administered the medicine that burned R.J., there is no documentation of a saline flush, and if something is not documented, then it was not done. (R. pp. 104, 111, 159, 288). Viewing that evidence in a light most favorable to Hamilton, a jury could have (and did) find that RMC's conduct amounted to gross negligence. The evidence "support[s] the jury's verdict," and this Court should affirm. *Bass*, 414 S.C. at 573, 780 S.E.2d at 259.

III. THE LOWER COURT PROPERLY EXERCISED ITS DISCRETION IN ADMITTING THE PHOTOGRAPHS OF R.J.'S HAND.

Hamilton submitted into evidence three photographs of R.J.'s hand. (R. pp. 463-65, 68-70). Two photographs show R.J.'s hand shortly after the burn injury occurred and the lump full

of fluid on his hand burst. (R. pp. 165-68, 463, 465). One photograph shows R.J.'s hand with a scar on the last day of his treatment at the wound center. (R. pp. 464, 170).

RMC argues that the alleged prejudicial effect of the photographs outweighed their probative value under Rule 403, SCRE ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . .").

"A trial court has particularly wide discretion in ruling on Rule 403 objections." *State v. Gray*, 408 S.C. 601, 608, 759 S.E.2d 160, 164 (Ct. App. 2014) (internal quotation marks omitted). "The relevance, materiality and admissibility of photographs are matters within the sound discretion of the trial court and a ruling will be disturbed only upon a showing of an abuse of discretion." *State v. Rosemond*, 335 S.C. 593, 596, 518 S.E.2d 588, 589-90 (1999). The lower court properly exercised its discretion by balancing the probative value of the photos against any unfair prejudice and admitting them into evidence. (R. pp. 46-51, 8).

Probative Value

The photos had probative value in establishing and proving damages, especially the condition of R.J.'s hand at the time of the burn because he was too young to testify. The photos had probative value in showing the healing process and, importantly, in helping Dr. DeVito to explain and corroborate his testimony.

Photographs are admissible when they "clearly demonstrate the extent and nature of the injuries in a way that would not be as easily understood based on the testimony alone." *State v. Holder*, 382 S.C. 278, 290, 676 S.E.2d 690, 697 (2009) (affirming the admission of autopsy photos of a two-year-old child). Tekayah used the photographs to explain the nature of R.J.'s injury at the time of the burn. (R. pp. 166-70). Dr. DeVito used the photos to describe the layers of skin and tissue injured by the infiltration, explain some of the healing process, explain the type of scar

and his proposed treatment for it, and support his opinion as to the level of pain R.J. would have felt from this type of burn at the time of the injury and throughout the healing process. (R. pp. 234-36, 241). R.J. could not tell the jury what he felt, and the photographs aided in explaining that to the jury.

"A test to determine whether the trial judge abused his discretion is whether the photographic evidence serves to corroborate the testimony of witnesses offered at trial." *State v. Vang*, 353 S.C. 78, 88, 577 S.E.2d 225, 230 (Ct. App. 2003). "If the offered photograph serves to corroborate testimony, it is not an abuse of discretion to admit it." *State v. Nance*, 320 S.C. 501, 508, 466 S.E.2d 349, 353 (1996) (affirming the admission of photographs of the victim's stab wounds in his hospital bed). Hamilton used the photographs to corroborate Tekayah's testimony about the appearance and state of the injury at the time it occurred and to corroborate Dr. DeVito's testimony describing the injury, the healing process, and that R.J. suffered pain. (R. pp. 166-71, 234-36, 241). RMC challenged Hamilton's damages and tried to focus the jury on the fact that R.J.'s hand healed to a scar rather than the condition of his hand right after the burn occurred. (R. pp. 89-90). This makes the corroborating probative value of the photographs very high. *See State v. Gray*, 408 S.C. 601, 613, 759 S.E.2d 160, 166-67 (Ct. App. 2014) ("Photos that corroborate important testimony on issues significant to the case may have very high probative value . . . .").

Unfair Prejudice

RMC argues three reasons why the lower court should have excluded the photos: they were (1) not necessary to substantiate Hamilton's case because RMC did not dispute that R.J. suffered an injury, (2) "grotesque, up-close images" that make the wound look bigger than it was, and (3) not representative of the state of R.J.'s hand at the time of trial. (Br. of App. pp. 21-22). These arguments show only that the evidence is prejudicial, as "[a]ll evidence is meant to be," and do not

rise to the level unfair prejudice. *State v. Gray*, 408 S.C. 601, 616, 759 S.E.2d 160, 168 (Ct. App. 2014). "Unfair prejudice does not mean the damage to a defendant's case that results from the legitimate probative force of the evidence; rather it refers to evidence which tends to suggest decision on an improper basis." *Id.* at 616, 759 S.E.2d at 168.

As to RMC's first argument, its acknowledgment that R.J. suffered an injury does not eliminate the need for Hamilton to establish for the jury the nature and severity of the injury. RMC essentially wants the Court to hold that, when a defendant admits an injury occurred and the injury heals some by the time of trial, the condition of the injury when it occurred is unfairly prejudicial evidence. That is not the law, and RMC cites no case with that ruling.

As to RMC's second argument, that the injury is, as the lower court stated, "hard to look at," does not make photographs of it unfairly prejudicial. (R. p. 8). "Numerous jurisdictions have found that photos are not inadmissible merely because they are gruesome, especially where, as here, the photos simply mirror the unfortunate reality of the case."[3] *State v. Collins*, 409 S.C. 524, 535-36, 763 S.E.2d 22, 28 (2014). Because the photos in this case merely show the reality of the injury to the jury, they are not unfairly prejudicial.

RMC incorrectly argues that the photos make the injury look bigger than its actual size. Each photograph has a scale of reference. Two of them include adult fingers holding R.J.'s hand,

[3] Our courts regularly allow the admission of photographs that are arguably "grotesque." *See Gray*, 408 S.C. at 609, 617, 759 S.E.2d at 164, 169 (affirming the admission of eleven "graphic" before-and-after autopsy photos, including the victim's "exposed skull and brain"); *State v. Holder*, 382 S.C. 278, 291, 676 S.E.2d 690, 697 (2009) (affirming the admission of autopsy photos of a two-year-old victim of child abuse "[a]lthough the photographs were graphic"); *State v. Jarrell*, 350 S.C. 90, 106-07, 564 S.E.2d 362, 371 (Ct. App. 2002) (affirming the admission of autopsy photos of a ten-month-old sexual abuse victim because they corroborated and helped the jury understand testimony).

and one includes R.J.'s head. (R. pp. 463-65). There is no basis to assume the photos enlarged the injury.

As to RMC's third argument, that R.J.'s burn wound healed by the time of trial does not make an image of it at the time of the burn unfairly prejudicial. Hamilton asked the jury to award damages for the injury from the time it occurred. Evidence showing the injury, particularly in light of R.J.'s inability to testify, does not suggest a "decision on an improper basis" but, rather, a decision based on the reality of the injury. *State v. Gray*, 408 S.C. 601, 616, 759 S.E.2d 160, 168 (Ct. App. 2014).

The photos are not *unfairly* prejudicial.

Balance

"The trial judge must balance the prejudicial effect of graphic photographs against their probative value." *State v. Vang*, 353 S.C. 78, 87, 577 S.E.2d 225, 229 (Ct. App. 2003). The lower court ruled that, although the photographs "are hard to look at, there is little doubt the photographs are relevant to corroborate the injury." (R. p. 8). The evidence and law support the lower court's conclusion that any danger of unfair prejudice does not substantially outweigh the probative value of the photos. This Court should affirm.

IV. THE LOWER COURT PROPERLY EXERCISED ITS DISCRETION TO EXCLUDE MS. HURLEY'S TESTIMONY ON GROSS NEGLIGENCE.

The lower court properly exercised its discretion to prohibit RMC from asking its nursing expert, Cynthia Hurley, whether RMC committed "negligence" or "gross negligence." The admissibility of expert testimony is a matter "largely within the trial judge's discretion." *McMillan v. Durant*, 312 S.C. 200, 204, 439 S.E.2d 829, 831 (1993). The Court "will not reverse absent an abuse of that discretion." *Graves v. CAS Med. Sys.*, 401 S.C. 63, 74, 735 S.E.2d 650, 655 (2012).

RMC made a directed verdict motion arguing that, because Nurse Stobbs did not use the words "gross negligence" in her testimony, Hamilton failed to introduce evidence of gross negligence. (R. pp. 320, 321 lns. 23-25, 322). After the court denied the motion, Hamilton moved to exclude RMC from asking its expert, Ms. Hurley, whether RMC committed gross negligence. (R. pp. 325-29). The lower court granted the motion because Hurley is not qualified to testify about the legal concepts of negligence and gross negligence, and RMC could elicit testimony about those topics without using the exact legal terminology. (R. pp. 327-28). The lower court properly exercised its discretion.

While RMC characterizes the testimony as an opinion on "an ultimate issue" under Rule 704, SCRE, the lower court correctly analyzed the testimony as a legal conclusion (R. pp. 327-28, 8), and correctly ruled it inadmissible because, "[i]n general, expert testimony **on issues of law** is inadmissible." *Dawkins v. Fields*, 354 S.C. 58, 66, 580 S.E.2d 433, 437 (2003) (emphasis in original).[4] This Court recently reiterated that "expert testimony on issues of law is rarely admissible. The common law and the federal rules of evidence forbid opinions on issues of law, except foreign law." *Carter v. Bryant*, 429 S.C. 298, 313, 838 S.E.2d 523, 531 (Ct. App. 2020) (internal citations omitted).

In *Carter*, which RMC does not address in its brief, an appellant proffered expert testimony that a warrant lacked probable cause. 429 S.C. at 312, 838 S.E.2d at 531. This Court affirmed the lower court's decision to exclude the testimony because "the expert's proffered testimony on probable cause was a legal conclusion." *Id.* at 313, 838 S.E.2d at 531. Looking to the advisory committee note to Federal Rule of Evidence 704, the Court explained:

[4] RMC's attempt to distinguish this case from *Dawkins* is unconvincing. (Br. of App. p. 26). RMC did ask Hurley to make a legal conclusion on gross negligence. As RMC acknowledged in its closing argument, "Judge Dickson's going to charge you on gross negligence." (R. p. 412).

> an opinion on the ultimate issue has to be "otherwise admissible," meaning in the context here that it must be helpful to the jury as required by Rule 702, SCRE, and satisfy the strictures of Rule 403, SCRE. The opinion here was not helpful to the jury because it stated a legal conclusion and essentially told the jury what result to reach on the probable cause question.

Id. at 313, 838 S.E.2d at 531. The same reasoning applies to this case.

Hurley's opinion was not helpful because it would have confused and misled the jury as to the meaning of gross negligence. During the proffer, Hurley testified RMC's conduct was not negligent or grossly negligent. (R. pp. 388-89). On cross-examination, she defined "gross negligence" as "[a]ctually causing a problem and knowing that you did it. Hurting someone intentionally." (R. p. 390). That is not the correct legal definition of gross negligence. The lower court charged the jury that "[g]ross negligence is the intentional, conscious failure to do something which is incumbent upon one to do, or the doing of a thing intentionally that one ought not do. . . . gross negligence is the failure to exercise slight care." (R. p. 433). Because Hurley's definition of gross negligence is contrary to the legal definition of gross negligence, it would have confused and misled the jury, Rule 403, SCRE, and "also risked treading on the trial judge's role as the sole source of the law in the trial," *Carter*, 429 S.C. at 314, 838 S.E.2d at 532.

Hurley's opinion also "essentially told the jury what result to reach on" the gross negligence question. *Id.* at 313, 838 S.E.2d at 531. RMC asked Hurley her opinion as to whether it "was grossly negligent in its care and treatment of" R.J. (R. p. 389). The verdict form asked the jury "Do you find the Defendant was grossly negligent?" (R. p. 535). The admission of Hurley's testimony would have impermissibly allowed an "expert to define [gross negligence] to the jury and apply [her] view of the facts to [her] definition of law," which "ran the risk of misleading the jury and telling them what their verdict should be." *Carter*, 429 S.C. at 314, 838 S.E.2d at 532. The proffered question was undoubtedly an "attempt[] to usurp" the jury's role in determining

whether RMC was grossly negligent. *Dawkins v. Fields*, 354 S.C. 58, 65, 580 S.E.2d 433, 437 (2003).

The decision of the United States District Court for the District of South Carolina in *Hermitage Industries v. Schwerman Trucking Co.*, 814 F. Supp. 484 (D.S.C. 1993), is instructive on this issue and, for brevity, Hamilton incorporates the reasoning of the decision into this brief. The Court excluded expert testimony on the legal conclusion of negligence because "the proffered testimony of defendant's expert witness that plaintiff was 'negligent' constitutes a legal conclusion and is therefore inadmissible." *Id.* at 487.

Alternatively, even if the Court finds error in the lower court's ruling, it is harmless and RMC suffered no prejudice from the exclusion because Hurley made it apparent to the jury that she believed Downing satisfied the standard of care and RMC did nothing wrong. Hurley testified four times to her opinion that Downing's treatment met the standard of care. (R. pp. 356 lns. 15-18 ; 359 lns. 9-13; 361 lns. 8-10; 365 lns. 21-25). She testified that Downing's treatment met RMC's policy expectations, "exceeded the standard of care," and was "an outstanding job." (R. pp. 356, 361-62, 366). The jury understood that Hurley did not think RMC was grossly negligent.

The lower court properly exercised its discretion to exclude Hurley's testimony on the legal conclusion of RMC's gross negligence, and this Court should affirm.

V. THE LOWER COURT PROPERLY EXERCISED ITS DISCRETION TO PUBLISH THE REQUESTS FOR ADMISSION TO THE JURY.

The court properly exercised its discretion to publish the requests to admit to the jury so it could consider them along with all of the other evidence. "A trial court has particularly wide discretion in ruling on Rule 403 objections." *State v. Gray*, 408 S.C. 601, 608, 759 S.E.2d 160, 164 (Ct. App. 2014) (internal quotation marks omitted).

Hamilton moved to admit the requests to admit as a stipulation (R. p. 259) and asked to explain to the jury "what a request to admit is" (R. p. 264), but the lower court denied those requests and only allowed Hamilton to read the exact language of the requests and answers to the jury (R. pp. 264-65). The jury was free to accept or reject the requests to admit just like any other evidence.

Under Rule 43(g), SCRCP, "[c]ounsel for any party may read his pleadings to the jury." Even when a pleading, including a request for admission, is later amended, both the original and the amended answer may be published to the jury for it to consider along with all of the other evidence.[5]

RMC made two objections to the evidence. It argued (1) the purpose of the requests was to obtain an independent medical examination, and (2) the prejudicial effect of the requests outweighed the probative value under Rule 403, SCRE, because the requests would confuse the jury by telling them "a verdict had to be awarded" and "effectively" directing a verdict of liability for Hamilton. (R. pp. 258-64) (Br. of App. pp. 28-30). The lower court properly acted within its discretion to rule these arguments did not require exclusion of the evidence.

As to the first argument, the reason RMC sent the requests to admit does not dictate their admissibility, especially when RMC did not limit the requests to a specific purpose. That RMC intended to use the requests to admit to get an independent medical examination under Rule 35(a), SCRCP, does not remove them from Rule 43(g), SCRCP.

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[5] "Once an answer to a Request for Admissions is amended under Rule 36, both the initial answer and the amended answer may be published to the jury. The jury may consider the initial answers as evidence, while the party who made such answers is free to explain why it was made and amended. . . . It was for the jury to weigh the evidence along with [other evidence]." *Tuomey Reg'l Medical Ctr. v. McIntosh*, 315 S.C. 189, 191, 432 S.E.2d 485, 487 (1993) (internal citation, quotation marks, and alterations omitted).

Regardless, even if the Court considers RMC's argument, the language of the requests shows they were not limited solely to Rule 35(a). Rule 35(a), SCRCP, provides for an independent medical examination when "the ***amount in controversy*** exceeds $100,000 actual damages." (emphasis added). RMC requested that Hamilton:

> Admit the value of the amount in controversy in this action is less than $100,000.00.
>
> Admit the ***value and amount in controversy*** in this action is greater than $100,000.00.
>
> Admit the ***value*** of Plaintiff's actual damages exceeds $100,000.00.

(R. p. 35) (emphasis added). The requests to admit went beyond the amount in controversy by asking Hamilton to admit the "value" of her actual damages. This supports the lower court's discretionary decision to publish the requests to admit to the jury.

As to RMC's Rule 403, SCRE, argument, the record supports the lower court's determination that the probative value of the evidence is not substantially outweighed by the danger of any unfair prejudice or confusion. The evidence had probative value in proving the amount of damages. In its post-trial motions and on appeal, RMC argues that the actual damages are only $20,854.00—the amount of the medical bills. (Br. of App. pp. 37-38). RMC cannot assert that the "value of Plaintiff's actual damages exceeds $100,000.00" so it can get an independent medical examination and then deny the possibility of that damages value in front of the jury.

RMC's argument that it suffered unfair prejudice because the jury would believe it had to find RMC liable and award damages is incorrect. Both parties argued about liability and damages in their closing arguments. (R. pp. 396-425). The court charged the jury on its duty "to evaluate the evidence and determine which evidence convinces you it is true." (R. p. 429 lns. 23-25). It charged the jury to determine if RMC acted with gross negligence and, if applicable, to choose an amount of damages. (R. pp. 432-39). It instructed the jury to "assess the amount that ***you*** find to

be justified by a preponderance of the evidence" and to "place a value on each element of the damage in accord with the evidence presented." (R. p. 436) (emphasis added). There is "a sound presumption of appellate practice, that jurors are reasonable and generally follow the instructions they are given." *Arnold v. State*, 309 S.C. 157, 166, 420 S.E.2d 834, 838 (1992). The verdict form asked the jury to decide whether "the Defendant was grossly negligent" and, if so, to "state the amount of damages, ***if any***," sustained by R.J. and Tekayah. (R. p. 535) (emphasis added). The jury knew that it must decide liability and damages.

The responses to the requests for admission were merely one piece of evidence. RMC was free to produce other, contradictory evidence, which it did. Just like any other evidence, the jury was free to accept or reject the requests for admission. The evidence and law support the lower court's decision, and this Court should affirm.

Finally, any error in publishing the admissions to the jury was harmless because, as explained below, there was ample other evidence that Hamilton's damages exceeded $100,000.00.

VI. THE LOWER COURT DID NOT ABUSE ITS DISCRETION IN DENYING THE MOTION FOR A NEW TRIAL OR *NISI REMITTITUR*.

The lower court did not abuse its discretion in denying RMC's new trial motions based on the alleged excessiveness of the verdicts and the thirteenth juror doctrine. "The jury's determination of damages is entitled to substantial deference. The denial of a new trial motion is within the discretion of the trial court and, absent an abuse of discretion, it will not be reversed on appeal." *Clark v. S.C. Dep't of Pub. Safety*, 353 S.C. 291, 309-10, 578 S.E.2d 16, 25 (Ct. App. 2002).

The lower court maintained R.J.'s $1,127,280.00 verdict but reduced it to the $300,000.00 cap in the Tort Claims Act, and maintained Tekayah's verdict of $135,477.00. (R. pp. 9-10). This Court "must accord the trial court's decision great deference, and respect its superior position to

gauge credibility and the field of evidence." *Nestler v. Fields*, 426 S.C. 34, 41, 824 S.E.2d 461, 465 (Ct. App. 2019) (internal quotation marks omitted).

"A verdict which may be supported by ***any*** rational view of the evidence and bears a reasonable relationship to the character and extent of the injury and damage sustained is not excessive." *King v. Daniel Int'l Corp.*, 278 S.C. 350, 355, 296 S.E.2d 335, 338 (1982) (emphasis added). RMC moved for a new trial on three grounds—thirteenth juror doctrine, new trial absolute when a verdict is grossly excessive or inadequate, or a new trial *nisi remittitur* or *additur* when the verdict is merely excessive or inadequate. *See Burke v. AnMed Health*, 393 S.C. 48, 55-57, 710 S.E.2d 84, 88-89 (Ct. App. 2011) (listing the three general grounds for a new trial). "Compelling reasons [] must be given to justify invading the jury's province in this manner." *Bailey v. Peacock*, 318 S.C. 13, 14, 455 S.E.2d 690, 691 (1995). The lower court correctly found the verdicts were not excessive in the first place—a basis to affirm as to all three alleged grounds for a new trial in this case.

If the court first finds the verdict excessive, it must determine whether it is merely excessive or grossly excessive. A merely excessive verdict is one that the court views as "not in accord with accepted judicial standards for measuring damages under the facts of the particular case." *Bowers v. Charleston & W. Carolina R.R. Co.*, 210 S.C. 367, 375, 42 S.E.2d 705, 708 (1947). A grossly excessive verdict is one "deemed to be the result of a disregard of the facts and of the instructions of the Court, and to be due to passion and prejudice rather than reason." *Id.* at 375, 42 S.E.2d at 708. "[T]o warrant a new trial absolute, the verdict reached must be so grossly excessive as to clearly indicate the influence of an improper motive on the jury." *Holroyd v. Requa*, 361 S.C. 43, 66, 603 S.E.2d 417, 429 (Ct. App. 2004).

In determining whether a verdict amount is excessive, "the facts must be viewed in the light most favorable to the plaintiff and, where the amount of a verdict bears a reasonable relationship to the character and extent of the injury sustained, it is not excessive." *Watson v. Wilkinson Trucking Co.*, 244 S.C. 217, 224, 136 S.E.2d 286, 289 (1964). RMC presents no compelling reason for the Court to invade the jury's province. Viewing the evidence in a light most favorable to Hamilton, it bears a reasonable relationship to the character and extent of the injuries sustained and supports the lower court's finding that neither verdict was excessive.

A. The evidence supports the jury's verdict for R.J.

Hamilton presented ample evidence of R.J.'s damages to support the jury's verdict. There is evidence R.J. suffered a permanent injury. There is evidence R.J. suffered past, present, and future pain and suffering, mental and emotional anguish, anxiety, and loss of enjoyment of life.

"An award for pain and suffering compensates the injured person for the physical discomfort and the emotional response to the sensation of pain caused by the injury itself." *Boan v. Blackwell*, 343 S.C. 498, 501-02, 541 S.E.2d 242, 244 (2001). "Separate damages are given for mental anguish where the evidence shows, for example, that the injured person suffered shock, fright, emotional upset, and/or humiliation as the result of the defendant's negligence." *Id.* at 502, 541 S.E.2d at 244. "One cannot easily or with any mathematical certainty place a value on the amount of a person's pain and suffering." *Smalls v. S.C. Dep't of Educ.*, 339 S.C. 208, 218, 528 S.E.2d 682, 687 (Ct. App. 2000).

RMC argues "there was little testimony regarding pain and suffering." (Br. of App. p. 33). This is false. There is evidence R.J. experienced pain at the time of the infiltration, during the healing process, and after the scar formed. When the nurses finally called a doctor to look at R.J.'s hand, it was swollen with "a big black scar and it was a bubble" on top of his hand full of fluid.

(R. pp. 165-66). R.J. cried during every one of the fifteen visits to the wound care center. (R. pp. 168-69). Dr. DeVito testified the "whole nature of the wound is painful." (R. p. 236). R.J. could not crawl with his hand out and Hamilton "constantly" watched him to make sure he did not hit it on something or make it bleed. (R. p. 172).

The infiltration resulted in keloid scar tissue that "invades" the skin surrounding it and causes painful burning and itching symptoms. (R. p. 233). Dr. DeVito testified some patients describe the pain "as if someone were putting hot needles to the skin." (R. p. 233). Dr. DeVito saw R.J. weeks before trial but testified he "couldn't even examine the child" because R.J. pulled his hand back and withdrew, it is still "a source of pain for him," and the examination "was really an ordeal." (R. pp. 242-43).

R.J. was three-years-old at the time of trial, and Hamilton testified he suffered complications from his scar. (R. pp. 171-72). His hand cramps up and he complains about itching and cannot sit still when it hurts. (R. p. 171). Hamilton massages his hand and does hand exercises with him using a ball. (R. p. 171).

Dr. Davis and Dr. DeVito agreed that R.J. will have a permanent scar regardless of any future treatment. (R. pp. 225-26, 242). R.J.'s skin will never be normal again. (R. p. 243). He does not have sweat glands or hair follicles on his right hand. (R. p. 243). Even slightly bumping R.J.'s hand could cause a blister or ulcer. (R. p. 244). The court charged the jury that R.J.'s life expectancy was 73.76 years. (R. p 439).

RMC argues that the functionality of R.J.'s hand is a basis to find the damages excessive. (Br. of App. p. 34). This misstates the testimony and fails to view it in a light most favorable to Hamilton. During all of the functionality tests that Dr. Davis performed, R.J. complained that his hand felt tight. (R. p. 220). Dr. Davis testified that scars have a negative psychological impact on

a person regardless of functional abilities. (R. pp. 217-18). Almost four years after the infiltration, R.J. still complained of itching on the scar site. (R. pp. 218-19). Dr. DeVito testified R.J. "has some limitation" compared to a child with no scar because R.J. would not even let Dr. DeVito touch the hand during the examination. (R. p. 255). Tekayah testified that she limits R.J.'s activities for fear that he will injure his hand. (R. p. 173). That R.J. has functionality in his hand does not decrease the significance, frequency, or intensity of his regular emotional and physical pain from the scar.

"[A] verdict which may be supported by any rational view of the evidence, or as to which reasonable and disinterested men might draw different inferences, is not of this class" of excessive verdicts. *Mickle v. Blackmon*, 252 S.C. 202, 248, 166 S.E.2d 173, 194 (1969) (affirming the denial of a new trial absolute of "probably the highest verdict in a personal injury case in the history of this State"). That RMC disagrees with the jury's damages determination does not make it excessive. Further, that R.J.'s verdict of $1,127,280.00 is "54 times" the medical expenses (Br. of App. p. 35), is not a basis for finding it excessive. RMC does not cite any law requiring that a verdict amount must be within a certain multiplier of alleged actual damages. On the contrary, the law is that there is no yardstick or measure for determining non-economic damages. *See Knoke v. S.C. Dep't of Parks, Rec. & Tourism*, 324 S.C. 136, 142, 478 S.E.2d 256, 258-59 (1996) (stating "intangible damages" "cannot be determined by any fixed measure"); *Lucht v. Youngblood*, 266 S.C. 127, 137, 221 S.E.2d 854, 859 (1976) (stating non-economic damages "are intangibles, the value of which cannot be determined by any fixed yardstick"). Further, R.J.'s medical expenses are Tekayah's damages and, therefore, cannot be used as the "yardstick" for his measure of damages.

An award of $1,127,280.00 for a child who will have to endure a scar and the daily physical and emotional pain and limitations associated with it for his ***entire life*** is neither merely nor grossly excessive.

B. The evidence supports the jury's verdict for Tekayah.

Hamilton presented ample evidence of Tekayah's damages to support the jury's verdict. A parent can recover medical expenses, loss of services, and other pecuniary losses arising out of the injuries of a minor child. *Doe v. Greenville Cnty. Sch. Dist.*, 375 S.C. 63, 68, 651 S.E.2d 305, 307-08 (2007).

The medical bills totaled $20,854.00. (R. pp. 423, 506-09). Dr. DeVito's recommended surgical treatment for R.J.'s scar will cost approximately $2,500.00 for the surgical fee and in excess of $12,000.00 for other associated costs such as the anesthesia, hospitalization, the operating room, and testing. (R. pp. 246-47). Dr. DeVito testified that R.J. would need steroid injections "indefinitely" and each injection costs $85.00. (R. pp. 240, 510-12).

RMC argues Hamilton did not establish the scar treatment. (Br. of App. p. 34). This is incorrect. Tekayah testified that she did not want to have surgery on R.J.'s hand at the time of trial because he was so young and had already been through a lot. (R. pp. 185-86). Dr. Davis testified that giving the steroid treatment to a three-year-old is "not easy" and "not successful at that age" because it is traumatic for the child and requires a sedative. (R. pp. 222-23). Dr. DeVito testified that Keloid scars are difficult to treat with steroids because penetrating "a hard scar with a needle and syringe is . . . like trying to inject the paint on [a] wall." (R. pp. 237-38). Even an alternative vaccination gun that uses high pressure is "painful." (R. pp. 238-39). Dr. DeVito found it "very understandable" that Tekayah may not want to put R.J. through that pain at three-years-old and agreed it is a "painful dilemma" for a child. (R. pp. 240-41). Based on that testimony, the jury

could have accepted Hamilton, Dr. DeVito, and Dr. Davis's testimony that it is best to wait to pursue scar treatment until R.J. is older. That Tekayah is choosing to wait does not mean she cannot recover for the future treatment.

The lower court considered that Tekayah missed work for a year because she could not trust anyone to properly watch out for R.J.'s hand. (R. pp. 172, 6). The lower court considered that Tekayah would remain R.J.'s guardian for an additional fifteen years from the date of trial. (R. p. 7).

RMC incorrectly argues that Tekayah's damages are limited to only the medical expenses. (Br. of App. p. 37). A parent may recover for loss of a child's services and earning capacity (which are not at issue here), as well as "***other*** pecuniary losses, ***including*** medical expenses incurred as a result of the injury." *Doe v. Greenville County Sch. Dist.*, 375 S.C. 63, 68, 651 S.E.2d 305, 308 (2007). That the court listed medical expenses as included within the category of "pecuniary losses" necessarily means that a parent's recovery is not limited to medical expenses.

An award of $135,477.00 for R.J.'s past and future medical expenses, as well as Tekayah's pecuniary loss for missed work, travel expenses, and constant daily watching over and caring for R.J. is neither merely nor grossly excessive.

CONCLUSION

For these reasons, the Court should affirm the lower court.

Respectfully submitted,

May 20, 2021

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