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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 M., Jr., a minor child under the age of 18,.. ..... Respondent

v.

Regional Medical Center, ...Appellant

FINAL BRIEF OF THE REGIONAL MEDICAL CENTER

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May 20, 2021

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STATEMENT OF THE CASE

This matter arises out of an IV infiltration to a minor child which occurred during an admission at The Regional Medical Center from October 25 through October 30, 2014. On October 7, 2015, Plaintiff "Respondent" Tekayah Hamilton filed a Summons and Complaint (R. pp. 12 - 28) alleging medical malpractice in the Orangeburg County Court of Common Pleas on behalf of herself individually, and as a parent and guardian ad litem for Robert Lee M., Jr., a minor child under the age of eighteen. The Defendant ("Appellant") The Regional Medical Center and Jamie Downing, RN, filed its Answer to the Complaint (R. pp. 29-33) on November 30, 2015, denied liability and any wrongdoing, and asserted numerous affirmative defenses. Jamie Downing, RN, was dismissed from the action on June 29, 2016, pursuant to the Tort Claims Act.

The action came to a Jury Trial beginning May 7, 2018, in front of Judge Edgar W. Dickson in Orangeburg County, South Carolina. *See* Trial Tr. Mar. 19, 2019 (R. pp. 60 - 462) & Trial Tr. Dec. 22, 2020 (R. pp. 37-59). Appellant presented three pretrial motions *in limine*. *See* Def.'s Mot. in lim. to Exclude Photos (R. pp. 533-534), Def.'s Mot. in lim. to Exclude Monica Stobbs Testimony (R. pp. 522-532), Trial Tr. Dec. 22, 2020 (R. pp. 37-59). In its first motion,

Appellant moved that Respondent's expert, Monica Stobbs, should not be qualified as an expert witness in this matter and allowed testify to the standard of care for pediatric nursing on the ground that she lacked the required qualifications. In its second Motion, Appellant moved to exclude photographs of the minor child's hands on the ground that the probative value of the photographs was substantially outweighed by the danger of unfair prejudice. In its third and final motion, Appellant moved to exclude hearsay testimony of the Respondent. The Trial Court denied the Appellant's motions regarding Monica Stobbs and the photographs and granted the motion to exclude the hearsay testimony. On May 9, 2018, the Jury returned a verdict for the Respondent Robert Lee Middleton Jr., in the amount of $1,127,280.00 and for Respondent Tekayah Hamilton in the amount of $135,477.00 (R. p. 535).

On May 17, 2018, Appellant filed two post trial motions. Appellant filed a Notice of Motion and Motion for JNOV or in the alternative Motion for New Trial (R. pp. 536-550) and a Post Trial Motion For Reduction to Statutory Cap (R. p. 552-554). Respondent filed a memorandum in opposition to Appellant's motions on June 13, 2018 (R. p. 556-571). On June 27, 2018, Appellant filed a response to the Respondent's Memorandum in Opposition (R. pp. 572-584). On October 25, 2019, the Trial Court issued its Order Granting Appellant's Motion for Reduction to Statutory Cap and Denying Appellant's Motion for JNOV or in the Alternative a New Trial (R. pp. 1-10).

Appellant timely filed a Notice of Appeal on November 19, 2019 (R. p. 585-597).

ARGUMENT

I. THE TRIAL COURT ABUSED ITS DISCRETION IN QUALIFYING RESPONDENT'S EXPERT MONICA STOBBS AS A GENERAL NURSE AND IN

PERMITTING HER TO TESTIFY AS TO THE STANDARD OF CARE FOR PEDIATRIC IV ADMINISTRATION.

STANDARD OF REVIEW

"The qualification of an expert witness and the admissibility of the expert's testimony are matters within the trial court's discretion." *Gooding v. St. Francis Xavier Hosp.*, 326 S.C. 248, 252, 487 S.E.2d 596 (1997) (citing *McGee v. Bruce Hosp. System,* 321 S.C. 340, 468 S.E.2d 633 (1996); *see, e.g., Fields v. The Reg'l Med. Ctr. of Orangeburg*, 363 S.C. 19, 25, 609 S.E.2d 506 (2005). "Similarly, the admission or exclusion of evidence in general is within the sound discretion of the trial court." *Fields,* 363 S.C. 19 at 25. "In both instances, the trial court's decision will not be disturbed on appeal absent an abuse of discretion." *Id.*; *see, e.g., Gooding v. St. Francis Xavier Hosp.*, 454 S.E.2d 328, 330 (Ct. App. 1995). "An abuse of discretion occurs when there is an error of law or a factual conclusion which is without evidentiary support." *Gooding,* 326 S.C. at 252 (citing *Lee v. Suess,* 318 S.C. 283, 457 S.E.2d 344 (1995)); *Fields*, 363 S.C. at 26. "A trial court's ruling on the admissibility of an expert's testimony constitutes an abuse of discretion when the ruling is manifestly arbitrary, unreasonable, or unfair." *Fields*, 363 S.C. at 26 (citing *Means v. Gates,* 348 S.C. 161, 166, 558 S.E.2d 921, 924 (2001). "To warrant reversal based on the admission or exclusion of evidence, the appellant must prove both the error of the ruling and the resulting prejudice, i.e., that there is a reasonable probability the jury's verdict was influenced by the challenged evidence or the lack thereof." *Fields*, 363 S.C. at 26 (citations omitted).

ARGUMENT

A. THE TRIAL COURT'S ERROR WAS AN ABUSE OF DISCRETION.

Appellant argues that the Trial Court erred in ruling that Monica Stobbs, R.N., was qualified as an expert in general nursing ("Nursing 101") (Trial Tr. 7-10, 10:4-6, Dec. 22, 2020 (R. pp. 43-46); Trial Tr. 78:1-19, Mar. 17, 2019 (R. p. 93)) and in allowing her to testify to the standard of care for pediatric nursing IV management. Def's Mot. *in lim.* to Exclude Monica Stobbs Testimony (R. p. 522-532), Def's Mot. for JNOV or in the alt. Motion for New Trial 4-5 (R. pp. 539-540); Court's Order Granting Def.'s Motion for Reduction to Statutory Cap & Denying Def.'s Motion for JNOV or in the Alt. for a New Trial 6 (R. p. 7). Appellant argues that this an error that amounted to an abuse of discretion because the case was about pediatric, not adult, nursing and IV medicine; Ms. Stobbs failed to meet the qualifications as set forth in the South Carolina Rules of Evidence 702 and *Gooding*; and the court allowed Ms. Stobbs to testify outside of the scope of her expert qualification in this matter.

1. THIS MATTER WAS ABOUT PEDIATRICS, NOT GENERAL NURSING.

Appellant first argues that the Trial Court's error in qualifying Ms. Stobbs amounts to an abuse of discretion because there was no basis or rationale for qualifying Ms. Stobbs as an expert in general nursing in this matter. Pediatric nursing, not general nursing or "Nursing 101" (Trial Tr. 8:4-11, Dec. 22, 2020 (R. p. 44)), was the issue in this case. Medical literature indicates a clear distinction between IV administration and management for pediatrics and adults.[1] Veins in

[1] [1]The Infusion Nurses Society: Infusion Therapy in Clinical Practice, 2nd. eds Hankins J, Lonsway RA, Hendrick C and Perdue MB. Saunders, St. Louis, MO 2001, 561 "Children present a wide variety of physical characteristics different from those in adults. In addition, premature infants and newborns vary greatly from older children in their anatomy and physiology. These characteristics affect the ability of neonates and infants to cope with environmental stress and to manage the metabolism, absorption, distribution, and excretion of medications and solutions. Although body systems in infants and children are different from those in adults, for the purpose of this text, only those related to infusion therapy are addressed in detail."

infants are "obviously smaller" and can be "threadlike."[2] Trial Tr. 105:3-13, Mar. 17 2019 (R. p. 120). "Vein fragility and the high acuity levels of young patients can increase the likelihood of infiltration and extravasation, resulting in significant morbidity."[3] *Id.* at 129:19-130:1 (R. p. 144-145). Furthermore, testimony from Appellant's expert and Nurse Downing, both of whom have extensive experience in pediatric nursing and IV administration (Trial Tr. 298:8-299:1 (R. pp. 306-307), 323:10-324:21 (R. pp. 332-333), 350:15-19 (R. p. 359), Mar. 17, 2019), revealed distinct differences between pediatrics and adult IV management (Trial Tr. 266:11-25 (R. p. 274), 331:11-332:24 (R. pp. 340-341), Mar. 17, 2019). Pediatric patients and their veins are smaller, more fragile, and more mobile and therefore need to be more frequently assessed, whereas adults are more stable, have bigger veins, and thus, nurses are able to use larger catheters. *Id.* Because there is a clear distinction in pediatrics and adult IV care and the issue here was pediatrics, it was manifestly arbitrary, unfair, and unreasonable, an thus, an abuse of discretion, to qualify and allow the testimony of a general nurse who never practiced pediatric nursing.

2. MONICA STOBBS FAILED TO MEET THE REQUIREMENTS OF RULE 702 OF THE SOUTH CAROLINA RULES OF EVIDENCE AND *GOODING*.

In order to be qualified as an expert witness, a person must have the "knowledge, skill, experience, training or education" in order to testify. 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

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[2] *Id.* at 562 "The size of venous and arterial vessels in the infant and child are obviously smaller than those in the adult. Although the vessels are anatomically positioned in the same locations throughout life, their sometimes-threadlike characteristics and tendency to hide make them difficult to locate in the young patient."

[3] *Policies and Procedures from Fusion Nursing of the Pediatric Patient*, The Infusion Nurses Society, supra at 125.

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*, 326 S.C. at 253, 487 S.E.2d at 598 (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) (holding that an orthopedic surgeon was not qualified to testify on the standard of care for podiatrist where the orthopedic surgeon had no training in podiatry, was not familiar with any journals or periodicals in podiatry, and was not familiar with the surgical procedure performed).

Appellant argues the Trial Court's error amounts of abuse of discretion because, as per the requirements of South Carolina Rules of Evidence 702 and *Botehlo,* Ms. Stobbs was not qualified to testify as to pediatric IV administration, as her experience has only been to general, adult IV administration. Trial Tr. 8:13-9:19, Dec. 22, 2020 (R. pp. 44-45); Def's Mot. *in lim.* to Exclude Monica Stobbs Testimony (R. pp. 522-532). The issue is not over a *defect* in amount or quality of experience or knowledge but rather, much like *Botehlo*, is over whether she possessed *any* of the required knowledge or experience. Similar to the orthopedic surgeon in *Botehlo*, Ms. Stobbs has had no personal experience or training at all in pediatric nursing or IV administration. Trial Tr. 103:14-104:8 (R. pp. 118-119),108:22-110:21 (R. pp. 123-125), Mar. 17, 2019. Ms. Stobbs has never cared for a pediatric patient and has never started or managed a pediatric IV. *Id.* at 79:24-25 (R. p. 94), 108:22-110:21(R. pp. 123-125); Stobbs Dep. 13:9-24 (R. p. 526). Additionally, Ms. Stobbs does not have any education or knowledge as to pediatric nursing or IV administration. Ms. Stobbs testified that she did not perform any research, independent study, or

review any medical literature in preparation of formulating her opinions. Trial Tr. 111:14-23, Mar. 17, 2019 (R. p. 126); Stobbs Dep. 26:15-24 (R. p. 527).

Ms. Stobbs proved her lack of knowledge and expertise by making baseless and inaccurate claims and testifying directly contradictory to the literature. Ms. Stobbs' opinion is premised on her belief that the standard of care for IV management is the same for pediatric patients as it is for adults. Trial Tr. 111:22-23, Mar. 17, 2019 (R. p. 126); Stobbs Dep. 13:13-18 (R. p. 526). Her opinions are based on the speculative belief that pediatric patients are simply little adults. She believes the standard of care for both pediatrics and adults is "simple nursing 101." *Id.* at 96:22-23 (R. p. 111); Stobbs Dep. 26:17 (R. p. 527). Although she acknowledged that the literature indicates children have a wide variety of physical characteristics that differ from adults, including smaller, "obviously threadlike" veins, it is her opinion that a "vein is a vein." Trial Tr. 104:20-105:23 (R. pp. 119-120), 126:1-15 (R. p. 141), 128:1-5 (R. p. 143), Mar. 17, 2019. She also testified that she disagreed with literature provided by Respondent that stated "[l]arger amounts of subcutaneous fat in children can make the identification of an early infiltration difficult;"[4] however, she admitted she had no literature with her to support her opinion. *Id.* at 130:10-131:25 (R. pp. 145-146).

Ms. Stobbs further proved her lack of knowledge concerning pediatric IV administration when she testified that she "should get blood return from a vein whether it's a baby or whether it's an adult." Stobbs Dep. 32:24–33:7 (R. p. 528-529). Trial Tr. 97:2-3 (R. p. 112), 110:22-24 (R. p. 125), 133:2-14 (R. p. 148), 133:20-134:13 (R. pp. 148-149), Mar. 17, 2019. This is directly

[4] The Infusion Nurses Society, *supra*

contrary to the literature.[5] Trial Tr. 104:16-106:2 (R. pp. 119-121), 351:7-14 (R. p. 360), Mar. 17, 2019. Although Ms. Stobbs has obtained blood returns in adult patients, she has never attempted to obtain one in a pediatric patient, and therefore, she does not know what it could do to a pediatric vein. Trial Tr., 134:20-135:8, Mar. 17, 2019 (R. pp. 149-150). On the contrary, Appellant's expert, Cindy Hurley, and Nurse Downing both testified that trying to obtain a blood return in a pediatric is inappropriate because it could cause the vein to collapse or result in a false reading. Trial Tr. 271:8-21 (R. p. 279), 347:20-25-349:14 (R. pp. 356-358), Mar. 17, 2019.

Thus, Ms. Stobbs failed to meet the requirements of SCRE 702 and *Gooding*. The sole purpose of an expert is to educate a jury on the subject matter of his or her expertise, and that is impossible to do without prior experience or study. Without proper education, training, or experience regarding pediatric administration and management, Ms. Stobbs was not more qualified than the jury to form an opinion as to the same. Therefore, Appellant asserts it was arbitrary, unfair, and unreasonable, thus an abuse of discretion, to permit Ms. Stobbs to testify as an expert in the standard of care for pediatric IV administration and administration.

3. THE CONTENT OF MS. STOBBS' TESTIMONY EXCEEDED THE QUALIFICATION OF THE TRIAL COURT.

Lastly, Appellant argues that the Trial Court's error amounts to abuse of discretion because it allowed Ms. Stobbs to provide expert testimony beyond the scope for what she had been qualified in this matter. During the Motion *in limine* hearing, the Trial Court specifically

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[5] "The Infusion Nurses Society, *supra at 422."* "Checking for a blood return, or backflow of blood, is not a reliable method for determining the absence of an infiltration. A blood return may not be present when small veins are used because they may not permit blood flow around the cannula; one may think the infusion has infiltrated when it has not."

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 (R. pp. 44-46). Despite this, during trial the Trial Court allowed Ms. Stobbs to testify as to the standard of care of pediatric nursing and IV administration. This was clearly beyond the scope of the Trial Court's qualification of her as an expert witness. Therefore, Appellant maintains that it was manifestly arbitrary, unfair, and unreasonable, and thus, an abuse of discretion, to allow Ms. Stobbs to testify regarding the standard of care for pediatric IV administration and management.

B. THE TRIAL COURT'S ABUSE OF DISCRETION WAS NOT HARMLESS

Appellant asserts this error was not harmless and was highly prejudicial to Appellant's case. "Whether an error is harmless depends on the circumstances of the particular case. 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." *State v Douglas*, 367 S.C. at 519-520 (citations omitted). "Error is harmless where it could not reasonably have affected the result of the trial." *Id.* at 520 (citing *Arnold v. State,* 309 S.C. 157, 420 S.E.2d 834 (1992)). "The admission of improper evidence is harmless where the evidence is merely cumulative to other evidence." *Id.* at 520 (citations omitted); *see also*, *McGee,* 468 S.E.2d at 636 (allowing an expert to testify about the placement of catheters was harmless as it was cumulative to other evidence). "To show prejudice, there must be a reasonable probability that the jury's verdict was influenced by the challenged evidence or the lack thereof." *State v. Douglas*, 367 S.C. at 508 (citations omitted).

Given the arguably excessive verdict (Trial Tr. 446:18-447:1, Mar. 17, 2019 (R. pp. 457-458)) in light of no other testimony or evidence as to Appellant's negligence (*see infra* Argument II), Appellant asserts the error in allow Ms. Stobbs' qualification and testimony was not harmless. Appellant asserts that had Ms. Stobbs not been qualified as an expert and allowed to testify as to the standard of care for pediatric IV management, then the Respondent could not meet its burden of proof which would have resulted in a directed verdict against Respondent. Ms. Stobbs' testimony was not cumulative to other testimony or evidence presented. She was the only witness offered by Plaintiff on two critical issues. Appellant further asserts that the excessive verdict demonstrates that there is reasonable probability that the jury was highly influenced by Ms. Stobbs' testimony. Thus, Appellant asserts this error not harmless, but rather was highly prejudicial to Appellant's defense of the matter. Therefore, because the Trial Court's error amounted to an abuse of discretion and this error was not harmless, the Trial Court's ruling is warranted a reversal on this ground.

II. APPELLANT IS ENTITLED TO A REVERSAL ON THE GROUNDS THAT THE LOWER COURT SHOULD HAVE GRANTED A DIRECTED VERDICT IN FAVOR OF APPELLANT AS RESPONDENT DID NOT ESTABLISH GROSS NEGLIGENCE.

STANDARD OF REVIEW

"When reviewing the denial of a motion for directed verdict or JNOV, this Court must employ the same standard as the trial court by viewing the evidence and all reasonable inferences in the light most favorable to the nonmoving party." *Welch v. Epstein*, 342 S.C. 279, 299-300, 536 S.E.2d 408 (2000) (citations omitted). "In ruling on a motion for directed verdict, it is the duty of the court to view the evidence and all inferences which may reasonably be drawn

therefrom in the light most favorable to the non-moving party." *Hollins v. Richland Cnty. Sch. Dist. One*, 310 S.C. 486, 427 S.E.2d 654, 655 (1993) (citing *Horton v. Greyhound Corp.,* 241 S.C. 430, 128 S.E.2d 776 (1962)). "The trial court must deny the motions when the evidence yields more than one inference or its inference is in doubt." *Welch*, 342 S.C. at 300 (citing *Steinke v. S.C. Dept. of Labor, Licensing, & Reg*, 336 S.C. 373, 520 S.E.2d 142(1999)). "Th[e] Court will reverse the trial court only when there is no evidence to support the ruling below." *Id.* (citations omitted)."When considering directed verdict and JNOV motions, neither the trial court nor the appellate court has authority to decide credibility issues or to resolve conflicts in the testimony or evidence." *Id.* (citations omitted). "A motion for JNOV may be granted only if no reasonable jury could have reached the challenged verdict." *Id.* (citing *Crossley v. State Farm Mut. Auto. Ins. Co.,* 307 S.C. 354, 415 S.E.2d 393 (1992)). "The jury's verdict will not be overturned if any evidence exists that sustains the factual findings implicit in its decision." *Id.* (citations omitted).

ARGUMENT

Gross negligence is the standard that applies in this matter. *See Stewart v. Richland Mem'l Hosp.,* 350 S.C. 589, 592, 567 S.E.2d 510, 511 (2002) (holding gross negligence was the standard, as per the South Carolina Torts Claim Act, that the plaintiff had to prove in a matter where a nurse in a hospital was involved in restraining and monitoring the plaintiff). Appellant is a government entity, as defined by the statute, S.C. Code Ann. § 15-78-30(j); and *Smith v TRMC*, 713 S.E.2d 656 (Ct. App. 2011) thus, this matter is restricted to the confines prescribed within the South Carolina Torts Claims Act, S.C. Code Ann. § 15-78-200. Per the South Carolina Torts Claims Act §15-78-60(25),

> The 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 student, patient, prisoner, inmate, or client 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) (Cum. Supp. 1991) (emphasis added). Moreover, the Torts Claims Act "must be liberally construed in favor of limiting the liability of the State." S.C. Code Ann. § 15-78-20(f) and § 15-78-200. Therefore, gross negligence is the applicable standard, and the facts must be applied in such a way to limit the liability on the State.

This Court has defined gross negligence in a number of ways. "Gross negligence is the intentional failure to do something which it is incumbent upon one to do or the doing of a thing intentionally that one ought not to do." *Etheredge v. Richland Sch. Dist. One*, 341 S.C. 307, 310, 534 S.E.2d 275 (2007); *see, e.g., Clyburn v. Sumter Cnty. Dist. Seventeen*, 317 S.C. 50, 451 S.E. 2d 885, 887 (1994); *Richardson v. Hambright*, 296 S.C. 504, 506, 374 S.E.2d 296, 298 (1988). It is the "failure to exercise slight care." *Id.* Gross negligence has also been defined as "a relative term, and means the absence of care that is necessary under the circumstances." *Hollins v. Richland Cnty. Sch. Dist. One*, 427 S.E.2d at 656 (quoting *Hicks v. McCandlish,* 221 S.C. 410, 415, 70 S.E.2d 629 (1952)). Furthermore, "[w]hile gross negligence ordinarily is a mixed question of law and fact, when the evidence supports but one reasonable inference, the question becomes a matter of law for the court." *Etheredge*, 341 S.C. at 310; *see, e.g., Clyburn*, 451 S.E. 2d at 887-88.

Appellant maintains that the Trial Court erred in refusing to grant Appellant's motion for directed verdict (Trial Tr. 311:8-313:3 (R. pp. 320-322), 315:2-23 (R. p. 324), 382:8-21 (R. p.

391), Mar. 17, 2019), or Appellant's motion for JNOV or a new trial as there was not more than one inference as to whether Appellant acted with gross negligence (Def. Mot. for JNOV or in the alt. Motion for New Trial 5-6 (R. pp. 540-541); Court's Order Granting Def.'s Motion for Reduction to Statutory Cap & Denying Def.'s Motion for JNOV or in the Alt. for a New Trial 6-7 (R. pp. 7-8). This was not a case of credibility issue or conflict in evidence or testimony. Rather, Respondent failed to provide *any* evidence or testimony of gross negligence; and thus, no reasonable jury could have made any finding of such.

Respondent did not submit any question to its own expert about whether Nurse Stobbs or Appellant were grossly negligent. Moreover, when asked by counsel for Appellant, Respondent's expert had no opinion as to the intentional conduct of Nurse Downing. Trial Tr. 132:24-25, 133:17-19, Mar. 17, 2019 (R. pp. 147-148). Respondent's expert further agreed that just because an IV infiltrated does not automatically warrant a conclusion that there was negligence. *Id.* at 139:7-16. In fact, she agreed that infiltration is a known risk. *Id.* at 112:2-24 (R. p. 127), 139:4-6 (R. p. 154) Respondent's expert herself testified that she has had IVs infiltrate without her having been negligent and has known other nurses who had IVs infiltrate without them being negligent. *Id.* at 138:10-139:3 (R. pp. 153-154).

Nurse Downing testified that she acted in accordance with how she was trained with respect to pediatric IV administration. She testified regarding her knowledge on the differences between adult and pediatric IV administration and monitoring. *Id.* at 266:11-269:23 (R. pp. 274-277), 271:8-21 (R. p. 279). She testified that she checked on the patient regularly and assessed the IV to make sure it was in properly and the medication was being administered as it should be. She testified that at no time during her assessment and monitoring of the minor

Respondent did she see an infiltration score of anything other than zero. *Id.* at 303:25-305:19 (R. pp. 311-313). She further testified that she followed the required protocol regarding flushing, always flushed the IV prior to administering medication, and documented her interactions with the patient into the hospital computer system as required. *Id.* at 272:9-274:19 (R. pp. 280-282); 274:23-275:1 (R. pp. 282-283); 275:19-276:9 (R. pp. 283-284); 276:22-277:10 (R. pp. 284-285); 280: 2-3, 6-10, 13-18 (R. p. 288); 280:21-281:1 (R. pp. 288-289); 299:13-303:22 (R. pp. 307-311). This is evidence that Nurse Downing, at the very minimum exercised at least slight care.

Moreover, Cindy Hurley, Appellant's expert who has had extensive experience working in pediatric nursing (*Id.* at 323:10-324:21 (R. pp. 332-333), 350:15-19 (R. p. 359)), testified that Nurse Downing actually exceeded the standard and the hospital's policy and procedure requirements by checking on him seven times during her twelve hour shift when she was only required to check on him once (*Id.* at 327:21-331:10 (R. pp. 336-340), 333:2-347:25 (R. pp. 342-356), 349:15-350:14 (R. pp. 358-359), 352:8-354:13 (R. pp. 361-363), 356:20-357:4 (R. pp. 365-466)). Certainly, if there was no evidence of negligence, but rather there was testimony that the standard was actually exceeded, there could not possibly have been any gross negligence or any inference of the same as a matter of law.

Even in the light most favorable to the non-moving party, there was no evidence or testimony presented establishing an inference or possibility of gross negligence on the part of Appellant. Respondent had the burden, and they failed to meet that burden. Respondent failed to demonstrate through evidence or testimony that Nurse Downing failed to exercise slight care or intentionally failed to do what she ought to have done in the care and treatment of the minor

Respondent. Because Respondent failed to meet their burden of establishing any inference of gross negligence, and the courts favor limitations on liability on the State, the Trial Court erred by not granting a directed verdict in favor of Appellant. Thus, the decision must be reversed on this ground.

III. THE TRIAL COURT ABUSED ITS DISCRETION BY ALLOWING, OVER OBJECTION, THE ADMISSION OF PREJUDICIAL PHOTOGRAPHS OF THE MINOR CHILD TO THE JURY.

STANDARD OF REVIEW

"[T]he admission or exclusion of evidence in general is within the sound discretion of the trial court." *Fields*, 363 S.C. 19 at 25. "[T]he trial court's decision will not be disturbed on appeal absent an abuse of discretion." *Id.*; *Gooding*, 454 S.E.2d at 30. "An abuse of discretion occurs when there is an error of law or a factual conclusion which is without evidentiary support." *Gooding*, 326 S.C. at 487 (citing *Lee,* 318 S.C. 283, 457 S.E.2d 344); *Fields*, 363 S.C. at 26. "To warrant reversal based on the admission or exclusion of evidence, the appellant must prove both the error of the ruling and the resulting prejudice, i.e., that there is a reasonable probability the jury's verdict was influenced by the challenged evidence or the lack thereof." *Fields*, 363 S.C. at 26 (citations omitted).

ARGUMENT

Rule 403 of the South Carolina Rules of Evidence states, "[a]lthough relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Rule 403, SCRE. "To constitute

unfair prejudice, the photographs must create 'an undue tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one.'" *State v. Holder*, 382 S.C. 278, 290, 676 S.E.2d 690 (2009) (quoting *State v. Jackson*, 364 S.C. 329, 334 (2005)). "Photographs calculated to arouse the sympathy or prejudice the jury should be excluded if they are irrelevant or not necessary to substantiate material facts or conditions." *State v. Torres*, 390 S.C. 618, 623, 703 S.E.2d 226 (2010).

In a Motion *in limine*, Appellant argued against the admission of photographs (Pltf.'s Exs. 1-3 (R. pp. 463-465) of the minor Respondent's hand into evidence. Trial Tr. 10-15, Dec. 22, 2020 (R. pp. 46-51); Def.'s Notice of Motion & Motion *in limine* to Exclude Photos (R. pp. 533-534). Appellant believes that the court erred in allowing the admission of the photographs (Trial Tr. 14:24-15:14, Dec. 22, 2020 (R. pp. 50-51)) and testimony during trial as to the same (Trial Tr. 151:7-152:15 (R. pp. 166-167), 154:20-156:3 (R. pp. 169-171), 228:1-230:15 (R. pp. 234-236), 235:8-236:4 (R. pp. 241-242), Mar. 17, 2019). Def.'s Motion for JNOV or in the alt. Mot. for New Trial 6-7 (R. pp. 541-542); Court's Order Granting Def.'s Motion for Reduction to Statutory Cap & Denying Def.'s Motion for JNOV or in the Alt. for a New Trial 7 (R. p. 8). First, these photographs were not necessary to substantiate the Respondent's case. The fact that there was a wound was never disputed, and at no time did Appellant's argue that the infiltration did not occur or was not the cause of the wound. Trial Tr. 3:13-18, Dec. 22, 2020 (R. p. 39); Trial Tr. 399:3-5, Mar. 17, 2019 (R. p. 409). The Respondent had ample other evidence of the wound, such as the wound center records (Pltf.'s Ex. 6), testimony by the witnesses, and presentation of the minor child at trial (Trial Tr. 158:15-159:25, Mar. 17, 2019 (R. pp. 173-174)), that were less prejudicial than the photographs of the open flesh wound.

Second, these were grotesque, up-close images of the wound that made them appear substantially large than they were in reality. One of the photographs was actually quite blurry. Moreover, the photographs did not include a scale to indicate measurements and proportions. As such, Appellant argues that these images were graphic, inflammatory, and not an accurate reflection of the child's hand and injuries. Trial Tr. 12:23-14:1, Dec. 22, 2020 (R. pp. 48-50); Def.'s Notice of Motion & Motion *in limine* to Exclude Photos (R. pp. 533-534); Def.'s Motion for JNOV or in the alt. Mot. for New Trial 6-7 (R. pp. 541-542). The photos, by their very nature, had a prejudicial tendency to arouse the emotions of the jury. *Id.* Moreover, the photographs did not reflect the current state of the wound. The minor child appeared during trial and showed the jury his scar, which did not appear as it did in the photographs. Trial Tr. 158:15-159:25, Mar. 17, 2019 (R. pp. 173-174). There was also testimony, including from Respondent's own expert, that the child's scar appeared healed since February 2015 and did not look like the photographs shown. *Id.* at 243:12-20 (R. p. 249); 245:2-3, 5-8 (R. p. 251). Thus, as the photographs were not necessary to determine the identity of the child or that the injury had occurred; were grotesque, up-close images not appropriately scaled; and were not representative of the nature of the child's scar, Appellant asserts the admission of the photographs and testimony of the same was in error.

Appellant further asserts this error amounted to prejudice based upon the excessive verdict in favor of Respondent. Due to the excessive jury award, the Appellant is left to conclude that the admission of the grotesque, up-close nature of the photographs were designed to and succeeded in arousing the sympathy of the jury. As stated above, the photographs were not necessary to establish identity or that the infiltration did occur and was the cause of the wound, the photographs were of little probative value. Appellant argues that any probative value they

may have had was substantially outweighed by the fact that they were grotesque, up-close images of the open wound, not to scale, and not representative of the actual appearance of minor's scar. Despite hearing testimony that the minor child's scar has been healed since February 2015 (*Id.* at 245:2-8 (R. p. 251)), is well-healed and stable (*Id.* at 191:17-192:3 (R. pp. 206-207)), does not appear as it did in the photographs, and, in fact, seeing this for themselves, the jury return a grossly excessive verdict in favor of Respondent. Thus, this leaves Appellant to conclude that, without any additional presentation from the Respondent of evidence of gross negligence on the part of Appellant, the jury must have been highly persuaded by these grotesque images. Thus, Appellant asserts the admission of these photographs were highly prejudicial to its defense.

Therefore, Appellant asserts the admission of the photographs was in error, was highly prejudicial to Appellant's defense, and their admission and the allowance testimony to the same an abuse of discretion by the Trial Court, thereby warranting a reversal of the Trial Court's decision.

IV. THE TRIAL COURT ABUSED ITS DISCRETION IN PROHIBITING APPELLANT'S EXPERT CYNTHIA HURLEY FROM TESTIFYING IN FRONT OF THE JURY AS TO WHETHER THE APPELLANT WAS GROSSLY NEGLIGENT OR NEGLIGENT.

STANDARD OF REVIEW

"The qualification of an expert witness and the admissibility of the expert's testimony are matters within the trial court's discretion." *Gooding*, 326 S.C. at 252 (citing *McGee v. Bruce Hospital System,* 321 S.C. 340, 468 S.E.2d 633 (1996); *see, e.g., Fields,* 363 S.C. at 25.

"Similarly, the admission or exclusion of evidence in general is within the sound discretion of the trial court." *Fields,* 363 S.C. at 25. "In both instances, the trial court's decision will not be disturbed on appeal absent an abuse of discretion." *Id.*; *see, e.g., Gooding*, 454 S.E.2d at 330. "An abuse of discretion occurs when there is an error of law or a factual conclusion which is without evidentiary support." *Gooding,* 326 S.C. at 252 (citing *Lee,* 318 S.C. 283, 457 S.E.2d 344); *Fields*, 363 S.C. 19 at 26. "A trial court's ruling on the admissibility of an expert's testimony constitutes an abuse of discretion when the ruling is manifestly arbitrary, unreasonable, or unfair." *Fields*, 363 S.C. at 26 (citing *Means,* 348 S.C. at 166, 558 S.E.2d at 924). "To warrant reversal based on the admission or exclusion of evidence, the appellant must prove both the error of the ruling and the resulting prejudice, i.e., that there is a reasonable probability the jury's verdict was influenced by the challenged evidence or the lack thereof." *Fields*, 363 S.C. at 26 (citations omitted).

ARGUMENT

During trial, Respondent asked the court to prohibit Appellant's expert from testifying as to any legal conclusion. Trial Tr. 316:2-7, Mar. 17, 2019 (R. p. 325). Appellant argues that the court erred prohibiting counsel for Appellant from asking its expert in front of the jury whether she believed Appellant was negligent or grossly negligent and instead forcing counsel for Appellant to ask her outside the presence of the jury in a proffer. *Id.* at 316:2-320:1 (R. pp. 325-329), 378:1-381:13 (R. pp. 387-390); Def.'s Motion for JNOV or in the alt. Motion for New Trial 7-8 (R. pp. 542-543); Court's Order Granting Def.'s Motion for Reduction to Statutory Cap & Denying Def.'s Motion for JNOV or in the alt. for a New Trial 7 (R. p. 8). It was her opinion via the proffer that Nurse Downing, and therefore TRMC, was not negligent and was not grossly

neglect. (*Id.* at 380:3-18 (R. p. 389)). Appellant argues that the Trial Court's error in not allowing this testimony has amounted to an abuse of discretion because it was allowed under the Rules of Evidence and case law, and it resulted in prejudice to the Appellant and the presentation of its defense on the matter.

Pursuant to the South Carolina Rules of Evidence, "[t]estimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." Rule 704, SCRE. "There is no invasion of the province of the jury, for the jury retains its power and duty to judge both the credibility of the witness and the weight to be given to his opinion." *Redman v. Ford Motor Co.*, 253 S.C. 266, 278, 170 S.E.2d 207 (1969). In *Dawkins*, the court held that "[i]n general, expert testimony on issues of law is inadmissible. *Dawkins v. Fields*, 354 S.C. 58, 66, 580 S.E.2d 433 (2003). However, the court has held "that the trial judge has the discretion to permit expert testimony on the ultimate issue before the jury." *Redman*, 253 S.C. at 278 (citing *O'Kelley v. Mut. Life Ins. Co.*, 197 S.C. 109, 14 S.E.2d 582 (1941)); *see, e.g., Hughes v. Children's Clinic, P.A.*, 269 S.C. 389, 403, 237 S.E.2d 753 (1977).

Appellant's expert, Cindy Hurley, testified as to the standard of care for pediatric nursing and her opinions as to whether Nurse Stobbs complied with that standard. Trial Tr. 327:21-24 (R. p. 336), 328-331:10 (R. pp. 337-340), 333:2-347:25 (R. pp. 342-356), 349:15-350:14 (R. pp. 358-359), 352:8-354:13 (R. pp. 361-363), 356:20-357:4 (R. pp. 365-366), Mar. 17, 2019. For reasons previously discussed, the ultimate issue, the burden which Respondent had to establish, was gross negligence. Given her extensive experience and knowledge regarding pediatric nursing and IV administration (*Id.* at 323:10-324:21 (R. pp. 332-333), 350:15-19 (R. p. 359)), Appellant

sought to ask Ms. Hurley whether she believed Nurse Stobbs and Appellant hospital acted with negligence or gross negligence (*Id.* at 316:14-21 (R. p. 325), 318:1-5 (R. p. 327)). Ms. Hurley could not be prohibited from testifying to this solely on the grounds that it was the ultimate issue in this matter. *See* Rule 704. Moreover, counsel for Appellant was not asking Ms. Hurley to give an opinion as to an issue of law, as this was not possible since Ms. Hurley was a nurse and not a legal expert. Asking Ms. Hurley this question should not have led to any confusion, as the jury was aware that Ms. Hurley was an expert in nursing, not law. Unlike in *Dawkins*, Ms. Hurley did not make, and was not asked to make, a legal argument nor she did offer these opinions in a written affidavit. Appellant wanted to simply asked its expert what her opinion was based on her experience and background as a pediatric nurse.

Earlier in the trial proceedings, counsel for Appellant had asked Respondent's expert the same questions regarding her opinions as to negligence and intentionality on the part of Appellant hospital and Nurse Stobbs, without any objection from counsel for Respondent. Trial Tr. 132:24-25 (R. p. 147), 133:17-19 (R. p. 148), 138:10-139:16 (R. pp. 153-154), Mar. 17, 2019. Appellant thought that asking Ms. Hurley the same questioning would assist the jury in its decision and in weighing and comparing the testimony of both expert witnesses in this matter. Thus, because the jury did retain its power in judging the experts' credibility, allowing this part of Ms. Hurley's testimony would not have usurped its role. Therefore, Appellant argues that the Trial Court's ruling denying this portion of Ms. Hurley's testimony was arbitrary, unreasonable, and unfair to the presentations of Appellant's defense of this matter; thus, Defendants assert it was error for this to be kept from the jury for its consideration.

Appellant further assert that this error resulted in prejudice to Appellant's defense of this matter. The jury returned a grossly excessive verdict in favor of Respondent (Trial Tr. 446:18-447:1, Mar. 17, 2019 (R. pp. 457-458)), despite not hearing any testimony or seeing any evidence of gross negligence. Therefore, the Appellant is left to conclude that not being allowed to ask its expert this important question did, in fact, affect the results of the trial. Appellant maintains that the purpose of the question was to ask its expert her opinion, based on her experience in pediatric nursing, and this would have helped educate and better inform the jury. Thus, not allowing the testimony in the presence of the jury was prejudicial to Appellant.

Therefore, the Trial Court abused its discretion in not allowing Ms. Hurley's testimony regarding gross negligence in front of the presence of the jury, and the decision must be reversed.

V. THE TRIAL COURT ABUSED ITS DISCRETION IN PERMITTING THE REQUEST FOR ADMISSION TO BE PUBLISHED TO THE JURY.

STANDARD OF REVIEW

"[T]he admission or exclusion of evidence in general is within the sound discretion of the trial court." *Fields*, 363 S.C. at 25 "[T]he trial court's decision will not be disturbed on appeal absent an abuse of discretion." *Id.*; *Gooding*, 454 S.E.2d at 330. "An abuse of discretion occurs when there is an error of law or a factual conclusion which is without evidentiary support." *Gooding*, 326 S.C. at 487 (citing *Lee,* 318 S.C. 283, 457 S.E.2d 344); *Fields*, 363 S.C. at 26. "To warrant reversal based on the admission or exclusion of evidence, the appellant must prove both the error of the ruling and the resulting prejudice, i.e., that there is a reasonable probability the jury's verdict was influenced by the challenged evidence or the lack thereof." *Fields*, 363 S.C. at 26 (citations omitted).

ARGUMENT

Appellant asserts that the publication of its Request to Admit was an error that prejudiced Appellant's defense of the matter and amounted to an abuse of discretion by the Trial Court. Trial Tr. 250:21-258:25, Mar. 17, 2019 (R. pp. 257-265); Def.'s Motion for JNOV or in the alt. Motion for New Trial 8-10 (R. p. 543-545); Court's Order Granting Def.'s Motion for Reduction to Statutory Cap & Denying Def.'s Motion for JNOV or in the alt. for a New Trial 8 (R. p. 9); Def. RTA (R. pp. 35-36). Appellant concedes this is an unusual circumstance and the case law seems to only address issues for withdrawal by the admitting party. As per Rule 36(b) of the South Carolina Rules of Civil Procedure, "[t]he Court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice him in maintaining or defense on the merits." Rule 36, SCRCP; *see, e.g., Commerce Ctr. of Greenville, Inc. v. W. Powers McElveen*, 347 S.C. 545, 557, 556 S.E.2d 718, 724 (Ct. App. 2001) ("The trial court may allow a party to amend or withdraw its answers to a request to admit when: (1) the presentation of the merits is furthered by the amendment; and (2) the party who obtained the admission cannot demonstrate prejudice because of the amendment."). However, Appellant asserts that, pursuant to Rule 403 of the South Carolina Rules of Evidence, publishing the Request to Admit was in error and was highly prejudicial to the Appellant, as it did nothing but confuse the issues for the jury. Trial Tr. 251:24-11 (R. p. 258), 253:9-18 (R. p. 260), 255:20-257:5 (R. pp. 262-264). "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or

misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Rule 403, SCRE.

In its Request to Admit, Appellant asked Respondent to admit or deny that the amount in controversy and amount of Respondent's actual damage exceeded one hundred thousand dollars. Trial Tr. 258:18-25, Mar. 17, 2019 (R. p. 265); Def.'s RTA (R. pp. 35-36). The Request to Admit were not a stipulation under South Carolina Rules of Civil Procedure Rule 43(k)[6] but rather a discovery tool. Trial Tr. 253:9-18, Mar. 17, 2019 (R. p. 260). *See* The purpose of the request to admit was to obtain an Independent Medical Examination under Rule 35(a)[7] of the South Carolina Rules of Civil Procedure, not for Respondent to represent that Appellant admitted the damages were in excess of $100,000.00. *Id.* at 251:24-252:6 (R. pp. 258-259). Although facts may be stipulated under the rule, these Request to Admit were subjective, as they went to damages. Because the purpose was for obtaining were to obtain Respondent's view of the case in order to obtain an Independent Medical Examination under South Carolina Civil Procedure Rule 35(a), these were subjective, not factual, and thus, could not be stipulated. *Id.* at 253:21-254:11 (R. pp. 260-261).

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[6] Rule 43(k), SRCRP. "No agreement between counsel affecting the proceedings in an action shall be binding unless reduced to the form of a consent order or written stipulation signed by counsel and entered in the record, or unless made in open court and noted upon the record, or reduced to writing and signed by the parties and their counsel. Settlement agreements shall be handled in accordance with Rule 41.1, SCRCP."

[7] Rule 35(a), SRCP. "In any case in which the amount in controversy exceeds $100,000 actual damages, and the mental or physical condition . . . of a party, or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to a physical or mental examination by a physician or to produce for examination the person in his custody or legal control. . . ."

Although the Trial Court stated that the modification of the Request to Admit would have to go to the merits, not damages, *Id.* at 254:12-255:17 (R. pp. 261-262), Appellant argued that that publication to the jury would prejudice the merits of its defense, *Id.* at 255:20-257:5 (R. pp. 262-264). Reading the Request to Admit to the jury had the effect of confusing them as to the issues in dispute and the purpose of the Request to Admit. Allowing the Request to Admit to be published to the jury made the effect that a verdict had to be awarded for Respondent in the amount of at least $100,000.00. *Id.* at 252:8-11 (R. p. 259), 255:20-257:5 (R. pp. 262-264). This effectively directed a verdict of liability in the Respondent's favor, thereby impeding presentation of the merits of Appellant's case. Throughout the case, liability was contested, and Appellant maintained that it was not negligent. Therefore, publishing the Request to Admit to the jury subserved and impeded the presentation of the merits of the defense.

Appellant argued that the burden was on the Respondent to show that they would be prejudiced if the Request to Admit were not allowed to be published. *Id.* at 256:22-25 (R. p. 263). Appellant argued that they would not be able to meet that burden, as Respondent certainly had every right to argue for whatever verdict amount they wanted. *Id.* at 256:25-257:3 (R. pp. 263-264). Appellant, on the other hand, would be and was in fact highly prejudiced by allowing the admission of the Request to Admit. Moreover, The Request to Admit was not mentioned in Respondent's pretrial brief. Pltf.'s Pretrial Br. Respondent intentionally failed to mention the Request to Admit to Appellant's counsel until they were about to publish it to the jury. This highly prejudiced Appellant, as it had no time to prepare argument or rebuttal evidence. Thus, when balancing the little, if any, probative value of the Request to Admit with the high amount of

confusion and prejudicial effect publishing it would and did have, the admission of the Request to Admit was improper under Rule 403.

As such, the Trial Court should have not have allowed the admission into evidence of the Request for Admission because it was of little probative value and was highly prejudicial to Appellant as it directly confused the issues and impeded the merits of the Appellant's case. Thus, the decision of the Trial Court must be reversed.

VI. THE TRIAL COURT ABUSED ITS DISCRETION IN NOT GRANTING A NEW TRIAL ABSOLUTE OR NEW TRIAL *NISI REMITTITUR* WHEN THE VERDICT WAS GROSSLY EXCESSIVE AND SHOCKINGLY DISPROPORTIONATE AND CONTRARY TO THE EVIDENCE ADMITTED AT TRIAL, OR, AT THE VERY MINIMUM, WAS AT LEAST MERELY EXCESSIVE GIVEN THE EVIDENCE.

STANDARD OF REVIEW

> The decision to grant or deny a new trial absolute based on the excessiveness of a verdict rests in the sound discretion of the trial court and ordinarily will not be disturbed on appeal. An abuse of discretion occurs if the trial court's findings are wholly unsupported by the evidence or the conclusions reached are controlled by an error of law.

Welch, 342 S.C. at 302 (citing *Krepps v. Ausen,* 324 S.C. 597, 479 S.E.2d 290 (Ct.App.1996)); *see, e.g.*, *Stevens v. Allen*, 336 S.C. 439, 446, 520 S.E.2d 625 (Ct. App. 1999). "In deciding whether to assess error when a new trial motion is denied, this Court must consider the testimony and reasonable inferences therefrom in the light most favorable to the nonmoving party." *Welch*, 342 S.C. at 302-03 (citing *Vinson v. Hartley,* 324 S.C. 389, 477 S.E.2d 715 (Ct.App.1996)).

ARGUMENT

A. THE TRIAL COURT ERRED IN NOT GRANTING A NEW TRIAL ABSOLUTE BECAUSE THE VERDICT WAS GROSSLY EXCESSIVE AND SHOCKINGLY DISPROPORTIONATE AND CONTRARY TO THE EVIDENCE ADMITTED AT TRIAL.

> When a party moves for a new trial based on a challenge that the verdict is either excessive or inadequate, the trial judge must distinguish between awards that are merely unduly liberal or conservative and awards that are actuated by passion, caprice or prejudice. The trial court must set aside a verdict only when it is shockingly disproportionate to the injuries suffered and thus indicates that passion, caprice, prejudice, or other considerations not reflected by the evidence affected the amount awarded. In other words, to 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.

Welch, 342 S.C. at 302 (citations omitted); s*ee, e.g.*, *Stevens*, 336 S.C. at 447 ("The trial judge must grant a new trial absolute if the amount of the verdict is grossly inadequate or excessive so as to shock the conscience of the court and clearly indicates the figure reached was the result of passion, caprice, prejudice, partiality, corruption or some other improper motives."); *Duncan v. Hampton Cnt. Sch. Dist. No. 2*, 235 S.C. 535, 517 S.E.2d 449, 455 (Ct. App. 1990); *see also*, *Sullivan v. Davis*, 317 S.C. 462, 467, 454 S.E.2d 907, 912 (Ct. App. 1995) (holding that the Trial Court abused its discretion in not granting the new trial absolute motion when the verdict was "shockingly disproportionate" to the evidence presented); *Zorn v. Crawford*, 252 S.C. 127, 138, 165 S.E.2d 640, 646 (1969) (granting a new trial in a wrongful death action where "a verdict of $250,000.00 for the actual damages sustained by the beneficiaries . . . [was] not supported by the

evidence and [could] only be explained upon the basis of sympathy, passion, or prejudice on the part of the jury").

The term "passion and prejudice" does not "necessarily imply bad faith, wrongful purpose, or moral delinquency," but rather, results when the award is "against the overwhelming weight of the evidence." *Beasley v. Ford Motor Co.*, 237 S.C. 506, 513, 117 S.E.2d 863, 867 (1961)."Ordinarily the only means of discovering the existence of passion and prejudice as influencing the verdict is by comparing the amount of the verdict with the evidence before the trial court." *Nelson v. Charleston W.C. Ry. Co.*, 231 S.C. 351, 362, 98 S.E.2d 798, 802 (S.C. 1957). However, in some instances,

> [t]he size of the verdict alone may show that it must have been the result of passion or prejudice, as for instance, when it is apparent that the award is obviously so disproportionate to the injury proved as to justify the conclusion that the verdict is not the result of the cool and dispassionate discretion of the jury.

Id. (quoting 15 Am. Jur., *Damages* § 205, p. 623); *see also, Smalls v. Springs Indus., Inc.* 292 S.C. 481, 486, 357 S.E.2d 452, 455 (1987) (stating that under the facts of the case, "the size of the jury's verdict alone establishes it is grossly excessive"). For further clarification,

> [a] close analysis of the results reached in the cases justifies the statement that the courts generally grant relief if convinced that the verdict substantially exceeds any rational appraisal or estimate of the damages even though the inference of passion, prejudice, partiality, or other improper motive on the part of the jury is no more natural or reasonable than the inference of mistake or misapprehension on their part.

Beasley, 237 S.C. at 512-513 (quoting 15 Am. Jur. *Damages* § 205, p. 623).

In this matter, the jury returned a verdict in the amount of $1,127,280 for the minor and $135,477.00 for Respondent Tekayah Hamilton. Trial Tr. 446:18-447:1, Mar. 17, 2019 (R. pp.

457-458); (R. p. 535). Subsequently, Appellant filed a Motion for Judgment Notwithstanding the Verdict or in the alternative Motion for New Trial, in which one of the grounds for a new trial absolute was because the verdict was grossly excessive as compared to the evidence presented at trial. Def.'s Mot. for JNOV or in the alt. Mot. for New Trial 11-13 (R. pp. 546-548). Appellant asserts the Trial Court's denial of its motion on this ground was an error in law, as the verdict was grossly excessive and shockingly disproportionate, wholly unsupported by and contradictory to the evidence presented a trial for the following reasons. Court's Order Granting Def.'s Motion for Reduction to Statutory Cap & Denying Def.'s Motion for JNOV or in the Alt. for a New Trial 8 (R. p. 9)

First, there was little testimony regarding any pain and suffering. Dr. Devito testified that the minor seemed to be experiencing pain during his examination of him, although Dr. Davis testified that during his examination of the minor, the minor denied any pain, burning, or itching (*Id.* at 192:13-25 (R. p. 207)). Dr. Davis testified that Respondent Tekayah Hamilton told him the minor would ask her if he could scratch it. (*Id.* at 192:25-193:2 (R. pp. 207-208)). The only testimony from Respondent Hamilton regarding pain was some itching and cramping that is alleviated with some exercises and crying during the infiltration and wound care follow up treatment.

Second, there was testimony establishing that very little has been done or is planned in regards to treatment. The minor treated at the wound care center at The Regional Medical Center immediately after the infiltration occurred and for a short period of time in 2015. *See* Plf.'s Ex. 6. He saw Respondent's expert Dr. Devito on February 2, 2015; March 5, 2015; and did not go back to him for three years until March 2018. Trial Tr. 163:13-15, 23-25 (R. p. 178); 165:10-12 (R. p.

180), Mar. 17, 2019. At the time of trial, the minor was not currently on any medications for this wound. *Id.* at 169:16-18 (R. p. 184). Nonsurgical options, such as steroidal injections and compression, have been recommended by both the physician referred by Respondent's lawyer and the court-appointed plastic surgeon; however, the minor has not gotten this treatment. *Id.* at 163:13-18 (R. p. 178), 163:23-164:13 (R. pp. 178-179), 195:23-196:18 (R. pp. 210-211), 198:20-199:15 (R. pp. 213-214), 248:23-249:17 (R. pp. 254-255). Surgery had also been recommended by both physicians as another method of treatment to improve the scar (*Id.* at 195:23-196:18 (R. pp. 210-211), 238:5 (R. p. 244)), but Respondent Tekayah Hamilton testified she has no plans for surgery at this time, although she testified she may consider it when the minor is older (*Id.* at 170:3-4, 11-15 (R. p. 185); 171:10-1 (R. p. 186)). Although surgery would improve the appearance of the scar, surgery is not needed for any functionality reasons. *Id.* at 210:2-12 (R. p. 225).

Third, although there is scar tissue (*Id.* at 191:5-14 (R. p. 206)) and the scar is permanent (*Id.* at 210:23-211:5 (R. pp. 225-226)), his hand is fully functioning (*Id.* at 193:3-195:22 (R. pp. 208-210)), and the wound is "well-healed" and "stable" (*Id.* at 191:17-192:3 (R. pp. 206-207)) and will not get worse (*Id.* at 199:16-25 (R. p. 214)). There are no functional deficits and "nothing inhibiting full functioning of the wrist": no diminished finger strength, no impairment of the tendons or wrist, and no issue with range of motion of the wrist. *Id.* at 192:6-12 (R. p. 207), 193:3-2-195:22 (R. pp. 208-210). The child "should have normal functionality throughout the rest of his life." *Id.* at 194:14-15 (R. p. 209). The child will be able to do things a normal child would, such as a throwing a ball, playing a music instrument, holding a fishing pole, writing and drawing, and driving a car. *Id.* at 200:25-202:9 (R. pp. 215-217).

As the evidence presented cannot support a $1,127,280 verdict for the minor and $135,477.00 for Respondent Tekayah Hamilton, the size of the verdict alone is sufficient to show that the jury must have been moved by passion or prejudice,. The verdict of $1,127,280 for minor Respondent is 54 times the amount of actual damages of $20,854. This is grossly excessive and shocks the conscience, as there was little testimony of pain and suffering; there is no ongoing treatment or plans for any in the future; the scar is well-healed and stable; and there are no functionality deficits. Additionally, the $135,477.00 verdict for Respondent Tekayah Hamilton is also grossly excessive, as past and future medical damages only amount to $20,854.00 (*Id.* at 412:24-413:12 (R. pp. 422-423)); she testified she has no plans for the child to undergo any steroidal injections or scar revision surgery (*Id.* at 170:3-4 (R. p. 185)); and she is not entitled to any pain or suffering.

Thus, the verdict in this matter is "without any rational support whatever in the evidence and is so grossly excessive as to show that the jury was actuated by considerations not founded on the evidence and/or the instructions of the court." *Joyner v. St. Matthews Builders*, 263 S.C. 136, 140-41, 208 S.E.2d 48, 50 (1974) (granting a new trial due to the "actual damages" being so manifestly and grossly excessive"). Given the complete lack of any cognizable basis to support the damages award, it is clear that in awarding these amounts for both the minor and his mother, the jury did not pay attention to the jury instructions. "[I]t is fundamental that a jury must abide by the judge's charge, be it right or wrong. Where the jury renders a verdict in disregard of his charge, it is error for the judge not to grant a new trial upon motion." *Southeastern Mobile Homes Inc., v. Walicki*, 282 S.C. 298, 302, 317 S.E.2d 773 (Ct. App. 1984). Appellant is left to conclude that, in light of the excessive verdict as compared to the evidence of actual damages,

the jury arrived as its award as a result of passion, caprice, or other improve motives. "If the amount of the verdict is grossly excessive so as to be the result of passion, caprice, prejudice or some other influence outside the evidence, the trial judge must grant a new trial absolute, not a new trial *nisi remittitur." Welch*, 342 S.C. at 303 (citing *O'Neal v. Bowles,* 314 S.C. 525, 431 S.E. 2d 555 (1993)). Therefore, it was an abuse of discretion for the Trial Court not to grant Appellant's motion for a new trial absolute based on the grossly excessive verdict, and thus, the decision must be reversed.

B. IN THE ALTERNATIVE, IF THE APPELLANT COURT DOES NOT BELIEVE THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING THE MOTION FOR A NEW TRIAL ABSOLUTE, APPELLANT ASSERTS THAT THE TRIAL COURT ABUSED ITS DISCRETION BY NOT GRANTING ITS MOTION FOR NEW TRIAL *NISI REMITTITUR* BECAUSE THE VERDICT WAS, AT THE VERY LEAST, MERELY EXCESSIVE.

> The trial court has wide discretionary power to reduce the amount of a verdict which in his or her judgment is excessive. Indeed, when the verdict indicates the jury was unduly liberal in determining damages, the trial court alone has the power to reduce the verdict by the granting of a new trial *nisi remittitur.* A motion for new trial *nisi remittitur* asks the trial court in its discretion to reduce the verdict because it is merely excessive, although not motivated by considerations such as passion, caprice or prejudice.

Welch, 342 S.C. at 303 (citations omitted); s*ee, e.g., RRR, Inc v. Toggas*, 378 S.C. 174, 183, 662 S.E.2d 438 (Ct. App. 2008) ("[T]he circuit court alone has the power to grant a new trial nisi when it finds the amount of the verdict to be merely inadequate or excessive."); *Howard v. Roberson*, 376 S.C. 143, 154, 654 S.E.2d 877 (Ct. App. 2007) (stating that the court "may grant a

new trial nisi additur or remittitur when it finds the verdict is merely inadequate or excessive."); *Becker v. Walmart Stores, Inc.*, 339 S.C. 629, 636, 529 S.E.2d 758 (Ct. App. 2000) (affirming trial court's granting of motion for remittitur on grounds that amount awarded by jury was "merely excessive"). "In considering a motion for new trial *nisi,* the trial court must evaluate the adequacy of the verdict in light of the evidence presented." *Welch*, 342 S.C. at 303 (citing *Waring v. Johnson,* 341 S.C. 248, 533 S.E.2d 906 (Ct.App.2000)).

In its motion, Appellant asked the Trial Court that if did not agree with Appellant that the verdict is grossly excessive to the extent of shocking the conscience and did not appear to be motivated by considerations such as passion, caprice or prejudice, then to grant a new trial *nisi remittitur* because the verdict was, at the very least, merely excessive. Def.'s Mot. for JNOV or in the alt. Mot. for New Trial 11-14 (R. pp. 546-549). The Trial Court denied Appellant's motion for a new trial *nisi remittitur*, although it did grant, in part, Appellant's motion to cap the damages as required by the South Carolina Torts Claims Act (§15-78-10, et seq.). Court's Order Granting Def.'s Motion for Reduction to Statutory Cap & Denying Def.'s Motion for JNOV or in the Alt. for a New Trial 4-6, 8 (R. pp. 5-7, 9); Def.'s Post Trial Mot. for Reduction to Statutory Cap (R. pp. 552-554). The Trial Court capped the judgment for the minor at $300,000.00 because §15-78-120(a)(1) provides a maximum of $300,000.00 for a loss arising from a single occurrence.

Additionally, Appellant moved for a reduction in Respondent Tekayah Hamilton's verdict, which was in the amount of $135,477.00, as she was only entitled to past and future medical costs, which totaled $20,854.00. Trial Tr. 412:24-413:12 (R. pp. 422-423); Def.'s Post Trial Mot. for Reduction to Statutory Cap (R. p. 552-554). *See*, *Patton v. Miller,* 420 S.C. 471, 804 S.E.2d

252 (2017) (a parent is the proper party in interest with respect to past and future medical expenses while the child is a minor); *Wright v. Colleton Cnty. Sch. Dist.*, 301 S.C. 282, 289-90, 391 S.E.2d 564 (1990) (finding that a parent may recover medical expenses separately from the child's claim). However, the Trial Court denied Appellant's motion to reduce the verdict for Respondent Tekayah Hamilton.

Even after capping the minor's judgment at $300,000.00 as required by §15-78-120(a)(1), the judgment is still, at the very minimum, merely excessive. As discussed above, there was no testimony of current, ongoing treatment or plans for any in the future, and there was little testimony of pain or suffering. The wound is well-healed (Trial Tr. 191:17-192:3, Mar. 17, 2019 (R. pp. 206-207)), and the hand fully functioning (*Id.* at 193:3-195:22 (R. pp. 208-210)). The jury saw this for themselves. Moreover, the verdict for Respondent Tekayah Hamilton in the amount of $135,477.00 was also, at the very minimum, merely excessive, as she testified she has no plans for steroidal injections or surgery (*Id.* at 170:3-4 (R. p. 185)), and the only evidence of actual damages, past and future medical expenses, were in the amount of $20,854 (*Id.* at 412:24-413:12 (R. pp. 422-423)). She was not entitled to any damages for pain and suffering. Therefore, the verdict rendered by the jury, as well as the statutory cap placed on the minor's verdict, was at least merely excessive as compared to the evidence presented at trial. As such, the Trial Court abused its discretion in denying Appellant's alternative motion for new trial *nisi remittitur.*

Since the verdict was grossly excessive or at least merely excessive, the Trial Court's error in not granting either a new trial absolute or in the alternative a new trial *nisi remittitur* amounted to an abuse of discretion, and the decision must be reversed.

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,

May 20, 2021

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ORANGEBURG COUNTY COURT OF COMMON PLEAS

RECEIVED
May 20 2021
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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 M., Jr., a minor child under the age of 18,..... Respondent

v.

Regional Medical Center, ...Appellant

PROOF OF SERVICE

I certify that I have served the Final Brief of The Regional Medical Center, by depositing a copy of it in the United States Mail, a postage prepaid, and via email on May 20, 2021, addressed to the attorneys of record, Jonathan F. Krell, Esquire, Post Office Box 299, Charleston, S.C., 29402, and David R. Williams, Esquire, Post Office Box, 1084, Orangeburg, S.C., 29116, and Kathleen Chewning Barnes, Esquire, Post Office Box, 897, Hampton, S.C., 29924.

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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211, SCACR.

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