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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM MARLBORO COUNTY
The Hon. Paul M. Burch, Circuit Court Judge

Appellate Case No.: 2020-00989

Daisy Frederick,.....Respondent,

v.

Daniel Lee McDowell,.....Appellant.

FINAL REPLY BRIEF

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ARGUMENT

I. Frederick's arguments ignore the significance of the absence of any evidence of future damages.

In her brief, Frederick does not attempt to demonstrate that she presented any evidence of future damages at trial. This amounts to a tacit admission that no such evidence exists or was presented at trial. Frederick submitted evidence of past medical treatments and pain, evidence of past lost wages, and testimony that she still experienced some pain as of the trial date. There was no other evidence of damages, let alone any that were likely to occur in the future. Again, Frederick does not appear to dispute that fact in her brief.

Instead, Frederick argues that her past damages – particularly her long course of recovery – were sufficient to justify the $5,000,000 verdict. That position cannot withstand any serious scrutiny. As noted in the Appellant's Brief, if Frederick's specials are removed from consideration, the jury awarded her $4,775,000 for intangible damages such as pain and suffering during a 20-month period (i.e. from the day of the accident to the trial date). That constitutes roughly $8,000 per day for the entire period, even though the undisputed medical evidence showed that Frederick's condition improved from her post-accident status during that time. Such a large amount 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." *Becker v. Wal-Mart Stores, Inc.*, 339 S.C. 629, 635, 529 S.E.2d 758, 761 (Ct. App. 2000).

Even if the amount of the verdict was not "shockingly disproportionate" to the claimed injuries, there can be no doubt that it was "merely excessive." There is simply no way to justify a $5,000,000 verdict based on the actual evidence presented at trial.

Therefore, the jury must have based its verdict on improper considerations.[1] Accordingly, McDowell was entitled, at a minimum, to a new trial *nisi remittitur*. The trial court erred in failing to grant McDowell that relief, or to grant him a new trial absolute.

Frederick's exclusive reliance on the evidence of past damages, and the lower amount of pain at the time of trial, also fails because it ignores the trial court's erroneous decision to charge the state mortality tables. As discussed in the Appellant's Brief, that decision invited the jury to award future damages, even though there was no evidence to support them. Why else would the mortality table be relevant? Frederick presented no evidence of any permanent impairment or other problems that were likely to occur in the future. Yet, the trial court allowed the jury to consider and award such damages by including the mortality tables in the jury instructions. That decision was a prejudicial error that led to a verdict that was excessive, if not shockingly so.

Essentially, Frederick's arguments on this issue try to have it both ways. She claims the past damages were sufficient to support the verdict, and although she never explicitly concedes the point, she does not make a serious effort to show any evidence of future damages. But Frederick fails to explain why, if that is true, there was any justifiable basis for the trial court to charge the mortality tables. Nor can she do so. There was no reason for the trial court to include those tables in the charge in the absence of future damages evidence, and the tables' erroneous inclusion had a clear and definite impact on the verdict.

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[1] Frederick takes issue with the use of the word "perhaps" in the Appellant's Brief, suggesting that McDowell bases his entire position on speculation as to the jury's motives. This is inaccurate. The word "perhaps" appears multiple times in a single paragraph as a rhetorical device to offer theories of what the jury might have thought. But the point was not to speculate that one or more of those possibilities must be what actually happened. Rather, the point was to demonstrate that while many improper bases are possible, there is no legitimate basis to justify the amount of the verdict.

It turned this from a case about past damages into a case about past and future damages. For that reason, the trial court erred in not granting McDowell the requested post-trial relief. This Court should reverse and remand with instructions to grant McDowell a new trial or a new trial *nisi remittitur*.

In addition, Frederick fails to present any arguments that would distinguish the cases cited in the Appellant's Brief on the excessiveness of the verdict. (*See* Appellant's Brief, pp. 12-15.) The absence of any such rebuttal is particularly significant with regard to *Becker v. Wal-Mart Stores, Inc.*, 339 S.C. 629 , 529 S.E.2d 758 (Ct. App. 2000). In that case, a new trial *nisi remittitur* was warranted when the jury awarded a verdict of $1,750,000 based on medical bills of $030,538.44. This was true even though the plaintiff presented evidence of future damages – i.e. a 4% permanent impairment rating. If a new trial *nisi remittitur* was appropriate in that case, which contained an element of future damages, then the same remedy should apply here, where a jury awarded a much larger sum despite the absence of any evidence of future damages. Frederick's brief offers nothing to dispute that conclusion. McDowell respectfully submits that this is because no credible distinguishing factor exists. *Becker* is on point, and it supports McDowell's position in this appeal.

II. Frederick has also failed to address controlling or persuasive case law in some of the other issues on appeal.

Just as Frederick ignores *Becker v. Wal-Mart Stores, Inc.*, on the issue of the excessive verdict, she also overlooks the relevant case law cited and discussed in the Appellant's Brief on other issues. Thus, the Court should rely on those authorities to reverse the result below and grant McDowell either judgment as a matter of law or a new trial.

On pages 16-18 of the Appellant's Brief, McDowell presented numerous examples of cases in which North Carolina's appellate courts have applied the doctrine of contributory negligence as a matter of law in a defendant's favor. Some of those cases involved analogous facts to those at issue in the present case. In her brief, Frederick does not acknowledge or discuss any of those cited cases. Instead, she cites other North Carolina authority for the general proposition that a contributory negligence defense is usually an issue for the jury. This is not a point in dispute, as McDowell noted as much in the Appellant's Brief. Yet, as the decisions cited in the Appellant's Brief demonstrate, that is not always the case. There have been plenty of occasions in which North Carolina's courts have treated this issue as a matter of law, and those cases support the same result here.

No reasonable jury could view the record evidence and conclude that Frederick's own negligence did not contribute to the accident, at least in some small part. Frederick admitted that she had an adequate line of sight to have observed McDowell's vehicle from a safe distance away prior to the accident, and yet, she did not actually see the vehicle until it was only about three car lengths away. [R. pp. 55, 77-79.] Those facts demonstrate that Frederick failed to maintain a proper lookout, and that her negligence in that regard contributed to the accident. Therefore, the cases cited in the Appellant's Brief are on point, and McDowell is entitled to reversal of the result below and the entry of judgment as a matter of law in his favor.

Similarly, Frederick makes no attempt to distinguish or explain away the impact of the Supreme Court's decision in *Hamrick v. State*, 426 S.C. 638, 828 S.E.2d 596 (2019), on the issue related to admissibility of her expert's opinions. As discussed in the Appellant's Brief, the trial court admitted opinions by Frederick's expert witness that were

primarily based on the conclusions and opinions of the investigating police officer. *Hamrick* demonstrates that this decision by the trial court was erroneous because there was no showing that the underlying opinions and conclusions were reliable, or that the trial judge undertook the proper steps to evaluate reliability.

Despite the existence of that very recent (and on point) Supreme Court case, Frederick chooses not to address it in her appellate arguments. Her brief acknowledges in its Statement of the Case that McDowell cited *Hamrick* in support of his post-trial motions. In the actual argument sections, however, the Respondent's Brief is silent as to *Hamrick* or its significance on this issue. Thus, Frederick has failed to rebut McDowell's analysis of, or reliance on, *Hamrick*, and that case serves as a sufficient basis for this Court to reverse and remand for a new trial.

CONCLUSION

McDowell's arguments on appeal are not meant to suggest that Frederick did not sustain significant injuries in this vehicular accident. But there is a clear and substantial difference between "significant" injuries and those that would justify a $5,000,000 verdict when the medical specials were only around $225,000. To justify a verdict of that amount, there would need to be evidence of future damages such as a permanent impairment, anticipated future medical expenses, or lost earning capacity. None of those things were present in this case. Nor was there evidence of any other kind of future damages that Frederick would be likely to sustain. Her course of medical treatment was long, and no doubt arduous, but it was also successful. She had fortunately overcome her injuries at the time of trial, and there was no legitimate basis for the jury to consider or award future damages. Yet, that is precisely what the trial court invited the jury to do by charging the

mortality tables. That error led to the predictable result of a verdict that was at a minimum excessive, if not shockingly so.

In emphasizing this point on reply, McDowell does not intend to abandon his other appellate issues or to suggest that they are any less meritorious. For example, McDowell strongly contends he is entitled to judgment as a matter of law based on the contributory negligence defense. Thus, McDowell reiterates his entitlement to all of the relief requested in the Appellant's Brief. But even if the Court were to reject those other issues, the Court should still reverse and remand for a new trial or new trial *nisi remittitur* based on the plainly excessive nature of the verdict.

Respectfully submitted,

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RULE 211(b) CERTIFICATION

The undersigned, an attorney in this matter for the Appellant, certifies that this Final Reply Brief complies with Rule 211(b), SCACR.

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