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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Marlboro County
Court of Common Pleas

The Honorable Paul M. Burch, Circuit Court Judge

Case No. 2016-CP-34-00072

Appellate Case No. 2020-000989

Daisy Frederick,

Respondent,

v.

Daniel Lee McDowell,

Appellant.

Final Brief of Respondent

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STATEMENT OF THE CASE

This matter stems from an automobile collision that occurred on or about April 29, 2015 in North Carolina between Daisy Frederick ("Frederick" or "Respondent") and Daniel Lee McDowell ("McDowell" or "Appellant"). At the time of the collision, both Frederick and McDowell were residents of the state of South Carolina. Accordingly, Frederick's Summons and Complaint were filed in the Court of Common Pleas for Marlboro County on or about April 1, 2016. (R. pp. 10 -15). McDowell thereafter filed his Answer on or about May 25, 2016. (R. pp. 15-17).

This case came before the Honorable Paul M. Burch for trial on January 29, 2018. After a pre-trial hearing and over Frederick's objection, Judge Burch ruled that the substantive law of North Carolina would apply to the trial of the case given that the subject accident occurred in that state. (R. pp. 45-48). The decision to apply North Carolina substantive law is not the subject of this appeal.

During the trial of this case, Frederick presented testimony from Appellant McDowell; Frederick's mother, Christine Howard; Stephen Sims, M.D.; expert witness Ken Richardson; as well as Frederick's own testimony. McDowell admitted that he lost control of his vehicle and his vehicle entered the oncoming lane of travel (R. pp. 84-86). Frederick contended, by and through herself and her expert witness, that Defendant was still moving forward when the collision occurred. (R. pp. 55-57). Put simply, Frederick contended that McDowell was at fault for causing the collision because she did not have time to avoid it. (R. pp. 55-57). McDowell, on the other hand, contended that he had already come to a complete stop and, in fact, was backing up to return to his lane of travel when the collision occurred. (R. pp. 84-89). As such, he contended that Frederick had ample opportunity to see him and to stop her car to avoid the collision, rendering

Frederick contributorily negligent. (R. pp. 15-17). Importantly, and as set forth herein, it is undisputed that the collision occurred in Frederick's own lane of travel; in fact, McDowell himself testified to that fact. (R. pp. 90-97).

Frederick also took the stand on her own behalf at trial. In addition to the testimony discussed above, Frederick testified to her extensive injuries, excruciating healing process, pain and suffering, mental anguish, emotional distress, and lost wages. (R. pp. 51-81). As set forth above, she testified that she was traveling the speed limit when McDowell came to rest in her lane of travel and that McDowell was moving forward when the collision occurred – not in reverse. (R. pp. 54-57). Frederick further provided extensive testimony regarding her injuries, pain and suffering, mental anguish, and emotional distress, including pain that was continuing during the time of trial and ongoing exercises she was undergoing to strengthen her healing limbs. (R. pp. 51-81). This included testimony of a difficult, delayed, months-long treatment and healing process after surgical procedures and the implantation of hardware. (Id.). Notably, and as discussed *infra*, she testified that her pain was still present at the time of trial and that she was undergoing exercises to strengthen her body and return it to normal. Testimony regarding Frederick's damages, including her pain and suffering, was bolstered by her mother (Christine Howard), and one of her treating surgeons (Stephen Sims, M.D.).

At the close of Plaintiff's case, counsel for McDowell moved for a directed verdict on the following grounds: (1) the only reasonable inference from the evidence was that Frederick's negligence contributed to the cause of the accident and she was therefore barred from any recovery; (2) no evidence supported an award of punitive damages; and (3) there was no evidence of any permanent impairment or disability that would justify an award of future damages. (R. pp. 105-106). The court properly denied McDowell's motion on all grounds save for punitive damages.

McDowell's own case consisted only of testimony by Don Roberts, an engineer who was admitted as an expert witness. Roberts presented line-of-sight testimony that McDowell relies on in asserting that Frederick was contributorily negligent. (R. pp. 108-139). More importantly, Roberts conceded that the point of impact occurred in Plaintiff's lane of travel and conceded that if the McDowell's vehicle came to rest where McDowell himself testified that it did, McDowell's vehicle must have been moving in a forward direction at the time of impact. (Id.).

During closing argument, Frederick's counsel stated that Plaintiff had $171,909.87 in medical bills to pay to medical providers and insurance, and suffered lost wages in the amount of $53,460.00. (R. pp. 142-143). In accordance with North Carolina's billed v. paid rule, Rule 414, NCRCP, Frederick's counsel explicitly told the jury not to consider any amounts written off by health insurance or other payer. (Id.). Frederick's pain and suffering and noneconomic damages also were discussed.

After defense counsel presented his closing argument, he again renewed his directed verdict motions based upon contributory negligence and an alleged absence of evidence to support awards for future damages. The jury then was charged. Defense counsel objected to charges concerning permanent disability, future damages, and statutory life expectancy. Interestingly, in doing so, defense counsel stated that he would imagine that Frederick had health difficulties and "probably still does in her recovery," (R. pp. 148) which should not be surprising given Frederick testified on her own behalf that she was still in pain at the time of trial. Judge Burch included a charge concerning contributory negligence. (R. pp. 149). Further, Judge Burch explicitly explained the portion of the verdict form regarding contributory negligence. (R. pp. 153). Following jury instructions and deliberations, the jury returned a verdict in Frederick's favor for $5,000,000.00.

McDowell filed post-trial motions on February 14, 2018, seeking a judgment notwithstanding the verdict on plaintiff's claims for negligence and damages and alternatively, pursuant to Rule 59(a), SCRCP and the Thirteenth Juror Doctrine, McDowell moved for a new trial absolute or for a new trial nisi remittitur. (R. pp. 18-26). Frederick filed her Memorandum in Opposition to Defendant's Post-Trial Motions on or about February 7, 2018. (R. pp. 29-33). McDowell then filed a "Supplemental Brief in Support of Defendant's Post-Trial Motions" on or about August 21, 2019 – more than one and a half years after filing his post-trial motions. (R. pp. 35-36). In doing so, McDowell relied on *Hamrick v. State*, 828 S.E.2d 596 (S.C. 2019) in support of his proposition that Frederick's expert improperly relied on the "subjective opinions" of the investigating office. Frederick filed her Reply on or about August 21, 2019, detailing that Frederick's expert witness did not rely on subjective opinions, but instead on simple factual observations that could be made by any fact witness and, that in any event, those factual observations were immaterial given that McDowell and McDowell's expert both agreed where the vehicles came to rest post collision. (R. pp. 37-41).

STATEMENT OF FACTS

The facts of this case are largely undisputed. On or about August 25, 2019, Frederick was traveling southbound on Highway 52 and McDowell was traveling northbound. As the two vehicles approached each other, McDowell lost control of his vehicle and crossed the center line, entering Frederick's lane of travel. McDowell testified that after losing control of his vehicle, he placed his truck in reverse, checked for traffic, attempted to back up into his original lane of travel after taking approximately 20 seconds to compose himself, but could not complete that maneuver before the collision occurred.

Importantly, it is undisputed that the collision occurred in Frederick's lane of travel. Frederick and McDowell each called an expert accident reconstructionist. The following diagram was created by McDowell's own expert Don Roberts and entered into evidence by the McDowell during the trial of this action:

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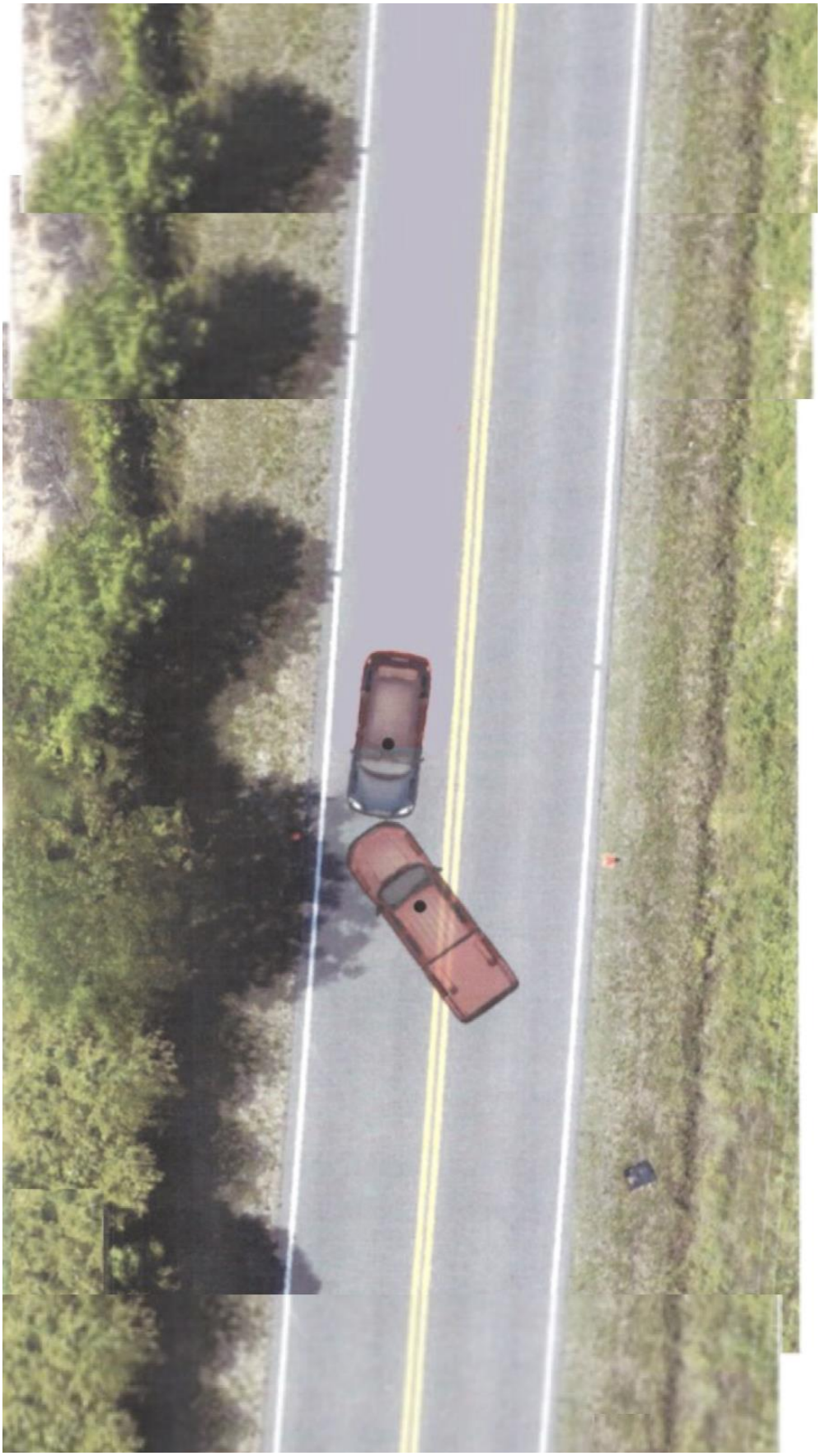
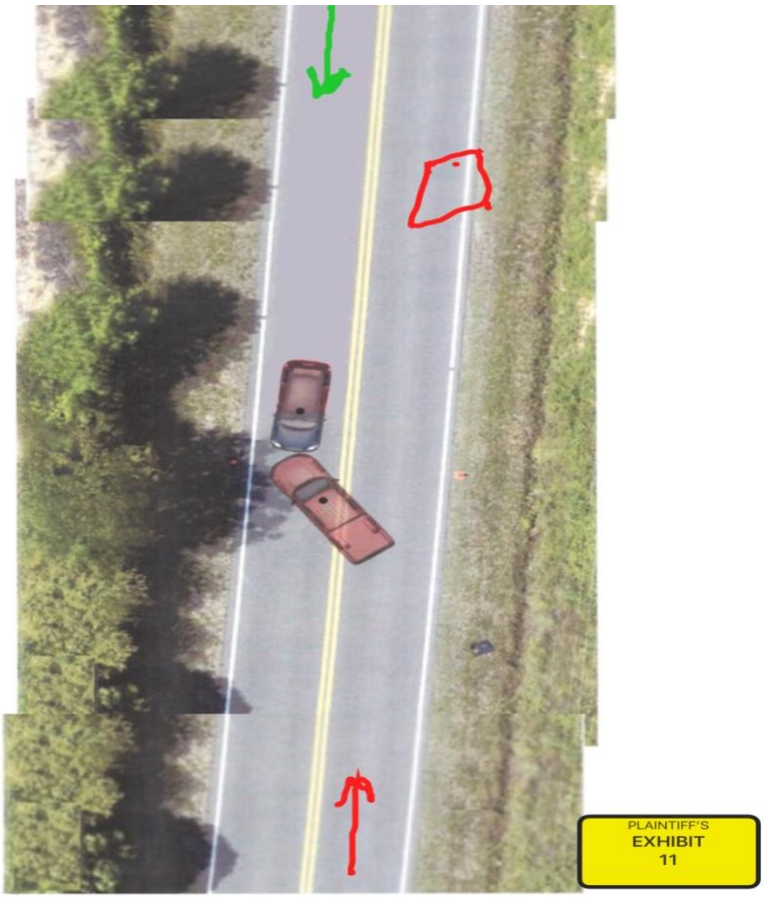


Put simply, McDowell's own expert and exhibit concede that the point of impact occurred in Frederick's lane of travel. As stated above, the dispute in the case was not the point if impact, but rather the central question of whether McDowell was moving forward or backward at the time of impact.

During the course of the trial, Frederick's counsel presented McDowell with a copy of his own expert's drawing, above. (R. pp. 128-139). McDowell personally took a pen and drew a square indicating where his vehicle came to rest in relation to the point of impact. That drawing was then entered into evidence:



It bears repeating that this was McDowell's own testimony. It is also worth noting that McDowell's own expert was questioned on this diagram and his expert testified that if McDowell's

vehicle came to rest where McDowell himself testified that it did, McDowell's vehicle must have been moving in a forward direction at the time of the collision.

Frederick's expert engineer, Ken Richardson, also testified during Frederick's case. (R. pp. 43-44);(R. pp. 198-210). Mr. Richardson testified that McDowell was moving forward at the time of the collision. He based this testimony on the position of the vehicles post-impact. Specifically, he testified that under the basic laws of physics, Defendant's vehicle could not have come to rest in front of Frederick's vehicle had it been moving backward. Therefore, if McDowell's vehicle came to rest in front of Frederick's vehicle, it must have been moving forward.

As stated above, during the trial of this case Frederick provided extensive testimony regarding her injuries, pain and suffering, and mental anguish, including pain that was continuing during the time of trial and ongoing exercises she was undergoing to strengthen her healing limbs. (R. pp. 59-75);(R. pp. 82-84). This included testimony of a difficult, delayed, months-long treatment and healing process after surgical procedures and the implantation of hardware. (Id). Notably, and as discussed *supra*, she testified that her pain was still present at the time of trial and that she was undergoing exercises to strengthen her body and return it to normal. Testimony regarding Frederick's damages, including her pain and suffering, also was offered by her mother (Christine Howard), and one of her treating surgeons (Stephen Sims, M.D.).

STANDARDS OF REVIEW

I. New Trial, New Trial Absolute, and New Trial Nisi Remittitur

"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." *Welch v. Epstein*, 536

S.E.2d 408, 420 (S.C. App. 2000), citing *Allstate Ins. Co. v. Durham*, 314 S.C. 529, 431 S.E.2d 557 (1993). 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. *Vinson v. Hartley*, 324 S.C. 389, 477 S.E.2d 715 (Ct.App.1996). 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. *Rush v. Blanchard*, 310 S.C. 375, 426 S.E.2d 802 (1993). 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. *Vinson*, *supra*.

A trial court may act as a thirteenth juror if it finds the evidence does not warrant the verdict; in doing so, it may grant a new trial. *Youmans ex rel. Elmore v. S.C. Dep't of Transp.*, 380 S.C. 263, 287, 670 S.E.2d 1, 13 (Ct. App. 2008). "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) aff'd, 362 S.C. 377, 608 S.E.2d 573 (2005).

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. *O'Neal v. Bowles*, 314 S.C. 525, 431 S.E.2d 555 (1993). However, "compelling reasons…must be given to justify invading the jury's province in this matter." *RRR, Inc. v. Toggas*, 378 S.C. 174, 183, 182 S.E.2d 438, 442 (Ct.App. 2008). An appellate court reviews a decision to grant or deny a motion for a new trial nisi remittitur on an abuse of discretion standard. *Id*. The decision as to whether to admit or exclude evidence is within the sound discretion of the

trial Court. *Hollins v. Wal-Mart Stores, Inc*., 381 S.C. 245, 250-51, 672 S.E.2d 805, 807 (Ct.App. 2008). Therefore, an appellate court will not reverse the trial court's decision absent an abuse of discretion. *Id*.

II. Directed Verdict/JNOV

"A party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict." SCRCP 50(b). When considering a motion for directed verdict, the trial court must consider the evidence and the inferences in the light most favorable to the non-moving party. *Williams Carpet Contractors, Inc. v. Skelly*, 400 S.C. 320, 325, 734 S.E.2d 177, 180 (Ct. App. 2012). The trial court should deny the motion where either the evidence yields more than one inference or its inference is in doubt. *Jinks v. Richland County*, 355 S.C. 341, 345, 585 S.E.2d 281, 283 (2003). "A jury's verdict should be affirmed if it is possible to do so and carry into effect the jury's clear intention." *Daves v. Cleary*, 355 S.C. 216, 234, 584 S.E.2d 423, 432 (Ct. App. 2003)(emphasis added).

ARGUMENT

I. The trial court properly denied Defendant's motions for new trial and new trial nisi remittitur, as the evidence submitted at trial supported the jury's verdict and the verdict was not grossly or merely excessive.

Given the evidence presented at the trial of this case, it is clear that the jury's verdict was neither grossly nor merely excessive. The injuries sustained by Frederick in the collision were devastating. Indeed, the force of the collision broke both her femur and ankle, requiring a blood transfusion, three surgeries, physical therapy, and additional care. She testified to the tremendous amount of physical pain she was still in at the time of the trial of the case. Frederick explained to the jury how it made her feel to be dependent on her family to take care of her basic health needs,

the year and a half long struggle to learn to walk again, and how difficult it was for her as a single mother to lose over $53,000.00 in wages during her recovery. Frederick's mother, Christine Howard, testified to the pain her daughter felt when Frederick's daughter, Shayna, failed to recognize her when she returned home from the hospital. Ms. Howard further testified to the embarrassment and anguish her daughter felt at having to rely on her to change bedpans and take baths. Frederick's mother provided further testimony that her daughter continues to be terrified of the rain and turned to scripture to calm down. Id. One of her treating physicians, Dr. Sims, testified that Frederick's injuries caused significant pain. (R. pp. 162-195).

Frederick presented $171,909.87 in outstanding medical bills and $53,460.00 in lost wages to the jury, along with the intangible damages she extensively testified to at trial. The Appellant's assertion that the jury had no evidentiary basis to arrive at their verdict is false. As set forth above, Frederick, her mother, and her surgeon testified to her physical and intangible injuries in great detail. Appellant argues that it is "very likely" that the jury heard Frederick's testimony and "made the leap on its own" to a conclusion that her pain would continue, calling the jury's verdict "guesswork." Appellant fails to recognize that his own argument – based on assumption and speculation that the jury "very likely" made conclusions he has no evidence of – is precisely the type of guesswork he argues against in his Initial Brief.

Indeed, Appellant's argument is littered with statements of what the jury "perhaps" heard, or "perhaps" had considered, or "perhaps" that it sympathized with a severely injured single mother. "Perhaps" is not the standard needed to justify invading the jury's province and overturning its verdict. Appellant has not advanced a viable argument that the jury's verdict was based on passion, prejudice, or caprice, or some other influence outside of the evidence. *O'Neal, supra*. Certainly, Appellant has not set forth the required "compelling reasons" which "must be

given to justify invading the jury's province in this matter." *Toggas, supra*. Instead, he argues that because there was "no evidence whatsoever that Frederick would sustain or experience any compensable damages in the future," the jury's verdict was excessive.

The appellate court's task here is not to weigh the evidence, but merely determine if there is any evidence to support the damages award. *See Hutson v. Cummins Carolinas, Inc*., 280 S.C. 552, 314 S.E.2d 19 (Ct.App.1984). Actual damages are properly called compensatory damages, meaning to compensate, to make the injured party whole, to put him in the same position he was in prior to the damages received insofar as this is monetarily possible. *See Clark v. Cantrell*, 339 S.C. 369, 529 S.E.2d 528 (2000). The goal is to restore the injured party, as nearly as possible through the payment of money, to the same position he was in before the wrongful injury occurred. *Clark*, 339 S.C. at 378, 529 S.E.2d at 533. Actual or compensatory damages include compensation for all injuries which are naturally the proximate result of the alleged wrongful conduct of the defendant. *See Rogers v. Florence Printing Co*., 233 S.C. 567, 106 S.E.2d 258 (1958). "While money cannot return an injured plaintiff to his pre-injury state, it can compensate for both pecuniary, e.g., medical and nursing care, lost wages, impaired earning capacity, and other expenses, and nonpecuniary, e.g., pain and suffering, mental anguish, humiliation, and other losses, both past and future." 11 S.C. Jur. Damages § 16 (Nov. 2020 Update)(emphasis added).

Here, Appellant attempts to sweep Frederick's nonpecuniary damages under the rug and asks this Court to invade the province of the jury to find that the jury's verdict was grossly excessive. Appellant has not provided the requisite compelling reasons to do so, nor has he shown that the verdict was 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. *Vinson, supra.* The jury was entitled to consider the pain and suffering Frederick

underwent before and up to trial. *Bussey v. Charleston & W. C. R. Co*., 52 S. C. 438, 446, 30 S. E. 477, 481 (1898); *see also Kapuschinsky v. United States*, 259 F. Supp. 1 (D. S. C. 1966). Likewise, the jury had the right to consider Plaintiff's mental anguish. *Boan v. Blackwell*, 343 S.C. 498, 541 S.E.2d 242 (2001). Indeed, "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." 11 S.C. Jur. Damages § 21 (November 2020 Update)(emphasis added).

Here, Appellant has conveniently disregarded the evidence of nonmonetary damages Frederick presented at the trial of this case and instead focuses solely on her special damages of over $225,000.00. At trial, Frederick of course provided evidence of special damages in an amount of over $225,000.00, and she also provided extensive evidence regarding her non-pecuniary damages. When coupled together, it is clear that the jury's verdict was not grossly excessive, but instead based upon the evidence presented during the trial of the case. Because the Appellant has not shown that the verdict was the result of passion, caprice, prejudice, or some other influence outside the evidence, the trial court's denial of a new trial absolute was proper, and the jury's verdict must be affirmed.

Likewise, the Appellant has failed to advance a cogent argument that the jury's verdict was merely excessive so as to warrant the granting of a new trial nisi remittitur. To reiterate, Appellant has not met his burden of showing compelling reasons to justify invading the jury's province to grant a new trial nisi remittitur. *See Proctor v. Dep't of Health & Envtl. Control*, 368 S.C. 279, 320, 628 S.E.2d 496, 518 (Ct.App.2006) (stating "compelling reasons must be given to justify invading the jury's province by granting a new trial nisi remittitur" and noting "[t]he consideration for a motion for a new trial nisi remittitur requires the trial judge to consider the adequacy of the

verdict in light of the evidence presented"). *Curtis v. Blake*, 709 S.E.2d 79, 82 (S.C. App. 2011) is instructive. In *Curtis,* the appellant argued that a new trial nisi remittitur should have been granted because the award of actual damages was "almost one hundred the times the cost of Curtis's medical treatment and lost wages." *Id*. at 83. The Court of Appeals noted that appellant's argument failed to fully consider Curtis's nonmonetary damages, including fright while driving. *Id*. Accordingly, the trial court's denial of appellant's motion for new trial nisi remittitur was affirmed. *Id*. The same outcome is countenanced here. Put simply, Appellant has not shown compelling reasons as to why the jury's province should be invaded and their verdict disregarded.

II. The trial court did not err in denying McDowell's request for directed verdict or JNOV, as the jury reached the reasonable conclusion that Frederick's alleged "negligence" did not contribute to the cause of the accident.

McDowell's argument can be boiled down to a single sentence: Frederick was negligent by not keeping a proper lookout and therefore is barred from recovery. His argument ignores the testimony provided by Frederick and her expert, Ken Richardson. Further, it seeks to invalidate the jury's ability of passing upon the credibility of witnesses and the accuracy of their testimony, which may very rarely be taken from jury. *Ingram v. Davis*, 125 S.E. 920 (S.C. 1924). The jury has the inviolate right to pass upon the credibility of a witness. Put differently, in a "case tried before a jury, it is the jury that must decide what part of the witness's testimony it wants to believe and what part it wants to disbelieve." *Small v. Pioneer Mach., Inc*., 329 S.C. 448, 494 S.E.2d 835 (S.C. App. 1997). "The fact finder is imbued with broad discretion in determining credibility or believability of witnesses. Quintessentially, an operative factor in evaluating credibility of a witness is inconsistency." *Id*.

Here, as discussed *supra,* Frederick presented evidence that she was properly traveling in her own lane with her eyes on the road. She was driving under the speed limit, had her headlights

on, using her windshield wipers, and not using her phone. Frederick testified that she first noticed McDowell's vehicle when it was approximately three (3) cars lengths away from her. McDowell argues that because he presented line-of-sight testimony through Don Roberts, Plaintiff was negligent. McDowell fails to mention that his witness's testimony was contested by that of the Frederick, who testified that there was no way she could have avoided the collision. Further, McDowell's argument ignores the testimony of Ken Richardson, who testified that McDowell's car was moving forwards at the time of the collision. Mr. Richardson testified that Frederick's testimony and recollection likely was more reliable, even without reference to the information contained in the police report. (R. pp. 197-209).

It is in the province of the jury to determine what weight and credibility (if any) to apply to each witness's testimony. Because there existed competing testimony, a jury question was created as to whether Frederick was contributorily negligent. A directed verdict motion should be granted as to contributory negligence only "if the jury could have drawn no conclusion from the evidence but that…the contributory negligence of [of the plaintiff] was a proximate cause [of the injury]." *Williams v. Odell*, 90 N.C. App. 699, 701, 370 S.E.2d 62, 64 (Ct. App. 1988)(internal quotations omitted)(emphasis added). Here, ample evidence was presented to the jury to make the determination that Frederick was not contributorily negligent. Despite Appellant's protestations, the only reasonable conclusion the jury could have reached from Frederick's testimony and the evidence presented in this case was not that Frederick's own negligence contributed to the accident. Accordingly, a question for the jury was present and the trial court properly denied Appellant's motion for directed verdict and JNOV.

III. The trial court did not err in admitting Frederick's medical bill exhibit which properly showed the amount of medical bills actually paid to satisfy those bills.

Rule 414, NCRE states that:

> Evidence offered to prove past medical expenses shall be limited to evidence of the amounts actually paid to satisfy the bills that have been satisfied, regardless of the source of payment, and evidence of the amounts actually necessary to satisfy the bills that have been incurred but not yet satisfied. This rule does not impose upon any party an affirmative duty to seek a reduction in billed charged to which the party is not contractually entitled. (emphasis added).

Appellant argues that the plain language of Rule 414 limits what a plaintiff can introduce as evidence. This is a strained and inaccurate reading of the rule, as despite Appellant's contention, Rule 414 only limits the evidence offered to prove past medical expenses. Frederick's exhibit contained the purported amount of medical bills that were still unpaid. Frederick's counsel explained to the jury that she was claiming only the unpaid amount of damages. The trial court charged the jury regarding the same. (R. pp. 150-153).

As counsel for the Appellant correctly noted, there is no way to determine whether the "higher number" contained within the medical exhibit in any way impacted the jury's decision. There is no evidence that the admission of the same was facially prejudicial. No actual prejudice has been shown. Accordingly, the trial court's decision must be affirmed.

IV. The trial court did not err in allowing Frederick's expert to rely upon objective opinion testimony regarding the location at which the vehicles came to rest following the collision, as he did not rely on any subjective opinions of the investigating officer.

Appellant argues that Frederick's expert, Ken Richardson, relied in large part on "calculations made and conclusions drawn by the investigating North Carolina law officer," and that the trial court committed "prejudicial error" by allowing him to rely on "subjective opinions." Appellant's assertion that Mr. Richardson improperly relied on subjective opinions of the investigating officer in forming his own expert opinions is incorrect. Indeed, Mr. Richardson relied on the objective testimony regarding the location at which the vehicles came to rest following the collision – information confirmed by the Defendant himself. Appellant attempts to argue that under

Hamrick, if the responding officer would not have been allowed to himself testify as to the subjective opinions, Mr. Richardson should not have been allowed to rely upon such opinions. This is incorrect because Plaintiff's expert did not rely upon any subjective opinions of the responding officer.

As discussed, *ad nauseum* herein, the point of impact was not disputed in this case. Mr. Richardson opined that McDowell was moving forward at the time of the collision and based this opinion not on the responding officer's investigation, but rather on the position of the vehicles post-impact. As an initial matter, while the responding officer may not have been qualified to conduct a full accident reconstruction, he was certainly qualified to take note of where the vehicles came to rest post impact. This is a simple observation that could be made by any fact witness. It is not an opinion, requiring specialized knowledge, but rather a factual observation made by a person with direct knowledge. Regardless, the responding officer's factual observation was immaterial because McDowell – on the stand at the trial of this case – agreed as to where the vehicles came to rest. McDowell's own expert further testified that, if McDowell's vehicle did in fact come to rest where McDowell himself testified that it did, Defendant's vehicle must have been moving in a forward collision at the time of the accident.

Appellant's argument ignores his own testimony. The trial court's ruling should be upheld on this basis alone. Moreover, even if Mr. Richardson did rely on subjective opinions (which he did not), reversal still would not be warranted. Pursuant to Rule 703, SCRE, "[t]he facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence." Defendant's assertion that an accident reconstructionist and engineer

cannot base his opinions on the data perceived by others is a misreading of our state's rules of evidence. Rule 703, SCRE allows an expert to rely upon such evidence even when those facts or data are not admissible into evidence, so long as they are reasonably relied upon by experts in that field of expertise. Accident reconstructionists routinely rely calculations within police reports if they are available; indeed, Defendant's own two experts explicitly reviewed said report and relied upon the same. Defendant's argument therefore fails, and the trial court's ruling must be upheld.

CONCLUSION

For the reasons set forth herein, the Court should affirm the rulings of the trial court and the jury's award.

Respectfully submitted,

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