THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas
The Honorable Grace Gilchrist Knie, Circuit Court Judge

Case No. 2017CP4203523
Appellate Case No. 2020-000203

Shannon P. Green,
and Darrell Russell, ... Plaintiffs,

v.

Edward C. McGee,
and David Hudgins, ... Respondents,

Of whom Shannon P. Green is the ..... Appellant-Respondent,

And

Of whom David Hudgins is the ..... Respondent-Appellant.

PETITION FOR REHEARING AND SUGGESTION FOR REHEARING *EN BANC* OF RESPONDENT-APPELLANT DAVID HUDGINS

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Pursuant to Rules 219, 221(a), and 240, SCACR, Respondent-Appellant David Hudgins ("Mr. Hudgins") requests rehearing or rehearing *en banc* of the Panel's Opinion 6001, filed July 26, 2023 (Howard Advance Sheet No. 29, pp. 37-46[1]), affirming in part and reversing in part the Circuit Court's post-trial rulings.

ARGUMENT

Mr. Hudgins respectfully submits that the Panel overlooked or misapprehended controlling law when it reallocated the Circuit Court's setoff calculation. Rather than follow the plain language of S.C. Code Ann. § 15-38-50(1), the Panel instead credited settlement amounts paid on behalf of Respondent Edward C. McGee ("Mr. McGee") *back to him*, offsetting in full the verdict amounts rendered against Mr. McGee and improperly reducing the statutory setoff to which only his other joint tortfeasor, Mr. Hudgins, was entitled. Specifically, the Panel credited $88,128.07 of the $100,000.00 in settlement proceeds, which were paid by Mr. McGee's liability carrier to Appellant-Respondent Shannon P. Green ("Ms. Green") in exchange for a covenant not to execute against Mr. McGee, to fully set off the jury's verdicts against Mr. McGee, which cannot be executed against Mr. McGee and for which Ms. Green's underinsured motorist ("UIM") carrier is statutorily and contractually liable. The Panel's reallocation left an excess of only $11,871.93 to reduce the verdict amounts against Mr. Hudgins, even though Mr. Hudgins was the *only* other tortfeasor with the statutory right to setoff after Mr. McGee was given a covenant not to execute.

As outlined below, although the Panel correctly determined the Circuit Court's setoff

[1] Because the Opinion transmitted to the parties is not paginated, citations herein to the Opinion reflect page numbers from the Howard Advance Sheet.

calculation was improper,[2] the Panel's recalculation of the setoff amount was flawed from its inception: The plain language of § 15-38-50(1) and the accompanying case law do not permit a court to reduce the claim against Mr. McGee by settlement payments made on his own behalf, nor credit those payments to a non-joint tortfeasor UIM carrier while denying the only other joint tortfeasor the full setoff to which he is statutorily entitled. Consideration *en banc* is necessary to secure or maintain uniformity of decisions on this important issue, because the Opinion directly conflicts with *Ellis v. Oliver*, 335 S.C. 106, 113, 515 S.E.2d 268, 272 (Ct. App. 1999), which recognized only the General Assembly, not this Court, makes the law and can correct any perceived, unintended results in the statute's application.

Additionally, the Opinion overlooked or misapprehended both the record and the controlling law when it affirmed the Circuit Court's denial of Mr. Hudgins' motions to set aside the verdicts against him, and rehearing is warranted for this reason as well.

I. The Panel's settlement reallocation overlooked or misapprehended controlling law and the plain language of S.C. Code § 15-38-50(1).

The plain language of § 15-38-50(1) is unambiguous in its application: When, as here, a covenant not to execute was given to Mr. McGee who is one of two tortfeasors, "it reduces the claim against the *other*[tortfeasors]," here Mr. Hudgins, and it does so "to the extent of any amount stipulated by the release or the covenant [$100,000.00 here], or in the amount of the

[2] As the Opinion explains:

> The [circuit] court calculated the setoff by adding the actual damages award (again, roughly $88,000) and both punitive damages awards ($35,000 each) for a total verdict of roughly $158,000. Then, the court subtracted the $100,000 settlement. This left about $58,000 in damages remaining. The trial court held this would be shared by the defendants and allocated 60/40 between them according to the fault assigned by the jury.

(Opinion, p. 39).

consideration paid for it [$100,000.00 here], whichever is greater." S.C. Code Ann. § 15-38-50(1)(emphasis added). The statute defines "tortfeasors" for the purpose of setoff as "persons liable in tort for the same injury or the same wrongful death," *id.,* of which there are only two in this case: Mr. McGee and Mr. Hudgins. And, once Ms. Green gave one of those two tortfeasors (Mr. McGee) a covenant not to execute in exchange for a $100,000.00 settlement payment from Mr. McGee's liability carrier, the only "other[tortfeasors]" allegedly "liable in tort for the same injury" and therefore entitled to setoff was Mr. Hudgins. The statutory language leaves no room for interpretation and "grants the court no discretion in determining the equities involved in applying a set-off" when – as here – "a release has been executed in good faith between the plaintiff and one of several joint tortfeasors." *Ellis*, 335 S.C. at 113, 515 S.E.2d at 272.

a. The Opinion does not afford controlling weight to the General Assembly's limitation of setoff rights to "other tortfeasors."

It is apparent from the Opinion that the Panel overlooked or misapprehended the weight that must be given to the General Assembly's delineation of those to whom setoff can and must be applied. Mr. Hudgins is the only "other tortfeasor" whose claim can be reduced by the settlement proceeds under the plain, unambiguous language of the statute, as neither Mr. McGee nor Ms. Green's UIM carrier qualifies as an "other[tortfeasor]" per the statutory definition. Mr. McGee by exclusion cannot be the "other[tortfeasor]," because he is the initial tortfeasor identified in § 15-38-50(1) in whose favor the covenant not to execute was given by Ms. Green. Ms. Green's UIM carrier too fails to qualify: Although her UIM carrier may be *contractually and statutorily* liable for the verdict against Mr. McGee, it is not "liable *in tort* for the same injury" as the statute requires.

Despite this straightforward application of the plain language which yields only one

result, the Opinion "reject[s] this argument."[3] Although the Panel correctly is "keenly mindful that the legislature's word with respect to public policy is final," the Panel nevertheless boldly rules this "*is an interpretation we cannot follow.*" (Opinion, p. 44) (emphasis added). This clear error requires rehearing or rehearing *en banc.*

b. The Opinion exercises discretion not permitted under the plain language of § 15-38-50(1) as outlined in other decisions of this Court.

The Panel's decision to override the plain language chosen by the General Assembly in favor of what the Opinion terms "the equitable purpose of setoff" (*id*.) also exercises discretion when the statute grants none. As previously noted, "once a release has been executed in good faith between a plaintiff and one of several joint tortfeasors," the Court has "*no discretion* in determining the equities involved in applying a set-off." *Ellis*, 335 S.C. at 113, 515 S.E.2d at 272 (emphasis added). In so finding, this Court in *Ellis* acknowledged that even when application of the plain language diverges from what a court might otherwise deem to be "equitable," the statutory language still must prevail:

> We recognize that a strict application of the statute may lead to unintended results; however, this is a matter for the legislature to correct if our interpretation is contrary to its intent. *See Adkins v. Comcar Indus., Inc.*, 316 S.C. 149, 151, 447 S.E.2d 228, 230 (Ct. App. 1994) (An appellate court "has no legislative powers. Our sole function is to determine and, within constitutional limits, give effect to the intention of the legislature while the responsibility for the justice or wisdom of legislation rests exclusively with the legislature, whether or not we agree with the laws it enacts." (internal citation omitted)), *aff'd*, 323 S.C. 409, 475 S.E.2d 762 (1996).

Ellis, 335 S.C. at 113–14, 515 S.E.2d at 272. The Panel misapprehended or overlooked this guiding principle which has echoed over the years in other opinions from this Court. *See, e.g., Huck v. Oakland Wings, LLC*, 422 S.C. 430, 437, 813 S.E.2d 288, 291 (Ct. App. 2018); *Vortex*

[3] This actually is not an "argument" but rather the only result reached when applying the statute to these facts.

Sports & Entertainment, Inc. v. Ware, 378 S.C. 197, 210, 662 S.E.2d 444, 451 (Ct. App. 2008). The Opinion and this Court's recognition in *Ellis* of the General Assembly's province cannot be reconciled. To secure and ensure consistency in these decisions and those to come, *en banc* rehearing is necessary.

c. Disagreement with the intended result of setoff undergirds the Opinion, but that is a matter for the General Assembly and not the courts.

Although the Opinion concludes "neither justice nor equity support [sic] giving Hudgins—who did not settle and has paid no money—the benefit of settlement funds that were paid on McGee's behalf," (Opinion, p. 44), *that very scenario is the natural and intended result of § 15-38-50(1).* When setoff is applied properly, it is the "non-settling defendant [who] is entitled to credit for the amount paid by another defendant who settles for the same cause of action." *Riley v. Ford Motor Co.*, 414 S.C. 185, 195, 777 S.E.2d 824, 830 (2015). In other words, the tortfeasor who benefits from setoff by having his claim reduced is *by design* the tortfeasor "who did not settle and has paid no money," and his claim will be reduced by the amount paid to settle *another* tortfeasor's claim "to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is greater." S.C. Code Ann. § 15-38-50(1). This is because is well-established "there can be only one satisfaction for an injury or wrong," *Truesdale v. South Carolina Highway Dep't*, 264 S.C. 221, 235, 213 S.E.2d 740, 746 (1975), and "[a]llowing this credit prevents an injured person from obtaining a double recovery for the damage he sustained," *Rutland v. S.C.D.O.T.*, 400 S.C. 209, 216, 734 S.E.2d 142, 145 (2012).

Moreover, although § 15-38-50(1) *requires* a court to reduce the jury's verdict by amounts already recovered from a joint tortfeasor for the same injury, the Opinion suggests this

is a result to be avoided: "Setoff is designed to prevent a plaintiff from recovering more than one share of her damages, not to prevent a plaintiff from recovering damages *the jury determined she was entitled to recover*." (Opinion, p. 45) (emphasis added). In fact, when setoff is applied according to the dictates of § 15-38-50(1), a plaintiff may not recover some (or all) damages the jury determined she was entitled to recover against a particular tortfeasor if she has already recovered some (or all) of those damages from another tortfeasor with whom she chose to settle before trial and seek recovery of UIM benefits. Ms. Green "is entitled to only one recovery, and the collection of a judgment against one wrongdoer extinguishes any claim against the other." *Rourk v. Selvey*, 252 S.C. 25, 27-28, 164 S.E.2d 909, 910 (1968). When – as here – there is no dispute the settlement is for the same injury as a matter of law, "the right to setoff arises as an operation of law, and the circuit court must award a setoff." *Smith v. Widener*, 397 S.C. 468, 474, 724 S.E.2d 188, 191 (Ct. App. 2012). Even if the Panel views this as an "unintended result" of the statute's strict application, "this is a matter for the legislature to correct if our interpretation is contrary to its intent." *Ellis*, 335 S.C. at 113–14, 515 S.E.2d at 272.

d. The Opinion prioritizes "equitable principles" that are beyond the plain language of § 15-38-50(1) and inconsistent therewith.

Finally, the Opinion erroneously infuses the setoff analysis with "equitable principles" that appear nowhere in the plain language of the statute, directly contradict the procedure and result dictated by the statute, and encourage punishment of any non-settling defendant with the ability to satisfy a judgment against him. It is axiomatic that when setoff is applied in accordance with the plain language of § 15-38-50(1), it is the non-settling, non-paying joint tortfeasors who receive the first (and only) credit for settlement funds paid by another. The Opinion seemingly disagrees with this result and invokes the phrase "equitable principles" to justify a different

outcome: "The equitable principles codified in the statute dictate that [settling tortfeasor] McGee receive first credit for funds paid on his behalf." (Opinion, p. 45). But this Panel's subjective sense of "equitable principles" appears nowhere in the case law and nowhere in the codified language of § 15-38-50(1). The Panel provides no legal basis whatsoever for giving "first credit" to a tortfeasor who has been given a covenant not to execute, was found by the jury to be more at fault, and who was driving the car that wrecked into Ms. Green.

Nor does the statute permit the court to consider whether Mr. "Hudgins has sufficient liability coverage to satisfy the awards against him" (*id.* at 45) or whether "the verdict plainly exceeds his co-defendant's coverage" (*id.* at 44). The General Assembly allotted no discretion – much less permitted consideration of the availability of inadmissible liability insurance to satisfy a verdict – when it outlined the procedure for determining the setoff to which a non-settling joint tortfeasor is entitled when the injury is the same. It was error for the Panel to inject the straightforward setoff analysis with extraneous factors.

For all these reasons, the Panel's settlement reallocation overlooked or misapprehended controlling law and the plain language of S.C. Code § 15-38-50(1), and setoff must be recalculated to credit Mr. Hudgins – the only non-settling "other tortfeasor" – with the full $100,000.00 paid in exchange for a covenant not to execute against his joint tortfeasor Mr. McGee. This recalculation will offset in its entirety the jury's verdicts against Mr. Hudgins,[4]

[4] Although the setoff calculated by both the Circuit Court and the Panel included the improper credits in Mr. McGee's favor discussed above, both courts properly used the jury's 40/60 fault allocation for actual damages – which was not appealed by Ms. Green and therefore is the law of the case – to determine Mr. Hudgins bore responsibility for 40% of the jury's $88,546.78 actual damages award. (*Compare* Opinion, p. 39 (noting the Circuit Court "allocated 60/40 between them according to the fault assigned by the jury") *with* p. 45 (finding "Hudgins' forty percent share of the actual damages award comes to $35,418.71)). As the Panel correctly noted, Mr. Hudgins bears responsibility for $35,418.71 in actual damages and $35,000.00 in punitive

regardless of whether they should have been set aside as discussed below.

II. The Panel overlooked or misapprehended both the record and the controlling law when it affirmed the Circuit Court's denial of Mr. Hudgins' motions to set aside the verdicts against him.

The Panel's decision to affirm the Circuit Court's denial of Mr. Hudgins' motions to set aside the actual damages and/or punitive damages verdicts also overlooks or misapprehends the record and the controlling law.

As to the jury's award of $88,546.78 in actual damages, for which the jury determined Mr. Hudgins was 40% responsible, the Opinion concludes "[i]t was reasonable for the jury to find Hudgins chased or followed McGee, which made McGee distracted and nervous, and therefore made Hudgins a proximate cause of the collision." (Opinion, p. 43). This conclusion is "blatantly contradicted by the record" and misapprehends or overlooks the evidence the jury had before it. *See Scott v. Harris*, 550 U.S. 372, 380 (2007) ("When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonably jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment.").

The record before the jury established Mr. Hudgins: (1) kept at least two to three car lengths behind Mr. McGee; (2) did not flash his lights; (3) never tried to run Mr. McGee off the road or otherwise encroached on Mr. McGee's vehicle; and (4) did nothing to distract Mr.

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damages, for a total of $70,418.71. (*Id.*). Accordingly, Mr. Hudgins' total liability to Ms. Green would be setoff in its entirety by the $100,000.00 in settlement paid to Ms. Green on Mr. McGee's behalf. And, even if Ms. Green had appealed the propriety of an allocation in light of the jury's finding of reckless, willful, and wanton conduct, and even if this Court rejects Mr. Hudgins' arguments *infra* Section II and finds that he is liable for the entire $88,546.78 actual damages award, the maximum amount for which Mr. Hudgins could be responsible after setoff is $23,546.78 ($88,546.78 total actual damages award + $35,000.00 punitive damages award - $100,000.00 setoff = $23,546.78).

McGee's attention from the roadway. The 911 Call played for the jury reflected that as Mr. McGee turned onto Simuel Road – 12 seconds before the accident occurred there – Mr. Hudgins stated to the 911 Operator, "He's gone. I'm not going to chase him." Even assuming arguendo the jury heard evidence to reasonably conclude Mr. Hudgins followed Mr. McGee *at some point prior to his turn on Simuel Road* or made him "nervous" *at some point prior to his turn on Simuel Road,* this contemporaneous evidence contradicts any finding Mr. Hudgins was chasing Mr. McGee or otherwise distracting him *when the accident occurred on Simuel Road*. When, as here, "the negligence appears merely to have brought about a condition of affairs, or a situation in which another and entirely independent and efficient agency intervenes to cause the injury, the latter is to be deemed the direct or proximate cause, and the former only the indirect or remote cause." *Woody v. South Carolina Power Co.*, 202 S.C. 73, 84-85, 24 S.E.2d 121, 125 (1943).

The jury's award of punitive damages in the amount of $35,000.00 against Mr. Hudgins also should have been set aside. The Opinion's one-sentence basis for affirming the Circuit Court's denial of Mr. Hudgins' motion to set aside the punitive damages verdict overlooks or misapprehends the law:

> As for punitive damages, we need go no further than Hudgins' guilty plea to driving too fast for conditions, which is *some evidence* that Hudgins acted recklessly, willfully, and wantonly. *See Austin v. Specialty Transp. Servs., Inc.*, 358 S.C. 298, 315, 594 S.E.2d 867, 875-76 (Ct. App. 2004) ("Violation of a statute does not constitute recklessness, willfulness, and wantonness per se, but is some evidence the defendant acted recklessly, willfully, and wantonly. . . . The jury determines whether a party has been reckless, willful, and wanton.").

(Opinion, p. 43)(emphasis added). First, the Opinion fails to recognize that not every violation of a statute constitutes "some evidence" of reckless, willful, or wanton conduct – only "*causative* violation[s] of a statute" do. *Wise v. Broadway*, 315 S.C. 273, 276, 433 S.E.2d 857, 859 (1993) (emphasis added). No reasonable jury could have concluded there was a "causative" statutory

violation responsible for the accident here. The evidence was undisputed at trial that Mr. Hudgins was at least "two or three car lengths" away from Mr. McGee when the accident occurred, rendering Mr. Hudgins' rate of speed irrelevant to Mr. McGee's wreck with *another vehicle*. Only Mr. McGee's own high rate of speed (which he acknowledged by pleading guilty to driving too fast for conditions) could be causative of an accident in which only Mr. McGee's vehicle crashed into the vehicle driven by Ms. Green. Second, even assuming arguendo the jury reasonably could have found Mr. Hudgins' plea constitutes "some evidence" that he acted recklessly, willfully, or wantonly, that is not enough: The evidence must have risen to the level of "clear and convincing" for a reasonable jury to award punitive damages. S.C. Code Ann. § 15-32-520(D). It did not in this case, and this verdict should have been set aside.

CONCLUSION

For all reasons set forth herein, and for the reasons set forth in his appellate briefs, Mr. Hudgins respectfully submits that he is entitled to rehearing and rehearing *en banc* of the Panel's Opinion.

Respectfully submitted,

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August 9, 2023

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PROOF OF SERVICE

I, the undersigned employee of Gallivan, White & Boyd, P.A., do hereby certify that I have caused the below referenced to be served via email to all parties of record at the address(es) shown below.

1. Petition for Rehearing and Suggestion for Rehearing En Banc of Respondent-Appellant David Hudgins

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