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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The SUPREME COURT

APPEAL FROM SC COURT OF APPEALS
AND
SPARTANBURG COUNTY
COURT OF COMMON PLEAS

Grace Gilchrist Knie, Circuit Court Judge

Appellate Case No. 2020-000203
Opinion No. 6001 (SC Ct. App. Filed 7/26/23)

Shannon P. Green and
Darrell Russell,……Plaintiff(s),

v.

Edward C. McGee and
David Hudgins,……Respondent(s),

Of whom Shannon P. Green is Appellant/Respondent

And

Of whom David Hudgins is the Respondent/Appellant.

PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

Petitioner Shannon P. Green petitions this Court to issue a Writ of Certiorari to review the Court of Appeals' decision in Appellate Case No. 2020-000203, Opinion No. 6001.

RULE 242(d)(1) SCACR CERTIFICATION

Counsel for Petitioner certifies that a Petition for Rehearing was filed with the Court of Appeals on 8/9/23 and denied on 10/11/23.

QUESTIONS PRESENTED FOR REVIEW BY THE SUPREME COURT

1. When Plaintiff proves she sustained serious and painful injuries (*i.e.*, bloody face/glass in eyes and mouth, fractured ribs, torn bicep tendon, etc.) as a proximate result of Defendants' actions, and the jury returns a verdict for her financial costs *only* (not one penny for pain and suffering), does the trial court abuse its discretion when it refuses to grant additur?

2. When a pre-trial settlement covers claims by Plaintiff's husband for his loss of her services, and she later obtains a verdict at trial, should the *entire* settlement be applied as a setoff to her verdict, or should the trial court hold a hearing to consider all relevant circumstances and allocate only a *portion* of the settlement as a setoff?

SUMMARY OF CASE: FIVE (5) INDISPUTABLE FACTS

1. This car crash case involves clear liability, *i.e.* the crash was caused 100% by Defendants' gross negligence.
2. Plaintiff was seriously injured and experienced severe pain and suffering as a result of Defendants' gross negligence.
3. The jury attributed all of Plaintiff's medical treatment (including surgeries and physical therapy) to the car crash.
4. The jury did not return one penny in its verdict to compensate Plaintiff for pain and suffering.
5. Plaintiff was then forced to accept a $100,000.00 setoff for a pretrial settlement that covered claims by her husband.

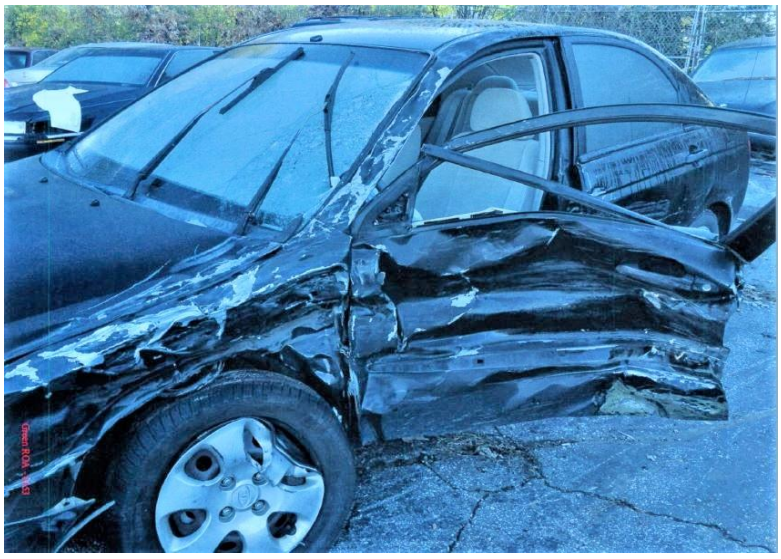
STATEMENT OF THE CASE/MATERIAL FACTS

This is a car crash case where Plaintiff ("Green") was not comparatively negligent, nor was it argued she was. Likewise, this is not a minor impact case resulting in soft tissue injury. This case involves a violent impact to Green's driver's door by a large truck traveling at a high rate of speed, causing bloody face/glass in her eyes and mouth, inability to breathe, fear of death, fractured left ribs, a left shoulder injury (torn bicep tendon requiring surgery), and upper back pain. None of these injuries are even arguably pre-existing.

Green's injuries occurred on November 19, 2015 because of a road rage incident between two Defendants. R. p. 31, lines 10-16. The incident began on I-85 near the Cherokee County/Spartanburg County line about 15-20 minutes before Green was injured. R. p. 90, lines 4-5; p. 93, lines 18-21; p. 109, lines 20-23. Defendant Edward C. McGee (hereafter "Defendant

McGee"), driving a large Chevrolet 2500 pickup truck, ran up behind Defendant David Hudgins (hereafter "Defendant Hudgins") driving a red Nissan. Defendant McGee was driving 65-70 mph. R. p. 94, lines 1-2. Traffic was heavy. R. p. 92, lines 15-21. Defendant Hudgins slammed on his brakes, and Defendant McGee came within 2 to 3 feet of hitting him. R. p. 94, line 20-p. 96 line 10. According to Defendant McGee, Defendant Hudgins came close to "wearing my grill." R. p.96, lines 22-25. This happened at least three (3) more times as they continued southwest on I-85. R.p.96, lines 7-12; p.312, lines 5-8. The two Defendants swerved around and in front of each other going 70 mph, and at times they were so close "you could have slipped a piece of paper between [them]." R. p. 98, line 14-p. 102, line 2; p. 103, lines 13-15. Defendant McGee got in front of Defendant Hudgins, and Defendant Hudgins followed him- "drafting" on him- onto Business I-85, then Hearon Circle, and then onto Simuel Road. R. p. 103, lines 19-24, p. 106, line 25-p. 114, line 3. Defendant McGee, attempting to get away from Defendant Hudgins, then traveled 60-90 mph down Simuel Road. R. p 77, lines 9-14; p. 208, lines 6-11; p. 323, line 9 – p. 324, line 4. Defendant McGee was being "chased" by Defendant Hudgins. R. 80, lines 12-15. Simuel Road has a speed limit of 25 or 35 mph. R. p. 77, lines 12-14. Defendant McGee came to a sharp right curve. R. p. 113, lines 3-6.

Meanwhile, Green was minding her own business – just finished dinner at Texas Roadhouse. She was driving her small black Kia toward Simuel Road from the opposite direction of Defendants. She was traveling 5-10 mph, having just stopped at a stop sign. R. p. 198, lines 10-11; p. 237, lines 23-25. She was in her lane. R. p. 198, lines 12-13. Defendant McGee lost control of his Chevrolet 2500 truck, crossed the center line, and struck Green's Kia in the driver door. R. p. 76, line 25- p. 76, line 8; p. 199, line 25. (Green's Kia below.)



It is significant that Green is a nurse practitioner with an acute nurse practitioner degree from the University of South Carolina. R. p. 235, lines 9-15. She has worked in surgical intensive care and currently works in internal medicine. R. p. 240, lines 2-3. Thus, when Green testifies she feared she would die at the scene, her fear is well-informed.

The following are uncontradicted facts that support Green's contention the collision was not minor, that her injuries were both serious and proximately caused by the collision, and that her injuries were not pre-existing.

1. Green's Kia sustained a severe blow from Defendant McGee's Chevrolet 2500 truck. Her driver's door "crumpled into the vehicle." There were 6+ inches of intrusion into the driver compartment. R. p. 453-p. 454; R. p 199, lines 18-25; p. 203, line 6-p. 204, line 10.

2. The cell phone on Green's left hip was broken - actually bent and would not function after the collision. R. p. 265, line 23-p. 266, line 5.

3. Green was knocked unconscious. She remembers nothing about the collision itself but woke up to a blaring horn. R. p. 238, line 12; p. 239, lines 10-18.

4. Green's face was covered in blood. She had glass in her mouth, eyes, and hair. R. p. 199, lines 21-25; p. 206, line 23-p, 207, line 7; p. 238, lines 12-17.

5. Green could not see. R. p. 239, line 24.

6. Green could not breathe; she was gasping for air. R. p. 206, lines 8-13; p. 238, line 18-p. 240, line 2.

7. Because Green could not breathe, she was afraid she would be intubated. R. p. 240, lines 4-11.

8. Green could not talk. R. p. 206, lines 7-8.

9. Green thought she was going to die. R. p. 240, line 22.

10. Green felt extreme pain in her chest and sternum. R. p. 238. Line 18-21.

11. Green felt severe pain in her left side. It was later determined she sustained two (2) fractured ribs. R.: 243, line 11-13.

12. Green felt severe pain in her left arm and left shoulder. R. p. 206, lines 11-13; p. 238, lines 14-17.

13. Green could not move her left arm or left shoulder and believed her collar bone was fractured. R. p. 238, lines 14-17.

14. Green had to be extricated from her Kia using the "jaws of life." R. p. 209, lines 15-18.

15. Green was placed on a backboard, transferred to Spartanburg Regional Hospital, and was discharged at 2 a.m. the next morning. R. p. 209, lines 16-18; p. 241, line 2-p. 242, line 4.

16. After returning home, Green could not sleep and could not get herself out of bed. R. p. 242, lines 11-14.

17. For several weeks, Green could not sleep in her bed at all and had to use a recliner chair.

R. p. 211, lines 13-15. She could not use the bathroom by herself or even wipe herself. She could not put her clothes or underwear on or remove them. R. p. 211, line 15-p. 212, line 14. She could not do her hair or shave her legs or armpits. She could not accomplish any activities of daily living without help from her husband. R. p. 211, line 12-p. 212, line 14; p. 242, lines 21-25.

18. Green's left arm was bruised from the top of her shoulder to the elbow and swollen 1.5 times the size of her right arm. R. p. 144, lines 14-18.

19. Green had "intense pain" in her upper back- "between the shoulder blades." R. p. 245, lines 10-13; p. 247, lines 5-7. (It is important to note here that she has never claimed injury to her lower back.)

20. For treatment, Green initially went to her family doctor. R. p. 243, lines 14-15. She complained about pain in her left shoulder, chest, and upper back. R. p. 275, lines 12-16. She later went to a walk-in clinic because she was still hurting, and she was diagnosed with two (2) fractured ribs. R. p. 243, line 11-p. 244, line 4.

21. Green missed eight (8) days of work. R. p. 212, lines 2-4; p. 251, lines 1-3.

22. For a solid month, Green could not drive, and her husband transported her everywhere. R. p. 213, lines 4-13.

23. Green could not sleep in her bed for approximately one (1) year. Instead, she slept in a recliner chair. R. p. 215, line 2. Green still sleeps in a recliner chair a couple of nights per week. R. p. 220, lines 19-20.

24. When Green returned to work, she was unable to perform all of her work without help from her fellow employees. R. p. 251, lines 10-15.

25. Green's family doctor referred her to Piedmont Orthopedic Associates, where she began

receiving treatment for her left shoulder by a surgeon, Shay Koch, MD., and her upper back by a nurse practitioner, Jaime Elliotte. R. p. 244, line 21- p. 246, line 5.

26. The pain in Green's back was "right between the shoulder blades." R. p. 245, lines 10-15.

27. Dr. Koch eventually diagnosed Green with a torn bicep tendon in her left shoulder, as well as impingement/entrapment of her left shoulder. R. P. 247, lines 5-7.

28. Dr. Koch gave Green two injections for her left shoulder. R. p. 246, lines 8-24. Green is diabetic, so the injections caused her blood sugar to skyrocket. R. p. 246, line 7- p. 249, line 10. Thus, the injections made Green feel sick, nauseated, thirsty and caused her to urinate. R. p. 249, lines 8-10.

29. Dr. Koch referred Green for physical therapy on her left shoulder but eventually scheduled her for surgery in April of 2016. R. p. 249, line 24- p. 250, line 22.

30. Meanwhile, Jaime Elliotte, who treated Green's upper back, offered steroid injections for Green's upper back and a referral to pain management. R. p. 291, line 17- p. 293, line 5.

31. Because of Green's diabetes, she could not undergo the steroid injections. R. p. 248, line 8 – p. 249, line 10; p. 292, lines 5-14.

32. Likewise, because of her work as a nurse practitioner, Green could not take narcotic prescriptions. R. p. 249, lines 13-17.

33. So to treat her pain, Green took two to three Advil per day until she got gastritis. R. p. 260, lines 17-21.

34. Green's gastroenterologist instructed her to stop taking so many NSAIDS. R. p. 260, lines 8-14.

35. Currently, Green takes one (1) Advil per day and uses Aspercreme. R. p. 260, line 15.

36. Dr. Koch performed surgery on Green's left shoulder in April 2016. R. p. 249, line 24-p. 250, line 21. He cut her biceps tendon away from the shoulder and reattached it to the humerus bone in a different spot near the shoulder. R. p. 249, line 24- p. 250, line 21. He also cut a centimeter out of her collar bone to shorten it and take pressure off her left shoulder. R. p. 249, line 24- p. 250, line 21.

37. After the surgery, Green testified "it was like starting over." Her arm was in a sling and pinned against her body for six (6) weeks. R. p. 253, line 4- p. 255, line 19. She could not dress herself, go to the bathroom, or do housework. R. p. 255, lines 14-19. She missed two (2) more weeks of work. R. p. 253, lines 4-5.

38. Once again, Green could not drive for several weeks, and her husband had to transport her everywhere. R. p. 254 – p. 255.

39. She underwent more physical therapy- first to address range of motion and then to address strength. R. p. 256, lines 6-10.

40. By July 2016, Green had developed a posttraumatic or post-surgical frozen left shoulder, because her arm was in a sling for six (6) weeks. This is "completely different from a diabetic frozen shoulder." R. p. 257, line 13- p. 258, line 14.

41. Green underwent a release of the frozen shoulder under anesthesia. She missed more work.

42. When she returned to work, she again could not do her job without help from others.

43. It has been more than four (4) years since the collision. Green plateaued a few years ago. R. p. 221, lines 14-20. She has daily pain in her left shoulder and upper back, which she self-treats with Advil and Aspercreme. R. p. 260, lines 4-22; p. 263, line 13. She does not have full range of

motion in her shoulder. She cannot reach over her head with her left arm or behind her- cannot latch her bra in the back. R. p. 259, line 12 – p. 260, line 3. She does not have full strength. R. p. 261, lines 14-18. She has crackling/crepitus in her left shoulder. R. p. 262, lines 14-18. Her lack of strength affects her work each day, as she cannot carry her laptop in her left arm and type with her right hand. She cannot do things she enjoys, like gardening. R. p. 262, line 25- p. 263, line 2. She pays someone to do home maintenance that she used to do and to chop/cut wood for the wood boiler that heats her house. She has spasms in her left bicep when she attempts to use her arm much. R. p. 262, lines 3-12. She cannot safely carry a pitcher of tea and has dropped one, so she doesn't attempt it. R. p. 262, lines 3-12. Her energy level is lower. Her sleep is affected- she must put a pillow under her left arm and sleep only on her right side. R. p. 260, line 24- p. 261, line 4. At least two (2) nights per week, she ends up sleeping in a recliner. R. pp. 260-261. Green's intimate relationship with her husband has been affected-their sexual activity is less frequent. R. p. 264, lines 5-10. Green's physical therapist taught her exercises and stretches to do at home. In an attempt to maintain her current level of pain and functioning, she does them every morning. R. p. 256, line 14- p. 257, line 9.

44. Green has a life expectancy of thirty (30) years. R. p. 384, lines 22-25.

45. Green's husband has been affected by her injuries. After the collision, he had to take care of her most basic daily needs, including dressing her, shaving her legs and armpits, curling her hair, and helping her use the bathroom. R. p. 212, lines 4-16. When she returned to work, he had to drive her to work- 45 minutes from their home. R. p. 213, lines 1-13. He would then go to work in North Carolina and later in the afternoon drive another 45 minutes to pick her up and return her home. R. p. 213, lines 1-13. This went on "for a solid month." R. p. 213, lines 1-13.

46. Because of Green's limitations and lower energy, the couple doesn't do "a lot of things we used to do as a married couple," and he provided the example of whitewater rafting. R. p. 219, lines 21- p. 220, line 1. He also indicated Green's injuries have affected the couple's level of intimacy, which Green confirmed. R. p. 220, line 25 - p. 221, line 1; p. 264, lines 11-13.

Green's financial costs totaled $88,546.78 (medical bills of $82,560.04, the cost of getting a new cell phone in the amount of $83.06, and lost income of $5,903.68). These financial costs were accurately outlined on a trial exhibit "Financial Costs" R. p. 456. At the end of the evidence, the jury received standard charges on noneconomic damages, including pain and suffering. The jury returned a verdict for the *exact* amount of Green's financial costs outlined on Exhibit 10 - $88,546.78. R. p. 7. The jury also returned a verdict of "0" for Plaintiff Russell's loss of consortium claim. R. p. 8.

GREEN'S EXHIBIT 10

SHANNON GREEN'S FINANCIAL COSTS

	MEDICAL PROVIDER	DATES OF SERVICE	CHARGES
1)	Spartanburg County EMS	11/19/15	$ 712.80
2)	Spartanburg Regional Medical Center	11/19/15	12,435.89
3)	Carolinas Pathology	11/19/15	45.23
4)	Medical Group of the Carolinas	11/19/15	470.00
5)	Upstate Eye Care	11/20/15	320.36
6)	St. Francis Urgent Care	11/22/15	324.00
7)	Cassandra E. Bray, M.D.	11/30/15	124.00
8)	St. Francis Hospital (X-ray)	11/30/15	795.00
9)	Upstate Carolina Radiology	11/19/15-11/30/15	890.00
10)	S.C. Diagnostic Imaging	12/10/15	1,650.00
11)	S.C. Diagnostic Imaging	12/28/15	1,870.00
12)	St. Francis Hospital (EKG)	3/17/16	409.00
13)	Palmetto Anesthesiology	3/23/16	3,245.00
14)	St. Francis Hospital (Surgery)	3/23/16	41,392.28
15)	St. Francis Hospital P.T.	4/12/16-9/13/16	13,157.00
16)	Piedmont Orthopaedic Associates	12/18/15-11/17/16	4,637.00
17)	Medical Supplies		35.63
18)	Prescription Medications		46.85
		Total Medicals	$ 82,560.04
19)	Miscellaneous (Cell Phone Replacement)		$ 83.06
20)	Lost Wages		$ 5,903.68
		TOTAL FINANCIAL COSTS	$ 88,546.78

JURY VERDICT

5. **ONLY ANSWER THIS QUESTION IF YOU ANSWERED YES TO QUESTIONS 2, 3, 4 ABOVE.** Taking into account the combined negligence that proximately caused Plaintiffs' damages, what percentage of fault is attributable to Defendant Edward C. McGee and Defendant David Hudgins? NOTE: YOUR NUMBERS MUST ADD UP TO 100%.

Defendant Edward C. McGee 60 %

Defendant David Hudgins 40 %

After making the determination, **GO TO QUESTION 6.**

6. We find that Plaintiff Shannon P. Green is entitled to actual damages in the amount of:

$ 88,546.78 .

7. Do you find that the Defendant, Edward C. McGee's negligence proximately caused Loss of Consortium to Mr. Darrell Russell?

[ ] Yes

[X] No

PLEASE GO TO QUESTION 8

8. Do you find that the Defendant, David Hudgins', negligence proximately caused Loss of Consortium to Mr. Darrell Russell?

[ ] Yes

[X] No

IF YOU ANSWERED YES TO EITHER QUESTION 7 OR 8 OR BOTH, PLEASE GO TO QUESTION 9. IF YOU ANSWERED NO TO BOTH QUESTIONS 7 AND 8, PLEASE GO TO QUESTION 10.

Verdict Form
Shannon P. Green and Darrell Russell vs. Edward C. McGee and David Hudgins
C.A.#: 2017-CP-42-03923

ARGUMENT

I. WHEN A PLAINTIFF PROVES SHE SUSTAINED SERIOUS AND PAINFUL INJURIES (i.e., CUTS TO THE FACE, FRACTURED RIBS, TORN BICEP TENDON, ETC.) AS A PROXIMATE RESULT OF DEFENDANTS' ACTIONS, AND THE JURY RETURNS A VERDICT FOR HER FINANCIAL COSTS *ONLY* (NOT ONE PENNY FOR PAIN AND SUFFERING), THE TRIAL COURT ABUSES ITS DISCRETION WHEN IT REFUSES TO GRANT ADDITUR.

A plaintiff "is *entitled* to recover *all* damages proximately caused by the defendant(s)…" *Watson v. Wilkinson Trucking Company,* 244 SC 219, 228, 136 SE2d 286 (1964) (emphasis added). "A person who is injured by reason of the negligence of another is *entitled* to recover for *all* damages proximately resulting from a negligent act…" 22 AmJur 2d Damages, Section 250 (emphasis added.)

"Pain and suffering…is a very material element of damages…", *Edwards v. Lawton*, 244 SC 276, 281, 136 SE2d 708 (citation omitted). Nonetheless, pain and suffering is in jeopardy of becoming a purely theoretical element of damages, especially in certain venues. Plain and simple, some jurors are resistant to awarding money for these damages, even when proven. As a result, juries often return minimal amounts for pain and suffering – not much in addition to economic damages. In such instances, the trial court does, in fact, have substantial discretion and can exercise that discretion by refusing to invade the "province of the jury".

But to be clear, where pain and suffering has been proven to be a proximate result of Defendants' actions, the question isn't "whether" the Plaintiff is entitled to money for that pain and suffering but "how much". There is no discretion as to whether such damages must be awarded; there is only discretion as to the amount of the award. 22 AmJur 2d Damages, Section 232, *citing McVey v. USAA Cas. Ins. Co.*, 372 Mont. 511, 517, 313 P2d 191, 196 (2013) ("…[T]he severity of the distress affects the *amount* of damages recovered but not the underlying *entitlement*

to recover.") (emphasis added). If the jury refuses to return even one (1) penny in its verdict, it is time for the trial court to step in – "the province of the jury" must be invaded.

In this case, if the jury had added $1,000.00 to Plaintiff's financial losses, would the verdict have been inadequate? Yes, grossly. Would the $1,000.00 have constituted evidence that the jury at least included something in its verdict for pain and suffering? Yes. Would Plaintiff have filed a motion for additur? Yes. If the motion had been denied, would Plaintiff's counsel have had the confidence to appeal the trial court's denial of additur? No.

This Petition for Writ is important because the Court of Appeals' decision tells the bench and the bar there is no limit to the trial court's discretion on the issue of additur. The trial court's discretion is so expansive as to be incapable of abuse. The standard has gone from "substantial deference" to "blind deference". The trial court can always refuse to "invade the province of the jury", even when it is clear the jury disregarded the law and essentially engaged in nullification.

In this case, the Plaintiff filed her Motion for New Trial *Nisi Additur*, and the trial court was "require[d]… to consider the adequacy of the verdict in light of the evidence presented." *Krepps v Ausen*, 324 SC 597, 479 SE2d 290 (Ct App 1996). Although the trial court has considerable discretion in this regard, "such discretion is not absolute." *Waring v. Johnson* 341 SC 248, 257, 533 SE2d 906 (Ct. App 2000). It is appropriate to grant additur when "it cannot be seriously argued that [an injured plaintiff] was adequately compensated for the injuries she sustained." *Graham v. Whitaker, MD*, 282 SC 393, 402, 321 SE2d 40 (SC 1984). Here, the trial court abused its discretion by declining to grant additur when the jury awarded *nothing* for Green's pain and suffering.

It is indisputable that the jury did not award anything to Plaintiff other than her economic damages. To the penny. The Court of Appeals has found that awarding a Plaintiff's medical expenses "to the penny" renders any argument that the jury included anything in its verdict for pain and suffering "patently untenable." *Waring v. Johnson*, 341 SC at 260. While this finding provides "authority" for Plaintiff's position, it is nothing more than common sense.[1]

It is also indisputable that Plaintiff experienced pain and suffering and impairment as a result of Defendants' actions. Plaintiff will not repeat here the litany of undisputed facts provided previously. However, anyone reading this brief knows it is not humanly possible for a 50-year-old woman who is struck by a vehicle traveling 60-90 mph; who has glass in her eyes and mouth; who cannot breathe and thinks she's going to die; who sustains rib fractures and a torn bicep tendon requiring surgery, not to experience pain and suffering. It is significant that Green's orthopedic doctor gave her injections to deal with the pain and suggested pain management. Because Green could not endure the results of such injections, she ate NSAIDS until she got gastritis.

Pre-existing injuries are not an issue here. There is no evidence or argument made that Green had fractured ribs or a torn left bicep tendon or intense pain "right between the shoulder blades" before being violently struck on her left side by Defendant McGee's truck. All of the evidence relating to her impairment is completely consistent with the type of injuries she sustained.

In response to Green's Motion for New Trial *Nis Additur*, Defendants cited other Court of Appeals' opinions that upheld the decision of trial courts to deny additur, even those in which

[1] The Court of Appeals stated that "the key to *Waring* is that this Court was reviewing a grant of additur rather than the denial of it." Such a statement overlooks and misapprehends the logic of *Waring.* Yes, the standard of review on the issue of additur is deferential, but the common sense conclusion in *Waring, i.e.* that a verdict for economic damages "to the penny" is conclusive proof that nothing was awarded for pain and suffering, applies when additur is granted and when it is denied.

verdicts were returned for medicals only, or reversed the decision of trial courts to grant additur. Defendants will undoubtedly cite those cases once again. However, those cases are easily distinguished from this one. In those cases, the plaintiffs had one or more serious proof problems, and very importantly those proof problems were actually raised and argued by defendants' lawyers. The proof problems relied upon by the Court of Appeals in such cases are summarized below:

1. Collisions that are so minor as to make injury reasonably questionable. *Vinson v. Hartley*, 324 SC 396, 410, 477 SE2d 715 (Ct App 1996) ("Vinson's own description of the collision showed it was minor and inconsequential… in the nature of a 'bump'….While questioning Vinson, defense counsel introduced photographs of Vinson's car to demonstrate the small amount of damage."); *Todd v. Joyner*, 385 SC 509, 518, 685 SE2d 613 (Ct App 2008) ("The jury awarded Todd $37,191.11, her exact medical costs…Joyner cited the relatively low impact of the collision along with Todd's apparently limited injury immediately following the accident in support of her position.")

2. Proximate cause of the injury or injuries is disputable. *Vinson v. Hartley,* 324 SC at 397 (["Vinson] did not complain of any injuries at the scene. No evidence was introduced that Vinson went to the emergency room…or even went to the hospital….Defense counsel stated Vinson 'was not injured as a result of this accident…'") *Green v. Fritz*, 356 SC 566, 568-569, 590 SE2d 39 (Ct. App. 2003) ("[A]t the hospital, Green did not complain of, and was not treated for, neck, back or muscle pain…Four weeks after the accident, Green sought treatment from Dr. Shay, a chiropractor. Dr. Shay diagnosed Green with cervical subluxation… [D]efense counsel

challenged the causal link between the accident and Green's subluxation diagnosis….Dr. Shay was asked whether Green's back injury could have been caused by something other than the car accident, and Dr. Shay admitted that was possible.") *Todd v. Joyner*, 385 SC at 518. ("Joyner argued that all of Todd's claimed damages were not proximately caused by the accident and that all of the medical treatment was not reasonably necessary."); *Luchok v. Vena*, 391 SC 262, 264, 705, SE2d 71 (Ct. App. 2010) ("The only two points made by defense counsel in her opening statement were to argue that Plaintiff did not prove causation…and…whether those treatments were reasonable and necessary….[Luchok] testified she did not need an ambulance, she did not go to the emergency room, and she drove herself home after the accident.") *Lynch v. Carolina Self Storage*, 409 SC 146, 150, 760 SE2d 111 (Ct App 2014) ("The jury returned a verdict for Lynch and awarded her $246,068.42- the exact amount of the medical expenses she claimed resulted from her injury…Carolina Self Storage argued Lynch failed to prove proximate cause for the majority of her medical expenses because…she was the sole cause of the medical expenses associated with the surgery."); *Nestler v. Fields*, 426 SC 34, 36, 824 SC2d 461 (Ct App 2019) ("Nestler did not introduce…his medical bills into evidence….[Defendant] offered them. Nestler's trial strategy focused on his pain and suffering. The jury awarded him $7,159.70 [the amount of his medical bills]…Nestler boasted a semi-photographic memory, but could not recall a prior lawsuit he had brought alleging permanent injuries to his neck and back."

3. Plaintiff has substantial credibility problems. *Vinson v. Hartley*, 324 SC at 410 ("Vinson stated he missed time from work as a result from the accident. Evidence concerning a lost wages claim was developed during direct examination. However, Vinson acknowledged he

was not working at the time of the accident…Vinson's credibility may have been seriously weakened by his first claiming lost wages, then withdrawing that claim when confronted with deposition testimony which indicated he had no lost wages and was not making such a claim….During closing argument, defense counsel argued about the credibility of witnesses and Vinson's referral to the doctors by his attorney."); *Nestler v. Fields*, 426 SC at 41-42, ("The jury had before it evidence that, if believed, undercut Nestler's credibility….Nestler boasted a semi-photographic memory, but could not recall a prior lawsuit he had brought alleging permanent injuries to his neck and back arising from a different wreck. Nestler did not disclose the lawsuit and discovery, and the trial court instructed the jury they could infer the information withheld would have been unfavorable to Nestler. Fields assailed the veracity of Nestler's permanency rating, bringing to light that the doctor's initial eight percent impairment rating for the entire person shot up to 32% after Nestler (his good friend) asked him to revisit it in an effort to resolve the case…. the jury could have found serious credibility gaps…")

Again, these proof problems must be *real* issues, not contrived. And if they are real issues, they will be *argued* by Defendants' attorneys. None of that happened here. Nowhere in the record did Defendants' attorneys argue that Green's injuries from this collision were caused by some other event or were caused by Green herself or were pre-existing.

Defendant McGee *did* use a common and often effective strategy in defense of injury cases, that is to make sure the jury knows a plaintiff is no "spring chicken" and doesn't have perfect health. Defendant McGee brought up other conditions of Green's – remote in time - that are completely unrelated to this case and for which she clearly was not attempting to recover. He referred to the conditions as "pain in other areas just from walking this earth for 50 years." (This

stuff works like a charm with some juries.)[2] He raised three issues. First, he raised the issue of a past lower back pain, though Green made clear that this collision "did not cause lower back pain for me…[rather] upper back pain between the shoulder blades." R. p. 282-284. Second, he raised the issue of a past hip pain that began in 2010, which Green testified "was not the result of trauma" and "was definitely not related to this accident." R. p. 282, lines 17-23. The "hip pain turned out to be a trochanter bursitis." R. p. 287, lines 10-11. Third, he raised the issue of a past right frozen shoulder that both he and Green acknowledged was "also unrelated to this accident,". It was clear that "the right shoulder was frozen from diabetes." R. p. 289, lines 21-25. Green was adamant she was not attempting to recover for "pains that all of us get from walking this earth." R. p. 293, lines 24-25. She testified that she was limiting her request to injuries sustained in the collision. "I'm not asking to be compensated for low back pain and trochanter bursitis…or even the right frozen shoulder…[T]hat's not part of this claim." R. p. 294, lines 12-18. As a result of the fact Green wasn't claiming pre-existing and unrelated conditions in this case, neither Defendant argued she was not credible or that the injuries she did claim were not caused by Defendant McGee's collision with her.

If pain and suffering is to remain "a very material element of damages", and if denial of a motion for additur can ever be reversed, there must be some parameters set. There must be some

[2] And in this case the Court of Appeals. While the Court of Appeals acknowledged "there is no doubt [Green] received serious injuries in the wreck", it found that "causation was an issue for treatment and on-going pain because Green had pre-existing ailments." Those ailments affected other parts of the body, *i.e.* low back pain, bursitis of the hip, and a frozen right shoulder – all from years before the crash. The Court of Appeals did not explain how low back pain, bursitis of the hip, and a frozen right shoulder could possibly have caused bloody face/glass in eyes and mouth, inability to breathe, fear of death, left rib fractures, and left shoulder injury (torn bicep tendon) requiring surgery. Refer back to the third indisputable fact – the jury attributed all of Plaintiff's medical treatment (including surgeries and physical therapy) to the car crash.

example to the bench and bar where failure to add money to a verdict for pain and suffering is reversible.

This is the case. It is an opportunity for this Court to provide guidance to the bench and bar, such as adoption of the following: In a case where property damage is not minor (such that injury would be expected), and where a plaintiff sustains *objective* injury, e.g. broken bones or a torn tendon, and where such injury would naturally cause pain and suffering to a human being, and where there is no reasonable argument as to proximate cause, and where there is no realistic argument that a plaintiff was comparatively negligent, then the jury *must* return a verdict that includes money for pain and suffering. If the jury will not do so, the trial court *must* grant a motion for additur.

III. WHEN A PRE-TRIAL SETTLEMENT COVERS CLAIMS BY PLAINTIFF'S HUSBAND FOR HIS LOSS OF HER SERVICES, AND SHE LATER OBTAINS A VERDICT AT TRIAL, SHOULD THE ENTIRE SETTLEMENT BE APPLIED AS A SETOFF TO HER VERDICT, OR SHOULD THE TRIAL COURT HOLD A HEARING TO CONSIDER ALL RELEVANT CIRCUMSTANCES AND ALLOCATE ONLY A PORTION OF THE SETTLEMENT AS A SETOFF?

Before trial, Defendant McGee's liability carrier, Nationwide, paid Green and her husband, Plaintiff Russell, $100,000.00 in settlement. R. pp. 460-462. In exchange for that payment, Nationwide required both Green and Plaintiff Russell to sign a Covenant Not to Execute. Plaintiff Russell gave up the right to execute a judgment against Defendant McGee for "any and all claims…including…loss of services."[3] R. 460-462.

No doubt Defendants are entitled to an offset, but not for money paid to settle the husband's

[3] Plaintiff Russell also received a settlement from Nationwide for a leg injury, and he signed a Covenant Not to Execute in exchange for $2500.00. R. 457-459. However, Green was not required to sign the Covenant for Russell's leg injury.

claims. Any "reduction in the judgment must be from a settlement for the same cause of action." *Riley v. Ford Motor Co.,* 414 SC 185, 196, 777 SE2d 824 (2015) (citations omitted). "[W]here a settlement involves more than one claim, the allocation of settlement proceeds between various causes of action impacts the amount a non-settling defendant may be entitled to offset." *Id.* Here, the $100,000.00 settlement involved more than one (1) claim. It covered not only Plaintiff's personal injuries but also her husband's loss of her services. Thus, the trial court should have attributed some amount of the $100,000.00 payment to Plaintiff Russell and subtracted that amount from the offset applied to Green's verdict.

To be sure, Plaintiff Russell had a real and valid claim for loss of consortium as a matter of law[4]. In *Page v. Crisp*, 303 SC 117, 118, 399 SE2d 161 (Ct. App. 1990), a wife was seriously injured, and the jury returned a verdict for $44,000.00. The same jury simultaneously returned a verdict on her husband's loss of consortium claim for "zero dollars." *Id*. The trial court refused to send the jury back to award money damages to the husband or to grant a Motion to Amend the Judgement. *Id*. at 119. The Court of Appeals reversed and remanded. It held that the "seriousness of the wife's injuries [were] reflected in the $44,000.00 jury award." *Id*. at 188. It noted that the husband had testified about how the wife's injuries had affected the couple's daily lives and relationship, including a sex life that was "just put on a back burner." *Id*. at 118. Because there was no actual credibility issue with husband's testimony, some amount should have been awarded for loss of consortium. *Id*. at 119.

Plaintiff Russell's case for loss of consortium is as strong as, if not stronger than, the

[4] Plaintiff Russell did not file an appeal, but he should have received a money award in the verdict for his loss of consortium as a matter of law. This supports Green's contention that the $100,000.00 settlement payment covered his loss of consortium claim.

husband's claim in *Page*. For starters, his wife's medical bills were much higher than the wife's in *Page.* For many weeks Plaintiff Russell had to dress Green and take care of her most basic needs, from wiping her to shaving her armpits. For months, he had to drive Green around and also to and from work in Greenville before going to work himself in North Carolina. He testified that he and his wife don't engage in the fun activities they used to do together. Finally, he testified that the couple's sex life has been affected. R. p. 220, line 25- p. 221, line 2.

Direction on handling the type of allocation this situation requires was limited for many years. However, this Court provided it in in *Green v. Bauerle,* No. 2019-MO-026, 2019 SC Unpub. LEXIS 27. (S.C. Unpub. May 29, 2019), an unpublished opinion cited by Defendant Hudgins in support of his Motion for Setoff[5]. Procedurally, this allocation *requires a hearing* to consider all relevant circumstances.

In *Green v. Bauerle*, a husband and wife, Mr. and Mrs. Green, filed suit against three (3) defendants. Mr. Green alleged malpractice, and Mrs. Green alleged loss of consortium. *Id*. Before trial, Mr. and Mrs. Green settled with two (2) of the defendants, but (as in this case) neither of the settlements was allocated between Mr. and Mrs. Green's claims. *Id*. Verdicts were returned in favor of both Mr. and Mrs. Green against the non-settling third defendant, and he moved for setoff of Mr. and Mrs. Green's settlements against the jury verdicts. The trial court "found it 'reasonable, fair, and just to utilize the jury's verdict as to the [Green's] claims' and, as a result, '[applied] the percentage of the total verdict given to each [spouse] by the jury to apportion the settlements between Mr. Green's claim for medical malpractice and Mrs. Green's claim for loss of

[5] The Court of Appeals has recently analyzed/applied this Court's direction on such allocation. *Green v. Bauerle,* Op. No. 6029 (Ct. App. Oct. 4, 2023).

consortium." *Id.*

This Court "conclude[ed] the trial court's determination of the specific amounts to be setoff from the verdicts was arbitrary, as the determination was based solely upon the ratios both verdicts bore to the whole." Id. This Court held that while such ratios may be "relevant..., they are not necessarily the sole relevant circumstance." Id. Accordingly, this Court vacated the trial court's order on the allocation and remanded the issue to the trial court with instructions to "convene a hearing to consider all relevant circumstances." *Id.*

Based on *Green v. Bauerle,* two (2) things are clear with respect to the amount of the setoff that should have been applied to the verdict in favor of Plaintiff Green: 1.) The setoff should not have been $100,000.00; and 2.) The fact that the jury returned zero to Plaintiff Russell in a clear case for loss of consortium is not controlling, i.e. not the "sole relevant circumstance" in determining the amount of the setoff against Green's verdict. Reliance on the jury verdict alone in establishing the proper amount of setoff is arbitrary. The trial court should have "convene[d] a hearing to consider all relevant circumstances" before applying a setoff to Plaintiff's verdict.

CONCLUSION

Based on the foregoing, this Court should grant the Petition for Writ of Certiorari.

BY: _____

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