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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

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 A WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for Petitioner David Hudgins certifies the Petition for Rehearing was made and finally ruled on by the Court of Appeals on October 11, 2023.

QUESTIONS PRESENTED

1. Should the Court of Appeals have set off Mr. Hudgins' verdict by the entire \$100,000 settlement amount paid to Plaintiff Shannon P. Green on Respondent Edward C. McGee's behalf as S.C. Code § 15-38-50(1) requires?
2. Should the Court of Appeals have reversed the Circuit Court's ruling on Mr. Hudgins' motions to set aside the verdicts against him and directed that the verdicts against him be set aside and judgment entered in his favor?

STATEMENT OF THE CASE

Pursuant to Rule 242 of the South Carolina Appellate Court Rules, Mr. Hudgins petitions this Court for a writ of certiorari to review the Court of Appeals' denial of his appeal in Opinion No. 6001 (the Opinion). Such relief is necessary because the Opinion directly conflicts with *Ellis v. Oliver*, 335 S.C. 106, 113, 515 S.E.2d 268, 272 (Ct. App. 1999), which recognizes the foundational principle that only the General Assembly, not the courts, makes the law and can correct any perceived, unintended results in the application of a statute, namely S.C. Code § 15-38-50. In denying Mr. Hudgins' appeal, the Court of Appeals recognized but then chose to disregard the plain language of S.C. Code § 15-38-50(1), which provides:

When a release or a covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons liable in tort for the same injury or the same wrongful death:

- (1) it does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms so provide, but it reduces the claim against the others 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 the greater.

Instead of applying the plain language of the statute, the Court of Appeals applied its own subjective “equity” determination of how setoff should operate in this case, concluding “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). The Court of Appeals’ substitution of an equitable analysis for the application of the statutory language directly conflicts with the determination in *Ellis* that § 15-38-50(1) “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.

The following is not in dispute:

1. Ms. Green settled with Mr. McGee and his liability insurer for One Hundred Thousand Dollars (\$100,000.00), for which Mr. McGee was given a “Covenant Not to Execute.” (R. pp. 460-462).
2. On October 16, 2019, the jury returned a verdict in favor of Ms. Green. (R. pp. 6-9).
3. The jury determined both Mr. Hudgins and Mr. McGee were negligent and proximately caused the November 19, 2015 motor vehicle accident at issue—in other words “liable in tort for the same injury or the same wrongful death”—with Mr. Hudgins forty percent (40%) at fault and Mr. McGee sixty percent (60%) at fault. (*Id.* at 6-7). The jury further found Ms. Green was entitled to actual damages in the amount of \$88,546.78. (*Id.* at 7).
4. The jury also awarded \$35,000 in punitive damages against Mr. Hudgins and \$35,000 in punitive damages against Mr. McGee. (*Id.* at 8).

The Court of Appeals correctly noted in the Opinion that, in accordance with the jury’s verdict, Mr. Hudgins bears responsibility for \$35,418.71 in actual damages (equivalent to 40%) and \$35,000 in punitive damages—a total damages award of \$70,418.71 against him. *See* Howard Advance Sheet No. 29, p. 45.¹ The Court of Appeals did not, however, apply set off in accordance with the statutory language, which required a \$100,000 setoff in Mr. Hudgins’ favor (i.e., the total amount in settlement proceeds paid on behalf of Mr. McGee to Ms. Green in exchange for a covenant not to execute). 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 consideration paid for it [\$100,000.00 here], whichever is greater.” S.C. Code § 15-38-50(1)(emphasis added).

Rather than reduce the claim against Mr. Hudgins, the Court of Appeals credited *Mr. McGee*, the settling party who received the covenant not to execute, \$88,128.07 of the \$100,000.00 in settlement proceeds and fully set off the jury’s verdicts against him, even though those verdicts cannot ever be executed against Mr. McGee pursuant to the settlement terms. The Court of Appeals’ reallocation left an excess of only \$11,871.93 to reduce the verdict amounts against Mr. Hudgins, even though Mr. Hudgins was the only tortfeasor with the statutory right to setoff after Mr. McGee settled. The Court of Appeals’ ruling recognizes but then completely disregards the plain language of S.C. Code § 15-38-50, which, of course, is not permissible. *See Ellis*, 335 S.C. at 113, 515 S.E.2d at 272 (recognizing that only the General Assembly, not the courts, makes the law and can correct any perceived, unintended results in the statute’s application).

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

In addition, the Court of Appeals erred when it affirmed the Circuit Court's denial of Mr. Hudgins' motions to set aside the verdicts against him. Simply put, the only reasonable inference from the evidence presented at trial is that Mr. McGee's negligence was the sole proximate cause of the accident at issue.

I. FACTS.

This case arises from an accident that occurred on November 19, 2015 on Simuel Road in Spartanburg, South Carolina, in which the only two vehicles involved were the car driven by Ms. Green and the Chevrolet 2500 truck driven by Mr. McGee. Mr. Hudgins' vehicle did not impact either Ms. Green's car or Mr. McGee's truck and in fact was traveling several car lengths (at least) behind Mr. McGee's truck when the accident occurred.

Prior to the accident, Mr. Hudgins was working and driving a Nissan Altima on Interstate 85 from a plant in Blacksburg to his next job at a plant in Spartanburg near Heron Circle. (R. pp. 298:11- 299:7). Traffic was very heavy on the interstate at that time and was "stop and go." (R. p. 300:10-19). While Mr. Hudgins was in the left lane on Interstate 85 North, Mr. McGee approached him from behind. The evidence showed that Mr. McGee was running late for work at the BMW plant in Greer at that time, as he had to be at work at 7:00 and the events of the accident occurred at 7:00. (R. p. 136:10-19). Mr. McGee admitted that as he approached Mr. Hudgins on the interstate, he was speeding and flashed his lights at Mr. Hudgins to tell him he was driving too slow and "let's go." (R. pp. 139:20-140:16). Mr. Hudgins had to apply his brakes, as vehicles in front of him were slowing down or stopping. (R. pp. 300:23-301:4).

As Mr. Hudgins applied his brakes on these occasions, Mr. McGee admitted he was traveling so close behind him he almost hit him. (R. p. 96:11-19). Mr. McGee moved to the middle lane and then "flipped" back to the left lane to get in front of Mr. Hudgins, approaching him so

closely “a piece of paper” could have fit between them. (R. p. 101:12-22). Mr. Hudgins had to slam on his brakes and swerve off of the roadway to avoid having an accident. (R. p. 314:2-9). He was startled and called 911 to report Mr. McGee’s aggressive and reckless driving. (R. pp. 302:23-303:8).

On this 911 call, which was played at trial, Mr. Hudgins is heard, as he continues to travel down the interstate, telling the operator Mr. McGee’s license plate number. (*See Hudgins Ex. 1 to Trial Tr.*, 911 Call). Then, there is silence for over two minutes as the operator attempts to get in touch with the South Carolina Highway Patrol. While on the 911 call, Mr. Hudgins exited onto Exit 4B on Interstate 85 Business along with Mr. McGee and other vehicles. (R. pp. 330:23-331:15). Mr. Hudgins saw Mr. McGee go around Heron Circle at a high rate of speed and almost cause a different accident, and Mr. Hudgins can be heard describing this on the 911 call. (R. p. 306:19-25). As Mr. McGee turned onto Simuel Road, Mr. Hudgins stated, “He’s gone. I’m not going to chase him.” (*See Hudgins Ex. 1 to Trial Tr.*, 911 Call). Then approximately twelve (12) seconds later, Mr. Hudgins is heard saying Mr. McGee “just wrecked.” (*Id.*).

Mr. Hudgins testified that as Mr. McGee drove down Simuel Road ahead of him, he was six car lengths or more behind him. (R. p. 307:9-14). Even Mr. McGee admitted Mr. Hudgins was at least “two or three car lengths” behind him on Simuel Road. (R. p. 148:11-20). The evidence was undisputed that Mr. Hudgins never tried to run Mr. McGee off the roadway or did anything else to distract Mr. McGee’s attention from the roadway. (R. p.148:24-25; 149:8-19; 334:2-5). Mr. McGee testified he was not really concerned with Mr. Hudgins’ vehicle coming into contact with his, and he admitted he was looking ahead at cars going through the intersection and not at Mr. Hudgins’ vehicle when the accident occurred. (R. pp. 149:18-150:7; 152:23-153:1).

As Mr. McGee drove on Simuel Road, his truck crossed the center line and struck the vehicle driven by Ms. Green. There was no dispute that Mr. Hudgins' Nissan Altima was not involved in the impact and never struck Ms. Green's car or Mr. McGee's truck. (R. p. 230:9-11). Mr. McGee admitted he was in "total control" of his truck at the time of the accident, (R. pp. 151:25-152:2), and in "total control" of his truck as he admittedly sped down Simuel Road:

Q. Okay. No one, other than you, was speeding down Simuel Road, right?

A. Exactly.

Q. Okay. And, again, you, you pled guilty to driving too fast for conditions, right?

A. I admit that, yes, sir. I pleaded guilty to it.

(R. p. 152:10-18). Mr. McGee further admitted he was in "total control" of his truck when he took the curve too fast, crossed the centerline, and struck Ms. Green's vehicle. (R. pp. 152:18-22; 153:16-23).

II. PROCEDURAL HISTORY.

Ms. Green, along with her husband, Darrell Russell, filed this action on September 27, 2017, alleging a cause of action for negligence against Mr. McGee and Mr. Hudgins arising out of the automobile accident. (R. pp. 10-12 (Complaint)). Mr. Hudgins filed his Answer to the Complaint on December 12, 2017, denying the allegations of negligence and asserting multiple affirmative defenses. (R. pp. 13-18). Prior to suit being filed, Ms. Green settled with Mr. McGee and his liability insurer for One Hundred Thousand Dollars (\$100,000.00) and executed a "Covenant Not to Execute." (R. pp. 460-462). Hoping to pursue underinsured motorist benefits under her own insurance policy with Respondent Progressive Direct Insurance Company (Progressive), Ms. Green served Progressive with the Complaint, and Progressive answered on May 30, 2018. (R. pp. 19-25).

The case went to trial before a Spartanburg County jury on October 14, 2019, with the Honorable Grace Gilchrist Knie presiding. At both the close of Plaintiffs' case and the close of Defendants' case, Mr. Hudgins and counsel for Progressive moved for directed verdict, which were denied. On October 16, 2019, the jury returned a verdict in favor of Ms. Green. (R. pp. 6-9). The jury determined both Mr. Hudgins and Mr. McGee were negligent and proximately caused the November 19, 2015 accident, finding Mr. Hudgins forty percent (40%) at fault and Mr. McGee sixty percent (60%) at fault. The jury further found Ms. Green was entitled to actual damages in the amount of \$88,546.78, while Mr. Russell was not entitled to any damages for Loss of Consortium. Finally, the jury awarded \$35,000 in punitive damages against Mr. Hudgins and \$35,000 in punitive damages against Mr. McGee. (*Id.*).

Both Ms. Green and Mr. Hudgins filed timely post-trial motions. On October 25, 2019, Mr. Hudgins submitted a Motion for Judgment Notwithstanding the Verdict (JNOV) pursuant to Rule 50(b), SCRPC, seeking to have the verdict against him set aside in its entirety and judgment entered in his favor, or to at least have the punitive damages award set aside. (R. pp. 27-38). Mr. Hudgins also filed a Motion for Setoff, pursuant to S.C. Code § 15-38-50, seeking to have the Court properly apply the statute to credit Mr. Hudgins the entire \$100,000.00 in settlement proceeds Ms. Green received from Mr. McGee prior to trial in exchange for a Covenant Not to Execute against Mr. McGee. (R. pp. 39-45). Ms. Green also filed a Motion for New Trial *Nisi Additur* or, in the alternative, a Motion for a New Trial Absolute. (R. p. 26).

A hearing was held before Judge Knie on December 20, 2019 on all post-trial motions. On January 8, 2020, Judge Knie issued an Order ruling on all post-trial motions. (R. pp. 1-5). The Circuit Court denied all post-trial motions except for the Motion for Setoff. With respect to that motion, the Court entered judgment as follows:

Defendant David Hudgins' Motion for a Setoff of the verdict against him pursuant to S.C. Code Ann. § 15-38-50 of the proceeds received by Plaintiff Shannon P. Green should be and is therefore granted as to both Defendants in the amount of One Hundred Thousand Dollars and no/100 (\$100,000.00); and

That the remaining amount of the verdict to be paid to Plaintiff Shannon P. Green of Fifty-Eight Thousand, Five Hundred Forty-Six and 78/100's Dollars (\$58,546.78) shall be shared by the Defendants on a pro-rata basis according to the fault assigned to the Defendants by the Jury Verdict; and Defendant McGee shall be responsible for 60% of the remaining amount owed to Plaintiff Green and Defendant Hudgins shall be responsible for 40% of the remaining amount owed to Plaintiff Green.

(*Id.* at 3-4.). On February 5, 2020, Appellant Green filed a Notice of Appeal, and thereafter on February 10, 2020, Mr. Hudgins timely submitted his Notice of Cross Appeal. The parties submitted their briefs and oral argument was held on March 1, 2023.

On July 26, 2023, the Court of Appeals issued the Opinion. On August 9, 2023, Mr. Hudgins filed a Petition for Rehearing and Suggestion for Rehearing *En Banc*. On October 11, 2023, the Court of Appeals denied Petitioner's Petition for Rehearing and rejected Petitioner's suggestion for Rehearing *En Banc*.

ARGUMENTS

- I. THE COURT OF APPEALS SHOULD HAVE SET OFF MR. HUDGINS' VERDICT BY THE ENTIRE \$100,000 SETTLEMENT AMOUNT PAID TO MS. GREEN ON MR. MCGEE'S BEHALF AS S.C. CODE § 15-38-50(1) REQUIRES.

The plain language of S.C Code § 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 consideration paid for it [\$100,000.00 here], whichever is greater." S.C. Code § 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[tortfeasor]” 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. The Court of Appeals, however, improperly brushed aside the plain statutory language and its proper application as just “one of the alternative approaches.” (Opinion, p. 45).² This rogue act should not be permitted.

a. The Court of Appeals did not afford controlling weight to the General Assembly’s limitation of setoff rights to “other tortfeasors.”

It is apparent the Court of Appeals failed to give controlling weight 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]” under 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:

² The other “alternative approach” mentioned in the Opinion is the one taken by the Circuit Court—applying the settlement funds first to the entire actual damages award and then to the punitive awards against McGee, Hudgins or both. (*Id.* at 45). The Court of Appeals rejected this alternative. (*Id.*). While such alternative should be rejected, the Court of Appeals’ basis for doing so was incorrect; it too invoked equity rather than the language of § 15-38-50(1). This improper analysis also results in an erroneous setoff calculation, this time giving Mr. McGee “first credit for funds paid on his behalf, and that the excess be applied to the judgment against [Mr.] Huggins.” (*Id.*).

Although her UIM carrier may be *contractually and/or statutorily* liable for the verdict against Mr. McGee, it is not “liable *in tort* for the same injury” as the statute requires. (emphasis added).

The straightforward application of the plain language of § 15-38-50(1) yields only one result here; even the Court of Appeals correctly noted in the Opinion “that the legislature’s word with respect to public policy is final.” (Opinion, p. 44). Despite this recognition of the General Assembly’s ultimate authority, the Opinion nevertheless incorrectly labels the General Assembly’s plain statutory language as “argument,” boldly ruling the only possible result by § 15-38-50(1) “*is an interpretation we cannot follow.*” (Opinion, p. 44)(emphasis added). This clear error by the Court of Appeals warrants relief from this Court.

b. The Court of Appeals exercised discretion not permitted under the plain language of § 15-38-50(1).

The Court of Appeals decision to override the plain language chosen by the General Assembly in favor of what it 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, the 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 Court of Appeals disregarded this guiding principle which has echoed over the years in the jurisprudence of South Carolina courts. *See, e.g., Huck v. Oakland Wings, LLC*, 422 S.C. 430, 437, 813 S.E.2d 288, 291 (Ct. App. 2018); *Vortex Sports & Entertainment, Inc. v. Ware*, 378 S.C. 197, 210, 662 S.E.2d 444, 451 (Ct. App. 2008). The Court of Appeals’ decision and the recognition in *Ellis* of the General Assembly’s province cannot be reconciled, and review by this Court is required to resolve this conflict.

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 § 15-38-50(1). 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 Court of Appeals 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 Court of Appeals 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” appearing nowhere in the plain language of the statute, directly contradicting the procedure and result dictated by the statute, and encouraging 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 the Court of Appeals’ subjective sense of “equitable principles” appears nowhere in the codified language of § 15-38-50(1). The Court of Appeals 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.

The statute does not permit any court to consider whether Mr. “Hudgins has sufficient liability coverage to satisfy the awards against him,” (Opinion, p. 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 Court of Appeals to inject the straightforward setoff analysis with extraneous factors.

For all these reasons, the Court of Appeals’ settlement reallocation hinges on an erroneous interpretation of 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,³ regardless of whether they should have been set aside as discussed below.

³ Although the setoff calculated by both the Circuit Court and the Court of Appeals 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 Court of Appeals correctly noted, Mr. Hudgins bears responsibility for \$35,418.71 in actual damages and \$35,000.00 in punitive damages, for a total of \$70,418.71. (*Id.*). Accordingly, Mr. Hudgins’ total liability to Ms. Green

II. THE COURT OF APPEALS SHOULD HAVE REVERSED THE CIRCUIT COURT'S RULING ON MR. HUDGIN'S MOTIONS TO SET ASIDE THE VERDICTS AGAINST HIM AND DIRECTED THAT THE VERDICTS AGAINST HIM BE SET ASIDE AND JUDGMENT BE ENTERED IN HIS FAVOR.

The Court of Appeals erred in affirming the Circuit Court's denial of Mr. Hudgins' motions to set aside the actual damages and/or punitive damages verdicts, as such decision is at odds with both the record on appeal and the 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 Court of Appeals 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 contrary to 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. (R. p. 14:11-20).
- (2) did not flash his lights.

would be setoff in its entirety by the \$100,000 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 this Court were to reject Mr. Hudgins' arguments *infra* Section II and find that he is liable for the entire \$88,546.78 actual damages award, the maximum amount for which Mr. Hudgins could possibly 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).

(3) never tried to run Mr. McGee off the road or otherwise encroached on Mr. McGee's vehicle. (R. p. 148:24-25; 149:8-19; 334:2-5).

(4) did nothing to distract Mr. McGee's attention from the roadway. (*Id.*).

(5) did not strike Ms. Green's vehicle or Mr. McGee's truck. (R. p. 230:9-11).

The 911 Call played for the jury revealed 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.” Mr. McGee admitted he was in “total control” of his truck leading up to and at the time of the accident. (R. pp. 151:25-152:2; 152:10-22; 153:16:23). Mr. McGee also testified he was not concerned with Mr. Hudgins’ vehicle coming into contact with his and admitted he was looking ahead at cars going through the intersection and not at Mr. Hudgins’ vehicle at the time of the accident. (R. pp. 149:18-150:7; 152:23-153:1).

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*. If Mr. Hudgins was negligent, such negligence merely “brought about a condition of affairs, or a situation in which another and entirely independent and efficient agency intervene[d] to cause the injury,” which is not a direct or proximate of this accident. *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 Court of Appeals offers a one-sentence basis for affirming the Circuit Court's denial of Mr. Hudgins' motion to set aside the punitive damages verdict:

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). This conclusory statement was error. First, it 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 § 15-32-520(D). It did not in this case, and this verdict should have been set aside.

CONCLUSION

For the reasons stated, Mr. Hudgins asks this Court to grant his petition for a writ of certiorari and review the two errors in the Court of Appeals’ Opinion as outlined above.

[signature page follows]

Date: November 10, 2023

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