

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. 2023-001735

RECEIVED

Dec 27 2023

S.C. SUPREME COURT

Shannon P. Green and Darrell Russell, Plaintiffs.

v.

Edward C. McGee and David Hudgins, Respondents,

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

And

Of whom David Hudgins is the Respondent-Petitioner.

**RETURN TO PETITIONER-RESPONDENT SHANNON P. GREEN'S PETITION FOR WRIT OF
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QUESTIONS PRESENTED

1. Did the Court of Appeals err in affirming the trial court's discretion to decline Ms. Green's request for a new trial *nisi additur*?
2. Did the Court of Appeals err in affirming the trial court's decision to allocate the full amount of Petitioner-Respondent Shannon P. Green's \$100,000 settlement to her own claims in determining setoff?

STATEMENT OF THE CASE

This matter is before this Court on Petitioner-Respondent Shannon P. Green and Respondent-Petitioner David Hudgins' respective petitions for a writ of certiorari to review *Green v. McGee*, 441 S.C. 157, 162, 892 S.E.2d 520, 522 (Ct. App. 2023), *reh'g denied* (Oct. 11, 2023) (the Opinion). Relief is necessary from the Opinion pursuant to Mr. Hudgins' petition, which is incorporated herein by reference. Ms. Green's petition, however, should be denied in full. Her petition first asks this Court to reverse the trial court's decision to let the jury's verdict stand without providing an adequate basis for this Court (or the Court of Appeals) to grant such extraordinary relief. Ms. Green's petition then asks this Court to reverse the trial court and allocate a portion of her \$100,000 settlement to claims other than her own in determining setoff, despite the jury *only having awarded damages to her*. Such requests are nonsensical and improper. They should not be granted.

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. (911 Call mailed to the Court for inclusion in the record). 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.” (911 Call mailed to the Court for inclusion in the record). 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).

Ms. Green claimed she injured her left shoulder and back in the accident and developed a frozen left shoulder. The evidence, however, provides as follows:

1. Ms. Green has been a severe Type I diabetic for over 40 years, and is insulin dependent. (R. p. 248:10-19).
2. She has pre-existing joint pain. (R. p. 290:10).
3. She previously had a frozen shoulder in her right shoulder that she admitted was related to her diabetes and required surgery. (R. p. 258:15-19).
4. She admitted that she had pain in her right shoulder even after the surgery. (R. p. 289:12-19).
5. She admittedly has pre-existing back pain. (R. p. 287:10-17.)
6. She admitted that she had chronic hip pain since 2010 unrelated to the accident. (R. pp. 281:15-282:2.)
7. No medical physician or other medical expert testified at trial regarding her alleged injuries.
8. Ms. Green was released from the hospital around 2:00 a.m. the night of the accident and did not stay for any significant length of time. (R. p. 273:8-14).
9. The CT scans of Ms. Green’s head, cervical spine, pelvis, and chest were all normal. (R. pp. 273:15-274:5).

10. No imaging was done of Ms. Green's left shoulder until three days after the accident at an Express Care, and the X-ray showed no fracture. (R. p. 274:6-13).
11. X-rays of Ms. Green's thoracic spine taken on November 30, 2015 were all normal. (R. p. 276:1-4).
12. Ms. Green went back to work full time as a nurse practitioner within eight days of the accident and within two weeks of her surgery without any assistance and has always worked full time other than these two brief periods. (R. pp. 228:25-229:6; 236:18-22; 271:11-16; 278:17-280:6).
13. The last time she made complaints of any type of chest pain to a physician was on November 30, 2015. (R. p. 275:19-25).
14. Ms. Green last complained of any type of back pain to a physician on December 29, 2015. (R. p. 276:20-24).
15. She has not received any treatment for her left shoulder since November 2016. (R. p. 285:13-19).

Ms. Green's husband, Plaintiff Darrell Russell, further testified that while the couple lived in Landrum, he worked and lived part-time in Chicago, Illinois and was there for a "couple weeks" at a time and traveled quite frequently. (R. pp. 193:22-194:14; 226:2-6). He estimated that he was away from Landrum approximately 60% of the time. (R. p. 226:7-12). While Mr. Russell was away, Ms. Green was at home and able to do everything she needed to do on her own and worked full-time as a nurse practitioner. (R. pp. 226:13-227:1). Mr. Russell also testified that when Ms. Green went back to work shortly after the accident, she did not need his assistance. (R. pp. 226:1-229:6).

II. PROCEDURAL HISTORY.

Ms. Green, along with her husband, Mr. Russell, filed this action on September 27, 2017 against Mr. McGee and Mr. Hudgins arising out of the automobile accident. (R. pp. 10-12). Mr. Hudgins filed his Answer to the Complaint on December 12, 2017, denying the allegations 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). Her husband and co-Plaintiff, Mr. Russell, executed a separate Covenant Not to Execute against Mr. McGee for a settlement of Two Thousand Five Hundred Dollars (\$2,500.00). (R. pp. 457-459). Hoping to pursue underinsured motorist benefits under her own insurance policy with Respondent Progressive Direct Insurance Company (Progressive), Ms. Green and Mr. Russell served the Complaint on Progressive, 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), SCRCP, 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 trial court denied all post-trial motions except for the Motion for Setoff. With respect to that motion, the trial 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, Ms. 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, Ms. Green and Mr. Hudgins each filed a Petition for Rehearing. Mr. Hudgins further requested a Rehearing *En Banc*. On October 11, 2023, the Court of Appeals denied the petitions for rehearing and rejected Mr. Hudgins suggestion for Rehearing *En Banc*.

On November 7, 2023, Ms. Green filed a Petition for Writ of Certiorari. On November 10, 2023, Mr. Hudgins filed his Petition for a Writ of Certiorari.

ARGUMENTS

I. THE COURT OF APPEALS PROPERLY AFFIRMED THE TRIAL COURT'S DISCRETION TO DECLINE MS. GREEN'S REQUEST FOR A NEW TRIAL *NISI ADDITUR*.

The trial court's decision to decline Ms. Green's request for a new trial *nisi additur* should not be reversed. "The grant or denial of new trial motions rests within the discretion of the trial [court,] and [its] decision will not be disturbed on appeal unless [its] findings are wholly unsupported by the evidence or the conclusions reached are controlled by error of law." *Hassell v. City of Columbia*, 430 S.C. 620, 635, 846 S.E.2d 373, 381 (Ct. App. 2020) (internal citations and quotations omitted). "Great deference is given to the trial [court, which] heard the evidence and is more familiar with the evidentiary atmosphere at trial, and . . . thus possesses a better-informed view of the damages than this [c]ourt." *Id.* "The jury's determination of damages . . . is entitled to substantial deference." *Vinson v. Hartley*, 324 S.C. 389, 404, 477 S.E.2d 715, 723 (Ct. App. 1996) (internal citations and quotations omitted). If a court chooses to grant a new trial *nisi additur*, "the trial judge must state compelling reasons for invading the province of the jury." *Green v. Fritz*, 356 S.C. 566, 570, 590 S.E.2d 39, 41 (Ct. App. 2003); *see Bailey v. Peacock*, 318 S.C. 13, 14, 455 S.E.2d 690, 691 (1995) ("Compelling reasons . . . must be given to justify invading the jury's province in this manner."). "A trial court does not abuse its discretion in denying a motion for new

trial *nisi additur* where there is evidence in the record to support the jury’s verdict.” *Ligon v. Norris*, 371 S.C. 625, 635, 640 S.E.2d 467, 473 (Ct. App. 2006).¹ The Court of Appeals deferred to the jury and the trial court and denied Plaintiffs’ request for *additur*. This Court should too.

a. A trial court has discretion to deny a plaintiff’s request for *additur* when a jury awards the exact amount of a plaintiff’s medical bills.

South Carolina courts have made clear it is not an abuse of a trial court’s discretion to deny a plaintiff’s motion for a new trial *nisi additur* when the jury awards the exact amount of a plaintiff’s claimed medical bills and nothing else. In *Nestler v. Fields*, 426 S.C. 34, 824 S.E.2d 461 (Ct. App. 2019), the plaintiff and defendant were involved in a car accident, and the defendant “admitted he was at fault in causing the wreck and [the plaintiff’s] injuries, so the trial concerned only the amount of [the plaintiff’s] damages.” 426 S.C. at 37, 824 S.E.2d at 463. The plaintiff claimed injuries of a cervical strain, left elbow contusion, tennis elbow, and a permanent impairment rating of 53% for his left upper extremity, which translated to a 32% impairment rating for the whole person. 426 S.C. at 37, 824 S.E.2d at 463. The plaintiff’s counsel focused at trial on the extent of the plaintiff’s pain and suffering and the permanency of his injuries and presented evidence regarding these issues. 426 S.C. at 40, 824 S.E.2d at 465. The medical bills submitted into evidence for the plaintiff’s alleged injuries totaled \$7,117.50, and the jury awarded \$7,117.50 in actual damages. As in this case, the plaintiff moved for both a new trial *nisi* and a new trial *nisi additur* and argued that he was entitled to such relief because, “despite the extensive evidence as to his permanent impairment, pain and suffering, and other non-economic damages, the jury awarded him the amount of his medical bills.” 426 S.C. at 39-40, 824 S.E.2d at 464. The Court

¹ In fact, even when other evidence in the record indicates that the jury could have awarded a larger verdict, there is no abuse of discretion in denying a motion or new trial *nisi additur* where the evidence in the record supports the amount of the jury award. *Steele v. Dillard*, 327 S.C. 340, 345, 486 S.E.2d 278, 281 (Ct. App. 1997).

found that the trial court did not abuse its discretion in denying these motions. With respect to the denial of the motion for a new trial *nisi additur*, the Court stated that “the trial court here found no compelling reason to impose its will on the parties and invade the jury’s domain. We must accord the trial court’s decision ‘great deference,’ and respect its superior position to gauge credibility and the field of evidence.” 426 S.C. at 41, 824 S.E.2d at 465.

Likewise, in *Todd v. Joyner*, 385 S.C. 509, 685 S.E.2d 613 (Ct. App. 2008), the defendant stipulated to her negligence stemming from an automobile accident with the plaintiff. The plaintiff’s medical bills totaled \$37,191.11, and the jury awarded the plaintiff that exact amount. The trial court denied the plaintiff’s motion for a new trial *nisi additur*, and the Court affirmed, holding:

The jury awarded Todd \$ 37,191.11, her exact medical costs. In the jury instructions, the circuit court provided the jury with a thorough explanation of how it could determine a monetary value for the damages to which it believed Todd was entitled. This included a full explanation of actual damages, including: “past and future medical charges related to the injury, pharmacy charges, related expenses, pain and suffering, loss of enjoyment of life, as well as mental anguish and impairment of health or physical condition.” We find evidence in the record to support the jury’s verdict. 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. 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. Because there was evidence in the record to support the jury’s verdict, we find no error in the circuit court’s denial of Todd’s motion for new trial *nisi additur*.

385 S.C. at 518, 685 S.E.2d at 618.

Moreover, in *Lynch v. Carolina Self Storage Ctrs.*, 409 S.C. 146, 760 S.E.2d 111 (Ct. App. 2014), the jury returned a verdict for the exact amount of medical expenses the plaintiff claimed-- \$246,068.42. The Court held, “[t]he trial court properly denied [plaintiff]’s motion for new trial *nisi additur* because there was evidence that the medical expenses [plaintiff] incurred to treat her

injury and her resulting noneconomic losses were not proximately caused by [defendant]'s negligence." 409 S.C. at 163, 760 S.E.2d at 120-21.²

b. The jury's verdict does not specify how much of Ms. Green's actual damages, if any, are for medical bills or pain and suffering.

The jury's verdict merely provides the following concerning Ms. Green's actual damages:

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

\$ 88,546.78

(R. p. 7). The verdict does not specify how much of Ms. Green's actual damages, if any, are for her medical bills or her pain and suffering. Thus, Ms. Green cannot even prove her claim that the jury did not award her anything for pain and suffering, which is the basis for her request for *additur*.

This is yet another reason to continue to affirm the trial court's decision.

c. Waring is inapposite.

Ms. Green's argument for *additur* largely relies on *Waring v. Johnson*, 341 S.C. 248, 533 S.E.2d 906 (Ct. App. 2000). Such argument, however, misunderstands *Waring*. Critically, in

² Even in cases where the verdict did not cover all of the medical bills claimed by plaintiffs, South Carolina courts have found that it was an abuse of discretion for the trial judge to grant an *additur*. In *Luchok v. Vena*, 391 S.C. 262, 705 S.E.2d 71 (Ct. App. 2010), the plaintiff's alleged medical bills were \$10,071.00, and the jury returned a verdict for only \$3,023.90. The defendant admitted fault for the accident but did submit evidence questioning whether some of the plaintiff's chiropractic bills were reasonable and necessary. While the trial judge granted the motion for *additur* based on the fact that the verdict did not cover all of the chiropractic bills, the Court reversed and held that "[i]n the face of the sharply conflicting evidence, this is not a compelling reason to grant the motion." 391 S.C. at 265, 705 S.E.2d at 73. Likewise, in *Green v. Fritz*, 356 S.C. 566, 590 S.E.2d 39 (Ct. App. 2003), where the jury's award had been increased from \$2,000.00 to \$14,000.00, the Court held, "[w]here, as here, the evidence of damages is disputed, the mere listing of Green's claimed damages by the trial judge in his order does not constitute compelling reasons for invading the jury's province." 356 S.C. at 570, 590 S.E.2d at 41; see *Gruber v. Santee Frozen Foods, Inc.*, 309 S.C. 13, 18, 419 S.E.2d 795, 799 (Ct. App. 1992) ("While the evidence of this case could certainly have supported a much larger verdict, we cannot say as a matter of law that the verdict of the jury in this case was grossly inadequate and resulted from the jury's disregard of the facts or the trial judge's instructions.").

Waring, the court reviewed *a grant of additur* rather than the denial of it. *Id.* at 256-61, 533 S.E.2d at 910-13. In affirming the trial court's decision to deny Ms. Green's *additur* motion, the Court of Appeals noted:

The standard of review is weighted in favor of affirming the trial court's decision; no doubt because that court possesses a superior sense of the case having presided over the trial. Just as the standard of review led this court to affirm *Waring*, so too it leads us to affirm here.

Opinion at 165.

Other critical distinctions from *Waring* exist. First, in *Waring*, plaintiff's treating physicians testified at trial and related her injuries to the accident, and there was no evidence presented by the defendant to the contrary. In this case, however, defendant presented evidence to the contrary and none of Ms. Green's treating physicians testified or offered opinions that her alleged injuries to her left shoulder and back were proximately caused or exacerbated by the November 19, 2015 accident, and there was no medical testimony ruling out Ms. Green's preexisting conditions possibly being the cause of Ms. Green's pain. *See Herndon v. Morgan Mills, Inc.*, 246 S.C. 201, 217, 143 S.E.2d 376, 384 (1965) ("Reliance on lay testimony is not justified when the medical question is a complicated one and likely to carry the fact-finding body into realms which are more properly within the province of medical experts."). Moreover, in *Waring*, the evidence of the amount of pain and suffering endured by the plaintiff was not in dispute nor was the causation of the plaintiff's alleged injuries disputed. In this case, both were.

1. The cause of Ms. Green's alleged injuries was disputed at trial.

Contrary to Ms. Green's petition, the medical causation of Ms. Green's claimed injuries and pain, along with her preexisting medical issues, were very much an issue in this case. At trial, Ms. Green admitted that she had a host of pre-existing medical issues that caused her significant pain upon which the jury could have based a determination that some or all of Ms. Green's claimed

medical expenses and noneconomic damages were unrelated to the accident. Ms. Green testified that she has been an Insulin-dependent Type I diabetic for years and has had previous complications. (R. p. 248:7-25). She admitted to having a frozen right shoulder that was caused by her diabetes and not related to any trauma. (R. 258:15-19). She admitted that she continued to have pain in her right shoulder even after the accident. (R. pp. 289:15-290:22). She further testified that she had been positive for arthralgias or joint pain. (R. pp. 283:22-284:8). She testified:

Q. Okay. And I'm just talking about that last sentence. It says have you had pain since then and you responded yes in your deposition.

A. May I clarify? I think of day-to-day pain as just being something that I got to live with. I, I mean do I have pain? Yeah, I have pain in my joints. When I'm laying on shoulders, yes, I have pain in them. . . .

(R. p. 290:4-11). Ms. Green also has had chronic hip pain since 2010 and admitted this gradually worsening hip pain "was definitely not related to the accident." (R. pp. 281:15-282:23). She further admitted that she had pains in her body simply as a result of getting older and testified:

Q. Okay. But my point is you – as we get older, as I do, you develop pain in other areas just from walking this earth for 50 some years, right?

A. Yes.

(R. p. 281:11-14). In addition to the above, Ms. Green admitted that she was not asking the jury to reimburse her for pains that she had from simply walking the earth or for her diabetic right frozen shoulder. (R. pp. 293:20-294:20).

The evidence at trial also showed that Ms. Green was released from the hospital around 2:00 a.m. the night of the accident and did not stay for any significant length of time. (R. p. 273:8-14). The CT scans of Ms. Green's head, cervical spine, pelvis, and chest were all normal. (R. p. 273:15-274:5). No imaging was done of Ms. Green's left shoulder until three days after the

accident at an Express Care. The X-ray showed no fracture. (R. p. 274:6-13). X-rays of Ms. Green's thoracic spine taken on November 30, 2015 were all normal. (R. p. 276:1-4).

Moreover, without any objection from Ms. Green and based on the testimony above, the trial court gave the following instruction to the jury: "I further will inform you that the Plaintiff, Shannon Green, is not entitled to recover for preexisting conditions, injuries, or ailments unrelated to the Defendant's negligence." (R. p. 383:13-16). While counsel for Progressive's closing argument is not transcribed, Ms. Green's counsel acknowledged in his closing that Progressive had argued that Ms. Green had other issues unrelated to the accident and stated: "First of all, basically, from the defense lawyer for Mr. McGee, what you sort of heard was a she's not a spring chicken anymore defense. She had other problems, and, you know what, we all have other problems." (R. p.365:2-5). Furthermore, even if testimony from Ms. Green was not expressly contradicted, "[j]uries do not have to accept even uncontradicted testimony, much less testimony that contradicts itself." *Nestler*, 426 S.C. at 41, 824 S.E.2d at 465. Thus, the jury could have found that some of Ms. Green's alleged injuries, such as her frozen left shoulder that occurred after the accident, were unrelated to the accident and were instead caused solely by her pre-existing conditions, such as her diabetes or previous joint pain. The jury could have also found that some of Ms. Green's claimed noneconomic damages for pain and suffering and her claimed inability to perform daily tasks were related solely to these other issues she had previously experienced. As the evidence in the record could support either finding and the jury's verdict, the trial court did not abuse its discretion, and this Court should continue to provide deference to the jury's verdict.

2. The amount of Ms. Green's alleged pain and suffering was disputed at trial.

In addition to causation of Ms. Green's injuries and alleged pain being at issue, the amount of Ms. Green's alleged pain and suffering and other non-economic damages was also highly

contested at trial. Although Ms. Green claimed significant continuing pain and suffering from the accident, again, the evidence showed that she was discharged from the hospital the night of the accident. (R. p. 273:8-14). She also took no pain medications other than over-the-counter drugs like Advil and Tylenol. (R. p. 249:11-21). Ms. Green also went back to work full time as a nurse practitioner within eight days of the accident and within two weeks of her surgery without any assistance and has always worked full time other than these two brief periods. (R. pp. 228:25-229:6; 236:18-22; 271:11-16; 278:17-280:6). The last time she made complaints of any type of chest pain to a physician was on November 30, 2015—roughly two weeks after the accident. (R. p. 275:19-25). Ms. Green last complained of any type of back pain to a physician on December 29, 2015. (R. p. 276:20-24). She has also not sought treatment for her left shoulder since November 2016. (R. p. 285:13-19). Mr. Russell further testified that while the couple lived in Landrum, he worked and lived part-time in Chicago, Illinois and was there for a “couple weeks” at a time and traveled quite frequently. (R. pp. 193:22-194:14; 226:2-6). He estimated that he was away from Landrum approximately 60% of the time. (R. p. 226:7-12). While Mr. Russell was away, Ms. Green was at home and able to do everything she needed to do on her own and worked full-time as a nurse practitioner. (R. pp. 226:13-227:1). While the *Waring* plaintiff’s physicians stated that she would suffer pain for the rest of her life, there was no medical testimony to that effect at this trial.

Additionally, Ms. Green admitted that despite certain medications and treatments helping decrease her pain, she was unwilling to take them. For instance, she testified that while two injections helped her pain in her shoulder, she was unwilling to take any more of them due to her Diabetes. (R. p. 249:4-10). She also refused to take any type of pain medication other than Advil,

Aleve, or Tylenol. (R. p. 249:11-21). She testified that she does not do any formal exercise program because she does not have enough time with her work schedule. (R. p. 273:2-6).

Lastly, as in *Todd*, the trial court “provided the jury with a thorough explanation of how it could determine a monetary value for the damages to which it believed [Ms. Green] was entitled.” *Todd*, 385 S.C. at 518, 685 S.E.2d at 618. In addition to the above-noted instruction on pre-existing conditions, the court instructed the jury on all aspects of potential actual damages, including pain and suffering:

Shannon Green is also requesting compensation or pain and suffering. Pain and suffering compensates the Plaintiff for physical discomfort, and emotional – and emotional response to the sensation of pain caused by the injury itself. There is no definite standard by which to compensate the Plaintiff for pain and suffering. You have the authority to determine the amount, if any, to be allowed for pain and suffering using calm and reasonable judgment to ensure that the damages are just and reasonable in light of the testimony and evidence presented in the case.

(R. pp. 383:17-384:1). Ms. Green’s counsel also spent a great deal of his closing argument explaining the concept of pain and suffering to the jury:

The judge will charge you about something called pain and suffering. I just referred it to typically as pain or discomfort, but that it – that was asked, if you decide that two Defendants were careless, and it causes the Plaintiff to experience pain and suffering, do you have any problem returning something in your verdict for that pain and suffering. That is because, under the law, if you find there was pain and suffering, the law says you should return something in your verdict for that pain.

(R. p. 344:16-24). Ms. Green’s counsel even went so far to suggest a particular amount for the jury to award, as he argued:

I’m not saying it’s a million dollar case. But it’s a big case. It’s a very big case. So, hundreds of thousands of dollars for this would not be, at all, inappropriate. Again, she didn’t ask for any of this. It was forced on her. Decisions were made.

(R. p. 352:20-25).

Accordingly, given all of the above evidence disputing Ms. Green’s claims, and the thorough explanation of “pain and suffering” by the trial court and Ms. Green’s counsel, it is clear

that the jury considered pain and suffering in this case. The fact that the jury returned a verdict below the amount Ms. Green requested is not a compelling justification for invading the jury's province and granting additur. Because there is evidence in this case supporting the jury's verdict of \$88,546.78 in actual damages, the trial court did not abuse its discretion in denying the extraordinary remedy of a new trial *nisi additur*, and Ms. Green's *additur* request should be denied.

II. THE COURT OF APPEALS DID NOT ERR IN AFFIRMING THE TRIAL COURT'S DECISION TO ALLOCATE THE FULL AMOUNT OF MS. GREEN'S \$100,000 SETTLEMENT TO MS. GREEN'S CLAIMS IN DETERMINING SETOFF.

As fully addressed in Mr. Hudgins' petition and incorporated herein by reference, the trial court and the Court of Appeals erred in the manner in which they applied the setoff of the \$100,000 received by Ms. Green in exchange for a Covenant Not to Execute. Those courts did not, however, err in utilizing the entire \$100,000 settlement proceeds in its setoff analysis.

When calculating a setoff under S.C. Code. § 15-38-50, "the court must review the documents to determine the amount of the settlement and its terms." *Huck v. Oakland Wings, LLC*, 422 S.C. 430, 438, 813 S.E.2d 288, 292 (Ct. App. 2018). "Covenants not to execute are treated as contracts and, as such, they are governed by general contract law." *Progressive Max Ins. Co. v. Floating Caps, Inc.*, 405 S.C. 35, 46, 747 S.E.2d 178, 183 (2013). If a covenant's "language is plain, unambiguous, and capable of only one reasonable interpretation, no construction is required and the contract's language determines the instrument's force and effect." 405 S.C. at 46, 747 S.E.2d at 184.

Ms. Green received the full policy limits of One Hundred Thousand Dollars (\$100,000) under Mr. McGee's liability policy from Nationwide and executed a Covenant Not to Execute against Mr. McGee for that amount. (R. pp. 460-462). Her husband and co-plaintiff, Mr. Russell, also executed a separate Covenant Not to Execute against Mr. McGee for a settlement of Two

Thousand Five Hundred Dollars (\$2,500.00). (R. pp. 457-459). Ms. Green's petition only briefly mentions Mr. Russell's separate Covenant in passing within a footnote because it states that it was given to Mr. Russell for valuable consideration in exchange for a release of "any and all claims demands, damages, costs or expenses, including, but not limited to, any medical or hospital expenses, *loss of services*, actions and cause of action, arising from any act, omission, or occurrence, resulting or to result from the above referenced automobile accident." (*Id.* (emphasis added)).

"It is well settled in South Carolina that one spouse's cause of action for medical expenses and loss of consortium resulting from negligent injuries to the other spouse is a different and distinct cause of action from one maintained by the injured spouse; judgment in favor of the defendant in one action is not a bar to the other action." *Graham v. Whitaker*, 282 S.C. 393, 397, 321 S.E.2d 40, 43 (1984). In other words, "loss of consortium is an independent action, not derivative." *Stewart v. State Farm Mut. Auto. Ins. Co.*, 341 S.C. 143, 156, 533 S.E.2d 597, 604 (Ct. App. 2000). Thus, Mr. Russell's Covenant with Mr. McGee, in which Mr. Russell agreed for a total of \$2,500 not to pursue a judgment against Mr. McGee for "any and all claims . . . including, but not limited to . . . loss of services," applies to the loss of consortium claim brought by Mr. Russell, as such a claim belongs only to Mr. Russell and is separate and independent of any claim belonging to Ms. Green.

In his closing argument, Ms. Green's counsel reiterated the evidence he believed favored an award for loss of consortium to the jury, and the trial judge gave a thorough jury instruction explaining the law on loss of consortium. (R. p. 351:9-25). Having heard all of the evidence, the jury found unanimously that there was not sufficient evidence to support Mr. Russell's claim that

he suffered a loss of consortium as a result of the November 19, 2015 accident and awarded him nothing on that claim. (R. pp. 6-9).

Again, great deference is given to a jury's findings, and "[a] jury's resolution of factual issues in a law case is binding on trial and appellate courts." *Erickson v. Jones Street Publishers, LLC*, 368 S.C. 444, 480, 629 S.E.2d 653, 672 (2006). Moreover, the jury's finding regarding the lack of a loss of consortium claim was not challenged by Mr. Russell in post-trial motions nor was it appealed, and it is now binding and the law of the case. *See First Union Nat. Bank of South Carolina v. Soden*, 333 S.C. 554, 566, 511 S.E.2d 372, 378 (Ct. App. 1998) (holding that an "unchallenged ruling, right or wrong, is the law of the case and requires affirmance").³ Not only did the trial court consider the finding by the jury in affirming its verdict, but the trial court also had before it Mr. Russell's separate and independent Covenant discussed above on which he was paid for releasing claims for "loss of services." Both of these items were argued by Mr. Hudgins' counsel during the post-trial motion hearing:

Mr. Hudgins should be entitled to the full \$100,000, because, again, Mr. Russell has been paid \$2,500 for relief, including all loss of services. The jury found there was no loss of consortium.

(R. pp. 413:25-414:3).

The trial court properly considered all relevant circumstances surrounding Ms. Green's Covenant and Mr. Russell's Covenant as well as the jury's unchallenged finding that there is no evidence to support a loss of consortium claim. It did not abuse its discretion in declining to re-allocate any of the \$100,000 in Ms. Green's covenant to any claims of Mr. Russell. In fact, the Court of Appeals was "not able to locate a case authorizing a judge, sitting after the verdict, to

³ In a decision cited by Ms. Green in her petition, *Page v. Crisp*, 303 S.C. 117, 399 S.E.2d 161 (Ct. App. 1991), the jury's award of \$0 to the husband on his loss of consortium claim was actually challenged in post-trial motions and on appeal.

allocate settlement funds to a claim after the jury determines the claim has no value.” (Opinion at 166).

CONCLUSION

For the reasons stated herein, Mr. Hudgins asks this Court to deny Ms. Green’s petition for writ of certiorari.

Date: December 27, 2023

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