

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

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Jan 12 2024

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.

**REPLY TO RETURNS TO RESPONDENT-PETITIONER DAVID HUDGINS' PETITION FOR A WRIT
OF CERTIORARI**

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Respondent-Petitioner David Hudgins submits this Reply to the Returns to his Petition 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). In short, the Returns cannot and do not set forth a basis for this Court to deny Mr. Hudgins' Petition. They instead only further justify the need for this Court's review.

To start, Ms. Green concedes in her Return that the jury's 40/60 fault allocation for actual damages was not appealed. *See* Ms. Green's Return, p. 10 ("It should be recognized both [Mr.] McGee and [Mr.] Hudgins are 100% liable (pure joint and several liability) for [Ms.] Green's actual damages. ***This matter was not addressed by the trial court or the Court of Appeals.***") (emphasis added) (internal parentheses omitted). The jury's 40/60 fault allocation for actual damages is indisputably 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").

Next, Ms. Green misrepresents the settlement with Mr. McGee. She states, "[Mr.] McGee settled with both [Ms.] Green and her husband, Darrell Russell, for \$100,000.00 on a Covenant Not to Execute." Ms. Green's Return, p. 10. This is not accurate. While Ms. Green did receive the full policy limits of \$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, executed a ***separate*** Covenant Not to Execute against Mr. McGee for a settlement of \$2,500. (R. pp. 457-459). Ms. Green avoids mentioning this separate covenant because it states 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)). The existence of this separate Covenant matters because it – not Ms. Green’s Covenant – applies to Mr. Russel’s independent loss of consortium claim (for which the jury awarded him nothing).

Third, Ms. Green claims in error that Mr. Hudgins can sue Mr. McGee for contribution. See Ms. Green’s Return, pp. 10-11. This too is wrong. S.C. Code § 15-38-50(2) prohibits such action:

When . . . 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 . . . ***it discharges the tortfeasor to whom it is given from all liability for contribution to any other tortfeasor.***

(emphasis added).

Fourth, in its Return, Progressive Direct Insurance Company (Progressive) emboldens the first clause of S.C. Code § 15-38-50(1) in what appears to be a disingenuous attempt to direct attention away from the language therein that matters, i.e., the rest of it:

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

Progressive’s Return, p. 10. To be clear, Mr. Hudgins does not claim that Ms. Green’s Covenant against Mr. McGee discharges Mr. Hudgins from liability. Rather, his position is that Ms. Green’s Covenant “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). Regardless of typeface, Mr. Hudgins' position is the only possible one under the plain language of the *entirety* of S.C. Code § 15-38-50(1).

Fifth, Progressive improperly attempts to confuse the Court by conflating set-off for the “other tortfeasor” with credits for the UIM carrier, which, of course, are different things governed by different statutes. Mr. Hudgins is the only “other tortfeasor” whose claim can be reduced by the settlement proceeds under S.C. Code § 15-38-50(1), as neither Mr. McGee nor Ms. Green's UIM carrier qualifies as an “other[tortfeasor]” under the statutory definition. Mr. McGee cannot be the “other[tortfeasor],” because he is the initial tortfeasor identified in § 15-38-50(1) in whose favor the Covenant was given by Ms. Green. Progressive, as Ms. Green's UIM carrier, too fails to qualify. Although Progressive may be *contractually and/or statutorily* liable for the verdict against Mr. McGee under the UIM statutes and case law, it is not “liable *in tort* for the same injury” as § 15-38-50(1) requires. (emphasis added).

Finally, in her Return, Ms. Green opines that “§ 15-38-50 could have been drafted better” before arguing that this Court should deviate from the statute's plain language. Ms. Green's Return, p. 11. Ms. Green may or may not be right about the statute's drafting. Even if she is though, an unintended result of the statute's strict application “is a matter for the legislature to correct if [the court's] interpretation is contrary to its intent.” *Ellis v. Oliver*, 335 S.C. 106, 113–14, 515 S.E.2d 268, 272 (Ct. App. 1999).

The Court of Appeals' decision on setoff 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. 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,¹ regardless of whether they should have been set aside (and they should have been for the reasons set forth in the Petition).

Based on the foregoing and the arguments made in his Petition and other briefings in support of his Petition, Mr. Hudgins requests the Court grant his Petition for a Writ Certiorari.

Date: January 12, 2024

s/ Curtis L. Ott

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¹ 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. Opinion, p. 45. Accordingly, Mr. Hudgins' total liability to Ms. Green 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 (she did not) and this Court were to reject Mr. Hudgins' arguments 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), which is far less than the \$58,546.78 for which the erroneous Court of Appeals' decision found him liable.