

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM ORANGEBURG COUNTY S C Supreme Court
Court of Common Pleas

George C James, Jr , Circuit Court Judge

Case No 2006-CP-38-0486

Clarence Rutland, as Personal Representative
of the Estate of Tiffanie Rutland,

Appellant,

v

South Carolina Department of Transportation,

Respondent

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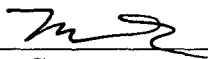
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**THE STATE OF SOUTH CAROLINA
In the Court of Appeals**

**APPEAL FROM ORANGEBURG COUNTY
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George C James, Jr , Circuit Court Judge

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**Clarence Rutland, as Personal Representative
of the Estate of Tiffanie Rutland,**

Appellant,

v

South Carolina Department of Transportation,

Respondent

RECORD ON APPEAL

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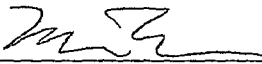
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CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

June 10, 2009
Hampton, South Carolina



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THE STATE OF SOUTH CAROLINA
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Case No 2006-CP-38-0486

Clarence Rutland, as Personal Representative
of the Estate of Tiffanie Rutland,

Appellant,

v

South Carolina Department of Transportation,

Respondent

- Proof of Service

This is to certify that I, Shanna M Jarrell, legal secretary with the law firm of PETERS, MURDAUGH, PARKER, ELTZROTH & DETRICK, P A , attorneys for the Appellant, have this date mailed via the U S Postal Service with first class postage prepaid a true and correct copy of the **RECORD ON APPEAL** to the following

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Shanna M Jarrell

June 10, 2009
Hampton, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF ORANGEBURG

Clarence Rutland, as Personal
Representative for the Estate of
Tiffanie Rutland,

Plaintiff,

vs

South Carolina Department of
Transportation,

Defendant

IN THE COURT OF COMMON PLEAS
FOR THE FIRST JUDICIAL CIRCUIT
CASE NO 06-CP-38-0486

ORDER

FILED
FEB 28 2008
CLERK OF COURT
ORANGEBURG COUNTY, SOUTH CAROLINA

This wrongful death action was tried to a jury verdict in favor of the plaintiff in the amount of \$300,000 00 By order dated February 28, 2008, the court denied plaintiff's motion for new trial and alternatively a new trial *additur* and granted defendant's motion for setoff in the amount of \$300,000 00 Plaintiff now moves for reconsideration Appearing on behalf of the plaintiff were his attorneys, Lee D Cope and J Christopher Wilson Appearing on behalf of the defendant were Richard B Ness and Norma A T Jett

I Plaintiff's Motion for New Trial Absolute and/or New Trial *Nisi Additur*

The trial court must grant a new trial absolute if the amount of the verdict is *grossly* inadequate, however, the court may use its discretion in granting a new trial *nisi additur* if the jury's verdict is *merely* inadequate "When a party moves for a new trial based on a challenge that the verdict is either excessive or inadequate, the trial judge must distinguish between awards that are merely unduly liberal or conservative and awards that are actuated by passion, caprice or prejudice The trial judge must set aside a verdict only when it is shockingly disproportionate to the injuries suffered and thus indicates that passion, caprice, prejudice, or other considerations

[Signature]
CLERK OF COURT
ORANGEBURG COUNTY, SOUTH CAROLINA
[Signature]

not reflected by the evidence affected the amount awarded ” Holyrod v Requa, 361 S C 43, 603 S E 2d 417 (Ct App 2004)

The plaintiff argues that the verdict is inadequate because the evidence established that (1) the deceased had a close relationship with her family, (2) the circumstances of the wreck were such that the loss to the family was tremendous, and (3) Dr Wood testified that the total economic loss was \$547,000 00 “As a general rule, the evidence should be such as to enable the court or the jury to determine the amount of damages with reasonable certainty or accuracy, and it is sufficient if they are so established Proof with absolute or mathematical certainty is not required, and it does not matter that the determination of damages depends to some extent on consideration of contingent events ” Proctor v Dep’t of Health & Envtl Control 368 S C 299, 628 S E 2d 496 (Ct App 2006)

The plaintiff argues that the aforesaid economic loss alone exceeds the jury’s verdict The jury was charged that the opinion of an expert can be weighed in the same manner as the testimony of any other witness The jury was further informed that it could reject the expert’s opinion if the reasons given for the opinion were not sound in the jury’s judgment. Dr Wood testified that his conclusion was based on a number of assumptions, e g , that the decedent would work until a certain age, that she would earn a certain wage, that she would accept a promotion, etc It was within the jury’s province to conclude that the economic loss calculations were not supported by its view of the evidence

As to the loss experienced by the wrongful death beneficiaries in the form of grief, sorrow, shock, and wounded feelings, there is no separate itemization of economic and noneconomic loss (nor is it common for the verdict form to contain such) so there is obviously no way to determine what amount the jury allocated for what component of damages The jury

was properly instructed on the elements of damages in a wrongful death case (1) pecuniary loss, (2) mental shock and suffering, (3) wounded feelings, (4) grief and sorrow, (5) loss of companionship, (6) loss of love and society, (7) loss of the use and comfort of deceased's society, including the loss of the deceased's experience, knowledge, and judgment in managing the affairs of the deceased and her beneficiaries, loss of deceased's nurture, guidance, and training of minor children, and (8) funeral expenses. The jury was also specifically instructed that it was not to base its verdict as to damages on sympathy, passion, or prejudice. The jury was charged that its arrival at the amount of damages to be awarded may not be based on speculation, but must be based on the evidence presented, the jury was further charged that the plaintiff does not have to prove these damages to a mathematical certainty.

Because the evidence supports the jury's verdict, the damages are not so grossly inadequate as to suggest the jury was motivated by passion, caprice, or prejudice. The verdict is within the range of evidence presented and that evidence sustains the factual findings implicit in the jury's decision. Likewise, the verdict is not so unduly conservative that an *additur* is warranted. Therefore, these motions are denied.

II Set-Off

The plaintiff has also moved for reconsideration of this court's February 28, 2008 Order in which the defendant was granted setoff in the amount of \$300,000.00. The effect of the court's February 28 Order was to reduce the verdict to zero, as the total sum received by the plaintiff from other parties exceeded the verdict in this matter. Plaintiff received \$305,000.00 from General Motors (GM) and the host driver prior to trial, of which \$138,000.00 allocated to claims for conscious pain and suffering (a/k/a survival claims) and \$167,000 allocated to the wrongful death action. Plaintiff argues that any setoff should be limited to \$167,000.00.

A handwritten signature in black ink, appearing to be "JH 3", is located at the bottom right of the page.

The Honorable Diane S. Goodstein presided over the proceedings at which the settlement paid by GM was approved pursuant to S.C. Code § 15-51-42. Counsel for GM, the plaintiff, and SCDOT were present and transcript of that hearing has been provided to this Court, as have the settlement petition and Judge Goodstein's order approving the settlement. Judge Goodstein went to great lengths to clarify the parties' positions as to the allocation of the GM proceeds between survival and wrongful death claims. Counsel for plaintiff clearly and correctly concurred with Judge Goodstein that the allocation of GM funds would not be binding on the defendant SCDOT and that SCDOT would have every right to raise the issue of the impropriety of the allocation once a verdict was returned against SCDOT.

Plaintiff maintains that the allocation of the GM proceeds was appropriate under the facts of this case and that the maximum setoff against the SCDOT wrongful death verdict should be in the amount of \$167,000.00 (\$29,500.00 from host driver settlement and \$137,500.00 from the GM settlement).

Defendant argues that this court's order setting off the entire sum of the plaintiff's settlement against the wrongful death verdict of \$300,000.00 verdict should remain in effect on the ground that the allocations of any portion of the GM and host driver settlements to a survival claim were a legal sham. The plaintiff is correct that the court did not consider the allocations of the GM and host driver settlements, as this court incorrectly assumed that the entire sum was allocated to the wrongful death claim. Therefore, it is indeed appropriate for this court to reconsider its ruling that the verdict should automatically be reduced to a net of zero (\$0.00) dollars.

A Statute of Limitations

Defendant argues that the allocation of any GM and host driver settlement funds to the



survival action was a sham because the survival action was never actually brought but merely used as a vehicle for lowering the wrongful death set-off. From the beginning, the complaint asserted only a wrongful death claim against GM based on allegations that the window glazing was defective and contributed to Tiffanie Rutland's injuries and death. Plaintiff has never put forth a survival action against either GM or SCDOT.

Plaintiff argues there was, at the time the GM settlement was reached, an unfiled, but valid warranty claim against GM. Under S.C. Code Ann. § 36-2-725, the statute of limitations for such an action is six years. The accident occurred on or about June 7, 2003. Since § 36-2-725 states that "[a]n action for breach of any contract for sale must be commenced within six years after the cause of action has accrued," the statute of limitations for bringing the a survival action under a warranty theory had not run at the time the GM settlement was approved. Plaintiff claims this militates against a finding the survival allocation was a sham. As a threshold matter, the court agrees, but the determination as to whether the allocation to a survival claim was a sham is factually driven and has no real dependence upon whether the cause of action was technically available. In other words, this court must determine whether the facts of this case support the allocations of the GM and host driver settlements.

B Merits of Survival Action

In this case, the jury returned a verdict for the plaintiff against SCDOT in the amount of \$300,000.00 for the wrongful death cause of action. Again, a survival cause of action was neither pled nor submitted to the jury. Defendant argues it is entitled to a credit against the verdict for all amounts paid in settlement by other defendants or tortfeasors in order to prevent double recovery. As noted above, defendant asserts that the plaintiff's settlement allocation to a survival claim was a legal sham, which "must yield to fairness and justice", plaintiff argues that

B/45

Judge Goodstein's August 9, 2007 Order allocating half the settlement funds from GM to the plaintiff's survival action limits the amount of setoff in this case to \$167,000 00

In her Order, Judge Goodstein found that there may be "some evidence however slight, that Tiffanie Rutland survived the crash and consciously endured pain and suffering prior to her death " Judge Goodstein further ruled, "Should later proceedings in this case or any other case determine that Tiffanie Rutland did not consciously endure pain and suffering prior to her death, and/or modify the apportionment herein, such a finding and/or modification will have no effect on this approval of Petitioner's settlement with and release of General Motors Corporation " More pertinently, Judge Goodstein found that SCDOT did not stipulate to the allocation and would not be precluded from arguing "against the allocation of wrongful death and survival proceeds or findings herein at the appropriate later time in the continuing litigation for purposes of setoff to which SCDOT may be entitled "

In South Carolina, "[a] nonsettling defendant is entitled to credit for the amount paid by another defendant who settles The reason for allowing such a credit is to prevent an injured person from obtaining a second recovery of that part of the amount of damages sustained which has already been paid to him In other words, there can only be one satisfaction for an injury or wrong. However, the reduction in judgment must be from a settlement for the same cause of action " Welch v Epstein, 342 S C 279, 312 13, 536 S E 2d 408, 425 (Ct App 2000)

The two main cases addressing the allocation of settlement funds between wrongful death and survival causes of action are Ward v Epting, 290 S C 547, 559, 351 S E 2d 867, 874 (Ct App 1986) and Welch, both medical negligence cases In Ward, the plaintiff settled with a co-defendant for pain and suffering and wrongful death causes of action In the covenant-not-to sue, \$29,500 00 was allocated to the pain and suffering cause of action and \$500 00 to the



wrongful death action. The plaintiff voluntarily dismissed the pain and suffering cause of action against nonsettling Dr. Epting prior to trial, but after the settlement with the co-defendant Epting argued that there was insufficient evidence of conscious pain and suffering and that the entire \$30,000.00 in settlement funds should be allocated to wrongful death and applied to the jury verdict. The trial court rejected the defendant's argument that the settlement allocation was a sham, finding that because the deceased responded to directions following surgery, there was evidence from which a jury could have concluded that the decedent endured conscious pain and suffering as a result of the defendant's negligence. The trial court declined to reallocate and the Court of Appeals affirmed.

In the instant case, the plaintiff argues that the evidence presented at trial was such that a jury could reasonably have found that Tiffanie Rutland experienced conscious pain and suffering prior to her death, including emotional trauma and mental suffering arising from her knowledge that serious injury or death was imminent. The plaintiff also relies on the statement in Judge Goodstein's order that there *may* be evidence, however slight, that Tiffanie Rutland experienced pain and suffering prior to her death.

The defendant primarily relies on Welch v. Epstein *supra*. It is recognized that where a settlement with one tortfeasor is allocated between survival and wrongful death causes of action, the law permits the trial court to effect post-trial reallocation of previously paid settlement funds for purposes of setoff determination. Welch reiterates the trial court's authority to effect post-trial reallocation of previously paid settlement funds for the purposes of setoff determination. This authority is equitable in nature and should be exercised when necessary to provide justice between the parties. In Welch, the Court of Appeals upheld the trial court's use of its equitable powers to reallocate settlement monies from a survival action to the wrongful death action,

thereby reducing the amount owed by Epstein because there was no evidence of conscious pain and suffering

In Welch, the personal representative settled wrongful death and survival claims against a co-defendant. The settlement totaled \$450,000.00, of which the parties allocated \$5,000.00 to the wrongful death claim and \$445,000.00 to the survival claim. The jury returned a verdict for the plaintiff against the non-settling co-defendant in the amount of \$3,000,000.00 for the wrongful death claim and \$28,535.88 (the amount of medical expenses incurred) for the survival claim. The defendant filed a post-trial motion seeking set-off based upon an equitable reallocation of the settlement proceeds. The trial judge ordered a reallocation of the settlement in the amount of \$28,535.88 for the survival claim and \$421,464.12 for the wrongful death claim, finding that since there was no evidence of conscious pain and suffering, the only item of damages possibly recoverable in a survival action was the sum of medical expenses. The appellate court agreed that reallocation was warranted considering the facts and equities of the case. The court stated that "the allocation between the survival and wrongful death claims must yield to fairness and justice." Id. at 313, 536 S.E.2d at 426.

The facts in Ward v. Epting are distinguishable from those in Welch. In Ward, there was some evidence that the deceased was responding to directions given to her following surgery and in the recovery room. Thus, the court found there would have been sufficient evidence to present a jury question on the conscious pain and suffering, and the trial judge rejected the argument that the pain and suffering allocation was a sham. In Welch, there was evidence only that Welch lapsed into a coma from which he never recovered, thus, the trial judge charged the jury it could only award damages in the survival claim for the amount of medical bills incurred from the point of the arrest to his death.

III Conclusion

In approving the GM settlement in the instant case, Judge Goodstein specifically recognized the defendant's right to later contest the allocation of the funds to the wrongful death and survival claims. Counsel for plaintiff concurred. The court's August 9, 2007 Order states that if later proceedings determined that there was no conscious pain and suffering, then the settlement funds may be reallocated accordingly. During the trial of this case, no evidence of conscious pain and suffering was directly introduced, primarily because there was no survival action pled. Any attempt to directly raise or argue such evidence in front of the jury would therefore have been improper. The plaintiff claims that the trial evidence indirectly raised reasonable inferences of evidence that Tiffanie endured some conscious pain and suffering in the form of actual physical pain, and in the form of mental anguish accompanying that pain and suffering. The plaintiff also argues that Tiffanie necessarily experienced emotional trauma and mental suffering knowing that serious injury or death was imminent and that it is proper for a plaintiff to recover for mental suffering without physical impact. Spaugh v. Atlantic Coast Line R. Co., 158 S.C. 25, 155 S.E. 145 (1930). Still, however, there must be some evidence that pain, fright, or anguish was *actually endured*, especially since the evidence introduced at trial establishes that the subject accident occurred over the course of mere seconds. Clarence Rutland testified at trial that he knew his wife was dead the moment he saw her immediately after the crash. There were no medical expenses incurred prior to Tiffanie's death.

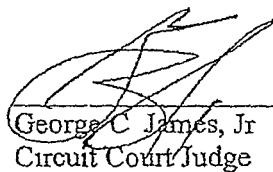
Based upon my view of the evidence and this court's authority and obligation to effect justice between the parties, I reluctantly conclude that there is not sufficient evidence from which a jury could have concluded Tiffanie Rutland experienced conscious pain and suffering of any kind before, during, or after the accident. The evidence of conscious pain and suffering does not

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remotely approach the quantum present in Ward. There is no evidence other than speculation that Tiffanie experienced any "pre-impact" fear or any other type of conscious pain and suffering that would support a survival claim. Therefore, this court must reallocate all of the prior settlement proceeds to the plaintiff's wrongful death claim. This reallocation results in a net verdict to the plaintiff of zero (\$0) dollars.

AND IT IS SO ORDERED

Aug 28
July 2, 2008


George C. James, Jr.
Circuit Court Judge



STATE OF SOUTH CAROLINA

COUNTY OF ORANGEBURG

Clarence Rutland, as Personal
Representative for the Estate of
Tiffanie Rutland

Plaintiff,

v.

South Carolina Department of
Transportation

Defendant

IN THE COURT OF COMMON PLEAS
FOR THE FIRST JUDICIAL CIRCUIT
CASE NO. 06 CP 38-0486

08-106

ORDER

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The plaintiff brought a wrongful death action against the defendant, and the jury rendered a verdict for the plaintiff in the amount of \$300,000 actual damages. The plaintiff now moves, pursuant to Rule 59, SCRPC, for a new trial absolute, a new trial on damages only, or in the alternative, for a new trial *nisi additur*. The grounds for the motion are that the verdict was the result of passion, caprice or prejudice and was so grossly inadequate as to require a new trial absolute or at a minimum so inadequate that the plaintiff is entitled to a new trial *nisi additur*.

Separately, the defendant moves for a set-off in the amount of \$300,000.00 which would thereby reduce the effect of the verdict to a net recovery of zero dollars to the plaintiff. The basis for this motion is that the plaintiff has recovered the total sum of \$300,000.00 from two other sources (the liability carrier for the host driver in this one-vehicle accident, and General Motors the manufacturer of the vehicle in which the decedent was a passenger). Prior to and during trial, the plaintiff stipulated that any verdict against the defendant SCDOT would be reduced by the sum of \$300,000.00.

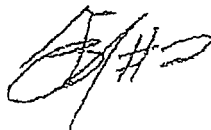
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New Trial Motions

The trial court must grant a new trial absolute if the amount of the verdict is *grossly* inadequate, however, the court may use its discretion in granting a new trial *nisi additur* if the jury's verdict is *merely* inadequate. "When a party moves for a new trial based on a challenge that the verdict is either excessive or inadequate, the trial judge must distinguish between awards that are merely unduly liberal or conservative and awards that are actuated by passion caprice or prejudice. The trial judge must set aside a verdict only when it is shockingly disproportionate to the injuries suffered and thus indicates that passion caprice, prejudice or other considerations not reflected by the evidence affected the amount awarded." *Holyrod v. Regua*, 361 S.C. 43, 603 S.E.2d 417 (Ct. App. 2004).

"The trial judge alone has the power to grant a new trial *nisi* when he finds the amount of the verdict to be merely inadequate or excessive. However, compelling reasons must be given to justify invading the jury's province in this manner. Although the trial court may not impose its will on a party by substituting its judgment for that of the jury, the court may in the proper case give the party an option in the way of *additur* or *remittitur*, or in the alternative, a new trial. The consideration of a motion for a new trial *additur* requires the trial judge to consider the adequacy of the verdict in light of the evidence presented. The test employed by the court in determining whether or not to set aside a verdict on the grounds of either excessiveness or inadequacy is whether the verdict is so shocking as to manifestly show the jury was moved by considerations not founded on the evidence and/or instructions of the trial judge." *Krepps v. Auser*, 324 S.C. 597, 479 S.E.2d 290 (Ct. App. 1996).

The plaintiff argues that the verdict is inadequate because the evidence established that (1) the deceased had a close relationship with her family, (2) the circumstances of the wreck



were such that the loss to the family was tremendous, and (3) Dr. Wood testified that the total economic loss was \$547,000.00. "As a general rule, the evidence should be such as to enable the court or the jury to determine the amount of damages with reasonable certainty or accuracy; and it is sufficient if they are so established. Proof with absolute or mathematical certainty is not required, and it does not matter that the determination of damages depends to some extent on consideration of contingent events." *Proctor v. Dep't of Health & Envtl. Control*, 368 S.C. 299, 628 S.E.2d 496 (Ct. App. 2006). In this case, the evidence supports the jury's verdict because the jury was able to determine the amount of damages with reasonable certainty.

The plaintiff argues that the economic loss alone exceeds the jury's verdict. The jury was charged that the opinion of an expert can be weighed in the same manner as the testimony of any other witness. The jury was further informed that it could reject the expert's opinion if the reasons given for the opinion were not sound in the jury's judgment. Dr. Wood testified that his conclusion was based on a number of assumptions, e.g., that the decedent would work until a certain age, that she would earn a certain wage, that she would accept a promotion, etc. It was within the jury's province to conclude that the lost earnings calculations were not supported by its view of the evidence.

As to the loss experienced by the wrongful death beneficiaries in the form of grief, sorrow, shock, and wounded feelings, there is no separate itemization of economic and noneconomic loss (nor is it common for the verdict form to contain such) so there is obviously no way to determine what amount the jury allocated for what component of damages. The jury was properly instructed on the elements of damages in a wrongful death case: (1) pecuniary loss, (2) mental shock and suffering, (3) wounded feelings, (4) grief and sorrow, (5) loss of companionship, (6) loss of love and society, (7) loss of the use and comfort of deceased's

EAH

society, including the loss of the deceased's experience, knowledge and judgment in managing the affairs of the deceased and her beneficiaries, loss of deceased's nurture, guidance, and training of minor children and (8) funeral expenses. The jury was also specifically instructed that it was not to base its verdict as to damages on sympathy, passion, or prejudice. The jury was charged that its arrival at the amount of damages to be awarded may not be based on speculation, but must be based on the evidence presented, however the plaintiff does not have to prove these damages to a mathematical certainty.

Because the evidence supports the jury's verdict, the damages are not so grossly inadequate as to suggest the jury was motivated by passion, caprice, or prejudice. The verdict is within the range of evidence presented and that evidence sustains the factual findings implicit in the jury's decision. Accordingly, proper deference will be given to the jury in awarding damages.

Set-off

The plaintiff has not disputed the defendant's entitlement to a set-off. Again, the plaintiff stipulated (and correctly so) that any verdict must be reduced by \$300,000.00. This is in accord with the law in this state. Therefore, the verdict is reduced to the sum of zero dollars.

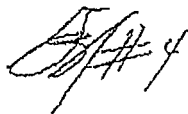
For the reasons set forth above, the plaintiff's motions are denied and the defendant's motion for a set-off is granted.

AND IT IS SO ORDERED



GEORGE C. JAMES JR.

February 28, 2008



STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

- - - COUNTY OF ORANGEBURG -)

CASE NO 05-CP-38-0143

Clarence Rutland, as Personal
Representative for the Estate of
Tiffanie Rutland,

Plaintiff,

vs

South Carolina Department of
Transportation and General Motors
Corporation.

Defendant(s)

Order Approving Settlement and Dismissing
General Motors

2007 AUG 10 AM 9 49

Clarence Rutland, as Personal
Representative for the Estate of
Tiffanie Rutland,

Plaintiff

vs

General Motors Corporation

Defendant(s)

CASE NO _____

Order Approving Settlement

ATTEST TRUE COPY
[Signature]
CLERK OF COURT
ORANGEBURG COUNTY

This matter comes before the Court on the verified Petition of Clarence Rutland as Personal Representative of the Estate of Tiffanie Rutland Present was the Petitioner as well as his attorney J Christopher Wilson Also present was Thomas Kennaday, attorney for General Motors Corporation and Richard B Ness, attorney for SCDOT

On or about June 7, 2003, Petitioner's decedent Tiffanie Rutland died when the 1999 Chevrolet S-10 Blazer in which she was a passenger was involved in a rollover crash.

A wrongful death claim has been asserted against Defendant General Motors Corporation based on allegations of the Plaintiff that the window glazing was defective and contributed to her injuries and death. Petitioner did not allege a survival action. Nevertheless, the Petitioner's settlement with General Motors Corporation includes settlement of all alleged and unalleged claims, including Petitioner's wrongful death claim and any potential survival claim.

The Defendant General Motors Corporation denies any liability or fault in causing this accident. Nonetheless, in the interest of compromise, the Defendant General Motors Corporation has agreed to pay a confidential sum of money to the Petitioner, for the benefit of the Petitioner and any and all other statutory beneficiaries, in exchange for a full and final settlement and release of any and all claims of any type or nature which the Petitioner and/or the beneficiaries of Tiffanie Rutland might have against Defendant General Motors Corporation under the aforementioned wrongful death statute or survival statute or otherwise arising out of the July 7, 2003 crash that is the subject of this action.

The Petitioner requests Court approval to allocate the settlement funds evenly to the alleged wrongful death claim and the potential survival claim. However, settlement and release of General Motors Corporation is unaffected by and not contingent upon the Court's approval or disapproval of Plaintiff's proposed allocation.

At the time of this accident the Petitioner's decedent had one minor child, both under the age of fourteen (14) years, namely Joseph Rutland, date of birth November 6, 2001.

The Petitioner has been represented by the Wilson Law Firm and by the law firm of Peters, Murdaugh, Parker, Eltzroth & Detrick. Total expenses and costs incurred by the Petitioner in pursuit of this action total \$6,840.36 and additional attorney's fees have been earned by Petitioner's counsel pursuant to a written fee agreement with Petitioner. These expenses,

costs and attorney's fees will be satisfied in full from the proceeds of this settlement. All funeral and death expenses have been paid in full, and there are no other known debts relative to the decedent's estate

The Court has reviewed the settlement agreement and heard from the counsel for the parties to the settlement and from the Petitioner, who are all in agreement that the settlement is fair and in the best interests of the Estate of Tiffanie Rutland and the beneficiaries of the Estate. The Court has been informed of the amount of the sum General Motors Corporation will pay the Estate of Tiffanie Rutland and the amount of attorney's fees and expenses to be paid from that sum.

Upon full consideration of this matter, it appears to the Court that the settlement and fee proposals outlined hereinabove, verified in the Petition and reviewed by the Court are fair and just and in the best interest of the parties. The Court further approves the allocation of the proceeds evenly to the alleged wrongful death claim and the unalleged survival claim. The Court approves the allocation without making any factual findings about the cause of the crash or the cause of Tiffanie Rutland's death but finds that there exists some evidence, however slight, that Tiffanie Rutland survived the crash and consciously endured pain and suffering prior to her death.

Upon full consideration of this matter, the Court's approval of this settlement between Petitioner and General Motors Corporation is not contingent upon the allocation or apportionment by the Court of the wrongful death or survival benefits. Should later proceeding in this case or any other case determine that Tiffanie Rutland did not consciously endure pain and suffering prior to her death, and/or modify the allocation or apportionment herein, such a finding and/or modification will have no effect on this approval of Petitioner's settlement with and

release of General Motors Corporation

Accordingly, it is

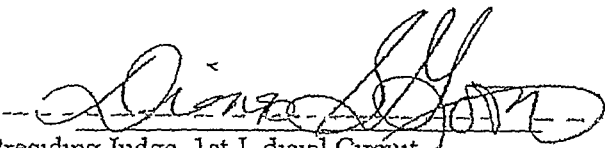
Ordered, Adjudged and Decreed that the settlement proposals set forth hereinabove, verified in the Petition and reviewed by the Court are approved, and that upon payment of the amounts described to the Court, the Petitioner, as Personal Representative, is hereby authorized and directed to execute such documents as will effect a complete, full and final release in favor of the Defendant General Motors Corporation, Defendant General Motors Corporation's insurance carriers, Defendant General Motors Corporation's agents, servants, and/or assigns from any and all claims or actions whatsoever arising out of the injury to and death of Tiffanie Rutland. Nothing herein shall be construed as a Release or authority to release in any manner Defendant South Carolina Department of Transportation nor shall any such action affect the claims of Petitioner against Defendant South Carolina Department of Transportation. All claims against General Motors Corporation are hereby dismissed with prejudice.

Nothing herein shall preclude by waiver or otherwise the right of SCDOT to argue against the allocation or apportionment of wrongful death and survival proceeds at the appropriate later time in the continuing litigation for purposes of setoff to which SCDOT may be entitled. Nothing herein shall preclude SCDOT and/or the Court from being informed when and under the appropriate circumstances of the settlement amounts, which have been disclosed to the Court at hearing to approve this settlement, and the appropriations and allocations set forth above, as well as attorney fees and costs or other information necessary for purposes of the issue of setoff. SCDOT will be allowed and is granted the right to raise any and all issues and grounds at the appropriate future time to litigate these issues to fully protect its rights concerning setoff and the allocation or apportionment to survival and wrongful death under common law, statutory and/or

or findings herein, to which SCDOT does not stipulate.

equitable principles

Aug 9, 2007
Orangely, SC


Presiding Judge, 1st Judicial Circuit

VERDICT FORM

STATE OF SOUTH CAROLINA
COUNTY OF ORANGEBURG

IN THE COURT OF COMMON PLEAS

CASE NO 2006-CP-38-486

Clarence Rutland as Personal Representative
of the Estate of Tiffanie Rutland,

Plaintiff,

vs

South Carolina Department of Transportation,

Defendant

VERDICT

____ We the jury find for the Defendant

OR

☒ We the jury find for the Plaintiff in the amount of \$300,000.00
actual damages Three Hundred Thousand Dollars

I certify that this decision is the unanimous decision of the jury

Leon White, Foreperson

01/31/08
Date

STATE OF SOUTH CAROLINA)
COUNTY OF ORANGEBURG)
CLARENCE RUTLAND as personal)
Representative of the Estate of)
TIFFANY RUTLAND)
Plaintiff)
vs)
SOUTH CAROLINA DEPARTMENT)
OF TRANSPORTATION)
Defendant)

IN THE COURT OF COMMON PLEAS
C/A NO 2004-CP-38-0143

SUMMONS
(Jury Trial Demanded)
(Wrongful death)

FILED FOR RECORD
CLERK OF COURT
ORANGEBURG COUNTY
SOUTH CAROLINA

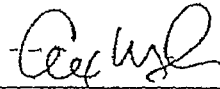
2005 FEB -7 PM 2:11

TO THE ABOVE NAMED DEFENDANT

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action of which a copy is herewith served upon you, and to serve a copy of your answer to said Complaint on the subscribed at their office 303 First Street, East Hampton South Carolina 29924 within thirty (30) days after the service hereof, exclusive of the day of such service and if you fail to answer the Complaint within the time aforesaid, judgment by default will be rendered against you for the relief demanded in this Complaint

PETERS, MURDAUGH, PARKER, ELTZROTH,
& DETRICK,

BY



R. Alexander Murdaugh
P O Box 457
Hampton, S C 29924
(803) 943-2111

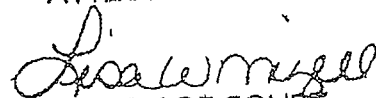
And

WILSON LAW FIRM
J Christopher Wilson
P O Box 1150
Bamberg, SC 29003

Hampton, South Carolina
January 27, 2005

ATTORNEYS FOR PLAINTIFF

ATTEST TRUE COPY


CLERK OF COURT
ORANGEBURG COUNTY SOUTH CAROLINA

STATE OF SOUTH CAROLINA)
COUNTY OF ORANGEBURG)
CLARENCE RUTLAND as Personal)
Representative of the Estate of)
TIFFANY RUTLAND,)
Plaintiff)
vs)
SOUTH-CAROLINA DEPARTMENT)
OF TRANSPORTATION)
Defendant)

IN THE COURT OF COMMON PLEAS

C/A NO 2004-CP-38-0143

COMPLAINT
(Jury Trial Demanded)
(Wrongful Death)

FILED FOR RECORD
USA W/ MICHEL
CLERK OF COURT
ORANGEBURG COUNTY SC

2005 FEB -7 PM 2 11

The plaintiff complaining that the defendant alleges

1 That the plaintiff, Clarence Rutland has been the duly appointed personal representative of the Estate of Tiffany Rutland by the Bamberg County Probate Court and he brings this action for the wrongful death of Tiffany Rutland on behalf of the statutory beneficiaries of Tiffany Rutland

2 That the South Carolina Department of Transportation is an agency of the state of South Carolina which is responsible for maintaining and repairing Highway 301 in Orangeburg County, South Carolina and is subject to this suit pursuant to §15-78-10 et seq of the South Carolina Code of Laws (1976)

3 That upon information and belief for a long period of time prior to June 7 2003, there is an area approximately four (4) miles south of the city of Orangeburg in Orangeburg County on Highway 301 upon which water accumulated and remained on Highway 301 creating a hazard to motorists

ATTEST TRUE COPY
[Signature]
CLERK OF COURT
ORANGEBURG COUNTY SOUTH CAROLINA

4 That on or about June 7, 2003 the plaintiff was a passenger in an automobile traveling north on Highway 301 when the vehicle in which she was traveling entered the aforementioned area where water was gathered on the roadway that the defendant through its employees and agents knew or should have known that this was a dangerous and hazardous condition, that as a result of the vehicle in which she was traveling hitting the accumulated water on the roadway and the negligent conduct of the defendant, the driver of the vehicle in which the plaintiff was a passenger lost control of the vehicle causing it to turn over and wreck, as a result of the wreck the plaintiff was severely injured and did thereafter die

5 That the plaintiff's wrongful death was due to and proximately caused by the negligent, reckless and willful conduct of the defendant by and through its agents servants and employees in the following particulars to wit

- (a) In failing to repair the highway to a reasonably safe condition,
- (b) In failing to inspect,
- (c) In creating maintaining and allowing a hazardous dangerous and unsafe condition to exist,
- (d) In failing to warn the public and the plaintiff of the condition which allows water to accumulate on the highway,
- (e) In failing to take proper precautions to assure that the highways were reasonably safe

6 By reason and a consequence of the aforesaid negligent, reckless and willful conduct of the defendant Tiffany Rutland was caused to wrongfully die

WHEREFORE, the plaintiff prays for judgment for actual damages and for whatever further relief this court deems just and proper and for the cost of the action

PETERS, MURDAUGH, PARKER, ELTZROTH,
& DETRICK

BY



R. Alexander Murdaugh

P O Box 457

Hampton, S C 29924

(803) 943-2111

And

WILSON LAW FIRM

J Christopher Wilson

P O Box 1150

Bamberg, SC 29003

ATTORNEYS FOR PLAINTIFFS

Hampton, South Carolina
January 27, 2005

STATE OF SOUTH CAROLINA

COUNTY OF ORANGEBURG

CLARENCE RUTLAND as Personal
Representative of the Estate of
TIFFANY RUTLAND,

Plaintiff

vs

SOUTH CAROLINA DEPARTMENT
OF TRANSPORTATION,
REA CONSTRUCTION COMPANY, AND
GENERAL MOTORS CORP ,

Defendants

IN THE COURT OF COMMON PLEAS

C/A NO 05-CP-38-0143

**AMENDED
SUMMONS**

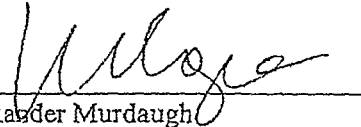
(Jury Trial Demanded)
(Wrongful Death/Strict Liability)

TO THE ABOVE NAMED DEFENDANTS

YOU ARE HEREBY SUMMONED and required to answer the Amended Complaint in this action, of which a copy is herewith served upon you, and to serve a copy of your answer to said Complaint on the subscribed at their office, 101 Mulberry Street, East, Hampton South Carolina 29924 within thirty (30) days after the service hereof, exclusive of the day of such service, and if you fail to answer the Complaint within the time aforesaid judgment by default will be rendered against you for the relief demanded in this Complaint

PETERS, MURDAUGH, PARKER, BLTZROTH,
& DETRICK,

BY

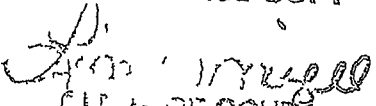

R. Alexander Murdaugh
Lee D. Cope
P O Box 457
Hampton, S C 29924
(803) 943-2111

And

WILSON LAW FIRM
J. Christopher Wilson
P O Box 1150
Bamberg, SC 29003

Hampton, South Carolina
May 1, 2006

ATTORNEYS FOR PLAINTIFF

ATTEST TRUE COPY

CLERK OF COURT
ORANGEBURG COUNTY SOUTH CAROLINA

STATE OF SOUTH CAROLINA)
COUNTY OF ORANGEBURG)
CLARENCE RUTLAND as Personal)
Representative of the Estate of)
TIFFANY RUTLAND,)
Plaintiff)
vs)
SOUTH CAROLINA DEPARTMENT)
OF TRANSPORTATION,)
REA CONSTRUCTION COMPANY,)
AND GENERAL MOTORS CORP ,)
Defendants)

IN THE COURT OF COMMON PLEAS

- C/A NO 05-CP-38-0143

AMENDED
COMPLAINT
(Jury Trial Demanded)
(Wrongful Death/Strict Liability)

The plaintiff complaining of the defendants alleges

1 That the plaintiff, Clarence Rutland, is the duly appointed personal representative of the Estate of Tiffany Rutland by the Bamberg County Probate Court and he brings this action for the wrongful death of Tiffany Rutland on behalf of the statutory beneficiaries of Tiffany Rutland

2 That the South Carolina Department of Transportation ("SCDOT") is an agency of the state of South Carolina which is responsible for maintaining and repairing Highway 301 in Orangeburg County, South Carolina and is subject to this suit pursuant to §15-78-10 et seq of the South Carolina Code of Laws (1976)

3 That the Defendant Rea Construction Company ("REA') is a foreign corporation organized under the laws of a state other than South Carolina but that transacts business in this state, including Orangeburg County, South Carolina and has an office and

TRUE COPY
[Signature]
CLERK OF COURT
ORANGEBURG COUNTY SOUTH CAROLINA

4 That the Defendant General Motors Corporation ('GM') is a foreign corporation organized under the laws of a state other than South Carolina but that transacts business in this state, including Orangeburg County, South Carolina, and has an office and agent therein

5 That upon information and belief for a long period of time prior to June 7, 2003, there is an area approximately four (4) miles south of the city of Orangeburg in Orangeburg County on Highway 301 upon which water accumulated and remained on Highway 301 creating a hazard to motorists

6 That the Defendant SCDOT was responsible for the maintenance of the aforementioned section of road

7 That at sometime prior June 7, 2003, the Defendant REA had been hired to and did in fact resurface the aforementioned section of road

8 That on or about June 7, 2003 the plaintiff was a rear-seat passenger in a 1999 Chevrolet S-10 Blazer that is manufactured by GM and was traveling north on Highway 301 when the vehicle in which she was traveling entered the aforementioned area where water was gathered on the roadway

9 That the defendants SCDOT and REA through its employees and agents knew and/or should have known that the water on this section of road was a dangerous and hazardous condition, that as a result of this dangerous condition, the vehicle in which she was traveling hit the accumulated water on the roadway causing the driver of the vehicle in which the plaintiff was a passenger to lose control of the vehicle causing it to turn over and wreck, as a result of the wreck the plaintiff was severely injured and did thereafter die

10 That the plaintiff's wrongful death was due to and proximately caused by the negligent, gross negligent, reckless and willful conduct of the defendants SCDOT and RBA by and through its agents, servants and employees in the following particulars to wit

- (a) In failing to repair the highway to a reasonably safe condition,
- (b) In failing to inspect
- (c) In creating, maintaining and allowing a hazardous, dangerous and unsafe condition to exist,
- (d) In failing to warn the public and the plaintiff of the condition which allows water to accumulate on the highway,
- (e) In failing to take proper precautions to assure that the highways were reasonably safe

11 By reason and a consequence of the aforesaid negligent, reckless and willful conduct of the defendants SCDOT and RBA, Tiffany Rutland was caused to wrongfully die

12 That the plaintiff's wrongful death was due to and proximately caused by the negligent, gross negligent, reckless and willful conduct of the defendant GM by and through its agents, servants and employees in the following particulars to wit

- a In designing the Chevrolet S 10 Blazer with tempered glass in the windows,
- b In failing to install laminated glass or other durable glazing materials in all windows on the Blazer,
- c In failing to warn of the dangers of ejection in the S-10 Blazer equipped with similar windows

13 By reason and a consequence of the aforesaid negligent, reckless and willful conduct of the defendant GM, Tiffany Rutland was caused to wrongfully die

FOR A SECOND CAUSE OF ACTION

14 The plaintiff alleges the above paragraphs as if rewritten.

15 That the S-10 Blazer in which the decedent, Tiffany Rutland, was riding was substantially unchanged from the time of purchase, was being used for its intended purpose and was defective and unreasonably dangerous to her as designed, such that she was injured while using the Blazer in its intended manner eventually causing her death

16 Due to the defective condition of the S-10 Blazer, the defendant GM is strictly liable for the injuries and death of the decedent, Tiffany Rutland and for such actual and punitive damages as shall be determined by the trier of fact

FOR A THIRD CAUSE OF ACTION

17 The plaintiff realleges the above paragraphs as if rewritten

18 That the Defendant GM breached express or implied warranties in the sale of the vehicle in a defective condition

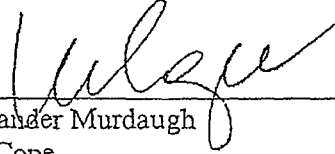
19 That the breaches of said warranties were the direct and proximate result of the injuries and death of the decedent, Tiffany Rutland

20 That the plaintiff is informed and believes that he is entitled to recover actual and punitive damages all in an amount to be determined by the trier of fact in this case

WHEREFORE, the plaintiff prays for judgment for actual damages and punitive damages and for whatever further relief this court deems just and proper and for the cost of the action

PETERS, MURDAUGH, PARKER, ELTZROTH,
& DETRICK

BY


R. Alexander Murdaugh
Lee D Cope
P O Box 457
Hampton, S C 29924
(803) 943-2111

And

WILSON LAW FIRM
J Christopher Wilson
P O Box 1150
Bamberg, SC 29003

ATTORNEYS FOR PLAINTIFFS

Hampton, South Carolina
May 17, 2006

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF ORANGEBURG)

C/A NO 05-CP-38-0143

CLARENCE RUTLAND as Personal
Representative of the Estate of
TIFFANY RUTLAND,

Plaintiff

vs

SOUTH CAROLINA DEPARTMENT
OF TRANSPORTATION, REA
CONSTRUCTION COMPANY, GENERAL
MOTORS CORPORATION AND J A
JONES CONSTRUCTION COMPANY

Defendants

SECOND
AMENDED SUMMONS
(Jury Trial Demanded)
(Wrongful Death/Strict Liability)

FILED MAY 22 AM 11 19
CLERK OF COURT
ORANGEBURG COUNTY SOUTH CAROLINA

TO THE ABOVE NAMED DEFENDANTS

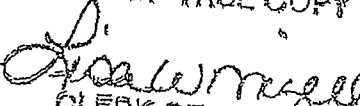
YOU ARE HEREBY SUMMONED and required to answer the Amended Complaint in this action, of which a copy is herewith served upon you, and to serve a copy of your answer to said Complaint on the subscribed at their office, 101 Mulberry Street, East, Hampton, South Carolina 29924 within thirty (30) days after the service hereof, exclusive of the day of such service, and if you fail to answer the Complaint within the time aforesaid, judgment by default will be rendered against you for the relief demanded in this Complaint

PETERS, MURDAUGH, PARKER, ELTZROTH,
& DETRICK

BY


R. Alexander Murdaugh
Lee D Cope
P O Box 457
Hampton, S C 29924
(803) 943-2111

And

ATTEST TRUE COPY

CLERK OF COURT
ORANGEBURG COUNTY SOUTH CAROLINA

WILSON LAW FIRM
J Christopher Wilson
P O Box 1150
Bamberg, SC 29003

ATTORNEYS FOR PLAINTIFF

Hampton, South Carolina
May 17 2006

STATE OF SOUTH CAROLINA)
)
 COUNTY OF ORANGEBURG)
)
 CLARENCE RUTLAND as Personal)
 Representative of the Estate of)
 TIFFANY RUTLAND,)
)
 Plaintiff)
)
 vs)
)
 SOUTH CAROLINA DEPARTMENT)
 OF TRANSPORTATION, REA)
 CONSTRUCTION COMPANY,)
 GENERAL MOTORS CORPORATION)
 AND J. A. JONES CONSTRUCTION)
 COMPANY)
)
 Defendants)
)

IN THE COURT OF COMMON PLEAS

C/A NO 05-CP-38-0143

SECOND
AMENDED COMPLAINT
 (Jury Trial Demanded)
 (Wrongful Death/Strict Liability)

FILED
 US/CLERK
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 MAY 22 AM 11 19

The plaintiff complaining of the defendants alleges

1 That the plaintiff, Clarence Rutland, is the duly appointed personal representative of the Estate of Tiffany Rutland by the Bamberg County Probate Court and he brings this action for the wrongful death of Tiffany Rutland on behalf of the statutory beneficiaries of Tiffany Rutland

2 That the South Carolina Department of Transportation ("SCDOT") is an agency of the state of South Carolina which is responsible for maintaining and repairing Highway 301 in Orangeburg County, South Carolina and is subject to this suit pursuant to §15-78-10 et. seq of the South Carolina Code of Laws (1976)

3 That the Defendant Rea Construction Company ("REA") is a foreign corporation organized under the laws of a state other than South Carolina but that it transacts business in this state, including Orangeburg County, South Carolina and has an office and agent therein

ATTEST TRUE COPY
 [Signature]
 CLERK OF COURT
 ORANGEBURG COUNTY, SOUTH CAROLINA

4 That the Defendant J A Jones Construction Company is a foreign corporation organized under the laws of a state other than South Carolina but that transacts business in this state, including Orangeburg County, South Carolina and has an office and agent therein that at all time hereafter mentioned REA is an agent/servant/employee of J A Jones Construction Company and Rea Construction Company's conduct is thereby imputed to J A Jones Construction Company

5 That the Defendant General Motors Corporation ("GM") is a foreign corporation organized under the laws of a state other than South Carolina but that transacts business in this state, including Orangeburg County, South Carolina, and has an office and agent therein

6 That upon information and belief for a long period of time prior to June 7, 2003, there is an area approximately four (4) miles south of the city of Orangeburg in Orangeburg County on Highway 301 upon which water accumulated and remained on Highway 301 creating a hazard to motorists

7 That the Defendant SCDOT was responsible for the maintenance of the aforementioned section of road.

8 That at sometime prior June 7, 2003, the Defendant REA had been hired to and did in fact resurface the aforementioned section of road

9 That on or about June 7, 2003 the plaintiff was a rear-seat passenger in a 1999 Chevrolet S-10 Blazer that is manufactured by GM and was traveling north on Highway 301 when the vehicle in which she was traveling entered the aforementioned area where water was gathered on the roadway

10 That the defendants SCDOT and REA through its employees and agents knew and/or should have known that the water on this section of road was a dangerous and hazardous

condition, that as a result of this dangerous condition, the vehicle in which she was traveling hit the accumulated water on the roadway causing the driver of the vehicle in which the plaintiff was a passenger to lose control of the vehicle causing it to turn over and wreck, as a result of the wreck the plaintiff was severely injured and did thereafter die

11 That the plaintiff's wrongful death was due to and proximately caused by the negligent, gross negligent, reckless and willful conduct of the defendants SCDOT and REA by and through its agents, servants and employees in the following particulars to wit

- (a) In failing to repair the highway to a reasonably safe condition,
- (b) In failing to inspect,
- (c) In creating, maintaining and allowing a hazardous, dangerous and unsafe condition to exist,
- (d) In failing to warn the public and the plaintiff of the condition which allows water to accumulate on the highway,
- (e) In failing to take proper precautions to assure that the highways were reasonably safe

11 By reason and a consequence of the aforesaid negligent, reckless and willful conduct of the defendants SCDOT and REA, Tiffany Rutland was caused to wrongfully die

12 That the plaintiff's wrongful death was due to and proximately caused by the negligent, gross negligent, reckless and willful conduct of the defendant GM by and through its agents, servants and employees in the following particulars to wit.

- a In designing the Chevrolet S-10 Blazer with tempered glass in the windows,
- b In failing to install laminated glass or other durable glazing materials in all windows on the Blazer;
- c In failing to warn of the dangers of ejection in the S-10 Blazer equipped with similar windows

13 By reason and a consequence of the aforesaid negligent, reckless and willful conduct of the defendant, GM, Tiffany Rutland was caused to wrongfully die

FOR A SECOND CAUSE OF ACTION

14 The plaintiff realleges the above paragraphs as if rewritten

15 That the S-10 Blazer in which the decedent, Tiffany Rutland, was riding was substantially unchanged from the time of purchase, was being used for its intended purpose and was defective and unreasonably dangerous to her as designed, such that she was injured while using the Blazer in its intended manner eventually causing her death

16 Due to the defective condition of the S-10 Blazer, the defendant GM is strictly liable for the injuries and death of the decedent, Tiffany Rutland and for such actual and punitive damages as shall be determined by the trier of fact

FOR A THIRD CAUSE OF ACTION

17 The plaintiff realleges the above paragraphs as if rewritten

18 That the Defendant GM breached express or implied warranties in the sale of the vehicle in a defective condition

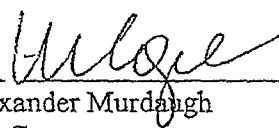
17 That the breaches of said warranties were the direct and proximate result of the injuries and death of the decedent, Tiffany Rutland

18 That the plaintiff is informed and believes that he is entitled to recover actual and punitive damages all in an amount to be determined by the trier of fact in this case

WHEREFORE, the plaintiff prays for judgment for actual damages and punitive damages and for whatever further relief this court deems just and proper and for the cost of the action.

PETERS, MURDAUGH, PARKER, ELTZROTH,
& DETRICK

BY


R Alexander Murdaugh
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(803) 943-2111

And

WILSON LAW FIRM
J Christopher Wilson
P O Box 1150
Bamberg, SC 29003

ATTORNEYS FOR PLAINTIFFS

Hampton, South Carolina
May 11, 2006

STATE OF SOUTH CAROLINA)

COUNTY OF ORANGEBURG)

Clarence Rutland, as Personal Representative for the Estate of Tiffame Rutland,)

Plaintiff,)

vs)

South Carolina Department of Transportation and General Motors Corporation,)

Defendants)

IN THE COURT OF COMMON PLEAS

CASE NO 05-CP-38-0143

(Wrongful Death)

Petition for Approval of Settlement and Dismissal of General Motors Corporation

FILED
CLERK OF COURT
2007 AUG 10 AM 9 42

Clarence Rutland, as Personal Representative for the Estate of Tiffame Rutland,)

Plaintiff,)

vs)

General Motors Corporation,)

Defendants)

CASE NO _____
(Survival Action)

Petition for Approval of Settlement

TO THE HONORABLE JUDGE OF THE CIRCUIT COURT FOR
ORANGEBURG COUNTY, SOUTH CAROLINA

1 Petitioner, Clarence Rutland, is the duly appointed Personal Representative of the Estate of Tiffame Rutland, having been so appointed by the Probate Court of Bamberg County on August 26, 2004. Petitioner seeks approval of a settlement

ATTACHED COPY

CR

with Defendant, General Motors Corporation in this case pursuant to the Wrongful Death Act and Survival Action Act of South Carolina.

2 On or about June 7, 2003, Petitioner's decedent Tiffanie Rutland died when the 1999 Chevrolet S-10 Blazer in which she was a passenger was involved in a rollover crash. Petitioner contends that the Blazer hit accumulated water on the roadway causing the driver of the vehicle in which the plaintiff was a passenger to lose control of the vehicle causing it to overturn and wreck.

3 A wrongful death claim has been asserted against Defendant General Motors Corporation based on allegations of the Plaintiff that the window glazing was defective and contributed to her injuries and death. The Defendant General Motors Corporation denies any responsibility. General Motors Corporation is self-insured.

4 Petitioner contends that there exists evidence and testimony established in the case that supports that Tiffanie Rutland survived the initial impact and that she did consciously endure pain and suffering prior to her death. This petition is based upon the Wrongful Death Act and the Survival Action Act.

5 Petitioner alleged a wrongful death action in the complaint, civil action number 05 CP-38-0143. Petitioner did not allege a survival action. The Petitioner's settlement with General Motors Corporation includes settlement of all alleged and unalleged claims, including any potential survival claim even if not previously asserted in the present case. The settlement between Petitioner and General Motors Corporation and Petitioner's release of all claims against General Motors Corporation, is unaffected by and not contingent on the actual existence of a viable survival cause of action. Rather, the settlement and release includes such a claim to the extent it exists.

CR

5 The Defendants deny any liability or fault in causing this accident or the death of Tiffanie Rutland. Nonetheless, Petitioner and General Motors Corporation have agreed to a confidential settlement to avoid the time, expense and uncertainty associated with continued litigation. Pursuant to the settlement, General Motors Corporation has offered to pay a confidential sum of money to the Petitioner for the benefit of the Estate of Tiffanie Rutland and any and all other statutory beneficiaries in exchange for a full and final settlement and release of any and all claims against General Motors Corporation which the Petitioner and/or the beneficiaries might have under the aforementioned wrongful death statute or survival action statute. The Petitioner proposes to allocate the proceeds of the settlement will be as follows: one-half of the proceeds are for the wrongful death action styled as Clarence Rutland, as the Personal Representative for the Estate of Tiffanie Rutland vs. South Carolina Department of Transportation and General Motors Corporation, and one-half of the proceeds are for the previously unalleged survival action styled as Clarence Rutland, as the Personal Representative for the Estate of Tiffanie Rutland vs. General Motors Corporation and captioned separately above for purposes of this petition. The settlement and release of General Motors Corporation is unaffected by and not contingent on the approval of the Petitioner's proposed allocation. At the time of this accident the Petitioner's decedent had one child under the age of fourteen (14) years, namely Joseph Rutland, date of birth November 6, 2001.

6 The total settlement amount shall be paid in cash.

7 The Petitioner has been represented by the Wilson Law Firm and by the Law Firm of Peters, Murdaugh, Parker, Eltzroth & Detrick. Total expenses and costs incurred by the Petitioner in pursuit of this action total \$6,840.36 and additionally

CR

attorney's fees have been earned by Petitioner's counsel pursuant to a written fee agreement with Petitioner. The amount of attorney's fees will be disclosed to the Court at the hearing of this motion. These expenses, costs and attorney's fees will be satisfied in full from the proceeds of this settlement.

8 All funeral and death expenses have been paid in full, and there are no other known debts relative to the decedent's estate.

9 Your Petitioner has carefully considered the facts and circumstances involved herein, the Petitioner is aware of the uncertainties of litigation and believes that the offer from General Motors Corporation, under the circumstances is fair and equitable and should be accepted, therefore, the Petitioner prays that this Court approve said offer and empower the Petitioner as Personal Representative of the Estate of Tiffanie Rutland to execute such documents as may be necessary to effect a full and final release in favor of the Defendant General Motors Corporation from any and all claims, past, present, or future, arising out of or in any way connected with the above-described accident and the injuries to and death of Tiffanie Rutland.

10 Petitioner and General Motors Corporation stipulate that the settlement between them will not and does not affect, alter, amend or resolve the dispute and ongoing litigation between the Petitioner and the Defendant South Carolina Department of Transportation.

Wherefore, the Petitioner prays that this Court approve the settlement as hereinabove set forth and authorize and direct the Petitioner to execute any and all

CR

instruments to effect a full and final release in favor of General Motors Corporation

Clarence Rutland
Clarence Rutland, Personal Representative
of the Estate of Tiffame Rutland, Petitioner

August 9, 2007

STATE OF SOUTH CAROLINA

COUNTY OF ORANGEBURG

VERIFICATION

PERSONALLY appeared before me, the undersigned, who, after being duly sworn, deposes and says that the allegations contained in the foregoing Petition are true of Petitioner's own knowledge, except those allegations stated to be upon information and belief, and as to those, Petitioner believes them to be true

FILED
CLERK OF COURT
ORANGEBURG COUNTY
SOUTH CAROLINA
AUG 10 AM 9 42

Clarence Rutland

Clarence Rutland, Personal Representative
of the Estate of Tiffanie Rutland, Petitioner

SWORN TO AND SUBSCRIBED before me

this 9 day of August, 2007

JC

Notary Public for South Carolina

My Commission Expires 7-15-15

J Christopher Wilson

ATTEST TRUE COPY
JUL 20 2007
CLERK OF COURT
ORANGEBURG COUNTY SOUTH CAROLINA

STATE OF SOUTH CAROLINA

COUNTY OF ORANGEBURG

Clarence Rutland as Personal Representative for the
Estate of Tiffanie Rutland,

☒ Plaintiff

v

South Carolina Department Of Transportation And
General Motors Corporation,

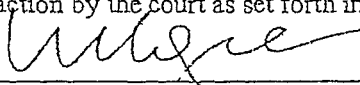
☐ Defendant

IN THE COURT OF COMMON PLEAS

CASE NO

2006-CP-38-0486

MOTION AND ORDER INFORMATION
FORM AND COVER SHEET

Plaintiff's Attorney Lee D Cope Esq Bar No 14361 Address PO Box 457 Hampton SC 29924 phone 803-943 2111 fax. 803-943-3943 e-mail lcope@pmped.com other	Defendant's Attorney Richard Ness, Bar No Address 2878 Main Highway, Bamberg, SC 29003 phone fax e-mail other
☒ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III) ☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III) ☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)	
SECTION I Hearing Information Nature of Motion Motion for a New Trial Absolute or in the Alternative for a New Trial N1 S1 Additur Estimated Time Needed Court Reporter Needed ☐ YES / ☐ NO	
SECTION II Motion/Order Type ☒ Written motion attached ☐ Form Motion/Order I hereby move for relief or action by the court as set forth in the attached proposed order  Signature of Attorney for ☒ Plaintiff / ☐ Defendant February 7, 2008 Date submitted	
SECTION III Motion Fee ☒ PAID - AMOUNT \$25 00 ☐ EXEMPT (check reason) ☐ Rule to Show Cause in Child or Spousal Support ☐ Domestic Abuse or Abuse and Neglect ☐ Indigent Status ☐ State Agency v Indigent Party ☐ Sexually Violent Predator Act ☐ Post-Conviction Relief ☐ Motion for Stay in Bankruptcy ☐ Motion for Publication ☐ Motion for Execution (Rule 69 SCRPC) ☐ Proposed order submitted at request of the court, or, reduced to writing from motion made in open court per judge's instructions Name of Court Reporter ☐ Other	
JUDGE'S SECTION ☐ Motion Fee to be paid upon filing of the attached order ☐ Other	JUDGE CODE Date
CLERK'S VERIFICATION Collected by _____ Date Filed _____ ☐ MOTION FEE COLLECTED _____	

☐ CONTESTED – AMOUNT DUE _____

44

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF ORANGEBURG	)	CASE NO 06-CP-38-486
	)	(Formerly 06-CP 38 01 13)
Clarence Rutland, as Personal	)	
Representative for the Estate of	)	
Tiffanie Rutland,	)	
	)	
Plaintiff,	)	MOTION FOR NEW TRIAL ABSOLUTE
	)	OR IN THE ALTERNATIVE FOR A
vs	)	NEW TRIAL NI SI ADDITUR
	)	
South Carolina Department of	)	
Transportation,	)	
Defendant	)	

TO Richard B Ness attorney for SCDOT

PLEASE TAKE NOTICE that Plaintiff, pursuant to Rule 59, SCRCPP, and other applicable law will move before The Honorable George C James Jr, presiding Judge at the appropriate time, for a new trial absolute, a new trial on damages only or in the for a new trial *ni si additur*. The grounds for the Motion is that the verdict was the result of passion, caprice or prejudice and is so grossly inadequate as to require a new trial absolute, or at a minimum, so inadequate that the Plaintiff is entitled to a new trial *nisi additur*.

If the amount of the verdict is grossly inadequate, the trial court must grant a new trial absolute. *O Neal v Bowles*, 314 S C 525, 431 S E 2d 555 (1993). However, the Court has the discretionary authority to grant a new trial *nisi additur* if the jury's verdict is merely inadequate. *Bailey v Peacock*, 318 S C 13, 455 S E 2d 690 (1995). The decision to grant a new trial *nisi additur* rests on the Court's determination of the sufficiency of the verdict in light of the evidence that was presented. *Kiepps by Kiepps*

v. Ausen, 324 S.C. 597, 479 S.E.2d 290 (Ct. App. 1996). As is set forth in summary fashion below, the jury's verdict is grossly inadequate; at a minimum it is inadequate in light of the evidence presented during the trial of this case.

The evidence supports a verdict in excess of the verdict rendered by the jury. During the course of the trial, the evidence established that the decedent, Tiffanie Rutland, and her husband, Clarence Rutland, had been very close for many years prior to their marriage. The couple did not argue or fight and had a very close marriage. The decedent and her infant son, Joseph Rutland, were also very close. The photographs admitted into evidence without objection, certainly support the conclusion that this was a very close family.

The circumstances of the wreck further support a greater jury award. Clarence Rutland testified that after the wreck, he saw the vehicle resting on his wife's neck and that he knew then that she was dead. Eyewitnesses testified that Mr. Rutland was grief-stricken at the loss of his wife at the scene of the wreck. Furthermore, the testimony of Mr. Rutland, Mr. Willard Gunnells, Mrs. Tina Bishop and Ms. Rhonda Sweatman established that Mr. Rutland's pain, sorrow, grief and loss continues daily. Mr. Rutland and Ms. Sweatman also testified to the loss Joseph has experienced over losing his mother and how, even at a very young age, he still inquires about his mother. The loss to this family was tremendous, certainly in excess of \$300,000.00.

The expert testimony of Oliver Wood, Ph.D., further established the extent of the loss to the wrongful death beneficiaries. According to Dr. Wood, the total economic loss was \$547,000.00. Under cross-examination, he testified that his conclusion was based on the assumption that the decedent would accept the full-time position and accompanying

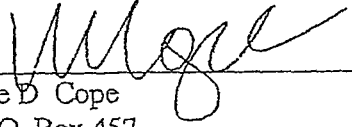
wage increase. However, if she remained at the part-time position, her economic loss would still be in excess of \$400,000.00. During this testimony, and that of Ms. Sweatman, the jury heard that Tiffanie not only earned income to support the family but also took care of most matters around the home such as cooking, cleaning and tending to her son. Thus, the economic loss alone exceeds the jury's verdict.

When the testimony and evidence with regards to damages is considered as a whole, it is clear that the jury's award is grossly inadequate. The Court instructed the jury on the proper elements of damages in a wrongful death case: (1) economic loss, (2) mental shock and suffering, (3) wounded feelings, (4) grief and sorrow, (5) loss of companionship, (6) loss of love and society, (7) loss of Tiffanie's ability to earn money for the support, maintenance, care and protection of the beneficiaries, and for the education and training of her children, (8) reasonable funeral expenses. Despite the clear instruction, it is obvious that the jury did not follow the charge and instead allowed passion, caprice and/or prejudice to invade the deliberations and causing the verdict to be grossly inadequate.

Because the verdict is grossly inadequate the Plaintiff moves for a new trial absolute, or for new trial *in si additur*.

This motion is based upon Rule 59, SCRPC and other applicable South Carolina case law and statutory authority.

PETERS, MURDAUGH, PARKER,
ELZROTH & DETRICK, PA

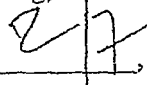


Lee D Cope

P O Box 457
Hampton, SC 29924
(803) 943-2111

And

WILSON LAW FIRM
J Christopher Wilson
P O Box 1150
Bamberg, SC 29003
(803) 245-7799

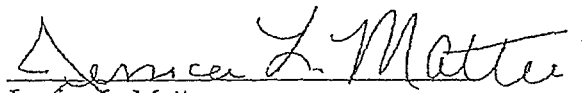
Bamberg, S C

_____, 2008

CERTIFICATE OF SERVICE

This is to certify that I, Jessica L. Mattie, with the Law Firm of PETERS, MURDAUGH, PARKER, ELTZROTH & DETRICK, P A , Attorneys for the plaintiff, have this date mailed via the U S Postal Service with first class postage prepaid a true and correct copy of the within Plaintiff's Motion for a New Trial Absolute or in the Alternative a New Trial on Damages Only or in the Alternative for a New Trial Nisi Additur to the following

Richard B. Ness Esquire
NESS, JETT & TANNER, LLC
2878 Main Highway
P O Box 909
Bamberg SC 29003

ATTORNEYS FOR DEFENDANT



Jessica L. Mattie

February 7, 2008

STATE OF SOUTH CAROLINA

COUNTY OF ORANGEBURG

Clarence Rutland, PR, Estate of Tiffanie Rutland

☐ Plaintiff

v

South Carolina Department Of Transportation

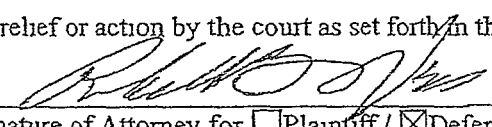
☒ Defendant

IN THE COURT OF COMMON PLEAS

CASE NO

2007-CP-38-0486

MOTION AND ORDER INFORMATION
FORM AND COVER SHEET

Plaintiff's Attorney J Christopher Wilson, Bar No Address POBox 1150, Bamberg, SC 29003 803-245-7799 Lee D Cope, PO Box 457, Hampton, SC 29924 phone 803-245-7799 fax e-mail other	Defendant's Attorney Richard B Ness, Bar No Address PO Box 909, Bamberg, SC 29003 phone 803-245-5178 fax 803-245-5384 e-mail other
☒ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III) ☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III) ☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)	
SECTION I Hearing Information Nature of Motion Setoff Estimated Time Needed 30 min Court Reporter Needed ☒ YES / ☐ NO	
SECTION II Motion/Order Type ☒ Written motion attached ☐ Form Motion/Order I hereby move for relief or action by the court as set forth in the attached proposed order  Signature of Attorney for ☐ Plaintiff / ☒ Defendant February 6, 2008 Date submitted	
SECTION III Motion Fee ☒ PAID - AMOUNT 25 00 ☐ EXEMPT (check reason) ☐ Rule to Show Cause in Child or Spousal Support ☐ Domestic Abuse or Abuse and Neglect ☐ Indigent Status ☐ State Agency v Indigent Party ☐ Sexually Violent Predator Act ☐ Post-Conviction Relief ☐ Motion for Stay in Bankruptcy ☐ Motion for Publication ☐ Motion for Execution (Rule 69 SCRPC) ☐ Proposed order submitted at request of the court, or, reduced to writing from motion made in open court per judge's instructions Name of Court Reporter ☐ Other	
JUDGE'S SECTION ☐ Motion Fee to be paid upon filing of the attached order ☐ Other	JUDGE CODE Date
CLERK'S VERIFICATION Collected by _____ Date Filed _____ ☐ MOTION FEE COLLECTED _____ ☐ CONTESTED - AMOUNT DUE _____	

STATE OF SOUTH CAROLINA)
COUNTY OF ORANGEBURG)

IN THE COURT OF COMMON PLEAS

Clarence Rutland, as Personal)
Representative for the Estate of)
Tiffanie Rutland,)

Plaintiff,)

South Carolina Department of)
Transportation,)

Defendant)

DEFENDANT'S MOTION FOR SETOFF

Civil Action Number 2006-CP-38-0486

TO LEE D COPE AND J CHRISTOPHER WILSON ATTORNEYS FOR PLAINTIFF

YOU WILL PLEASE TAKE NOTICE the defendant hereby moves the Court, pursuant to the common law of South Carolina and the equitable jurisdiction of the Court, for a setoff, against the verdict and judgment rendered in this action of all monies paid to the plaintiff by or on behalf of General Motors Corporation, Joseph Bishop, or their insurers, in settlement, satisfaction, or compensation for any cause of action or claim, under any theory, related to Tiffanie Rutland's injuries and death whether paid pursuant to release, covenant not to sue, or covenant not to execute. The defendant is informed and believes plaintiff has been paid settlement funds on behalf of General Motors Corporation and Joseph Bishop prior to the trial of this action, and it is entitled to have such funds set off against the verdict and/or reallocated and set off according to law

Feb 8, 2008

Respectfully submitted,

Bamberg, SC

By Richard B. Ness
NESS & JETT, LLC
Richard B. Ness
Post Office Box 909
Bamberg, SC 29003
(803)245-5178
ATTORNEY FOR DEFENDANT

STATE OF SOUTH CAROLINA)
)
COUNTY OF BAMBERG)

I, Richard B Ness, attorney for defendant, South Carolina Department of Transportation, in
Clarence Rutland, as Personal Representative of the Estate of Tiffany Rutland v South Carolina
Department of Transportation, Case No 06-CP-38-0486, do hereby certify that I have served the
foregoing Defendant's Motion for Setoff by mailing a copy of same, with postage prepaid, via
United States mail to the person(s) at the address(es) indicated as follows

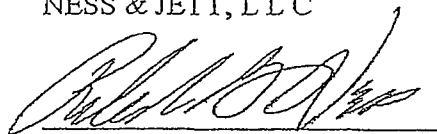
J Christopher Wilson, Esquire
Post Office Box 1150
Bamberg, South Carolina 29003

Lee D Cope, Esquire
Post Office Box 457
Hampton, South Carolina 29924

Honorable George C James, Jr
Circuit Court Judge
Post Office Box 1716
Sumter, SC 29150

NESS & JETT, L L C

By



Richard B Ness
P O Box 909
Bamberg, SC 29003
(803) 245-5178
Attorney for Defendant

Bamberg, South Carolina

February 8, 2008

WILSON LAW FIRM

392 Second Street
P O Box 1150
Bamberg, SC 29003

J Christopher Wilson
R Steven Chanaler

March 18, 2008

Phone 803-245-1799
Fax 803-245-0037

VIA FAX AND MAIL (803-436-2403)
Honorable George C James, Jr
P O Box 1716
Sumter, SC 29151

RE Clarence Rutland, as Personal Representative of the Estate of Tiffany
Rutland v SCDOT
Case No 06-CP-38-486 (Formerly 05-CP-38-143)

Dear Judge James

Enclosed please find a Motion for Reconsideration and/or To Alter and Amend Order we have filed in the above matter We would ask to be heard by the Court as to the issues contained herein and in the post-trial Motions previously filed by Plaintiff and Defendant We will be happy to travel to where you are located to have the Motions heard, and if you will have your Clerk or assistant contact me, I will be happy to arrange for scheduling

I look forward to hearing from you as to scheduling a hearing in this matter Thank you for your attention to this matter Please contact me if you have any questions

Sincerely,

J Christopher Wilson

JCW vl
Enclosure

cc Richard Ness (VIA FAX AND MAIL 803 245-5384)
Lee Cope (VIA FAX AND MAIL 803-943-3943) ✓

MAR 20 2008

WILSON LAW FIRM

392 Second Street
PO Box 1150
Bamberg, SC 29003

J Christopher Wilson
R Steven Chandler

Phone 803-245-7799
Fax 803 245 0037

March 18, 2008

VIA DELIVERY

Lisa Mizelle
Orangeburg County Clerk of Court
P O Box 9000
Orangeburg, SC 29116

RE Clarence Rutland, as Personal Representative of the Estate of Tiffany
Rutland v SCDOT
Case No 06-CP-38-486 (Formerly 05-CP-38-143)

Dear Lisa

Enclosed please find for filing a Motion for Reconsideration and/or To Alter and Amend
Order By copy of this letter, I am serving opposing counsel and providing a copy to the
trial Judge

Please file the original and return one certified copy to me Thank you for your attention
to this matter Please contact me if you have any questions

Sincerely,

J Christopher Wilson

JCW vl
Enclosure

cc Honorable George C James, Jr (VIA FAX AND MAIL 803-436-2403)
Richard Ness (VIA FAX AND MAIL 803-245-5384)
Lee Cope ✓

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF ORANGEBURG)

Clarence Rutland as PR for Estate of
Tiffany Rutland
____ Plaintiff

v

SCDOT
____ Defendant

Case No 06 CP 05-486
Formerly 05 CP 38 143
MOTION INFORMATION FORM
AND COVER SHEET

name, S C Bar no and address of plaintiff's attorney
J Christopher Wilson
P O Box 1150, Bamberg, SC 29003
telephone 803 245 7799 fax 803 245 0037
e-mail wilsonlaw@edistoelectric.com

name, S C Bar no and address of defendant's attorney
Richard B Ness
P O Box 909
Bamberg, SC 29003
telephone 803 245 5178
fax 803 245-5384

☒ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)
☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)

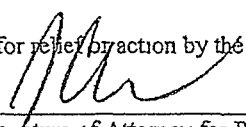
SECTION I Hearing Information

Nature of Motion Motion for Reconsideration and/or to Alter and Amend Order
Estimated Time Needed 15 minutes Court Reporter Needed NO

SECTION II Motion Type - New Trial or in the alternative

☒ Written motion attached
☐ Form Motion

I hereby move for relief by action by the court as set forth in the attached proposed order



Signature of Attorney for Plaintiff

3/18/08

Date submitted

SECTION III Motion Fee

☒ PAID AMOUNT 25.00

EXEMPT ☐ Rule to Show Cause in Child or Spousal Support
(check reason) ☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v Indigent Party
☐ Sexually Violent Predator Act ☐ Post Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69 SCRCP)
☐ Proposed order submitted at request of the court or, reduced to
writing from motion made in open court per judge's instructions
Name of Court Reporter _____
☐ Other _____

JUDGE'S SECTION

☐ Motion Fee to be paid upon filing of the attached order
☐ Other _____

JUDGE

CODE _____ Date _____

CLERK'S VERIFICATION

Collected by

DATE FILED

☐ MOTION FEE COLLECTED _____

☐ CONTESTED AMOUNT DUE _____

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF ORANGEBURG	)	CASE NO 06-CP-38-486
	)	Formerly 05-CP-38-0143
	)	
Clarence Rutland, as Personal	)	
Representative for the Estate of	)	
Tiffanie Rutland,	)	
	)	
Plaintiff,	)	MOTION FOR RECONSIDERATION
	)	AND/OR TO ALTER AND AMEND
vs	)	ORDER
	)	
	)	
South Carolina Department of	)	
Transportation,	)	
Defendant	)	
	)	

TO Richard B Ness, attorney for SCDOT

PLEASE TAKE NOTICE that Plaintiff, pursuant to Rule 59, SCRPC, and other applicable law, will move before The Honorable George C James Jr , presiding Judge, at the appropriate time, for the Court's reconsideration of the previous Motion filed by Plaintiff dated February 7, 2008, the previous Motion for Setoff filed by Defendant dated February 8, 2008, and the Order issued by the Court dated February 28, 2008 and filed February 29, 2008 Plaintiff will also move for and seek an Order granting Plaintiff the relief sought in the Plaintiff's above-referenced Motion and denying the setoff sought by Defendant's above-referenced Motion dated The grounds for the Motion are as follows

- 1 Plaintiff incorporates the grounds set forth in its previous Motion dated February 7, 2008,
- 2 The Court neither received evidence nor heard argument on Plaintiff's above-referenced Motion or Defendant's above-referenced Motion before issuing its ruling dated February 28, 2008 and filed February 29, 2008,

- 3 The Court erroneously finds in the Order dated February 28, 2008 that Plaintiff's counsel did not dispute Defendant's entitlement to setoff and that Plaintiff's counsel stipulated that any verdict had to be reduced by \$300,000.00. Plaintiff's counsel did not stipulate to setoff but did indicate to the Court during the submission of evidence that the death certificate would be submitted as evidence in the wrongful death case but not to show evidence of survival,
- 4 The Court received no evidence and heard no argument about any monies paid to Plaintiff from other sources for which Defendant sought setoff. The only evidence and record before the Court at this time is the Petition for Approval of Settlement filed August 10, 2007 (copy attached) and prior Order of The Honorable Diane Goodstem dated August 9, 2007 and recorded August 10, 2007 (copy attached) wherein she allocates one-half of the monies paid Plaintiff by Defendant General Motors to wrongful death claims of Plaintiff. In particular, the Court failed to consider the prior Orders issued in connection with this matter wherein Plaintiff was paid monies by sources other than SCDOT. By doing so, the Court has set aside the findings of the Bamberg County Probate Court and the findings of the Honorable Diane Goodstem without proper consideration of the evidence and argument of counsel.

This motion is based upon Rule 59, SCRCP and other applicable South Carolina caselaw and statutory authority. A copy of the Court's Order dated February 28, 2008

was received by Plaintiff counsel by email on March 10, 2008

WHITSON LAW FIRM



J Christopher Wilson
P O Box 1150
Bamberg, SC 29003
(803) 245-7799

PETERS, PARKER, MURDAUGH
DETRICK & ELZROTH

Lee Cope
P O Box 457
Hampton, SC 29924
(803) 943-2111

Bamberg, S C

March 18, 2008

STATE OF SOUTH CAROLINA)

COUNTY OF ORANGEBURG)

Clarence Rutland, as Personal
Representative for the Estate of
Tiffanie Rutland,)

Plaintiff,)

vs)

South Carolina Department of
Transportation and General Motors
Corporation)

Defendants)

Clarence Rutland, as Personal
Representative for the Estate of
Tiffanie Rutland,)

Plaintiff,)

vs)

General Motors Corporation,)

Defendants)

IN THE COURT OF COMMON PLEAS

CASE NO 05-CP-38-0143

(Wrongful Death)

Petition for Approval of Settlement and
Dismissal of General Motors Corporation

2007 AUG 10 AM 9 42
FILED
CLERK OF COURT
ORANGEBURG COUNTY
SOUTH CAROLINA

CASE NO _____
(Survival Action)

Petition for Approval of Settlement

TO THE HONORABLE JUDGE OF THE CIRCUIT COURT FOR
ORANGEBURG COUNTY, SOUTH CAROLINA

1 Petitioner, Clarence Rutland, is the duly appointed Personal
Representative of the Estate of Tiffanie Rutland, having been so appointed by the Probate
Court of Bamberg County on August 26, 2004. Petitioner seeks approval of a settlement

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with Defendant, General Motors Corporation in this case pursuant to the Wrongful Death Act and Survival Action Act of South Carolina

2 On or about June 7, 2003, Petitioner's decedent Tiffanie Rutland died when the 1999 Chevrolet S-10 Blazer in which she was a passenger was involved in a rollover crash. Petitioner contends that the Blazer had accumulated water on the roadway causing the driver of the vehicle in which the plaintiff was a passenger to lose control of the vehicle causing it to overturn and wreck.

3 A wrongful death claim has been asserted against Defendant General Motors Corporation based on allegations of the Plaintiff that the window glazing was defective and contributed to her injuries and death. The Defendant General Motors Corporation denies any responsibility. General Motors Corporation is self-insured.

4 Petitioner contends that there exists evidence and testimony established in the case that supports that Tiffanie Rutland survived the initial impact and that she did consciously endure pain and suffering prior to her death. This petition is based upon the Wrongful Death Act and the Survival Action Act.

5 Petitioner alleged a wrongful death action in the complaint, civil action number 05-CP-38-0143. Petitioner did not allege a survival action. The Petitioner's settlement with General Motors Corporation includes settlement of all alleged and unalleged claims, including any potential survival claim even if not previously asserted in the present case. The settlement between Petitioner and General Motors Corporation and Petitioner's release of all claims against General Motors Corporation, is unaffected by and not contingent on the actual existence of a viable survival cause of action. Rather, the settlement and release includes such a claim to the extent it exists.

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5 The Defendants deny any liability or fault in causing this accident or the death of Tiffanie Rutland. Nonetheless, Petitioner and General Motors Corporation have agreed to a confidential settlement to avoid the time expense and uncertainty associated with continued litigation. Pursuant to the settlement, General Motors Corporation has offered to pay a confidential sum of money to the Petitioner for the benefit of the Estate of Tiffanie Rutland and any and all other statutory beneficiaries in exchange for a full and final settlement and release of any and all claims against General Motors Corporation which the Petitioner and/or the beneficiaries might have under the aforementioned wrongful death statute or survival action statute. The Petitioner proposes to allocate the proceeds of the settlement will be as follows: one-half of the proceeds are for the wrongful death action styled as Clarence Rutland, as the Personal Representative for the Estate of Tiffanie Rutland vs. South Carolina Department of Transportation and General Motors Corporation, and one-half of the proceeds are for the previously unalleged survival action styled as Clarence Rutland, as the Personal Representative for the Estate of Tiffanie Rutland vs. General Motors Corporation and captioned separately above for purposes of this petition. The settlement and release of General Motors Corporation is unaffected by and not contingent on the approval of the Petitioner's proposed allocation. At the time of this accident the Petitioner's decedent had one child under the age of fourteen (14) years, namely Joseph Rutland, date of birth November 6, 2001.

6 The total settlement amount shall be paid in cash.

7 The Petitioner has been represented by the Wilson Law Firm and by the Law Firm of Peters, Murdaugh, Parker, Elitzroth & Detrick. Total expenses and costs incurred by the Petitioner in pursuit of this action total \$6,840.36 and additionally

CR

attorney's fees have been earned by Petitioner's counsel pursuant to a written fee agreement with Petitioner. The amount of attorney's fees will be disclosed to the Court at the hearing of this motion. These expenses, costs and attorney's fees will be satisfied in full from the proceeds of this settlement.

8 All funeral and death expenses have been paid in full, and there are no other known debts relative to the decedent's estate.

9 Your Petitioner has carefully considered the facts and circumstances involved herein, the Petitioner is aware of the uncertainties of litigation and believes that the offer from General Motors Corporation, under the circumstances, is fair and equitable and should be accepted, therefore, the Petitioner prays that this Court approve said offer and empower the Petitioner as Personal Representative of the Estate of Tiffanie Rutland to execute such documents as may be necessary to effect a full and final release in favor of the Defendant General Motors Corporation from any and all claims, past, present, or future, arising out of or in any way connected with the above-described accident and the injuries to and death of Tiffanie Rutland.

10 Petitioner and General Motors Corporation stipulate that the settlement between them will not and does not affect, alter, amend or resolve the dispute and ongoing litigation between the Petitioner and the Defendant South Carolina Department of Transportation.

Wherefore, the Petitioner prays that this Court approve the settlement as hereinabove set forth and authorize and direct the Petitioner to execute any and all

CR

instruments to effect a full and final release in favor of General Motors Corporation

Clarence Rutland

Clarence Rutland, Personal Representative
of the Estate of Tiffame Rutland Petitioner

August 9, 2007

STATE OF SOUTH CAROLINA

COUNTY OF ORANGEBURG

VERIFICATION

PERSONALLY appeared before me, the undersigned, who, after being duly sworn, deposes and says that the allegations contained in the foregoing Petition are true of Petitioner's own knowledge, except those allegations stated to be upon information and belief, and as to those, Petitioner believes them to be true

FILED
CLERK
COURT
RECORD
AUG 10 AM 9 42

Clarence Rutland

Clarence Rutland Personal Representative
of the Estate of Tiffanie Rutland, Petitioner

SWORN TO AND SUBSCRIBED before me

this 9 day of August, 2007

[Signature]

Notary Public for South Carolina

My Commission Expires 7-15-15

Christopher Wilson

ATTEST TRUE COPY
CLERK OF COURT
ORANGEBURG COUNTY SOUTH CAROLINA

STATE OF SOUTH CAROLINA)
)
 --- COUNTY OF ORANGEBURG)
)
 Clarence Rutland, as Personal)
 Representative for the Estate of)
 Tiffanie Rutland,)
)
 Plaintiff,)
)
 vs)
)
 South Carolina Department of)
 Transportation and General Motors)
 Corporation)
)
 Defendant(s))
)

IN THE COURT OF COMMON PLEAS

CASE NO- 05-GP-38-0143

Order Approving Settlement and Dismissing
 General Motors

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 REC'D
 CLERK
 COURT

Clarence Rutland, as Personal)
 Representative for the Estate of)
 Tiffanie Rutland,)
)
 Plaintiff,)
)
 vs)
)
 General Motors Corporation)
)
 Defendant(s))
)

CASE NO _____

Order Approving Settlement

ATTEST TRUE COPY
[Signature]
 CLERK OF COURT
 ORANGEBURG COUNTY

This matter comes before the Court on the verified Petition of Clarence Rutland as Personal Representative of the Estate of Tiffanie Rutland Present was the Petitioner as well as his attorney J Christopher Wilson Also present was Thomas Kennaday, attorney for General Motors Corporation and Richard B Ness attorney for SCDOT

On or about June 7, 2003, Petitioner's decedent Tiffanie Rutland died when the 1999 Chevrolet S-10 Blazer in which she was a passenger was involved in a rollover crash.

A wrongful death claim has been asserted against Defendant General Motors Corporation based on allegations of the Plaintiff that the window glazing was defective and contributed to her injuries and death. Petitioner did not allege a survival action. Nevertheless, the Petitioner's settlement with General Motors Corporation includes settlement of all alleged and unalleged claims, including Petitioner's wrongful death claim and any potential survival claim.

The Defendant General Motors Corporation denies any liability or fault in causing this accident. Nonetheless, in the interest of compromise, the Defendant General Motors Corporation has agreed to pay a confidential sum of money to the Petitioner, for the benefit of the Petitioner and any and all other statutory beneficiaries, in exchange for a full and final settlement and release of any and all claims of any type or nature which the Petitioner and/or the beneficiaries of Tiffanie Rutland might have against Defendant General Motors Corporation under the aforementioned wrongful death statute or survival statute or otherwise arising out of the July 7, 2003 crash that is the subject of this action.

The Petitioner requests Court approval to allocate the settlement funds evenly to the alleged wrongful death claim and the potential survival claim. However, settlement and release of General Motors Corporation is unaffected by and not contingent upon the Court's approval or disapproval of Plaintiff's proposed allocation.

At the time of this accident the Petitioner's decedent had one minor child, both under the age of fourteen (14) years, namely Joseph Rutland, date of birth November 6, 2001.

The Petitioner has been represented by the Wilson Law Firm and by the law firm of Peters, Murdaugh, Parker, Eltzroth & Detrick. Total expenses and costs incurred by the Petitioner in pursuit of this action total \$6,840.36 and additional attorney's fees have been earned by Petitioner's counsel pursuant to a written fee agreement with Petitioner. These expenses,

costs and attorney's fees will be satisfied in full from the proceeds of this settlement. All funeral and death expenses have been paid in full, and there are no other known debts relative to the decedent's estate.

The Court has reviewed the settlement agreement and heard from the counsel for the parties to the settlement and from the Petitioner, who are all in agreement that the settlement is fair and in the best interests of the Estate of Tiffanie Rutland and the beneficiaries of the Estate. The Court has been informed of the amount of the sum General Motors Corporation will pay the Estate of Tiffanie Rutland and the amount of attorney's fees and expenses to be paid from that sum.

Upon full consideration of this matter, it appears to the Court that the settlement and fee proposals outlined hereinabove, verified in the Petition and reviewed by the Court are fair and just and in the best interest of the parties. The Court further approves the allocation of the proceeds evenly to the alleged wrongful death claim and the unalleged survival claim. The Court approves the allocation without making any factual findings about the cause of the crash or the cause of Tiffanie Rutland's death but finds that there exists some evidence, however slight, that Tiffanie Rutland survived the crash and consciously endured pain and suffering prior to her death.

Upon full consideration of this matter, the Court's approval of this settlement between Petitioner and General Motors Corporation is not contingent upon the allocation or apportionment by the Court of the wrongful death or survival benefits. Should later proceeding in this case or any other case determine that Tiffanie Rutland did not consciously endure pain and suffering prior to her death, and/or modify the allocation or apportionment herein, such a finding and/or modification will have no effect on this approval of Petitioner's settlement with and

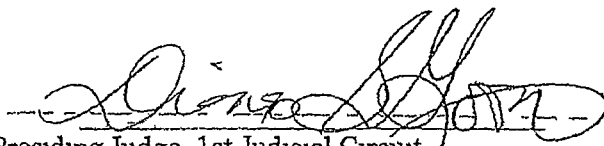
release of General Motors Corporation

Accordingly, it is

Ordered, Adjudged and Decreed that the settlement proposals set forth hereinabove, verified in the Petition and reviewed by the Court are approved, and that upon payment of the amounts described to the Court, the Petitioner, as Personal Representative, is hereby authorized and directed to execute such documents as will effect a complete, full and final release in favor of the Defendant General Motors Corporation, Defendant General Motors Corporation's insurance carriers, Defendant General Motors Corporation's agents, servants, and/or assigns from any and all claims or actions whatsoever arising out of the injury to and death of Tiffanie Rutland. Nothing herein shall be construed as a Release or authority to release in any manner Defendant South Carolina Department of Transportation nor shall any such action affect the claims of Petitioner against Defendant South Carolina Department of Transportation. All claims against General Motors Corporation are hereby dismissed with prejudice.

Nothing herein shall preclude by waiver or otherwise the right of SCDOT to argue against the allocation or apportionment of wrongful death and survival proceeds ^{or findings herein, to which SCDOT does not stipulate,} at the appropriate later time in the continuing litigation for purposes of setoff to which SCDOT may be entitled. Nothing herein shall preclude SCDOT and/or the Court from being informed when and under the appropriate circumstances of the settlement amounts, which have been disclosed to the Court at hearing to approve this settlement, and the appropriations and allocations set forth above, as well as attorney fees and costs or other information necessary for purposes of the issue of setoff. SCDOT will be allowed and is granted the right to raise any and all issues and grounds at the appropriate future time to litigate these issues to fully protect its rights concerning setoff and the allocation or apportionment to survival and wrongful death under common law, statutory and/or

equitable principles


Presiding Judge, 1st Judicial Circuit

Aug 7, 2007

Orangeburg, SC

STATE OF SOUTH CAROLINA)
COUNTY OF BAMBERG)

I, J Christopher Wilson, attorney for Plaintiff in the case of Clarence Rutland as Personal Representative for the Estate of Tiffanie Rutland v South Carolina Department of Transportation, Case No 06-CP-38-486 (Formerly 05-CP-38-0143) do hereby certify that I have served the foregoing Motion for Reconsideration and/or Alter and Amend Order, by mailing a copy U S mail, postage prepaid to the attorney(s) or person(s) at the address(es) indicated as follows

VIA FAX AND MAIL (803-245-5384)
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(803) 943-2111

Bamberg, S C

March 18, 2008

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIRST JUDICIAL CIRCUIT
COUNTY OF ORANGEBURG	)	2005 CP-38-0143
	)	
CLARENCE RUTLAND, AS	)	
PERSONAL REPRESENTATIVE	)	
FOR THE ESTATE OF	)	
TIFFANIE RUTLAND	)	
Plaintiff,	)	MEMORANDUM IN SUPPORT OF
v	)	PLAINTIFF'S MOTION TO RECONSIDER
	)	THE COURT'S ORDER OF
	)	FEBRUARY 28, 2008
SOUTH CAROLINA	)	
DEPARTMENT OF	)	
TRANSPORTATION	)	
Defendant	)	

This matter is before the Court on the Plaintiff's Motion to Reconsider the denial of its post-trial motions for new trial *nisi additur* and/or new trial absolute and the grant of Defendant's motion for set-off in the amount of \$300,000 00

Plaintiff's Post-Trial Motions

The verdict rendered in this matter by the jury is so grossly inadequate that the trial court must grant a new trial absolute. *O'Neal v Bowles* 314 S C 525, 431 S E 2d 555(1993). Plaintiff presented to the jury un-contradicted evidence of economic loss from Tiffanie Rutland's death in excess of \$447,000 00. Taking into account such economic loss, mostly which consisted not of lost earnings but loss of family services from Tiffanie Rutland, and the non-economic loss suffered by her death, the jury verdict is grossly inadequate. The testimony of Tina Bishop, Clarence Rutland, and Rhonda Sweatman, along with the photographs and other evidence entered show the loving, nurturing relationship between Tiffanie Rutland and her husband Clarence Rutland and son Joseph Rutland and the loss of companionship and services suffered by these statutory beneficiaries. In addition, several witnesses testified about the grief and sorrow experienced in the past and still today by Clarence Rutland and Joseph Rutland at the loss of Tiffanie.

In the event the Court determines that the verdict is merely inadequate, the Court has the power to grant a new trial *ni si additur* *Bailey v Peacock*, 318 S C 13, 455 S E 2d 690 (1955). The Court can base its decision to grant new trial *ni si additur* on its determination of the sufficiency of the verdict in light of the evidence presented *Krepps by Krepps v Ause* 324 S C 597 479 S E 2d 290 (Ct App 1996). In this matter and considering the evidence cited above, the Court should grant new trial *ni si additur* of \$300,000 00, bring the total jury verdict to \$600,000 00. Considering the economic loss exceeds \$447,000 00, a grant of *ni si additur* in this amount would be extremely reasonable and warranted.

Defendant's Post Trial Motion

The Plaintiff has also moved for reconsideration of this Court's order dated February 28, 2008 in which the Defendant was granted set off in the amount of \$300 000 00. For the reasons set forth below, the Plaintiff's motion should be granted and any set-off should be limited to \$167,000 00.

The Defendant's claim that the survival action that was settled between Plaintiff and General Motors was a sham is without merit. Defendant contends that the settlement was a sham because the survival action was never brought but merely used as a vehicle for settlement after the applicable statute of limitations had run. The Plaintiff had an unfiled, valid warranty claim against GM for the injuries resulting in his wife's death. Under S C Code Ann. Sec. 36-2-725, the statute of limitations for such an action is six years. Therefore, even if the Defendant had standing to assert such a defense, it is not a sham because the statute of limitations had not run.

The Defendant further contends that there is no evidence that Tiffanie Rutland endured any conscious pain and suffering prior to her death. At the hearing on August 9, 2007, The Honorable Dianne S. Goodstein approved the settlement between the Plaintiff and GM that provided for an allocation of \$137,500 00 to the survival action. At the request of Plaintiff's

counsel¹, Judge Goodstein made a specific finding that evidence existed to support a claim of survival.² Accordingly, there is an unappealed written Order making a factual finding that supports the claim that Tiffanie endured conscious pain and suffering prior to her death. Thus, Defendant's claim that the survival action was a sham is contrary to the findings of Judge Goodstein as well as the evidence in this case.

The case law cited by the Defendant does not support its position. The Defendant primarily relies upon *Welch v. Epstein*, 536 S.E.2d 408 (Ct. App. 2000). There the Court of Appeals upheld that the trial court's use of its equitable powers to reallocate settlement monies from a survival action to the wrongful death action, thereby reducing the amount owed by Epstein, because there was no evidence of conscious pain and suffering. The Court of Appeals responded to Welch's reliance on *Ward v. Epting*, 351 S.E.2d 867 (Ct. App. 1986) by stating

Ward is distinguishable. In *Ward*, prior to her arrest, there was some evidence that Ward was responding to directions while in the recovery room. Thus, a factual issue was presented as to conscious pain and suffering. The trial judge in *Ward* rejected the argument the pain and suffering cause of action was a sham.

Welch at 314, 426. Therefore, the clear inference in *Welch* is that there was not a factual finding to support a survival cause of action.

This case is more closely aligned with *Ward*. Here, Judge Goodstein specifically found that there was evidence from which a jury could find that Tiffanie suffered conscious pain and suffering prior to her death. In addition, the Plaintiff put forth more evidence at the hearing on May 6, 2008. The photographs of Tiffanie at the scene of the wreck indicate that her head had to go through a glass window in order for her to be partially ejected prior to her death. The deposition testimony of Clarence Rutland included evidence that after the vehicle came to final rest, Tiffanie still had a pulse. A jury considering this evidence could reasonably find that she suffered pain prior to her death. In addition, the trial testimony of Brenda Kittrell included her observation of the vehicle in which Tiffanie was a passenger while it was upside down in the air.

¹ See Transcript of Settlement Hearing, p 9, 11.

² See Order Approving Settlement, p 3.

A jury could reasonably find that Tiffanie experienced emotional trauma and mental suffering knowing that serious injury or death was imminent. The South Carolina Supreme Court has held that a plaintiff can recover for mental suffering without physical impact *Spaugh v Atlantic Coast Line R. Co*, 158 S C 25, 155 S E 145 (1930). Moreover, if a person suffers mental anguish in anticipation of an imminent injury and survives, the mental suffering is compensable. Therefore, [l]ogic dictates that if a wrongdoer maybe punished if his victim lives, then surely he should not escape retribution if his wrongful act causes death." *Leahy v Morgan*, 275 F Supp 426 (N D Iowa 1967).

The greatest burden for the Defendant to overcome in this case is the Order of Judge Goodstein. Judge Goodstein found evidence to support a survival action. Although she left open the opportunity for the Defendant to move for the very relief that it now seeks, she still made a finding of fact that is binding on this determination. This is a clear distinction between the present case and *Welch*. In *Welch*, there was no Order for the trial court to consider, only a settlement agreement three days before trial. *Welch* at 312, 425. Here, evidence was received at a hearing and a ruling was made by Judge Goodstein that was later reduced to a written, filed and unappealed Order. Accordingly, that Order is the law of the case and proves that the survival action was not a sham.

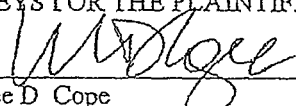
The Defendant's argument that *Welch* requires that there be trial testimony as to conscious pain and suffering to support a survival allocation is inaccurate. In *Welch*, the Court made a factual finding that the personal representative's claim that Welch was in considerable pain prior to the arrest, was directly related to the back surgery which was not an element of damages in the case. *Welch* at 313, 426. In fact, this issue highlights the main difference in the two cases. There was no Order in *Welch* and the Court there specifically found that no evidence existed as to conscious pain and suffering. Here, however, Judge Goodstein's Order includes a factual finding of evidence to support a finding of conscious pain and suffering. Thus, *Welch* is clearly distinguishable and Defendant's argument is without merit.

Conclusion

The evidence presented at trial warrants damages in excess of those awarded by the jury. The Court should grant the Plaintiff's motion for new trial or for *additur* and increase the damages award to no less than \$600,000.00.

In addition, the Court should grant Plaintiff's motion to reconsider its Order of February 28, 2008 regarding the set-off of \$300,000.00. As is set forth above, the set-off should be no more than \$167,000.00. The Defendant has admitted at trial that in order to set-off the entire amount of the jury verdict the Court must find that the survival action was a sham. The bases for this assertion are without merit. The Order of Judge Goodstein is the law of the case. Her Order establishes that the survival action was not a sham. Because there has been nothing presented that would undermine her unappealed Order, the relief sought by the Defendant should not be granted. Accordingly, the judgment in this case should be reduced to \$133,000.00 to reflect the proper set-off.

ATTORNEYS FOR THE PLAINTIFF



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And

J. Christopher Wilson
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May 12, 2008
Hampton, SC

STATE OF SOUTH CAROLINA)
)
COUNTY OF ORANGEBURG)

COURT OF COMMON PLEAS

Clarence Rutland, as Personal)
Representative of the Estate of)
Tiffanie Rutland,)
)
Plaintiff,)

DEFENDANT'S MEMORANDUM
IN OPPOSITION TO
PLAINTIFF'S MOTION FOR RECONSIDERATION

v)
)

South Carolina Department of)
Transportation,)
)
Defendants)
_____)

Civil Action No 2006-CP-38-0486

The plaintiff has asked this Court to reconsider and change its February 28, 2008, Order denying plaintiff's Motion for New Trial and granting Defendant's Motion for Setoff against the verdict of all settlement funds received by the plaintiff related to the injuries and death of Tiffanie Rutland, regardless of whether those funds were "allocated" by plaintiff to wrongful death or survival causes of action. The effect of the Court's Order was to reduce the verdict to zero, as the total sum received by the plaintiff from other parties exceeded the verdict in this matter.¹ The defendant urges the Court to deny the Motion for Reconsideration.

Setoff

In order to prevent double recovery, a defendant is entitled to credit against the verdict for the amounts paid in settlement by other defendants or tortfeasors. Since a verdict is deemed to be the full measure of the plaintiff's loss, a verdict plus a settlement would be a more than full recovery. Traditionally, the offset was only allowed where the cause of action settled and that

¹ The total funds received pretrial, in the amount of \$305,000.00, had been allocated by plaintiff as follows: \$137,500 and \$500 to survival, and \$137,500 and \$29,500 to wrongful death. The verdict was \$300,000.00.

tried to a verdict were one and the same *Hawkins, supra, Ward v Epting*, 290 S C 547, 351 S E 2d 867, 875 (Ct App 1986). Thus, a settlement of a survival claim would not be offset against a verdict for wrongful death. Now, however, it is recognized that where a settlement with one tortfeasor is allocated between the survival and wrongful death causes of action, the law permits post-trial reallocation of the funds by the trial Court for purposes of setoff determination.

In *Welch v Epstein*, 342 S C 279, 536 S E 2d 408 (Ct App 2000), the estate settled with the hospital three days prior to trial, for \$450,000, of which \$445,000 was allocated to survival, and \$5,000 was allocated to wrongful death. At trial, the jury awarded against a physician actual damages of \$28,535.88 for a survival action and \$3 million for wrongful death. The physician sought set-off, asking the trial court to reallocate the settlement to offset the entire survival verdict and apply the remainder of the settlement proceeds to the wrongful death verdict. The trial court granted the motion and the plaintiff appealed.

The Court of Appeals affirmed, reiterating the equitable origins of set-off. 536 S E 2d at 425, citing *Smalls v South Carolina Department of Education*, 339 S C 208, 528 S E 2d 682 (Ct App 2000). The Court stated set-off "is not necessarily founded upon any statute or fixed rule of court, but grows out of the inherent equitable jurisdiction of the court." *Id*, citing *Rookard v Atlanta & Charlotte Air Line Ry*, 89 S C 371, 71 S E 992 (1911). The Court found it significant that Dr. Epstein was not a party to the settlement, its negotiation, and its allocation, and was not bound by its terms, which, if applied, would greatly impact his interests.

The Court further noted there was no evidence presented at trial of any conscious pain and suffering, and, thus, distinguished *Ward v Epting*, 290 S C 547, 351 S E 2d 867 (Ct App 1986), holding "the allocation between survival and wrongful death claims must yield to fairness and justice." 536 S E 2d at 426. Rejecting the estate's argument that its trial strategy may have

even different had the hospital not settled, the Court of Appeals judged the pretrial settlement by the evidence presented later at trial against a different defendant, not by the suffering evidence in the possession of plaintiff's counsel. The Court of Appeals further rejected the estate's arguments concerning the differences between its two causes of action, citing *Ellis v. Oliver*, 335 S C 106, 515 S E 2d 268 (Ct App 1999), for its "one injury" treatment of survival and wrongful death for the purpose of determining the double recovery issue.

Similarly, SCDOT was not a party to Clarence Rutland's settlements with General Motors and the host driver, Bishop, and, at trial, Clarence Rutland presented no evidence of conscious pain and suffering. He testified he knew his wife was dead the moment he saw her immediately after the crash. He testified that he lost consciousness as the car entered its spin. No person testified that Tiffanie Rutland did not do likewise, nor that she was conscious as the car was leaving the road. The *Welch* decision impliedly holds *Ward v. Epting*, 290 S C 547, 351 S E 2d 867, 875 (Ct App 1986), would have applied to limit set-off to the same cause of action if there had been evidence at trial of conscious pain and suffering.

In approving the pretrial settlement between plaintiff and General Motors, the Court recognized SCDOT's right to later contest the allocation, providing in its August 9, 2007, Order, at page four, "Nothing herein shall preclude by waiver or otherwise the right of SCDOT to argue against the allocation or apportionment of wrongful death and survival proceeds or findings herein, to which SCDOT does not stipulate, at the appropriate later time in the continuing litigation for purposes of setoff to which SCDOT may be entitled." Reallocation will not work an avoidance of the Release of General Motors, as the Order provides, on page two, that "settlement and release of General Motors Corporation is unaffected by and not contingent upon the Court's approval or disapproval of Plaintiff's proposed allocation", and, on page three,

"Should later proceeding in this case or any other case determine that Tiffanie Rutland did not consciously endure pain and suffering prior to her death, and/or modify the allocation of apportionment herein, such a finding and/or modification will have no effect on this approval of Petitioner's settlement with and release of General Motors Corporation."

The Petition for Approval of the subject settlement states, at item 5, "The settlement is unaffected by and not contingent on the actual existence of a viable survival cause of action." Contrary to plaintiff's assertions to the Court at argument of this issue, there is no mention of a warranty cause of action. Rather, the warranty issue has been mentioned only in the setting of setoff. The defendant respectfully asserts that the plaintiff's settlement allocation to an admittedly questionable cause of action is a legal sham, which "must yield to fairness and justice." *Welch, supra*. The Court's Order setting off all plaintiff's settlements against the verdict should remain in effect and not be altered.

New Trial

Defendant asserts a new trial, whether absolute or *nisi additur*, would be inappropriate in this case, where the jury attentively received the testimony and evidence, and, as is their province as the trier of fact, weighed those matters and made a determination. Dr. Oliver Wood, presenting economic loss testimony, stated he based much of his calculation on assumptions that Mrs. Rutland would have continued to work to Social Security retirement age (which also assumes no earlier death or disability), would have accepted full-time employment (although she was working only part-time at her death), and would have received raises and promotions (despite her lack of post-high school education). Mrs. Rutland's husband and mother testified all she wanted was to be an at-home mother to her son, and she worked to make money but missed her child. The jury heard that Mrs. Rutland was offered full-time work, but had not yet accepted

e offer nor made a decision to accept it, when she died several days later. The jury heard testimony that Mrs. Rutland had few material desires and had the life she wanted. Thus, the jury may have determined that Mrs. Rutland's career aspirations were inconsistent with Dr. Wood's testimony. The plaintiff has provided the Court no reason to substitute its judgment and reasoning for that of the jury, nor any indication of any improper considerations by the jury.

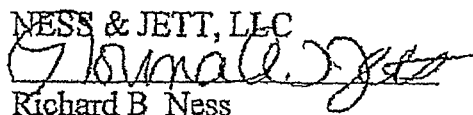
The Court should further consider that the South Carolina legislature has seen fit to enact §15-78-120, *Code of Laws of South Carolina*, which provides an actual damages cap in this action of \$300,000.00, regardless of the damages proven. If no other tortfeasor were available to pay a settlement to the plaintiff, this is the maximum amount the plaintiff would recover regardless of the jury's verdict. How, then, is the Court to find the jury's verdict of \$300,000.00 inadequate, when it is the maximum the plaintiff could recover? Additionally, while the statute does not state that the limit is the reasonable amount for a jury award in a wrongful death action, the defendant asserts the Court can consider that law as some indication of the appropriate award in this matter.

Defendant asserts the jury's verdict was reasonable, and was the maximum allowed for this action. No new trial should be granted.

Defendant requests the Court let stand its Order of February 28, 2008.

Respectfully submitted,

May 9, 2008
Bamberg, South Carolina

By 
NESS & JETT, LLC
Richard B. Ness
Norma A. T. Jett
Post Office Box 909
Bamberg, SC 29003
(803)245-5178
ATTORNEY FOR DEFENDANT

5

STATE OF SOUTH CAROLINA)
)
COUNTY OF ORANGEBURG)

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL CIRCUIT
2005-CP-38-0143

CLARENCE RUDD, AS PERSONAL)
REPRESENTATIVE FOR THE ESTATE)
OF TIFFANIE RUTLAND,)

PLAINTIFF,)

VS)

SOUTH CAROLINA DEPARTMENT OF)
TRANSPORTATION & GENERAL)
MOTORS CORPORATION,)

DEFENDANTS)

TRANSCRIPT OF RECORD

CLARENCE RUDD, AS PERSONAL)
REPRESENTATIVE FOR THE ESTATE)
OF TIFFANIE RUTLAND,)

PLAINTIFF,)

VS)

GENERAL MOTORS CORPORATION,)

DEFENDANT)

AUGUST 9, 2007
ORANGEBURG, SOUTH CAROLINA

B E F O R E

THE HONORABLE DIANE S GOODSTEIN, JUDGE

A P P E A R A N C E S

J CHRISTOPHER WILSON, ESQUIRE
ATTORNEY FOR THE PLAINTIFF

RICHARD B NESS, ESQUIRE
ATTORNEY FOR DEFENDANT SCDOT

THOMAS M KENNADAY, ESQUIRE
ATTORNEY FOR DEFENDANT GENERAL MOTORS

ELIZABETH B HARRIS, CVR
CIRCUIT COURT REPORTER

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<u>WITNESS/DESCRIPTION</u>	<u>PAGE NO</u>
SETTLEMENT AGREEMENT	4
STATEMENT BY MR NESS	11
CLARENCE RUTLAND	
EXAMINATION BY THE COURT	13
CERTIFICATE PAGE	19

E X H I B I T S

<u>NO</u>	<u>DESCRIPTION</u>	<u>I D</u>	<u>EV</u>
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NO EXHIBITS INTRODUCED

IN-CHAMBERS HEARING

THE COURT All right, we are on the record and I'm listening to you Please let Mr Rutland sit down Okay

MR WILSON Before we go on the record

(OFF THE RECORD)

THE COURT Here's what I'm going to do We will seal the portion of the record with the numbers in it when you tell me, talk to me about the numbers because what I think, for purposes of the record and the approval, I think they have to be on the record, or else I've got the file I think it's a better course of business if we announce them and that portion of the record is sealed because it will not be, it wouldn't be duplicated unless of course you all wanted it duplicated And that portion of it with regards to numbers would not be unsealed unless of course some judge ordered that it be unsealed I think that is a better course than filing the documents with the numbers in the documents

And having said that, of course I've already told you all I would not be inclined to approve the portion of the confidentiality agreement

MR KENNADAY And I think that we'd ask for you to order ---

THE COURT I will order you to tell us what the numbers are so he can use it for a setoff All right, do

1 you want me to do that now?

2 MR KENNADAY No, we can do that at any time He
3 hasn't gotten there yet

4 THE COURT All right

5 MR WILSON Chris Wilson from Bamberg County on
6 behalf of Clarence Rutland, who is the petitioner Mr
7 Rutland was appointed by probate court order by the Bamberg
8 County probate court back in 2004 for his deceased wife,
9 Tiffanie Rutland She died in an automobile wreck back in
10 June of 2003 on Highway 301 South in Orangeburg
11 Subsequent to that, we brought suit against the South
12 Carolina Department of Transportation and also against
13 General Motors Corporation The suit was initially against
14 the Department of Transportation, General Motors was later
15 added as a party defendant

16 The allegations against the DOT, for the court's
17 information, are that there was standing water on the
18 roadway, that they hit water, lost control, and thrown over
19 into a ditch There was an allegation of glazing, window
20 glazing defects against General Motors

21 Your Honor, the case was mediated some several months
22 ago with Judge Tommy Cooper acting as mediator We reached
23 a settlement with respect to the claims against General
24 Motors Corporation Did not reach any settlement with
25 respect to claims against Department of Transportation

1 Part of the terms of the settlement with General
2 - Motors Corporation, the terms of the settlement, that the
3 monies would be paid, the settlement is \$275,000 The
4 apportionment between wrongful death and survival claims,
5 Your Honor, was to be made by the plaintiff pursuant to the
6 terms of our settlement agreement We were to choose the
7 terms of the apportionment, and there was some
8 confidentiality provisions between the parties I think
9 they're pretty accurately set forth, the terms of the
10 agreement

11 We come before the court today to have this wrongful
12 death settlement and the settlement apportions being
13 allocated in the wrongful death and survival action
14 approved by the court And I would submit to the court
15 that present is myself, Mr Clarence Rutland as the
16 personal representative, Mr Tom Kennaday from Nelson
17 Mullins in Columbia represents General motors Mr Richard
18 Ness, who represents the South Carolina Department of
19 Transportation

20 Your Honor, the evidence and testimony in this case,
21 we took a number of depositions and a good bit of
22 discovery, a great deal of discovery This case has been
23 ongoing for some several years, and the testimony and the
24 evidence has produced a number of things There's some
25 dispute as to the allocation by the Department of

1 Transportation. There's some dispute about whether there
2 is the existence of a survival-cause of action

3 I will tell the court we filed a wrongful death action
4 against the Department of Transportation We later brought
5 General Motors in this, but no survival cause of action or
6 survival case brought against DOT or General Motors But
7 as a part of the settlement with General Motors, the
8 settlement required that we settle all claims pled, unpled
9 known, unknown, et cetera, et cetera, and including any
10 survival wrongful death claims We would submit to the
11 court that that is the settlement that's been arranged

12 We have agreed without -- with that objection from the
13 Department of Transportation Mr Ness, you know, put
14 forward their position, but we have agreed to allocate half
15 of the proceeds to the wrongful death, half of the proceeds
16 to the survival claims, so it would be 137,500 on each
17 The attorneys' fees were one-third The costs were set
18 forth in the petition of \$1600 and some change Those are
19 the numbers that are involved in the case

20 The testimony had established, Your Honor, that
21 Clarence and his wife, Effanie, and their son were
22 passengers in the rear seat of a Blazer, Chevy Blazer that
23 was headed to Orangeburg one evening back in June of 2003
24 And about the time they got about a mile south of the town
25 of Orangeburg, apparently on 301 North there was water

1 standing on the road Our allegation is that there had
2 been problems here before The DOT was aware that there
3 were problems with the roads, and the water came from a
4 number of different factors That made DOT liable

5 They hit the water The vehicle was thrown and
6 overturned when it was down in the ditch Ms Rutland was
7 ultimately killed in the wreck Testimony had established
8 that Mr Rutland was thrown out of the vehicle but ran to
9 the vehicle and when he arrived at the vehicle, saw his
10 wife in the ditch The vehicle flipped upside down

11 There was, there were a number of passerbys We would
12 submit to the court and if the court needs to see it, I'll
13 provide it to the court There was a, there was deposition
14 testimony There was a passerby, some type of, form of
15 hospital/EMS personnel He had scrubs on He was passing
16 by He jumped down in the ditch He told Mr Rutland --
17 Mr Rutland was trying to take the vehicle off, pick up the
18 vehicle The passerby told Mr Rutland don't touch her
19 Don't bother her She has a pulse Leave her there He
20 was ultimately pushed back from the vehicle and back up on
21 the road out of the ditch way, and ultimately she died

22 Your Honor, we would submit to the court there is
23 evidence of survival to support the allocation today and
24 the finding based on the evidence and the stipulation
25 between General Motors and Mr Rutland Two, that there is

1 evidence sufficient enough for today's purposes for a
2 survival action nor an allocation to be made of that.
3 We've already submitted to the court the allocation

4 I understand that Department of Transportation has
5 objections and is basically looking to preserve its right
6 to setoff, which we've already acknowledged the Department
7 of Transportation has. And at the appropriate time will be
8 able to raise an argument on all of those points, all of
9 those issues. Your honor, I don't know at this time that
10 the issue is ripe, number one, for Department of
11 Transportation to argue because there's been no judgment, I
12 guess, for them to be looking for setoff issues. I think
13 at the end of the day if we were to just run against the
14 Department of Transportation, they want to argue setoff,
15 they'd be able to argue the issues that pertain to setoff.
16 I don't know, number one, that it's ripe. And I don't
17 know, number two, that they have standing in the wrongful
18 death settlement between these two parties. There's
19 nothing that affects them directly or tangentially because
20 their right for setoff has been preserved. I don't know if
21 they have standing to argue. I know Mr. Ness wanted to put
22 some things on the record.

23 And we'd ask the court to approve the settlement.
24 We'd ask the court to approve the allocation and the fees
25 and costs, and I believe that would be it.

1 THE COURT Let me ask you this question or a couple
2 of questions. First of all, Mr Wilson, it is your
3 intention, is it not, that there would be no prejudice to
4 the Department of Transportation regarding the allocation
5 as it exists between Mr Rutland as a personal
6 representative and GM?

7 MR WILSON No, Your Honor And as I indicated to
8 the court before we got on the record, my understanding of
9 the case law is that they would be able to argue to the
10 trial judge at some point in time in future that the
11 allocation was not appropriate and needed to be adjusted
12 and get their appropriate setoff And I don't believe
13 anything they do today prejudices them with respect to
14 arguing against the allocation

15 THE COURT And along that same line, there is no
16 intention on behalf of the plaintiff to have the court
17 enter findings of fact regarding survival action or
18 survival matter and claim which is being settled and the
19 Department of Transportation?

20 MR WILSON Judge, I think you have to, in all
21 candor, I think you have to make the finding of fact

22 THE COURT But not vis-a-vis the Department of
23 Transportation

24 MR WILSON No, ma'am

25 THE COURT The finding of fact is a stipulation

1 between General Motors, GM and plaintiff

2 MR WILSON - We have stipulated that

3 THE COURT That while GM and plaintiff are
4 comfortable being bound by that finding of fact in the
5 settlement, as I understand it, it is not plaintiff's
6 position that the finding of fact applies to the Department
7 or is a finding on the DOT

8 MR WILSON Your Honor, Mr Ness has indicated that
9 he doesn't want to be bound by anything and he objects to
10 any finding, findings made today by the court today I
11 believe he would be able to argue the issues of setoff at
12 trial, whatever those issues might be That issue would be
13 the finding, the allocation, whatever the issues that he
14 needs to argue at setoff, what we've agreed is he's not
15 been precluded from arguing about

16 THE COURT It is my understanding that the finding of
17 fact regarding the survival claim is applicable, it's a
18 stipulation between GM and plaintiff and is binding as a
19 stipulation only between the two of you, plaintiff and GM

20 MR WILSON Correct We stipulate to the survival
21 and DOT has not

22 THE COURT Okay

23 MR KENNADAY That's correct, Your Honor That's
24 written in the order and the settlement agreement Any
25 later modification of the allocation or any later finding

1 of fact will have no affect on the settlement or your
2 approval of the settlement

3 THE COURT All right, and ---

4 MR WILSON Your Honor, if I could, we've stipulated
5 to that effect and ask the court to make that finding I
6 can talk to the court in general terms about what the
7 evidence and testimony would be I can put forward
8 anything into the record, but I don't feel it's necessary
9 at this time We'll put it in if we have to argue that
10 issue down the road

11 THE COURT Very well And, Mr Wilson, just for the
12 record, you have recommended this settlement to Mr
13 Rutland?

14 MR WILSON Yes, ma'am, I have, Your Honor, along
15 with Alex Murdaugh and Lee Cope down in Hampton represented
16 -- recommended the settlement to him

17 THE COURT Do you have anything along this line?

18 MR NESS Briefly to protect my client's position on
19 the record, I do not stipulate to any findings of fact the
20 court may make today I understand that plaintiff and GM
21 make a stipulation, but I want to make sure the DOT has
22 preserved its right to contest any and all issues with
23 regard to allocation at such time as it becomes necessary,
24 issues such as setoff under the principles of the Epstein
25 case, the *Ellis vs Oliver* case, and those equitable

1 principles that the court has I believe at the necessary
2 time, we can argue if we have to that the court should
3 reallocate those issues

4 It's only been a wrongful death action pled in this
5 case I believe the statute of limitations ran This
6 action happened in June of '03 This is now August of '07
7 and the petition issued now, this is double captioned with
8 a new case, with a survival case being filed before the
9 court today The wrongful death action is the only one
10 that has previously been pled For that reason and all of
11 the reasons of equitable principles, statutory and the
12 common law, I request that the court preserve all of my
13 rights to contest all issues as to the allocation at such
14 time as it becomes necessary against the DOT

15 MR KENNADAY And finally one thing for GM The
16 stipulation we're making today is for the settlement only
17 There's other ongoing litigation regarding other parties
18 I don't think this is going to have an affect on them, but
19 even if it did, the stipulation is only for today

20 Just out of candor, I think I need to tell the court
21 that while there is testimony that Mr Rutland was told she
22 was still alive, there's testimony from Mr Rutland he
23 didn't believe them Thought they were just trying to get
24 him out of the way, and so GM isn't stipulating for now and
25 forever in every case what the facts actually are We're

1 stipulating for the purposes of this settlement

2 MR WILSON Your Honor, just one thing so everything
3 is clear We have not filed a separate survival action
4 It's not on the order There's no other reference than the
5 case caption We pled it with the case number simply
6 because we were resolving not only wrongful death but
7 survival claims with respect to General Motors today

8 THE COURT Okay

9 MR WILSON I don't want that to come across as
10 misleading It's not intended We're just trying to
11 acknowledge what we are resolving

12 THE COURT All right, Mr Rutland, raise your right
13 hand

14 CLARENCE RUTLAND, BEING DULY
15 SWORN, TESTIFIES AS FOLLOWS
16 EXAMINATION BY THE COURT

17 Q Now, Mr Rutland, you have been appointed as the
18 personal representative of the estate of Tiffanie Rutland?

19 A Yes, ma'am

20 Q Tiffanie Rutland I gather was your bride?

21 A Yes, ma'am

22 Q You all have a child?

23 A Yes, ma'am

24 Q And do you understand, Mr Rutland, what has been
25 discussed here today?

1 A Yes, ma'am

2 Q And have you had an opportunity to discuss with Mr
3 Wilson and with Mr Murdaugh and the other folks of the
4 Murdaugh firm the settlement proposed with General Motors?

5 A Yes, ma'am

6 Q And do you have any questions either of Mr Wilson or
7 of me about the settlement?

8 A No, ma'am

9 Q Do you understand that there are some issues which
10 will be resolved against GM?

11 A No, ma'am

12 Q I should say with GM that will not be applicable with
13 regards to the DOT in this litigation?

14 A Yes, ma'am

15 Q And you're also just fine with that?

16 A Yes, ma'am

17 Q And do you believe that this settlement is an
18 appropriate settlement for the estate of your late wife?
19 In other words, do you think this is appropriate, and I
20 have confused you Let me try again Do you believe as
21 the personal representative -- you have many, many hats in
22 all of this, but as the representative of Ms Rutland's
23 estate, do you believe that this settlement is in the best
24 interest of the estate under all the circumstances?

25 A Under all of them?

1 MR WILSON I think he's confused You think it's a
2 resolution as to the DOT?

3 Q No, not -- no, no, just GM Just GM

4 MR WILSON I think he's thinking all defendants

5 A No, no, no I'm not

6 Q I'm just asking with regard to the GM settlement, just
7 isolate I know there have even been some issues regarding
8 DOT, but just focus on the GM settlement

9 A Okay

10 Q And as to just GM, do you believe that the settlement
11 that is proposed against GM only is in the best interest of
12 the estate?

13 A Yes, ma'am

14 Q In other words, I know that there are other -- the
15 journey is not ended at this point

16 A Yes, ma'am

17 Q But only as to GM because that's all that's before me

18 A Yes, ma'am

19 Q Okay, very well There is a fee that is requested
20 Do you have any concerns about the requested amount of fee?

21 A No, ma'am

22 Q The expenses, I understand, are about \$1600 Do you
23 have any concerns, particular concerns about that amount of
24 expenses?

25 A No, ma'am

1 Q I will share with you that typically fees won't go up
2 to what they used to Used to a long time ago go up to
3 forty percent when actions were brought So, I know a
4 third is certainly reasonable And believe me, believe
5 that a third is reasonable and expenses to this point,
6 point in the litigation \$1600 is very reasonable

7 A Yes, ma'am

8 Q As far as I can tell Very well Of course, the
9 beneficiaries of Ms Rutland's estate of course are you and
10 your child, and you believe that is in the best interest of
11 your son, this settlement against GM?

12 A I think it's in the best, best interest?

13 Q The settlement with GM is in the best interest of the
14 beneficiaries of the estate, you and your son?

15 A Yes, ma'am

16 Q And finally, have I prompted any questions that you
17 would like me to attempt to answer or Mr Wilson?

18 A No, ma'am

19 THE COURT Anything further from anyone?

20 MR NESS No, ma'am

21 THE COURT I think the settlement is fair I know
22 all of us express sadness that he finds himself here so
23 obviously so young and it's just heartbreaking clearly
24 But under the circumstances that certainly have been
25 presented to me, I think it's fair and reasonable I think

1 the expenses are ---

2 MR. WILSON Judge, we were lucky enough to be able to
3 ---

4 THE COURT --- remarkable

5 MR WILSON --- talk to GM before we got too far into
6 discovery Had some experience with them, they had some
7 experience with us, and we were able to keep costs down
8 Still, it was a lot of work, but the costs were down

9 THE COURT I understand All right, now, you have
10 looked at this, Mr Ness, and you are satisfied that
11 language in the order does what you request, and that's
12 simply that the Department of Transportation be protected
13 to the extent from any findings that can affect the
14 allocation and protect it as to Department of
15 Transportation's ability in the future if necessary to
16 litigate the issue of allocation?

17 MR NESS Yes, yes With the proposed order as well
18 as what's on the record here, I feel like the DOT is
19 protected

20 THE COURT Okay, and you all are asking that the
21 portion of the record as it regards just the numbers be
22 sealed, that they be sealed but not the remaining part,
23 right?

24 MR KENNADAY Yes, Your Honor

25 THE COURT All right, thank you

1 MR WILSON That's correct

2 THE COURT Of course I'm not approving the
3 confidentiality part That would not become a part of the
4 court's order, but would of course be subjected to the
5 principles of contract law

6 MR NESS Your Honor, I have ordered a copy of the
7 transcript We would ask the court would direct the court
8 reporter to provide me a copy which I will keep
9 confidential

10 THE COURT All right, you want one as it exists You
11 don't want one as it exists? You don't want one as it
12 exists?

13 MR WILSON I don't need one

14 MR KENNADAY I don't need one Just Mr Ness No
15 objection to Mr Ness having the numbers We're obligated
16 to give them to him if you tell us to for the settlement

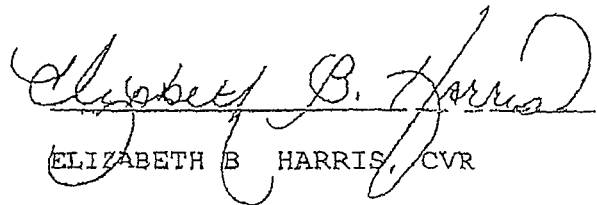
17 THE COURT Very well

18 --- END OF TRANSCRIPT OF RECORD ---

CERTIFICATE

I, THE UNDERSIGNED ELIZABETH B HARRIS, CERTIFIED
VERBATIM OFFICIAL COURT REPORTER FOR THE FIFTH
JUDICIAL CIRCUIT OF THE STATE OF SOUTH CAROLINA, DO
HEREBY CERTIFY THAT THE FOREGOING IS A TRUE, ACCURATE
AND COMPLETE TRANSCRIPT OF RECORD OF ALL THE
PROCEEDINGS HAD AND EVIDENCE INTRODUCED IN THE HEARING
OF THE CAPTIONED CAUSE, RELATIVE TO APPEAL, IN THE
CIRCUIT COURT FOR ORANGEBURG COUNTY, SOUTH CAROLINA,
ON THE 9TH DAY OF AUGUST, 2007

I DO FURTHER CERTIFY THAT I AM NEITHER OF KIN,
COUNSEL, NOR INTEREST IN ANY PARTY HERETO


ELIZABETH B HARRIS, CVR

COLUMBIA, SOUTH CAROLINA

OCTOBER 22ND, 2007

STATE OF SOUTH CAROLINA)
COUNTY OF ORANGEBURG)

IN THE CIRCUIT COURT
OF THE FIRST JUDICIAL CIRCUIT
2006-CP-38-486

CLARENCE RUTLAND, P R FOR)
THE ESTATE OF TIFFANIE RUTLAND,)

PLAINTIFF,)

POST-TRIAL HEARING

vs)

SOUTH CAROLINA DEPARTMENT)
OF TRANSPORTATION,)

DEFENDANT)

MAY 6, 2008
ORANGEBURG, SOUTH CAROLINA

BEFORE THE HONORABLE GEORGE C JAMES, JUNIOR

APPEARANCES

FOR THE PLAINTIFF

LEE D COPE, ESQUIRE
POST OFFICE BOX 457
HAMPTON, SOUTH CAROLINA 29924-0457

J CHRISTOPHER WILSON, ESQUIRE
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BAMBERG, SC 29003

FOR THE DEFENSE

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BAMBERG, SOUTH CAROLINA 29003

JO RICE
CIRCUIT COURT REPORTER

1 THE COURT ALL RIGHT WE HAVE A MOTION OR MOTIONS IN THE CASE
2 OF RUTLAND VERSUS THE SOUTH CAROLINA DEPARTMENT OF
3 TRANSPORTATION THIS WAS A CASE THAT WAS TRIED I WANT TO SAY BACK
4 IN MARCH IS THAT RIGHT?

5 MR COPE THIS WAS JANUARY, LATE JANUARY, YOUR HONOR

6 THE COURT JANUARY TIME FLIES WE HAVE A MOTION FOR
7 RECONSIDERATION FROM THE PLAINTIFF AND A MOTION FOR SET-OFF FROM
8 THE DEFENDANT WHICH MOTION DO YOU THINK IT WOULD BE BEST TO HEAR
9 FIRST? PROBABLY YOUR MOTION FOR A NEW TRIAL OR RECONSIDERATION?

10 MR COPE YOUR HONOR, THAT'S RIGHT AND BASED ON OUR
11 CONVERSATION PRIOR TO THE HEARING, I THINK WE ARE JUST GOING TO
12 RELY ON THE MEMORANDUM THAT WE'VE ALREADY SUBMITTED, THE
13 MOTIONS THAT WE FILED AND ALL FOR THE SAME REASONS WE DON'T
14 BELIEVE THEY'VE CHANGED

15 THE COURT ALL RIGHT

16 MR COPE WE WOULD ASK THAT THE COURT CONSIDER THAT

17 THE COURT ALL RIGHT ANYTHING ELSE, MISTER WILSON, ON THAT?

18 MR WILSON NO SIR

19 THE COURT ALL RIGHT MISTER NESS, MISS JETT WHO IS GOING TO
20 ARGUE THE SET-OFF MOTION?

21 MS JETT YOUR HONOR, JUST FOR THE RECORD ON THE NEW TRIAL
22 MOTION, WE DID WANT TO SPEAK TO THAT FIRST AND THEN MISTER NESS
23 WILL BE SPEAKING TO THE RECONSIDERATION ON THE SET-OFF

24 THE COURT ALL RIGHT

25 MS JETT YOUR HONOR, ON THE NEW TRIAL, THE JURY CERTAINLY DID

1 HEAR THE TESTIMONY OF DOCTOR WOODS CONCERNING THE ECONOMIC
2 LOSSES TO THE FAMILY, BUT THEY ALSO HEARD HIM TESTIFY THAT ALL OF
3 HIS CONCLUSIONS WERE BASED ON CERTAIN ASSUMPTIONS, WHICH YOUR
4 HONOR BROUGHT OUT IN THE ORDER AND THAT IS THE ASSUMPTION SHE
5 WOULD CONTINUE TO WORK, THAT SHE WOULD APPLY FOR AND ACCEPT
6 FULL-TIME WORK THAT SHE WOULD GET RAISES AND PROMOTIONS YOUR
7 HONOR BUT THEY ALSO HEARD THE TESTIMONY FROM MISTER RUTLAND
8 FROM MS RUTLAND'S MOTHER, RHONDA SWEATMAN AND FROM THE ECKERD
9 MANAGER, WHO'S NAME ESCAPES ME AT THE MOMENT, BUT SHE HAD NOT,
10 TIFFANY RUTLAND HAD NOT APPLIED FOR NOR ACCEPTED FULL-TIME WORK
11 THAT SHE WANTED MOST IN HER LIFE TO BE A STAY-AT-HOME MOTHER AND
12 THAT SHE HAD NOT MADE A DECISION ON AN OFFER THAT HAD BEEN GIVEN
13 TO HER ABOUT FULL-TIME WORK AND IN FACT, THAT OFFER HAD BEEN ON
14 THE TABLE SEVERAL DAYS AND SHE HAD NOT MADE THE DECISION ON THAT
15 OFFER AND SO, IT IS NOT OBVIOUS TO THE JURY THAT SHE WOULD HAVE
16 LEAPED AT THE CHANCE TO WORK FULL-TIME FOR GREATER PAY THEY
17 ALSO HEARD SHE ONLY HAD A HIGH SCHOOL DIPLOMA AND THEY HEARD
18 LITTLE OR NO TESTIMONY ABOUT THE EMOTIONAL IMPACT ON THE INFANT IN
19 THIS CASE YOUR HONOR, THE JURY CERTAINLY HAD THE WHEREWITHAL TO
20 MAKE THE DECISION ON THE ECONOMIC LOSS AND ON THE EMOTIONAL
21 DAMAGES ON A TOTAL DAMAGES FIGURE THE CASE LAW IS CLEAR, YOUR
22 HONOR, THAT ONLY WHEN THAT VERDICT SHOCKS THE CONSCIENCE,
23 BECAUSE IT IS SO DISPROPORTIONATE TO THE HARM, THAT IT INDICATES
24 PASSION, CAPRICE OR PREJUDICE SHOULD YOUR HONOR OVERTURN THAT
25 VERDICT

1 THE COURT Y'ALL MADE A N/SI MOTION, TOO THOUGH RIGHT?

2 MR WILSON WE DID, YOUR HONOR

3 THE COURT ALL RIGHT SO, THE N/SI IS A SLIGHTLY LOWER
4 THRESHOLD

5 MS JETT YES, YOUR HONOR BUT IT IS —

6 THE COURT I'VE READ AND A MATTER OF FACT, THE POINTS YOU
7 MADE ARE SOME OF THE POINTS I MADE IN MY ORDER AND MISTER WILSON
8 IF YOU WANT TO RESPOND TO THAT, YOU CAN

9 MR WILSON YOUR HONOR, IF I COULD JUST VERY BRIEFLY YOUR
10 HONOR, WE MADE THE MOTION FOR A NEW TRIAL ABSOLUTE AND ALSO FOR
11 N/SI, AND OF COURSE, AS THE COURT KNOWS THE STANDARDS ARE
12 DIFFERENT WITH RESPECT TO THE ECONOMIC ARGUMENT THAT MS JETT
13 HAS MADE, AND I HAVE A COPY OF THE CHARTS THAT WERE DISCUSSED
14 WITH THE JURY BY DOCTOR WOODS FOR THE COURT AND ALL OF HIS
15 TESTIMONY AND EVIDENCE THAT WENT IN BEFORE THE JURY

16 (MISTER WILSON HANDS DOCUMENTS TO THE JUDGE)

17 MR WILSON YOUR HONOR, THE POINT WAS MADE THAT MISS
18 RUTLAND WAS WORKING AT THAT TIME AND THERE WAS AN ISSUE ABOUT
19 WHETHER SHE WAS GOING TO ACCEPT A PROMOTION AND A FULL-TIME JOB
20 OR NOT THE TESTIMONY BEFORE THE JURY WAS THAT IF SHE DID NOT
21 THEN DOCTOR WOOD'S NUMBERS WOULD HAVE TO BE REDUCED SOMEWHAT
22 BECAUSE HER EARNINGS WOULD BE LESS AND THE TESTIMONY WAS THAT
23 SHE MOST LIKELY WAS GOING TO ACCEPT THE FULL-TIME JOB AND
24 PROMOTION TERRY WILLIAMS INDICATED THAT SHE HAD TOLD HIM SHE
25 WOULD, HE WAS THE MANGER AT ECKERD'S HER HUSBAND, CLARENCE

1 RUTLAND, INDICATED THAT SHE DID WHAT IT TOOK TO PROVIDE FOR THE
2 FAMILY AND THE INDICATION THAT SHE WAS MOST PROBABLY GOING TO
3 TAKE THE FULL-TIME POSITION AND THE PROMOTION AND DOCTOR WOOD'S
4 NUMBERS WERE BASED ON THAT EVEN IF THE JURY HADN'T BELIEVED THAT
5 TESTIMONY AND FOUND THAT TESTIMONY CREDIBLE, MISTER NESS' CROSS
6 EXAMINATION OF DOCTOR WOODS WAS, "WELL, IF SHE DIDN'T DO THAT, HOW
7 WOULD YOUR NUMBERS CHANGE?" AND HIS ANSWER WAS THAT HIS
8 NUMBERS WOULD HAVE TO BE REDUCED APPROXIMATELY IN HALF BECAUSE
9 OF THAT BUT, YOUR HONOR, THE TELLING POINT IN THAT EQUATION IS THAT
10 YOU WOULD NOT REDUCE DOCTOR WOOD'S NUMBERS FOR LOSS OF FAMILY
11 SERVICES, YOU WOULD REDUCE HIS NUMBERS FOR LOSS OF EARNINGS,
12 FUTURE EARNINGS AND IF YOU LOOK AT THE CHARTS THERE, YOUR HONOR
13 THE TESTIMONY BEFORE THE JURY THAT THE PRE-TRIAL ECONOMIC
14 EARNINGS LOSS WAS \$27,519 00 IF YOU CUT THAT FIGURE IN HALF THE
15 POST-TRIAL ECONOMIC EARNINGS LOSS WAS \$172,373 00, IF YOU CUT THAT
16 FIGURE IN HALF BUT YOUR HONOR, THE LOSS OF FAMILY SERVICES
17 PRE-TRIAL WAS \$52,080 00 AND THE PRE-TRIAL, EXCUSE ME, THE POST-TRIAL
18 LOSS OF FAMILY SERVICES WAS \$295 294 00 AND THOSE NUMBERS BEARED
19 OUT IN DOCTOR WOOD'S TESTIMONY AND ON THOSE CHARTS YOUR HONOR,
20 IF YOU DO THAT, YOU STILL COME UP WITH IN EXCESS OF \$440,000 00 OF
21 ECONOMIC LOSS THAT'S NOT TAKING INTO ACCOUNT THE TESTIMONY
22 ABOUT THE CLOSENESS OF THIS FAMILY, THE LOVING, NURTURING
23 RELATIONSHIP THAT THIS MOTHER HAD WITH THE CHILD AND WITH HER
24 HUSBAND, THE HOMEMAKER RESPONSIBILITIES THAT SHE PERFORMED THAT
25 HER MOTHER TESTIFIED TO, THAT OLIVER WOOD TESTIFIED TO AND THINGS

1 THAT SHE PROVIDED FOR THIS FAMILY THE GRIEF, THE SORROW, THE LOSS
2 OF COMPANIONSHIP THAT MISTER RUTLAND TESTIFIED TO WAS CLEAR FROM
3 HIS TESTIMONY ON THE STAND AND THAT OF THE CHILD'S LOSS WITH ALL
4 THE PHOTOGRAPHS AND EVIDENCE THAT WAS ENTERED BUT YOUR HONOR,
5 THE TELLING POINT IS THE ECONOMIC LOSS, EVEN DISCOUNTING IT DOWN
6 LIKE THE DEFENDANT ARGUED TO THE JURY THAT IT SHOULD BE CUT
7 BECAUSE SHE HAD NOT TAKEN THAT FULL-TIME POSITION, WAS IN EXCESS
8 OF \$440,000 00 BEFORE YOU EVEN GET TO THE ISSUES OF THE OTHER
9 ELEMENTS OF DAMAGES

10 THE COURT IF THAT'S THE LEGAL QUESTION THAT I HAVE TO DECIDE,
11 THEN WHY IN EVERY CASE SUCH AS THIS WHERE DOCTOR WOOD TESTIFIES
12 OR A VOC REHAB EXPERT TESTIFIES AND THE NUMBERS, ACCORDING TO THE
13 PLAINTIFF, HAVE GOT TO BE A CERTAIN LEVEL, HOW COME THERE'S NEVER A
14 FINDING AS A MATTER OF LAW AT THE TRIAL LEVEL THAT, AND INSTRUCTED
15 TO THE JURY, THAT YOUR AWARD HAS TO BE NO LOWER THAN "X" DOLLARS?
16 I MEAN, YOU THINK IT SHOULD GO THAT FAR?

17 MR WILSON WELL YOUR HONOR THAT'S NOT THE WAY THAT THE
18 CASE WAS PRESENTED AND THAT'S NOT THE WAY THAT THE DEFENDANT
19 ARGUED THE CASE TO THE JURY THE DEFENDANT ARGUED THE CASE TO
20 THE JURY THAT NOBODY SAID THIS GIRL YOU CAN'T FIND THAT SHE WAS
21 GOING TO TAKE THE FULL-TIME JOB AND THE PROMOTION AND —

22 THE COURT AND THE JURY COULD HAVE FOUND THAT, OR FOUND
23 THAT IT WAS SPECULATIVE OR FOUND THAT IT WAS FACT IN THEIR MIND,
24 THAT SHE WAS GOING TO WORK ANY MORE AFTER FIVE YEARS IN OTHER
25 WORDS ONE OF MY CHARGES TO THE JURY IS THAT THEY ARE TO SEEK THE

1 TRUTH AND THEY ARE TO USE THEIR COMMON SENSE AND LOGIC AND
2 ARRIVE AT A DAMAGES FIGURE, IF ANY, THAT'S FAIR AND REASONABLE AND
3 SPEAKS THE TRUTH

4 MR WILSON AND I DON'T DISPUTE THE FACT THAT THAT WAS IN THE
5 JURY'S PROVIDENCE TO FIND, YOUR HONOR

6 THE COURT I'LL LOOK AT WHAT Y'ALL HAVE AND I'M NOT ENTIRELY
7 CONFIDENT THAT MY RULING WILL BE ANY DIFFERENT, BUT I'LL TAKE A LOOK,
8 I'LL RE-READ AGAIN YOUR MOTIONS AND YOUR INITIAL PRESENTATIONS ON
9 THAT POINT YES, MA'AM

10 MS JETT YOUR HONOR, IF I MAY, I HAVE ONE LAST THOUGHT

11 THE COURT ALL RIGHT

12 MS JETT \$300 00 00 IS APPARENTLY AND STATUTORILY REASONABLE
13 FOR THE DEATH OF ANY PERSON UNDER THE SOUTH CAROLINA TORT CLAIMS
14 ACT, BECAUSE THAT IS THE VALUE THAT IS PUT AS A "NOT TO EXCEED "

15 THE COURT SOME WOULD DISAGREE WITH THAT

16 MS JETT BUT THE LEGISLATURE HAS DEEMED IT REASONABLE AND I
17 THINK THAT IS SOME INFORMATION WHICH THE COURT MUST CONSIDER IN
18 DETERMINING WHETHER THE FIGURE RETURNED BY THIS JURY IS SO
19 SHOCKINGLY LOW THAT —

20 THE COURT I UNDERSTAND

21 MS JETT --- IT REQUIRES A REVERSAL

22 THE COURT ALL RIGHT MISTER NESS, YOU ARE GOING TO ARGUE
23 THE SET-OFF?

24 MR NESS YES, SIR, YOUR HONOR

25 THE COURT OKAY

1 **MR NESS** YOUR HONOR, AS I START I'D LIKE TO HAND UP THE
2 ORIGINAL TRANSCRIPT FROM THE SETTLEMENT APPROVAL HEARING
3 BETWEEN THE PLAINTIFF IN THIS CASE AND GÉNÉRAL MÔTORS
4 CORPORATION AS WELL AS A COPY OF THE WELCH VERSUS EPSTEIN CASE
5 AND SMALLS VERSUS THE SOUTH CAROLINA DEPARTMENT OF EDUCATION
6 CASE JUST FOR THE COURT'S BENEFIT

7 (MISTER NESS HANDS DOCUMENTS TO THE JUDGE)

8 **MR NESS** THAT'S THE ORIGINAL TRANSCRIPT THAT I RECEIVED FROM
9 THE COURT REPORTER

10 **THE COURT** LET ME SEE IF I CAN BACK UP HERE I KNOW THAT THERE
11 IS SOME CONFIDENTIALITY ASPECTS OF SOME PRELIMINARY AGREEMENTS
12 BETWEEN THE PLAINTIFF AND THE ENTITY THAT IS NOT A PARTY HERE AND I
13 THINK IT WAS A HOST DRIVER TOO IS THAT RIGHT MISTER COPE? HOST
14 DRIVER AND A THIRD PARTY? WASN'T THE HOST DRIVER AND A THIRD PARTY
15 PAID SOME AMOUNTS IN SETTLEMENT THAT ARE CONFIDENTIAL AND, I'M NOT
16 GOING TO STEAL YOUR THUNDER, MISTER NESS, BUT WHAT YOU ARE SAYING
17 IS THAT THE AMOUNT OF THIS VERDICT, \$300 000 00 WHICH WAS ALL FOR
18 WRONGFUL DEATH BECAUSE THAT WAS THE ONLY CAUSE OF ACTION
19 SUBMITTED TO THE JURY THE VAST MAJORITY IF NOT ALL OF THE AMOUNTS
20 PAID BY THE OTHER PARTIES, SHOULD BE APPLIED AS AN OFF-SET AGAINST
21 THE VERDICT THIS JURY RETURNED IS THAT WHAT YOUR ARGUMENT IS?

22 **MR NESS** THAT'S CORRECT YOUR HONOR AN INJURED PARTY IS
23 ENTITLED TO ONE TOTAL DAMAGES AWARD

24 **THE COURT** AND JUDGE GOODSTEIN'S APPROVAL OF A SETTLEMENT
25 THAT BLESSED SETTLEMENTS PAID BY THESE THIRD PARTIES AND THOSE

1 ALLEGATIONS SHOULD NOT BE BINDING ON YOU AND YOU THINK THAT THOSE
2 ALLOCATIONS UNDER THE FACTS OF THIS CASE WERE A SHAM, AND I USE
3 THAT WORD AS A LEGAL TERM, NOT AS A TERM TO CASTIGATE THE
4 PLAINTIFFS YOU ARE SAYING IT IS A LEGAL SHAM

5 MR NESS YES, SIR THAT'S CORRECT AND THAT THE COURT, WITHIN
6 ITS EQUITABLE JURISDICTION AS SET FORTH IN THE EPSTEIN CASE, THAT'S
7 THE MATTER BEFORE YOU TO EXERCISE YOUR EQUITABLE JURISDICTION
8 AND OFF-SET THE AMOUNTS OF THE OTHER SETTLEMENT AGAINST THE
9 VERDICT AGAINST DOT

10 THE COURT AND MISTER COPE, I GUESS THIS WOULD BE A ONE-WORD
11 ANSWER TO THIS QUESTION, YES OR NO DO I HAVE EQUITABLE POWER, IN
12 THEORY, TO DO THIS AND IT HAS TO BE JUST APPLIED TO THE FACTS AS I
13 SEE THE FACTS TO BE?

14 MR COPE THAT'S MY UNDERSTANDING YES, YOUR HONOR YOU
15 HAVE THE INHERENT POWER TO RE-ALLOCATE PREVIOUS SETTLEMENTS

16 THE COURT ALL RIGHT, MISTER NESS, YOU CAN GO AHEAD

17 MR NESS THANK YOU, YOUR HONOR YOUR HONOR, I ALSO WANT TO
18 BRING THE COURT'S ATTENTION, WITHOUT MENTIONING ANY AMOUNTS, THAT
19 THE APPROVAL BY JUDGE GOODSTEIN WAS ONLY AS TO THE
20 MANUFACTURER THERE WAS ALSO AN APPROVAL IN PROBATE COURT IN
21 BAMBERG COUNTY OF A SETTLEMENT AGAINST THE HOST DRIVER

22 THE COURT OKAY

23 MR NESS AND IF THE COURT NEEDS THAT, I HAVE - ALTHOUGH IT'S
24 HIGHLIGHTED BY MY HIGHLIGHTER, I ONLY HAVE ONE COPY, BUT I CAN HAND
25 IT UP AND GET A CERTIFIED TRUE COPY THROUGH THE BAMBERG PROBATE

1 COURT

2 THE COURT YOU CAN JUST E-MAIL ME THE FIGURES OR I CAN TAKE

3 THOSE DOWN BEFORE WE LEAVE HERE TODAY I DON'T THEY DISPUTE THE

4 ALLOCATIONS

5 MR NESS OKAY

6 THE COURT I'LL TAKE NOTICE OF WHATEVER THE PROBATE COURT

7 JUDGE APPROVED AS BEING THE NUMBERS NOT NECESSARY APPROVE THE

8 ALLOCATION BUT I'LL TAKE NOTE OF WHAT THE PROBATE JUDGE

9 ALLOCATED

10 MR NESS OKAY AND I WOULD LIKE LEAVE TO SUBMIT A CLEAN COPY

11 TO PUT IN THE FILE JUST FOR ANY FURTHER PURPOSES DOWN THE ROAD

12 THE COURT THAT'S FINE

13 MR NESS OKAY YOUR HONOR, IN THIS CASE, AS YOU KNOW, THERE

14 WERE TWO DIFFERENT COURT HEARINGS WHERE SETTLEMENTS WERE

15 APPROVED WE TAKE THE POSITION AND IF YOU LOOK AT THE TRANSCRIPT

16 FROM JUDGE GOODSTEIN, THE APPORTIONMENT WAS TO BE MADE BY THE

17 PLAINTIFF PURSUANT TO THE TERMS OF A SETTLEMENT WITH THE

18 MANUFACTURING ENTITY IN THIS CASE

19 THE COURT RIGHT

20 MR NESS MISTER WILSON WAS QUOTED AS SAYING, "IF WE WERE TO

21 CHOOSE THE TERMS OF THE APPORTIONMENT" -- THE PETITION FOR THE

22 APPROVAL THAT WAS SUBMITTED TO JUDGE GOODSTEIN, IS DOUBLE

23 CAPTIONED -- IT SHOULD BE A MATTER OF RECORD IF YOU'VE GOT THE FILE

24 I'M NOT SURE IF THEY'VE PROVIDED YOU WITH THE FILE OR NOT

25 THE COURT I'VE READ IT, BUT I DON'T HAVE THE FILE WITH ME RIGHT

1 NOW

2 MR COPE I HAVE A COPY OF THE ORDER

3 MR NESS THE CAPTION OF THE ORDER AND THE PETITION CAPTION
4 ARE SOMEWHAT DIFFERENT

5 THE COURT OKAY

6 MR NESS I DON'T KNOW HOW MUCH BEARING IT MAKES

7 (MISTER NESS HANDS DOCUMENT TO THE JUDGE)

8 MR NESS I'LL HAND THE PETITION FOR APPROVAL UP TO THE COURT

9 THE COURT IS THIS MY COPY OR DO YOU NEED TO SEND ME ANOTHER
10 COPY?

11 MR NESS I CAN GET ANOTHER COPY YOUR HONOR

12 THE COURT ALL RIGHT I'M FAMILIAR WITH ALL THE PROVISIONS OF
13 THE PETITION AND THE ORDER I GUESS WHAT I NEED TO HEAR IS WHY YOU
14 THINK IT'S NOT THE APPROPRIATE WAY TO GO FOR THIS TRIAL OF THIS CASE
15 AND THIS VERDICT

16 MR NESS YOUR HONOR AS I UNDERSTAND IT THE CASE LAW IN THIS
17 STATE -- AND MY FIRM WAS INVOLVED IN THE WELCH VERSUS EPSTEIN CASE,
18 AND ON THE LOSING END OF THE WELCH VERSUS EPSTEIN CASE DOCTOR
19 EPSTEIN WAS NOT A PARTY TO THE SETTLEMENT BETWEEN WELCH, THE
20 PLAINTIFF, AND AIKEN HOSPITAL, THE DEFENDANT THAT CASE WAS
21 SETTLED BEFORE THE TRIAL EPSTEIN WAS NOT A PARTY IN THIS CASE
22 BEFORE YOU HONOR TODAY, DOT WAS NOT A PARTY TO THE SETTLEMENT
23 BETWEEN THE PLAINTIFF AND GENERAL MOTORS AND SO THE CASES ARE
24 VERY SIMILAR THE CASE WENT TO TRIAL WITH THE LAWYER FOR DOCTOR
25 EPSTEIN INDICATING THAT HE WOULD LIKE TO RESERVE THE RIGHT TO BE

1 ABLE TO CONTEST THE ALLOCATION IF THAT WAS NECESSARY DOWN THE
2 ROAD WELL, IT BECAME NECESSARY BECAUSE OF THE VERDICT IN THE
3 EPSTEIN CASE AND JUDGE KEESLEY HEARD THE HEARING JUST AS YOU ARE
4 HEARING THE HEARING TODAY, ON THE REQUEST FOR RE-ALLOCATION
5 JUDGE KEESLEY DECIDED THAT IT WAS WITHIN THE COURT'S INHERENT
6 JURISDICTION TO RE-ALLOCATE IF THE ALLOCATION WAS A LEGAL SHAM IN
7 THIS CASE WE SUBMIT THAT THE ALLOCATION BETWEEN GENERAL MOTORS
8 AND THE PLAINTIFF IS A LEGAL SHAM BECAUSE OF SEVERAL REASONS ONE
9 THE SURVIVAL ACTION THAT THEY HAVE ALLOCATED MONEY TO DID NOT
10 WAS NOT EVER FILED AGAINST GENERAL MOTORS THE WRECK IN THIS
11 CASE HAPPENED ON JUNE 7, 2003 THE SETTLEMENT WITH GENERAL
12 MOTORS, AS TO THE SURVIVAL CASE OCCURRED IN AUGUST OF '07, MORE
13 THAN FOUR YEARS LATER THE IMPORTANT POINT ABOUT THAT IS THAT THE
14 COMPLAINT IN THIS ACTION BEFORE YOUR HONOR TODAY, NEVER ASSERTED
15 A SURVIVAL CLAIM IT WAS ONLY A WRONGFUL DEATH CLAIM AND SO THE
16 STATUTE OF LIMITATIONS HAD RUN ON A SURVIVAL CLAIM THEY ALLOCATED
17 THE AMOUNT OF MONEY TOWARD SURVIVAL AND WE SUBMIT THAT THAT IS
18 AN ABSOLUTE SHAM LEGALLY, BECAUSE IT COULDN'T HAVE BROUGHT A
19 SURVIVAL ACTION

20 THE COURT DID THEY BRING ONE AGAINST GM?

21 MR. NESS NO, SIR THERE WAS NEVER A SURVIVAL ACTION BROUGHT
22 THAT I'M AWARE OF IN THIS CASE IN ANY RESPECT THE COMPLAINT ONLY
23 DECLARED AT THE VERY BEGINNING, WRONGFUL DEATH, THE ONLY CASE
24 THAT WAS EVER INVOLVED AND SO, THE SURVIVAL ACTION CAME UP AFTER
25 THE SETTLEMENT WITH GENERAL MOTORS WELL, DURING THE SETTLEMENT,

1 AND THE COURT ENTERTAINED A PETITION AND THE REASON I HANDED IT
2 UP TO THE COURT IS THE CAPTION IS THE WRONGFUL DEATH CASE WITH
3 THE CASE NUMBER THEN IT CAPTIONED THE NEXT CASE, THE SURVIVAL
4 ACTION, WITH NO CASE NUMBER SHOWING THAT IT WAS NEVER FILED THE
5 ENTIRE I GUESS, BRINGING UP OF SURVIVAL WAS JUST TO ALLOCATE IN A
6 WAY TO PREVENT AN ALLOCATION DOWN THE ROAD NOW, I UNDERSTAND
7 WHY ATTORNEYS DO THAT, AND IN SOME CASES IT IS ABSOLUTELY OKAY
8 BUT THE SECOND REASON THAT YOU HAVE -- AND IT'S NOT OKAY IN THIS
9 CASE -- BUT THE SECOND REASON THAT YOU HAVE TO LOOK AT SURVIVAL
10 ACTIONS IF THEY COULD BE BROUGHT, IS IF YOU PROVE CONSCIOUS PAIN
11 AND SUFFERING, MENTAL DISTRESS THOSE ISSUES ARE ELEMENTS OF A
12 SURVIVAL ACTION IN THIS CASE, AND YOUR HONOR WAS THE TRIAL JUDGE
13 YOU HEARD THE TESTIMONY, THERE IS NO TESTIMONY THAT TIFFANIE
14 RUTLAND SURVIVED THIS WRECK AT ALL SHE NEVER SPOKE SHE NEVER
15 MOANED THERE WAS -- MISTER RUTLAND TESTIFIED THAT HE KNEW SHE
16 WAS DECEASED IT WAS AN AWFUL TRAGEDY, BUT SHE DIDN'T SURVIVE ANY
17 AT ALL TO HAVE CONSCIOUS PAIN AND SUFFERING SO, THAT'S THE SECOND
18 REASON THAT WHEN YOU ALLOCATE MONEY FOR A SURVIVAL ACTION THAT
19 REALLY NEVER DID EXIST AND IF WE HAD TRIED THE CASE, I THINK WE
20 WOULD HAVE BEEN ENTITLED TO A DIRECTED VERDICT ON SURVIVAL IF IT
21 HAD ACTUALLY BEEN AN ISSUE BUT, FOR THOSE TWO REASONS, USING THE
22 WELCH VERSUS EPSTEIN REASONING, WE DON'T BELIEVE THAT THE
23 ALLOCATION THAT WAS APPROVED BY JUDGE GOODSTEIN IS APPROPRIATE
24 THE ORDER APPROVING THE SETTLEMENT --
25 THE COURT AND IN THE TRANSCRIPT YOU HANDED ME, IS THERE A

1 REFERENCE BY HER THAT YOU HAVE THE RIGHT TO CONTEST THAT
2 ALLOCATION AT A LATER DATE?

3 MR NESS YES, SIR IT'S ALSO IN HER ORDER ON THE NEXT TO LAST
4 PAGE, IT SAYS, "NOTHING HEREIN SHALL PRECLUDE BY WAIVER OR
5 OTHERWISE, THE RIGHT OF SCDOT TO ARGUE AGAINST THE ALLOCATION OR
6 APPORTIONMENT OF WRONGFUL DEATH, SURVIVAL PROCEEDS OR THE
7 FINDINGS HEREIN TO WHICH SCDOT DOES NOT STIPULATE "

8 THE COURT ALL RIGHT

9 MR NESS JUDGE, THERE'S ANOTHER PARAGRAPH ON PAGE TWO —

10 THE COURT THE ORDER THAT YOU HANDED UP TO ME WAS MY
11 ORDER

12 MR COPE I DID THAT YOUR HONOR, THAT'S MY MISTAKE I HAVE A
13 COPY OF HER ORDER HERE IT IS I APOLOGIZE, YOUR HONOR

14 (MISTER COPE HANDS DOCUMENT TO THE JUDGE)

15 THE COURT OKAY

16 MR NESS ON THE SECOND PAGE OF JUDGE GOODSTEIN'S ORDER
17 APPROVING SETTLEMENT AND DISMISSING GENERAL MOTORS, THE THIRD
18 PARAGRAPH DOWN, THE SECOND SENTENCE IN THE THIRD PARAGRAPH,
19 SAYS "HOWEVER, SETTLEMENT AND RELEASE OF GENERAL MOTORS IS
20 UNAFFECTED BY AND NOT CONTINGENT UPON THE COURT'S APPROVAL OR
21 DISAPPROVAL OF PLAINTIFF'S PROPOSED ALLOCATIONS "

22 THE COURT OKAY

23 MR NESS SO, I THINK DOT IS PROTECTED TO DO WHAT WE ARE DOING
24 HERE TODAY AND THAT IS CONTESTING THE ALLOCATION IT DOESN'T
25 AFFECT ANY CONSIDERATION THAT MAY HAVE BEEN INCLUDED IN THE

1 CONTRACT BETWEEN GM AND THE PLAINTIFF IN THIS CASE

2 THE COURT ALL RIGHT

3 MR NESS FURTHER, ON THE THIRD PAGE, YOUR HONOR, THE LAST
4 PARAGRAPH DOWN AT THE BOTTOM OF THE PAGE, JUDGE GOODSTEIN SAID
5 IN HER ORDER, "SHOULD LATER PROCEEDING IN THIS CASE OR ANY OTHER
6 CASE DETERMINE THAT TIFFANIE RUTLAND DID NOT CONSCIOUSLY ENDURE
7 PAIN AND SUFFERING PRIOR TO HER DEATH AND/OR MODIFY THE
8 ALLOCATION OR APPORTIONMENT HEREIN, SUCH A FINDING OR
9 MODIFICATION SHALL HAVE NO AFFECT ON THIS APPROVAL OF PETITION OF
10 SETTLEMENT AND RELEASE OF GENERAL MOTORS "

11 THE COURT OKAY

12 MR NESS SO – YOU RAISED THOSE CONCERNS, I THINK, IN CHAMBERS
13 AND I THINK THAT ORDER TAKES CARE OF IT NOW, I WAS AT THAT HEARING
14 – I REALLY WASN'T A PARTY TO THE HEARING ON BEHALF OF DOT, BUT I WAS
15 THERE, AND I CERTAINLY VOICED MY OBJECTIONS AND THAT'S WHY JUDGE
16 GOODSTEIN, I THINK, PUT THAT LANGUAGE IN THERE TO MAKE SURE THAT
17 DOT WAS PROTECTED TO MAKE THIS MOTION HERE TODAY

18 THE COURT OKAY ALL RIGHT DO YOU FOLKS WANT TO, OR AT LEAST
19 ON THE DEFENSE SIDE, DO YOU WANT TO SUBMIT ANY KIND OF MEMO TO ME
20 THAT YOU HAVEN'T DONE SO FAR OR WHAT'S YOUR PLEASURE?

21 MR NESS YOUR HONOR, I WOULD BE HAPPY TO SUBMIT A MEMO

22 THE COURT YOU DON'T HAVE TO

23 MR NESS I THINK THE CASE LAW THAT COVERS THIS ISSUE IS
24 PRETTY MUCH IN THE WELCH CASE, THE WARD VERSUS EPTING CASE, AND
25 THE ELLIS VERSUS OLIVER CASE THOSE WERE THE THREE CASES THAT

1 SOUTH CAROLINA HAS DEALT WITH —

2 THE COURT DID YOU GIVE ME OLIVER?

3 MR NESS NO, SIR I DID NOT

4 THE COURT GIVE ME THE CITE ON THAT

5 MR NESS I'D BE GLAD TO

6 THE COURT AND MISTER COPE, WHILE HE'S GETTING THAT CITE, THE
7 QUESTION I WANTED YOU TO BE THINKING ABOUT IS, IN THE TRIAL BEFORE
8 ME, IF THERE WAS NO EVIDENCE, SO TO SPEAK, OF CONSCIOUS PAIN AND
9 SUFFERING, WHAT DO I HAVE TO BASE MY DECISION ON, THAT THE
10 ALLOCATION IS APPROPRIATE THAT JUDGE GOODSTEIN THE ALLOCATION
11 THAT WAS BEFORE JUDGE GOODSTEIN?

12 MR COPE I THINK THAT'S A VERY VALID POINT, YOUR HONOR

13 THE COURT YOU'VE GOT THAT CITE?

14 MR NESS ELLIS VERSUS OLIVER IS CITED ON THE LAST PAGE OF THE
15 WELCH VERSUS EPSTEIN CASE, 335 S C 106, 515 S E 2d, 268

16 THE COURT ALL RIGHT

17 MS COPE THERE IS A VERY GOOD ANSWER AS TO WHY THERE WAS
18 NO EVIDENCE OF CONSCIOUS PAIN AND SUFFERING BEFORE YOUR HONOR
19 WE WERE NOT TRYING A SURVIVAL ACTION IN FRONT OF YOUR HONOR WE
20 WERE TRYING A WRONGFUL DEATH ACTION, AND IN A WRONGFUL DEATH
21 ACTION, CONSCIOUS PAIN AND SUFFERING IS NOT EVEN AN ELEMENT TO BE
22 CONSIDERED BY THE JURY IN THAT CASE YOU SEE, WHAT'S HAPPENING
23 HERE IS INHERENTLY UNFAIR TO THE PLAINTIFF YOUR HONOR FIRST OFF,
24 THEY HAVE NO STANDING TO CLAIM THERE WAS A STATUTE OF LIMITATIONS
25 ISSUE THEY ARE NOT A PARTY TO THAT SURVIVAL CLAIM THEY HAVE NO

1 STANDING GM IS THE ONLY PERSON THAT CAN RAISE THAT AFFIRMATIVE
2 DEFENSE

3 **THE COURT** WELL, WHAT THEY ARE SAYING IS THAT THEY ARE NOT, ~~~~~ -
4 THEY ARE SAYING THAT GOES INTO THE HOPPER AS TO WHETHER OR NOT
5 IT'S A SHAM ALLOCATION, IF YOU ALLOCATE BASICALLY HALF TO ONE AND
6 HALF TO THE OTHER AND FOR ONE-HALF OF THE MONEY, YOU ARE NOT EVEN
7 ASSERTING A CAUSE OF ACTION

8 **MR COPE** HOW CAN AN AFFIRMATIVE DEFENSE BE THE BASIS FOR
9 THE LACK OF RAISING AN AFFIRMATIVE DEFENSE BY THE PARTY THAT COULD
10 HAVE BE THE BASIS FOR A LEGAL SHAM?

11 **THE COURT** I'M LOOKING MORE TOWARDS THE FACTS —

12 **MR COPE** EXACTLY, YOUR HONOR

13 **THE COURT** — OF THIS CASE AS TO WHY THERE IS CONSCIOUS PAIN
14 AND SUFFERING

15 **MR COPE** THAT'S WHY I SAY IT IS INHERENTLY UNFAIR THEY WANT
16 YOU TO LOOK BACK AND SAY "YOUR HONOR REFLECT BACK ON THIS TRIAL,
17 THINK ABOUT WHAT YOU HEARD YOU DIDN'T HEAR ANYTHING ON
18 CONSCIOUS PAIN AND SUFFERING IT'S A SHAM THROW IT OUT " BUT
19 THAT'S NOT WHAT THE EVIDENCE WE WOULD HAVE HAD TO PUT UP IT'S
20 INHERENTLY UNFAIR BECAUSE IF WE HAD KNOWN THIS WAS GOING TO COME
21 UP WHEN WE SETTLED WITH GM, WE DECIDED AT THAT POINT, WE DON'T
22 HAVE TO PUT UP EVIDENCE OF CONSCIOUS PAIN AND SUFFERING WE'VE
23 SETTLED THE SURVIVAL CLAIM SO, THERE WOULD BE NO BASIS FOR US TO
24 PUT THAT EVIDENCE UP IN FRONT OF YOU OR THIS JURY BECAUSE WE ARE
25 DEALING WITH TWO SEPARATE CAUSES OF ACTION BEAR IN MIND, YOUR

1 HONOR, THE ORDER BEFORE YOU FROM JUDGE GOODSTEIN APPROVES THE
2 SETTLEMENT AND SAYS, "THERE EXISTS SOME EVIDENCE, HOWEVER SLIGHT,
3 THAT TIFFANIE RUTLAND SURVIVED THE CRASH AND CONSCIOUSLY
4 ENDURED PAIN AND SUFFERING " THEY ARE ONLY ENTITLED, ACCORDING
5 THE THE WARD CASE THAT I'VE HANDED UP, TO SET-OFF ON A JUDGMENT IN
6 THE SAME CAUSE OF ACTION WE DIDN'T TRY SURVIVAL HERE WE PUT UP
7 SUFFICIENT EVIDENCE FOR JUDGE GOODSTEIN TO FIND THERE WAS A CAUSE
8 OF ACTION

9 THE COURT OKAY I UNDERSTAND WHAT YOU ARE SAYING AND I
10 AGREE WITH YOU TO SOME EXTENT, BUT IF THIS VERDICT OR LET S SAY
11 THAT YOU AND GM HAD ALLOCATED 95% TO SURVIVAL, 5% TO WRONGFUL
12 DEATH DO YOU THINK THEY WOULD HAVE A REASON TO COMPLAIN?

13 MR COPE NO, SIR BECAUSE IF THERE IS EVIDENCE TO SUPPORT A
14 SURVIVAL CAUSE OF ACTION, IT IS NOT FOR THEM TO DETERMINE HOW MUCH
15 THAT'S WORTH

16 THE COURT BUT JUDGE GOODSTEIN SAID THAT THEY CAN ARGUE
17 ABOUT IT

18 MR COPE THEY CAN ARGUE ABOUT IT BUT AGAIN WE ARE NOT FACED
19 WITH WHAT THEY TRIED TO DO IN THE EPSTEIN CASE AGAIN, MR NESS
20 KNOWS ABOUT EPSTEIN BECAUSE THEY ARE THE ONES THAT TRIED TO PUT
21 ALL BUT \$5,000 00 ON A SURVIVAL ACTION THAT THEY DIDN'T HAVE AND
22 DIDN'T TRY

23 THE COURT SO, THEY WERE IN YOUR SHOES IN THAT CASE, NOT THAT
24 THAT MAKES A DIFFERENCE

25 MR COPE THEY WERE IN A DIFFERENT SITUATION, YOUR HONOR,

1 BECAUSE IN THAT CASE AS I UNDERSTAND IT, THE ONLY EVIDENCE CITED IN
2 THE COURT OPINION -- AND THIS IS NOT VERY FAIR FOR MISTER NESS TO
3 TELL US WHAT THEY DID AND WHAT THE JUDGE HEARD IN THE CASE WHAT
4 WE HAVE TO GO BY IN WELCH V EPSTEIN IS WHAT IS REPORTED IN THE
5 OPINION IN THE OPINION, THE COURT INDICATES THAT THEY FOUND THEIR
6 SURVIVAL ACTION TO BE A SHAM

7 THE COURT TOTALLY?

8 MR COPE THAT'S CORRECT

9 THE COURT NOT THE ALLOCATION, BUT THE CAUSE OF ACTION
10 ITSELF?

11 MR COPE THAT'S RIGHT AND IF YOU'LL LOOK AT THE WELCH V
12 EPSTEIN, THEY SAY, "RICHARD NESS AND JUDGE EARLY, JACK EARLY AT THE
13 TIME, WAS ARGUING WARD V EPTING IS OUR CASE TO WIN ON AND IN THE
14 EPSTEIN CASE THEY SAY WE CAN DISTINGUISH THIS CASE FROM THE WARD
15 CASE BECAUSE IN THE WARD CASE, THEY SPECIFICALLY FOUND THAT IT
16 WAS NOT A SHAM " JUST WHAT JUDGE GOODSTEIN FOUND, IT'S NOT A SHAM

17 THE COURT ALL RIGHT LET ME ASK YOU THIS QUESTION WHILE I'M
18 THINKING ABOUT IT, MISTER NESS DO YOU THINK YOU ARE BOUND BY
19 JUDGE GOODSTEIN'S STATEMENT IN HER ORDER THAT THERE IS SOME
20 EVIDENCE, HOWEVER SLIGHT, TO SUPPORT A CONSCIOUS PAIN AND
21 SUFFERING CAUSE OF ACTION?

22 MR NESS ABSOLUTELY NOT, YOUR HONOR SHE PROVIDED IN PAGE
23 THREE AT THE BOTTOM, "SHOULD LATER PROCEEDINGS -- THE VERY LAST
24 PARAGRAPH DOWN THERE, SECOND SENTENCE "SHOULD LATER
25 PROCEEDINGS IN THIS CASE OR ANY OTHER CASE DETERMINE THAT TIFFANIE

1 RUTLAND DID NOT CONSCIOUSLY ENDURE PAIN AND SUFFERING PRIOR TO
2 HER DEATH OR MODIFY THE ALLOCATION OR APPORTIONMENT, SUCH A
3 FINDING WILL HAVE NO EFFECT ON THIS APPROVAL —

4 THE COURT BUT NO PROCEEDING HAS DETERMINED THAT THE FACT
5 THAT THEY DIDN'T BRING THE CAUSE OF ACTION IS WHAT YOU ARE SAYING
6 CLINCHES THAT FOR YOU?

7 MR NESS BUT YOUR HONOR, SHE PROTECTED AS I UNDERSTAND
8 HER ORDER AND THE RECORD, SHE PROTECTED DOT TO RAISE ANY AND ALL
9 ISSUES AS TO THE APPORTIONMENT AND THAT WE WERE NOT BOUND BY
10 ANY FINDINGS THAT SHE MAY HAVE MADE BETWEEN, BASED ON THE
11 CONTRACT BETWEEN GM AND THE PLAINTIFF THAT WAS WHAT I WAS
12 TRYING TO ACCOMPLISH BY BEING AT THAT HEARING AND AS I UNDERSTAND
13 IT BY READING THE ORDER AND READING THE TRANSCRIPT SHE
14 PROTECTED DOT TO RAISE ANYTHING WE NEED TO RAISE

15 THE COURT ALL RIGHT AND ONE MORE QUESTION, MISTER COPE
16 WHAT ARE MY CHOICES TO GO WITH THE FIGURES PREVIOUSLY REACHED,
17 TO WIPE THEM ALL OUT TOTALLY AND SAY THAT IT'S ALL A SHAM, OR DO I
18 HAVE THE POWER TO MAKE AN ALLOCATION OF MY OWN?

19 MR COPE I THINK YOU PROBABLY HAVE THE POWER TO DO AN
20 ALLOCATION OF YOUR OWN IF YOU FIND THAT THE EVIDENCE THAT JUDGE
21 GOODSTEIN RELIED UPON IN REACHING HER DECISION TO FIND THAT THERE
22 IS EVIDENCE OF A SURVIVAL ACTION IS SO LACKING THAT YOU ARE GOING TO
23 OVERTURN HER FINDINGS AND I THINK, WHEN YOUR HONOR — I'VE GOT
24 DEPOSITION TESTIMONY OF CLARENCE RUTLAND FROM MAY 1, 2007, WHERE
25 HE SAYS WHEN HE WAS AT THE SCENE, SOMEBODY IN SCRUBS TOLD HIM —

1 AND I THINK IT GOES ON TO THE SECOND PAGE OF WHAT I HANDED UP –
2 "DON'T MOVE THE CAR, SHE'S GOT A PULSE " WE'VE GOT AN EXCITED
3 UTTERANCE AT THE SCENE THAT SAYS, 'SHE'S GOT A PULSE "

4 THE COURT I DON'T THINK THAT'S ENOUGH TO SUPPORT A SURVIVAL
5 ACTION, "SHE'S GOT A PULSE "

6 MR COPE THAT'S PART OF IT, THOUGH HERE, YOUR HONOR, I WOULD
7 ALSO HAND UP PHOTOGRAPHS – I THINK Y'ALL HAVE GOT PHOTOGRAPHS
8 FROM THE SCENE (SPEAKING TO DEFENSE)– AND I THINK YOUR HONOR SAW
9 THIS WITHOUT GETTING INTO THE DETAILS, MISS RUTLAND WAS IN THE
10 BACK SEAT WHAT CAUSED HER DEATH WAS SHE WAS PARTIALLY EJECTED
11 FROM THE VEHICLE AND THE VEHICLE LANDED ON HER FOR HER TO GO
12 THROUGH THE WINDOW THAT WAS THERE, SHE HAD TO BUST THROUGH THE
13 GLASS THERE IS EVIDENCE THAT A JURY COULD DETERMINE THAT SHE DID
14 SUFFER SOME FORM OF PAIN BEFORE SHE DIED

15 IN ADDITION, YOUR HONOR, THERE WAS TESTIMONY IN THIS TRIAL
16 THAT WOULD SUPPORT A SURVIVAL CAUSE OF ACTION, THE PRE-IMPACT
17 FEAR THESE TYPES OF CASES, YOUR HONOR REALLY STARTED WITH THE
18 AIRLINE INDUSTRY, BUT THEY'VE ALSO BEEN HELD UP IN LOUISIANA AGAINST
19 THE DEPARTMENT OF TRANSPORTATION

20 THE COURT BUT WE DON'T HAVE ANY CASES LIKE THAT IN SOUTH
21 CAROLINA THAT DOESN'T MEAN THE LAW IS NOT THERE, BUT WE JUST
22 DON'T HAVE ANY HERE

23 MR COPE ACTUALLY, I THINK THERE IS CASE LAW THAT SUPPORTS IT,
24 YOUR HONOR NO, THERE HAS NOT BEEN DETERMINED SPECIFICALLY, THAT
25 PRE-IMPACT FEAR IS AN ELEMENT OF DAMAGES FOR A SURVIVAL CAUSE OF

1 ACTION, BUT WHEN YOU LOOK AT ALL OF THE CASES ACROSS THE COUNTRY
2 THAT HAVE ANALYZED THIS DECISION THIS MEANS OF MEASURE OF
3 DAMAGES, WHAT IT REALLY COMES DOWN TO IS CAN YOU HAVE AN
4 ELEMENT OF DAMAGES FOR MENTAL DISTRESS EMOTIONAL DISTRESS--
5 WITHOUT THE PHYSICAL IMPACT BECAUSE, AND HERE IS WHAT I THOUGHT
6 THIS REALLY STOOD OUT WELL --

7 THE COURT BUT YOU HAVE GOT TO HAVE SOME EVIDENCE OF IT AND
8 IN AN AIRLINE CRASH YOU HAVE THE PERIOD OF TIME WHEN THE PLANE IS
9 GOING DOWN

10 MR COPE WE'VE GOT THE SAME THING HERE, YOUR HONOR

11 THE COURT ALL RIGHT HOW DO YOU HAVE THAT?

12 MR COPE BRENDA CANTRELL TESTIFIED BEFORE YOUR HONOR IN
13 THE WRONGFUL DEATH CASE SHE WAS TRAVELING IN THE OPPOSITE
14 DIRECTION ON 301 AT THE EXACT MOMENT OF THE WRECK SHE SAW THE
15 RUTLAND VEHICLE GO OFF THE ROAD, HIT THE PIPE, GO UPSIDE DOWN, SAW
16 THE VEHICLE UPSIDE DOWN IN THE AIR BEFORE IT LANDED TIFFANIE
17 RUTLAND WAS IN THAT VEHICLE THE ENTIRE TIME IF YOU LOOK AT THE
18 SMALL VERSUS ATLANTIC COASTLINE CASE IN SOUTH CAROLINA THERE THE
19 COURT FINDS IN 1930, THAT YOU DO NOT HAVE TO HAVE A PHYSICAL IMPACT
20 FOR THERE TO BE AN ELEMENT OF DAMAGES FOR EMOTIONAL DISTRESS OR
21 MENTAL DISTRESS SO, WE'VE KNOWN IN THIS COUNTRY, IN THIS STATE FOR
22 ALMOST EIGHTY YEARS THAT THIS TYPE OF DAMAGE IS RECOVERABLE AND
23 IF YOU TAKE THE PRE-IMPACT CASES, YOUR HONOR, AND I FOUND IN DOING
24 SOME RESEARCH RECENTLY ON THIS ISSUE, I FOUND THAT TEXAS,
25 LOUISIANA, MARYLAND, NEW YORK IOWA, GEORGIA, MICHIGAN, SOUTH

1 CAROLINA, ALL HAVE ADOPTED THE PRE-IMPACT FEAR WE'VE GOT
2 EVIDENCE OF THAT AGAIN WE DON'T HAVE TO PUT UP A TON OF EVIDENCE,
3 ALL WE'VE GOT TO DO IS SHOW THERE IS SOME EVIDENCE, HOWEVER
4 SLIGHT AS JUDGE GOODSTEIN SAID, AND WE'VE GOT A VIABLE SURVIVAL
5 CAUSE OF ACTION

6 THE COURT AND YOU SAY IT WOULD BE AN ABUSE OF DISCRETION ON
7 MY PART TO MINIMIZE THAT FROM WHAT Y'ALL REACHED IN AGREEMENT
8 WITH GM

9 MR COPE I THINK IT WOULD BE AN ABUSE OF DISCRETION TO UN-DO
10 HER ORDER, BECAUSE THERE IS EVIDENCE AS SHE FOUND AND AS WE'VE
11 PRESENTED HERE TODAY THAT HAD WE TRIED THE SURVIVAL CASE, WE
12 WOULD HAVE PUT UP EVIDENCE IN FRONT OF THE JURY THAT THEY COULD
13 HAVE DETERMINED WAS RECOVERABLE

14 THE COURT ALL RIGHT MISTER NESS I'LL GIVE YOU THE LAST WORD

15 MR NESS THANK YOU, YOUR HONOR YOUR HONOR, THE ARGUMENTS
16 THAT MISTER COPE USED ARE ALMOST IDENTICAL TO THE ARGUMENTS THAT
17 I USED IN THE WELCH VERSUS EPSTEIN CASE TO KEEP THE ALLOCATION
18 FROM BEING RE-DONE WE LOST THAT WE CITED WARD VERSUS EPSTEIN, I
19 MEAN, WARD VERSUS EPTING WE LOST THAT IN THE COURT OF APPEALS
20 WHEN THE WELCH VERSUS EPSTEIN CASE CAME OUT YOU KNOW, WE MADE
21 THIS LAW, UNFORTUNATELY FOR ME AT THAT TIME BECAUSE I WAS THE
22 PLAINTIFF'S ATTORNEY, BUT YOUR HONOR, THERE IS NO EVIDENCE OF
23 TESTIMONY OF CONSCIOUS PAIN AND SUFFERING OF TIFFANIE RUTLAND I
24 KNOW WHAT MISTER COPE HAS JUST SAID, BUT IN THE TESTIMONY FROM
25 CLARENCE RUTLAND, WHEN HE TESTIFIED IN THIS CASE, WAS THAT HE

1 BLACKED OUT AS SOON AS THE CAR STARTED TO SPIN IF THAT IS WHAT
2 TIFFANIE RUTLAND DID AND THERE'S NO EVIDENCE ONE WAY OR THE
3 OTHER, BUT IF THAT IS WHAT SHE DID, SHE WOULD HAVE BLACKED OUT, SHE
4 WOULD HAVE HAD NO PRE-IMPACT THAT MISTER COPE IS ASSERTING OF
5 COURSE, YOUR HONOR, IT WOULD NOT BE AN ABUSE OF DISCRETION, AND I
6 SUBMIT TO YOU THAT RUTLAND TESTIFIED AT THE TRIAL -- I DON'T KNOW IF
7 THE COURT STILL HAS HIS NOTES OR NOT, IF WE NEED TO GET THE
8 TRANSCRIPT I WILL BE GLAD TO GET IT -- BUT HE TESTIFIED AT TRIAL THAT HE
9 KNEW THAT SHE WAS DEAD WHEN HE FIRST SAW HER AFTER THE WRECK
10 HAPPENED THE TRIAL JUDGE, BY WELCH, HAS THE JURISDICTION TO
11 SET-OFF ONE JUDGMENT AGAINST ANOTHER THAT IS EQUITABLE AND
12 SHOULD BE EXERCISED WHEN NECESSARY TO PROVIDE JUSTICE IN THIS
13 CASE YOUR HONOR, BECAUSE THERE WAS NEVER A SURVIVAL ACTION
14 FILED, IT NEVER EXISTED, THEY DIDN'T TRY TO ASSERT IT BY FILING THEN I
15 THINK THE EQUITABLE JURISDICTION OF THE COURT KICKS IN TO SHOW THAT
16 THIS IS UNFAIR TO DOT IN THE CASE WHERE, IN THE WELCH CASE WHERE
17 WE HAD IT RE-ALLOCATED, DOCTOR EPSTEIN WAS NOT A PARTY TO A
18 SETTLEMENT THAT OCCURRED A WEEK OR SO BEFORE THE TRIAL WE
19 SETTLED WITH THE HOSPITAL AND MADE THE UNDERSTANDING,
20 AGREEMENT, CONTRACT WHATEVER YOU WANT TO CALL IT, AND JUDGE
21 KEESLEY WENT BACK IN AFTERWARD AND IN THE EXERCISE OF HIS
22 EQUITABLE JURISDICTION, HE MADE THE ALTERATION OF THE ALLOCATION
23 NOW, THAT HAPPENED BECAUSE HE DECIDED IT WASN'T FAIR -- AND WE
24 ACTUALLY TRIED SOME OF THE SURVIVAL CASE IN THAT, IN WELCH VERSUS
25 EPSTEIN MEDICAL BILLS WERE PUT IN AND THAT WAS PART OF JUDGMENT

1 FOR A SURVIVAL ACTION, BUT THERE WAS A FINDING MADE BY THE COURT
2 THAT THERE WAS NO CONSCIOUS PAIN AND SUFFERING AND IN THIS CASE,
3 THERE WAS NO CONSCIOUS PAIN AND SUFFERING YOU KNOW, TACTICALLY,
4 BACK IN THAT CASE, MAYBE, YOU KNOW, WE SHOULD HAVE ZIGGED AND
5 ZAGGED AND WE PUT UP THE WRONG EVIDENCE, WE DIDN'T PUT ENOUGH IN
6 AND JUDGE KEESLEY WOULDN'T CONSIDER IT BUT IT'S THE SAME THING
7 THAT THE PLAINTIFF HAS DONE IN THIS CASE THEY PUT UP EVIDENCE ON
8 WRONGFUL DEATH, THEY DON'T HAVE ANY EVIDENCE OF SURVIVAL PUT
9 BEFORE THE JURY OR THE COURT WHEN WE TRIED THIS CASE AND NOW
10 THEY ARE TRYING TO BACKTRACK JUST AS WE DID IN THE WELCH VERSUS
11 EPSTEIN CASE, AND SAY THAT THERE WAS CONSCIOUS PAIN AND SUFFERING
12 AND THE COURT SAID YOU JUST CAN'T DO IT WHEN IT'S NOT CONSCIOUS
13 PAIN AND SUFFERING AND EQUITABLY STEP IN AND RE-ALLOCATE

14 THE COURT ALL RIGHT WELL, I'M GOING TO HAVE TO READ THOSE
15 TWO CASES OR THREE CASES, AND IF YOU WANT TO SUBMIT ANYTHING TO
16 ME, TRY TO KEEP IT FIVE PAGES OR LESS BY MONDAY, BECAUSE WE HAVE
17 MEETINGS ALL NEXT WEEK AND I'VE GOT TO LEAVE TUESDAY NIGHT SO IF
18 YOU GET IT TO ME BY MONDAY, CLOSE OF BUSINESS, I COULD TAKE IT WITH
19 ME

20 MISTER NESS THANK YOU, YOUR HONOR

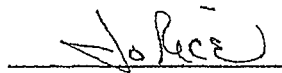
21 MISTER COPE THANK YOU YOUR HONOR

C-E-R-T-I-F-I-C-A-T-E

I, THE UNDERSIGNED JO RICE, OFFICIAL COURT REPORTER FOR THE EIGHTH JUDICIAL CIRCUIT OF THE STATE OF SOUTH CAROLINA, DO HEREBY CERTIFY THAT THE FOREGOING TWENTY- FIVE PAGE TRANSCRIPT IS A TRUE, ACCURATE, AND COMPLETE TRANSCRIPT OF RECORD OF THE HEARING IN THE CAPTIONED CASE, IN THE COURT OF COMMON PLEAS FOR ORANGEBURG COUNTY, SOUTH CAROLINA ON MAY 6, 2008, TO THE BEST OF MY SKILL AND ABILITIES

I DO FURTHER CERTIFY THAT I AM NEITHER OF KIN, COUNSEL, NOR INTEREST TO ANY PARTY HERETO

JANUARY 25, 2009

A handwritten signature in cursive script, appearing to read "Jo Rice", is written over a horizontal line.

JO RICE

STATE OF SOUTH CAROLINA)
) COURT OF COMMON PLEAS
COUNTY OF ORANGEBURG)

CLARENCE RUTLAND, AS PERSONAL)
REPRESENTATIVE FOR THE)
ESTATE OF TIFFANIE RUTLAND,)
)
PLAINTIFF,)
)
-VS-)
)
SOUTH CAROLINA DEPARTMENT OF)
TRANSPORTATION,)
)
DEFENDANTS)
_____)

ORIGINAL

TRIAL
2006-CP-38-0486
(PART ONE)

BEFORE THE HONORABLE GEORGE C JAMES, JR , JUDGE
JANUARY 28 - 31, 2008
ORANGEBURG, SOUTH CAROLINA

A P P E A R A N C E S

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For the Defendant

REMA K GANTT THOMAS
CIRCUIT COURT REPORTER

1 THE COURT For the reasons we discussed
2 yesterday?

3 MR NESS Yes, sir

4 THE COURT I'll leave it up to you to
5 protect the record in any way you see fit as
6 proceeds today And if at some point you want to
7 make sure you have that straight in the record you
8 can ask to approach or ask to take up a matter
9 outside the presence of the jury, however you want
10 to handle it

11 MR NESS One other issue I'd like on the
12 record is Plaintiff's Number 40 which is the death
13 certificate?

14 THE COURT Yes, sir

15 MR NESS I am stipulating to letting
16 that in with the understanding with Mr Cope, it
17 says on the death certificate death occurred within
18 minutes, by a coroner who obviously wasn't there
19 when it happened Mr Cope has agreed that that --
20 he is not intending to use the in minutes with
21 anything to deal with a survival action in this case
22 or even post verdict to claim there is a survival
23 issue in this case

24 THE COURT Okay

25 Is that correct, Mr Cope?

1 MR COPE Yes, sir, we agree we will not
2 use that document for those purposes at all And
3 just so the record is clear, Your Honor, what I'd
4 like to do is state clearly by agreement of counsel
5 exhibits one through ten are admitted by agreement
6 of counsel

7 THE COURT One through six with no
8 objection Seven, eight, nine and ten will be
9 subject to his objection, which I will overrule and
10 he can preserve it any way he thinks is necessary to
11 meet that rule we discussed

12 MR COPE Eleven was withdrawn We
13 withdrew that voluntarily And 12 through 42 are in
14 by agreement with the limitation that the Court will
15 advise as to exhibit 18, that has the cross in it

16 THE COURT I'll give an instruction to
17 the jury and that will be discussed for the first
18 time through Dr Parsonson

19 COURT REPORTER So, Plaintiff's one
20 through 42 are in evidence except for 11?

21 THE COURT Correct Eight, nine and ten
22 have some objection that we'll clarify But yes
23 they are in And 18 will be with a curative
24 instruction

25 Anything else before we bring in the jury?

1 A We were on our way home from Orangeburg

2 Q And who was with you?

3 A My husband

4 Q Where were you all headed?

5 A We were headed home

6 Q And what route did you all take to get
7 home?

8 A That one

9 Q And you all would be on the south-bound
10 lanes toward Bamberg?

11 A Towards Bamberg, yes

12 Q If you would, describe for us what you saw
13 when you got in this area of 301?

14 A We were on our way home and I saw a car
15 that started -- well, I saw it like this --

16 Q Upside down?

17 A Upside down

18 Q And I followed it in the air and when the
19 guy fell out the back window I took my eyes off the
20 car and looked at him and the car went on to flip
21 over

22 Q Are you familiar where the car landed?

23 A I'm not exactly sure but I know it landed
24 over in this area

25 MR COPE Your Honor, can the

1 make any observations of the roadway condition at
2 that time?

3 A It was water, water there, because it was
4 raining really hard

5 Q It was raining really hard while you were
6 sitting in the car?

7 A Yes Well, it had slacked up a little by
8 then But when we were on the road before we turned
9 around we were in a downpour until when we turned
10 around and it was slacking up a little bit

11 Q But as the wreck was happening you were in
12 a downpour?

13 A Yean, yeah

14 Q Did you ever see the car spinning or did
15 you see the car at all before it was airborne?

16 A I saw -- no, I saw it this way And then
17 it -- then the guy fell out of the back

18 Q You said you saw it this way--

19 A I mean, it had already--

20 Q You had already--

21 A It had already flipped over But it was
22 in the air

23 Q It was in the air, not on the pavement?

24 A I saw it from the beginning and then it
25 went upside down in the air The guy fell out of

1 the back window and onto the middle of the road

2 Q You saw the car actually leave the
3 pavement and go into the air?

4 A Yeah, at the spin, you know, right at the
5 beginning I mean, I didn't see right like before
6 it did but as it was going into--

7 Q Well, you said spin and I'd like to make
8 sure we--

9 A Well, flip

10 Q --we're communicating here

11 A Flip

12 THE COURT Let's do this Let
13 her finish the question and then you can begin to
14 talk so the court reporter can transcribe

15 Q When I think of spin I think of a 360
16 degree turn when you're still on the pavement And
17 I mean turning around and still at one level
18 upright When you say spin it sounds like you mean
19 it started to roll over and go airborne at the same
20 time Is that about right?

21 A All I know is I saw it like this -- then
22 it went over

23 Q So it turned sideways to go upside down?

24 A It was upside down when he fell out

25 Q And did you ever see it spin around on the

1 pavement?

2 A No

3 Q Do you know the exact point on the
4 pavement at which you saw the car leave the
5 pavement? Where it started to go up in the air?

6 A I really can't be sure

7 Q Did you ever see the car when it was under
8 control?

9 A No

10 Q When it was driving straight as it should
11 have been?

12 A No

13 Q You said there was water on the pavement
14 from the rain at the time, it was still raining?

15 A Yes

16 Q Was the water moving across the pavement?

17 A I don't know I know we were having to be
18 careful yourselves

19 Q When you were driving before you saw this
20 event you were having to be careful?

21 A Yes

22 Q Were your windshield wipers on as high as
23 they would go?

24 A Yes

25 Q Were your headlights on?

1 license within the area I got a phone number from
2 him and I asked, you know, the circumstances of the
3 wreck, what had happened

4 Q Okay

5 A So he told me what had happened in his
6 traffic collision and after he told me what had
7 happened I asked him how fast were you going

8 Q And what did he tell you?

9 A He said 45 to 50 miles per hour, I think
10 I don't recall exactly

11 Q Okay Do you remember Saturday a week
12 ago?

13 A Yes, sir

14 Q Do you remember it was raining that day?

15 A Yes, sir

16 THE COURT Saturday a week ago
17 today?

18 MR COPE Yes, Your Honor I
19 believe it was the 19th of January I'm not sure on
20 the dates

21 Q How would you compare the rain from
22 Saturday a week ago to the rain on the day of this
23 wreck?

24 MR NESS Your Honor, I object to
25 that

1 MR COPE Thank you Your Honor Just a few
2 more brief questions

3 DIRECT EXAMINATION CONTINUED

4 BY MR COPE

5 Q Trooper Sox, when we took a break, I had
6 asked you about the rainfall Saturday a week ago as
7 compared to the rain on June 7, 2003

8 A That's correct

9 Q And --

10 THE COURT And all the objections that were
11 noted by the parties are preserved

12 MR NESS Thank you, Your Honor

13 Q Can you tell us, was it raining harder on
14 June 7, 2003, or what you saw Saturday a week ago?

15 A In 2003, it was raining harder

16 Q Okay What's the speed limit out there
17 where this wreck occurred?

18 A Sixty miles per hour

19 MR COPE Those are the questions we would
20 have, Your Honor

21 Q Mr Sox, please answer any questions they
22 may have

23 A Yes, sir

24 MR NESS Thank you, Your Honor

25 CROSS-EXAMINATION

1 Do you mind taking a look at it? And I'm showing
2 Exhibit One Do you recognize this area?

3 A That's 301?

4 Q Yes And do you know where the windmill
5 is on 301 --

6 A Yes, sir

7 Q -- the Stillinger driveway? We've got
8 that marked here Is that the route y'all took to
9 go?

10 A Yes, sir

11 Q What was the weather like when y'all got
12 in this area right here?

13 A It was raining real hard

14 Q It was And where were you in the
15 vehicle?

16 A I was in the passenger side in the front

17 Q Okay And where was -- Clarence is your
18 nephew, correct?

19 A Yes, sir

20 Q You call him Bubba?

21 A I call him Bubba, yes, sir

22 Q And where was Bubba sitting?

23 A Behind me

24 Q And where was Tiffanie sitting?

25 A Tiffanie was sitting behind Joey

1 Q Who is Joey?
2 A My husband, Joey
3 Q Okay Joey, what was he doing?
4 A He was driving
5 Q Okay And was Joseph with y'all?
6 A Yes, sir
7 Q Okay And he was in the back --
8 A Back, sitting --
9 Q -- with Clarence?
10 A -- in a car seat
11 Q As it was raining hard, were you having
12 trouble seeing out the windshield at all?
13 A The windshield wipers was on
14 Q So you were able to see?
15 A Yes, sir
16 Q And how would you describe -- were y'all
17 driving fast or normal, or how would you describe
18 that?
19 A We was going about I guess 45 or so, you
20 know, because it was raining so hard
21 Q Had y'all slowed down due to the rain?
22 A Yes, sir
23 Q Now --
24 MR COPE Bear with me one minute, please,
25 Your Honor

1 Q When y'all -- after y'all got engaged and
2 married, did y'all spend -- if you weren't working,
3 who were you spending time with?

4 A Her

5 Q Now, Tina -- your Aunt Tina -- you were in
6 here --

7 A Uh-huh

8 Q -- when she testified a moment ago -- said
9 something about fishing that day Can you tell us
10 what was going on that day?

11 A Well, me, and her, Joseph, my stepdad, and
12 two of our friends got together, and we went fishing
13 at the catfish pond down on 301 coming toward
14 Orangeburg And it was drizzling off and on, and we
15 was fishing, and she caught the most and the biggest
16 fish

17 And we left there to go home, because it
18 slacked up some So when we got home, we went to my
19 grandparents' house, and we cleaned the fish and
20 cooked them And then after we ate and all, my Aunt
21 Tina and Uncle Joey, they live right next to my
22 grandparents

23 So we went over to their house, and we
24 ended up going to Orangeburg, to Wal-Mart, so she
25 could buy something for her mama, Rhonda, for her

1 birthday that was, you know, coming up So on the
2 way toward Orangeburg, it was raining

3 But as we got closer, it started raining
4 harder And when we got down by Stillinger's, it
5 was raining hard I looked up there to see

6 We wasn't going fast or nothing, but I
7 felt when he hit the puddle of water that's next to
8 some stuff I put my arms over my head and tried to
9 save my little boy

10 THE COURT Mr Rutland, do you need to take a
11 break for a minute?

12 MR RUTLAND I'm good

13 THE COURT All right, Mr Cope

14 Q Clarence, you testified that you -- did
15 you feel it when you hit the -- when the vehicle hit
16 the puddle of water?

17 A Yes, sir, it pulled the vehicle

18 Q And what happened to the vehicle after
19 that?

20 A After that, we lost control And all I
21 did was look up, and I put my hands over my head and
22 leaned over by my wife and little boy And then
23 after that, I was ejected from the vehicle And
24 when I got up, I seen the vehicle laying in the
25 ditch upside-down

1 continue.

2 MR COPE Thank you

3 DIRECT EXAMINATION CONTINUED

4 BY MR COPE

5 Q And, Clarence, I know this is tough for
6 you We certainly want to make it as smooth as
7 possible under the circumstances But we do need to
8 understand some things that may have happened that
9 night

10 A Yes, sir

11 Q You testified that -- about the speed
12 issue Do you know how fast y'all were going when
13 you hit the puddle of water?

14 A Well, I glanced up there I know we
15 wasn't going too fast when we was going toward
16 Orangeburg But I felt when we broke speed When I
17 looked up there, we was going around 45 to 50 when I
18 seen it And then, all of a sudden after that,
19 that's when we lost -- hit the puddle of water, and
20 it snatched, and we lost control

21 Q Put one up, please We'll put Exhibit One
22 up

23 Your Honor, can the witness please show us
24 where --

25 THE COURT Yes, sir

1 MR COPE -- a few things are on there

2 Q Clarence, I want you to take this stick --
3 you've got to speak up now so the Court Reporter and
4 the jury can hear you -- and show us You recognize
5 where the windmill is --

6 A Yes sir

7 Q -- right here at the Stillinger driveway
8 And I believe this is where the vehicle came to
9 final rest?

10 A Yes, sir

11 Q If you would, show us where you recall
12 hitting the water

13 A It was right around in this area right
14 here

15 Q Okay Just north of the Stillinger
16 driveway?

17 A Yes, sir, just past their driveway

18 Q And what lane were y'all in?

19 A We was on the inside lane

20 Q Okay, the left

21 THE COURT If you could speak up just a tad,
22 Mr Rutland

23 A On the inside lane

24 Q Okay And you can sit back down,
25 Clarence

1 MR COPE Beg the Court's indulgence

2 THE COURT All right

3 Q You mentioned earlier that you looked out
4 the window -- windshield, I believe, as y'all were
5 going down the road?

6 A Yes, sir

7 Q And that was before the wreck?

8 A Yes, sir

9 Q And were you able to see out the
10 windshield?

11 A Yes, sir He had his wipers on high, but
12 you could still see out of it

13 Q Your son, was he injured?

14 A No, sir he got a scratch on his leg, just
15 a scratch

16 Q And did you leave the scene with your son?

17 A Yes, sir, we rode -- well, after it
18 happened, a guy, one of the sheriffs out there, put
19 me and him in the car because it was pouring down
20 rain And after we got in the car, then they got my
21 Aunt Tina out of the Blazer, and my uncle

22 And then they put me and my son, Joseph,
23 and Tina in the rescue squad and took us to the
24 rescue -- to the hospital

25 Q Clarence, did you know what had happened

1 to Tiffanie at that point?

2 A Well, when nobody got up, from after I got
3 throwed out, I glanced down in the hole and seen her
4 head hanging out -- in the ditch

5 Q Did you go to her?

6 A Yes, sir

7 Q Was she alive at that point?

8 A No, sir

9 Q Have y'all done some things as a family to
10 try and keep her memory alive?

11 A Yes, sir

12 Q I'd like to show you what's put up on the
13 screen here, Exhibit Eighteen In the right-hand
14 side, there's a visible cross there

15 A Yes, sir

16 Q Do you know how that cross got there?

17 A Yes, sir, we put it up

18 Q And why did y'all put that there?

19 A To remember

20 Q Have you done anything else there?

21 A Yes, sir, we've got a big angel out there

22 THE COURT All right, ladies and gentlemen,
23 one instruction I have for you about this picture
24 that's Exhibit Eighteen, I will instruct you that
25 the positioning of that cross that's been referenced

1 Q Y'all were a young family just getting
2 started?

3 A Yes, sir

4 Q Did you have your own home?

5 A Yes, sir

6 Q Extra money came in helpful?

7 A Yes, sir

8 Q Had there been any talk about whether or
9 not she was going to move to full-time?

10 A We talked -- mentioned something about it,
11 but we didn't never get to talk really about it
12 But they was wanting to put her full-time, but we
13 didn't never get to talk about it before this
14 happened

15 Q As far as you were concerned, would that
16 have been okay?

17 A Yes, sir

18 Q We've got -- do you know her date of
19 birth?

20 A Yes, sir

21 Q What is it?

22 A 4/12/82

23 Q You had to -- were you involved in the
24 funeral arrangements and everything for your wife?

25 A I couldn't My -- I did what I could, but

STATE OF SOUTH CAROLINA)
) COURT OF COMMON PLEAS
COUNTY OF ORANGEBURG)

CLARENCE RUTLAND, AS PERSONAL)
REPRESENTATIVE FOR THE)
ESTATE OF TIFFANIE RUTLAND,)

PLAINTIFF,)

-VS-)

SOUTH CAROLINA DEPARTMENT OF)
TRANSPORTATION,)

DEFENDANTS)

ORIGINAL

TRIAL

2006-CP-38-0486

(PART TWO)

BEFORE THE HONORABLE GEORGE C JAMES, JR , JUDGE
JANUARY 28 - 31, 2008
ORANGEBURG, SOUTH CAROLINA

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For the Defendant

REMA K GANTT THOMAS
CIRCUIT COURT REPORTER

1 Q We can go to Exhibit Fourteen And this
2 is just a little bit larger than of that area?

3 A Yes, sir, and it's just a tad north of
4 where we were in the last photo

5 Q And did you check --

6 A We're still looking up the Stillinger
7 drive

8 Q Was the cross-slope in this area -- was it
9 to the proper two-percent slope?

10 A No, no Like the previous location, it
11 was much flatter I can give you numbers, but it
12 was -- I found it to be much flatter

13 Q Let's go now to Exhibit Fifteen Can you
14 tell us what we're looking at here?

15 A What we're looking at here is the
16 intersection with Frolic Meadows Lane in the
17 background where you see that pole And I'm
18 standing really in the driveway of the Stillinger
19 driveway

20 And you can see the asphalt of it down
21 here in the foreground And what we're looking at
22 here is the slope of the shoulder and the slope of
23 the four-slope down into the ditch And in the
24 foreground here, it's very obvious that you don't
25 have a ditch that is two feet below the edge of the

1 pavement

2 It's nothing like two feet below It's
3 maybe a half foot below In fact, the ditch is so
4 shallow that it's impossible to put in a culvert
5 pipe under the driveway

6 Q Why is that important?

7 A Well, you want the water to be able to
8 flow In other words, here we're headed downhill in
9 this location where the Stillinger drive is We're
10 headed downhill to the north Well, water flowing
11 into ditches flowing northward has to be able to get
12 under or over the driveway

13 And the preferred method is to have it go
14 under by means of a culvert pipe But here you
15 don't have that And so the driveway is really
16 acting like a dam, and that would tend to send water
17 out into and onto the asphalt pavement

18 Q Did you -- while you were doing your
19 measurements, did you measurement the distance from
20 the Stillinger driveway to Frolic Meadows Lane?

21 A Yes, I did

22 Q What is that distance?

23 A Three hundred and sixty-six feet to the
24 center line of the Stillinger drive

25 Q And what was the end point?

1 A The end point was the stop sign at Frolic
2 Meadows Lane

3 Q And is that where -- the vehicle in which
4 Ms Rutland was killed, is that where it came to
5 final rest?

6 A Yes

7 Q Okay Let's go on to Exhibit Sixteen, and
8 I believe this is just a better view of the ditch
9 area?

10 A Yes, sir It's extremely shallow It
11 just does not begin to have the kind of volume to
12 hold water that you need And, therefore, there's
13 quit a tendency for water to want to fill the ditch
14 completely and then flow out onto the road

15 Q And Exhibit Seventeen Did you take
16 measurements of the highway that's shown here in
17 Exhibit Seventeen?

18 A Yes, I did I took the cross-slope
19 measurements all the way down to Frolic Meadows Lane
20 and then down to the billboard that you see on the
21 left

22 Q Okay And the cross-slope that's shown in
23 Exhibit -- the road that's shown in Exhibit
24 Seventeen, was the cross-slope proper?

25 A No, no It was much flatter than it's

1 supposed to be If I had to give you a single
2 number instead of having two percent, they had
3 maybe one-half of one percent But it wasn't
4 uniform

5 And in lots of cases, it was sloping even
6 in the wrong direction For example, right at the
7 Stillinger drive, in the right lane, the slope is in
8 the wrong direction

9 Q And what do you mean by that?

10 A Well, at the Stillinger drive, the right
11 lane is supposed to be sloping toward the drive
12 It's supposed to be sending water out to the right
13 Let me get down and show you

14 Here at the Stillinger Drive, the right
15 lane is supposed to be sloping toward the Stillinger
16 drive It's supposed to be sending water down the
17 start of the drive, and then the water is supposed
18 to flow into a deep ditch system here that's two
19 feet below the level of the pavement

20 And it has buried a culvert pipe
21 underneath Well, I found that this lane, this
22 right-hand northbound lane, was actually sloping
23 toward the left, sending water out into the road
24 instead of away from the road

25 Q Doctor, based on the measurements that

1 ...you've taken and your numerous site inspections, do
2 you have an opinion as to whether or not this road
3 is unreasonably dangerous?

4 A Yes, I certainly do

5 Q And what is that opinion?

6 A The road is indeed unreasonably dangerous,
7 and that's because it's going to be holding
8 excessive water on it And that means that the
9 water is going to be excessively deep, and that's
10 going to promote hydrodynamic drag that I've already
11 explained It's also going to promote hydroplaning
12 and in general cause a loss of control in wet
13 weather

14 Q Now, you mentioned the resurfacing project
15 that's been talked about here today Is a
16 resurfacing project -- is that a maintenance issue
17 or a design issue?

18 A No, no, that's strictly a maintenance
19 issue It has nothing to do with design, except
20 that in the repaving project, they, meaning the
21 contractor -- they are supposed to be building in
22 cross-slopes that are faithful to the initial design
23 of two percent

24 Q Do you have any complaint about the
25 original design at this location?

1 A No, not at all It's excellent

2 Q You were here when Mr Rutland testified
3 about where they lost control?

4 A Yes

5 Q And is that in an area where you found the
6 highway to be unreasonably dangerous?

7 A Absolutely Again, these cross-slopes
8 that I found at that location were just a fraction
9 of what they were supposed to be In other words,
10 instead of two percent, they were less than one-half
11 of one percent

12 And as I've already said, in the right
13 lane, they were actually -- the right lane is
14 actually sloping to the left and sending water into
15 that lane that Mr Rutland was in, instead of
16 sending water to the right away from the Rutland
17 vehicle

18 Q With a flat highway that you've described
19 would that account for the type of accumulation of
20 water that Trooper Sox testified to seeing?

21 A Yes, absolutely

22 Q Would that be -- as a highway engineer,
23 are you familiar with whether that would be
24 sufficient to cause a vehicle to go out of control?

25 A There's no question, it will be sufficient

1 to cause a vehicle to go out of control --

2 Q Do you --

3 A -- in many circumstances, not in every
4 vehicle for every vehicle that comes along,
5 certainly But, yes, it's a complete and
6 satisfactory explanation of loss of control in these
7 situations

8 Q Do you have an opinion as to whether or
9 not the water that Clarence Rutland testified to
10 caused the vehicle to go out of control that night?

11 A Yes, I'm sure it did

12 Q And I'm referring, of course, to the wreck
13 -- do you know what date the wreck -- of the
14 Clarence Rutland wreck?

15 A Yes, it was June 7, 2003

16 Q Okay Now back to this resurfacing
17 project, are you familiar with what the Department
18 of Transportation's role is during a resurfacing
19 project?

20 A Yes, I am familiar

21 Q And could you tell us about that, please?

22 A Their role is to be out there every day
23 and to be checking on the cross-slopes as they are
24 constructed by the contractor What I mean is that
25 the asphalt is being put down by a paving machine,

1 and then it's being rolled immediately

2 And there is supposed to be on the part of
3 the South Carolina DOT a lay-down inspector who has
4 a smart level or some equivalent device And as
5 soon as the roller hits that freshly laid material,
6 the inspector is supposed to be measuring that
7 cross-slope that's being obtained by the contractor

8 And if it isn't quite right, he or she is
9 supposed to tell the contractor to adjust the screed
10 -- S-C-R-E-E-D -- at the back of the paver to adjust
11 that slope And so you have a constant situation
12 here where the inspector is making readings, giving
13 feedback to the contractor, and the contractor is
14 making adjustments

15 Now, the contractor himself is supposed to
16 be noting that cross-slope and is supposed to be
17 making their own adjustments That's what the
18 inspector is there to do, to check up on the
19 contractor and make sure that the contractor is
20 meeting the plans and specifications for the job

21 Q And would that requirement -- is that
22 something the DOT did in this project?

23 A Yes, there's no question that they did it

24 Q They were there inspecting every day that
25 the contractor was there?

1 A Yes, they were out there every day

2 Q If an inspector with the Department of
3 Transportation saw the type of slope that you found
4 on your inspection, do you have an opinion as to
5 whether or not that should have triggered some
6 reaction?

7 A I do have an opinion, yes

8 Q And what is that?

9 A There would be an immediate reaction by
10 the inspector to the contractor to adjust the screed
11 on the back of the paver to get that cross-slope
12 correct And so you would have this constant
13 interplay where the contractor is doing his best to
14 get the required slope, and then the inspector is
15 checking up to make sure, in fact, that it is
16 correct and giving feedback to the contractor

17 Q Can you check the cross-slope after you
18 finish a segment of road?

19 A No, it's too late You can't do anything
20 about it

21 Q Can you explain that to us?

22 A Well, suppose you do a segment of road
23 that's, let's say, a mile long, just to name a
24 number And after it's constructed, this mile-long
25 segment, you, the South Carolina DOT, go out there

1 with your smart level, and you get readings such as
2 what I'm getting here at this location

3 It's totally impractical to go to the
4 contractor and say, "Well, look, you messed up You
5 didn't do what you were supposed to do You're
6 going to have to go take up all of this pavement and
7 just do the whole thing all over again "

8 It's just not practical The contractor
9 would have a right to say, "Well, look, DOT, you
10 know, your criticism is not timely If you didn't
11 like what I was doing, you should have told me at
12 the time so that I could have corrected it "

13 Q If an inspector is doing his job for the
14 DOT and checked that cross-slope during the
15 resurfacing, would you consider that to be an open
16 and obvious hazard, the cross-slope not being
17 proper?

18 A Yes, it is open and obvious, because
19 anyone such as myself can easily go out to that
20 location, and make the proper measurements, and see
21 exactly what is going on and what the hazard is In
22 other words, there's nothing latent or hidden about
23 it It's open and obvious to anyone who cares to go
24 and measure the cross-slope

25 Q Now, I want to hand you exhibit -- I'm

1 sorry, I didn't have it marked

2 THE COURT Ladies and gentlemen, everybody on
3 the jury stand up and stretch real quickly If you
4 don't want to, you don't have to

5 MR NESS Your Honor, I'm going to have a
6 matter that we need to discuss

7 THE COURT All right

8 All right, ladies and gentlemen, the
9 lawyers tell me they have a matter that they'd like
10 to take outside of your presence I will ask you
11 now to step to your jury room Please do not
12 discuss the case And then when the Bailiff comes
13 back to get you, if you have not had enough time,
14 you let the Bailiff know

15 (The jury left the courtroom at 3 20
16 p m for break)

17 THE COURT All right, Mr Cope, you would have
18 some questions of the witness about this particular
19 document?

20 MR COPE Yes, sir

21 THE COURT And just for the record, it's
22 entitled "Affidavit of Ernest F Mallard " Has it
23 been marked or given any ID number?

24 MR COPE I put a sticker on it, Your Honor,
25 Exhibit Forty-Three

1 STATE OF SOUTH CAROLINA

COURT OF COMMON PLEAS

2 COUNTY OF ORANGEBURG

3

CLARENCE RUTLAND, as Personal
Representative of the Estate of
TIFFANY RUTLAND,

**DEPONENT'S COPY
TO READ & SIGN**

5

Plaintiff,

6

vs

CASE NO 2005-CP-38-0143

7

SOUTH CAROLINA DEPARTMENT OF
TRANSPORTATION and GENERAL MOTORS
CORPORATION,

9

Defendants

10

11

~~DEPOSITION OF CLARENCE RUTLAND~~

~~DATE Tuesday, May 1, 2007~~

~~13~~

TIME 10 12 a m

14

LOCATION The Wilson Law Firm
392 Second Street
Bamberg, SC

15

16

TAKEN BY Counsel for the Defendants

17

REPORTED BY Susan M Valsecchi
Registered Professional Reporter
Certified Realtime Reporter

18

19

20

Computer-Aided Transcription By

21

~~A--WILLIAM ROBERTS, JR , & ASSOCIATES~~

22

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25

Page 2	Page 4
1 APPEARANCES OF COUNSEL 2 ATTORNEYS FOR THE PLAINTIFF 3 CLARENCE RUTLAND as Personal 4 Representative of the Estate of 5 TIFFANY RUTLAND 6 THE WILSON LAW FIRM 7 BY J. CHRISTOPHER WILSON 8 392 Second Street 9 Bamberg SC 29003 10 (803) 245-7799 11 and wilsonj@wilsonlaw.net 12 PETERS MURDAUGH PARKER ELTZROTH 13 & ASSOCIATES 14 BY NORMA A. JETT 15 101 Mulberry Street 16 Hampton South Carolina 29924 17 (803) 943-2111 18 lcope@pmpe.com 19 ATTORNEYS FOR THE DEFENDANT 20 SOUTH CAROLINA DEPARTMENT OF 21 TRANSPORTATION 22 NESS JETT & TANNER L.L.C. 23 BY NORMA A. JETT 24 and RICHARD B. NESS 25 2878 Main Highway 26 Bamberg South Carolina 29003 27 (803) 245-5178 28 normajett@bellsouth.net 29 ATTORNEYS FOR THE DEFENDANT 30 GENERAL MOTORS CORPORATION 31 HARTLINE DACUS BARGER DREYER & KERN 32 BY MARY LOU ALVAREZ 33 6688 North Central Expressway 34 Suite 1000 35 Dallas Texas 75206 36 (214) 369-2100 37 malvarez@hdbdk.com 38 (INDEX AT REAR OF TRANSCRIPT)	1 deposition before? 2 A. No ma'am 3 Q. Okay. Have you talked to your 4 attorneys about the deposition - 5 A. Yes 6 Q. -- process? 7 A. Yes 8 Q. Now I don't want to know what was said 9 between you and your attorneys but did you review 10 any documents? 11 A. I'm not sure what you mean by 12 documents 13 Q. Any papers did you review? The 14 accident report or any papers or photos that were 15 given to you? 16 A. No ma'am 17 Q. Okay. I may be a little repetitive and 18 I don't mean to be but I just want to get some 19 ground rules out. 20 You understand that there's a court 21 reporter here recording everything that we say 22 A. Yes ma'am 23 Q. Okay. So throughout the course of the 24 deposition I need you to say yes or no as you're 25 doing now verbally because she can't record head
Page 3	Page 5
1 STIPULATION 2 It is stipulated by and among Counsel 3 that this deposition is being taken in accordance 4 with the South Carolina Rules of Civil Procedure 5 Rule 30 that all objections as to Notice of this 6 deposition are hereby waived that all objections 7 except as to form are reserved until the time of 8 trial and that the deponent waives reading and 9 signing of this deposition 10 11 CLARENCE RUTLAND 12 being first duly sworn testified as follows 13 EXAMINATION 14 BY MS. ALVAREZ 15 Q. Good morning 16 A. Good morning 17 Q. Will you please state your full name 18 for the record 19 A. Clarence Rutland Jr. 20 Q. Would you like me to call you 21 Mr. Rutland or Clarence throughout this deposition? 22 A. Whichever. It doesn't matter 23 Clarence 24 Q. Okay. Thank you 25 Now Clarence have you given a	1 nods. Is that okay? 2 A. Yes ma'am 3 Q. I'm going to be asking you a series of 4 questions and the other attorneys may as well. If 5 there's ever a question that I ask you and you 6 don't understand it or you'd like me to rephrase 7 it please let me know otherwise I'm going to 8 assume that you understood the question and your 9 answer is your truthful testimony. Is that fair? 10 A. Yes ma'am 11 Q. Okay. Have you filed any lawsuits or 12 been involved in any lawsuits before? 13 A. No ma'am 14 Q. Okay. Throughout the course of this 15 deposition again your attorneys may object to the 16 form of the question. That's for the record and 17 that will be used for later. You can go ahead and 18 answer the question unless you're instructed 19 explicitly to not do so. Do you understand that? 20 A. Yes ma'am 21 Q. Are you taking any medications today? 22 A. No ma'am 23 Q. Is there anything that you've done this 24 morning that may affect your ability to testify 25 honestly?

2 (Pages 2 to 5)

A. William Roberts, Jr. & Associates (800) 743-DEPO

Page 74	Page 76
1 Q But you knew it. Is that correct? 2 A. Yes ma'am. 3 Q Did you ask Tiffany to put her seat 4 belt on? 5 A. No ma'am "No ma'am 6 Q Why not? 7 A It never crossed my mind 8 Q Did you and Tiffany typically ride in 9 the vehicles without seat belts? 10 A Yes ma'am 11 Q So you're driving to Orangeburg it 12 starts to rain heavier Is that correct? 13 A Yes ma'am 14 Q What happens? 15 A When it was raining there was puddles 16 of water on the road And I could see it looking 17 out my window And you know how it is when you're 18 riding down the road you hit a puddle of water 19 how it feels it pulls you sometimes I felt that 20 a couple times 21 And my Uncle Joey he slowed down a 22 little bit and we got on down the road a little bit 23 and then all of the sudden it started to pull and 24 hydroplane That's the only thing I can remember 25 I put my arms over my little boy and Tiffany's head	1 A Going around and around like that. 2 Q So the vehicle was rotating on the 3 pavement? 4 A Yes ma'am 5 Q And during that rotation is that's 6 went out the back? 7 A Yes ma'am 8 Q Do you know which back glass you went 9 out? 10 A The back, the far back glass with the 11 back door on the gate at the back 12 Q And what happened when you went out? 13 A Where I landed over there I'm not sure 14 where I landed but I know I had a rash on my 15 head and my arms was all cut up and stuff I had 16 glass in -- as a matter of fact I've still got 17 glass in my head and my arm 18 And then whenever I got up I seen the 19 Blazer when I landed upside down with the four 20 tires up in the air like it was headed back up 21 toward Bamberg When I got over there I was going 22 over there to -- I heard my aunt hollering Bubba 23 Bubba and I kept telling her I'm out here I'm 24 out here 25 And then there was a couple people
Page 75	Page 77
1 he back and then at that time I now as 2 sucked me out the back glass during the hydroplane 3 Q Now when you say the vehicle was 4 pulled which direction was it pulled in? 5 A I can't remember But I mean I could 6 feel when you're riding how the water pulls you 7 like that right there that's how I felt 8 Q So it just pulled from side to side? 9 A. Yes ma'am And then we wasn't going 10 that fast around the speed limit and then he 11 slowed down some And then all of the sudden hit 12 another puddle and then it started hydroplaning 13 Q Now what highway were y'all on? 14 A 301 toward Orangeburg 15 Q When you started feeling the pulling 16 right before the accident, were you going up a 17 hill? Do you remember? 18 A. No I can't remember 19 Q So do you remember being sucked out the 20 back before the vehicle left the roadway? 21 A. During the hydroplane all I could hear 22 was swoosh swoosh like that and I was laid out 23 there. It done threw me out the back glass 24 Q Now when you say during the 25 hydroplane what do you mean? Was the vehicle --	1 stopped on the side of the road and they wanted to 2 know who all was in the vehicle And I told them I 3 had my little boy in there and all And then 4 everybody started going over there 5 The motor was still running and they 6 said we need to try to get this motor to shut off 7 so it won't catch on fire or whatever And then 8 they started grabbing rocks and stuff throwing it 9 at the motor to get the motor to shut off because 10 we couldn't get it shut off no other way 11 And then I went and glanced down or 12 stepped down in the ditch to get a rock because we 13 were going to have to bust the side of the window 14 to get them out open the door and try to pull them 15 out and when I stepped down in the ditch my leg 16 slipped and that's when I seen Tiffany's head 17 hanging out the window 18 Q And had you been calling for her before 19 you saw her? 20 A Yeah 21 Q Did you hear her respond or hear her 22 groan or anything? 23 A. No She was dead 24 Q She was dead right away? 25 A. (Nodding)

Page 78 1 Q So you didn't hear her make any noises? 2 A No I rubbed her head it was cold 3 Her eyes were shut and she wasn't moving or 4 nothing 5 Q What did you say when you saw her? 6 A I started raising cane started 7 flipping out running toward the road and stuff 8 Q Running towards the what now? 9 A The road I couldn't get her to talk 10 to me or nothing I knew she was dead 11 Q And what -- when you say you isn't 12 the ditch right next to the road? 13 A (Nodding) 14 Q So were you running down the road? 15 A No I walked out down the pavement on 16 the highway where the other cars was pulled beside 17 the road and then started fussing and stuff And 18 then they got Joseph out to me and then they 19 handed me Joseph. 20 Q Do you know who handed you Joseph? Do 21 you want to take a break for a couple minutes? 22 MR WILSON Why don't we take a break 23 for a couple minutes 24 (A recess transpired) 25 BY MS ALVAREZ	Page 80 1 Aunt Tina? Do you remember where they were or did 2 you talk to them before you got into the sheriff's 3 car? 4 A Whenever I got in the sheriff's car 5 they were lying her out and Joseph was 6 the first one they got out they handed him to me 7 And we was in the sheriff's car And I didn't see 8 the rest of them until -- 9 Well when I got out of the sheriff's 10 car to get into the rescue squad Tina was out and 11 then they had Joey laying on the side of the road 12 right there where they got him out because they 13 said they had to bring him back or something the 14 seal belt cut his circulation off or something He 15 wasn't breathing or something 16 Q And did you tell anyone about Tiffany 17 or where Tiffany was or that she was dead? 18 A I kept hollering telling them that I 19 wasn't going nowhere until they got her out until 20 they got her out. They said well they had to get 21 someone there to turn the vehicle over to be able 22 to get her out They made me get in the rescue 23 squad me and Joseph 24 Q So you told them that she was in the 25 car is that correct?
Page 79 1 Q Okay So we left off where you 2 remembered someone handed you Joseph from the car 3 is that correct? 4 A Yes ma'am. 5 Q Did you talk to them at all? 6 A The only thing I can remember is 7 whenever they got there they said it was someone 8 who worked at the Bamberg ER they were on the way 9 to work and they stopped to help I don't know 10 nobody's name or nothing 11 Q But it was a Bamberg ER person that 12 handed you Joseph? 13 A They helped because they had to go in 14 there and cut the little straps so they could lift 15 the top of his car seat off him and hand him to me 16 Q And what did you do? 17 A I was crying and hollering and he was 18 crying He was asleep during the whole thing And 19 then when they got him out, that's when he woke up 20 And then I was out there for a minute and then they 21 put me and him in the sheriff's car out of the 22 pain 23 Q And this was the Bamberg sheriff? 24 A Orangeburg deputy sheriff 25 Q And where was your Uncle Joey and your	Page 81 1 A I kept hollering them people that we a 2 out there helping I kept showing them where her 3 head was laying like that out the window And 4 they kept telling me that she had a pulse she had 5 a pulse But she was dead I think they just told 6 me that to calm me down. 7 Q But you didn't believe them did you? 8 A No ma'am I didn't believe them. 9 Q And so you got into the rescue squad 10 before they were able to pull Tiffany out of the 11 vehicle Is that correct? 12 A We was going to the hospital before 13 they even got her out 14 Q And who were you going to the hospital 15 with? 16 A Me Tina and Joseph was in the rescue 17 squad 18 Q And what about your Uncle Joey? 19 A They brought him by a different rescue 20 squad because I heard them at the time talking 21 about they was going to have to get a helicopter 22 down there or something So they must have brought 23 him to Orangeburg by a separate rescue squad 24 Q Do you know if he got there before 25 y'all did?



THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas

George C. James, Jr., Circuit Court Judge

Case No. 2006-CP-38-0486

Clarence Rutland, as Personal Representative
of the Estate of Tiffanie Rutland,

Appellant

v

South Carolina Department of Transportation,

Respondent

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

- I THE TRIAL COURT ERRED IN GRANTING THE SOUTH CAROLINA DEPARTMENT OF MOTOR VEHICLES' POST TRIAL MOTION FOR SET-OFF AND REDUCING THE VERDICT AGAINST THE SCDOT TO ZERO
 - A Sufficient Evidence Exists to Support a Survival Claim and the Trial Court Erred in Failing to Recognize the Decedent's "Pre-Impact" Damages
 - B The Trial Court Erred In Equitably Reallocating the GM Settlement Proceeds and Applying the Full Amount of the Settlement towards the SCDOT's Right to Set-Off

STATEMENT OF THE CASE

This case arises out of a single car accident which occurred on June 7, 2003 on S C Highway 301 in Orangeburg County, South Carolina. The decedent, Tiffanie Rutland ("Tiffanie" or "Decedent"), was a passenger in a 1999 S-10 Blazer driven by Joseph Bishop which lost control and left the roadway. During the wreck, Tiffanie was partially ejected from the vehicle and suffered fatal injuries.

On or about August 26, 2004, the decedent's husband, Clarence Rutland, was appointed as the personal representative of the Estate of Tiffanie Rutland ("Appellant"). In that capacity, he was able to negotiate for the payment of all insurance limits available, \$30,000.00, under a policy of automobile insurance issued to Joseph Bishop. On February 7, 2005, Appellant filed a wrongful death Complaint in the Orangeburg County Court of Common Pleas against the South Carolina Department of Motor Vehicles ("SCDOT"). Appellant alleged that the SCDOT had constructive and/or actual notice of a defect in the roadway which caused water to accumulate on the road surface, thereby causing the dangerous condition that proximately caused the accident which killed Mrs. Rutland. (R pp 22-23)

Thereafter, Appellant filed an Amended Complaint for wrongful death on May 8, 2006. This Amended Complaint added REA Construction Company and General Motors Corporation as parties to the action. Appellant asserted a product defect claim against GM sounding in strict liability, negligence, and breach of warranty, alleging that GM failed to design and/or manufacture the windows in the Blazer with materials sufficient to withstand ejection. (R pp 28-29) Appellant asserted the same causes of action and theories of negligence against Defendant REA as those against SCDOT, as REA had

resurfaced the roadway at issue prior to the accident giving rise to the litigation (R pp 27-28) Finally, on May 22, 2006, Appellant filed his Second Amended Complaint for wrongful death, adding J A Jones Construction Company to the litigation as an upstream contractor of Defendant REA for the road construction work to the stretch of Highway 301 at issue ¹

Prior to the trial of this case, Appellant reached a settlement with General Motors (the "GM Settlement") On August 9, 2007, counsel for the Appellant, SCDOT, and GM appeared before the Honorable Dianne S Goodstein for a settlement approval hearing pursuant to S C Code § 15-51-42 The settlement reached between the Appellant and GM totaled \$275,000 00 From the total settlement proceeds from all settling parties, GM and Appellant agreed to allocate \$167 000 00 to the wrongful death claim and \$138,000 00 to a survival claim The viability and existence of evidence to support a survival action on behalf of Tiffanie was stipulated between GM and Appellant, although Plaintiff had only filed a wrongful death claim at that point against GM ² This stipulation was entered only between the Appellant and GM and Judge Goodstein made a finding of fact that "there exists some evidence, however slight" to support a survival cause of action (and corresponding allocation of proceeds) between the settling parties (R p 91, lines 16-21)

At the settlement hearing, counsel for the SCDOT appeared and made a record of his objections to the settlement, particularly that the SCDOT did not stipulate to any findings of fact (R p 92, line 18-p 93, line 14) SCDOT also sought to preserve the

¹ Due to their bankruptcies both REA Construction and J A Jones Construction Company were voluntarily dismissed from this action prior to trial without any settlement monies exchanged

² The six (6) year statute of limitations to bring a survival action on behalf of Tiffanie under a warranty theory against GM had not expired at the time of this settlement

right to contest the allocation of the settlement for setoff purposes in the event of a verdict against the SCDOT (*Id*). At the settlement hearing, Appellant's counsel objected to the SCDOT's right to argue against the allocation on the grounds that the question was not ripe and that the SCDOT lacked standing to assert their objections (R p 89 lines 4-22). Nevertheless, counsel for the Appellant acknowledged SCDOT's ability to pursue its setoff argument and agreed that the SCDOT would not be precluded from arguing against the allocation if a verdict was entered against it (R p 91, lines 8-15).

The Appellant's case against SCDOT was tried to a jury from January 28-31, 2008. The sole action before the jury was for the wrongful death of Tiffanie, as no survival action was ever pled against the SCDOT. The jury returned a verdict in favor of the Estate of Tiffanie Rutland for \$300,000.00 in compensatory damages for her wrongful death (R p 20).

Both Appellant and SCDOT filed post-trial motions. The Appellant sought either a new trial absolute or new trial *nisi additur* (R pp 46-49). The SCDOT requested a setoff against the verdict for the proceeds of the GM and Bishop Settlements (R p 52). In an Order dated February 28, 2008, the trial court entered an Order denying Plaintiff's new trial motions and summarily³ granting the SCDOT's motion for setoff in the amount of \$300,000.00 (R pp 1-10). Appellant timely filed his Motion for Reconsideration pursuant to Rule 59(e) on March 18, 2008 (R pp 57-59). The trial court then issued a final Order of September 2, 2008, denying Plaintiff's post trial motions and clarifying its previous ruling on the issue of setoff. In this Order the trial court found that insufficient

³ The Court's Order incorrectly stated that Plaintiff had stipulated to setoff in the amount of \$300,000.00 and did not consider the parties' arguments concerning the allocation of the underlying GM settlement and proceeds received from Joseph Bishop's insurance.

evidence existed to support the apportionment of the GM settlement proceeds to Tiffanie's survival claim, and therefore equitably reallocated all settlement proceeds to the wrongful death claim (R pp 9-10) Based on this finding, all prior settlement proceeds were applied to the SCDOT's right to setoff on the wrongful death claim, resulting in a verdict of \$0.00 for the Plaintiff (*Id.* at 10) The Appellant received written notice of the entry of this Order on September 4, 2008, and timely filed his notice of appeal on September 8, 2008

FACTS

On June 7, 2003, twenty-one year old Tiffanie Rutland was a backseat passenger in a 1999 S-10 Blazer that was being driven by Joseph Bishop, the Appellant's uncle. Also present in the vehicle were Tiffanie's husband/Appellant Clarence, her infant son Joseph Rutland, and Tina Bishop, the Appellant's aunt (R p 136, line 16–p 137, line 10) After an afternoon of fishing with her family, Tiffanie and her husband cooked fish at a family member's home and then went next door to the Bishop's residence (R p 138, lines 11–22) The Bishops and the Rutlands decided to travel to the Wal-Mart in Orangeburg, S.C. so that Tiffanie could shop for a present for her mother's upcoming birthday (R p 138, line 23–p 139, line 1) While en route to Orangeburg Mr. Bishop traveled generally northbound on S.C. Highway 301 in a heavy rain storm (R p 139, lines 1-5) Due to weather conditions, Mr. Bishop slowed and drove approximately 45-50 miles per hour on Highway 301, for which the posted speed limit is 60 m.p.h. (R p 134, lines 5-10, p 135, lines 16-18, p 137, lines 16-20, and p 140, lines 16-18) As the vehicle approached a stretch of Highway 301 just north of a private driveway for the Stillenger Body Shop, the vehicle began to hydroplane, causing the Blazer to leave the

roadway and turn over, finally coming to rest in a ditch off of the roadway (R p 139, lines 3-9 and lines 14-25)

The Appellant, who was completely ejected from the Blazer during the accident, testified that as the car approached the Stillenger driveway, he felt the vehicle hit a puddle of water and felt the vehicle being “pulled” or “snatched” by the water (R p 139, lines 14-17, p 140, lines 14-20) In the time after the vehicle hit the water and after recognizing vehicle’s loss of control, the Appellant was able to lift his hands over his head and then lean his body over Tiffanie and their infant child in an effort to protect them (R p 139, lines 6-10 and lines 20-25) In Appellant’s deposition taken prior to the settlement with GM, Mr Rutland testified that immediately prior to hitting aforementioned accumulated water that “pulled” the Blazer and caused the accident the Blazer hit other water that pulled the vehicle in the roadway (R p 159 (Deposition Transcript p 74, line 21–p 75, line 2)) Mr Rutland further testified in his deposition that he was told by a passerby who offered assistance at the scene, that Tiffanie still had a pulse when the passerby went to her aid (R p 160 (Deposition Transcript p 81, lines 1–6)) During the accident Tiffanie was partially ejected from a rear window on the Blazer Brenda Kitrell was an eyewitness to the accident and at trial she testified to viewing the accident long enough to see the car in the air and seeing Mr Rutland get ejected from the rear of the Blazer (R p 130, lines 14-24, p 131, line 14–p 133, line 1) At its resting point, with the vehicle in a ditch, Tiffanie’s head protruded through a side window of the vehicle (R p 143, lines 2-4, p 161)

The Blazer accident resulting in Tiffanie Rutland's tragic death was the result of the SCDOT's failure to maintain Highway 301. The roadway at the scene constituted an unreasonably dangerous condition. (R. pp. 154-156)

ARGUMENTS

I THE TRIAL COURT ERRED IN GRANTING THE SOUTH CAROLINA DEPARTMENT OF MOTOR VEHICLES' POST TRIAL MOTION FOR SET-OFF AND REDUCING THE VERDICT AGAINST THE SCDOT TO ZERO

In its post trial motions, the SCDOT argued that the Appellant's allocation of settlement proceeds to a survival action were a legal sham and a mere vehicle to shield the proceeds from the SCDOT's claim to setoff. In granting the SCDOT's motions, the trial court effectively nullified the jury's verdict of \$300,000.00 against the SCDOT. The trial court ruled that all previous settlement proceeds gained by the Appellant, totaling \$305,000.00, should be equitably reallocated to a wrongful death cause of action. The court found that the previous stipulated settlement allocations toward a survival action were unsupported by the evidence presented during the *wrongful death* trial against the SCDOT. For the reasons that follow, the trial court erred in granting the SCDOT's post trial motions. The trial court's Order of September 2, 2008 should be reversed and remanded for an entry of judgment against the SCDOT in the amount of \$138,000.00.

A Sufficient Evidence Exists to Support a Survival Claim and the Trial Court Erred in Failing to Recognize the Decedent's "Pre-Impact" Damages

The central basis for the trial court's decision to reallocate the prior proceeds is the finding that no evidence existed that Tiffanie Rutland endured any conscious pain and suffering prior to her death. Contrary to the trial court's finding, ample evidence existed in the record to support the allocation of settlement proceeds to a survival action which

was approved by Judge Goodstein. The evidence presented during the wrongful death trial against the SCDOT was sufficient to create a factual issue of whether Tiffanie endured conscious pain and suffering prior to her death. Finally, the trial court's ruling fails to recognize the pre-impact damages suffered by Tiffanie before her fatal injuries were sustained.

The South Carolina survival statute provides that a cause of action for injuries to a person shall survive the person's death, with damages recoverable by the legal representative of the deceased. S.C. Code Ann. § 15-5-90 (1976). Damages in a survival action include recovery for the deceased's conscious pain and suffering and medical expenses. *See generally, Smalls v. South Carolina Department of Education*, 339 S.C. 208, 528 S.E.2d 682 (Ct. App. 2000). On the factual question underlying a survival claim, the issue must be submitted to the jury "[i]f there is any evidence from which a jury could reasonably conclude a decedent experienced conscious pain and suffering." *Vereen v. Liberty Life Ins. Co.*, 306 S.C. 423, 432, 412 S.E.2d 425, 431 (Ct. App. 1991), *Smalls, supra*. In deciding whether to submit a claim of conscious pain and suffering claim to a jury, all evidence and any inferences reasonably therefrom must be viewed in the light most favorable to the plaintiff. *Vereen, supra, Croft v. Hall*, 208 S.C. 187, 37 S.E.2d 537 (1946). Under this "any evidence" standard, a plaintiff must provide more than a mere scintilla of evidence, but circumstantial and even "weak" evidence is sufficient. *Id.*

As an initial matter, the trial court's reallocation of the settlement proceeds is improper because the Order Approving the Settlement between GM and the Appellant is binding on the parties and the trial court. In her Order Approving Settlement, Judge

Goodstein made a specific finding that evidence existed, “however slight,” to support a claim of survival. At that point in the proceedings, this factual finding was based not only on the stipulation between the settling parties as to the viability of a survival claim, but also upon the discovery in the case. In its Petition for Settlement Approval and during oral argument to Judge Goodstein, counsel for the Appellant pointed to evidence gathered during the course of discovery to support the contention that Tiffanie experienced conscious pain and suffering. For example, Mr. Rutland testified in his deposition that he was told by a passerby who offered assistance at the scene that Tiffanie still had a pulse when the passerby went to her aid. (R. p. 160 (Deposition Transcript p. 81, lines 1-6)). A picture of Tiffanie’s partial ejection from the window of the blazer, from which it could be reasonably inferred that she was injured by her movement through the glass and therefore suffered injury and pain before her fatal injuries were sustained, also existed. (R. p. 161).

While the Appellant conceded the SCDOT’s ability to argue for setoff at the appropriate stage and Judge Goodstein’s Order did not preclude “the right of SCDOT to argue against the allocation or apportionment of wrongful death and survival proceeds, or findings herein to which SCDOT does not stipulate,” her finding of fact regarding the sufficiency of evidence bound the trial court and parties. (R. p. 18). The SCDOT did not challenge the Order of Judge Goodstein by seeking reconsideration or appeal. The finding of fact in Judge Goodstein’s Order cannot be reversed or reconsidered by the trial judge, who presided solely over the wrongful death trial. There is a long-standing rule in this State that one judge of the same court cannot overrule another. *Tisdale v. Amer. Life Ins. Co.*, 216 S. C. 10, 56 S. E. 2d 580 (1950), *Drakins v. Robbins*, 203 S. C. 199, 26 S. E. 2d

689 (1943) Because Appellant's claim against the SCDOT was solely for wrongful death, evidence pertaining to survival was not offered by the Appellant at trial. It is manifestly unfair for the trial judge to reverse Judge Goodstein's finding of fact based solely on the evidence in the wrongful death trial. Such evidence was necessarily kept out of the trial, as it was immaterial to the issues before the court and the jury. In fact, counsel for SCDOT objected to certain evidence coming before the jury because it went to *survival* and the trial only pertained to *wrongful death*. Evidentiary objections on these grounds were lodged at the offer of Tiffanie's Death Certificate. (R. pp. 128, line 11 – p. 129, line 2). Rather than being presented during the wrongful death trial, the full evidentiary basis for the survival claim was provided during the settlement approval process, and the trial judge should not have disturbed Judge Goodstein's finding based upon the evidence at trial.⁴

Even if the trial court did not consider the same evidence before Judge Goodstein in approving the settlement, the evidence at trial also supports a claim for survival because the Survival statute allows the decedent's injuries to survive her death. South Carolina case law involving proof of survival actions has generally addressed the question of whether a decedent was conscious of pain for the time period *between* bodily injury and their death.⁵ On the other hand, South Carolina jurisprudence has long recognized that a plaintiff may recover for "bodily injury" for emotional damages or mental suffering without suffering actual physical injury, in the current context,

⁴ If it were proper for the trial judge to reconsider or reverse Judge Goodstein's factual finding, the review should not be limited to evidence during the wrongful death trial, but the evidence in the record as a whole. The trial testimony in conjunction with the evidence passed upon by Judge Goodstein in approving the settlement creates sufficient evidence on the question of whether Tiffanie endured conscious pain and suffering.

⁵ See generally *Peeples v. Seaboard Air Line Ry.*, 115 S.C. 115, 104 S.E. 541 (1920); *Croft v. Hall*, 208 S.C. 187, 37 S.E.2d 537 (1946); and, *Vereen v. Liberty Life Ins. Co.*, 306 S.C. 423, 412 S.E.2d 425 (Ct. App. 1991).

Tiffany's emotional and mental damages suffered in the short time between the start of the wreck and her death are proper under the survival statute. In *Spaugh v. Atlantic Coast Line R. Co.*, 155 S.E. 145 (1930), the Supreme Court held that the contention that a "plaintiff could not recover for mental suffering for the reason that there was no proof of bodily injury, cannot be sustained." *Id.* at 147. The Court further noted that in "order to receive bodily injury, it was not necessary that the plaintiff should lose a limb or receive a broken limb to have wounds inflicted on her body."

While the facts at hand are clearly distinguishable from *Spaugh* where the plaintiff suffered no physical trauma, the logic of *Spaugh* applies directly to the tragic facts of this case. Based upon the testimony of Clarence Rutland, evidence clearly existed from which a jury could infer that Tiffany consciously recognized the wreck had begun when the car lost control. Clarence Rutland testified that in the time after the vehicle hit the water and after recognizing vehicle's loss of control, he was able to lift his hands over his head and then lean his body over Tiffany and their infant child in an effort to protect them. (R. p. 138, lines 6-9 and 20-25). Brenda Kitrell was an eyewitness to the accident and testified to viewing the accident long enough to see the car in the air and seeing Mr. Rutland get ejected from the rear of the Blazer. (R. p. 130, lines 14-24, p. 131, line 14-p. 133, line 1). This testimony creates the reasonable inference that the passengers in the vehicle had sufficient time to realize that the wreck was imminent. It is also inferable that in the brief time before she was killed, this recognition caused her great fear and mental trauma.

Spaugh therefore, stands for the proposition that such mental trauma suffered before actual physical injury is recoverable and a proper element of damages under the

Survival statute. Therefore, the Appellant contends that the trial court also erred in failing to recognize *Spaugh* and not considering Tiffanie's pre-impact damages as proper under S C Code Ann § 15-5-90.

While this specific issue has not been addressed by our Courts, this view is consistent with modern jurisprudence from other jurisdictions recognizing a cause of action for "pre-impact" damages. Many courts have addressed "pre-impact" damages or "pre-impact fear." The most comprehensive examination of the issue is found in *Beynon v. Montgomery Cablevision Limited Partnership*, 351 Md. 460, 718 A.2d 1161 (Md. 1998). In *Beynon*, the Maryland Court of Appeals undertook to answer the question of "whether 'pre-impact fright,' or any other form of mental and emotional disturbance or distress, suffered by an accident victim who dies instantly upon impact is a legally compensable element of damages in a survival action." After conducting an exhaustive review of Maryland law, the Restatement of Torts, 2d, and cases from across the nation, the Court concluded

[D]amages for emotional distress or mental anguish are recoverable in Maryland, provided that it is proximately caused by the wrongful act of the defendant and it results in a physical injury, or is capable of objective determination. This standard, we recognize, does not hold sacred the common law sequence of events for recovery of emotional damages: wrongful act, physical impact, physical injury and then emotional injury. It is more accommodating.

It is no great leap to conclude that the compensability of "pre-impact fright" is permissible when it is the proximate result of a wrongful act and it produces a physical injury or is manifested in some objective form.

Id. 351 Md. at 505, 718 A.2d at 1183. The laws of Florida, Texas, Louisiana, Georgia, Nebraska and Michigan have been construed to allow claims for pre-impact fear. *See*,

Solomon v Warren, 540 F 2d 777, 796-97 (5th Cir 1976) (an airplane crash case where notwithstanding that the record did not reflect the length of time the decedents were aware of their impending deaths, “the inference is reasonable, almost compelling, that they appreciated that possibility at least from the time of the [last] radio transmission”), *Haley v Pan American World Airways*, 746 F 2d 311 (5th Cir 1984), (airplane crash case allowing recovery under Louisiana law for pre-impact apprehension in anticipation of imminent death), *Thomas v State Farm Insurance Co*, 499 So 2d 562 (La App 2d Cir 1986) (auto wreck case), *Hood v State*, 587 So 2d 755 (La App 2d Cir 1991) (auto wreck case), *Kozar v Chesapeake & Ohio Ry Co*, 320 F Supp 335, 365-66 (W D Mich 1970), *Monk v Dial*, 212 Ga App 362, 441 S E 2d 857 (1994) The reasoning in *Nelson v Dolan*, 230 Neb 848, 434 N W 2d 25 (1989), is also instructive “[W]e are persuaded that there exists no sound legal or logical distinction between permitting a decedent's estate to recover as an element of damages for a decedent's conscious post-injury pain and suffering and mental anguish and permitting such an estate to recover for the conscious prefatal-injury mental anguish resulting from the apprehension and fear of impending death”

In the case at bar, the evidence before Judge Goodstein and even that presented in the wrongful death trial itself, is sufficient to sustain Appellant’s argument that prior to her death, Tiffanie Rutland experienced apprehension and fear of impending death, or in terms of *Spaugh*, bodily injury in the form of mental suffering Although the Courts of our state have never squarely addressed this issue, based upon *Spaugh*, the plain language of the survival statute, and a host of persuasive authorities discussed in *Beynon*, the trial court failed to recognize the Decedent’s injuries prior to her death and the sufficiency of

evidence to support a survival claim

Moreover, there is a reasonable inference that Tiffanie suffered actual pain and suffering before her death. The unfortunate circumstances that led to her untimely death indicate that her head had to have crashed through a side window before her death. The side window was permanently closed. Her head had to knock out the glass in order for her to be partially ejected through it before the vehicle came to rest on her neck and eventually caused her death. Accordingly, there is sufficient evidence for a jury to determine that she suffered conscious pain and suffering as a result of a physical injury prior to her death. Thus, Judge Goodstein's finding of fact is clearly supported by uncontradicted evidence in the record.

B The Trial Court Erred In Equitably Reallocating the GM Settlement Proceeds and Applying the Full Amount of the Settlement towards the SCDOT's Right to Set-Off

In South Carolina, a nonsettling defendant is entitled to credit for the amount paid by another defendant who settles. *Powers v Temple*, 250 S C 149, 156 S E 2d 759 (1967); *Truesdale v South Carolina Hwy Dept*, 264 S C 221, 213 S E 2d 740 (1975). However, the reduction in judgment must be from a settlement for the same cause of action. *Hawkins v Pathology Assocs of Greenville*, 330 S C 92, 498 S E 2d 395 (Ct App 1998). A motion to set off one judgment against another is "equitable in nature and should be exercised when necessary to provide justice between the parties." *Welch v Epstein*, 342 S C 279, 536 S E 2d 408 (Ct App 2000). Such discretion may be exercised when a settlement or judgment is based on fraud or a sham. *Id*, *Ward v Epting*, 290 S C 547, 351 S E 2d 867 (Ct App 1986). The basis for the trial court's decision to use its inherent powers of equity to "provide justice between the parties" was

its acceptance of the SCDOT's argument that the allocation of proceeds to the survival action was a "legal sham." SCDOT's arguments to the trial court were without merit. Because the settlement was not a sham or fraudulent, the trial court erred in equitably reappportioning the settlement proceeds and applying them to the SCDOT's setoff.

Again, the trial court's reallocation of the settlement proceeds is improper because the Order Approving the Settlement between GM and the Appellant is binding on the parties and the trial court.⁶ As a further procedural matter, Appellant maintains that SCDOT did not have standing to object to the survival settlement entered between Appellant and GM. While the recent case of *Ex Parte Government Employee's Insurance Company*, 373 S.C. 172, 644 S.E.2d 699 (2006), is procedurally distinguishable from the facts at bar, the Supreme Court's general reasoning is applicable. In the *GEICO* case the UIM carrier moved to join (Rule 19, SCRPC) and/or intervene (Rule 24, SCRPC) in a family court action that had been brought to establish the validity of a common law marriage. This domestic action was filed after the carrier had filed a declaratory judgment action to determine their rights and obligations under a UIM policy, and the family court's determination of the common law marriage issue would affect the outcome of the declaratory judgment action. In holding that GEICO lacked standing, the Court commented that "GEICO's economic interest under the policy is merely tangential to the family court action. While the existence of a common law marriage may impact GEICO's liability, GEICO has no real interest in the subject matter before the family court." *Id.* The question before Judge Goodstein at the settlement approval hearing was

⁶ As discussed above, Judge Goodstein's Order Approving Settlement was a final, unappealed order containing the factual finding that evidence existed to support the allocation of settlement proceeds to a survival action. Judge Goodstein's order in essence found that the survival action settlement was not a sham.

whether sufficient evidence existed in the record as a whole to support the settling parties' allocation of proceeds to an un-filed but viable survival claim against GM. No survival action was ever filed against the SCDOT and while the allocation of proceeds tangentially effected the amount of setoff, SCDOT had no real interest in the subject matter before Judge Goodstein in the settlement between other parties.⁷ On this basis, SCDOT should not be allowed to challenge the sufficiency of proof of a survival claim, against another party, in which the SCDOT was never directly involved.

Underlying the trial court's decision to equitably reallocate the prior settlement funds is its acceptance of the SCDOT's arguments that the settlement was a "legal sham." In its post trial motions the SCDOT argued that several factors militated towards a finding that the settlement was a legal sham. Each of these arguments is without merit and as such, the trial court erred in equitably reallocating the proceeds of the settlement and applying those funds toward setoff.

First, SCDOT contended that because no survival action had been filed against GM, the allocation to survival was improper. This argument is unavailing, as the six (6) year statute of limitations on a warranty claim against GM had not expired. S.C. Code Ann. § 36-2-725. Therefore, a viable survival action remained against GM and SCDOT's argument on this point fails. To the extent the trial court considered this in its "sham" analysis, the decision should be reversed.

SCDOT next argued that no evidence existed to support a survival claim. These issues have been fully addressed above and cannot provide a basis to reallocate the

⁷ Appellant concedes that SCDOT and the settling parties were parties to the same wrongful death suit and the specific standards under Rules 19 and 24 SCRPC addressed in *GEICO* need not be considered here.

settlement funds and apply them to setoff on the wrongful death verdict against the SCDOT

Finally, the jurisprudence relied upon by the court in ordering equitable reallocation does not support the trial court's decision. On the contrary, these cases highlight that under the facts of this case, the Appellant adequately presented evidence sufficient to sustain a survival cause of action. The seminal case addressing setoff and equitable reallocation is *Ward v. Epting*, 290 S.C. 547, 351 S.E.2d 867 (Ct. App. 1986). In that case, Defendant Epting argued that the plaintiff's pain and suffering cause of action was a sham. The trial judge refused to attack the prior settlement absent a showing of fraud or lack of jurisdiction. The trial court then noted that under the "any evidence" standard of *Croft*, *supra*, evidence existed from which a jury could reasonably find conscious pain and suffering. *Ward*, 290 S.C. at 559-60, 351 S.E.2d at 874-75. As noted above, the evidence of Tiffanie's pain and suffering prior to death in this record far exceeds the requisite "any evidence" standard.

In the case at bar, SCDOT argued and the trial court ruled, that *Welch v. Epstein* support the ruling that Appellant's survival claim was in fact a sham. In *Welch*, a medical malpractice suit dealing with substandard *post*-operative care, the only evidence presented as to the plaintiff's conscious pain and suffering was that the plaintiff suffered pain resulting from the underlying back surgery, rather than as a result of the failures and omissions giving rise to the suit. *Id.* at 426. The trial court therefore found that the plaintiff's burden to prove a survival action had not been met and therefore equitably reallocated between the plaintiff's survival and wrongful death causes of action.

The facts of the case at bar are more closely aligned with *Ward*. As explained fully above, ample evidence exists in the record to sustain a survival cause of action against GM. In contrast to *Welch*, the evidence presented by the Appellant here far exceeds the dearth of evidence which led to the Court's ruling in *Welch*. Because some evidence exists from which a jury could reasonably conclude that Tiffanie Rutland endured conscious pain and suffering before her tragic death, the trial court's order granting the SCDOT's post trial motion is erroneous in light of *Welch* and *Ward*.

CONCLUSION

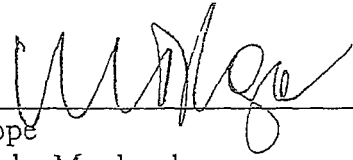
For the forgoing reasons, the trial court erred in finding the Appellant's survival claim to be a legal sham. The trial court erred further by equitably reapportioning the prior settlements with General Motors and Mr. Bishop and finding that all proceeds should be assigned to a wrongful death claim, resulting in the complete nullification of the Appellant's verdict against the SCDOT. Appellant Clarence Rutland, as the personal representative of the Estate of Tiffanie Rutland, respectfully requests that this Court reverse trial court's Order of September 2, 2008 and remand the case with instructions to enter judgment against the SCDOT in the amount of \$138,000.00.

Respectfully submitted,

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June 24, 2009
Hampton, South Carolina

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In The Court of Appeals

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas

George C James, Jr , Circuit Court Judge

Case No 2006-CP-38-0486

Clarence Rutland, as Personal Representative
of the Estate of Tiffanie Rutland,

Appellant,

v

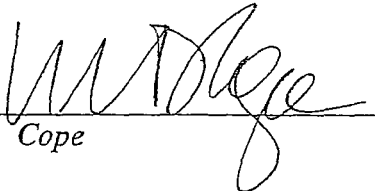
South Carolina Department of Transportation,

Respondent

CERTIFICATE OF COMPLIANCE WITH RULE 211(b), SCACR

By his signature below, the undersigned certifies that the foregoing Final Brief of
Appellant complies with the requirements of Rule 211(b), SCACR

June 24, 2009
Hampton, South Carolina



Lee D Cope

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM ORANGEBURG COUNTY
COURT OF COMMON PLEAS
THE HONORABLE GEORGE C. JAMES, JR., PRESIDING

DOCKET NO. 2006-CP-38-0486

Clarence Rutland, as Personal Representative of the Estate of Tiffanie Rutland, Appellant,

v.

South Carolina Department of Transportation, Respondent

RESPONDENT'S FINAL BRIEF

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STATEMENT OF ISSUES ON APPEAL

- 1 Did the trial court rule correctly in determining that the appellant did not produce evidence of a survival claim sufficient to overcome the respondent's right to set-off?
- 2 Does South Carolina recognize pre-impact fright as conscious pain and suffering for purposes of a survival cause of action?
- 3 Did the trial court rule correctly in equitably reallocating the GM and Bishop settlement proceeds paid to appellant and applying the full settlement towards the SCDOT's right of set-off?
- 4 Did the trial judge have authority to reallocate the settlement proceeds?

STATEMENT OF THE CASE

This is an appeal from the August 28, 2008, Order Denying Motion to Reconsider (R p 1), and the February 28, 2008, Order (R p 11) granting setoff, issued by the Court of Common Pleas for Orangeburg County, Honorable George C. James, Jr., presiding. It was commenced by the service of a Summons and Complaint filed February 7, 2005 (R p 21). Initially, the case was brought only against this respondent. Appellant ("Rutland") asserted only a wrongful death cause of action.

Prior to commencing this action, Rutland received a settlement of \$30,000.00 under the policy of insurance covering the automobile involved in the accident and driven by Joseph Bishop, who was not made a party to this action. On February 7, 2005, Rutland then filed his wrongful death action in the Orangeburg County Court of Common Pleas. The case was removed from the active docket pursuant to *Rule 40(j), SCRCP* then restored on April 26, 2006 with a new case number. On May 8, 2006, Rutland filed an Amended Complaint for wrongful death, adding REA Construction Company ("REA") and General Motors Corporation ("GM") as defendants. Plaintiff never asserted a survival cause of action in any lawsuit (R p 26). He asserted only wrongful death, and his claims against all defendants were in negligence only. As against respondent ("SCDOT"), Rutland alleged SCDOT caused or had notice of a road defect which he alleged contributed to the rainy weather wreck in which Rutland's decedent was partially ejected and killed on June 7, 2003. As against General Motors, Rutland alleged a vehicle defect contributed to the decedent's death by allowing her partial ejection. His claims were in negligence. As against REA, Rutland alleged it negligently caused or had notice of the alleged road defect. On May 22, 2006, Rutland filed a Second Amended Complaint for wrongful death, adding J. A. Jones Construction Company ("Jones") as an additional contractor which allegedly caused or had notice of the alleged road defect (R p 33). Soon thereafter, Rutland voluntarily dismissed the action as against REA and Jones, which had each filed for protection in bankruptcy.

Several months prior to the trial of this case, Rutland settled with GM. On August

9, 2007, counsel for Rutland, GM, and SCDOT were present for a hearing before the Honorable Diane S. Goodstein for consideration of the settlement pursuant to *S. C. Code Ann. §15-51-42*. Rutland and GM settled for \$275,000.00, and agreed between themselves to allocate \$167,000 to the wrongful death claim and \$138,000 to a survival claim, even though no survival claim had been filed. Rutland and GM stipulated between themselves, with no input from SCDOT's counsel, that there existed evidence to support a survival action. SCDOT's counsel voiced his reservations about the settlement, and requested that the Court make no findings which would be binding on SCDOT, but, instead, expressly preserve SCDOT's right to contest the allocation of the settlement and to seek its reallocation for purposes of setoff against any verdict against SCDOT. Rutland's counsel objected that the allocation of the settlement was not a question ripe for decision, and asserted SCDOT lacked standing to raise the matter. Rutland's counsel acknowledged, however, SCDOT's right to pursue setoff at the appropriate time and to contest the allocation agreed between Rutland and GM. (R. pp. 89 - 92). Judge Goodstein's Order approving the settlement (R. p. 15) makes reference to that stipulation, but expressly provides the Order is not binding on SCDOT, and provides the settlement may be reallocated after trial. (R. pp. 18 - 19).

The case was tried January 28 through 31, 2008, only for wrongful death. Rutland testified that his wife was dead immediately after the collision. The jury returned a verdict in favor of Rutland for \$300,000 in actual damages. That verdict, and the trial court's rulings leading up to the verdict, are not at issue in this appeal. SCDOT does not contest that it was found at fault in the wrongful death. Rutland then filed a Motion for New Trial Absolute or, in the alternative, New Trial *nisi additur*. SCDOT requested setoff of the entire settlement proceeds from Bishop (the driver) and GM against the verdict. By Order dated February 28, 2008, the trial court entered an Order without a hearing, denying Rutland's new trial motions and granting SCDOT's motion for setoff of the entire proceeds, reducing the verdict to zero. (R. p. 11). Rutland timely filed a Motion for Reconsideration, which was heard on oral argument. The trial court then issued its Order dated August 28, 2008, denying Rutland's post-trial motions and clarifying the previous ruling on the issue of setoff, but

applying the entire settlements from GM and Bishop against the verdict and reducing it to zero (R p 1) The trial court expressly found that no survival evidence was presented at trial sufficient to support allocation of settlement funds to a survival claim Rutland then timely filed this appeal

ARGUMENT

Factual Background

On June 7, 2003, Tiffanie Rutland, a young wife and mother, was an unrestrained backseat passenger in a 1999 Chevrolet S-10 Blazer driven by Joseph Bishop, the uncle of Tiffanie Rutland's husband, Clarence Rutland, the appellant herein Also in the car were the appellant, the Rutlands' toddler son, and Joseph Bishop's wife, Tina The vehicle was traveling 45 to 60 miles per hour throughout the trip from Bamberg to the accident scene near Orangeburg It was raining heavily, and Mr Bishop had slowed the car to 45 to 50 miles per hour immediately prior to losing control of the vehicle Mr Bishop lost control of the vehicle, which left the roadway, struck a culvert, and overturned in a ditch alongside the road Clarence Rutland was completely ejected from the vehicle, but was able at some point to walk to the vehicle Rutland's wife had been partially ejected through a rear side window of the vehicle, and the vehicle had come to rest on her neck pinning her to the ditch wall and leaving her body in the vehicle and her head outside the vehicle with the weight of the vehicle on her neck Mr Rutland testified that as soon as he saw his wife, he knew she was dead (R p 142 line 25 through p 143 line 8) Indeed no person at the scene testified that they saw or heard any evidence of Tiffanie Rutland surviving the impact, whether consciously or otherwise, and there was certainly no evidence of conscious survival of the impact

I THE LOWER COURT CORRECTLY SET OFF THE APPELLANT'S PRIOR SETTLEMENTS WITH OTHER TORTFEASORS AND CORRECTLY REDUCED TO ZERO THE VERDICT AGAINST SCDOT

A Appellant Did Not Establish a Survival Claim at Trial, and Pre Impact Fright is Not Compensable

At the trial of this matter Rutland presented no evidence of Tiffanie Rutland's conscious pain and suffering While Rutland asserts that his failure to do so was because he was

pursuing only a wrongful death claim against SCDOT, the South Carolina Court of Appeals rejected a similar argument in *Welch v Epstein*, 342 S C 279, 536 S E 2d 408 (Ct App 2000)

Nonetheless, evidence refuting conscious pain and suffering was admitted in the trial, without objection from Rutland Clarence Rutland testified that as soon as he saw his wife, he knew she was dead (R p 142, line 25, through p 143, line 8) He did not testify to any pre-impact fear or suffering on her part He likewise testified in his deposition that Tiffanie Rutland showed no signs of life or consciousness (R p 159/deposition, p 77, line 16, through R p 160/deposition p 78, line 10)

Rutland further asserts that, despite the lack of evidence of conscious pain and suffering by Tiffanie Rutland, the jury could **infer** (read, “assume” or ‘speculate’) that she experienced pain and injury as she passed through the glass of the automobile Likewise, however, the jury could infer that Tiffanie Rutland, an obviously unrestrained back seat passenger of a vehicle spinning on pavement before it struck a culvert pipe and flipped, airborne, landing in a ditch, passed out, was rendered unconscious, or even died prior to her head passing through the window glass There was no testimony nor evidence to establish either scenario There was no testimony or evidence presented of conscious pain and suffering, and none to establish that Tiffanie Rutland was even conscious when the vehicle left the roadway The test of a survival cause of action in South Carolina is **conscious** pain and suffering, which must be proven and not left to speculation or conjecture *Camp v Petroleum Carrier Corp* , 204 S C 133, 28 S E 2d 683 (1944)

Rutland urges the Court to recognize that Tiffanie Rutland experienced compensable, actionable, pre-impact fright sufficient to justify an award of survival damages There is no evidence of such damages Moreover South Carolina does not recognize pre-impact fright as conscious pain and suffering for purposes of a survival action, and did not recognize it during the discovery, pretrial proceedings, and trial in this action Survival of causes of action in South Carolina is governed by *South Carolina Code Ann §15-5-90 (1976, as amended)*, which provides for the survival to the decedent’s estate of an action which the decedent could have brought had she survived her injuries

Rutland argues that pre-impact fright is compensable pursuant to *Spaugh v Atlantic Coast Line R Co*, 158 S C 25, 155 S E 145 (1930), which recognized that, “In order to receive bodily injury, it was not necessary that the plaintiff should lose a limb or receive a broken limb, or to have wounds inflicted on her body **Having her nervous system injured and being made sick, constitutes a bodily injury,** ” 155 S E at 147 Thus, *Spaugh*, does not concern any impact, nor pre-impact fright, nor purely emotional injury or distress *Spaugh* was decided in 1930 It involves a woman being made physically ill by a nervous breakdown, **after** she was stranded by a rail company and walked home to her children in the rain, whereupon she “became highly nervous” and “suffered from troubles peculiar to ladies, which condition was brought on her by the exposure and experience she was subjected to ” 155 S E at 147 *Spaugh* has no bearing on this case, and South Carolina has not adopted pre-impact fear as an element of damages

Moreover, South Carolina’s law is clear as to the relevant period in which compensable conscious pain and suffering must occur In *Camp v Petroleum Carrier Corp*, 204 S C 133, 28 S E 2d 683 (1944), the Supreme Court held the trial court should have directed a verdict on the survival cause of action In *Camp*, a witness at the scene, who was outside the car, claimed to have heard the decedent groaning within the car The Supreme Court noted such groaning may not have been conscious, remarking “We have studied the record and find no evidence from which a reasonable inference can be drawn that [decedent] was **conscious of any pain and suffering in the interval between his injury and death** All of the witnesses who saw or came in close contact with the body immediately after the accident testified that there was no sign of life A witness, , testified that while standing on the outside of the wrecked automobile helping get [surviving wife] out of the car, he heard a man groaning on the inside of the car, but there is no evidence that this man (the intimation and surmise being that it was [decedent]) was conscious of pain and suffering This witness, while stating that the man was groaning, explained that he did not try to get him out of the wrecked car because the truck driver who had been inside the car said he was dead ” 204 S C at 138 28 S E 2d at 685 The Court held that, “as a prerequisite to any recovery on account of pain and

suffering, it was incumbent upon the plaintiff in the case at bar to establish that [decedent] **was conscious after the collision occurred and before he died and that during such conscious period he experienced pain and suffering**” *Id* (emphasis added) In the instant case, no person testified to any movement or noise from Tiffanie Rutland Even in Rutland’s own deposition, he states he was told his wife had a pulse, but he didn’t believe it, and he knew she was dead At trial, his testimony also stated there was no sign of life

Rutland further asks this Court, on appeal, to adopt, retroactively, legal principles not in place at the time of trial, in order to judge a scenario and an element of damages not addressed in discovery, pretrial proceedings, and trial because it was not the law at the time of the trial, and, moreover, such damages were not plead at any time against any defendant Had pre-impact fear been an element of conscious pain and suffering under South Carolina law during discovery and the trial of this matter, it could have been explored and addressed It was not so recognized, and was thus irrelevant and not addressed in discovery and trial Its adoption, retroactively, would serve to prejudice the respondent in this action Any adoption of pre-impact fear as an element of damages should only be prospective, nor retroactive

Furthermore, Rutland urges the Court not to adopt, even prospectively, such an element of damages To do so would start this state’s law of damages down a slippery slope If pre-impact fear is adopted as an element of damages, then will pre-impact fear be compensable if the impact is avoided? Might the next appellant ask the Court to allow a cause of action for putting him in fear of impact even though the impact itself was ultimately avoided? Even the Maryland case cited by Rutland on the subject of pre-impact fright acknowledges the matter should not be left to “rank speculation” *Beynon v Montgomery Cablevision Limited Partnership*, 351 Md 460, 509718 A 2d 1161, 1185 (Ct App, 1998)(noting the decedent, who was driving, obviously apprehended the collision as he personally applied the brakes) Speculation, however, is a genuine risk when attempting to discern a dead woman’s pre-impact mental status Such speculation was deemed unacceptable in Kentucky, in the case *Steel Technologies Inc v Congleton*, 234 S W 3rd 920 (Ky

2007), in which the only testimony of pre-impact fright was that of an emergency worker who testified the deceased woman's face was frozen in a grimace of fear. Pre-impact fright has further been rejected as an element of conscious pain and suffering in Massachusetts, which held the relevant period of conscious pain and suffering is properly limited to the period after injury and before death. *Gage v City of Westfield*, 26 Mass App Ct 681, 532 N E 2d 62 (Mass App Ct 1988). Other states rejecting pre-impact fear include Pennsylvania (*Nye v Com Dep't of Transp*, 331 Pa Super 209, 480 A 2d 318 (Pa Super 1984)), Illinois (*In re Air Crash Disaster near Chicago, Ill, etc*, 507 F Supp 21 (N D Ill 1980)), and Kansas (*Fogarty v Campbell 66 Exp, Inc*, 640 F Supp 953 (D Kan 1986)). This Court should likewise reject Rutland's attempt to expand South Carolina's law.

B The Trial Court Correctly Applied the Law of Setoff in Reallocating the GM Settlement Proceeds and Applying the Full Amount of the Settlement Towards SCDOT's Right to Set-Off

It is well settled that there can be only one satisfaction for an injury or wrong. *Hawkins v Pathology Associates of Greenville P A*, 330 S C 92, 498 S E 2d 395 (Ct App 1998). In multi-defendant litigation, this 'one satisfaction' principle grants a right of setoff to the nonsettling defendant against any verdict arising after another defendant settles. This prevents a double recovery to the plaintiff. *Welch, supra*; *Vaughn v City of Anderson*, 300 S C 55, 386 S E 2d 297 (Ct App 1989); *Truesdale v South Carolina Hwy Dept*, 264 S C 221, 213 S E 2d 740 (1975); *Powers v Temple* 250 S C 149, 156 S E 2d 759 (1967). To receive a verdict plus settlement would exceed a full recovery.

The right to set-off arises by operation of law as an equitable power of the trial court. *Ellis v Oliver* 335 S C 106 515 S E 2d 268 (Ct App 1999). In *Smalls v South Carolina Department of Education*, 339 S C 208 528 S E 2d 682 (Ct App 2000), the South Carolina Court of Appeals noted, "The trial court's jurisdiction to set off one judgment against another is equitable in nature and should be exercised when necessary to provide justice between the parties." *Smalls*

involved the death of a young child hit by a truck as she attempted to board a school bus. The claims included wrongful death and survival, and the defendants included the state education department, the truck driver, and his employer. Prior to trial, the estate settled with the nongovernmental defendants, allocating \$90,000 to the wrongful death action and \$10,000 to the survival action. The jury returned a verdict against the state agency for \$600,000 for the wrongful death action and \$310,000 for the survival action. The verdicts were reduced for the child's comparative negligence as found by the jury, and then further reduced to the caps set forth in the *South Carolina Tort Claims Act*, §15-78-120(a). Pursuant to *S.C. Code Ann.* §15-38-65, the *Contribution Among Tortfeasors Act* did not apply to the Department of Education, which was the sole entity at trial. Additionally, *S.C. Code Ann.* §15-78-100, requiring the jury to apportion liability between governmental and non-governmental defendants, did not apply, as there was only one defendant left at trial. The trial court denied the Department's motion for setoff. On appeal, however, this Court recognized in *Smalls* the inequity of allowing the plaintiff to settle an action with some defendants and collect on a verdict against a nonsettling defendant, and reversed, holding the trial court should have offset the pretrial settlement against the verdict, so that there would be only one total recovery for the wrongful death and survival actions. The Court further held the proper manner of applying setoff is to reduce the original verdicts by the settlement amounts prior to further reduction for comparative negligence and application of the statutory caps.

Reduction of judgment was historically allowed only where the cause of action settled and that tried to a verdict were one and the same. *Hawkins, supra*, *Ward v. Epting*, 290 S.C. 547, 351 S.E.2d 867, 875 (Ct. App. 1986). Thus, where a survival cause of action, for the decedent's conscious pain and suffering, was pursued with a wrongful death action for the loss suffered by his statutory beneficiaries, a settlement of one cause of action would not be offset against a verdict in the other cause of action, provided both causes of action were factually supported at trial. *Ward, supra*. Indeed, even where wrongful death actions were pursued against separate defendants in separate states for the death of one person, if the elements and damages of the two states' wrongful

death actions were dissimilar, the settlement of the action in one state would not be offset against the verdict in the other state *Hawkins, supra*. The plaintiff was free to allocate his settlement to his liking, provided it was not a legal sham or fraudulent. Now, however, it is held that the law permits the trial court, post-verdict, to essentially reallocate that settlement for purposes of setoff determination.

In *Welch v Epstein*, 342 S C 279, 536 S E 2d 408 (Ct App 2000), the jury awarded \$28,535.88 actual damages for a survival action, \$3 million actual damages for wrongful death, and \$3.9 million in punitive damages against a neurosurgeon. Three days prior to trial, the estate had settled with the hospital for \$450,000, of which \$445,000 was allocated to the survival action and \$5,000 was allocated to the wrongful death claim. Trial proceeded against two physicians, and the jury returned a verdict against one of them. The physician asked the Court to reallocate the settlement for purposes of his set-off motion, so that the entire survival verdict would be offset, and the remainder of the settlement proceeds would be applied to the wrongful death verdict, rather than applying only the allocated \$5,000. The trial court granted the motion. This Court affirmed, reiterating the equitable origins of set-off. 536 S E 2d at 425, *citing Smalls supra*. The Court stated set-off “is not necessarily founded upon any statute or fixed rule of court, but grows out of the inherent equitable jurisdiction of the court.” *Id. citing Rookard v Atlanta & Charlotte Air Line Ry* 89 S C 371, 71 S E 992 (1911). The Court found it significant that Dr. Epstein was not a party to the settlement, its negotiation, and its allocation, and was not bound by its terms, which, if applied, would greatly impact his interests. The Court further noted the plaintiff did not appeal the trial court’s ruling that the survival damages would be limited to medical bills, and, thus, distinguished *Ward* and held “the allocation between survival and wrongful death claims must yield to fairness and justice.” 536 S E 2d at 426. With the survival damages limited to medical expenses at trial, the Court affirmed the trial court’s ruling that the remainder of the settlement must be reallocated to wrongful death. Rejecting the estate’s argument that its trial strategy may have been different had the hospital not settled, the Court of Appeals judged the pretrial settlement with the

hospital by the evidence presented later at trial against the co-defendant physicians

In *Welch*, this Court cited *Ellis v Oliver*, 335 S C 106, 515 S E 2d 268 (Ct App 1999), for its “one injury” treatment of survival and wrongful death for the purpose of determining the double recovery issue, and implied that *Ward* would have applied to limit Dr Epstein’s set-off to the same cause of action if there had been more evidence at trial of conscious pain and suffering. In *Ellis*, this Court upheld the set-off of a hospital’s settlement of a Richland County survival action in the amount of medical bills incurred, against wrongful death and survival verdicts against a physician in Lexington County. Both the Lexington County verdicts exceeded the amount of the settlement proceeds. The set-off award did not delineate which verdict would be offset, but treated the two verdicts as one unit, and the Court did not clarify the matter.

Recently, however, this Court has again visited the subject of setting off settlements against verdicts on different causes of action, albeit not in a case of wrongful death and survival. In *Vortex Sports & Entertainment, Inc , v Ware*, 378 S C 197, 662 S E 2d 444 (Ct App 2008) rehearing denied, Vortex sued its former officer and a competitor who had hired him. The trial court offset Vortex’s pretrial settlement with the officer against its verdict against the competitor, despite Vortex’s assertions that the causes of action and damages asserted against the two defendants were separate and distinct. Citing *Ellis*, this Court affirmed, and reiterated its construction that the term “injury,” is “broad enough to include all damages.” *Id , at 209*. Likewise, Tiffanie Rutland’s injuries and death are one injury, for which her beneficiaries are entitled to one recovery.

C The trial judge was authorized to analyze and reallocate the pre-trial settlements

As provided in the trial court’s August 28, 2008, Order (R p 1) the analysis of the settlement allocation is fact-driven, and is dependent on the question whether there was proof of conscious pain and suffering sufficient to overcome the attack on the settlement allocation. Judge Goodstein’s August 9, 2007, Order contemplated just such an analysis, when she provided, ‘ Nothing herein shall preclude by waiver or otherwise the right of SCDOT to argue against the allocation or apportionment of wrongful death and survival proceed or findings herein, to which SCDOT does

not stipulate, at the appropriate later time in the continuing litigation for purposes of setoff to which SCDOT may be entitled SCDOT will be allowed and is granted the right to raise any and all issues and grounds at the appropriate future time to litigate these issues to fully protect its rights concerning setoff and the allocation or apportionment to survival and wrongful death under common law, statutory and/or equitable principles ” (R pp 18-19)(emphasis denotes Judge Goodstein’s handwritten added language) Rutland neither sought reconsideration of, nor appealed, that Order, and it is the law of this case Rutland now asserts the trial court lacked authority to perform, and SCDOT lacked standing to request the very analysis and reallocation Judge Goodstein contemplated, expected, and provided for in her Order Under Rutland’s logic, no trial court could ever perform the analysis of settlement contemplated by *Welch Ellis* and *Vortex*, if the settlement were approved by one judge, and the trial presided over by another Yet in South Carolina, that is a likely scenario, unless a case is deemed complex Such logic is not the law of South Carolina Rutland asserts at page 9 of his brief, that Judge Goodstein’s finding of fact as to survival, in the setting of a settlement approval to which SCDOT is not a party, cannot be reversed or reconsidered by the trial judge, because the trial judge presided solely over the wrongful death trial Yet, Judge Goodstein’s Order, the law of the case, specifically says findings herein, to which SCDOT does not stipulate, shall not be binding on SCDOT Rutland’s argument thus fails

CONCLUSION

As set forth above, the Order appealed from did not result from judicial error, and should be affirmed

June 17, 2009
Bamberg, South Carolina

Respectfully submitted,
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I, Norma A T Jett, attorney for the Respondent in the appeal of *Clarence Rutland as Personal Representative of the Estate of Tiffanie Rutland v South Carolina Department of Transportation*, Docket No 2006-CP-38-0486, do hereby certify the foregoing Respondent's Final Brief complies with Rule 211(b), SCACR

June 17, 2009
Bamberg South Carolina

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I, Norma A T Jett, attorney for the Respondent in the appeal of *Clarence Rutland as Personal Representative of the Estate of Tiffanie Rutland v South Carolina Department of Transportation*, Docket No 2006-CP-38-0486, do hereby certify the foregoing Respondent's Final Brief complies with the August 13, 2007, Order of the Supreme Court regarding personal data identifiers and sensitive information

June 17, 2009

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THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM ORANGEBURG COUNTY
COURT OF COMMON PLEAS
THE HONORABLE GEORGE C JAMES, JR , PRESIDING

DOCKET NO 2006-CP-38-0486

Clarence Rutland, as Personal Representative of the Estate of Tiffanie Rutland, Appellant,

v

South Carolina Department of Transportation, Respondent

PROOF OF SERVICE

I, Norma A T Jett, one of the attorneys for Respondent in the above-captioned matter, do hereby certify that, on this date, my agent has served the foregoing **Respondent's Final Brief** upon the persons below-listed by placing a copy, first-class postage prepaid, in the United States Mail, addressed as follows

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas

George C. James, Jr., Circuit Court Judge

Case No. 2006-CF-38-0486

Clarence Rutland, as Personal Representative
of the Estate of Tiffanie Rutland,

Appellant,

v

South Carolina Department of Transportation,

Respondent

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STATEMENT OF THE CASE

Appellant adopts and incorporates by reference the Statement of Case and Facts presented in his Initial Brief of March 3, 2009. The factual history discussed below is limited to reply to the issues raised in the Respondent SCDOT's Statement of the Case.¹

In its Statement of the Case, SCDOT characterizes the decedent's husband's testimony during the trial of the case as stating that "his wife was dead immediately after the collision." (Respondent's Initial Brief, p. 3). This characterization is misleading because of the nature of this wreck, the issues of damages, and the temporal questions of whether Tiffanie Rutland suffered conscious pain and suffering and/or mental and emotional distress prior to her death. The undisputed facts show that this wreck was not a simple, immediate "collision." Instead, this wreck was a series of events leading to the vehicle finally crashing into a ditch, with the weight of the Blazer coming to rest on the partially ejected body of the decedent. In the Argument section of its brief, the SCDOT acknowledges that the vehicle began "spinning on pavement before it struck a culvert pipe and flipped, airborne, landing in a ditch." (Respondent's Initial Brief, p. 5).

The "collision" at issue began when the Breland vehicle hit the defective and unreasonably dangerous portion of S.C. Highway 301 which held water. Clarence Rutland, a backseat passenger with his wife, testified that he felt the vehicle being "pulled" or "snatched" by the water. (R. p. 139, lines 6-25, R. p. 140, lines 14-20). Recognizing the loss of control (or *beginning* of the "collision"), the Appellant had time to lift his hands over his body and then lean his body over his wife and child in an effort to protect them. (*Id.*) The evidence at trial showed that the vehicle spun on the roadway

¹ Similarly, under the Argument section of this Reply Brief, Appellant adopts and incorporates by reference those arguments raised in his Initial Brief of March 3, 2009. For the sake of brevity, Appellant submits the arguments herein as a limited reply to those issues raised in the Respondent's Initial Brief.

and then hit a culvert sending it airborne. Eyewitness Brenda Kirtrell viewed the accident in progress long enough to see the Blazer airborne after hitting the culvert and see Mr. Rutland completely ejected from the rear of the vehicle. (R. p. 151, lines 12-21)

Aside from any semantic issues with the word "collision," the record does not support that Clarence Rutland saw his deceased wife "immediately" after the vehicle came to rest in the ditch, as Clarence himself had been ejected from the vehicle. In fact, Clarence was thrown some distance from the overturned Blazer and before he approached the vehicle, a couple of people had stopped to assist. He went to the vehicle with them and after attempting to get the motor to stop and searching for an object to break windows to get the occupants out, he slipped in the ditch and saw Tiffanie. (R. p. 159 (Deposition Transcript, p. 76 line 12-p. 77, line 17))

Appellant notes these facts in reply because of the important questions concerning the viability of a survival action and the issue of "pre-impact" emotional and mental distress raised in this appeal.

ARGUMENT

I THE SOUTH CAROLINA DEPARTMENT OF TRANSPORTATION'S ARGUMENTS FOR ITS EQUITABLE SET-OFF ARE UNAVAILING

In its post trial motions, the SCDOT argued that the Appellant's allocation of settlement proceeds to a survival action were a legal sham and a mere vehicle to shield the proceeds from the SCDOT's claim to setoff. In granting the SCDOT's motions, the trial court nullified the jury's verdict of \$300,000.00 against the SCDOT by ruling that all previous settlement proceeds gained by the Appellant, totaling \$305,000.00, should be equitably reallocated to a wrongful death cause of action. The court found that the previous stipulated settlement allocations toward a survival action were unsupported by

the evidence presented *during the wrongful death trial* against the SCDOT. The SCDOT's arguments in support of this ruling are unavailing. The trial court's Order of September 2, 2008 should be reversed and remanded for an entry of judgment against the SCDOT in the amount of \$138,000.00.

A. The Trial Court's Review of the Viability of a Survival Action Is Not Limited to the Evidence Presented During the Trial of the Wrongful Death Claim, but Rather the Entire Record Produced in the Litigation, furthermore, Even if so Limited, the Evidence at Trial is Sufficient to Warrant Reversal.

Throughout its Initial Brief in support of its contention that the Appellant failed to provide sufficient evidence to sustain the allocation of settlement proceeds towards a survival action, SCDOT raises the point that the trial of this action against SCDOT was solely for wrongful death and that no survival action was ever filed against it or the other settling parties on numerous occasions. As the Court's Order from which this Appeal is taken states:

During the trial of this case, no evidence of conscious pain and suffering was directly introduced, primarily because there was no survival action pled. Any attempt to directly raise or argue such evidence would therefore have been improper.

From the Appellant's perspective that is *precisely* the point raised in appealing the trial court's rulings.

The trial before the Orangeburg jury was solely for wrongful death. The presentation of evidence concerning the conscious pain and suffering of Tiffanie Rutland was irrelevant to any issue in the wrongful death claim and therefore inadmissible. Rule 401, SCRE. As such, it was not the Appellant's burden at trial to present even a scintilla of evidence concerning Tiffanie Rutland's conscious pain and suffering before her death. Had Appellant presented such evidence, Rule 401 would have required the exclusion of

such evidence. Without question, even if evidence of this nature were relevant, the prejudicial effect and possibility of jury confusion on the issues of damages from such evidence would have outweighed its probative value in the context of the wrongful death claim. Rule 403, SCRE.

Even within the evidentiary strictures of the wrongful death trial, evidence existed from which the trial court could reasonably infer that between the start of the incident and the final insult resulting in Tiffanie's death - her partial ejection from the vehicle - Tiffanie endured conscious pain and suffering. This accident was not a single, sudden impact event. Rather, the testimony at trial indicates that the passengers felt an initial "pull" causing the vehicle to lose control and after a series of events, Tiffanie was partially ejected and the vehicle landed on her when it came to rest. Based on the timing elements of this wreck alone, a jury could have inferred that Tiffanie received bodily injuries before she was killed in the accident and that during this process she suffered immediate fear and mental distress of being in this wreck.² Therefore, the trial court's finding that the stipulation between Appellant and GM as to the survival action was a

² For further detail analyzing the requirements of S.C. law concerning conscious pain and suffering and whether a cause of action for emotional/mental distress exists under existing law, see Appellant's Initial Brief, pp. 8-14.

By way of rebuttal to SCDOT's "slippery slope" policy argument at page 7 of its Initial Brief, SCDOT's policy argument fails to comprehend the limited circumstances where this element of damages has been found proper. Appellant does not seek an expansion of existing damages law. Nor does Appellant seek to create law that would allow parties to recover for emotional turmoil, mental distress, or pre-impact fear that is unaccompanied by physical injury. Based on the facts of this case, it strains logic to conclude that prior to her violent death Tiffanie Rutland did not experience fear, terror, emotional trauma, and mental distress not only for her own life, but also that of her family. It likewise strains logic to conclude that prior to her death she was uninjured as this vehicle spun, hit a culvert, became airborne, and finally landed in a ditch on her partially ejected body. As noted by the numerous jurisdictions who have allowed pre-impact fear in survival actions, this element of damages is simply a practical acknowledgement that in limited circumstance where evidence exists from which it is reasonable to conclude that the decedent was aware of imminent injury or death, that decedent has actual emotional or mental trauma. Such emotional trauma and mental distress, followed by the death of the decedent, is a compensable element of damages under the South Carolina Survival Statute. *Scott v. Porter*, 340 S.C. 158, 530 S.E.2d 389 (Ct. App. 2000) (noting that appropriate damages in survival actions include those for medical, surgical, and hospital bills, conscious pain, suffering, and mental distress of the deceased).

legal sham and requiring equitable reapportionment is unsupported based upon only the evidence and inferences drawn therefrom in the trial of the wrongful death case. While the SCDOT in its brief equates “inference” with “assumption” and “speculation,” it is well established that a finder of fact may base decisions on reasonable inferences drawn from the evidence before it.

Moreover, to the extent the trial judge ruled that the survival allocation was a legal sham based upon the lack of evidence *at trial*, any such narrowing of the record on the issue was improper. To the extent this finding is premised upon SCDOT’s argument that Appellant could not recover under a survival cause of action because no suit was filed, such reliance is misplaced. S.C. Code Ann. § 15-51-42 governs the approval of settlements of wrongful death or survival actions. Subsection 15-51-42(B) specifically provides a procedure for the approval of settlements in cases where *no action is pending*. Here, Judge Goodstein merely considered the Petition for approval of a survival claim where an un-filed but viable action for survival existed. Because of this, the evidence before Judge Goodstein in her consideration of allocating settlement proceeds to the survival claim was not limited to the filed, pending wrongful death action. Rather, her decision was based on the stipulation of the parties and the evidence gathered during discovery between all parties to that point. It follows that the trial court’s post-trial review of the allocation issues should not have been limited to the review of the evidence presented during the wrongful death trial. Certainly, had the trial court considered the evidence at trial and that of the total record and inferences reasonably drawn therefrom, sufficient evidence existed to support the viability of the survival action settlement.

B Under Existing South Carolina Law Regarding Setoff and the Equitable Reallocation of Proceeds, the Court Erred in Finding the Allocation to be a Legal Sham or a Fraud

Based on Judge Goodstein's Order approving the allocation of settlement proceeds to survival, as well as the procedural posture of the case presided over, the trial judge's post-verdict inquiry as to set-off should have been guided by whether evidence of conscious pain and suffering existed in the record as whole. Most importantly, that review was undertaken under the court's inherent equitable powers to order set-off. Under the common law cited by both parties, a motion to set off one judgment against another is "equitable in nature and should be exercised when necessary to provide justice between the parties." *Welch v. Epstein*, 342 S.C. 279, 536 S.E.2d 408 (Ct. App. 2000). This discretion should not be arbitrarily or capriciously exercised. *Id.* at 426. However, as noted in the Respondent's Initial Brief, a plaintiff is free to allocate a settlement to his liking, provided it was not a legal sham or fraudulent. *Id.* *Ward v. Epting*, 290 S.C. 547, 351 S.E.2d 867 (Ct. App. 1986), *Hawkins v. Pathology Associates of Greenville P.A.*, 330 S.C. 92, 498 S.E.2d 395 (Ct. App. 1998). In order for the court to equitably reallocate a settlement and apply the set off, it is therefore a prerequisite that the settlement was fraudulent or a sham.

In the instant case, SCDOT's relies exclusively on *Welch v. Epstein* case to bolster its argument that the settlement reached by the Appellant and GM is fraudulent and a sham. The facts of the *Welch* case and those at hand are entirely distinguishable and SCDOT's reliance on *Welch* is misplaced.

In that case, the decedent's estate brought wrongful death and survival actions against Aiken Hospital and two attending physicians. Prior to trial, the estate settled with

the hospital and allocated \$445,000 00 out of a \$450,000 00 settlement to the survival action. At trial against the two physicians, a substantial wrongful death verdict was rendered against Dr. Epstein, the attending neurosurgeon. The jury awarded only \$28,535 88 for the survival action, representing the medical expenses incurred by the decedent.³ The trial court granted defendant Epstein's post-trial motions to reallocate the proceeds of the estate's settlement with the hospital, finding the parties' allocation between wrongful death and survival claims was fraudulent. In upholding the trial court's finding that the allocation of the hospital's settlement to the survival action was a sham, the sole factual basis for the decision was that absolutely no evidence existed that the decedent endured conscious pain and suffering as a result of the negligence of Dr. Epstein. On this utter lack of evidence of pain and suffering the Court commented

Welch [decedent] fell into a coma at the time of his arrest and did not recover from that condition. While the personal representative claims Welch was in considerable pain prior to the arrest, that pain was directly related to the back surgery.

Id. at 426. As noted in the Court's recitation of the facts, there was "no issue concerning Dr. Epstein's performance of the neurosurgery." *Id.* at 413. Rather, the jury's finding of negligence against Dr. Epstein dealt solely with post-operative care. All pain and suffering endured by Welch was related to the underlying neurosurgery, not the post-operative care. It followed, as a matter of law, that the negligent acts of Dr. Epstein were not causally related to any conscious pain or suffering endured by Welch, the only pain and suffering endured was a result of the surgery itself, which was not at issue in the case. Therefore, in *Welch*, absolutely no evidence existed of conscious pain and suffering

³ The trial judge charged the jury that these bills were the sole element of damages recoverable under the survival action which the estate did not appeal.

that was attributable or proximately caused by Dr. Epstein. Based on these facts, it is readily apparent why the trial court viewed the allocation of \$450,000.00 to the survival action as a fraud and was affirmed by this Court. It is also apparent why the court used its equitable powers to reallocate the settlement with the hospital and apply the set off to the verdict against Dr. Epstein.

The facts presented in the case at bar are clearly distinguishable between the sham settlement allocations presented in *Welch*. Unlike *Welch*, the Appellant's allocation of portions of the GM settlement to the survival action is supported by credible evidence. The facts here are therefore more closely aligned with *Ward v. Epting* *supra*. *Ward* was also a medical malpractice suit where the remaining Defendant sought set off of another defendant's pre-trial settlement. The trial court refused Dr. Epting's motion for reallocation because there was no showing that the allocation of settlement proceeds was a sham. *Id.* at 560. In finding that the settlement was not a sham, the *Ward* Court set forth the level of proof required to resist the argument that a settlement allocation was a sham. *Ward* directly cites to the standard established in *Croft v. Hall*, 208 S.C. 187, 37 S.E.2d 537 (1946), as the level of proof required to present a conscious pain and suffering claim.

Unless respondent's intestate consciously suffered there could be no recovery of damages on that account [Citations omitted]. We think, like the lower court finally concluded, that the evidence required that the jury pass upon this issue.

Respondent's factual showing thereabout was weak but there was more than a scintilla of evidence tending to prove the point.

[O]ur decision is not of the preponderance of evidence
but whether there was any from which the jury could
reasonably find conscious pain and suffering

Id. at 539-540. *Croft* establishes that if a Plaintiff can satisfy the “any evidence” standard to overcome a summary judgment motion, the allocation cannot be deemed a sham or fraudulent. Applying the standard, as Chief Justice Toal recently held “in cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment.” *Hancock v. Mid-South Management Co., Inc.* 673 S.E.2d 801, 803 (2009).

In further distinguishing the facts of this case from those of *Welch*, in her Order Approving Settlement, Judge Goodstein necessarily found that evidence of conscious pain existed to support the allocation of the proceeds to the survival claim. Her Order speaks for itself as to SCDOT’s objection to the allocation and SCDOT’s ability to contest the allocation at the appropriate post-verdict juncture. However, a flaw in the trial court’s analysis was to limit the review of the survival claim solely to the evidence presented during the wrongful death trial. Rather, the trial court’s post-verdict review should have questioned whether the record as a whole, as was considered by Judge Goodstein, supported her finding that evidence sufficient to satisfy the *Croft* standard existed. With a judicial finding that evidence sufficient to support a survival claim existed, the trial court was bound to equitably reallocate the settlement only if no evidence existed to support the claim.

As addressed in Appellant’s Initial Brief and herein, evidence of Tiffanie Rutland’s conscious pain and suffering, as well as pre-death emotional and mental trauma certainly exists beyond a mere scintilla of evidence. Whether limited to the trial of the

wrongful death case or in viewing the record as a whole as suggested by Appellant, the standard of *Croft* and *Ward* has been satisfied. The issues of whether the Appellant's allocation of proceeds with GM stand in stark contrast to the utter lack of evidence presented in *Welch v. Epstein*. For these reasons, the arguments of SCDOT regarding equitable reallocation and set off must be rejected and Judge Goodstein's factual finding should not be disturbed.

Finally, because the equitable reapportionment arguments posed by SCDOT are founded in equity and the notion that "justice be done between the parties," Appellant is compelled to address policy considerations. Following the verdict in this case, the valid, fair and reasonable settlements obtained from joint tortfeasors, the driver and GM, have been collaterally attacked and an order issued which nullifies the jury's findings against the SCDOT. Appellant acknowledges the SCDOT's statutory right of set-off as well as the trial court's inherent power to order equitable set-off under the common law. However, to require what the SCDOT's arguments seek, and what the trial court's ruling requires -- that the Plaintiff in a wrongful death trial introduce and prove elements of damages under a survival action -- is inherently unfair and simply contrary to the law of equitable reapportionment. To require such a showing would produce a chilling effect on the settlement of claims with other tortfeasors, because it would serve little purpose to release joint tortfeasors by settlement if the Plaintiff then has to present that same evidence against remaining defendants in order to stave off the post-verdict settlement analysis. Such a requirement also would necessarily require the introduction of irrelevant, prejudicial, and potentially confusing evidence into the trial against the remaining defendant. Moreover, the broad expansion of the law regarding set off and

equitable reallocation that SCDOT seeks would provide disincentive for the SCDOT to enter into reasonable, good faith settlement negotiations. The stifling and impeding of fair, just settlements being reached against tortfeasors is contrary to the public policy of South Carolina. Albeit in a different context as between joint tortfeasors, as noted recently in *Fowler v Hunter*, 668 S E 2d 803 (Ct App 2008)

South Carolina has shown a willingness to depart from the common law in order to promote reasonable settlements between tortfeasors and injured parties. In *Bartholomew v McCartha* 255 S C 489, 179 S E 2d 912 (1971), our Supreme Court concluded the common-law rule regarding the release of one joint tortfeasor was not in the best interests of justice.

Being untrammelled by the ancient rule which, in our view, tends to stifle settlements, defeat the intention of parties and extol technicality, we adopt the view that the release of one tort-feasor does not release others who wrongfully contributed to plaintiff's injuries unless this was the intention of the parties, or unless plaintiff has, in fact, received full compensation amounting to a satisfaction. *Id* at 492, 179 S E 2d at 914.

While acknowledging the inherent benefits of settlement, we also note South Carolina promotes the careful examination of settlement agreements to avoid the potential for complicity or wrongdoing.

We are cognizant that litigants are free to devise a settlement agreement in any manner that does not contravene public policy or the law. In fact, this Court encourages such compromise agreements because they avoid costly litigation and delay to an injured party. However, these settlement agreements must be carefully scrutinized in order to determine their efficiency and impact upon the integrity of the judicial process.

As addressed above, in the allocations at issue in this appeal, there is no fraudulent or sham allocation to the survival action, as sufficient evidence existed on the issue of conscious pain and suffering and/or pre-death mental and emotional distress. Nor does

the allocation of settlement proceeds in the amount of \$167,000 00 towards the wrongful death claim and \$138,000 00 towards survival contravene public policy or the law, or indicate complicity or wrongdoing on behalf of the settling parties from a policy standpoint. It follows that the SCDOT's arguments concerning the equitable reallocation and set off of the settlement proceeds at issues are without merit. Furthermore, taken to their logical conclusion, the standards sought to be applied by respondent have substantial and real adverse policy ramifications for those injured by the negligence of a governmental entity in conjunction with other joint tortfeasors.

CONCLUSION

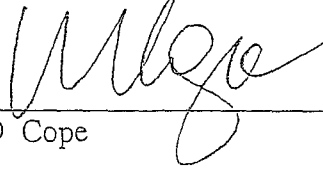
As addressed herein, SCDOT's arguments to support the trial court's finding that the Appellant's survival claim was a legal sham are without merit. Based upon the existing laws of South Carolina, the trial court erred further by equitably reapportioning the prior settlements with General Motors and Mr. Bishop and finding that all proceeds should be assigned to a wrongful death claim, resulting in the complete nullification of the Appellant's verdict against the SCDOT.

Respectfully submitted,

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And-

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Lee D. Cope

June 24, 2009
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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas

George C James, Jr , Circuit Court Judge

Case No 2006-CP-38-0486

Clarence Rutland, as Personal Representative
of the Estate of Tiffanie Rutland,

Appellant,

v

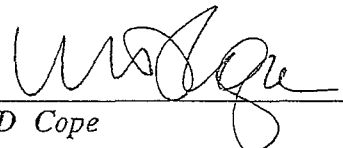
South Carolina Department of Transportation,

Respondent

CERTIFICATE OF COMPLIANCE WITH RULE 211(b), SCACR

By his signature below, the undersigned certifies that the foregoing Final Reply
Brief of Appellant complies with the requirements of Rule 211(b), SCACR.

June 24, 2009
Hampton, South Carolina



Lee D Cope

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Clarence Rutland, as Personal
Representative for the Estate of
Tiffanie Rutland, Appellant,

v

South Carolina Department of
Transportation, Respondent

Appeal From Orangeburg County
George C. James, Circuit Court Judge

Opinion No. 4721
Heard May 18, 2010 – Filed August 4, 2010

AFFIRMED

J. Christopher Wilson, of Bamberg, Lee D. Cope, R.
Alexander Murdaugh, Matthew V. Creech, of
Hampton, for Appellant

Richard B. Ness and Norma A. T. Jett, of Bamberg,
for Respondent

WILLIAMS, J. Clarence Rutland (Rutland), as personal representative of the Estate of Tiffanie Rutland, appeals the trial court's decision granting the South Carolina Department of Transportation's

(SCDOT) post-trial motion for set-off, which subsequently reduced the verdict against SCDOT to zero. We affirm.

FACTS

On June 7, 2003, Tiffanie Rutland (the decedent) was a passenger in a 1999 Chevrolet S-10 Blazer (the Blazer) on Highway 301 in Orangeburg County along with her husband, Rutland, her son, and Rutland's aunt. Rutland's uncle, Joseph Bishop (Bishop), was driving the Blazer. While traveling on Highway 301, Bishop encountered a heavy rain storm and reduced his speed to approximately 45-50 miles per hour. However, Bishop subsequently lost control of the Blazer when it hydroplaned. The Blazer overturned in a nearby ditch. The decedent sustained fatal injuries after she was partially ejected from the Blazer's side window.

Rutland received a \$30,000 settlement from Bishop's automobile insurance policy. On February 2, 2005, Rutland filed a wrongful death action against SCDOT. On May 8, 2006, Rutland amended his complaint and added REA Construction Company¹ and General Motors (GM) as defendants to the wrongful death action.

Prior to the trial against SCDOT, GM and Rutland reached a settlement agreement. The settlement agreement totaled \$275,000, of which GM agreed to allocate \$137,500 to the wrongful death claim and \$137,500 to the survival claim. The trial court approved the settlement agreement (the settlement trial court) on August 9, 2007, and allocated \$167,000 (\$29,500 from Bishop's automobile policy and \$137,500 from the GM settlement) to the wrongful death claim and \$138,000 to a survival claim.² The Bishop and GM settlements totaled \$305,000.

In the trial against SCDOT, the jury awarded Rutland a \$300,000 verdict in actual damages for the decedent's wrongful death. SCDOT subsequently filed a motion to set-off the proceeds of the Bishop and GM

¹ REA Construction Company was voluntarily dismissed prior to trial.

² The settlement trial court's order states, "Petitioner did not allege a survival action. Nevertheless, the Petitioner's settlement with [GM] includes settlement of all alleged and unalleged claims, including Petitioner's wrongful death claim and any potential survival claim."

settlements Rutland filed a motion for a new trial absolute, new trial on damages only, or in the alternative for a new trial nisi additur

The trial court that heard the case against SCDOT (the SCDOT trial court) issued an order approving SCDOT's motion for set-off, reduced the verdict against SCDOT to zero, and denied Rutland's new trial motions. Rutland subsequently filed a motion for reconsideration of the SCDOT's trial court order. In the SCDOT trial court's final order, the trial court denied Rutland's new trial motions and clarified its set-off ruling. The SCDOT trial court concluded the settlement agreement should be reallocated based on the insufficiency of the evidence to support a survival claim. This appeal followed.

STANDARD OF REVIEW

The trial court's jurisdiction to set off one judgment against another is equitable in nature and should be exercised when necessary to provide justice between the parties. Welch v. Epstein, 342 S.C. 279, 313, 536 S.E.2d 408, 425 (Ct. App. 2000). A set-off is not necessarily founded upon any statute or fixed rule of court but grows out of the inherent equitable jurisdiction of the court. Rookard v. Atlanta & Charlotte Air Line Ry., 89 S.C. 371, 376, 71 S.E. 992, 995 (1911). Therefore, a motion for set-off is addressed to the discretion of the court, and this discretion should not be arbitrarily or capriciously exercised. Id.

LAW/ANALYSIS

A Survival Action

Rutland contends the SCDOT trial court erred in granting SCDOT's motion for set-off because there is sufficient evidence to support a survival claim.³ We disagree.

³ Rutland did not plead a survival claim against SCDOT or any other defendant. However, the settlement trial court concluded the settlement included all alleged and unalleged claims, including Rutland's wrongful death claim and any potential survival claim against GM. Even though Rutland failed to plead a survival action, the elements of a survival action are discussed to analyze whether the trial court properly concluded that there was

The test of a survival action in South Carolina is whether the decedent suffered conscious pain and suffering Camp v Petroleum Carrier Corp., 204 S C 133, 139, 28 S E 2d 683, 685 (1944) South Carolina case law provides illustrative examples of when a survival action has evidentiary support of conscious pain and suffering

In Waid v Epting, 290 S C 547, 560, 351 S E 2d 867, 875 (Ct App 1986), this court found testimony that the decedent's response to directions in the recovery room following surgery constituted sufficient evidence of conscious pain and suffering to present a factual question to the jury In contrast, in Welch v Epstein, this court concluded there was only evidence the decedent lapsed into a coma at the time of his arrest and he did not recover from this condition 342 S C at 313, 536 S E 2d at 426 This court found the survival action was limited solely to medical bills, and Ward was distinguishable because there was some evidence to support a factual issue of conscious pain and suffering based on Waid's responses to directions Id

Rutland asserts there was sufficient evidence to support a survival claim because a passerby indicated the decedent had a pulse after the accident After reviewing the record, we conclude the trial court did not err in granting SCDOT's motion for set-off based on the insufficiency of the evidence to support a survival claim The record does not reveal any evidence tending to show the decedent endured conscious pain and suffering In fact, Rutland testified the decedent did not respond when he called her name, the decedent did not make any noises, he knew she was dead immediately after the accident, and he knew the decedent died even though he was told that the decedent had a pulse Therefore, the SCDOT trial court did not err in concluding that there was not sufficient evidence from which a jury could have concluded the decedent experienced conscious pain and suffering

B "Pre-Impact Fear"

Rutland argues the decedent experienced "pre-impact fear" and suffered mental trauma because of her knowledge of her impending death Rutland contends this "pre-impact fear" is recoverable in a survival action

insufficient evidence to support a survival action in reallocating the proceeds of the survival action to the wrongful death action

when the decedent suffered mental trauma before actual physical injury resulting in the decedent's death. We disagree.

In support of his position, Rutland cites Spaugh v. Atlantic Coast Line Railroad Co., 158 S.C. 25, 155 S.E. 145 (1930). Spaugh involved a woman who became physically ill after experiencing a nervous breakdown when she was stranded by a train company. Id. at 27-29, 155 S.E. at 146-47. The woman "became highly nervous" and "suffered from troubles peculiar to ladies which condition was brought on her by the exposure and experience she was subjected to." Id. at 29-30, 155 S.E. at 147. In affirming the trial court's denial of the defendant's directed verdict motion, our supreme court concluded there was sufficient evidence that the plaintiff suffered bodily injury. Id. at 30, 155 S.E. at 147. The court stated,

In order to receive bodily injury, it was not necessary that the plaintiff should lose a limb or receive a broken limb, or to have wounds inflicted on her body. Having her nervous system injured and being made sick, in the manner she testified, constitutes bodily injury provided the proof establishe[d] negligence on the part of the defendant's agent and such negligence caused the alleged injury complained of.

Id.

Additionally, Rutland cites several cases in which other jurisdictions have recognized a cause of action for "pre-impact fear."

South Carolina does not recognize "pre-impact fear" as a compensable cause of action. See Hoskins v. King, 676 F. Supp. 2d 441, 451 (D.S.C. 2009) (concluding South Carolina law does not permit recovery for pre-impact fright). Also, we decline to extend the holding in Spaugh for the proposition that "pre-impact fear" is recoverable in this State.

C Sufficiency of the Evidence

Rutland contends SCDOT is bound by the sufficiency of the evidence in the settlement trial court's order. We disagree.

The settlement trial court's order stated,

The court approves the allocation without making any factual findings about the cause of the crash or the cause of Tiffanie Rutland's death but finds that there exists some evidence, however slight, that Tiffanie Rutland survived the crash and consciously endured pain and suffering prior to her death

Nonetheless, the order further states,

Nothing herein shall preclude by waiver or otherwise the right of SCDOT to argue against the allocation or apportionment of wrongful death and survival proceeds or findings herein, to which SCDOT does not stipulate at the appropriate later time in the continuing litigation for purposes of set[-]off to which SCDOT may be entitled

Because SCDOT was not a party to the Bishop and GM settlements and the settlement trial court's order expressly granted SCDOT the right not to stipulate to the findings of the order, we conclude SCDOT was not bound by the settlement trial court's sufficiency of the evidence ruling in regard to whether the decedent endured conscious pain and suffering. McCrea v City of Georgetown, 384 S C 328, 332, 681 S E 2d 918, 921 (Ct App 2009) (stating that a stipulation is an agreement, admission, or concession made in judicial proceedings that are binding upon those who make them). Additionally, the settlement trial court's order as it pertains to the non-binding effect of non-stipulated matters is the law of the case because Rutland never appealed the order. See ML-Lee Acquisition Fund, LP v Deloitte & Touche, 327 S C 238, 241, 489 S E 2d 470, 472 (1997) (holding an unappealed ruling, right or wrong, becomes the law of the case).

D Equitable Reallocation

Rutland finally contends the trial court erred in equitably reallocating the Bishop and GM settlement proceeds and in applying the full settlement award towards SCDOT's right of set-off. Rutland argues the trial court's reallocation of the settlement proceeds is improper because the settlement

agreement is binding and argues the decedent experienced conscious pain and suffering. We disagree.

A non-settling defendant is entitled to credit for the amount paid by another defendant who settles. Smalls v. S.C. Dep't of Educ., 339 S.C. 208, 219, 528 S.E.2d 682, 688 (Ct. App. 2000). The trial court's jurisdiction to set-off one judgment against another is equitable in nature and should be exercised when necessary to provide justice between the parties. Welch, 342 S.C. at 313, 536 S.E.2d at 425.

In Ward, the personal representative settled with a co-defendant for \$29,500 for pain and suffering and \$500 for wrongful death on behalf of the decedent. 290 S.C. at 559, 351 S.E.2d at 874. The personal representative subsequently went to trial against Dr. Epting, the non-settling defendant, and the jury awarded Ward \$400,000 in actual damages for wrongful death. Id. at 552, 351 S.E.2d at 870. Dr. Epting moved in limine to assign the full amount of the settlement agreement to the wrongful death action and argued the personal representative's settlement with the co-defendant was a de facto settlement of the wrongful death action since there was insufficient evidence to support a survival action. Id. at 559, 351 S.E.2d at 874. This court declined to reallocate the proceeds because there was evidence that Ward was responding to directions following surgery; therefore, there was sufficient evidence to present a jury question on conscious pain and suffering. Id. at 560, 351 S.E.2d at 875.

In Welch, the personal representative settled with a co-defendant for \$445,000 for a survival claim and \$5,000 for a wrongful death claim. Welch, 342 S.C. at 312, 536 S.E.2d at 425. The personal representative asserted a wrongful death and survival action claim against Dr. Epstein, and the jury awarded the personal representative \$28,535.88 on the survival claim, \$3,000,000 on the wrongful death claim, and \$3,900,000 in punitive damages. Id. at 287, 536 S.E.2d at 412. Dr. Epstein filed a post-trial motion for set-off based on the reallocation of the settlement proceeds. Id. at 312, 536 S.E.2d at 425. The trial court reallocated the proceeds in the amount of \$28,535.88 for the survival action and \$421,464.12 in the wrongful death action. Id. In upholding the trial court's reallocation, this court concluded that the reallocation must "yield to fairness and justice." Id. at 313, 536 S.E.2d at 426. This court also distinguished Ward on the grounds that the decedent fell into a coma and the pain suffered by the decedent was directly

related to the surgery Id. Additionally, the court noted Dr. Epstein was not a party to the settlement and was not bound by the settlement's terms Id.

We conclude the instant case is controlled by Welch. The SCDOT trial court concluded, and we agree, the record does not contain any evidence to support a survival action based on conscious pain and suffering suffered by the decedent. Thus, unlike in Ward, where there was evidence that existed to prohibit the reallocation of the pain and suffering and wrongful death claims, there is not sufficient evidence to present a jury question that the decedent suffered conscious pain and suffering in the instant case. Moreover, SCDOT was not a party to the settlement agreement, and the settlement trial court's order expressly granted SCDOT the right not to be bound by the settlement agreement. Therefore, we conclude the SCDOT trial court did not abuse its discretion in reallocating the settlement proceeds to the wrongful death verdict against SCDOT.

CONCLUSION

Accordingly, the trial court's decision is

AFFIRMED

HUFF and SHORT, JJ , concur

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas

George C. James, Jr., Circuit Court Judge

Case No. 2006 CP-38-0486

Clarence Rutland, as Personal Representative
of the Estate of Liffanie Rutland,

Appellant,

v

South Carolina Department of Transportation,

Respondent

APPELLANT'S PETITION FOR REHEARING AND SUGGESTION FOR
REHEARING *EN BANC*

Pursuant to Rule 221(a) of the South Carolina Rules of Civil Procedure, the Appellant respectfully moves the Court for Rehearing and/or to alter its Opinion No. 4721 of August 4, 2010, which affirmed the trial court's grant of Respondent South Carolina Department of Transportation's post-trial motion for set-off. Appellant also respectfully petitions and suggests the desirability of rehearing by the Court *en banc* because the proceeding involves questions of exceptional importance.

Consideration by the full Court is necessary to secure and/or maintain uniformity of the appellate courts' opinions. The opinion below overrules the well settled precedent of Spaugh v. Atlantic Coast Line Railroad Co., 158 S.C. 25, 155 S.C. 145 (1930) and

other cases allowing the mental distress of a decedent as an appropriate element of damages in a survival action. The opinion also misapplies and misapprehends a long line of South Carolina cases dealing with the evidentiary standards to be met to maintain a survival cause of action. Furthermore, the opinion misapprehends the law concerning "the impact fear" and the ruling on that issue creates a novel issue that has not been previously addressed by our Appellate Courts. See, Rule 219 (a), SCACR.

The opinion issued in this case has far reaching implications that affect all current and future classes of plaintiffs in South Carolina who seek compensatory damages under wrongful death and/or survival actions. Appellant believes that the findings and rulings of the Court's Order dated April 4, 2010 overlooks, misapprehends, and conflicts with the established laws of our state. For the reasons that follow, your Appellant therefore respectfully seeks rehearing and review of the Opinion below and suggests rehearing *en banc*.

I **By Concluding that Insufficient Evidence of Conscious Pain and Suffering Exists in this Case, the Court Misapplies South Carolina Case Law Addressing Evidentiary Standards to Support a Survival Claim**

In the Opinion below, this Court has failed to recognize and apply the standards enunciated in several illustrative and binding South Carolina cases which require a finding that the Appellant presented sufficient evidence to support a claim for survival.

In South Carolina "[i]f there is *any* evidence from which a jury could reasonably conclude a decedent experienced conscious pain and suffering," then the claim must be submitted to the jury. (Emphasis added) Vereen v. Liberty Life Ins. Co., 306 S.C. 423, 432, 412 S.E.2d 425, 431 (Ct. App. 1991), Smalls v. South Carolina Department of Education, 339 S.C. 208, 528 S.E.2d 682 (Ct. App. 2000). It is well settled that under

this “any evidence” standard, even “weak” evidence is sufficient Croft v. Hall, 208 S. C. 187, 37 S. E. 2d 537 (1946). The “any evidence” standard is equivalent to a “scintilla of evidence.” Hancock v. Mid-South Management Co., Inc., 381 S. C. 326, 673 S. E. 2d 801 (2008). Furthermore, in this analysis the evidence – even if only a scintilla exists – must be viewed in the light most favorable to the nonmoving party Vereen. If that evidence is susceptible of more than one reasonable inference, the evidence is sufficient to support the survival cause of action. Id., 306 S. C. at 432, 412 S. E. 2d at 431.

Croft, supra, is a seminal case addressing conscious pain and suffering. In that case, the Court addressed a factual showing that it noted to be “weak” and concluded that sufficient evidence existed that the issue should go to the jury. The only testimony in that case in support of pain and suffering was the testimony of the decedent’s mother that her daughter “recognized her” and that the decedent “opened her eyes and looked at me several times.” Id. at 540. In contrast to this testimony, the attending physicians and nurses testified that in their medical opinions, there was no conscious suffering. Id. Faced with the testimony of the mother that the decedent opened her eyes and recognized her mother, the Court held

There was positive testimony of the physician, nurses and others that in their opinion there was no conscious suffering, which may convince the jury upon trial to that conclusion, and it might so persuade us were we empowered to find the facts, but that was the jury’s province in this, a case at law. [O]ur decision is not of the preponderance of the evidence but whether there was any from which the jury could reasonably find conscious pain and suffering.

Id.

Veieen, supra, is another illustrative case where wholly circumstantial and "weak" evidence of conscious pain and suffering nevertheless supported a viable cause of action for survival. In Veieen, the trial court directed a verdict against the plaintiff on his survival cause of action and this Court reversed. The investigating law enforcement officer arrived on the scene to find the sole occupant of the vehicle already deceased. Upon arrival though the officer "saw an eight foot trail of blood leading away from Veieen's body and observed Veieen's hands clutching his chest with leaves and pine needles on them." Id. at 431. A photograph showing how the hands were positioned was also admitted into evidence. This Court held that this evidence constituted sufficient circumstantial evidence to preclude a directed verdict on the survival cause of action. This Court held:

A reasonable jury could conclude from the proffered evidence that Veieen lived long enough to crawl eight feet from the point of the shooting and attempted to cover his wound with his hands. They could also infer that anyone who lived long enough to do these things lived long enough to experience conscious pain and suffering before his death. The directed verdict, therefore, should not have been granted.

Id., 306 S.C. at 432, 412 S.E.2d at 431.

In the Opinion below, this Court states that the Appellant's sole evidence to support a survival claim is that "a passerby indicated the decedent had a pulse after the accident." This is incorrect. In fact, Appellant has consistently argued that the circumstantial evidence in this case is much more akin to that of Veieen. In the case at bar, rather than an eight foot trail of blood, the Plaintiff endured a "wall" of physical injury, terror, and fear for her very life as the vehicle in which she and her family rode hydroplaned, skidded, rolled and flipped, ultimately partially ejecting her and being

crushed by the vehicle⁶ The incident which killed Tiffanie Rutland began when the vehicle hit water on S C Highway 301 Her husband testified that when the vehicle hit the water, he felt the vehicle "pulled" or "snatched" by the water (Tr p 271, ll 6-25, Tr p 273, ll 14-20) Recognizing the beginning of this collision, the Appellant, who was seated in the back seat with his wife and child, had sufficient time to recognize the danger, to lift his hands over his body, and to then lean his body over his wife and child in an attempt to protect them (Id) The vehicle then spun in the roadway, exited the roadway, and then hit a culvert, which sent the vehicle airborne An eyewitness viewed the accident in progress long enough to see the vehicle go airborne and to observe the Appellant as he was completely ejected from the rear of the vehicle (Tr p 151, ll 12-21) Due to the Appellant's complete ejection from the vehicle, he was unable to immediately view Tiffanie's body after the vehicle came to rest, although he acknowledges believing she was dead when he did first see her Instead, by the time Clarence Rutland found his wife, other motorists had stopped at the vehicle On approach to the vehicle, Clarence searched for an object to break the windows and then attempted to break windows to get the occupants out At that point Appellant slipped into the ditch, where he then saw his partially ejected wife (Tr p 151, ll 12-21, Tr p 11 14-15)

Based on this testimony from multiple witnesses concerning the accident, a jury could reasonably conclude that prior to her death Tiffanie Rutland suffered physical injuries during the violent unfolding of this collision, whether before the partial ejection that sent her head through a window, or before the vehicle's weight ultimately landed on her head, neck, and torso The temporal length of the collision also factors in to a jury's

reasonable consideration of the issue. The Appellant testified that at the initial triggering event of this accident, hitting the water on the road, he actually and consciously perceived the danger to himself and the vehicle's occupants, and had time to shield and protect his family. A jury could therefore reasonably conclude that Tiffanie endured the same realization and perception, and that aside from physical injuries, she suffered mental anguish and emotional flight before she was killed. Mental or emotional distress, when accompanied by physical injury, is a compensable element of damages.¹

While a jury might ultimately conclude that this evidence failed to prove that there was conscious pain and suffering, evidence sufficient to present the question to a jury exists, particularly when viewing this evidence in the light most favorable to the Appellant as the Court must. Sufficient evidence exists from which a jury could reasonably find conscious pain and suffering. The standards of Vereen, Croft, and Hancock, et al, being thus satisfied, the analysis of the opinion below ignores substantial circumstantial evidence that supports the viability of a survival action.

B South Carolina Has Long Allowed Recovery for Mental or Emotional Injuries Accompanied by Physical Injury, Even if the Label "Pre-Impact Fear" is Attached, the Court Erred in Holding South Carolina Does Not Recognize it as "a Compensable Cause of Action"

The Court's opinion misconstrues the arguments of the Appellant, as well as the law of South Carolina, in determining that "South Carolina does not recognize 'pre-impact fear' as a compensable cause of action" (Opinion, Section B).

The Appellant has never argued that the mental distress and anguish suffered by the decedent before her death constitutes a discrete cause of action, whether novel or already existing, whether named "pre-impact fear," or called by any other name. Rather,

¹ This concept is discussed in detail in Section II of the Petition, below.

mental or emotional distress endured by a plaintiff who is killed is simply an element of damages that has long been recognized as compensable in South Carolina under existing causes of action

"Recovery for mental or emotional disturbance based upon violation of a legal right for which other damages are recoverable has long been accepted in this state. Perhaps the most common example occurs when damages for mental suffering are allowed in a personal physical injury suit. See Mack v. South Bound R. Co., 52 S.C. 323, 29 S.E. 905 (1898)." Ford v. Hutson, 276 S.C. 157, 159, 276 S.E.2d 776, 777 (1981). Moreover, this very Court has acknowledged that in a survival action, the "mental distress of the deceased" is an appropriate element of damages, amongst others. Scott v. Porter, 340 S.C. 158, 170, 530 S.E.2d 389, 395 (Ct. App. 2000).²

Notwithstanding the settled principles above, in Section B of the Opinion the Court holds that a survival action decedent may not recover for damages "when the decedent suffered mental trauma before actual physical injury resulting in the decedent's death." This holding directly conflicts with the authorities above. Similarly, the opinion below reverses Spaugh v. Atlantic Coast Line Railroad Co., *supra*, which stands for a correct proposition of the law. Appellant readily agrees that some *dicta* in Spaugh stems from a time, outlook, and social rationale much different from ours today.³ Nevertheless, Spaugh's recognition of the compensability of mental distress caused by the negligence of others, even without actual physical injury, is consistent with the principles of law concerning mental distress.

² "Appropriate damages in survival actions include those for medical, surgical, and hospital bills, conscious pain, suffering, and mental distress of the deceased." *Id.*

³ "The woman 'became highly nervous' and 'suffered from troubles peculiar to ladies' which condition was brought on her by the exposure and experience she was subjected to'."

Even if the damages at issue are denominated as "pre-impact fear," the Opinion below mistakenly concludes that South Carolina does not recognize "pre-impact fear" as "a compensable cause of action." This conclusion is based upon the South Carolina Federal District Court case of Hoskins v. King, 676 F. Supp. 2d 441, 451 (D.S.C. 2009). However, upon review of Judge Anderson's ruling in that non-binding case, there is no statement, express or implied, that South Carolina does not recognize "pre-impact fear" as a compensable element of damages. Instead, the District Court merely concludes that under the facts before it there was no factual issue as to whether the decedent could have endured conscious pain and suffering of pre-impact fear. The Court's discussion of the issue follows:

In addition to seeking the more established post-impact survival damages, Hoskins seeks damages for the split-second between when the rear tire of the bicycle touched the front bumper of the Pacifica and the impact of Thomas Hoskins on the windshield. However, this position does not find support under South Carolina law. Hoskins has cited many cases, from other jurisdictions which recognize recovery for pre-impact flight. In nearly all of these cases the victims knew they were going to die for a period of at least some seconds, not fractions of a second. Moreover, there was evidence in almost all of the cases that the victim saw the ending coming and there was no question that the victim consciously perceived the cause of his or her death—such as a car crashing in to the back of a tractor trailer, an imminent plane crash, or a pedestrian trapped on roadway.

In this case the King's car closed from the rear at a high rate of speed, causing a tremendous impact—throwing Thomas Hoskins seventy-five feet in the air and instantly killing him. A survival claim requires that the deceased consciously endure pain and suffering. Due to the severity of the impact, the court finds that the evidence does not demonstrate that the decedent had time to consciously perceive the means of his death, much less consciously suffer pain. Accordingly, for the reasons above, King's

motion for summary judgment regarding the survival action
is granted

Id at 451

When compared to the facts of the case at bar, Judge Anderson's factual analysis actually militates for a finding for the Appellant on the issues of pre-impact fear. The decedent in Hoskins was involved in a "split-second" impact. The court concluded that the "evidence does not demonstrate that the decedent had to consciously perceive the means of his death, much less consciously suffer pain." Due to the circumstances of this wreck, as recited herein, significant factual issues exist from which a jury could conclude that Tiffanie Rutland actually "perceived the means of her death," as certainly her husband, the Appellant, perceived the same. Thus, this Court's reliance on Hoskins is misplaced.

To the extent that the Opinion below actually rules upon or addresses the seemingly novel question of whether "pre-impact fear" damages are recoverable in South Carolina, Appellant seeks reconsideration of the opinion. To the extent that the Opinion also characterizes pre-death mental distress or "pre impact fear" as a "cause of action," as opposed to an element of damages, Appellant also seeks rehearing. In light of existing South Carolina precedent which allows for survival action decedents to recover mental distress, the question truly need not be reached. However, if the issue is reached, the Appellant respectfully requests that the full Court decide this important issue which would affect all those persons of the state who are killed due to the negligence of another.

**III Based on the Erroneous Conclusions of the Court Regarding the
Sufficiency Evidence to Support a Survival Claim, the Court Should
Not Affirm the Equitable Reallocation of the Settlement Below**

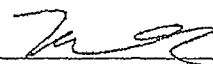
This Court's decision to uphold the equitable reallocation ordered by the trial court is premised upon the conclusion that no evidence exists to support a wrongful death claim. As discussed above, there are substantial and compelling reasons why rehearing on those issues is appropriate and the decision should be altered. Because sufficient evidence exists to support the Appellant's survival claim below, as in Ward v. Epting, 290 S.C. 547, 351 S.E.2d 867 (Ct. App. 1986), equitable reallocation is inappropriate. Based on Ward and Welch v. Epstein, the trial court's set off decision, and this Court's affirmation of the same, should be reconsidered and reversed. Based on the sufficiency of evidence to support the settlement allocation of the survival claim, reversal is required to provide justice between the parties.

CONCLUSION

For the foregoing reasons, the Court's Opinion of August 4, 2010, should be altered and/or rehearing is appropriate. Furthermore, due to the important issues addressed and raised by the Opinion, your Appellant respectfully requests rehearing *en banc*.

Respectfully submitted,

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August 19, 2010
Hampton, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas

George C James, Jr., Circuit Court Judge

Case No 2006 CP 38-0486

Clarence Rutland, as Personal Representative
of the Estate of Tiffanie Rutland,

Appellant,

v

South Carolina Department of Transportation,

Respondent

PROOF OF SERVICE

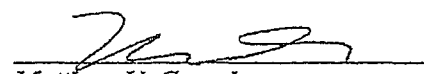
This is to certify that I, *Matthew V Creech*, with the Law Firm of PETERS, MURDAUGH, PARKER ELTZROTH & DETRICK, P A, Attorneys for the Appellant, have this date mailed via the U S Postal Service with first class postage prepaid, a true and correct copy of the within *Appellant's Petition for Rehearing and Suggestion for Rehearing En Banc* to the following

Richard B Ness, Esq
Norma Jett, Esq
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Bamberg, South Carolina 29003

I, *Matthew V Creech*, further certify that I have on this date caused to be delivered, by personal delivery via process server, an original and (7) copies of the within *Appellant's Petition for Rehearing and Suggestion for Rehearing En Banc* and *Certificate of Service* to the following

The Honorable Tanya Gee
Clerk of Court, S C Ct of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

August 19, 2010
Hampton, South Carolina


Matthew V Creech

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM ORANGEBURG COUNTY
COURT OF COMMON PLEAS
THE HONORABLE GEORGE C JAMES JR PRESIDING

DOCKET NO 2006-CP-38-0486

Clarence Rutland as Personal Representative of the Estate of Tiffanie Rutland, Appellant

v

South Carolina Department of Transportation

Respondent

**RESPONDENT'S RETURN TO APPELLANT'S PETITION FOR REHEARING
AND SUGGESTION FOR REHEARING *EN BANC***

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Respondent hereby responds to and opposes Appellant's Petition for Rehearing and Suggestion for Rehearing *En Banc*. Respondent asserts the Court of Appeals in its unanimous decision correctly applied the law and correctly affirmed the decision of the trial court that the Court did not overlook nor misapprehend any point of law or fact and that Appellant is not entitled to rehearing for the reasons set forth herein. Respondent further asserts rehearing *en banc* is likewise not appropriate in this case.

I APPELLANT DID NOT ALLEGE, NOR INTRODUCE EVIDENCE OF, CONSCIOUS PAIN AND SUFFERING IN ORDER TO ESTABLISH A SURVIVAL CAUSE OF ACTION AGAINST THE SETTLING DEFENDANT

A Appellant presented no evidence of conscious pain and suffering

Appellant has asserted the Court erred in its holding he did not introduce evidence of conscious pain and suffering. The facts and procedural history of this action are fully and accurately recited in the Court's decision. This action was never about conscious pain and suffering or a survival cause of action until Appellant won a verdict in the wrongful death action now on appeal before this Court and sought to avoid the offset of settlement against verdict provided to a nonsettling defendant by law. Not one element of a survival action is pleaded in the Complaint, and the record of the trial of this action contains no mention of a survival cause of action or conscious pain and suffering. Although the Appellant in a pre-trial settlement approval hearing with a separate defendant allocated a portion of his settlement to a potential survival cause of action against General Motors that allocation was not binding on the Appellant. Moreover pre-impact fear as an aspect of conscious pain and suffering was improperly first raised during the hearing of post-trial motions. *Bank of New York v Sumter County* 387 S. C. 147, 691 S. E. 2d 473 (2010).

A survival action requires proof of conscious pain and suffering on the part of the deceased whose action for infliction of injury then survives to her estate. *Camp v Petroleum Carrier Corp.* 204 S. C. 133, 139, 28 S. E. 2d 683, 685 (1944). The Appellant introduced at trial no evidence of conscious pain and suffering on the part of Tiffanie Rutland. As noted

by the Court of Appeals the Appellant testified that the decedent did not respond to him nor make noises and he knew she was dead immediately upon seeing her even though he was told she had a pulse. A pulse is not evidence of consciousness.

The Appellant in its effort to persuade the Court has referenced reported case decisions on conscious pain and suffering but those cases only serve to point out what the Appellant is lacking in this case. In *Croft v Hall*, 208 S.C. 187, 37 S.E.2d 537 (1946) for example the decedent opened her eyes, looked at her mother and in the mother's estimation recognized her mother. While the nurses and physicians testified contrary to the mother, there was some evidence in the mother's testimony of conscious pain and suffering. The Appellant relies on *Vereen v Liberty Life Ins. Co.*, 306 S.C. 423, 412 S.E.2d 425 (Ct. App. 1991), in which this Court reversed a directed verdict finding evidence of conscious pain and suffering in the form of a "eight foot trail of blood leading away from Vereen's body and Vereen's hands clutching his chest with leaves and pine needles on them." *Id.*, at 431. Again it is obvious that a person who crawled eight feet and died clutching his chest with hands full of leaves and pine needles picked up during the crawl did indeed endure conscious pain and suffering. Yes, the evidence in *Vereen* was sufficient to prove conscious pain and suffering. Here, however, there is no evidence that Tiffanie Rutland suffered consciously.

The Appellant attempts to liken the vehicle's path toward its ultimate collision to the blood trail in *Vereen*. In *Vereen*, however, the blood trail is a path of pain and bleeding from an injury to a death in pain with a clutched chest. In this case, the path the decedent is said to have endured is taken before, not after, her injury.

The Appellant further asks the Court to assume that a jury would have assumed that Tiffanie Rutland in the moments before the impact was as aware as her husband was that the vehicle would soon crash. That assumption of an assumption requires the further assumption that Tiffanie Rutland remained conscious during this entire process. The testimony of Clarence Rutland does not establish that fact. Thus, there is no evidence upon which the jury

could set out on this course of assumptions the Appellant requires for his proof. Indeed, on page 5 of his Petition, the Appellant asserts a jury could ‘reasonably conclude’ (read ‘assume’) Tiffanie Rutland suffered physical injuries during the unfolding of the collision. If it is assumed that Tiffanie Rutland’s unrestrained body moved about the interior of the vehicle and was injured before her partial ejection or during, one might likewise assume she was unconscious from the moment of the first blow to her head in the vehicle.

In short, there is no evidence of conscious pain and suffering, only the urging by Appellant that this Court (and the trial court) assume the jury could assume as much. If such assumption is made in this case, it would necessarily be made in every case of wrongful death, and a survival cause of action would automatically append to every wrongful death case by the mere assumption that a decedent must have apprehended her injury and death. In fact, the Appellant actually states, at page 9 of his Petition, that this issue ‘would affect all those persons of the state who are killed due to the negligence of another.’ Respondent agrees. To adopt Appellant’s position is to append to every wrongful death action a companion survival action, essentially, nullifying the legal requirement of conscious pain and suffering. If one ‘assumes’ Tiffanie Rutland knew of her impending injury or death and suffered fright as a result, one might likewise assume all persons about to die have some similar foreboding for which the estates of those who died wrongfully should be compensated.

Having pleaded and tried only a wrongful death action, Appellant provided the trial court no evidence of conscious pain and suffering on the part of the decedent. There being no evidence presented, the trial court and the Court of Appeals were correct in their decisions. The Petition for Rehearing should be denied.

B. No pre-impact fright can be attributable to GM

The Appellant paints a picture of what the Court is urged to assume was experienced by an assumed conscious Tiffanie Rutland as the vehicle spun out of control, left the road, and overturned. It must be remembered, however, that the settlement to which Appellant is

attempting to allocate the alleged pre-impact fright damages is the GM settlement¹. So even if pre-impact fright is compensable in South Carolina, and even if the Appellant's narrative of a conscious Tiffanie Rutland enduring the violent spinning and overturning of the vehicle is taken as fact, the question remains: Could any blame for that torment be assessed by Appellant or was it asserted against GM? Did the Appellant ever contend GM caused the vehicle to experience a loss of control and to leave the roadway? The answer is clearly "No." Appellant never blamed GM for the vehicle's loss of control or its leaving the roadway. The Appellant only blamed GM for the window glass shattering and allowing Tiffanie Rutland to pass partially through it, whereupon she was pinned when the vehicle landed upside down in a ditch. The Appellant's allegations in its Amended Complaint and Second Amended Complaint were that GM designed the vehicle with tempered glass, failed to install laminated glass or other durable glazing materials, and failed to warn of the danger of ejection. (Record pp. 28-35) The Order Approving Settlement drafted by Appellant's attorneys stated the Appellant's allegations against GM were "that the window glazing was defective." (Record p. 16) At the settlement approval hearing, Appellant's attorney stated, "There was an allegation of glazing window glazing defects against General Motors." (Record p. 85) In the Court's August 28, 2008 Order, the Court noted the only claim asserted against GM in the Complaint was wrongful death based on window glazing defects. (Record p. 5) Appellant always contended SCDOT (and for a while, REA) caused the loss of control and caused the vehicle to leave the roadway.

Since CM cannot have been alleged to have caused the decedent's alleged pre-impact fright, none of its settlement money can be allocated to such damages, and the trial court's reallocation of settlement funds and the Court of Appeals decision affirming that reallocation

¹Of the \$305,000.00 in total settlement funds paid by GM and the driver (Bishop), which were offset against the \$300,000.00 verdict, the Appellant allocated \$500.00 from Bishop to the survival action. That amount is immaterial, as it would not increase Appellant's ultimate verdict.

should stand

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**II THE COURT OF APPEALS CORRECTLY HELD THAT SOUTH
CAROLINA DOES NOT RECOGNIZE PRE-IMPACT FEAR AS AN ELEMENT
OF CONSCIOUS PAIN AND SUFFERING AND A SURVIVAL CAUSE OF
ACTION, AND, IT SHOULD NOT BE ADOPTED AS SUCH IN THIS CASE
AFTER A TRIAL WAS CONDUCTED IN ACCORDANCE WITH THE LAW OF
SOUTH CAROLINA IN EFFECT AT THE TIME OF THE ACCIDENT,
LITIGATION, AND TRIAL**

The Court of Appeals correctly held that South Carolina does not recognize and award pre-impact fear in a survival action. Whether it is discussed as a separate cause of action or as a pre-injury aspect of the required element of conscious pain and suffering, South Carolina law does not provide for the compensation of fear suffered prior to injury which results in death. To assert otherwise is to argue against precedent for which the Appellant neither sought nor was granted leave as required by SCACR 217. Yet the Appellant concedes the question of pre-impact fear in South Carolina is novel. Thus this Court should reject the Appellant's arguments toward a change in South Carolina law when Appellant did not comply with SCACR 217.

South Carolina law does not recognize pre-impact fear as conscious pain and suffering for purposes of a survival cause of action. The Appellant erroneously states that the United States District Court decision in *Hoskins v King*, 676 F. Supp. 2d 441 (D.S.C. 2009) does not expressly nor impliedly state that South Carolina does not recognize 'pre-impact fear as an element of damages. After noting that Hoskins sought not only post-impact survival damages but also damages for 'the split-second between when the rear tire of the bicycle touched the front bumper of the Pacifica and the impact of Thomas Hoskins on the windshield,' the Court stated 'this position does not find support under South Carolina law.' The Court then contrasts this statement by discussion of jurisdictions that do recognize recovery for 'pre-impact fright.' 676 F. Supp. 2d at 451.

It should be remembered that a 'survival' cause of action in South Carolina is actually the "survival of" a cause of action to the decedent's estate which the decedent could have brought for her injuries had she survived. It is statutory in origin. Under §15-5-90, *Code of*

Laws of South Carolina if the decedent could have maintained a cause of action for personal injury had she lived that cause of action survives her death. The common law applicable to such actions further limits them to cases where conscious pain and suffering is alleged and proven. The damages recoverable are then limited to those recoverable by the decedent had she lived. The Appellant has furnished the Court with no case decisions recognizing pre-impact fright as an element of personal injury damages. While the Appellant furnished the Court with cases of other jurisdictions in which pre-impact fright was compensated in cases of resulting death, it should be remembered that not every state's wrongful death and survival damages elements are the same as South Carolina's, and what might fall into one category in South Carolina would fall into another in other states.

The trial of this action and the decisions of the trial court on Respondent's setoff motion and Appellant's motion for reconsideration all were conducted in light of South Carolina's current law, which does not recognize pre-impact fright as an element of damages. To adopt the Appellant's position and recognize that element of damages after the trial and post-trial proceedings are concluded would be the ultimate unfairness to the Respondent. It would set the precedent that litigants trying cases are not allowed to know the "secret" laws yet adopted, to be adopted on appeal of the case when it is too late to develop the record appropriately.

**III THE COURT SHOULD NOT ADOPT PRE-IMPACT FEAR AS AN
ELEMENT OF CONSCIOUS PAIN AND SUFFERING AND SURVIVAL
DAMAGES, WHERE DOING SO WILL CREATE A SURVIVAL CAUSE OF
ACTION IN THE CASE OF VIRTUALLY EVERY WRONGFUL DEATH**

The Appellant has urged the Court to adopt pre-impact fear as an element of conscious pain and suffering for purposes of survival damages. Doing so will create a survival cause of action in the case of virtually every wrongful death, as almost all such decedents can be said to have been cognizant of their approaching injury. Additionally, since survival action damages only consist of those the decedent could have collected had she

survived to bring her own case such a decision would add pre-impact fear as a damages element in negligent injury cases. Furthermore, if pre-impact fear is compensable even though it occurred before a physical injury, then perhaps pre-impact fear should be compensable even where the ultimate impact is avoided. Near misses might be actionable. The Appellant has asked this Court to set South Carolina on a slippery slope of compensating damages not traditionally compensated with no logical endpoint.

V REHEARING *EN BANC* IS NOT APPROPRIATE IN THIS CASE, AS IT IS NOT NECESSARY TO THE UNIFORMITY OF THE COURT'S DECISIONS, NOR IS THE QUESTION PRESENTED OF EXCEPTIONAL IMPORTANCE

Pursuant to SCACR 219(a), "A rehearing *en banc* is not favored and ordinarily will not be ordered except (1) when necessary to secure or maintain uniformity of its decisions or (2) when the proceeding involves a question of exceptional importance." To every party his or her case is the most important case ever. The decision of the Court of Appeals did not, however, stray from precedent, and a rehearing *en banc* is not necessary to secure or maintain uniformity of the Court's decisions. The case does not present a question of exceptional importance, except, of course, to the litigants involved. The Court's decision is consistent with precedent and does not threaten to change the manner in which wrongful death actions are decided, nor settlements offset. The case, therefore, does not justify an *en banc* hearing.

CONCLUSION

The Court of Appeals correctly applied South Carolina law to the facts of this matter and correctly affirmed the decision of the trial court. No rehearing is necessary, as the law and the record are clear. A Petition for Rehearing is intended to draw the Court's attention to points of law or fact which were overlooked or misapprehended. There are neither in this case. The Petition for Rehearing should be denied. Respondent asserts the decision of the

Court of Appeals should stand and the Petition for Rehearing should be denied

August 24 2010
Bamberg South Carolina

Respectfully submitted

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THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM ORANGEBURG COUNTY
COURT OF COMMON PLEAS
THE HONORABLE GEORGE C JAMES JR PRESIDING

DOCKET NO 2006-CP-38-0486

Clarence Rutland, as Personal Representative of the Estate of Tiffanie Rutland Appellant

v

South Carolina Department of Transportation

Respondent

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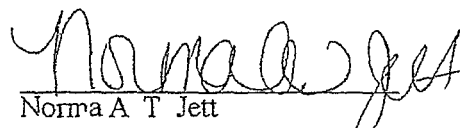
I Norma A T Jett one of the attorneys for Respondent in the above-captioned matter do hereby certify that on this date my agent has served the foregoing Respondent's **Return to Petition for Rehearing and Suggestion for Rehearing *en banc***, upon the persons below-listed by placing a copy first-class postage prepaid, in the United States Mail addressed as follows

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ATTORNEYS FOR RESPONDENT

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas

George C. James, Jr., Circuit Court Judge

RECEIVED

SEP 01 2010

SC Court of Appeals

Case No. 2006-CP-38-0486

Clarence Rutland, as Personal Representative
of the Estate of Tiffanie Rutland,

Appellant,

v

South Carolina Department of Transportation,

Respondent

APPELLANT'S REPLY TO RESPONDENT'S RETURN TO PETITION FOR
REHEARING AND SUGGESTION FOR REHEARING *EN BANC*

Appellant Clarence Rutland previously served and filed his Petition for Rehearing and Suggestion for Rehearing *En Banc* on August 19, 2010. Respondent South Carolina Department of Transportation's Return to Appellant's Petition for Rehearing and Suggestion for Rehearing *En Banc* was served on August 24, 2010. Pursuant to Rule 240(f) of the South Carolina Rules of Appellate Procedure, Appellant submits the following Reply Brief to the Return of Respondent SCDOT.

In this Reply Brief, Appellant incorporates and adopts by reference all arguments made in his previous Petition for Rehearing. Otherwise, the arguments included herein are limited to brief responses to the arguments contained in the SCDOT's Return of August 24, 2010. Substantial misunderstanding of the concepts and issues at the heart of

the Opinion remain, as the Respondent's Return illustrates. For these reasons and those previously stated, Appellant respectfully seeks rehearing and review of the Opinion below and suggests rehearing *en banc*.

I The Timing of the Introduction of the Evidence of Conscious Pain and Suffering Offered at the Settlement Hearing and Post-Trial Hearing was Appropriate

Section I of the Respondent's Return essentially, for the first time, attacks the timing of the introduction of Appellant's evidence concerning conscious pain and suffering. It is absolutely correct that evidence of conscious pain and suffering was not presented to the jury during the *wrongful death* trial before the trial court. At the settlement hearing before Judge Goodstein, prior to trial, the settling parties and the SCDOT noted the SCDOT's ability to attack the settlement allocation in a post-trial setting in the event a verdict was rendered against it. Once a verdict was given against the SCDOT, the introduction of evidence of conscious pain and suffering was properly addressed by the trial court in the post-trial motions. Yet, SCDOT continues to attack the lack of evidence presented in the wrongful death trial. As thoroughly addressed in Appellant's briefs below, introduction of survival evidence in the wrongful death trial against the SCDOT would have been inappropriate, irrelevant, and inadmissible.

In Section I of its Return, the SCDOT also argues that Appellant's evidence of conscious pain and suffering requires the layering of assumptions ("the assumption of an assumption requires the further assumption. . ."). Again, the SCDOT fails to acknowledge the absolute certainty that evidence before the courts of South Carolina may take the form of circumstantial or inferential evidence. Evidence is properly considered so long as it allows a reasonable inference to be drawn therefrom. The facts of this wreck clearly

would allow the reasonable conclusion, or inference, that Tiffanie Rutland was injured in this wreck before she ultimately was killed and that during the wreck she was consciously aware of the imminent death and injury that she suffered. The SCDOT incorrectly attempts to devalue the weight of the circumstantial evidence on these issues by labeling a jury's collective mental process of inference as mere "assumption."

While a jury might ultimately conclude that this evidence failed to prove conscious pain and suffering, evidence sufficient to present the question to a jury exists, particularly when viewing this evidence in the light most favorable to the Appellant. Sufficient evidence exists for a jury to reasonably find conscious pain and suffering. The standards of Vereen, Croft and Hancock, et al, being thus satisfied, the analysis of the opinion below ignores substantial circumstantial evidence that supports the viability of a survival action.

Finally, the SCDOT's arguments with regard to the amount of mental distress attributable to the settling party GM are unavailing. These arguments fail to consider that South Carolina recognizes the law of concurring proximate causes of a plaintiff's injuries. A defendant's negligence does not have to be the sole proximate cause of the plaintiff's injuries; instead, the plaintiff must prove the defendant's negligence was at least one of the proximate causes of the injury. Hughes v. Children's Clinic, P.A., 269 S.C. 389, 237 S.E.2d 753 (1977). "It is generally for the jury to determine whether the defendant's negligence was a concurring proximate cause of the plaintiff's injuries. Only when the evidence is susceptible of only one inference does proximate cause become a matter of law for the court." Bishop v. South Carolina Dep't of Mental Health, 331 S.C. 79, 89, 502 S.E.2d 78, 83 (1998). While the arguments posed by the SCDOT here might

ultimately convince a jury that GM did not cause any of the mental distress in this wreck, such decision ultimately does not fall within the province of the courts. Based on the facts as addressed at length before this Court, numerous points of circumstantial evidence exist such that the question of concurring proximate causes can not be decided here, as a matter of law.

II SCDOT's Arguments in Section II of the Return Concerning Recognition of "Pre-Impact Fear" in South Carolina Actually Support Appellant's Position that South Carolina Allows for Mental Distress Damages in Survival Actions

SCDOT alleges that in arguing for the application of "pre-impact fear" Appellant has not complied with Rule 217, SCACR. This argument illustrates the flawed reasoning of the SCDOT's arguments below and against rehearing. First and foremost, Appellant never "argued against precedent" or advocated the creation of some new element of recovery for plaintiffs. Appellant's arguments for reversal are firmly rooted in existing law dealing with the elements of damages allowable under longstanding South Carolina precedent. Where the Opinion, as written, creates a "novel" issue, though, is by labeling such damages as "pre-impact fear" and then holding that South Carolina does not recognize pre-impact fear as a "cause of action."

Reference to SCDOT's Return is instructive. The SCDOT notes

It should be remembered that a "survival" cause of action in South Carolina is actually the "survival of" a cause of action, to the decedent's estate, which the decedent could have brought for her injuries had she survived. It is statutory in origin. Under § 15-5-90, *Code of Laws of South Carolina*, if the decedent could have maintained a cause of action for personal injury had she lived, that cause of action survives her death. The common law applicable to such actions further limits them to cases where conscious pain and suffering is alleged and proven. *The damages recoverable are then limited to those recoverable by the*

decedent had she lived. The Appellant has furnished the Court with no case decisions recognizing pre-impact fear as an element of personal injury damages.

Appellant wholeheartedly agrees with SCDOT that this statutory creation “is actually the ‘survival of’ a cause of action, to the decedent’s estate, which the decedent could have brought for her injuries had she survived.” That is precisely the point Appellant makes in his briefs below. Had Tiffanie Rutland survived this accident, the mental anguish, trauma, distress, and terror she suffered during the accident would be an allowable and compensable element of her damages. The SCDOT asks this Court to relieve it of liability for these allowable damages simply because Mrs. Rutland died as a result of the wreck. Had she merely broken her arm in the wreck though, presumably SCDOT would acknowledge that mental distress damages would be recoverable by her. As stated in SCDOT’s brief, these damages should be recoverable here, because survival action damages are “limited to those recoverable by the decedent had she lived.”

Second, SCDOT incorrectly states that Appellant has not furnished the Court with decisions recognizing “pre-impact fright” as an element of personal injury actions. Simply stated, South Carolina precedent does not label these damages as “pre-impact” fear. However, this Court *has* acknowledged that in a survival action the “mental distress of the deceased” is an appropriate element of damages. Scott v. Porter, 340 S.C. 158, 170, 530 S.E.2d 389, 395 (Ct. App. 2000).¹ Surely SCDOT does not contend that “mental distress” damages would not be recoverable had Tiffanie Rutland lived.

SCDOT attempts to obfuscate this fact by attaching a new label to an old concept. In doing so, SCDOT invites this Court to believe the issues before it are not well-settled.

¹ Appropriate damages in survival actions include those for medical, surgical, and hospital bills, conscious pain, suffering, and mental distress of the deceased. Id.

That Tiffanie Rutland was actually killed should be immaterial to the question, where had she only been maimed – or even merely bruised – in an accident of this nature she would be able to recover for mental distress. While the Court may believe that the evidence to support her mental distress is “weak,” South Carolina courts have consistently held that such weak evidence is sufficient for jury consideration. Veeen, Cloft and Hancock, *et al*

Thus, in the context of this Appeal, the evidence is sufficient to support the challenged settlement allocation to a survival action. Finally, Appellant notes the arguments as posited here by SCDOT -- that in order to recover mental distress damages a plaintiff must be injured *before* the onset of the mental distress – are illogical. A defendant should not be relieved of mental distress damages recoverable by an injured party simply because that defendant’s negligence causes the person’s death. Based on the record at hand and the violent course of this accident before Tiffanie Rutland was killed, factual issues exist from which a jury could conclude that prior to being ejected as this car spun, tumbled into a ditch, and then became airborne, Tiffanie received significant injuries before her death.

III Even if the Court Were to Label the Damages at Issue here as “Pre-Impact Fear,” South Carolina Should Recognize “Pre-Impact Fear” as an Element of Recoverable Damages in a Survival Action

Black letter South Carolina holds that in a survival action the “mental distress of the deceased” is an appropriate element of damages. Scott v. Porter, *supra*. “Recovery for mental or emotional disturbance based upon violation of a legal right for which other damages are recoverable has long been accepted in this state. Perhaps the most common example occurs when damages for mental suffering are allowed in a personal physical

injury suit. See Mack v. South Bound R. Co., 52 S.C. 323, 29 S.E. 905 (1898).” Ford v. Hutson, 276 S.C. 157, 159, 276 S.E.2d 776, 777 (1981). As noted above, because of the existence of these damages in existing South Carolina precedent, Appellant asserts the application of the term is inappropriate. However, even if the Court were to apply the term “pre-impact fear” to these mental distress damages, alternatively the Court should recognize the viability of such pre-impact fear damages.

In its Return, as it did below, SCDOT employs the “Chicken Little” argument that the judicial sky will fall by recognizing some “new” element of damages or cause of action. SCDOT argues the adoption of this term and acknowledgment of its viability would essentially be a survival cause of action in the case of “virtually every wrongful death, as almost all decedents can be said to have been cognizant of their approaching injury.”² This alarmist approach simply misses the mark and strains logic.³

This approach fails to comprehend the limited circumstances where this element of damages may be considered. As addressed in the underlying briefs, multiple jurisdictions that recognize this element of damages note that “pre-impact fear” is simply a practical acknowledgment that in limited circumstances – where evidence exists from which a fact finder could reasonably conclude that the decedent was aware of imminent injury or death – the decedent suffered actual mental trauma prior to dying. The classic example of this is where a plaintiff’s vehicle has veered to avoid impact or skidded a great distance before impact. See, e.g., Monk v. Dial, 212 Ga.App. 362, 441 S.E.2d 857

² It is interesting that after making such a sweeping statement the SCDOT apparently contends under the facts of this case, that Tiffanie Rutland, *as a matter of law* would be one of those rare exceptions where the decedent was not cognizant of her ‘approaching injury’.

³ On page three of its Return the SCDOT correctly notes that Appellant’s brief states that the ruling on these issues affects ‘all those persons of the state who are killed due to the negligence of another’. While Appellant may have awkwardly crafted this sentence, Appellant does not intend, nor has he ever intended, to extend application of these damages beyond the limited context addressed below.

(1994) Where, as in Hoskins v. King, 676 F. Supp. 441 (D.S.C. 2009), there is simply no evidence except that the decedent recognized her imminent injury or death, the element of damages may be precluded as a matter of law. Whole cloth rejection of the existing element of damages, simply because of the application of the "pre-impact fear" label, is inappropriate. Under the facts of this case, sufficient evidence exists from which a jury could conclude that Tiffanie Rutland suffered mental distress prior to her actual death. Under existing South Carolina law or application of the pre-impact fear terminology, such damages are recoverable.

IV Based on the Erroneous Conclusions of the Court Regarding the Sufficiency of Evidence to Support a Survival Claim, the Court Should Reverse the Equitable Reallocation of the Settlement Below

This Court's decision to uphold the equitable reallocation ordered by the trial court is premised upon the conclusion that no evidence exists to support a survival claim. As discussed above, there are substantial and compelling reasons why rehearing on those issues is appropriate and the decision should be altered. Because sufficient evidence exists to support Appellant's survival claim below, as in Ward v. Epting, 290 S.C. 547, 351 S.E.2d 867 (Ct. App. 1986), equitable reallocation is inappropriate. Based on Ward and Welch v. Epstein, the trial court's set-off decision, and this Court's affirmation of the same, should be reconsidered and reversed. Based on the sufficiency of evidence to support the settlement allocation of the survival claim, reversal is required to provide justice between the parties.

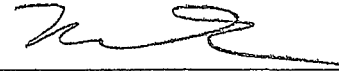
CONCLUSION

For the foregoing reasons, the Court's Opinion of August 4, 2010, should be altered and/or rehearing is appropriate. Furthermore, due to the important issues

addressed and raised by the Opinion, your Appellant respectfully requests rehearing *en banc*

Respectfully submitted,

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ATTORNEYS FOR APPELLANT

August 30, 2010
Hampton, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ORANGEBURG COUNTY
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George C James, Jr , Circuit Court Judge

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PROOF OF SERVICE

This is to certify that I, *Matthew V Creech*, with the Law Firm of PETERS, MURDAUGH, PARKER, ELTZROTH & DETRICK, P A , Attorneys for the Appellant, have this date mailed via the U S Postal Service with first class postage prepaid, a true and correct copy of the within *Appellant's Reply to Respondent's Return to Petition for Rehearing and Suggestion for Rehearing En Banc* to the following

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The Honorable Tanya Gee
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Columbia, South Carolina 29211

August 30, 2010
Ridgeland, South Carolina


Matthew V Creech

The South Carolina Court of Appeals

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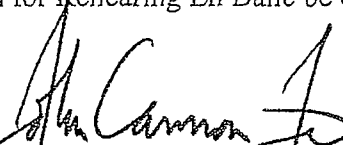
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Orangeburg County
Trial Court Case No 2006-CP-38-00486

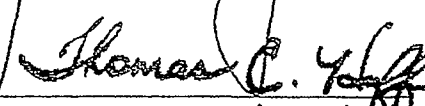
ORDER DENYING PETITION FOR REHEARING EN BANC

PER CURIAM After a careful consideration of the Petition for Rehearing En Banc, the Court has determined that en banc consideration is not necessary to secure or maintain the uniformity of its decisions, nor is the proceeding one involving a question of exceptional importance Further, the Court finds no other ground appearing to warrant a rehearing en banc

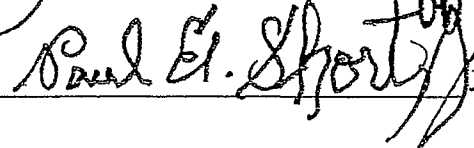
It is, therefore, ordered that the Petition for Rehearing En Banc be denied



C J Few



Thomas C. Huff



Paul E. Short

H B Woe J Williams

Paul W Thomas J Thomas

J Pieper J Pieper

U. Ke J Konduros

John Ose J Geathers

James E Lockemy J Lockemy

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Norma A T Jett, Esquire

FILED
October 29, 2010

The South Carolina Court of Appeals

Clarence Rutland, as Personal
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Appellant,

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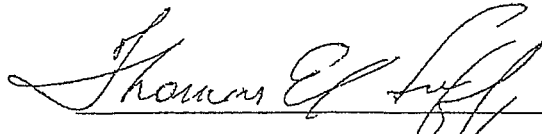
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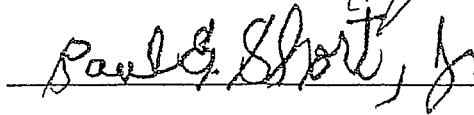
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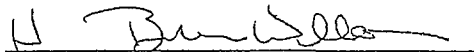
The Honorable George C James
Orangeburg County
Trial Court Case No 2006-CP-38-00486

ORDER DENYING PETITION FOR REHEARING

PER CURIAM After a careful consideration of the Petition for Rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded and hence, there is no basis for granting a rehearing. It is, therefore, ordered that the Petition for Rehearing be denied.

 J Huff

 J Short

 J Williams

Columbia, South Carolina

cc J Christopher Wilson, Esquire
Lee D Cope, Esquire
R Alexander Murdaugh, Esquire
Matthew V Creech, Esquire
Richard B Ness, Esquire
Norma A T Jett, Esquire

FILED
October 29, 2010

