The Supreme Court of South Carolina

DANIEL E SHEAROUSE
CLERK OF COURT

BRENDA F SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA SOUTH CAROLINA 29211

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February 28, 2012

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Richard B Ness, Esquire
Norma Jett, Esquire
Ness, Jett & Tanner
P O Box 909
Bamberg, SC 29003

Re Rutland, Clarence v SC DOT

Dear Counsel

The record in the above case has been reviewed and the time allotment for oral argument for this case is as follows

Petitioner	10 minutes
Respondent	10 minutes
Petitioner in Reply	5 minutes

This case is scheduled for hearing on Wednesday, March 7, 2012 at 10 30 a m

Very truly yours,

Daniel E Shearouse, Clerk

By Debbie M Hopkins

Administrative Assistant

DES/dmh

The South Carolina Supreme Court

DANIEL E SHEAROUSE
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To Richard B Ness Esquire
Norma Jett Esquire

From Daniel E Shearouse

Date January 24 2012

RE March Preliminary List

Pursuant to the provisions of Rule 216 of the South Carolina Appellate Court Rules this is to advise that the following case(s) will probably be reached for hearing at the March 2012 term of the South Carolina Supreme Court Our records indicate that you are counsel of record in one or more of these case(s)

Court will meet the days of March 6 7 8 20 and 21 Please notify this office in writing prior to January 31 2012 as to any scheduling conflicts for the March term and any changes or additions of counsel that should be made to the record for the purpose of argument If you do have a scheduling conflict please advise as to the specific nature of the conflict

Rutland, Clarence v SC DOT

The South Carolina Supreme Court

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To Lee D Cope Esquire
R Alexander Murdaugh Esquire
Matthew V Creech Esquire

From Daniel E Shearouse

Date January 24 2012

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Rutland, Clarence v SC DOT

The South Carolina Supreme Court

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To J Christopher Wilson Esquire

From Daniel E Shearouse

Date January 24 2012

RE March Preliminary List

Pursuant to the provisions of Rule 216 of the South Carolina Appellate Court Rules this is to advise that the following case(s) will probably be reached for hearing at the March 2012 term of the South Carolina Supreme Court Our records indicate that you are counsel of record in one or more of these case(s)

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Rutland, Clarence v SC DOT

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January 3, 2012

pm 1-3-12

VIA U S MAIL
The Honorable Daniel E Shearouse
Clerk of Court
SUPREME COURT OF SOUTH CAROLINA
P O Box 11330
Columbia, South Carolina 29211

Re Clarence Rutland, as Personal Representative of the Estate of Tiffanie Rutland vs South Carolina Department of Transportation,
Case No 2006-CP-28-486

Dear Mr Shearouse

With reference to the above case, enclosed for filing please find one unbound, original and fifteen (15) bound copies of *Petitioner s Reply Brief* as well as one original and two (2) copies of the *Certificate of Service*

Please return a filed, bound copy of the *Petitioner s Reply Brief* and of the *Certificate of Service* in the envelope I have provided By copy of this correspondence, copies of the enclosed Brief and Certificate of Service are being served on all counsel of record

Sincerely,

Matthew V Creech

Enclosures as stated
cc Richard B Ness Esq / Norma Jett Esq (Brief & Certificate of Service via U S Mail)
J Christopher Wilson Esq

The Supreme Court of South Carolina

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

v

South Carolina Department of Transportation, Respondent

The Honorable George C James, Jr
Orangeburg County
Trial Court Case No 2006-CP-38-0486

ORDER

For good cause having been shown, the time for serving and filing the Reply Brief of Petitioner in the above entitled matter is hereby extended until January 3, 2012

IT IS SO ORDERED

JEAN H TOAL, CHIEF JUSTICE

BY Linda I Healy
Chief Deputy Clerk

Columbia, South Carolina

January 3, 2012

cc: J Christopher Wilson, Esquire
Lee D Cope Esquire
R Alexander Murdaugh, Esquire
Matthew V Creech, Esquire
Richard B Ness, Esquire
Norma Jett, Esquire

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December 27, 2011

VIA FACSIMILE (803 734 1499) & U S MAIL
The Hon Daniel E Shearouse
Clerk of Court
Supreme Court of South Carolina
P O Box 11330
Columbia, SC 29211

Re Estate of Tiffanie Rutland v SCDOT
Civil Action No 2006-CP-38-0486

Dear Mr Shearouse

Our law firm represents the Petitioner in the above matter The brief of Respondent SCDOT was served on December 15, 2011 Due to the state and federal holidays, by my count the Reply Brief of Petitioner is due tomorrow, December 28, 2011 Due to the holidays I am seeking a five (5) day extension of time from the original due date of December 28, 2011 within which to file our Reply Brief *By my estimation the Reply Brief of the Petitioner would then be due on Tuesday January 3 2011*

I have spoken to Norma Jett, Esquire, counsel for the SCDOT, and she consents to our request

Should a formal motion or motion filing fee be required please let me know and I will be happy to forward the same to you Thank you for your consideration

With kind regards, I am

Sincerely,

Matthew V Creech

cc Norma Jett, Esq
Richard Ness, Esq
Lee Cope, Esq

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December 29, 2011

VIA U S MAIL
ATTN Linda Allen
The Hon Daniel E Shearouse
Clerk of Court
Supreme Court of South Carolina
P O Box 11330
Columbia, SC 29211

Re Estate of Tiffanie Rutland v SCDOT
Civil Action No 2006-CP-38-0486

Dear Ms Allen

Thank you for your telephone call today Pursuant to our conversation I enclose herewith the $25 00 filing fee for the extension request previously sent Should you have any further questions or concerns please do not hesitate to contact me

With kind regards, I am

Sincerely,

Matthew V Creech

cc Norma Jett, Esq
Richard Ness, Esq

$25.00 Cash

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RICHARD B NESS
NORMA A T JETT

CERTIFIED CIRCUIT COURT MEDIATOR

ALISON DENNIS HOOD

2878 MAIN HIGHWAY
Telephone 803/245 5178
Telecopier 803/245 5384

JULIUS B NESS

1916-1991

December 15 2011

Honorable Daniel Shearouse Clerk
South Carolina Supreme Court
Post Office Box 11330
Columbia SC 29211

Re *Rutland v South Carolina Department of Transportation*
Case Number 2006-CP-38-486 (S C Ct App Op 4721)

Dear Mr Shearouse

Enclosed for filing please find one unbound original one unbound copy and fifteen bound copies of **BRIEF OF RESPONDENT** By copy of this letter I have served a copy of the brief upon all attorneys of record Please clock in the unbound copy and return to me in the enclosed envelope

Thanking you for your assistance I am

Sincerely yours

Richard B Ness

Richard B Ness

cc
Lee D Cope
R Alexander Murdaugh
Matthew V Creech
PETERS MURDAUGH PARKER ELTZROTH
& DETRICK P A
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November 17, 2011

VIA U S HAND DELIVERY
The Honorable Daniel E Shearouse
Clerk of Court
SUPREME COURT OF SOUTH CAROLINA
P O Box 11330
Columbia, South Carolina 29211

Re Clarence Rutland, as Personal Representative of the Estate of Tiffanie Rutland vs South Carolina Department of Transportation,
Case No 2006-CP-28-486

Dear Mr Shearouse

With reference to the above case, enclosed for filing please find the following documents

1) One unbound, original and fifteen (15) bound copies of *Petitioner s Brief*
2) Fourteen (14) copies of the Appendix, and,
3) One original and two (2) copies of the *Certificate of Service*

Please return a filed, bound copy of the *Petitioner s Brief* and of the *Certificate of Service* in the envelope I have provided By copy of this correspondence, copies of the enclosed Brief and Certificate of Service are being served on all counsel of record

Sincerely,

Matthew V Creech

Enclosures as stated
cc Richard B Ness Esq / Norma Jett Esq (Brief & Certificate of Service via U S Mail)
J Christopher Wilson Esq

The Supreme Court of South Carolina

DANIEL E SHEAROUSE
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October 19, 2011

Lee D Cope, Esquire
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Matthew V Creech, Esquire
Peters, Murdaugh, Parker,
Eltzroth & Detrick, PA
P O Box 457
Hampton, SC 29924

Re Rutland, Clarence v SC DOT

Dear Counsel

Enclosed is the Order granting your Petition for Writ of Certiorari in the above entitled matter

It will be necessary for you to furnish this office with an additional thirteen (13) copies of the appendix within thirty (30) days from the date of this letter

Brief of Petitioner should be served and filed on or before November 18, 2011 The brief is not properly filed until we have proof of service

Brief of Respondent should be served and filed within thirty (30) days after petitioner's brief is filed We must have proof of service Any reply brief should be served and filed within ten (10) days after filing of respondent's brief

Very truly yours,

CLERK

DES/lda

cc J Christopher Wilson, Esquire
Richard B Ness, Esquire
Norma Jett, Esquire
The Honorable Tanya Gee

The Supreme Court of South Carolina

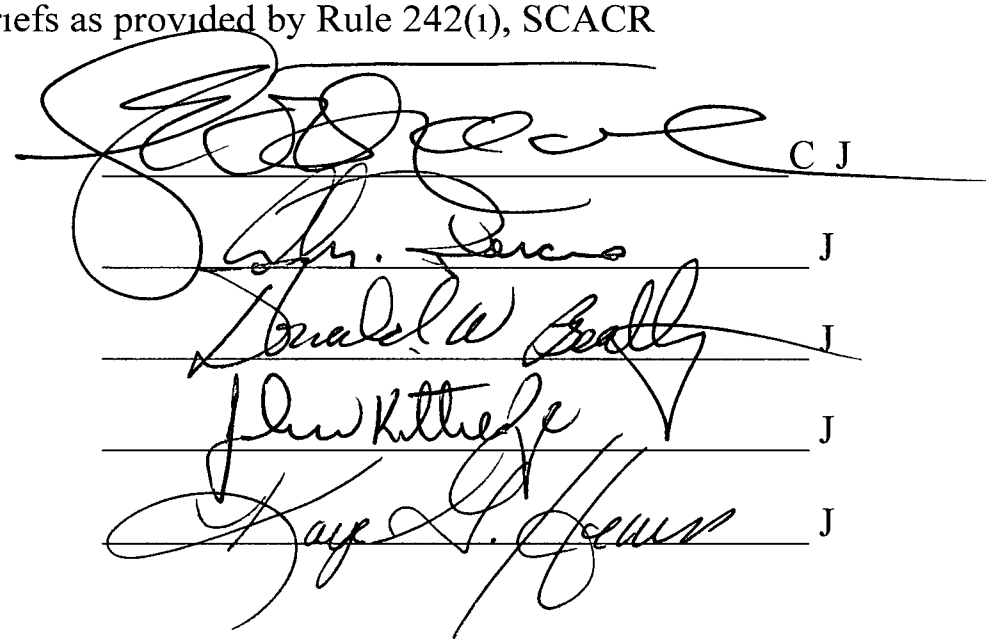
Clarence Rutland, as Personal Representative of the Estate of Tiffanie Rutland, Petitioner,

v

South Carolina Department of Transportation, Respondent

ORDER

We grant the petition for a writ of certiorari to review the Court of Appeals' decision in Rutland v South Carolina Dep't of Trans , 390 S C 78, 700 S E 2d 451 (Ct App 2010) The parties shall proceed to serve and file the appendix and briefs as provided by Rule 242(i), SCACR



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Columbia, South Carolina

October 19, 2011

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DEC 0 1 2010

S C Supreme Court

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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

PETITION FOR WRIT OF CERTIORARI

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-- and –

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ATTORNEYS FOR APPELLANT

Other Counsel of Record

Jonathan J Anderson, Esq
Lisa A Reynolds, Esq
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ANDERSON & REYNOLDS, LLC
Post Office Box 87
Charleston, S C 29202

INDEX

CERTIFICATE OF COUNSEL

Counsel for the petitioner certifies that the Petition for Rehearing and Rehearing *En Banc* was made and finally ruled on by the Court of Appeals on October 29, 2010

QUESTIONS PRESENTED

1 WHETHER THE COURT OF APPEALS ERRED IN RULING THAT THERE WAS NO EVIDENCE FROM WHICH A JURY COULD HAVE CONCLUDED THAT THE DECEDENT SUFFERED CONSCIOUS PAIN AND SUFFERING?

2 WHETHER THE COURT OF APPEALS ERRED IN FINDING THAT SOUTH CAROLINA DOES NOT RECOGNIZE "PRE-IMPACT" FEAR AS A "COMPENSABLE CAUSE OF ACTION"?

3 WHETHER THE COURT OF APPEALS ERRED IN AFFIRMING THE TRIAL COURT'S EQUITABLE REALLOCATION OF SETTLEMENT PROCEEDS?

STATEMENT OF THE CASE

This action arises our 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" hereinafter), was a passenger in a 1999 S-10 Blazer driven by Joseph Bishop which lost control and left the roadway At the conclusion of the wreck, Tiffanie was partially ejected through a rear driver side window and suffered fatal injuries

On the date of her death, Tiffanie was the backseat passenger in the Blazer being driven by her uncle, Joseph Bishop Tiffanie's husband, Clarence Rutland, and their infant son were in the back seat with her Her aunt, Tina Bishop, rode in the front passenger seat (R pp 136-137) After an afternoon of fishing and eating at a family member's home, Tiffanie needed to go to Wal-Mart in Orangeburg to shop for a birthday present for her mother (R p 138) While traveling to Orangeburg, Mr Bishop drove in a generally northbound direction on S C Highway 301 in a heavy rain storm (R p 139) Due to the conditions, Mr Bishop slowed and drove approximately 45-50 miles an hour, though the posted speed limit on this portion of Highway 301 is 60 m p h (R pp 134, 135, 137, 140) As the Blazer approached a private driveway for the Stillenger Body Shop, the vehicle began to hydroplane (R p 139)

Without dispute, this wreck was not a simple, immediate "collision" The collision began when the Blazer hit the defective portion of Highway 301 which collected and held water At the moment the hydroplane began Clarence Rutland, in the back seat with his wife, felt the vehicle being "pulled" or "snatched" by the water (R p 139, ll 6-25, R p 40, ll 14-20) Recognizing the loss of control at the beginning of the collision,

Clarence 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 vehicle spun on the roadway, left the roadway, and hit a culvert, which sent the vehicle airborne Eyewitness Brenda Kitrell viewed the accident in progress long enough to see the Blazer become airborne after hitting the culvert and to see Mr Rutland completely ejected from the rear of the vehicle (R p 151, ll 12-21) After the Blazer hit the culvert and became airborne, Clarence Rutland was completely ejected from the vehicle and was thrown some distance from the car After his ejection, he walked to the overturned Blazer where a couple of people had stopped to assist Clarence Rutland went to the vehicle with these witnesses, attempted to get the motor to stop running, and then searched for an object to break windows to get the remaining occupants out At this point, he slipped in the ditch and saw Tiffanie, whose head and neck protruded through a side window of the vehicle, partially ejected (R p 159) Mr Rutland testified in his deposition that he was told by a passerby who offered assistance that Tiffanie still had a pulse when the passerby went to her aid (R p 160) Clarence Rutland did acknowledge at trial though that as soon as he saw his wife, he thought that she was dead (R p 142, l 25 – p 143, l 8)

The Decedent's husband, Clarence Rutland, was appointed as the Personal Representative of the Estate of Tiffanie Rutland on August 26, 2004 As personal representative he was able to negotiate the payment of all available insurance limits on the vehicle the Decedent was killed in, totaling $30,000 00 under a policy of insurance issues to Joseph Bishop On February 7, 2005, the Petitioner filed a wrongful death Complaint in the Orangeburg County Court of Common Pleas against the South Carolina Department of Transportation ("SCDOT") Petitioner alleged that the SCDOT had

constructive and/or actual knowledge 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)

Petitioner later 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 Rutland asserted a products liability claim against GM sounding in strict liability, negligence, and breach of warranties, alleging that GM failed to design and/or manufacture the windows in the Blazer with materials sufficient to withstand ejectment (R pp 28-29) Against REA, the Amended Complaint asserted similar theories of negligence as were asserted against the SCDOT, as REA had resurfaced this roadway prior to the Rutland accident (R pp 27-28) Finally, on May 22, 2006, Petitioner filed his Second Amended Complaint for wrongful death, adding J A Jones Construction Company to the litigation as an upstream contractor for construction work to the stretch of highway 301 at issue [1]

Prior to the trial of this case, the Petitioner reached a settlement with GM ("the GM Settlement") On August 9, 2007, counsel for the Petitioner, SCDOT, and GM appeared before the Honorable Dianne S Goodstein for a settlement approval hearing pursuant to S C Code Ann § 15-51-42 GM's settlement with the Rutland Estate totaled $275,000 00 From the total settlement proceeds from all parties ($305,000 00 total), GM and the Petitioner agreed to allocate $167,000 00 to wrongful death 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 Petitioner, although Petitioner had

[1] Due to their bankruptcies, both REA and J A Jones Construction were voluntarily dismissed from this action prior to trial without any settlement funds being exchanged

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 the survival cause of action and corresponding allocation of proceeds between the settling parties (R p 91, lines 16-21)

At the GM 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 factual findings (R p 92, l 18 – p 93, l 14) SCDOT also sought to preserve the right to contest the allocation of the settlement for setoff purposes in the event of a verdict against the SCDOT (*Id*) Petitioner acknowledged SCDOT's ability to pursue its setoff argument if a verdict was entered against it at trial (R p 91, ll 8-15)

The Petitioner's case against SCDOT was tried before 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 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 Petitioner and SCDOT filed post-trial motions Rutland sought either a new trial absolute or a 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) By Order dated February 28, 2008, the trial court entered an Order denying Petitioner's new trial motions and summarily granting the SCDOT's motion for setoff in the amount of

---

[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

$300,000 00 [3] (R pp 1-10) Petitioner timely filed his Motion for Reconsideration pursuant to Rule 59(e), SCRCP on March 18, 2008 (R pp, 57-59) The trial court then issued a final Order of September 2, 2008, denying Petitioner's post-trial motions and clarifying its previous ruling on the issue of setoff In this Order the court found that insufficient evidence existed to support the apportionment of the settlement proceeds to Tiffanie's survival claim and the court 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 (R p 10)

Petitioner timely filed his notice of appeal on September 8, 2008 On August 4, 2010, the Court of Appeals issued Opinion No 4721, which affirmed the trial court's ruling The Court of Appeals specifically ruled (1) that there was not sufficient evidence from which a jury could have concluded that the decedent experienced conscious pain and suffering, (2) South Carolina does not "recognize 'pre-impact fear' as a compensable cause of action," and, (3) that the "SCDOT trial court did not abuse its discretion in reallocating the settlement proceeds to the wrongful death verdict against SCDOT "

Petitioner timely filed his Motion for Rehearing and Motion for Rehearing *En Banc* on August 19, 2010 (APP 68) By Orders filed October 29, 2010, the Court of Appeals issued final Orders denying the Appellant's request for Rehearing and for Rehearing *En Banc* (APP 102)

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[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

ARGUMENTS

Pursuant to Rule 242, SCACR, the Petitioner respectfully moves for a Writ of Certiorari and for this Court to review and reverse the Court of Appeals' Opinion No 4721 of August 4, 2010, which affirmed the trial court's grant of SCDOT's post-trial motion for set-off

This Court's consideration is necessary to secure and/or maintain uniformity of the appellate courts' opinions The opinion below overrules well the settled precedent of Spaugh v Atlantic Coast Line Railroad Co , 158 S C 25, 155 S C 145 (1930) and other binding precedent of this Court allowing the mental distress of a decedent as an appropriate element of damages in a survival action The Court of Appeals' opinion also misapplies and misapprehends a long line of binding precedent stating the evidentiary standards to be met in order to maintain a survival cause of action Furthermore, the opinion misapprehends the law concerning "pre-impact fear" and the ruling on that issue creates a novel issue that has not been addressed by our Courts

The opinion below has far reaching implications that affect all current and future classes of plaintiffs in South Carolina who seek compensatory damages under survival actions The findings and rulings of the opinion of August 4, 2010 conflict with the prior opinions of this Court The Court of Appeals' opinion also creates novel issues of law concerning whether South Carolina recognizes "pre-impact" fear as an element of damages in a survival action For the reasons that follow, the Petitioner therefore respectfully requests that this Court grant a Petition for Writ of Certiorari

I THE COURT OF APPEALS ERRED IN HOLDING THAT INSUFFICIENT EVIDENCE EXISTED FROM WHICH A JURY COULD CONCLUDE THAT THE DECEDENT EXPERIENCED CONSCIOUS PAIN AND SUFFERING, AND, IN SO RULING, THE COURT OF

APPEALS' OPINION CONFLICTS WITH THIS COURT'S PRECEDENT CONCERNING THE EVIDENTIARY STANDARDS TO SUPPORT A CLAIM FOR CONSCIOUS PAIN AND SUFFERING

In the Opinion below the Court of Appeals fails to recognize and apply the standards enunciated in several illustrative and binding South Carolina cases which here require a finding that the Petitioner presented sufficient evidence to support a claim for survival In essence, the Court of Appeals ignores the "any evidence" standard as announced by this Court in Croft v Hall, 208 S C 187, 37 S E 2d 537 (1946), confirmed by a host of cases, and recently addressed by Hancock v Mid-South Management Co , Inc , 381 S C 326, 673 S E 2d 801 (2008) The "any evidence" standard is equivalent to a "scintilla of evidence " Hancock, 381 S C 326, 673 S E 2d 801 (2008) Rather than test the record below for the existence of any evidence, the Court of Appeals substituted its view of the effectiveness or weight of the evidence This is not the test employed on review, as the correct test is to determine whether any evidence exists from which a jury could conclude that the decedent suffered conscious pain and suffering

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 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, supra The "any evidence" standard is equivalent to a "scintilla of evidence " Hancock, supra 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 cases addressing conscious pain and suffering In that case, this 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 Croft 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 there 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

Vereen, 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 Vereen, 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 The officer testified, however, that upon arrival he "saw an eight foot trail of blood

leading away from Vereen's body and who observed Vereen'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 Vereen 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 the Court of Appeals states that the Petitioner'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, the circumstantial evidence in this case is much more akin to that of Vereen Rather than an eight foot trail of blood, here Tiffanie Rutland endured a "trail" of physical injury, terror, and fear for her very life as the vehicle in which she rode with her family hydroplaned, skidded, rolled and flipped, ultimately partially ejecting her and being crushed by the vehicle When the vehicle in which she was riding first hit water on the road, Clarence Rutland felt the vehicle "pulled" or "snatched" by the water (R p 139, ll 6-25, R p 40, ll 14-20) Recognizing the beginning of this collision, the Petitioner, 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 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 a window to get the occupants out Petitioner slipped into the ditch where he then saw his partially ejected wife (R p 159)

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 Petitioner testified that at the initial triggering event of this accident, hitting the water on the road, he actually and consciously recognized the danger 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 that aside from physical injuries, she suffered mental anguish and emotional fright before she was killed Mental or emotional distress, when accompanied by physical injury, is a compensable element of damages [4]

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

[4] This concept is discussed in detail in Section II of the Petition below

jury exists, particularly when viewing this evidence in the light most favorable to the Petitioner, as a reviewing Court must Based on 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, injuries which were accompanied by significant emotional and mental distress 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 to support the viability of a survival action

II 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 OF APPEALS ERRED IN HOLDING THAT SOUTH CAROLINA DOES NOT RECOGNIZE IT AS "A COMPENSABLE CAUSE OF ACTION"

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 death However, decisions of this Court have 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, Tiffanie'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 The opinion below misconstrued the arguments of the Petitioner, 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 Petitioner never argued that the mental distress and anguish suffered by the decedent before her death constituted a discrete cause of action, whether novel or already existing, whether named "pre-impact fear," or called by any other name Rather, 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) [5]

Notwithstanding the settled principles above, the Court of Appeals held 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 this Court's decision of Spaugh v Atlantic Coast Line Railroad Co , supra, which stands for a correct proposition of the law While Petitioner agrees that some *dicta* in Spaugh stems from a time, outlook, and social rationale much different from ours

[5] ' Appropriate damages in survival actions include those for medical, surgical, and hospital bills conscious pain suffering and mental distress of the deceased Id

today[6], 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

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 or 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 fright 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 their 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

[6] "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 '

> 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 discussed 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 Petitioner, perceived the same Thus, this Court's reliance on Hoskins is misplaced Finally, the Court of Appeals' reliance on a Federal District Court case to address the "pre-impact fear" issue is inappropriate While the opinion might be persuasive authority, Hoskins certainly is not binding Moreover, by its reliance on the merely persuasive authority of Hoskins, the Court of Appeals ignored the binding precedent of Mack v South Bound R Co , supra, Ford v Hutson, and, Scott v Porter, supra

To the extent the opinion below creates a novel issue by declining to recognize "pre-impact" fear as a viable element of damages in South Carolina, this Court should address the issue To allow pre-impact fear as an element of damages in a survival action

(as opposed to a discrete cause of action as stated by the Court of Appeals) would be consistent with modern jurisprudence from other jurisdictions Georgia, Florida, Texas, Louisiana, Nebraska, Michigan, and Maryland, are but some jurisdictions which recognize the compensability of pre-impact fear in survival actions[7] In Beynon v Montgomery Cablevision Limited Partnership, 351 Md 460, 718 A 2d 1161 (Md 1998) the Maryland Supreme Court undertook an exhaustive analysis to determine "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" The Beynon 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

"There exists no legal or logical distinction between permitting a decedent's estate to recover as an element of damages for a decedent's 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"

---

[7] See Solomon v Warren, 540 F 2d 777, 796 97 (5th Cir 1976) Haley v Pan American World Airways 746 F 2d 311 (5th Cir 1984) Thomas v State Farm Insurance Co 499 So 2d 562 (La App 2d Cir 1986) Hood v State 587 So 2d 755 (La App 2d Cir 1991), 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)

Nelson v Dolan, 230 Neb 848, 434 N W 2d 25 (1989) In the case at bar, 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 opinion below, in declining to recognize this concept, relieves the SCDOT for 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, one must presume that these same mental distress damages would be recoverable by her Because survival action damages are limited to those recoverable by the decedent had she lived, the same mental and emotional damages should be allowed under a survival theory

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, Petitioner seeks review by this Court To the extent the opinion below has characterized pre-death mental distress or "pre-impact fear" as a "cause of action," as opposed to an element of damages, the Court of Appeals erred In light of existing South Carolina precedent which allows for survival action decedents to recover mental distress, the opinion conflicts with settled law of this Court and a Writ of Certiorari should issue

III THE COURT OF APPEALS ERRED IN AFFIRMING THE EQUITABLE REALLOCATION OF SETTLEMENT PROCEEDS

The Court of Appeal's decision upholding the equitable reallocation 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 this Court should review the decision below 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, 342

S C 279, 536 S E 2d 408 (Ct App 2000), the Court of Appeals' affirmation of the equitable reallocation should be reversed

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 Such discretion may be exercised when a settlement or judgment is based on fraud or a sham Id The precedent relied upon by the Court of Appeals in affirming equitable reallocation does not support the Opinion's conclusions To the contrary, Ward and Welch highlight that under the facts of this case, the Petitioner presented adequate evidence to sustain a survival cause of action and equitable reallocation is inappropriate

The seminal case addressing setoff and equitable reallocation is Ward v Epting 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 noted that under the "any evidence" standard of Croft, supra, evidence existed from which a jury could reasonably find conscious pain and suffering existed Ward, 290 S C at 559-560, 351 S E 2d at 874-75

On the other hand, the case which the Court of Appeals erroneously found the facts of this case to most closely mirror is Welch v Epstein In Welch, a medical malpractice suit dealing with substandard *post*-operative care, the only evidence presented as to the plaintiff's pain and suffering was that the plaintiff suffered pain as a result of the underlying back surgery, rather than as a result of the *post*-surgical 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 equitable reallocation was proper In essence, the settlement apportionment in Welch was deemed a sham

because as a matter of law, there was no pain and suffering proximately caused by the alleged negligence of the Defendant

Under the analysis of the "any evidence" standard above, and the existence of facts sufficient to support a survival claim, the Court of Appeals erred in declaring the settlement allocation in the case at bar to be a sham The Court of Appeals therefore erred in affirming the equitable reallocation of the settlement proceeds in this case and the Court of Appeals' analysis under Welch and Ward is mistaken Petitioner therefore respectfully requests the grant of a Writ of Certiorari to review the opinion below

CONCLUSION

For the foregoing reasons, this Court should grant The Estate of Tiffanie Rutland's Petition for Writ of Certiorari to review the Court of Appeals' Opinion of August 4, 2010

Respectfully submitted,

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November 29, 2010
Ridgeland, South Carolina

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED
DEC 01 2010
S.C Supreme Court

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 ***Petition for Certiorari*** 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

I further certify that I have this date mailed via the U S Postal Service with first class postage prepaid, a true and correct copy of the within ***Petition for Certiorari, Appendix, and Certificate of Service*** to the following

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The Honorable Daniel E Shearouse
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November 29, 2010
Ridgeland, South Carolina

Matthew V Creech

IN THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM ORANGEBURG COUNTY
COURT OF COMMON PLEAS

Honorable George C James Jr Circuit Court Judge Presiding

Op No 4721 (S C Ct App Filed August 4 2010)

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

v

South Carolina Department of Transportation Respondent

RETURN TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED IN THE PETITION

1 Did the Court of Appeals err in affirming the decision of the trial court that the Petitioner presented no evidence of conscious pain and suffering to support a survival action?

2 Did the Court of Appeals err in affirming the trial court's reallocation of pretrial settlement proceeds to offset the wrongful death verdict?

ADDITIONAL QUESTIONS PRESENTED

3 Does the decision by the Court of Appeals present special and important circumstances justifying a Writ Certiorari pursuant to Rule 242(b) SCACR?

STATEMENT OF THE CASE

A Procedural History of the Case

The instant Petition for Writ of Certiorari arises from the decision of the Court of Appeals affirming the Circuit Court's Order (R p 11) granting setoff and Order Denying Motion to Reconsider (R p 1)

This is a negligence wrongful death action arising from Tiffanie Rutland s death in an automobile accident No survival cause of action was ever asserted in this action Petitioner settled with the driver Joseph Bishop for $30 000 then filed this action against SCDOT (R p 21) The case was removed from the active docket pursuant to *Rule 40(j) SCRCP* then timely restored Defendants REA Construction Company ("REA") and General Motors Corporation ("GM") were added by Amended Complaint Rutland then filed a Second Amended Complaint for wrongful death adding J A Jones Construction Company ("Jones) as an additional contractor (R p 33) Soon thereafter Rutland voluntarily dismissed the action as against REA and Jones which had both filed for protection in bankruptcy This left only defendants SCDOT and GM At all times Petitioner asserted only negligent wrongful death He alleged SCDOT caused or had notice and failed to repair a road defect which he alleged contributed to the rainy weather crash He alleged GM negligently created a vehicle defect which contributed to the death by allowing the decedent s partial ejection

Several months prior to the trial of this case Rutland settled with GM leaving SCDOT as the only defendant 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 only for negligent 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

SCDOT requested setoff of the entire settlement proceeds from Bishop (the driver) and GM against the verdict 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 timely appealed The three-judge panel of the Court of Appeals unanimously affirmed the trial court finding the trial court correctly concluded that the record contained no evidence of conscious pain and suffering to support a survival action that the alleged pre-impact fright of the decedent did not constitute conscious pain and suffering for that purpose that the SCDOT was not a party to the pretrial settlement agreement and not bound by its terms and that the settlement proceeds should be reallocated and offset against the wrongful death verdict against SCDOT The Court of Appeals held the trial court did not abuse its discretion in the reallocation of the settlement (S C Ct App Opinion No 4721)

Petitions for Rehearing and Rehearing en Banc were timely filed and were denied The Petitioner now seeks a Writ of Certiorari to the South Carolina Court of Appeals

B Material Facts

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 Petitioner Clarence Rutland Also in the car were the Petitioner 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) 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 No person testified that Tiffanie Rutland consciously experienced anything between the driver's loss of control and the discovery of her body under the car No person testified to any remarks or exclamations by Tiffanie Rutland nor any evidence of her being aware of the impending crash And no testimony was presented that she was conscious between the time of injury and death for even a moment

ARGUMENT

I CERTIORARI IS NOT JUSTIFIED IN THIS CASE UNDER SCACR 242

Rule 242(b) SCACR provides that the granting of a writ of certiorari to the Court of Appeals is discretionary but the Supreme Court should grant the writ "only where there are special and important reasons ' The Rule provides a list of circumstances not exclusive but illustrative in which certiorari should be considered The list includes (1) cases in which there are novel questions of law (2) those in which there is dissent in the Court of Appeals decision (3) those in which the Court of Appeals decision conflicts with a prior decision of this Court (4) those involving substantial constitutional issues and (5) those involving a federal question and a conflict between the Court of Appeals decision and one of the United States Supreme Court

The decision by the Court of Appeals in this case included no dissent no constitutional issue and no federal question As set forth in Arguments II and III below the law on the issues presented is clear A trial court has equitable jurisdiction to reallocate settlements and determine offset of settlements against verdicts The pain and suffering compensable as damages in a survival action is that which occurs between injury and death

not that which precedes injury Damages must be proven Thus the questions are not novel and the Court of Appeals decision does not conflict with a prior decision of this Court The case therefore does not fit within the list of categories provided by Rule 242(b)

Additionally there are no special or important reasons for this Court to review the decision of the Court of Appeals The Court of Appeals fully addressed and accurately apprehended the facts of this case and the law applicable thereto It determined there was presented no evidence of conscious pain and suffering at all and certainly none between the time of injury and the decedent's death It apprehended correctly that South Carolina had never recognized as an element of damages the alleged conscious pain and suffering of a decedent which preceded her injury It declined to change South Carolina's established common law on conscious pain and suffering as an element of damages in a survival action It recognized the trial court's equitable jurisdiction in setoff questions As set forth in Arguments II and III herein the Court of Appeals decision was correct and comports with established South Carolina law There is no reason nor authority for the Court of Appeals to change that established law and its decision not to do so does not compel review of this Court

II THE COURT OF APPEALS DID NOT ERR, NOR CONTRADICT THE ESTABLISHED LAW OF SOUTH CAROLINA, IN AFFIRMING THE CIRCUIT COURT DECISION THAT THE APPELLANT DID NOT PROVE CONSCIOUS PAIN AND SUFFERING, AND THAT THE DECEDENT'S PRE-IMPACT FRIGHT IS NOT COMPENSABLE IN A SURVIVAL ACTION

A Petitioner presented no evidence of conscious pain and suffering

B The relevant interval for conscious pain and suffering is between injury and death, and South Carolina does not recognize pre-impact fright

The Petitioner asks this Court to review the Court of Appeals decision which essentially rejected as unproven the Petitioner's assertion after trial of conscious pain and suffering and its further decision that any such pain and suffering prior to crash and injury are not compensable This Court need review only the record in this case to determine that the record contains no proof of any conscious pain and suffering before or after the crash Thus the Court need not reach the question of whether pre-impact fright is compensable in a South

Carolina survival action Even if South Carolina recognizes pre-impact fright there is no proof in the record to support the claim so the issue is moot

The established law of South Carolina recognizes pain and suffering as damages in a survival action but requires that it be proven and that it be **consciously** suffered *Camp v Petroleum Carrier Corp* 204 S C 133 28 S E 2d 683 (1944) Speculation is not allowed In *Camp* the evidence considered by the Supreme Court was that a man was heard groaning from within a car before he died of injuries sustained in the wreck There was no evidence however that he was ' conscious of pain and suffering " 204 S C at 138 28 S E 2d at 685 Thus the claim was rejected Conversely in *Scott v Porter* 340 S C 158 530 S E 2d 389 (Ct App 2000) conscious pain and suffering was established by testimony the child spoke to his mother and made clear he was in conscious pain

Even the Maryland case cited by Petitioner on the subject of pre-impact fright acknowledges the matter should not be left to rank speculation " but should be capable of objective determination *Beynon v Montgomery Cablevision Limited Partnership* 351 Md 460 509718 A 2d 1161 1185 (Ct App 1998) In *Beynon* the Court noted the decedent driver applied brakes (obviously consciously and in a position to foresee the impending impact) leaving seven and one-half feet of skid marks which allowed objective determination that he may have experienced some mental distress See also *Steel Technologies Inc v Congleton* 234 S W 3rd 920 (Ky 2007)(claim rejected where 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)

Here there is no proof of conscious pain and suffering whether before or after the crash While it is unrefuted that the driver of the car involved in this action lost control of the vehicle before it crashed and that it traveled astray of its planned path for at least a brief moment before landing upside down in a ditch and entrapping the body of the decedent there is no proof that between an injury and her death the decedent was conscious and consciously

suffered pain The Petitioner has offered speculation in his legal arguments that passenger Tiffanie Rutland was consciously frightened during the course of events between loss of control and the wreck (pre-impact fright) There was no proof however that she was conscious during those events nor was there any testimony of her emotional state The testimony concerning a pulse after the crash was immaterial as it does not establish consciousness "[T]he relevant inquiry [where conscious pain and suffering is at issue] is not whether the decedent's vital functions continued after impact but rather whether the decedent exhibited some cognitive awareness" *Fanning v Sitton Motor Lines Inc* 695 F Supp 2d 1156 (D Kan 2010) *St Clair v Denny* 245 Kan 414 422 781 P 2d 1043 1049 (1989)

As for the time in which the conscious pain and suffering must have occurred the Supreme Court has recognized that the relevant period for such pain and suffering of a decedent is "the interval between his injury and death *Camp v Petroleum Carrier Corp* 204 S C 133 28 S E 2d 683 (1944) 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 *South Carolina Code Ann §15-5-90 (1976 as amended)* provides for the survival to the decedent s estate of an action which the decedent could have brought had she survived her injuries Tiffanie Rutland could not have recovered for pre-impact fright had she survived Pre-impact fear is not compensable in South Carolina Were it so then even those who narrowly dodge a car collision might find themselves sued by the occupants of the other vehicle for the fear inspired by 'the wreck that wasn't" Such a claim finds no support in South Carolina law

In South Carolina the effects of negligence on the mind alone are not compensable *Mack v South Bound R Co* 52 S C 323 29 S E 905 (1898) Emotional distress which neither results from a physical injury nor causes a physical injury is not compensable in a negligence action but only in an intentional tort case *Ford v Hutson* 276 S C 157 276 S E 2d 776 (1981) Had the driver of the Bishop vehicle gone through the swerving

described by Petitioner perhaps even flipping through the air and then somehow miraculously righted the car without physical injury to the occupants the mental stress they may have endured would not be compensable

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 *Spaugh* makes no mention of any impact nor pre-impact fright nor purely emotional injury or distress *Spaugh* simply makes clear that where emotional distress produces a physical injury such injury is compensable *Spaugh* is a 1930 case in which a woman was allegedly made physically ill by a nervous breakdown she suffered **after** she was stranded by a rail company and walked home to her children in the rain then "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* contains no support for pre-impact fear as an element of damages and certainly no support for any damages not proven in a trial The plaintiff in *Spaugh* alleged hysteria **following** an alleged harrowing experience and there was proof of her awareness of her experience and proof of its later effects on her

There is no prior authority in South Carolina law for pre-impact fright to be considered as conscious pain and suffering in a survival action Moreover even if there were such authority there was no proof The Court of Appeals correctly applied established law to the facts within the record before it Its decision does not compel review by this Court

III THE COURT OF APPEALS CORRECTLY APPLIED THE LAW OF SETOFF IN AFFIRMING THE REALLOCATION OF THE PRETRIAL SETTLEMENT PROCEEDS AND APPLYING THE FULL AMOUNT OF THE SETTLEMENT TOWARDS SCDOT'S RIGHT TO SET-OFF

The Court of Appeals applied established South Carolina law in affirming the setoff of the Petitioner's pretrial settlement proceeds against the verdict he obtained at trial Regardless of the pretrial designation of the settlement funds the record contains no evidence of conscious pain and suffering not even pretrial deposition testimony

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) The settlement approval order recognized the SCDOT was not a party to the settlement and that its terms were not binding on SCDOT which reserved the equitable right to request setoff of settlement proceeds against any verdict obtained As there is to be only one recovery for a wrong SCDOT retained the right to assert setoff and to ask the Court to exercise its equitable jurisdiction to ensure there was only one recovery *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)

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 the Court of Appeals 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 once available only between settlement and verdict of the same cause of action *Hawkins v Pathology Associates of Greenville P.A* 330 S C 92 498 S E 2d 395 (Ct App 1998) *Ward v Epting* 290 S C 547 351 S E 2d 867 875 (Ct App 1986) Later decisions however recognized the injustice of allowing a plaintiff to settle with one or more defendants craft a settlement allocation favoring one cause of action and then proceed to trial only on the other cause of action *Ward supra* In the past 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 sham or not See *Welch v Epstein* 342 S C 279 536 S E 2d 408 (Ct App 2000) *Smalls supra Rookard v Atlanta & Charlotte Air Line Ry* 89 S C 371 71 S E 992 (1911)

In *Welch* the Court of Appeals 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 In *Vortex Sports & Entertainment Inc v Ware* 378 S C 197 662 S E 2d 444 (Ct App 2008) rehearing denied 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* the Court of Appeals 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

The Court of Appeals in affirming the settlement reallocation followed the law of South Carolina and did not stray from the prior case decisions of that Court nor the Supreme Court Its decision does not compel the review of the Supreme Court

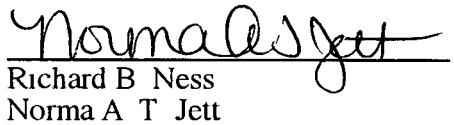
CONCLUSION

No ground is presented by this case under Rule 242(b) SCACR to justify review by this Court This case presents no novel question of law no dissent in the decision of the Court of Appeals no federal nor constitutional questions and no conflict with any prior decisions of the South Carolina Supreme Court nor the United States Supreme Court The Court of Appeals simply applied the law of South Carolina to the facts (or paucity thereof) presented at trial and correctly affirmed the trial court Without proof of conscious pain and suffering whether before or after impact the question of whether South Carolina recognizes pre-impact fear is immaterial With no evidence to support a survival cause of action reallocation of the settlement was the only just result and rightly affirmed by the Court of Appeals There is no reason for this Court to grant a Writ of Certiorari and the Petition

should be denied

Respectfully submitted

NESS & JETT LLC

BY 

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December 20 2010

STATE OF SOUTH CAROLINA)
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I an attorney for Respondent in the appeal of *Ervin M Mathias Jr et al v Rural Community Insurance Company et al* Docket No 2003-CP-25-133 do hereby certify that my agent has served the foregoing **Return to Petition for Writ of Certiorari** by mailing a copy of the same with postage prepaid by United States mail to be attorney(s) at the address(es) indicated as follows

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

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, **Petitioner,**

v

South Carolina Department of Transportation, **Respondent**

PETITIONER'S REPLY TO RESPONDENT'S RETURN TO PETITION FOR WRIT OF CERTIORARI

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Pursuant to Rule 242 of the South Carolina Appellate Court Rules, Petitioner Clarence Rutland (hereinafter, "Rutland") submits the following Reply Brief to the Return of Respondent SCDOT which was served on December 20, 2010

In this Reply Brief, Petitioner incorporates and adopts by reference all arguments made in his Petition for Certiorari Otherwise, the arguments herein are limited to brief responses to the arguments contained in the SCDOT's Return Respectfully, Petitioner submits that substantial misreading of the concepts and issues at the heart of the Opinion below remain, as the SCDOT's Return illustrates For these reasons and those previously stated, Petitioner respectfully requests that this Court issue a Writ of Certiorari so that the Opinion of the Court of Appeals can be reviewed

STATEMENT OF THE CASE

First, Petitioner replies briefly to the Statement of the Case submitted by SCDOT and particularly the "Material Facts" noted at pages 3-4 The facts cited by SCDOT are drawn only from the evidence presented during the wrongful death trial SCDOT's reference to only the wrongful death trial record underscores precisely the point raised in appealing the trial court's ruling

The trial court limited the scope of its equitable reallocation review, and SCDOT now advocates for the same scope on appellate review, drawn only from the wrongful death trial rather than the record as a whole During the wrongful death trial it was not Petitioner's burden to present even a scintilla of evidence concerning Tiffanie Rutland's conscious pain and suffering before her death [1] At the settlement hearing between the Petitioner and GM, it was agreed by all parties that in the event of a verdict against the

[1] Such evidence would have been excluded under Rule 401 SCRE Even if relevant, evidence of this nature certainly would have been objected to justifiably as it would be prejudicial and lead to jury confusion on the issues of damages in the context of a wrongful death trial Rule 403 SCRE

SCDOT, at the post-trial stage SCDOT would have leave to challenge the settlement by seeking equitable reallocation At that post-trial stage, because of the continued viability of a survival action against the settling party GM, the trial court was required to review the record as a whole to decide the issues before it The record on appellate review should be similarly broad, though the review by the Court of Appeals seems to have been limited to evidence presented in the wrongful death trial Although sufficient circumstantial evidence exists in the trial record alone to support a survival cause of action, Petitioner contends that the evidence to be considered is not limited to the wrongful death trial, but the record as a whole These facts are recited fully in Petitioner's Statement of the Facts in his Petition for Certiorari

ARGUMENTS

I CERTIORARI IS WARRANTED IN THIS MATTER PURSUANT TO RULE 242(b), SCACR

Pursuant to Rule 242(b), SCACR, subsections (1) and (3), a grant of certiorari is warranted in this matter Certiorari may be granted in cases where "there are novel questions of law" and "the Court of Appeals decision conflicts with a prior decision of this Court " Furthermore, this Court's consideration is necessary to secure uniformity of the appellate courts' opinions on multiple issues herein

A Because the Opinion Conflicts with Decisions of this Court, Certiorari is Appropriate Pursuant to Rule 242(b)(3)

Under Rule 242(b)(3), the Court of Appeals' Opinion misapprehends and misapplies numerous decisions of this Court with regard to review of the "any evidence" or "scintilla" standards The Opinion conflicts with previous decisions of this Court such as Croft v Hall, 208 S C 187, 37 S E 2d 537 (1946) and Hancock v Mid-South

Management Co , Inc , 381 S C 326, 673 S E 2d 801 (2008) Similarly, the Opinion directly conflicts with the holding of Spaugh v Atlantic Coast Line Railroad Co , 158 S C 25, 155 S C 145 (1930) [2]

The Court of Appeals' opinion also conflicts with longstanding precedent concerning the survival of mental distress damages under the survival statute As noted in this Court's decision of Ford v Hutson, 276 S C 157, 276 S E 2d 776 (1981)

> 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 Mack v South Bound R Co , 52 S C 323, 29 S E 905 (1898)

Id 276 S C at 159, 276 S E 2d at 777 The Court of Appeals itself has previously 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) "Appropriate damages in survival actions include those for medical, surgical, and hospital bills, *conscious pain suffering and mental distress* of the deceased" Id The Opinion below, however, denominates that same conscious *mental distress* as "pre-impact fear" and denies their compensability in South Carolina [3] This ruling therefore conflicts with controlling precedent, while also creating novel issues in the jurisprudence of South Carolina

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[2] Again Petitioner acknowledges that the *dicta* in that Spaugh as well as the underlying sociological concepts are outdated Nevertheless, the holding of that opinion concerning mental distress damages has been unmodified for approximately eighty (80) years and the case has been favorably cited for the same period

[3] As addressed in the Petition for Certiorari, the Court of Appeals actually states that this element of damages is not recognized as a ' cause of action

B In Designating Mental Distress Damages of the Decedent as "Pre-Impact Fear" and Denying the Compensability of Such Damages in South Carolina, the Opinion Creates a Novel Issue of Law under Rule 242(b)(1), SCACR

In the Opinion the Court of Appeals designates the type of mental and emotional distress suffered by the decedent prior to her death as "pre-impact fear." Granted, this is consistent with the modern trend in analyzing mental distress prior to death which occurs in a relatively short time frame. As noted in Section A above though, such mental distress historically has been recognized in South Carolina as an element of damages in a survival action. From Petitioner's perspective, in terms of existing South Carolina law, this new terminology is simply "old wine in a new bottle." But, by denominating and analyzing Tiffanie Rutland's mental distress prior to her death as "pre-impact fear," the Court's ruling on that issue creates a novel issue that has not been addressed by our Courts. This fact is highlighted by the Court of Appeals' reliance on a South Carolina District Court case in deciding that South Carolina does not recognize "pre-impact fear" as a "cause of action." Moreover, the language of the Court of Appeals' decision on this issue certainly creates a novel issue in South Carolina jurisprudence, as this element of damages has been changes to a discrete "cause of action."

> 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.

Because this ruling creates a novel issue of law, the grant of a writ of certiorari is appropriate so that this Court can decide this important issue.

II CONTRARY TO SCDOT'S ASSERTIONS, SUFFICIENT EVIDENCE OF PAIN AND SUFFERING EXISTS IN THE RECORD AND THE OPINION CONFLICTS WITH THIS COURT'S EVIDENTIARY STANDARDS CONCERNING CLAIMS FOR CONSCIOUS PAIN AND SUFFERING

As addressed fully in his Petition for Certiorari, by concluding that no evidence of conscious pain and suffering exists in the record, the Court of Appeals ignores the "any evidence" standard as announced by this Court in Croft v Hall, 208 S C 187, 37 S E 2d 537 (1946) and Hancock v Mid-South Management Co , Inc , 381 S C 326, 673 S E 2d 801 (2008) The "any evidence" standard is equivalent to a "scintilla of evidence " Hancock, 381 S C 326, 673 S E 2d 801 (2008)

The Return of SCDOT analyzes the quality, credibility, and ultimate weight of the evidence in the record to conclude that no evidence of conscious pain and suffering exists This is the same erroneous balancing of evidence which undermines the Opinion below For example, SCDOT seeks to color the evidence cited by the Petitioner as subjective and as "rank speculation " This ignores the true test to be employed, the test of whether there is any evidence, even a scintilla, from which a jury could conclude that the decedent suffered conscious pain and suffering Under 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), and even those cases cited by the Defendant, sufficient evidence exists so that the issue could be considered by a jury [4] While a jury might ultimately conclude that the evidence in this record failed to prove that Tiffanie suffered conscious pain, suffering, and mental distress in the period between the beginning of the accident and her death, sufficient evidence

[4] These concepts are fully addressed in the Petition for Certiorari

exists to present the question to a jury This is particularly true when viewing this evidence in the light most favorable to the Petitioner, as a reviewing Court must

Finally, a number of fallacious and illogical arguments in SCDOT's Return bear mentioning

SCDOT argues that if pre-impact fear were a compensable element of damages, "then even those who narrowly dodge a car collision might find themselves sued by the occupants of the other vehicle for the fear inspired by 'the wreck that wasn't '" (Return, p 7) This is clearly not the aim of the Petitioner, nor the effect of any conscientious analysis of pre-death mental distress or pre-impact fear Acknowledgment of pre-impact fear by this Court would in no way expand or alter existing standards for conscious pain, suffering, and mental distress allowed under the survival statute Affirmation of this type of distress, whether called pre-impact fear or not, is simply a practical acknowledgment that in limited circumstances – where evidence exists from which it is reasonable to conclude that the decedent was aware of imminent death or injury – the decedent has suffered compensable and actual emotional or mental trauma The injury, unfortunately, accompanying this narrow, defined type of mental distress is death, rather than broken bones or torn flesh Despite SCDOT's argument to the contrary, nothing in the analysis of pre-impact fear would engender frivolous, false, or trumped-up damages claims in any legal action Under these narrow circumstances and under the standard analysis of conscious pain and suffering, mental distress such as Tiffanie's is a recoverable element of damages Stated most simply had Tiffanie survived this crash, would her emotional reaction, fear, horror, and distress as the vehicle flipped down the roadway be compensable, though the time she suffered that distress was brief? Undoubtedly, yes

The very purpose of the survival statute is that actual damages consciously suffered by a decedent before death survive

These arguments are closely tied to the SCDOT's equally illogical position that Tiffanie Rutland's mental distress is not compensable, as a matter of law, unless physical injury preceded the mental injury (Return, pp 7-8) First, this entire argument is premised upon weighing factual evidence and concluding that Tiffanie was in no way injured in this accident before her body was partially ejected through the back window This argument ignores the circumstantial evidence in the record that Tiffanie and others in the vehicle recognized the start of the accident, realized the danger her and her family were in, and then begs the assumption that Tiffanie was completely uninjured as this violent collision unfolded While this argument may be very persuasive before a jury, it does not support the conclusion that as a matter of law, no compensable mental distress was suffered by Tiffanie

III THE COURT OF APPEALS ERRED IN AFFIRMING EQUITABLE REALLOCATION AND SCDOT'S ARGUMENTS ON THIS ISSUE ARE UNAVAILING

For the reasons stated in his Petition for Certiorari, the Court of Appeals erred in affirming the trial court's equitable reallocation of the settlement With the any evidence standard having been met to establish the viability of a survival claim, the case at bar is controlled by Ward v Epting, 290 S C 547, 351 S E 2d 867 (Ct App 1986) Under this analysis, equitable reallocation was inappropriate

The arguments set forth by SCDOT in its Return concerning equitable reallocation are unpersuasive SCDOT argues again that the "one injury" rule of Vortex Sports & Entertainment, Inc v Ware, 378 S C 197, 662 S E 2d 444 (Ct App 2008)

would preclude and disallow the distinction between survival action damages and those allowed under a wrongful death claim However, the "one injury" language of Vortex is premised upon the inclusion of that language in S C Code Ann § 15-38-50, or the South Carolina Contribution Among Tortfeasors Act As acknowledged by the SCDOT, the Contribution Among Tortfeasors Act does not apply the SCDOT "The Uniform Contribution Among Tortfeasors Act shall not apply to governmental entities" S C Code Ann § 15-38-65 Vortex and the "one injury" rule are therefore inapplicable

CONCLUSION

For the foregoing reasons, this Court should Grant a Writ of Certiorari to review the Court of Appeals Opinion below which both contradicts existing decisions of this Court, as well as creates novel questions of law within South Carolina's existing jurisprudence

Respectfully submitted,

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

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 Petitioner, have this date mailed via the U S Postal Service with first class postage prepaid, a true and correct copy of the within ***Petitioner's Reply to Respondent's Return to Petition for Certiorari*** and ***Certificate of Service*** to the following

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The Honorable Daniel E Shearouse
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December ~~29~~ 30th, 2010
Ridgeland, South Carolina

Matthew V Creech

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Re Clarence Rutland, as Personal Representative of the Estate of Tiffanie Rutland vs South Carolina Department of Transportation,
Case No 2006-CP-28-486

Dear Mr Shearouse

With reference to the above case, pursuant to Rule 242, SCACR, enclosed for filing please find the following documents

1) One unbound, original and seven (7) bound copies of *Appellant s Reply to the SCDOT s Return to Petition for Certiorari*, and,
2) One original and two (2) copies of the *Certificate of Service*

Please return a filed copy of the *Reply* and of the *Certificate of Service* in the envelope I have provided By copy of this correspondence, copies of the enclosed Reply and Certificate of Service are being served on all counsel of record

Sincerely,

Matthew V Creech

Enclosures as stated
cc Richard B Ness Esq / Norma Jett Esq (Reply Certificate of Service)
J Christopher Wilson, Esq (Reply and Certificate of Service)

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of the Estate of Tiffanie Rutland, ... Petitioner,

v.

South Carolina Department of Transportation, .. Respondent

PETITIONER'S REPLY TO RESPONDENT'S RETURN TO PETITION FOR WRIT OF CERTIORARI

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Pursuant to Rule 242 of the South Carolina Appellate Court Rules, Petitioner Clarence Rutland (hereinafter, "Rutland") submits the following Reply Brief to the Return of Respondent SCDOT which was served on December 20, 2010

In this Reply Brief, Petitioner incorporates and adopts by reference all arguments made in his Petition for Certiorari Otherwise, the arguments herein are limited to brief responses to the arguments contained in the SCDOT's Return Respectfully, Petitioner submits that substantial misreading of the concepts and issues at the heart of the Opinion below remain, as the SCDOT's Return illustrates For these reasons and those previously stated, Petitioner respectfully requests that this Court issue a Writ of Certiorari so that the Opinion of the Court of Appeals can be reviewed.

STATEMENT OF THE CASE

First, Petitioner replies briefly to the Statement of the Case submitted by SCDOT and particularly the "Material Facts" noted at pages 3-4 The facts cited by SCDOT are drawn only from the evidence presented during the wrongful death trial SCDOT's reference to only the wrongful death trial record underscores precisely the point raised in appealing the trial court's ruling

The trial court limited the scope of its equitable reallocation review, and SCDOT now advocates for the same scope on appellate review, drawn only from the wrongful death trial rather than the record as a whole During the wrongful death trial it was not Petitioner's burden to present even a scintilla of evidence concerning Tiffanie Rutland's conscious pain and suffering before her death [1] At the settlement hearing between the Petitioner and GM, it was agreed by all parties that in the event of a verdict against the

[1] Such evidence would have been excluded under Rule 401, SCRE Even if relevant, evidence of this nature certainly would have been objected to, justifiably, as it would be prejudicial and lead to jury confusion on the issues of damages in the context of a wrongful death trial Rule 403, SCRE.

SCDOT, at the post-trial stage SCDOT would have leave to challenge the settlement by seeking equitable reallocation At that post-trial stage, because of the continued viability of a survival action against the settling party GM, the trial court was required to review the record as a whole to decide the issues before it The record on appellate review should be similarly broad, though the review by the Court of Appeals seems to have been limited to evidence presented in the wrongful death trial Although sufficient circumstantial evidence exists in the trial record alone to support a survival cause of action, Petitioner contends that the evidence to be considered is not limited to the wrongful death trial, but the record as a whole These facts are recited fully in Petitioner's Statement of the Facts in his Petition for Certiorari

ARGUMENTS

I. CERTIORARI IS WARRANTED IN THIS MATTER PURSUANT TO RULE 242(b), SCACR

Pursuant to Rule 242(b), SCACR, subsections (1) and (3), a grant of certiorari is warranted in this matter Certiorari may be granted in cases where "there are novel questions of law" and "the Court of Appeals decision conflicts with a prior decision of this Court" Furthermore, this Court's consideration is necessary to secure uniformity of the appellate courts' opinions on multiple issues herein

A. Because the Opinion Conflicts with Decisions of this Court, Certiorari is Appropriate Pursuant to Rule 242(b)(3)

Under Rule 242(b)(3), the Court of Appeals' Opinion misapprehends and misapplies numerous decisions of this Court with regard to review of the "any evidence" or "scintilla" standards The Opinion conflicts with previous decisions of this Court such as Croft v. Hall, 208 S C 187, 37 S E 2d 537 (1946) and Hancock v Mid-South

Management Co , Inc , 381 S C 326, 673 S E 2d 801 (2008) Similarly, the Opinion directly conflicts with the holding of Spaugh v Atlantic Coast Line Railroad Co , 158 S C 25, 155 S C 145 (1930) [2]

The Court of Appeals' opinion also conflicts with longstanding precedent concerning the survival of mental distress damages under the survival statute As noted in this Court's decision of Ford v Hutson, 276 S C 157, 276 S E.2d 776 (1981)

> 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. Mack v. South Bound R Co , 52 S C 323, 29 S E 905 (1898)

Id 276 S C at 159, 276 S E 2d at 777 The Court of Appeals itself has previously 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) "Appropriate damages in survival actions include those for medical, surgical, and hospital bills, *conscious pain, suffering, and mental distress* of the deceased." Id The Opinion below, however, denominates that same conscious *mental distress* as "pre-impact fear" and denies their compensability in South Carolina [3] This ruling therefore conflicts with controlling precedent, while also creating novel issues in the jurisprudence of South Carolina.

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[2] Again, Petitioner acknowledges that the *dicta* in that Spaugh, as well as the underlying sociological concepts, are outdated. Nevertheless, the holding of that opinion concerning mental distress damages has been unmodified for approximately eighty (80) years, and the case has been favorably cited for the same period

[3] As addressed in the Petition for Certiorari, the Court of Appeals actually states that this element of damages is not recognized as a "cause of action."

B. In Designating Mental Distress Damages of the Decedent as "Pre-Impact Fear" and Denying the Compensability of Such Damages in South Carolina, the Opinion Creates a Novel Issue of Law under Rule 242(b)(1), SCACR.

In the Opinion the Court of Appeals designates the type of mental and emotional distress suffered by the decedent prior to her death as "pre-impact fear." Granted, this is consistent with the modern trend in analyzing mental distress prior to death which occurs in a relatively short time frame. As noted in Section A above though, such mental distress historically has been recognized in South Carolina as an element of damages in a survival action. From Petitioner's perspective, in terms of existing South Carolina law, this new terminology is simply "old wine in a new bottle." But, by denominating and analyzing Tiffanie Rutland's mental distress prior to her death as "pre-impact fear," the Court's ruling on that issue creates a novel issue that has not been addressed by our Courts. This fact is highlighted by the Court of Appeals' reliance on a South Carolina District Court case in deciding that South Carolina does not recognize "pre-impact fear" as a "cause of action." Moreover, the language of the Court of Appeals' decision on this issue certainly creates a novel issue in South Carolina jurisprudence, as this element of damages has been changes to a discrete "cause of action."

> 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.

Because this ruling creates a novel issue of law, the grant of a writ of certiorari is appropriate so that this Court can decide this important issue.

II. CONTRARY TO SCDOT'S ASSERTIONS, SUFFICIENT EVIDENCE OF PAIN AND SUFFERING EXISTS IN THE RECORD AND THE OPINION CONFLICTS WITH THIS COURT'S EVIDENTIARY STANDARDS CONCERNING CLAIMS FOR CONSCIOUS PAIN AND SUFFERING.

As addressed fully in his Petition for Certiorari, by concluding that no evidence of conscious pain and suffering exists in the record, the Court of Appeals ignores the "any evidence" standard as announced by this Court in Croft v Hall, 208 S C 187, 37 S.E 2d 537 (1946) and Hancock v Mid-South Management Co , Inc , 381 S C 326, 673 S E 2d 801 (2008) The "any evidence" standard is equivalent to a "scintilla of evidence" Hancock, 381 S C 326, 673 S E 2d 801 (2008).

The Return of SCDOT analyzes the quality, credibility, and ultimate weight of the evidence in the record to conclude that no evidence of conscious pain and suffering exists This is the same erroneous balancing of evidence which undermines the Opinion below For example, SCDOT seeks to color the evidence cited by the Petitioner as subjective and as "rank speculation" This ignores the true test to be employed, the test of whether there is any evidence, even a scintilla, from which a jury could conclude that the decedent suffered conscious pain and suffering Under 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), and even those cases cited by the Defendant, sufficient evidence exists so that the issue could be considered by a jury[4] While a jury might ultimately conclude that the evidence in this record failed to prove that Tiffanie suffered conscious pain, suffering, and mental distress in the period between the beginning of the accident and her death, sufficient evidence

[4] These concepts are fully addressed in the Petition for Certiorari.

exists to present the question to a jury This is particularly true when viewing this evidence in the light most favorable to the Petitioner, as a reviewing Court must

Finally, a number of fallacious and illogical arguments in SCDOT's Return bear mentioning

SCDOT argues that if pre-impact fear were a compensable element of damages, "then even those who narrowly dodge a car collision might find themselves sued by the occupants of the other vehicle for the fear inspired by 'the wreck that wasn't'" (Return, p 7). This is clearly not the aim of the Petitioner, nor the effect of any conscientious analysis of pre-death mental distress or pre-impact fear Acknowledgment of pre-impact fear by this Court would in no way expand or alter existing standards for conscious pain, suffering, and mental distress allowed under the survival statute Affirmation of this type of distress, whether called pre-impact fear or not, is simply a practical acknowledgment that in limited circumstances – where evidence exists from which it is reasonable to conclude that the decedent was aware of imminent death or injury – the decedent has suffered compensable and actual emotional or mental trauma The injury, unfortunately, accompanying this narrow, defined type of mental distress is death, rather than broken bones or torn flesh Despite SCDOT's argument to the contrary, nothing in the analysis of pre-impact fear would engender frivolous, false, or trumped-up damages claims in any legal action Under these narrow circumstances and under the standard analysis of conscious pain and suffering, mental distress such as Tiffanie's is a recoverable element of damages Stated most simply had Tiffanie survived this crash, would her emotional reaction, fear, horror, and distress as the vehicle flipped down the roadway be compensable, though the time she suffered that distress was brief? Undoubtedly, yes

The very purpose of the survival statute is that actual damages consciously suffered by a decedent before death survive

These arguments are closely tied to the SCDOT's equally illogical position that Tiffanie Rutland's mental distress is not compensable, as a matter of law, unless physical injury preceded the mental injury (Return, pp 7-8) First, this entire argument is premised upon weighing factual evidence and concluding that Tiffanie was in no way injured in this accident before her body was partially ejected through the back window This argument ignores the circumstantial evidence in the record that Tiffanie and others in the vehicle recognized the start of the accident, realized the danger her and her family were in, and then begs the assumption that Tiffanie was completely uninjured as this violent collision unfolded While this argument may be very persuasive before a jury, it does not support the conclusion that as a matter of law, no compensable mental distress was suffered by Tiffanie

III THE COURT OF APPEALS ERRED IN AFFIRMING EQUITABLE REALLOCATION AND SCDOT'S ARGUMENTS ON THIS ISSUE ARE UNAVAILING

For the reasons stated in his Petition for Certiorari, the Court of Appeals erred in affirming the trial court's equitable reallocation of the settlement With the any evidence standard having been met to establish the viability of a survival claim, the case at bar is controlled by Ward v Epting, 290 S C 547, 351 S E 2d 867 (Ct App 1986) Under this analysis, equitable reallocation was inappropriate

The arguments set forth by SCDOT in its Return concerning equitable reallocation are unpersuasive SCDOT argues again that the "one injury" rule of Vortex Sports & Entertainment, Inc v Ware, 378 S C 197, 662 S E.2d 444 (Ct. App 2008)

would preclude and disallow the distinction between survival action damages and those allowed under a wrongful death claim However, the "one injury" language of Vortex is premised upon the inclusion of that language in S C Code Ann § 15-38-50, or the South Carolina Contribution Among Tortfeasors Act As acknowledged by the SCDOT, the Contribution Among Tortfeasors Act does not apply the SCDOT "The Uniform Contribution Among Tortfeasors Act shall not apply to governmental entities." S C. Code Ann § 15-38-65 Vortex and the "one injury" rule are therefore inapplicable

CONCLUSION

For the foregoing reasons, this Court should Grant a Writ of Certiorari to review the Court of Appeals Opinion below which both contradicts existing decisions of this Court, as well as creates novel questions of law within South Carolina's existing jurisprudence

Respectfully submitted,

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December 30, 2010
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THE STATE OF SOUTH CAROLINA
In The Supreme Court

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

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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 Petitioner, have this date mailed via the U S Postal Service with first class postage prepaid, a true and correct copy of the within ***Petitioner's Reply to Respondent's Return to Petition for Certiorari*** and ***Certificate of Service*** to the following

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The Honorable Daniel E. Shearouse
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FROM Matthew V Creech

RE ***Clarence Rutland, as Personal Representative of the Estate of Tiffany Rutland v South Carolina Department of Transportation***

PAGES 14 (INCLUDING COVER PAGE)

DATE December 30, 2010

SENT BY Tammy M Lee

MESSAGE **Appellant's Return Brief attached**

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December 20 2010

Honorable Daniel Shearouse Clerk
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Re *Rutland v South Carolina Department of Transportation*
S C Ct App Op 4721
Tracking # 2010-178606

Dear Mr Shearouse

Enclosed for filing please find unbound original and seven copies of **RETURN TO PETITION FOR WRIT OF CERTIORARI** By copy of this letter I have served copies upon all attorneys of record Please clock in one copy and return to me in the enclosed envelope

Thanking you for your assistance I am

Sincerely yours

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Re Rutland, Clarence v SC DOT
Case Tracking No 2010-178606

Dear Counsel

This office has received your Petition for Writ of Certiorari and Appendix in the above matter It has been assigned the Case Tracking Number that appears above Please use this number on all future correspondence relating to this matter

I do wish to call the attention of the parties to the attached order relating to the inclusion of personal data identifiers and other sensitive information in documents filed with the Supreme Court of South Carolina and the South Carolina Court of Appeals Please note that the responsibility for insuring that information is redacted or sealed as required by this order rests with counsel and the parties This office will not review filings for redaction or to determine if materials should be sealed

Very truly yours,

CLERK

DES/lda

Enclosure

cc J Christopher Wilson, Esquire
Richard B Ness, Esquire
Norma Jett, Esquire
The Honorable Tanya Gee

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November 29, 2010

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pm 11-29-10

VIA U S MAIL

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Re Clarence Rutland, as Personal Representative of the Estate of Tiffanie Rutland vs South Carolina Department of Transportation,
Case No 2006-CP-28-486

Dear Mr Shearouse

With reference to the above case, pursuant to Rule 242, SCACR, enclosed for filing please find the following documents

1) One unbound, original and seven (7) bound copies of *Appellant s Petition for Certiorari*,
2) One original and two (2) copies of the *Certificate of Service*,
3) One unbound and one (1) copy of the *Appendix*, and,
4) Firm check for $100 00 for the filing fee

Please return a filed copy of the *Petition for Certiorari* and of the *Certificate of Service* in the envelope I have provided By copy of this correspondence, copies of the enclosed Petition, Certificate of Service, and Appendix are being served on all counsel of record By separate cover I am filing a copy of our Petition for Certiorari and Certificate of Service with the Court of Appeals

Sincerely,

Matthew V Creech

Enclosures as stated
cc Richard B Ness Esq / Norma Jett Esq (Petition Certificate of Service and Appendix)
J Christopher Wilson Esq (Petition and Certificate of Service)
The Hon Tonya Gee (Petition & Certificate of Service w/out Appendix)