

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas
Grace Gilchrist Knie, Circuit Court Judge

Case No. 2017CP4203523
Appellate Case No. 2023-001735

Shannon P. Green and Darrell Russell, ...Plaintiffs.

v.

Edward C. McGee and David Hudgins, ...Defendants.

Of whom Shannon P. Green is the Respondent,

And

Of whom David Hudgins is the Petitioner.

APPENDIX

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Appellate Case No. 2020-000203

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

Grace Gilchrist Knie, Circuit Court Judge

Case No. 2017-CP-42-03523

RECEIVED

Oct 30 2020

SC Court of Appeals

Shannon P. Green and
Darrell Russell,

Appellant -Respondent

v.

Edward C. McGee and
David Hudgins,

Respondent
Respondent-Appellant,

RECORD ON APPEAL

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG	)	SEVENTH JUDICIAL CIRCUIT
	)	
Shannon P. Green and Darrell Russell,	)	CIVIL ACTION NO.: 2017-CP-42-03523
	)	
Plaintiffs,	)	Order Regarding Plaintiffs' Motion for
	)	a New Trial and Defendant David Hudgins'
	)	Motion for Judgment Notwithstanding the
	)	Verdict and, in the alternative, Motion for
	)	Setoff
vs.	)	
	)	
Edward C. McGee and David Hudgins,	)	
Defendants.	)	
	)	

Hearing Date:	December 20 th , 2019, at 9:30 a.m.
Hearing Judge:	Grace Gilchrist Knie
Counsel for Plaintiffs:	Douglas A. Churdar
Counsel for Defendants:	James A. Bradshaw & Michael T. Coulter
Court Reporter:	Michael R. Watts

This matter was before the Court on Friday, December 20th, 2019, at 9:30 a.m., in Spartanburg County, SC, the Seventh Judicial Circuit. Attorney Douglas A. Churdar was present representing the interests of the Plaintiffs. Attorney James A. Bradshaw was present representing the interests of Defendant, David Hudgins. Attorney Michael T. Coulter was present representing the interests of Edward C. McGee and Progressive Direct Insurance Company. Michael R. Watts was the Court Reporter.

Procedural History:

This matter was before the Court pursuant to the parties' post-trial motions subsequent to a jury trial in which a verdict was received on October 16th, 2019. Specifically, before the Court are the following motions, all timely filed with the Court on October 25th, 2019: Plaintiffs' Rule 59, SCRCF, Motion for a New Trial Nisi Additur, or in the alternative, New Trial Absolute; Defendant Hudgins' Rule 50(b), SCRCF, Motion for judgment notwithstanding the verdict

("JNOV"), and, in the alternative, a Motion for a Setoff of the verdict against, pursuant to S.C. Code Ann § 15-38-50 of the proceeds received by Plaintiff.

Factual History:

This action was tried before a jury in Spartanburg County on October 14-16, 2019. Following the conclusion of the testimony, argument, and charge, the jury found the Defendants were negligent, and were the proximate cause of the subject motor vehicle accident. The jury found that Defendant McGee was 60% at fault and Defendant Hudgins was 40% at fault. The jury returned a verdict for the Plaintiff Shannon P. Green in amount of Eighty Eight Thousand, Five Hundred Forty-Six and 78/100's Dollars (\$88,546.78) in actual damages and a punitive damages verdict against each defendant for Thirty Five Thousand Dollars (\$35,000.00). The jury found that neither Defendants' negligence proximately caused Loss of Consortium to Plaintiff Darrell Russell.

Prior to suit being filed, Plaintiff Shannon P. Green received the full policy limits of One Hundred Thousand Dollars (\$100,000.00) under Mr. McGee's liability policy from Nationwide and executed a Covenant Not to Enforce Judgment against Mr. McGee for that amount. Her husband, Darrell Russell, also executed a separate Covenant Not to Enforce Judgment against Mr. McGee for a settlement of Two Thousand, Five Hundred Dollars (\$2,500.00).

Law:

Under South Carolina law, "there can be only one satisfaction for an injury or wrong." *Truesdale v. South Carolina Highway Dep't*, 264 S.C. 221, 235, 213 S.E.2d 740, 746 (1975).

Section 15-38-50 of the South Carolina Code states in full as follows:

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

(1) it does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms so provide, but it reduces the claim against the others to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is greater; and

(2) it discharges the tortfeasor to whom it is given from all liability for contribution to any other tortfeasor.

Thus, under this statute, “[a] non-settling defendant is entitled to credit for the amount paid by another defendant who settles for the same cause of action.” *Riley v. Ford Motor Co.*, 414 S.C. 185, 195, 777 S.E.2d 824, 830 (2015). “Allowing this credit prevents an injured person from obtaining a double recovery for the damage he sustained.” *Rutland v. S.C.D.O.T.*, 400 S.C. 209, 216, 734 S.E.2d 142, 145 (2012). “[T]he court must review the documents to determine the amount of the settlement and its terms. Under section 15-38-50, the court must determine if the release or covenant was ‘given in good faith.’” *Huck v. Oakland Wings, LLC*, 422 S.C. 430, 438, 813 S.E.2d 288, 292 (Ct. App. 2017). This settlement credit is “statutorily mandated,” and “Section 15-38-50 grants the court no discretion in determining the equities involved in applying a set-off once a release has been executed in good faith between a plaintiff and one of several joint tortfeasors.” *Ellis by Ellis v. Oliver*, 335 S.C. 106, 113, 515 S.E.2d 268, 272 (Ct. App. 1999).

Conclusion:

The Court acknowledges and appreciates the amount of research and preparation for the hearing by all counsel, as well as, the professionalism of all counsel in their presentations to the Court. After consideration of the record, arguments of counsel, memoranda of counsel, and the applicable law, the Court finds that:

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

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

Further, the Plaintiffs' Rule 59, SCRCF, Motion for a New Trial Nisi Additur, should be and is therefore denied; and,

Further, the Court finds that Plaintiffs' Motion for a New Trial Absolute, made in the alternative, should be and is therefore denied; and,

Further, the Court finds that Defendant David Hudgins' Rule 50(b), SCRCF, Motion for judgment notwithstanding the verdict ("JNOV") should be and is therefore denied; and

IT IS SO ORDERED.

/s/Grace Gilchrist Knie
Honorable Grace Gilchrist Knie
Resident Judge, Seventh Judicial Circuit

January 5th, 2020
Spartanburg, South Carolina



Spartanburg Common Pleas

Case Caption: Shannon P Green , plaintiff, et al VS Edward C Mcgee , defendant, et al
Case Number: 2017CP4203523
Type: Order/JNOV

IT IS SO ORDERED.

S/GRACE GILCHRIST KNIE - 2760

Electronically signed on 2020-01-08 15:14:51 page 5 of 5

STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG

IN THE COURT OF COMMON PLEAS

Shannon P. Green and Darrell Russell,

Plaintiffs,

vs.

Edward C. McGee and David Hudgins,

Defendants.

VERDICT FORM
CASE NO. 2017-CP-42-03523

1. Defendant Edward C. McGee has admitted fault in this accident.

PLEASE GO TO QUESTION 2.

2. Do you find that Defendant Edward C. McGee's negligence proximately caused Plaintiffs' damages?

☒ YES: If you answer yes, **GO TO QUESTION 3.**

☐ NO: If you answer no, **GO TO QUESTION 3.**

3. Do you find that Defendant David Hudgins was negligent?

☒ YES: If you answer yes, **GO TO QUESTION 4.**

☐ NO: If you answer no, **GO TO QUESTION 6.**

4. Do you find that Defendant David Hudgins' negligence proximately caused Plaintiffs' damages?

☒ YES: If you answer yes, **GO TO QUESTION 5.**

☐ NO: If you answer no, **GO TO QUESTION 6.**

Verdict Form
Shannon P. Green and Darrell Russell vs. Edward C. McGee and David Hudgins
C.A.#: 2017-CP-42-03523

5. **ONLY ANSWER THIS QUESTION IF YOU ANSWERED YES TO QUESTIONS 2, 3, 4 ABOVE.** Taking into account the combined negligence that proximately caused Plaintiffs' damages, what percentage of fault is attributable to Defendant Edward C. McGee and Defendant David Hudgins?
NOTE: YOUR NUMBERS MUST ADD UP TO 100%.

Defendant Edward C. McGee

60 %

Defendant David Hudgins

40 %

After making the determination, **GO TO QUESTION 6.**

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

\$ 88,546.78

7. Do you find that the Defendant, Edward C. McGee's negligence proximately caused Loss of Consortium to Mr. Darrell Russell?

[] Yes

[☒] No

PLEASE GO TO QUESTION 8

8. Do you find that the Defendant, David Hudgins', negligence proximately caused Loss of Consortium to Mr. Darrell Russell?

[] Yes

[☒] No

IF YOU ANSWERED YES TO EITHER QUESTION 7 OR 8 OR BOTH, PLEASE GO TO QUESTION 9. IF YOU ANSWERED NO TO BOTH QUESTIONS 7 AND 8, PLEASE GO TO QUESTION 10.

Verdict Form
Shannon P. Green and Darrell Russell vs. Edward C. McGee and David Hudgins
C.A.#: 2017-CP-42-03523

9. Please state the **total** amount of damages sustained by Mr. Darrell Russell in his claim for Loss of Consortium in this case.

\$ ~~0~~

10. Did the Plaintiff/s prove by clear and convincing evidence that the Defendant Edward C. McGee acted recklessly, willfully, and wantonly and that conduct proximately caused the damages to Plaintiff Shannon P. Green?

☒ Yes

☐ No

If your answer to Question #10 is NO, skip Question #11 and proceed to Question #12.

If your answer to Question #10 is YES, then proceed to Question #11 and then proceed to Question #12.

11. Please state the amount of Punitive Damages you award to the Plaintiff Shannon P. Green against the Defendant Edward C. McGee?

\$ 35,000 punitive damages.

12. Did the Plaintiff/s prove by clear and convincing evidence that the Defendant David Hudgins acted recklessly, willfully, and wantonly and that conduct proximately caused the damages to Plaintiff Shannon P. Green?

☒ Yes

☐ No

If your answer to Question #12 is NO, skip Question #13. If your answer to Question #12 is YES, then proceed to Question #13.

13. Please state the amount of punitive damages you award to the Plaintiff Shannon P. Green against the Defendant David Hudgins?

\$ 35,000 punitive damages.

October 16, 2019



Kaitlyn E. Paris

Foreperson of the Jury

Verdict Form
Shannon P. Green and Darrell Russell vs. Edward C. McGee and David Hudgins
C.A.#: 2017-CP-42-03523

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SPARTANBURG	)	C.A. No.: 2017-CP-42-
	)	
Shannon P. Green and Darrell Russell,	)	
	)	
Plaintiffs,	)	COMPLAINT
	)	
v.	)	
	)	
Edward C. McGee and David	)	
Hudgins,	)	
	)	
Defendant(s).	)	
	)	

Plaintiffs, complaining of Defendants, would respectfully show unto the Court that:

I.

Plaintiffs are citizens and residents of Spartanburg County, South Carolina.

II.

Defendant Edward C. McGee is a citizen and resident of Cherokee County, South Carolina.

III.

Upon information and belief, Defendant David Hudgins is a citizen and resident of Greenville County, South Carolina.

IV.

On or about November 19, 2015 Plaintiffs were traveling North on Simuel Road in Spartanburg, SC. Defendants were engaged in a road rage incident, with Defendant David Hudgins aggressively following Defendant Edward C. McGee who turned onto Simuel Road and struck Plaintiffs' vehicle.

V.

Defendants were negligent and reckless in that they failed to travel the speed limit, failed to maintain a proper lookout for other vehicles, failed to remain in their proper lanes of travel, and knowingly engaged in conduct that resulted in injury to Plaintiffs and could have resulted in injury to others.

VI.

As a direct and proximate result of Defendants' negligence and recklessness, Plaintiff Shannon Green sustained serious and permanent injuries and impairment, which have required and will in the future require expensive and extensive medical treatment. In addition, Plaintiff Shannon Green was disabled from work for a period of time.

VII.

Plaintiff Darrell Russell also sustained injuries and impairment, which have required and will in the future, will require medical treatment. Also, as husband of Plaintiff Shannon Green, he was required to perform duties she would have ordinarily performed and otherwise deprived of her companionship and society.

WHEREFORE, Plaintiffs pray for a verdict including actual and punitive damages and for such other and further relief as the Court deems just and proper.

Respectfully Submitted,

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Dated: September 27, 2017

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SPARTANBURG	)	C.A. NO.: 2017-CP-42-03523
	)	
Shannon P. Green and Darrell Russell,	)	
	)	
Plaintiffs,	)	DEFENDANT DAVID HUDGINS'
	)	ANSWER TO PLAINTIFFS'
vs.	)	COMPLAINT
	)	
Edward C. McGee and David Hudgins,	)	(Jury Trial Demanded)
	)	
Defendants.	)	
_____	)	

Defendant David Hudgins (hereinafter "Mr. Hudgins") answering the complaint of the Plaintiffs herein, would respectfully allege and show unto the court as follows:

FOR A FIRST DEFENSE

1. Mr. Hudgins is without sufficient information to either admit or deny the allegations contained in Paragraph I of the Plaintiffs' Complaint and therefore denies them.
2. Mr. Hudgins is without sufficient information to either admit or deny the allegations contained in Paragraph II of the Plaintiffs' Complaint and therefore denies them.
3. Mr. Hudgins admits the allegations contained in Paragraph III of the Plaintiffs' Complaint.
4. In response to the allegations contained in Paragraph IV of the Plaintiffs' Complaint, Mr. Hudgins admits only that Plaintiffs were involved in an accident with Defendant Edward C. McGee on Simuel Road in Spartanburg, SC on November 19, 2015. Mr. Hudgins denies the remaining allegations contained in Paragraph IV of the Plaintiffs' Complaint.
5. Mr. Hudgins denies the allegations contained in Paragraph V of the Plaintiffs' Complaint.

6. Mr. Hudgins denies the allegations contained in Paragraph VI of the Plaintiffs' Complaint.

7. Mr. Hudgins denies the allegations contained in Paragraph VII of the Plaintiffs' Complaint, including the WHEREFORE Paragraph, those being the remaining allegations contained in the Plaintiffs' Complaint.

8. Mr. Hudgins denies each and every allegation of the Plaintiffs' Complaint not specifically admitted, modified, or explained hereinabove.

FOR A SECOND DEFENSE

9. Mr. Hudgins incorporates the allegations of his previous defense which is consistent with this defense.

10. Even assuming Mr. Hudgins was negligent, careless, grossly negligent, willful, wanton and reckless in any respect and that any such conduct operated as the proximate cause of the accident and the Plaintiffs' resulting damages, if any, all of which is expressly denied and admitted solely for the purpose of this defense and no other, Mr. Hudgins alleges that the Plaintiffs exhibited negligent, grossly negligent, reckless, willful and wanton conduct in one or more of the following particulars:

- a. In failing to pay attention to the circumstances around them;
- b. In failing to keep a proper lookout;
- c. In failing to maintain proper control of their vehicle;
- d. In failing to brake or take other action to avoid the accident; and
- e. In failing to use that degree of care and caution which a reasonable person would have used under the circumstances then and there existing.

All of which are contrary to the common and statutory laws of the State of South Carolina.

11. Mr. Hudgins alleges that this negligent, grossly negligent, reckless, willful and wanton conduct on the part of the Plaintiffs, in the particulars set forth above, contributed more than fifty percent (50%) to cause the accident and the Plaintiffs' resulting injuries and damages, if any. Accordingly, the Plaintiffs' causes of action are barred.

12. Except as admitted in his first defense and in the preceding paragraphs for the purpose of this defense and no other, Mr. Hudgins denies each and every allegation of the Complaint.

FOR A THIRD DEFENSE

13. Mr. Hudgins incorporates the allegations of his previous defenses which are consistent with this defense.

14. Mr. Hudgins alleges that even if he was careless, negligent, grossly negligent, willful, wanton or reckless in any respect, which is expressly denied and admitted solely for the purpose of this defense and no other, and even if any such conduct on his part operated as fifty percent (50%) or greater cause of the accident and the Plaintiffs' resulting damages, if any, which is also expressly denied and admitted solely for the purpose of this defense and no other, Mr. Hudgins is entitled to a determination as to the percentage which the Plaintiffs' negligent, grossly negligent, reckless and willful conduct in the particulars set forth hereinabove contributed to this accident and to a reduction of any amount awarded to them by an amount equal to the percentage of their own negligent, grossly negligent, reckless, willful and wanton conduct.

15. Except as admitted in his first defense and in the preceding paragraph for the purpose of this defense and no other, Mr. Hudgins denies each and every allegation of the Complaint.

FOR A FOURTH DEFENSE

16. Mr. Hudgins incorporates the allegations of his previous defenses which are consistent with this defense.

17. Mr. Hudgins alleges that even if he were negligent, grossly negligent, reckless, and/or willful and wanton in any respect, which is expressly denied by him, he is still not liable to Plaintiffs for their alleged resulting damages, if any, because of the intervening negligent, grossly negligent, reckless, willful and wanton acts and omissions of third parties over which Mr. Hudgins had no control and for which he had no responsibility, which negligent, grossly negligent, reckless, willful and wanton acts or omissions were not reasonably foreseeable and which intervened and acted as the direct and proximate cause of the damages and injuries, if any, allegedly sustained by Plaintiffs.

18. Except as admitted in his first defense and in the preceding paragraph for the purpose of this defense and no other, Mr. Hudgins denies each and every allegation of the Complaint.

FOR A FIFTH DEFENSE

19. Mr. Hudgins alleges that pursuant to South Carolina Code §15-38-15, he shall only be liable for the percentage of the individual damages determined by the jury or trier of fact if his conduct is determined to be less than 50% of the total fault and further alleges that he is entitled to the appropriate apportionment under this section.

FOR A SIXTH DEFENSE

20. Mr. Hudgins incorporates the allegations of his previous defenses which are consistent with this defense.

21. Mr. Hudgins alleges that Plaintiffs have failed to mitigate their damages in the manner required by law. Such failure to mitigate is pled as a bar to Plaintiffs' claims, and any amount awarded to the Plaintiffs should be reduced or diminished by the amount the Plaintiffs could have reasonably avoided, including the amount they could have reasonably earned or otherwise reasonably avoided.

FOR A SEVENTH DEFENSE

22. Mr. Hudgins incorporates the allegations of his previous defenses which are consistent with this defense.

23. Plaintiffs are not entitled to an award of punitive damages against Mr. Hudgins to the extent that such an award is barred by the Constitution of the United States and the Constitution of the State of South Carolina. Mr. Hudgins further alleges that any award of punitive damages would violate the prohibition against excessive fines found in the Eighth Amendment of the Constitution of the United States as applied to the states by way of the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States. Further, any award of punitive damages would violate the guarantee of due process found in the Fourteenth Amendment to the Constitution of the United States because of the lack of objective guidelines on which a jury might base its award and further that such guidelines to the extent that they exist are arbitrary and void for vagueness.

WHEREFORE, having fully answered Plaintiffs' Complaint herein, Mr. Hudgins prays that Plaintiffs' Complaint be dismissed with costs, and for such further and other relief as the Court deems just and proper.

December 12, 2017

s/James A. Bradshaw

James A. Bradshaw (S.C. Bar # 100548)

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Attorneys for Defendant David Hudgins

Mr. Hudgins hereby demands a trial by jury of all issues triable by jury.

s/James A. Bradshaw

James A. Bradshaw

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	C.A. NO. 2017-CP-42-03523
COUNTY OF SPARTANBURG	)	
	)	
Shannon P. Green and Darrell	)	
Russell,	)	
	)	
Plaintiffs,	)	PROGRESSIVE DIRECT
	)	INSURANCE COMPANY'S NOTICE OF
vs,	)	APPEARANCE AND ANSWER
	)	
Edward C. McGee and David	)	
Hudgins,	)	(Jury Trial Demanded)
	)	
Defendants.	)	
	)	

Progressive Direct Insurance Company, as possible un/underinsured motorist carrier (hereinafter "Carrier") herein, hereby files a Notice of Appearance and Answer to the Complaint as follows:

1. That the Carrier, by and through its assigned counsel, Michael T. Coulter, notices its appearance pursuant to Section 38-77-160, 1976, S.C. Code of Laws, as amended, specifically reserving any and all rights, objections, and defenses it may have available under the law and the insurance policy in question, and request that copies of all pleadings, discovery, and other materials served in this action by any party be served upon the undersigned at the address given below.

2. The alleged un/underinsured motorist carrier respectfully demands a jury trial pursuant to Rule 38 of the South Carolina Rules of Civil Procedure. That assigned counsel is not representing the Defendants and will not undertake that representation at this time.

3. To the extent that a responsive pleading is required, the undersigned deny each and every allegation of the Complaint, asserts affirmative defenses set forth in Rule 8

of the South Carolina Rules of Civil Procedure, as to service and personal jurisdiction, asserts the defense that the plaintiffs' claims are, or maybe, time barred by the applicable Statute of Limitations, and raises those defenses set forth in Rule 12, of the South Carolina Rules of Civil Procedure, all to the extent they are applicable.

4. That counsel for the Carrier specifically reserves the option to assume control of the defense of the case in the name of the defendants pursuant to the underinsurance or uninsured statute should the Carrier choose to exercise that option; and

5. Further, in filing this notice, Progressive Direct Insurance Company makes no representations, admissions or otherwise as to the existence, applicability or amount of any insurance coverage. Progressive Direct Insurance Company specifically pleads and asserts any applicable offsets, credits, setoffs or exclusions available under the terms of any applicable policy and South Carolina Law.

6. This appearance is made pursuant to South Carolina Code of Laws, Section 38-77-160, in making this appearance, Progressive Direct Insurance Company specifically reserves all rights, objections, setoffs, exclusions, credits, offsets, and defenses available under the terms of any applicable policy, and the applicable laws and statutes of the State of South Carolina.

7. In making this appearance, the Carrier specifically reserves and does not waive any rights pursuant to its policy of insurance, including, but not limited to, the applicability of underinsured and/or uninsured motorist coverage to this action and/or whether or not underinsured and/or uninsured motorist coverage is included as part of said policy, and further intends to reserve all rights which it may have pursuant to South Carolina Code 38-77-160.

8. That the Carrier requests that its counsel be notified in writing, and served by counsel of record for Plaintiff and Defendants, of all court hearings, motion hearings, status conferences, trial dates and like matters and be provided copies of all discovery requests, discovery responses and notice of all depositions and like proceedings by the respective counsel for the parties herein.

9. The Carrier admits, upon information and belief, the allegations contained in paragraph 1 of the plaintiffs' Complaint.

10. The Carrier admits, upon information and belief, the allegations contained in paragraph 2 of the plaintiffs' Complaint.

11. The Carrier admits, upon information and belief, the allegations contained in paragraph 3 of the plaintiffs' Complaint.

12. The Carrier denies the allegations contained in paragraph 4 of the plaintiffs' Complaint.

13. The Carrier denies the allegations contained in paragraph 5 of the plaintiffs' Complaint.

14. The Carrier denies the allegations contained in paragraph 6 of the plaintiffs' Complaint.

15. The Carrier denies the allegations contained in paragraph 7 of the plaintiffs' Complaint.

16. The Carrier denies the allegations contained in the "WHEREFORE" paragraph of the plaintiffs' Complaint.

17. The Carrier denies each and every allegation of the plaintiffs' Complaint not specifically admitted, modified, or explained herein above.

FOR A SECOND DEFENSE

18. The Carrier realleges and reiterates each and every allegation set forth above, and not inconsistent herewith, as if fully repeated herein.

19. The Carrier alleges that the Complaint of the plaintiffs fails to state facts sufficient to constitute a cause of action against them and, therefore, the plaintiffs' Complaint should be dismissed pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure.

FOR A THIRD DEFENSE

20. The Carrier realleges and reiterates each and every allegation set forth above, and not inconsistent herewith, as if fully repeated herein.

21. The Carrier alleges that even assuming that the defendants were negligent, careless, grossly negligent, willful, wanton or reckless in any respect, and that any such conduct on her part operated as a proximate cause of the accident and the plaintiffs' resulting injuries and damages, if any, all of which is expressly denied and admitted solely for the purpose of this defense and no other, that the plaintiffs' negligent, grossly negligent, reckless, willful and wanton conduct contributed more than 50% to the cause of the accident and the plaintiffs' resulting injuries and damages, if any. For that reason, the co-defendant is not liable to the plaintiff in any sum whatsoever.

FOR A FOURTH DEFENSE

22. The Carrier realleges and reiterates each and every allegation set forth above, and not inconsistent herewith, as if fully repeated herein.

23. The Carrier alleges that even if the defendants were negligent, careless, grossly negligent, reckless, willful or wanton in any respect whatsoever, which is expressly

denied and admitted solely for the purpose of this defense and no other, and if any such conduct on her part operated as a greater than 50% cause of the accident and the plaintiffs' resulting injuries and damages, if any, which is also expressly denied and admitted solely for the purpose of this defense and no other, they are entitled to a determination as to the percentage which the plaintiffs' negligent, grossly negligent, reckless, willful and wanton conduct contributed to the accident and to a reduction of any amount awarded to the plaintiffs in an amount equal to that percentage of the plaintiffs' own negligent, grossly negligent, reckless, willful and wanton conduct.

FOR A FIFTH DEFENSE

24. The Carrier realleges and reiterates each and every allegation set forth above, and not inconsistent herewith, as if fully repeated herein.

25. The Carrier alleges that the plaintiff has failed to mitigate her damages and, therefore, the plaintiffs' Complaint should be dismissed.

FOR A SIXTH DEFENSE

26. The Carrier realleges and reiterates each and every allegation set forth above, and not inconsistent herewith, as if fully repeated herein.

27. The Carrier specifically reserves any additional and/or affirmative defenses as may become available to them or revealed to them during the course of the investigation and/or discovery in this case.

FOR A SEVENTH DEFENSE

28. The Carrier realleges and reiterates each and every allegation set forth above, and not inconsistent herewith, as if fully repeated herein.

29. The Carrier alleges that plaintiffs saw or should have seen any danger which may have been created by defendants' negligence, if any, for some distance; that plaintiff saw or should have seen defendants' automobile approaching; that in the exercise of due care, plaintiffs should have and could have realized the imminent danger to all concerned and could have by the proper action and control of his/her vehicle stopped or turned so as to avoid the collision which ensued; and, that plaintiffs were negligent and/or willful in failing to utilize with reasonable care and competence his/her then existing ability to avoid the collision which ensued and thereby failing to take advantage of the last clear chance to avoid the collision, for which reasons defendants are not liable to plaintiffs in any sum whatsoever.

FOR AN EIGHTH DEFENSE

30. The Carrier realleges and reiterates each and every allegation set forth above, and not inconsistent herewith, as if fully repeated herein.

31. The Carrier would allege that an award of punitive damages would constitute an impermissible and excessive fine under the Eighth Amendment of the Constitution of the United States, and such damages would further be a violation of the due process and equal protection causes of the Fifth and Fourteenth Amendments, respectively, of the United States Constitution, as well as the applicable corresponding section of the Constitution of the State of South Carolina, Article 1, Section 3.

Plaintiffs' claim for punitive damages violates the defendants' right to access to the Courts guaranteed by the Seventh and Fourteenth Amendments because the threat of an award of unlimited punitive damages chills the defendants exercise of that right.

Plaintiffs' claim for punitive damages violates the due process and equal protection clauses of the Fourteenth Amendment for the following reasons;

(a) The standard or test for determining the requisite mental state of the defendantss for imposition of punitive damages is void for vagueness; and

(b) Insofar as punitive damages are not measured against actual injury to the plaintiffs and are left wholly to the discretion of the jury, there is no objective standard that limits the amount of such damages that may be awarded, and the amount of punitive damages that may be awarded is indeterminate at the time of the defendantss' alleged conduct.

WHEREFORE, having fully answered the Complaint of the plaintiff, the Carrier prays that the Complaint of the plaintiffs be dismissed, for the costs and disbursements of this action, and for any such other and further relief as this Court shall deem just and proper.

By: s/Michael T. Coulter
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and defendants

JURY TRIAL DEMANDED

By: s/Michael T. Coulter
Michael T. Coulter (15177)

Greenville, South Carolina
May 29, 2018

STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG)
Shannon P. Green and Darrell Russell,)
Plaintiff(s),)
v.)
Edward C. McGee and David Hudgins,)
Defendant(s).

IN THE COURT OF COMMON PLEAS

C.A. No.: 2017-CP-42-03523

**PLAINTIFF'S MOTION FOR
NEW TRIAL *NISI ADDITUR* OR IN
THE ALTERNATIVE NEW TRIAL
ABSOLUTE**

Plaintiff, pursuant to Rule 59 of the S.C. Rules of Civil Procedure, files this Motion for New Trial *Nisi Additur* or in the alternative New Trial Absolute. Plaintiff's motion is based upon the evidence and arguments at trial and the memorandum to be submitted to the Court. Notice of this motion is contemporaneously given to counsel for Defendant.

Respectfully submitted,

CHURDAR LAW FIRM

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Attorney for Plaintiffs

October 25, 2019
Greenville, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SPARTANBURG	)	C.A. NO.: 2017-CP-42-03523
	)	
Shannon P. Green and Darrell Russell,	)	
	)	
Plaintiffs,	)	DEFENDANT DAVID HUDGINS'
	)	MOTION FOR A JUDGMENT
vs.	)	NOTWITHSTANDING THE VERDICT
	)	
Edward C. McGee and David Hudgins,	)	
	)	
Defendants.	)	
_____	)	

Pursuant to Rule 50(b), S.C.R.C.P., Defendant David Hudgins (hereinafter "Mr. Hudgins") hereby moves for judgment notwithstanding the verdict ("JNOV"). As set forth in more detail herein, a JNOV is appropriate as to all of Plaintiffs' causes of action against Mr. Hudgins because the evidence submitted at trial permits only one reasonable conclusion—that no negligence on the part of Mr. Hudgins proximately caused the November 19, 2015 accident or Plaintiff Shannon P. Green's alleged injuries. As such, Mr. Hudgins respectfully requests that the verdict against him be set aside in its entirety and judgment be entered in his favor.

STANDARD OF REVIEW

Rule 50(b) of the South Carolina Rules of Civil Procedure allows the Court discretion to grant a judgment notwithstanding a jury's verdict. Rule 50(b), S.C.R.C.P. "A party making a motion for a directed verdict must state the specific grounds relied upon therefor, and the trial court may grant the motion when the case presents only issues of law." *RFT Mgmt. Co., L.L.C. v. Tinsley & Adams L.L.P.*, 399 S.C. 322, 331, 732 S.E.2d 166, 170 (2012). "If the motion is denied, the party may thereafter move for a JNOV in order to have the verdict and judgment set aside and a judgment entered in accordance with the party's directed verdict motion." *Id.* "A motion for JNOV may be granted only if no reasonable jury could have reached the challenged

verdict.” *Gastineau v. Murphy*, 331 S.C. 565, 568, 503 S.E.2d 712, 713 (1998). A court “cannot ignore facts unfavorable to [the nonmoving] party and it must determine whether a verdict for the party opposing the motion would be reasonably possible under the facts.” *Hopson v. Clary*, 321 S.C. 312, 314, 468 S.E.2d 305, 307 (Ct. App. 1996). Moreover, the “rule does not authorize submission of speculative, theoretical, and hypothetical views to the jury,” and “verdict may not be permitted to rest upon surmise, conjecture, or speculation.” *Small v. Pioneer Mach.*, 329 S.C. 448, 461, 494 S.E.2d 835, 841 (Ct. App. 1997). “[W]hen only one reasonable inference can be deduced from the evidence, the question becomes one of law for the court.” *Id.* In other words, “[i]f only one reasonable inference can be drawn from the evidence, the motion must be granted.” *Brady Dev. Co. v. Town of Hilton Head Island*, 312 S.C. 73, 78, 439 S.E.2d 266, 269 (1993).

ARGUMENT

I. The Only Reasonable Inference From the Evidence Submitted At Trial Is That Defendant David Hudgins Did Not Proximately Cause the Accident.

A. The Sole Proximate Cause of the Accident Was Co-Defendant Edward C. McGee.

The South Carolina Supreme Court has long held that when the evidence is susceptible of only one inference, proximate cause becomes a matter of law for the court. *Wright v. PRG Real Estate Mgmt.*, 426 S.C. 202, 222, 826 S.E.2d 285, 295 (2019). The only reasonable inference from the evidence presented at trial is that Co-Defendant Edward McGee’s negligence was the sole proximate cause of the November 19, 2015 accident. Mr. McGee admitted fault for the accident. The evidence showed that the only vehicle that struck Plaintiffs’ vehicle was Mr. McGee’s Chevrolet Silverado truck. The evidence also showed that Mr. Hudgins’ Nissan Altima never struck Plaintiffs’ vehicle and never struck Mr. McGee’s truck. Mr. McGee admitted that he was in “total control” of his truck at the time of the accident. No one other than Mr. McGee

was pushing the accelerator or steering the steering wheel. He stated he was in “total control” of his truck as he admittedly sped down Simuel Road. And he was in “total control” of his truck when he took the curve too fast and crossed the centerline and struck the Plaintiffs’ vehicle. Thus, the only reasonable inference that can be drawn from the evidence in this case is the Mr. McGee was solely responsible for the accident and was the sole proximate cause of the accident.

B. No Evidence Was Presented At Trial Upon Which A Reasonable Jury Could Conclude That Mr. Hudgins Breached a Duty or Proximately Caused the Accident.

There was simply no evidence presented at trial upon which a reasonable jury could conclude that there was any breach of duty on the part of David Hudgins or that any actions on his part proximately caused the November 19, 2015 accident. “Negligence is not actionable unless it is the proximate cause of the plaintiff’s injury.” *Hubbard v. Taylor*, 339 S.C. 582, 589, 529 S.E.2d 549, 552 (Ct. App. 2000). “Proximate cause requires proof of (1) causation in fact and (2) legal cause.” *Bramlette v. Charter Medical-Columbia*, 302 S.C. 68, 72, 393 S.E.2d 914, 916 (1990). “Causation in fact is proved by establishing the injury would not have occurred ‘but for’ the defendant’s negligence,” and “[l]egal cause is proved by establishing foreseeability.” *Id.*

The evidence at trial showed that on November 19, 2015, Mr. Hudgins was minding his own business as he drove on Interstate 85 from a plant in Blacksburg to his next job at a plant in Spartanburg near Heron Circle. All the evidence clearly showed that Mr. McGee drove aggressively on the interstate and was running late for work. Mr. McGee admitted that as he approached Mr. Hudgins on the interstate, he was speeding and flashed his lights at Mr. Hudgins to tell him he was driving too slow and “let’s go.” He further admitted that when Mr. Hudgins applied his brakes on the interstate, he was traveling so close behind him that he almost hit him. Mr. McGee then moved to the middle lane and then “flipped” back to the left lane to get in front of Mr. Hudgins and got so close to him that you may could have gotten “a piece of paper”

between them. Mr. McGee admitted that it was his responsibility to make sure that there was enough room to pass. Mr. Hudgins testified that he had to slam on brakes and swerve off the roadway to avoid having an accident. He was in shock and called 911 to report Mr. McGee.

This 911 call was played at trial and admitted into evidence as Defendant Hudgins' Exhibit 1. This contemporaneous 911 call made by Mr. Hudgins unequivocally shows that he did not proximately cause the accident. Mr. Hudgins is heard telling the 911 operator Mr. McGee's license plate number as he continues to travel down the interstate. He then sat calmly and not in a state of rage as the 911 operator attempted to get in touch with the South Carolina Highway Patrol for over two minutes—which took almost until the time the accident occurred. This is in direct contradiction to Plaintiffs' counsel's argument that the Highway Patrol "had it," and Mr. Hudgins should have let it go. Mr. Hudgins then exited onto Exit 4B on Interstate 85 Business—the very exit he planned to take from the beginning of his trip—along with Mr. McGee and other vehicles. He observed Mr. McGee go around Heron Circle at a high rate of speed and almost have another accident. Importantly, as Mr. McGee turned onto Simuel Road, Mr. Hudgins stated, "He's gone. I'm not going to chase him." *See* Def. Hudgins Ex. 1. Then approximately twelve (12) seconds later Mr. Hudgins is heard saying that Mr. McGee "just wrecked." *Id.* However, he was so far back at that time that it was not until over a minute later after Mr. Hudgins went to the accident scene that he realized that Mr. McGee had struck another vehicle. *Id.*

In fact, all of the evidence at trial showed that Mr. Hudgins was far away from Mr. McGee's truck at the time of the accident and not chasing him or trying to run him off the road. Trooper J.R. Helmly testified that on the day of the accident, Mr. Hudgins told him that he was far away from Mr. McGee's truck at the time of the accident. Plaintiff Darrell Russell also

testified that just prior to the accident he only saw one set of headlights from Mr. McGee's truck coming toward their vehicle. Mr. Hudgins testified that he was six car lengths or more away from Mr. McGee's truck. In fact, Mr. McGee admitted that as he drove down Simuel Road, Mr. Hudgins was at most "two or three car lengths" away from him. He admitted that Mr. Hudgins was not trying to run him off the road, not getting right on his bumper, not flashing his lights at him, and not pointing a gun at him. In other words, Mr. Hudgins was not doing anything to distract Mr. McGee's attention from the roadway. Mr. McGee also admitted that at the time of the accident, he was paying attention to cars in front of him going through the intersection of Howard and Simuel. He was not really concerned with Mr. Hudgins being behind him and stated that if Mr. Hudgins' small car hit his truck, then Mr. Hudgins' car would not be drivable. Following the accident, Mr. McGee did not even immediately recognize Mr. Hudgins' car, and it took him a minute to figure out who he was. He even stated, "You wouldn't even know he was anywhere around unless he had showed up."

Thus, again, the only inference susceptible from the evidence presented at trial is that Mr. McGee was the sole proximate cause of the accident. The evidence does not show that Mr. Hudgins ever hit Mr. McGee's truck or ever hit Plaintiffs' vehicle. In fact, the evidence shows that Mr. Hudgins did absolutely nothing on Simuel Road to cause Mr. McGee to choose to drive the way he did.

C. Edward C. McGee Was An Independent Intervening Cause of the Accident, and At Most, Mr. Hudgins Was a Remote Cause and Not a Proximate Cause.

While Mr. McGee testified that he somehow felt threatened by Mr. Hudgins being that far behind him, this does not transform Mr. Hudgins into a proximate cause of this accident. "One is not charged with foreseeing that which is unpredictable or which would not be expected to happen as a natural and probable consequence of the defendant's negligent act." *Vinson v.*

Hartley, 324 S.C. 389, 401, 477 S.E.2d 715, 721 (Ct. App. 1996). Thus, “[w]here the injury complained of is not reasonably foreseeable there is no liability.” *Id.*; see *Mellen v. Lane*, 377 S.C. 261, 283, 659 S.E.2d 236, 247 (Ct. App. 2008) (stating same). Additionally, the South Carolina Supreme Court has long held that “when the negligence appears merely to have brought about a condition of affairs, or a situation in which another and entirely independent and efficient agency intervenes to cause the injury, the latter is to be deemed the direct or proximate cause, and the former only the indirect or remote cause.” *Woody v. South Carolina Power Co.*, 202 S.C. 73, 84-85, 24 S.E.2d 121, 125 (1943). In making this determination, courts are instructed to apply the following test:

The test, therefore, by which the negligent conduct of the original wrongdoer is to be insulated as a matter of law by the independent negligent act of another, is whether the intervening act and the injury resulting therefrom are of such character that the author of the primary negligence should have reasonably foreseen and anticipated them in the light of attendant circumstances.

202 S.C. at 85, 24 S.E.2d at 125.

For instance, in *Gray v. State Highway Dep’t*, 165 S.C. 248, 163 S.E. 793 (1932), the plaintiff was the passenger in a truck that struck the rear of a sedan that suddenly stopped in front of it. The Highway Department had placed an employee in the road with a flag to warn motorists of a slippery and wet spot in the road. Upon seeing this guard, the driver of the sedan came to a sudden stop. The plaintiff alleged that her injuries were due to this defect in the highway. While the South Carolina Supreme Court acknowledged that plaintiff made a persuasive argument that the alleged defect brought about a succession of other causes that led to plaintiff’s injuries, it held, “under the facts disclosed, the defective highway was not the direct or proximate cause, but was either the remote cause, or no cause whatever, of plaintiff’s injuries.” 165 S.C. at 252, 163 S.E. at 794. With respect to the Highway Department guard, the Court

held, “[a]ll that the guard did was to flag the automobile; the manner of its slowing down or stopping was in the control of its driver, and, if the collision and resulting injuries were due to the sudden stopping of the sedan, it is clear that they were due to that cause independently of the condition of the highway.” 165 S.C. at 253, 163 S.E. at 794; *see Gibson v. Gross*, 280 S.C. 194, 197, 311 S.E.2d 736 (Ct. App. 1983).

Here, based on the actions of Mr. Hudgins in keeping at the least two to three car lengths behind Mr. McGee, not flashing his lights, not trying to run him off the road, not getting right on his bumper, and not doing anything to distract Mr. McGee’s attention from the roadway, no reasonable jury could find that Mr. Hudgins was a proximate cause of the accident. If Mr. Hudgins had been following Mr. McGee at all, then this had ended well before the accident. *See Skipper v. Hartley*, 242 S.C. 221, 226, 130 S.E.2d 486, 489 (1963) (“A participant who abandons the race, to the knowledge of the other participants, before the accident and injury, may not be held liable.”); *see also Johnson v. Johnson*, 171 So.2d 710, 712 (La. App. 1965) (finding that when a vehicle following another vehicle was about two blocks from the vehicle when it was involved in an accident, there was “not even the remotest causal connection between the pursuit . . . and the accident or injury.”). Furthermore, if Mr. McGee truly felt threatened by Mr. Hudgins, in addition to being unreasonable from the standpoint of an ordinary prudent person, Mr. McGee’s actions in driving at a high rate of speed down Simuel Road and then crossing the centerline and striking Plaintiffs constitutes an independent intervening cause. Mr. McGee admitted that he had a number of other options other than driving down Simuel Road in the manner in which he did on November 19, 2015 and causing this accident. He could have called 911, pulled into the QT gas station off of Heron Circle, or even pulled to the side of the roadway and let Mr. Hudgins pass. Yet, he chose to continue down the roadway in such a manner that

caused this accident. Thus, even if Mr. McGee did somehow feel threatened by Mr. Hudgins keeping a distance of between two and three car lengths behind him, no reasonable juror could find that it would be reasonably foreseeable that such actions would lead to an accident. If that were the case any motorist following at a safe distance behind another vehicle that is involved in an accident could be drug into a lawsuit based merely on the other driver's subjective statement that he somehow felt threatened by the vehicle having been behind him for some distance.

Accordingly, as the only reasonable inference from the evidence presented at trial is that the November 19, 2015 accident was proximately caused solely by Co-Defendant Edward McGee and not by David Hudgins, Mr. Hudgins respectfully requests that the verdict against him be set aside in its entirety and that the court enter judgment in his favor on all of Plaintiffs' claims.

II. No Medical Evidence Was Presented At Trial Upon Which a Jury Could Determine That Plaintiff Shannon Green's Alleged Injuries Were Proximately Caused by the Accident.

In addition to there being absolutely no evidence presented at trial upon which a reasonable jury could find that David Hudgins proximately caused the accident, there was also no evidence presented at trial upon which a jury could find that Plaintiff Shannon Green's alleged injuries were proximately caused by the accident. Again, a "verdict may not be permitted to rest upon surmise, conjecture, or speculation." *Small v. Pioneer Mach.*, 329 S.C. 448, 461, 494 S.E.2d 835, 841 (Ct. App. 1997). "The general rule in South Carolina is that where a subject is beyond the common knowledge of the jury, expert testimony is required." *Babb v. Lee County Landfill SC, LLC*, 405 S.C. 129, 153, 747 S.E.2d 468, 481 (2013). In fact, "[A]ll jurisdictions require expert testimony at least where the issues are medically complex and outside common knowledge and lay experience." *In re Lipitor (Atorvastatin Calcium) Mktg.*,

Sales Practice and Prods. Liab. Litig., 226 F. Supp. 3d 557 (D.S.C. 2017). The South Carolina Supreme Court has held that “[r]eliance on lay testimony is not justified when the medical question is a complicated one and likely to carry the fact-finding body into realms which are more properly within the province of medical experts.” *Herndon v. Morgan Mills, Inc.*, 246 S.C. 201, 217, 143 S.E.2d 376, 384 (1965).

Here, Plaintiff Shannon Green claimed that she injured her left shoulder and back in the November 19, 2015 accident. However, evidence was presented at trial that showed that Ms. Green has several pre-existing issues that make it questionable whether these injuries were in fact related to the accident. Ms. Green has pre-existing joint pain. She has also been a severe Type I diabetic for over 40 years, and is insulin dependent. She previously had a frozen shoulder with her right shoulder in 2010 through 2011 that had no traumatic cause and was related to her diabetes and required surgery. She also admittedly has pre-existing back pain and hip pain. Now Ms. Green claims that the accident caused her to develop back pain and left shoulder pain and eventually a diabetic frozen left shoulder.

However, no doctor or other qualified medical expert testified at trial regarding medical causation or attempted to rule out these other possible causes. There was also no medical expert testimony opining to a reasonable degree of medical certainty that her injuries were most probably related to the accident. Without such evidence, the jury was left to only speculate and conjecture as to the cause of Ms. Green’s alleged injuries. In other words, without expert testimony linking Plaintiff Shannon Green’s alleged soft tissue injuries to this accident rather than her other pre-existing issues, the jury’s verdict cannot stand, and it should be set aside and judgment entered in favor of Mr. Hudgins on all of Plaintiffs’ claims.

III. No Evidence Was Presented at Trial That Could Allow for Punitive Damages Against Mr. Hudgins.

Finally, should the Court not aside the entire verdict against Mr. Hudgins, the jury's award of punitive damages in the amount of \$35,000 against Mr. Hudgins should be set aside and judgment on the question of punitive damages should be entered in Mr. Hudgins' favor. There was absolutely no evidence presented at trial against Mr. Hudgins that could sustain an award of punitive damages. In order to recover punitive damages, a plaintiff must establish, by clear and convincing evidence, that a defendant's behavior was willful, wanton, or reckless and caused the accident. S.C. Code Ann. § 15-32-520(D). The test for willful, wanton, or reckless behavior is whether it is:

committed in such a manner or under such circumstances that a person of ordinary reason or prudence would then have been conscious of it as an invasion of plaintiff's rights. It is this present consciousness of wrongdoing that justifies the assessment of punitive damages against the tortfeasor. In other words, at the time of his act or omission to act the tortfeasor must be conscious, or chargeable with consciousness, of his wrongdoing.

Cody P. v. Bank of America, N.A., 395 S.C. 611, 625, 720 S.E.2d 473, 479 (Ct. App. 2011).

In addition to not providing any evidence at trial that Mr. Hudgins was negligent, Plaintiffs certainly did not provide any evidence upon which a jury could find by clear and convincing evidence that there was willful, wanton, or reckless conduct on the part of Mr. Hudgins that caused the November 19, 2015 accident. As set forth above, no reasonable jury could find that Mr. Hudgins' actions in being at most two or three car lengths from Mr. McGee's truck, not trying to run him off the road, not flashing his lights at Mr. McGee, and not otherwise distracting Mr. McGee somehow constitutes willful, wanton, or reckless conduct. In fact, the contemporaneous 911 call made by Mr. Hudgins at the time of the accident proves that there was no conscious disregard for the rights of Plaintiffs at the time of the accident, as it shows that he

calmly waited on the line with the 911 operator while he reported Mr. McGee's conduct, waited patiently while the operator tried to conduct the Highway Patrol, and stated that he was not going to chase him as Mr. McGee traveled at a high rate of speed down Simuel Road.

While Mr. Hudgins did admit that he pled guilty to driving too fast for conditions, it is only "[t]he causative violation of a statute [which] constitutes negligence *per se* and is evidence of recklessness and willfulness." *Wise v. Broadway*, 315 S.C. 273, 276, 433 S.E.2d 857, 859 (1993) (emphasis added). Again, as explained above, there is no evidence that any action on the part of Mr. Hudgins proximately caused this accident or caused Mr. McGee to drive in the manner in which he did. Additionally, the Supreme Court had held that a "[v]iolation of a statute does not constitute recklessness, willfulness, and wantonness *per se*, but is some evidence that the defendant acted recklessly, willfully, and wantonly." *Id.* In other words, "it is not obligatory as a matter of law for the jury to make such a finding in every case of a statutory violation." *Id.* Here, Mr. Hudgins emphatically denied that he was driving too fast for conditions and explained that his guilty plea was merely a financial decision. Given the totality of the other evidence presented at trial, no reasonable jury could find that Mr. Hudgins acted recklessly on November 19, 2015. To the contrary, the only reasonable inference in this case is that he was not acting recklessly but merely trying to report on a dangerous driver. Therefore, Mr. Hudgins should not be punished for his actions and the evidence presented at trial does not provide a reasonable basis for a punitive damages award. As such, should the Court not enter judgment in Mr. Hudgins' favor on all of Plaintiffs' claims, Mr. Hudgins respectfully requests that the Court at least enter judgment in his favor on the punitive damages claim.

CONCLUSION

For the reasons set forth hereinabove, Mr. Hudgins respectfully requests that the verdict against him be set aside and that a judgment be entered by the Court in his favor.

October 25, 2019

s/James A. Bradshaw

James A. Bradshaw (S.C. Bar # 100548)

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Attorney for Defendant David Hudgins

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SPARTANBURG	)	C.A. NO.: 2017-CP-42-03523
	)	
Shannon P. Green and Darrell Russell,	)	
	)	
Plaintiffs,	)	DEFENDANT DAVID HUDGINS'
	)	MOTION FOR SETOFF
vs.	)	
	)	
Edward C. McGee and David Hudgins,	)	
	)	
Defendants.	)	
	)	

Should the Court deny Defendant David Hudgins' (hereinafter "Mr. Hudgins") motion for a judgment notwithstanding the verdict, Mr. Hudgins alternatively moves for a setoff of the verdict against him pursuant to S.C. Code Ann. § 15-38-50 of the proceeds received by Plaintiff Shannon P. Green from Nationwide Insurance Company on behalf of Co-Defendant Edward C. McGee. As set forth herein, due to the amount of this setoff, Plaintiff Shannon P. Green is not entitled to recover anything from Mr. Hudgins.

ARGUMENT

Prior to suit being filed, Plaintiff Shannon P. Green received the full policy limits of one hundred thousand dollars (\$100,000) under Mr. McGee's liability policy from Nationwide and executed a Covenant Not to Enforce Judgment against Mr. McGee for that amount. *See* Ex. 1, Covenant. Her husband, Darrell Russell, also executed a separate Covenant Not to Enforce Judgment against Mr. McGee for a settlement of two thousand five hundred dollars (\$2,500.00). *See* Ex. 2, Covenant. This separate Covenant with Mr. Russell was for "any and all claims demands, damages, costs or expenses, including, but not limited to, any medical or hospital expenses, loss of services, actions and cause of action, arising from any act, omission, or

occurrence, resulting or to result from the above referenced automobile accident.” *Id.* (emphasis added).

Under South Carolina law, “there can be only one satisfaction for an injury or wrong.” *Truesdale v. South Carolina Highway Dep’t*, 264 S.C. 221, 235, 213 S.E.2d 740, 746 (1975). Section 15-38-50 of the South Carolina Code states in full as follows:

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

- (1) it does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms so provide, but it reduces the claim against the others to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is greater; and
- (2) it discharges the tortfeasor to whom it is given from all liability for contribution to any other tortfeasor.

S.C. Code Ann. § 15-38-50. Thus, under this statute, “[a] non-settling defendant is entitled to credit for the amount paid by another defendant who settles for the same cause of action.” *Riley v. Ford Motor Co.*, 414 S.C. 185, 195, 777 S.E.2d 824, 830 (2015). “Allowing this credit prevents an injured person from obtaining a double recovery for the damage he sustained.” *Rutland v. S.C.D.O.T.*, 400 S.C. 209, 216, 734 S.E.2d 142, 145 (2012). “[T]he court must review the documents to determine the amount of the settlement and its terms. Under section 15-38-50, the court must determine if the release or covenant was ‘given in good faith.’” *Huck v. Oakland Wings, LLC*, 422 S.C. 430, 438, 813 S.E.2d 288, 292 (Ct. App. 2017). This settlement credit is “statutorily mandated,” and “Section 15-38-50 grants the court no discretion in determining the equities involved in applying a set-off once a release has been executed in good faith between a plaintiff and one of several joint tortfeasors.” *Ellis by Ellis v. Oliver*, 335 S.C. 106, 113, 515 S.E.2d 268, 272 (Ct. App. 1999).

A. *If the Court Grants Only JNOV On the Punitive Damages Against Mr. Hudgins, Plaintiff Shannon Green Cannot Recover Anything From Him.*

Should the Court choose to only grant a JNOV on the punitive damages award against Mr. Hudgins, Plaintiff Shannon P. Green is not entitled to recover anything from him. Here, the total amount of actual damages awarded by the jury to Plaintiff Shannon Green was \$88,546.78. In apportioning liability between Mr. Hudgins and Mr. McGee, the jury determined that Mr. Hudgins was 40% at fault and Mr. McGee was 60% at fault. Section 15-38-15(A) of the South Carolina Code explicitly provides, “A defendant whose conduct is determined to be less than fifty percent of the total fault shall only be liable for that percentage of the indivisible damages determined by the jury or trier of fact.” S.C. Code Ann. § 15-38-15(A). Thus, Mr. Hudgins is only responsible for 40% of the actual damages determined by the jury, which equates to \$35,418.712. Therefore, because Mr. Hudgins is liable only for \$35,418.712 and is entitled to an offset of \$100,000, Plaintiff Shannon P. Green is not entitled to recover anything from Mr. Hudgins.

The setoff provisions of S.C. Code Ann. § 15-38-50 do not apply to underinsured motorist carrier, Progressive. “It is axiomatic that statutory interpretation begins (and often ends) with the text of the statute in question.” *Smith v. Tiffany*, 419 S.C. 548, 555, 799 S.E.2d 479, 483 (2017). “Absent an ambiguity, there is nothing for a court to construe, that is, a court should not look beyond the statutory text to discern its meaning.” *Id.* As stated above, the statutory setoff provision explicitly states that it applies to “other tortfeasors.” See S.C. Code Ann. §15-38-50(A). Progressive, as the underinsured motorist carrier, is not one of these “other tortfeasors” under the statute. See *Broome v. Watts*, 319 S.C. 337, 340, 461 S.E.2d 46, 48 (1995) (“Although the UIM carrier ‘steps into the shoes’ of the underinsured motorist, it has rights separate and distinct from those of the underinsured motorist.”). In fact, even if Progressive

could ostensibly be said to be the same as Mr. McGee, the statute would still not apply because Mr. McGee is the one who gave Plaintiffs the covenant and is not an “other tortfeasor.”

Instead, the type of setoff that a UIM carrier is entitled to is “a different type of set-off.” *Ellis by Ellis v. Oliver*, 335 S.C. 106, 111, 515 S.E.2d 268, 271 (Ct. App. 1999). It arises out of the underinsured motorist statute, which provides that the purpose of UIM coverage is “to provide coverage in the event that damages are sustained in excess of the liability limits carried by an at-fault insured or underinsured motorist.” S.C. Code Ann. § 38-77-160. Thus, “[t]he very definition of UIM insurance mandates a set-off.” *Broome v. Watts*, 319 S.C. 337, 341, 461 S.E.2d 46, 48 (1995). In other words, “underinsured motorist coverage is optional coverage provided by an insurance carrier in the event damages are sustained by the insured in excess of the at fault driver’s liability coverage, recovery therefrom being additional to any recovery from the at fault motorist, *total recovery not to exceed the damages sustained.*” *Id.* (emphasis in original). As such, the setoff inherent in UIM coverage is different from the setoff mandated by S.C. Code Ann. § 15-38-50 for other tortfeasors, and this UIM setoff focuses only on the underinsured motorist, Edward McGee, and whether the jury awarded anything against Mr. McGee in addition to the \$100,000 already paid on his behalf. Thus, UIM coverage is only triggered when a plaintiff is able to obtain a verdict against an underinsured motorist in excess of the liability limits.

Accordingly, Mr. Hudgins gets the full benefit of the \$100,000 covenant entered into by tortfeasor Edward McGee, and S.C. Code Ann. § 15-38-50 grants the Court “no discretion” in applying this setoff. *Ellis by Ellis v. Oliver*, 335 S.C. 106, 113, 515 S.E.2d 268, 272 (Ct. App. 1999). Therefore, should the Court choose to grant Mr. Hudgins’ motion for JNOV with respect to punitive damages only, because Mr. Hudgins’ liability at that point is only \$35,418.71, and

this is offset by \$100,000, Plaintiff Shannon P. Green is not entitled to recover anything from Mr. Hudgins.

B. *If the Court Does Not Grant JNOV on the Punitive Damages Against Mr. Hudgins, Plaintiff Shannon Green Still Cannot Recover Anything From Him.*

In fact, the result is the same even if the Court allows the punitive damages award in the amount of \$35,000 against Mr. Hudgins to stand. South Carolina courts have long held that “when a plaintiff seeks actual and punitive damages in the same claim, both types of damages arise out of the same injury.” *Smith v. Widener*, 397 S.C. 468, 472, 724 S.E.2d 188, 191 (Ct. App. 2012). As such, “a plaintiff’s claim for actual and punitive damages arising from the same injury is the same claim for purposes of setoff under section 15-38-50(1).” *Smith*, 397 S.C. at 473, 724 S.E.2d at 191. Therefore, the punitive damages award against Mr. Hudgins for \$35,000 is also subject to setoff by S.C. Code Ann. § 15-38-50.

It is true that S.C. Code Ann. § 15-38-15(F) states, “This section does not apply to a defendant whose conduct is determined to be willful, wanton, reckless, grossly negligent, or intentional or conduct involving the use, sale, or possession of alcohol or the illegal or illicit use, sale, or possession of drugs.” S.C. Code Ann. § 15-38-15(F). However, the effect of this statute merely means that Mr. Hudgins and Mr. McGee are “subject to pure joint and several liability regardless of their at-fault percentage.” *Donze v. GM, LLC*, 420 S.C. 8, 23, 800 S.E.2d 479, 487 (2017). The South Carolina Court of Appeals has illustrated the law of joint and several liability as follows: “[I]f A is ten percent negligent and B is ninety percent negligent, and together they combine to injure C, they are both liable to C. C can recover one hundred percent of his or her damages from either one.” *Fernanders v. Marks Constr.*, 330 S.C. 470, 476, 499 S.E.2d 509, 511-12 (Ct. App. 1998). However, this does not mean that for purposes of calculating the setoff under S.C. Code Ann. § 15-38-50 that the actual damages attributable to Mr. Hudgins and Mr.

McGee are the full \$88,546.78 for each of them. Instead, the South Carolina Supreme Court has explained:

This stipulation clearly implies the typical case of a collision between automobiles contributed to by the negligence of both drivers, which causes personal injury to a third person. In such a case, the negligence of each driver is a proximate cause of inherently indivisible injuries. Both wrongdoers are jointly and severally liable for the entire harm, and plaintiff has the election of suing one or both. Upon recovery of a judgment against both, plaintiff may, at his election, **collect the full amount from one. However, he is entitled to only one recovery, and the collection of a judgment against one wrongdoer extinguishes any claim against the other.**

Rourke v. Selvey, 252 S.C. 25, 27-28, 164 S.E.2d 909, 910 (1968) (emphasis added). Thus, under pure joint and several liability Plaintiff Shannon P. Green is only allowed to recover the full amount of \$88,546.78 from either Mr. Hudgins or Mr. McGee or a combination of the two, but she is not entitled to a double recovery of that amount from each of them. With respect to determining the proper setoff under S.C. Code Ann. § 15-38-50, the South Carolina Supreme Court has stated that “[t]he jurisdiction of the court to set off one judgment against another is equitable in its nature, and should be exercised so as to do justice between parties.” *Riley v. Ford Motor Co.*, 414 S.C. 185, 195, 777 S.E.2d 824, 830 (2015). Additionally, albeit in an unpublished decision, the South Carolina Supreme Court has held that “setoffs should be calculated based upon the entirety of relevant circumstances.” *Green v. Bauerle*, No. 2019-MO-026, 2019 S.C. Unpub. LEXIS 27, at *10 (S.C. Unpub. May 29, 2019).

Here, the jury found explicitly that Mr. McGee was 60% at fault for this accident, and that Mr. Hudgins was 40% at fault. As such, in the interest of equity and to avoid an arbitrary and capricious setoff in this case, the Court should find that for purposes of setoff, Mr. McGee would be responsible for 60% of the total actual damages and that Mr. Hudgins would be responsible for 40% of the total damages or \$35,418.71. This combined with the \$35,000 in

punitive damages awarded against Mr. Hudgins, the total award against Mr. Hudgins would be \$70,418.71. Accordingly, because this is still less than the \$100,000 setoff, Plaintiff Shannon Green can still not recover anything from Mr. Hudgins.

CONCLUSION

Accordingly, because S.C. Code Ann. § 15-38-50 gives the Court no discretion in applying the \$100,000 setoff in this case, Mr. Hudgins respectfully requests that if the Court chooses to not grant JNOV to him on all of Plaintiffs' claims, that the Court apply the setoff in this case as set forth above and find that Ms. Green can recover nothing from Mr. Hudgins.

October 25, 2019

s/James A. Bradshaw

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Attorney for Defendant David Hudgins

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SPARTANBURG	)	C.A. No.: 2017-CP-42-03523
	)	
Shannon P. Green and Darrell Russell,	)	
	)	
Plaintiffs,	)	MEMO IN OPPOSITION TO
	)	DEFENDANT DAVID HUDGINS'
	)	MOTION FOR SETOFF
	)	
v.	)	
	)	
Edward C. McGee and David	)	
Hudgins,	)	
	)	
Defendant(s).	)	
	)	

I.

FIRST THINGS FIRST

Prior to applying any setoff, the Court should resolve two (2) issues: 1.) How much to add to Plaintiff Shannon Green's verdict pursuant to her Motion for New Trial *nisi additur*; and 2.) How much of the \$100,000 settlement obtained by both Plaintiff's from Nationwide on behalf of Defendant Edward McGee should be applied as a setoff to the verdict in favor of Plaintiff Shannon Green.

With regard to the second issue, it is clear that Mr. McGee and Nationwide required both Plaintiffs to sign a Covenant Not to Execute in exchange for payment of \$100,000. (See Exhibit 1.) In exchange for that payment, Plaintiff Darrell Russell gave up the right to execute a judgment against Mr. McGee for "any and all claims...including...loss of services." *Id.* So some amount of the \$100,000 payment must be allocated to Mr. Russell.

So, two things are clear with respect to the amount of the setoff to be applied to the verdict in favor of Plaintiff Shannon Green: 1.) The setoff is not \$100,000; and 2.) The fact that the jury returned zero to Mr. Russell for obvious loss of consortium is not controlling; not the “sole relevant circumstance” in determining the amount of the setoff. Reliance on the jury verdict alone in establishing the proper amount of setoff would be deemed arbitrary.

II.

MR. HUDGINS CANNOT RELY ON SECTION 15-38-50 TO OBTAIN A SETOFF

First, whereas §15-38-50 (as well as common law) is intended to prevent the plaintiff from obtaining a double recovery for an injury, it is not intended to impose a double reduction, which is what Mr. Hudgins proposes. Mr. Hudgins contends that Progressive is entitled to a “different type of setoff” of \$100,000 and that he also “gets the full benefit of the \$100,000 covenant...” Such a contention is inconsistent with the purpose for setoff, which is to allow “only one satisfaction for an injury...” Rutland v. SC Dept. of Transportation, 400 S.C. 2019, 216, 734 S.E. 2d 142, 145 (2012). One. Not double. Not half. There is only one setoff.

Second, §15-38-50 does not apply in this case. The Contribution Among Tortfeasors Act “does not apply to a defendant whose conduct is determined to be willful, wanton, reckless, grossly negligent, or intentional...” S.C. Code Ann. §15-38-15(f). The jury specifically found on its verdict form that Mr. Hudgins “acted recklessly, willfully, and wantonly, and that conduct proximately caused the damages to Plaintiff Shannon Green.” With respect to actual damages, this is a pure joint and several liability case. As such, Shannon Green can recover one hundred percent (100%) of her judgment for actual

damages (to be determined) from either Defendant, subject to a setoff (also to be determined). If the judgment for actual damages ultimately exceeds the setoff, the balance should be split 60/40 consistent with the jury's response to Question five (5) in the verdict form. Then the punitive damages awards against each Defendant (\$35,000) should be added to the balance attributed to each Defendant, with the total sums to then be entered as judgments against them.

Respectfully Submitted,

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Dated: November 5, 2019
Greenville, South Carolina

1 STATE OF SOUTH CAROLINA)

2 COUNTY OF SPARTANBURG)

COURT OF COMMON PLEAS

3
4 SHANNON P. GREEN AND DARRELL RUSSELL,)

5 PLAINTIFFS,)

6 VS.)

7 EDWARD C. MCGEE AND DAVID HUDGINS,)

8 DEFENDANTS.)

TRANSCRIPT

OF

RECORD

2017-CP-42-3523

9
10 October 14th - 16th, 2019
11 Spartanburg, South Carolina

12 B E F O R E:

13 THE HONORABLE GRACE GILCHRIST KNIE, Judge; and a jury.

14 A P P E A R A N C E S:

15 DOUGLAS A. CHURDAR

16 ESQ.

17 Attorney for the Plaintiffs

18 MICHAEL T. COULTER

19 ESQ.

Attorney for the Defendant McGee

20 JAMES A. BRADSHAW

21 ESQ.

22 Attorney for the Defendant Hudgins

23 PAMELA E. GREEN

24 Circuit Court Reporter

25 Seventh Judicial Circuit

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E X H I B I T S

<u>NOS.</u>	<u>DESCRIPTION</u>	<u>ID</u>	<u>EV</u>
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<u>NOS.</u>	<u>DESCRIPTION</u>	<u>ID</u>	<u>EV</u>
	<u>Defendant McGee's Exhibits</u>		
D-1	Photograph		
D-2	Medical Records		

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<u>NOS.</u>	<u>DESCRIPTION</u>	<u>ID</u>	<u>EV</u>
	<u>Defendant Hudgins Exhibits</u>		
D-1	9-1-1 call		

1 P R O C E E D I N G S

2
3 (WHEREUPON, the following is a partial transcript of
4 the captioned case. Only the parts requested by Mr. Churdar
5 are included in this transcript.)

6 MR. CHURDAR: Your Honor, at this time I'd like to call
7 Trooper J.R. Helmlly to testify.

8 THE COURT: Yes, sir.

9 Yes, sir. If you'll please come forward.

10 (WHEREUPON, the witness complies.)

11 J.R. HELMLY, being first duly
12 sworn, testified as follows:

13 THE COURT: Good afternoon, sir. If you will make
14 yourself comfortable.

15 THE WITNESS: Yes, ma'am.

16 THE COURT: You might need to adjust that microphone.
17 If you will, state your full name, spelling your last for
18 the record.

19 THE WITNESS: Yes, ma'am. Full name is James R.
20 Helmlly. H-E-L-M-L-Y.

21 THE COURT: Okay. If you will please, sir, answer the
22 questions of Mr. Churdar, and then cross, and then any
23 redirect.

24 THE WITNESS: Yes, Your Honor.

25 THE COURT: All right. Thank you.

1 DIRECT EXAMINATION

2 BY MR. CHURDAR:

3 Q All right. Trooper Helmly, you work for the South
4 Carolina Department of Highways.

5 Is that correct?

6 A Yes, Your Honor. I mean yes, sir. Sorry.

7 Q I'm flattered, but --.

8 what -- how long have you been a trooper?

9 A I've been a trooper since 2005, but I had prior
10 experience in law enforcement.

11 Q All right. And what type of training have you had in
12 law enforcement?

13 A I started in 1998 for a small town, City of Central,
14 which is up near Clemson University. I was there on a
15 traffic and K-9 grant. Stayed there in that position for
16 five years for the duration of the grant. Left there and
17 went to Anderson County Sheriff's Office, and then came to
18 the Highway Patrol in 2005.

19 Q All right. Did you take any, any training re, re --
20 for, for the purpose of learning how to investigate
21 accidents?

22 A Yes, sir, we have a -- kind of called a three tier
23 process. Initially it's called accident and collision
24 investigation, which is a two week course. Then you go into
25 technical collision investigation. Then you have one week

1 of reconstruction, which is just basically they give you one
2 collision to reconstruct using the knowledge of the first
3 two tiers you've been on.

4 Q And which of the courses have you taken?

5 A I've had at scene and technical.

6 Q All right. And during your courses with the Highway
7 Patrol, did you learn what a yaw mark is?

8 A Yes.

9 Q And what a striation is?

10 A Yes, sir.

11 Q Okay. Did you learn what causes yaw marks and
12 striations?

13 A Yes, sir.

14 Q Did you learn how they relate to the speed of vehicles
15 that leave them on the road?

16 A Yes, sir.

17 Q All right. Now, what is your rank?

18 A I am currently a master trooper.

19 Q And what district or area do you work?

20 A Troop 3, which consists of five Upstate counties,
21 Anderson, Pickens, Oconee, Greenwood, and Spartanburg.

22 Q Is there a particular area where you work primarily?

23 A Spartanburg County is my primary duty assignment.

24 Q Okay. So, are you familiar with I-85, Business 85,
25 Hearon Circle, Simuel Road?

1 A Yes, sir.

2 Q You, you around those areas a lot?

3 A Yes, sir.

4 Q I want to start by asking you -- we're here about a
5 collision that occurred, occurred on Simuel Road back in
6 November of 2015.

7 A Yes, sir.

8 Q Did you work that collision?

9 A I did, sir.

10 Q Okay. Do you remember -- do you remember the
11 collision?

12 A Yes, sir.

13 Q You remember where it was?

14 A Yes, sir.

15 Q You remember when it happened, the types of cars, that
16 sort of thing?

17 A I can't give you the exact date. I do know it was in
18 November of 2015.

19 Q Okay. You remember the---

20 A I want to say it was somewhere, somewhere around
21 November. Say between the 15th and the 20th of that
22 month maybe.

23 Q All right. And do you remember the people who were
24 involved?

25 A Yes, sir.

1 Q Do you just have a phenomenal memory or is there
2 something about this collision that makes it more memorable
3 than others?

4 A Unfortunately I can remember just about any collision
5 I've, I've worked.

6 Q All right. Well, I represented, in my opening
7 statement, that this incident between these two Defendants
8 started at Mile Marker 80.

9 Do you know where that is?

10 A Yes, sir, it's up around Gossett Road. If I recall,
11 it's somewhere between the 80 and 83 Mile Marker, south
12 bound.

13 Q Do you know how many miles that is from where you
14 worked this collision?

15 A Well, 80 comes down, and the Business 85 splits off at
16 the 77 Mile Marker. So -- and then you got another four,
17 five miles on Business 85 to exit off of Hearon Circle.

18 Q Okay. So, approximately -- at -- what, what, what
19 would be the, the least amount of miles it was from the --
20 from -- if this incident started at Mile Marker 80 to---

21 A We'll say---

22 Q ---Simuel Road?

23 A We'll say we're between eight -- somewhere between
24 eight and ten miles---

25 Q All right.

1 A ---overall.

2 Q All right. Now, this, this, this accident that you
3 worked, this collision that you worked, did you make notes
4 about it?

5 A Yes, sir.

6 Q And were they made by you near the time of the
7 investigation?

8 A Yes, sir.

9 Q When the---

10 A Normally---

11 Q Go ahead.

12 A Normally, we do -- we have 24-hours to turn in the
13 collision report after we work it. So, somewhere in that
14 timeframe we'll also make our field notes to go along with
15 it.

16 Q And why do you only have 24-hours?

17 A They's the policy of the Highway Patrol.

18 Q Okay. So, when you made this, were your -- was your
19 memory fairly fresh?

20 A Yes, sir.

21 Q Okay. And do you make these reports in the ordinary
22 course of your work as a highway patrolman?

23 A Yes, sir.

24 Q Would it help you if you referred to the notes you made
25 on this accident?

1 A Sure. Like for some of the finer details, maybe.

2 (WHEREUPON, the trooper's notes were marked as
3 Plaintiff's Exhibit No. 11 for identification purposes only
4 at this time.)

5 Q All right. I'm gonna show you what has been marked as
6 Plaintiff's Exhibit 11.

7 A Yes, sir.

8 Q All right. I'd ask you to take a look at it, and tell
9 the jury what that is.

10 A This would be my field notes dated November 19th,
11 2015, Secondary 23, which is Simuel Road.

12 Q All right. Now, the parties have agreed that those---

13 THE COURT: And, counsel, just to be clear, that's been
14 marked for identification only?

15 MR. CHURDAR: Only.

16 THE COURT: Is that correct, counsel?

17 MR. BRADSHAW: That's my understanding, yes.

18 MR. COULTER: That's correct.

19 THE COURT: Okay. Thank you.

20 Yes, sir, go ahead.

21 Q So, Trooper, that record will not be going into
22 evidence, but you may refer to it to refresh your memory.

23 All right?

24 A Yes, sir.

25 Q would you tell the jury when you first or how you first

1 heard about this collision?

2 A We first got it as a -- it came across from our
3 dispatch as a BOLO, Be On The Lookout, for due -- two
4 vehicles traveling southbound on 85. Apparently they had
5 some sort of situation going on between the two of them.
6 Some aggressive driving is what was related to us by
7 dispatch, some swapping lanes, cutting each other off in
8 traffic.

9 Q All right.

10 A So, at that point, myself and a couple other units, we
11 started toward 85.

12 Q So, you got this call about an incident on 85. You
13 just told us what the call was about or what was said.

14 would you have gotten the make, and the model, and the
15 tag number of the vehicle?

16 A Sometimes we get it. Sometimes we don't. I don't
17 recall -- I knew -- I, I note one was a pickup truck, I
18 think we were told, but other than that, I'm not sure.

19 Q All right. Be -- what is a BOLO?

20 Did you say -- did, did you already say---

21 A Yes.

22 Q Be On The Lookout?

23 A Be On The Lookout, yes, sir.

24 Q Okay. So, did y'all have a description of the truck?

25 A Yes, I, I know they said it was a pickup truck. I

1 don't have in my notes, I can't -- I refer to the other
2 vehicle as other vehicle.

3 Q If, if the description of the truck and the license tag
4 were called in to 9-1-1, would that have been provided to
5 y'all?

6 A Unfortunately sometimes yes, sometimes no.

7 Q Okay.

8 A If these -- if you call 9-1-1, it will go to the
9 Sheriff's Office, and then the Sheriff's Office will have to
10 relay to Highway Patrol. So, sometimes, between the two
11 dispatches, some things -- sometimes you get more
12 information than others.

13 Q So, you -- a few minutes ago you said y'all were
14 heading out there.

15 A Uh-huh. (Affirmative).

16 Q Were other Highway Patrol cars heading out there?

17 A There was myself, and a corporal, and another unit were
18 at the office on Fairforest Road. We were doing some
19 paperwork. So, I gathered my stuff up, chunked it in the
20 car, and we headed that way.

21 Q And I guess my question is do you have someone in the
22 car with you or did other cars go out there?

23 A No, we, we ride single units.

24 Q So---

25 A We're in the car alone.

1 Q So, how many cars went out there to look for this tan
2 truck?

3 A If I recall, it was just three of us, myself, another
4 trooper, and the corporal.

5 Q Okay. At what point did you hear about a crash?

6 A That also came in through the Sheriff's Office to our
7 dispatch. Said they had units out with a collision at
8 Simuel and Howard that was possibly our two vehicles from
9 the BOLO.

10 Q Okay. And, at this point when you got to the scene,
11 did you connect, did you connect the crash to the, the Be On
12 The Lookout call?

13 A Yes.

14 Q All right. How did you do that?

15 How did you connect the two?

16 A Well, I had to -- I had a pickup truck on scene, and
17 the -- one of the deputies come up to me, and said Hayes, I
18 think this is your truck. He said they---

19 MR. BRADSHAW: Objection, Your Honor.

20 THE COURT: Yes, sir.

21 MR. BRADSHAW: He's getting into accident
22 reconstruction.

23 THE COURT: Okay.

24 MR. CHURDAR: He's---

25 THE COURT: All right.

1 MR. CHURDAR: ---talking about what---

2 THE COURT: All right, counsel, again, no speaking
3 objections in front of the jury.

4 Can you-all come forward please?

5 (WHEREUPON, a bench conference was held out of the
6 hearing of the jury at this time.)

7 THE COURT: Okay. Mr. Churdar, I, I will sustain -- I
8 mean I will over -- I'm gonna sustain that objection, but,
9 again, I, I understand the grounds that it was made may not
10 have been technically the reason that I'm allowing that
11 testimony.

12 MR. CHURDAR: Thank you, Your Honor.

13 THE COURT: Okay. Yes, sir.

14 Q All right. I, I believe you were explaining how you
15 came to the conclusion that the two vehicles at the scene
16 were the ones who were related to that BOLO or Be On The
17 Lookout call.

18 A Yes. Of course, it was brought to my attention by the
19 deputy on scene, and then the first person that I spoke to,
20 if I have it correct, was -- get his name right to make sure
21 I'm right. It was Unit 2 would of been on my report. I
22 don't have first name listed, and I don't remember first
23 name. I just have McGee.

24 Q You talked to McGee?

25 A And -- yes. And when I talked to McGee, I was like,

1 you know, and I usually take a -- some say not a very
2 professional approach, I say hey, what's going on. You
3 know, tell me about it. Tell me what's happening.

4 Q what did he say?

5 A And he was like hey, you know, this guy's been messing
6 with me all the way down 85, and, you know, I'm trying to
7 get away from him, and I was like okay, so now I know I got
8 my people --

9 Q Okay.

10 A -- that this is the BOLO for sure.

11 Q All right. Now, at the scene, what did you find?

12 A So, I got listed Unit 1 as Ms. Green on the report. I
13 have her vehicle.

14 MR. BRADSHAW: Objection, Your Honor. It goes back to
15 your, your earlier ruling on the Motion in Limine.

16 THE COURT: Yes.

17 Okay. Counsel.

18 (WHEREUPON, a bench conference was held out of the
19 hearing of the jury at this time.)

20 Q Trooper, have you had a chance to review the notes
21 cause I'm, I'm gonna---

22 A Yes, sir.

23 Q If you've, if you've used them to refresh your memory
24 sufficiently --.

25 A Yes.

1 Q All right. Very good.

2 Now, the question I asked you was where -- when you got
3 there, where was, you know, where were the vehicles?

4 A Okay. Ms. Green's vehicle is facing north. It is on
5 Simuel Road, and it's kind of partially still in the road.
6 The passenger side is a little bit off in the, in the grass
7 area there.

8 THE COURT: Has that document been marked, Mr. Churdar?

9 MR. CHURDAR: It's been marked and we've all agreed
10 it's in evidence.

11 THE COURT: What is it?

12 MR. CHURDAR: It is---

13 THE COURT: What number?

14 MR. CHURDAR: It is exhibit, Plaintiff's Exhibit 2.

15 THE COURT: Okay. So, Plaintiff's Exhibit No. 2.
16 Can you get that in with this witness?

17 MR. CHURDAR: Yes.

18 THE COURT: Can you ask him to identify it?

19 MR. CHURDAR: All right.

20 Do you recognize Plaintiff's Exhibit, Exhibit 2?

21 A Yes.

22 Q What is it?

23 A This is Howard Street at Simuel Road.

24 Q All right.

25 A This is the location of the collision.

1 Q And you're, you're familiar enough with it to say that
2 that's what it is?

3 A Yes, sir.

4 Q All right. Very good.

5 Like to move Plaintiff's Exhibit 2 into evidence at
6 this time.

7 THE COURT: Okay. I'm assuming there's no objection---

8 MR. BRADSHAW: No objection.

9 THE COURT: ---prior -- based on prior communications
10 with y'all pretrial.

11 Is that correct?

12 MR. BRADSHAW: That's correct.

13 MR. COULTER: Yes, ma'am.

14 THE COURT: All right. Thank you. Plaintiff's No. 2
15 without objection.

16 (WHEREUPON, Plaintiff's Exhibit No. 2 was received into
17 evidence at this time.)

18 Q All right. So, Officer, as you -- and I'm gonna give
19 you this.

20 Do you -- have you ever used a, a laser pointer?

21 A Yeah.

22 Q Okay. So, there you go. You can use that to explain
23 to the jury where -- what cars -- when, when you got there,
24 what vehicles did you see.

25 A Gotcha.

1 THE COURT: Sir, if you need to get up, you can.

2 THE WITNESS: Okay.

3 THE COURT: It's hard for me to see over this bar, but
4 --.

5 THE WITNESS: I just don't want to hit nobody in the
6 eye with this thing. So -- sorry.

7 So, Ms. Green's vehicle, I'm gonna refer to this -- I
8 think technically it would be a gore area. We'll just say
9 it's the little median here.

10 Her vehicle is somewhere right in this area. It's
11 right up here against -- this is the grassy area. Her
12 vehicle is here. Of course, stop sign is, is down here, and
13 the pickup truck is over here, and Mr. Hudgins vehicle, I'm
14 just gonna be right honest with you, I'm not sure where he
15 had it parked. It was not damaged. It, it had not made
16 contact with any other vehicles. So, it was not really---

17 Q And---

18 A ---up -- a, a point of my concern as far as the
19 collision report.

20 Q All right. But Mr. Hudgins was there?

21 A Yes.

22 Q The red car?

23 A Yes.

24 Q Okay.

25 A Yeah, all parties were on scene.

1 Q All right. Very good. And so were there markings on
2 the road?

3 A As I recall, yes, there were some marks left from
4 Mr. McGee's vehicle.

5 Q And what kind of markings were they?

6 A Clarify something we talked about earlier about the
7 yaw. There's a couple of -- there's a couple of elements
8 you have to have for something to be a true yaw mark.

9 MR. BRADSHAW: I'm sorry, Judge.

10 THE COURT: Okay. All right.

11 Q Did you---

12 THE COURT: If---

13 MR. CHURDAR: I can move on, Your Honor.

14 THE COURT: Yes, we're -- I, I will sustain that, and
15 just ask that the officer testify as to what he observed on
16 that day.

17 MR. CHURDAR: All right.

18 THE COURT: Okay. Thank you.

19 Q Did you see yaw marks on the road?

20 A I saw what I would call the beginning of a yaw that was
21 interfered with by striking another vehicle.

22 Q Okay. And what is a yaw?

23 A A yaw mark occurs---

24 MR. COULTER: Judge, same objection. We---

25 THE COURT: Okay. I --.

1 THE WITNESS: Your Honor, if I'm doing something wrong,
2 you can tell me. I'm not used to being in Civil Court
3 testifying.

4 THE COURT: Yes, sir, and I know.

5 THE WITNESS: I'm used to Traffic Court. You just call
6 me down, call me out.

7 THE COURT: Yes, sir. I think counsel's doing a good
8 job of that on their own as quietly as possible. But, I
9 will tell you, sir, really the testimony that is appropriate
10 is what you observed, and without going back to the
11 beginning of time and explaining what a yaw mark is
12 scientifically, okay, if, if you could just state very
13 succinctly what --.

14 THE WITNESS: You just want just the mark that I saw on
15 the road?

16 THE COURT: Yes. Yes, sir, that is---

17 THE WITNESS: Whether, whether I---

18 THE COURT: ---and I'm trying not to tell you how to
19 testify.

20 THE WITNESS: Whether I classify it as a true yaw or
21 not, or not, you just want me to testify to---

22 THE COURT: Yes, sir.

23 THE WITNESS: ---exactly what was on the road?

24 THE COURT: Yes, sir.

25 THE WITNESS: Okay.

1 THE COURT: I do.

2 THE WITNESS: Thank you, Your Honor.

3 THE COURT: All right.

4 THE WITNESS: I'm sorry. I apologize.

5 THE COURT: All right.

6 Q Let me show you what's marked as Plaintiff's Exhibits 3
7 and 4, and I'll ask you to take a look at those.

8 Do you recognize them?

9 A Thank you. Well, I'm getting fat in my old age.
10 Yes.

11 Q All right. And what are they?

12 A This is the mark left by Mr. McGee's vehicles.

13 Q Well, the vehicles themselves.

14 Are they the, the -- I mean the pictures themselves,
15 are they pictures of the scene?

16 A Yes, they're pictures of the scene.

17 Q All right. And you've talked about marks --

18 A Yes.

19 Q -- on, on the road?

20 A Yes.

21 Q Correct?

22 A Yes.

23 Q I'm gonna put this up on the screen, and I'll let you
24 use the -- you can either come over here or you can use the
25 --.

1 THE COURT: Mr. Churdar, what exhibit is that?

2 MR. CHURDAR: Plaintiff's Exhibits 3 and 4.

3 THE COURT: Okay. Which one is on there right now?

4 MR. CHURDAR: No. 4.

5 THE COURT: Okay. And that is of --?

6 MR. CHURDAR: It is of the intersection.

7 THE COURT: Okay. Any objection to that by counsel?

8 MR. BRADSHAW: No, ma'am.

9 MR. COULTER: None, Your Honor.

10 THE COURT: Okay. So Plaintiff's Exhibit No. 4 is
11 entered without objection.

12 (WHEREUPON, Plaintiff's Exhibit No. 4 was received into
13 evidence at this time.)

14 THE COURT: Okay.

15 MR. CHURDAR: And, Your Honor, before I use it, I'd
16 like to enter Plaintiff's Exhibit 3, which we've, we've all
17 seen in which the trooper has identified.

18 THE COURT: Is -- which is what?

19 MR. CHURDAR: Which is from the other direction.
20 Simuel Road right at the intersection.

21 THE COURT: Any objection, counsel?

22 MR. COULTER: Judge, just to speed it up, I don't have
23 any objection to any of the things that have been marked by
24 Plaintiff's counsel other than the one for identification,
25 which I believe was 11.

1 THE COURT: Yes, sir, I know---

2 MR. COULTER: So that would be the only---

3 THE COURT: ---but to make the record, and to make this
4 as understandable as possible---

5 MR. COULTER: Okay.

6 THE COURT: ---we need to put on the record which each
7 of them are.

8 Okay. I'm just---

9 MR. COULTER: Yes, ma'am.

10 THE COURT: All right. So, Churdar---

11 MR. COULTER: No objection.

12 THE COURT: Okay. All right. Thank you.

13 (WHEREUPON, Plaintiff's Exhibit No. 3 was received into
14 evidence at this tie.)

15 Q All right. Trooper, what is, what is Plaintiff's
16 Exhibit 4?

17 A This is the scene. This is Simuel Road approaching the
18 stop sign at Howard Street.

19 Q All right. And, on that road, do you see the yaw marks
20 you referred to?

21 A Yes.

22 Q Can you please use your laser pointer and point to
23 them?

24 A would be in this area here.

25 Q All right. And those are on -- so, was that -- where

1 Shannon Green's -- Shannon Green's car was?

2 A Her vehicle would of been here.

3 Q Okay. So, those were on her side of the road?

4 A Yes, sir, that be would correct.

5 Q All right. And let me show you, if, if I could,
6 Plaintiff's Exhibit 3, which is at that intersection looking
7 in a, in a northerly direction. It's very bright.

8 But do you see the, do you see the yaw marks here?

9 A Yes.

10 Q And where are they?

11 A Right there.

12 Q And is that in, in -- if I'm in that lane where your
13 laser pointer is right now, and I'm traveling north, what
14 am I going to -- where am I going to end up?

15 A It's gonna take you back up to Hearon Circle. Hardee's
16 will be on your left. Miami Grill will be on your right.

17 Q Okay. Now, in addition to the yaw marks, did you look
18 for debris in the road?

19 A Yes, there was debris in the road.

20 Q Can see any of it in this picture, in Plaintiff's
21 Exhibit 3?

22 A It looks like some debris over -- looks like some
23 debris over in here.

24 Q All right.

25 A It's probably, you know -- obviously, the, the

1 collision was at night. This is at daytime. So, the debris
2 is not gonna still be in its original position.

3 Q Now, those orange, those orange marks in the road, who
4 made those?

5 A Those will be mine, sir. I made those.

6 Q Okay. All right. Did you find any yaw marks or debris
7 on the other side of the line?

8 A If I recall, there was some very faint markings, but
9 the heaviest mark would of been in the north bound lane,
10 which -- where Ms. Green's vehicle was.

11 Q Did you -- let's go ahead and put the lights up. Thank
12 you.

13 Did you have the opportunity to talk to, to Mr. McGee?

14 A Yes.

15 Q And what did he -- what did you ask him and what did he
16 tell you?

17 A well, basically I asked him how they came about to be
18 where they were.

19 Q And what did he tell you?

20 A And told me he had -- this vehicle was behind him. The
21 exact wording I'm not sure. Basically he just couldn't
22 shake this vehicle. Once again, this thing had started up
23 on 85 and continued on, and this vehicle just stayed with
24 him.

25 Q All right. Did he admit to hitting Ms. Shannon---

1 A Yes.

2 Q ---Green?

3 A Yes.

4 Q Did he tell you whether he crossed the line or not?

5 A Yes, he admitted he was, he was traveling at a high
6 rate of speed then he should.

7 Q Did he tell you --

8 A And that's why he lost control of the vehicle.

9 Q Did he tell you how fast he was going?

10 A If I can recall, he was somewhere -- stated he was
11 probably 60 to 65 miles an hour.

12 Q All right. Do you know what the speed limit is on
13 Simuel Road?

14 A Max is 35. I want to say 25, but the max would be 35.

15 Q All right. Did you talk to the, talk to the driver of
16 the, of the red truck or the red car?

17 A Yes, sir.

18 Q So, he -- what did he say?

19 A Stated that he was not there at the time of the
20 collision.

21 Q Okay. And did you and he---

22 A But he---

23 Q Go ahead.

24 A He stated that he could, that he could see and hear the
25 collision, but he was not there. So, I asked where, where

1 were you that you could see it and hear it, and he stated
2 that he was coming off the ramp from Business 85 South, and
3 had stopped at the bottom of the ramp over at the QT, which,
4 from the position we were in, the QT---

5 MR. BRADSHAW: Objection, Your Honor.

6 THE COURT: Okay.

7 MR. BRADSHAW: Just the information from him---

8 THE COURT: Oh, okay. All right. Again, I tell you
9 what, y'all come up.

10 This is testimony from Defendant Hudgins?

11 MR. COULTER: Yes, he's attributing statements---

12 (WHEREUPON, a bench conference was held out of the
13 hearing of the jury at this time.)

14 THE COURT: All right. Let's, let's just move on.
15 Okay. Thank you.

16 MR. CHURDAR: All right.

17 THE COURT: All right.

18 Q So, Mr. Hudgins, in the red car, told you that he saw
19 the accident.

20 Is that what you're saying?

21 A Yes.

22 Q Mr. Hudgins, in the red car, said that he heard the
23 accident.

24 Is that what you're saying?

25 A Yes.

1 Q All right. I don't have any further questions. Thank
2 you.

3 THE COURT: Okay. Please, sir, answer the questions of
4 Mr. Coulter --

5 THE WITNESS: Yes, Your Honor.

6 THE COURT: -- and then Mr. Bradshaw.

7 THE WITNESS: Yes, Your Honor.

8 THE COURT: And then possibly Mr. Churdar again.

9 THE WITNESS: Yes, Your Honor.

10 THE COURT: Okay. Thank you.

11 Yes, sir.

12 MR. COULTER: Thank you, Judge. Just briefly.

13 CROSS-EXAMINATION

14 BY MR. COULTER:

15 Q Good afternoon, Trooper.

16 A Yes, sir. Good afternoon.

17 Q You've done hundreds of accidents before I'm sure?

18 A Yes.

19 Q Okay. And it's pretty common for a person involved in
20 an accident to be pretty nervous, and, and, and kind of in
21 somewhat shock, correct?

22 A Yes, I'd say that.

23 Q Okay. And when you first came up and talked to my
24 client, Mr. McGee, the first thing he told you was he was
25 being chased?

1 A I'm not sure the exact words, but, yes, that's what it,
2 that's what it boiled down to.

3 Q And let me, let me just show you Plaintiff's Exhibit
4 No. 11 for identification, and if you read -- just see if
5 this refreshes your recollection.

6 A Yes, sir.

7 Q Does it refresh your recollection?

8 A Yes, sir, my bad.

9 Q And---

10 A My bad.

11 Q Okay.

12 A He did claim -- it did -- my, my notes do say Unit 2
13 claims to being chased by another vehicle.

14 Q So, he specifically told you chased---

15 A Yes.

16 Q ---right after this accident occurred?

17 A Yes.

18 Q All right. And he was cooperative with you, right?

19 A Yes.

20 Q Okay. All right. He didn't give you any problems at
21 the scene?

22 A No, sir.

23 Q Okay. And there weren't any indication that he had
24 consumed any type of alcohol, drugs, anything insidious of
25 that nature at all?

J.R. Helmly - Cross-examination
By Mr. Coulter

1 A No, sir, no evidence.

2 Q Okay. All right. Thank you.

3 THE COURT: Mr. Bradshaw.

4 MR. BRADSHAW: Yes, Your Honor.

5 CROSS-EXAMINATION

6 BY MR. BRADSHAW:

7 Q Trooper Helmly, good afternoon.

8 A Good afternoon, sir.

9 Q I'll try to be brief.

10 And what time was it that you actually arrived at the
11 scene?

12 A I guess I should of looked at that note a little bit
13 better, shouldn't I?

14 I do know it was nighttime.

15 Q Yes, sir.

16 A I want to say we're getting on---

17 Q Let me give you that.

18 A I put the date. Did not put the time.

19 Q Okay.

20 A I'm gonna say -- I hate to even guess, sir.

21 Q Okay.

22 A I do know it was after dark.

23 Q All right. Thank you. So, when at -- when you got to
24 the scene, you had the opportunity to represent -- to
25 examine Mr. McGee's vehicle?

1 A Yes.

2 Q Okay. Was there damage to that vehicle?

3 A Yes.

4 Q Okay. And you also had an opportunity to examine Mr.
5 Hudgins vehicle as well, correct?

6 A Yes.

7 Q Right?

8 And I believe you already testified there was no damage
9 to that vehicle?

10 A No damage. No contact.

11 Q Okay. And then you gave me -- you testified you spoke
12 with Mr. Hudgins, correct?

13 A Yes, sir.

14 Q And he told you, at the time of the accident, he
15 could -- he was not, not close to the other vehicles, right?

16 A Correct.

17 Q Okay. But he told you he could see the accident, could
18 hear -- and could hear the accident?

19 A Yes.

20 Q Correct.

21 Okay. All right. And he mentioned that he was near
22 the QT.

23 Is that correct?

24 A Yes, that's what he said.

25 Q Okay. I want to show you. This is, this is

1 Plaintiff's Exhibit 3.

2 A Okay.

3 Q And you testified that's the scene of the accident?

4 A Yes.

5 Q Okay. And there in the, in the distance, is that a QT
6 sign there pictured as well?

7 A That is their tallest sign, yes, sir.

8 Q Okay.

9 A That is correct.

10 Q All right. And where I'm pointing to with my, my pen
11 here, that's the QT sign you referred to?

12 A Yes.

13 Q Okay. And Mr. Hudgins, he also told you that he was on
14 the phone when 9-1-1 at the time of the accident?

15 A Yes, I think there were several calls made to 9-1-1 I
16 think. I think maybe one time, I think I remember that they
17 might of got disconnected, got back on the line, but, yes,
18 there was pretty constant communication with 9-1-1.

19 Q Okay. And you've never listened to that, that 9-1-1
20 call?

21 A No, sir, that was through the Sheriff's Office.

22 Q Okay. And, at, at the scene of the accident, you never
23 walked back with Mr. Hudgins to where he actually said he
24 was at the time of the accident?

25 A I'm -- once again, I've been over -- I been working at

1 Spartanburg since '05. I'm pretty familiar with that, with
2 that area right there. There was no need to -- there was no
3 need to go back to that location.

4 Q Okay. And the Plaintiffs, Ms. Green and Darrell
5 Russell, they never said that they saw Mr. Hudgins right
6 behind Mr. McGee?

7 A I'm, I'm trying to think how to answer this so I don't
8 get -- I don't want to get called down.

9 Q Do you recall what they, what they told you at this
10 time?

11 A I wanted to say, and -- I want to say that one of the
12 two of them told me they saw two sets of headlights coming
13 up, but I do not have that in my notes, and, unfortunately,
14 once the, once everything was cleared in Traffic Court, and,
15 by our policy, the videos were --

16 Q Okay.

17 A -- were disposed of. So, I did not have -- I don't
18 have that to go back and---

19 Q Okay. These notes here---

20 A ---and look at.

21 Q ---were, were taken the day of the accident?

22 A Yes.

23 Q Okay. And you didn't write anything about what the
24 Plaintiffs told you in those notes?

25 A I didn't write about the---

1 Q All right.

2 A ---about the second set of headlights, no, sir.

3 Q Okay. All right. And you agree your recollection, at
4 that time, was fresher than it is today?

5 A I'm, I'm pretty clear on everything. I'm, I'm pretty
6 confident in my memory today as it was then.

7 Q All right. And, again, there was no damage to Mr.
8 Hudgins vehicle, right?

9 A That is correct.

10 Q Okay. And -- all right. I believe that's all I have
11 for you. Thank you, sir.

12 A Yes, sir.

13 THE COURT: Any redirect, Mr. Churdar?

14 MR. CHURDAR: No, Your Honor.

15 THE COURT: Okay. Thank you.

16 Any objection to Corporal Helmly being excused?

17 MR. COULTER: None.

18 MR. CHURDAR: None from the Plaintiff.

19 MR. COULTER: None from the defense.

20 MR. BRADSHAW: No, sir.

21 THE COURT: Okay. Thank you, sir. Thank you for being
22 here. You are excused.

23 THE WITNESS: I'm leaving the State.

24 So, that means I'm good to---

25 THE COURT: Yes, sir.

1 THE WITNESS: I'm good to leave the State?
2 THE COURT: You've heard them say it on the record.
3 THE WITNESS: Okay.
4 THE COURT: All right.
5 THE WITNESS: Thank you, Your Honor.
6 THE COURT: Thank you. Safe travels.
7 THE WITNESS: Thank you.
8 THE COURT: All right. Mr. Churdar, next witness.
9 MR. CHURDAR: All right. Your Honor, at this time I
10 would call Mr. Clary McGee to testify.
11 THE COURT: Yes, sir, if you'll please come forward.
12 EDWARD MCGEE, being first duly
13 sworn, testified as follows:
14 THE COURT: Good afternoon, sir. If you'd make
15 yourself comfortable.
16 THE WITNESS: I'm fine.
17 THE COURT: And I need for you to state your full name
18 for the record, and then spell your last name.
19 All right?
20 THE WITNESS: My name's Edward Clary McGee, M-C-G-E-E,
21 and I go by Clary.
22 THE COURT: Thank you.
23 DIRECT EXAMINATION
24 BY MR. CHURDAR:
25 Q All right. Mr. McGee, you did hit Shannon Green on

1 November 19, 2015, correct?

2 A Yes, sir.

3 Q And you hit her with your Chevy pickup truck?

4 A Yes, sir.

5 Q All right. Now, there was some question earlier in the
6 opening about the time you and I have met before.

7 A There was a question, but it was true that I did meet
8 with you.

9 Q Yes, you did meet with me.

10 Did you---

11 A And I did it voluntarily.

12 Q And you had a lawyer---

13 A Yes, sir.

14 Q ---correct?

15 A Yes, sir.

16 Q And your lawyer knew you and I met, didn't he?

17 A Right. He did.

18 Q And your lawyer wasn't Mr. Coulter at the time, was he?

19 A Not at that time.

20 Q Right.

21 And when you and I met, it was, it was because you and
22 I were both concerned that Mr. Hudgins was trying to act
23 like he was a good samaritan in this case.

24 A Yeah, trying to make that out.

25 MR. COULTER: Judge, I object.

1 Could we approach?

2 THE COURT: Yes, sir.

3 MR. COULTER: Okay.

4 (WHEREUPON, a bench conference was held out of the
5 hearing of the jury at this time.)

6 THE COURT: All right. I am going to request that the
7 jury go out, Mr. Plexico.

8 The Court staff hasn't had a break since about 1:45
9 anyway. I know y'all have been in and out, but we'll take a
10 brief recess and cool off a little bit.

11 THE WITNESS: I've got to take a blood pressure pill.

12 THE COURT: Okay. Just hold on just a minute.

13 THE WITNESS: I mean that's no, that's no problem.

14 THE COURT: Okay. Yes, if you -- if the jury will
15 follow Mr. Plexico please.

16 MR. COULTER: Here's a cup of water.

17 THE WITNESS: Just a cup of water will be fine.

18 THE COURT: Let the jury get out please. Thank you.

19 (WHEREUPON, the following takes place outside the
20 presence of the jury.)

21 THE COURT: All right. We will -- the Court staff will
22 take about five minutes.

23 Mr. McGee, sir, you are free to step down and use the
24 restroom or get a sip of water. You can't talk to counsel
25 about your testimony.

1 okay?

2 THE WITNESS: Okay.

3 THE COURT: All right. We'll come back and then I will
4 hear your objections.

5 MR. BRADSHAW: Thank you, Your Honor.

6 THE WITNESS: Yes, ma'am. Thank you.

7 (Whereupon, a short recess was taken at this time
8 followed by arguments from the lawyers on the pending
9 objection, which was requested by Mr. Churdar not to be
10 included in this transcript.)

11 THE COURT: Okay. All right. And so, if you-all are
12 ready, we're going to call the jury back in.

13 All right?

14 MR. CHURDAR: Thank you.

15 (WHEREUPON, the following takes place within the
16 presence of the jury.)

17 THE COURT: Okay. Madam Forelady, are we ready?

18 THE FORELADY: Yes, ma'am.

19 THE COURT: All right. Thank you.

20 Mr. Churdar, sir --

21 MR. CHURDAR: Thank you.

22 THE COURT: -- are you ready?

23 MR. CHURDAR: Yes, Your Honor.

24 THE COURT: Okay. Please proceed.

25 CONTINUED DIRECT EXAMINATION

1 BY MR. CHURDAR:

2 Q All right. Mr. McGee, let's talk about how all this
3 started.

4 Okay. Let's go out to I-85 on the evening of
5 November 19, 2015.

6 what time is it?

7 A I was on night shift then. I'm not on that shift
8 anymore. I'm gonna say getting around seven o'clock or---

9 Q Okay.

10 A ---somewhere around in that time period. I'm not
11 really sure. I would of had to be at work, I believe back
12 then, at 7:20.

13 Q Okay.

14 A I was running early. I wasn't in a hurry---

15 Q All right.

16 A ---cause I had to make a presentation where I'd been to
17 a meeting the night before or the morning before or actually
18 should say being on night shift.

19 Q You were scheduled to, to make a presentation at a
20 meeting when you got to BMW?

21 A About the notes that I took in the meeting for the --
22 all others associates to know cause they have questions for
23 the management.

24 Q Right.

25 A And they give me the questions, and I go to the table,

1 meeting with the management, and ask these questions.

2 whatever answers I get --

3 Q All right.

4 A -- you know, I have to present them.

5 Q In any event, it's, it's getting dark out there?

6 A Uh-huh. (Affirmative).

7 Q Right?

8 A Uh-huh. (Affirmative).

9 Q Yes, sir?

10 A Yes, sir.

11 Q Like -- I'm not asking you to say yes, sir to me.

12 Sorry.

13 A Okay.

14 Q But it's getting dark out there.

15 Your lights are on?

16 A Right.

17 Q Okay. And you're driving your truck from Gaffney to

18 BMW, correct?

19 A Yes, sir.

20 Q And it's a Chevy --?

21 A 2500.

22 Q Is that a big truck?

23 A It's a big truck. It's four wheel drive.

24 Q All right. And you were suppose to present the notes

25 for this meeting when you got there.

1 were you in a hurry at all?

2 A Didn't need to be really.

3 Q what lane are you in?

4 A Left lane.

5 Q And you call that the fast lane?

6 A I -- yes, sir, you call that the fast lane.

7 Q How fast are you going?

8 A Anywhere between 65 to 70. Somewhere around 68 more
9 than likely.

10 Q And, at this point, as I represented in opening, I-85
11 is two lanes, correct?

12 A Yes, sir.

13 Q All right. will you tell the jury you're -- what was
14 going on in the right lane?

15 A There was traffic. It was moving. It wasn't stop and
16 go. It was moving and everybody was in the right lane
17 evidently trying to get around him. I'm not sure why, but
18 there -- the left lane was moving and clear.

19 Q But the right lane was bumper to bumper, correct?

20 A Yes, sir, it wasn't any openings for me to get in
21 there.

22 Q All right. There was no way for you to move over into
23 the right lane?

24 A If there was I would of went.

25 Q And, by the same token, there was no way for Mr.

1 Hudgins, this red car you came upon, to move over in the
2 right lane, correct?

3 A No, sir.

4 Q All right. So, you, you, you -- you're, you're coming
5 in.

6 I guess you'd cross the Pacolet River?

7 A Yes, sir, that is Pacolet, yes, sir.

8 Q And, and you're starting up that hill.

9 was it -- near Hoechst, right, old Hoechst?

10 A Well, yeah, I call it Hoechst Celanese hill. They go
11 under a railroad trestle, and then you're going up the hill
12 right before it goes into the three lanes.

13 Q All right. And, and that, that old Hoechst plant's to
14 your right?

15 A That's what that -- it's not that anymore, but, yeah,
16 it was the Hoechst Celanese Plant at one time.

17 Q And what mile marker are you at?

18 A Well, it's -- when I first encountered them, I'm gonna
19 say 81 and a half, which is putting me a little north of
20 there. I'm coming south, but it's a little north of that,
21 the river.

22 Q All right. So, it's dark. It's two---

23 A Yes, sir.

24 Q It's two lanes?

25 A (WHEREUPON, the witness nods affirmatively.)

1 Q You're in the fast lane. You're driving 65 to 70 miles
2 per hour, and to your right it's bumper to bumper?

3 A Yes, sir.

4 Q And that's all true?

5 A Yes, sir.

6 Q And there's no way you can move into the right lane?

7 A No, sir.

8 Q So, what do you see up ahead?

9 A A red Nissan Altima.

10 Q And tell the jury, in detail, what was going on with
11 that red Nissan Altima.

12 A It's sort of like somebody on their cell phone.
13 Their -- you know, or something -- you know is the -- like
14 they're distracted or something, and not running the speed
15 limit. I call it Sunday driving, and he's running way too
16 slow. Well, I just blink my lights at him. Like I say, you
17 know, get his attention like, you know, let's go.

18 Q All right. So, you flashed your lights, and what did
19 he do?

20 A Well, we went a little ways, and he slammed on brakes.
21 Well, I had enough distance. I wasn't right on him. If I
22 would of been right on him, I would of hit him. He slammed
23 on brakes. He didn't brake check me.

24 So, I put on brakes. I -- you know, I got good brakes
25 on my truck. So, that was fine. I handled that.

1 We went a little bit further. He did it again, and I
2 handled it.

3 Well, I kept my distance on him enough, and then we
4 went up the hill a little further, and he hit the brakes
5 again. And I said well, I don't know what this guy's up to.
6 But I'm just, you know, I'm wanting to get around the
7 situation and get rid of the situation and move on and get
8 on to work.

9 Q All right. So, each time you move up on him, you flash
10 the red light -- you flash the lights?

11 A No. Just that one time. I didn't have time to flash
12 the lights anymore because, you know, I'm trying to stop.

13 Q But he's slamming on the brakes?

14 Yes?

15 A Yeah, he's slamming on brakes. Not just putting his
16 brake lights on.

17 Q Is, is, is -- is he, is he almost causing an accident?

18 A Yes, sir.

19 Q With you and him or with other people?

20 A With other -- with me and him.

21 Q Okay. And if y'all had had an accident, would it of---

22 A It would probably been---

23 Q ---caused---

24 A ---a lot of problems on the interstate. It shut the
25 whole interstate down probably.

1 Q Okay. And this happened three times?

2 A Yes, sir.

3 Q All right. So, how many times did you say he slammed
4 on the brakes?

5 Three times?

6 A I'm sure how -- many times did I say or he say?

7 Q Did -- how many times -- is it your testimony that he
8 slammed on the brakes---

9 A Three.

10 Q ---three times?

11 All right. And did you -- how close were y'all to
12 crashing at that, at that point?

13 I'm not talking about when you---

14 A We would get it---

15 Q ---passed him.

16 A ---within two or 3-feet of him every time. I mean I --
17 my truck would just -- it would just, you know, gnarl down
18 in the front trying to get stopped. I had real good brakes.
19 So, that's one thing. I kept my truck in good shape.

20 Q Okay. But that happened three times?

21 A Yes, sir.

22 Q And used a phrase, you said -- you would -- if you'd
23 run up against him, he would be wearing your grill.

24 A Exactly. If I'd of hit him, he'd been wearing my
25 grill, yeah.

1 Q which means what?

2 A A 2500 versus an Altima?

3 I mean it -- I would of probably put the back seat up
4 in the front, you know, more than likely. I mean that's
5 about like getting hit by a tractor trailer.

6 Q All right. So, why didn't you just back off?

7 A why didn't I back off?

8 I did, but he would do that again to me.

9 Q Yeah.

10 And then you don't almost hit him again.

11 A Yeah, I was backed off, but I mean, you know, we
12 wouldn't go far before he'd do it to me again, and it wasn't
13 a whole lot of time there to back off.

14 Q All right. But this happened three times?

15 A Yes, sir. I mean I could of pulled in the grass on the
16 left side probably, and let him go on if he would of. But
17 that's not safe either. Not on the left median.

18 Q well, we'll talk about---

19 A I think it's a cable barrier there.

20 Q All right. So, you continued to drive behind him,
21 correct?

22 A well, up until it got three lanes.

23 Q All right. And that's when you eventually found a way
24 to try to get around him?

25 A Right, to eliminate the problem of him being in front

1 of me, and I would of been in the front, and he would of
2 went -- I would of went my way, and he would of went his.

3 Q All right. So, you -- so, up at the top of the hill, I
4 guess, I-85 goes from two lanes to three lanes, right?

5 A Yes, sir.

6 Q Does Mr. Hudgins move?

7 A I got enough distance -- I mean there, you know, to
8 get, you know, around him.

9 Q Does he stay in the left lane?

10 A Yes, sir, he did.

11 Q Is there traffic to your right?

12 A Yes, sir.

13 Q Okay. And you---

14 A They's three lanes, but the middle lane is clear --

15 Q All right.

16 A -- to a point.

17 Q So, the traffic's to your right, and, and you're in the
18 middle lane.

19 Do you speed up?

20 A I speed it up cause the speed limit increased there to
21 70.

22 Q But I mean do you speed up to pass him?

23 A Yes, sir.

24 Q Okay. And what does he do?

25 A well, I mean I was paying attention to what's in front

1 of me more or less, but I seen that I could get over. So I
2 did, and he sped up then when I put my turn signal on to get
3 over.

4 Q Okay. Before that happened, isn't it true that you ran
5 up on another slow car?

6 A That's what I'm saying. I was running up on another
7 car. So, I come over. That's what I -- I changed lanes
8 into the left lane. If I could of got in the right lane I
9 would have.

10 Q Okay. So, you ran up on Mr. Hudgins, and then you
11 started to pass him, and you ran up on another car?

12 A Well, it was on up. I had enough time to change lanes.

13 Q So, how fast were you going at this point?

14 You're in the middle lane. You're running up on
15 another car.

16 How fast are you going?

17 A Probably about 70, something over where -- that's the
18 speed limit up through there.

19 Q All right. And so, as you're running up on this car,
20 you want to move into the left lane, correct?

21 A Yes, sir.

22 Q All right. Did you put on your turn signal?

23 A Yes, sir, all the way through.

24 Q And so what is the red car doing?

25 what's Hudgins doing?

1 A He speeds up as I look over, you know, like he's gonna
2 try to block me from coming over.

3 Q Now, how do you know he was speeding up?

4 A You can tell when somebody's gaining on you.

5 Q All right. So, he was going -- was he going a lot
6 faster?

7 I mean did he---

8 A He picked up---

9 Q ---pick up his speed?

10 A ---speed then, yeah.

11 Q Is that why you concluded he was trying to block you?

12 A I would say, but I wanted to eliminate him to -- from
13 being in front of me because of what he had been doing to me
14 prior to me getting past him. If I could of just got in
15 front of him and eliminated the problem, I mean, you know,
16 him being in front of me, I could of went on about my
17 business.

18 Q So, you moved up and you, you put your turn signal on,
19 and I believe it's your testimony that he sped up and tried
20 to block you?

21 A (WHEREUPON, the witness nods affirmatively.)

22 Q Yes, sir?

23 A Yes.

24 Q But you changed lanes anyway?

25 A I changed from -- I changed lanes. I got in front of

1 him, and I -- you know, that way I was in front, and, and I,
2 you know, he was behind me, and I wouldn't have anybody
3 slamming on brakes in front of me anymore.

4 Q wouldn't you agree that, when you changed lanes in
5 front of him, you swerved?

6 A I just came over on, you know, in front of him.

7 Q Did you flip lanes?

8 A what you mean flip?

9 Q I'm using your words.

10 A well, I mean change lanes. That's the same term I
11 guess you'd say. Flip lanes to change lanes.

12 Q And, and you, you just flipped lanes, you just flipped
13 lanes to the left, correct?

14 A Yeah, I come over on the -- in the -- into the left
15 lane.

16 Q And when you did that, did you and Mr. Hudgins almost
17 have another collision?

18 A I was looking ahead, but I -- you know, it was close,
19 but I didn't hit him. So, I mean it don't matter if you had
20 the thickness of a piece paper or 10-feet or 20-feet. It --
21 I missed him. You know, if we would of contacted it, it
22 would of been evident.

23 Q I think when you can slip a piece of paper between cars
24 they're pretty close, don't you?

25 A Yeah, that's pretty close, but you didn't hit. That's

1 my -- that's just terminology, you know.

2 Q But y'all were real close?

3 A Pretty close. But I don't know how close because I'm
4 trying to pay attention to what's ahead of me.

5 Q Well, let me ask you this.

6 Did you or did you not testify previously that you
7 could of slipped a piece of paper between you and Mr.
8 Hudgins?

9 A That's my terminology, but that's terminology that if
10 you -- if you miss somebody even by a -- a thickness of a
11 piece of paper, you didn't hit them.

12 Q Oh, okay. You guys are both going 65 and 70 miles an
13 hour?

14 A I'm not sure how fast he was going because he sped up
15 on me.

16 Q But you could fit a piece of paper between you.

17 So, you're all right with that?

18 A Well, that's what I testified, but I mean that's just
19 saying that I missed him. You know, I didn't hit him. If
20 it would of been, we would of been on the side of road, and
21 there would of been an accident scene.

22 Q Now, you did get ahead of him?

23 A Yes, sir, I stayed ahead of him. I wasn't speeding,
24 but I just wanted to try to let him have the opportunity to
25 go on, and, and me just go on to work. That's what I was

1 trying to do. Never made it. I, I called in and told them
2 I wasn't coming that night.

3 Q All right. No -- nobody's hurt at this point, right?

4 A No, sir.

5 Q You're ahead of him.

6 Yes?

7 A Yes, sir.

8 Q You want to get away from him?

9 A Right. Correct.

10 Q Were you still able to see him in your rearview mirror?

11 A Yes, sir.

12 Q Did he follow you?

13 A He sure did.

14 Q How close was he?

15 A A couple of car lengths behind me. I mean, you know,
16 you could -- it was evident he was back there every time I
17 changed lanes.

18 Q What happened when you changed lanes?

19 A I would turn my turn signal on to move over, get around
20 another car, turn my turn signal, and he was -- it was like,
21 you know, like you driving -- you were Nascar or something
22 or another, and, you know, they're drafting on you.

23 Q With Mr. Hudgins drafting on you?

24 A Yeah, that's what I'm saying. He was right behind me.

25 Q So, you changed lanes, and he changes lanes?

1 A Exactly.

2 Q You change lanes, and he changes lanes?

3 A Exactly.

4 Q You change lanes, and he changes lanes?

5 A Exactly.

6 Q All right. Did you become concerned?

7 A Real concerned.

8 Q Tell the jury about that.

9 A I was fearful for my life really. I didn't know -- I
10 just had heart surgery, been out of work 16 months, and it
11 was trauma. I mean I was in the hospital 1.2 months, and
12 flown by helicopter from Spartanburg and, in my mind, I was
13 just thinking, you know, it's trying to live, you know, and
14 I was scared. I didn't know if he had a gun. I didn't know
15 what the deal was. I didn't know what he was up -- why he
16 was following me. I gave him every opportunity to leave me
17 alone and he didn't.

18 Q Did it ever occur to you to pull off into a well lit
19 area, call law enforcement, and wait it out?

20 A I was headed to my old workplace. That was my
21 destination and that was a well lit area, people I know. I
22 didn't know what would happen if I went to a public place
23 that didn't know me. I didn't, I didn't know if he had a
24 gun or not. I was going to a place where I knew people, and
25 it was within less than a mile from where the accident

1 happened.

2 Q Right.

3 But to get to the place where the accident happened,
4 you had to drive, according to the trooper, nine or 10
5 miles, right?

6 A Yes, sir.

7 Q All right. You had plenty of opportunities to pull off
8 between there and the time you hit Shannon Green, correct?

9 A Correct. I, I tell you what I could of done, and I
10 thought about after the fact. When I first got on Business
11 85, it's separated by a big dirt area, you know, to the
12 left.

13 Q Okay.

14 A If I'd of just pulled over in that dirt, and went
15 across that field, and got back on regular 85, he couldn't
16 of followed me cause I got a four wheel drive truck. And I,
17 I go to the, the old family farm and I used it around the
18 farm going across the field. I could of done it easy, but I
19 mean I wasn't thinking about that. I, I could have, yeah.

20 Q But you had your phone with you?

21 A I -- I'm trained at work not to use my phone. I don't
22 have Bluetooth in my truck. If I'm wearing my uniform, and
23 I'm driving, and I get caught in an accident or something,
24 they can fire me.

25 Q All right.

1 A I am.

2 Q You're telling me---

3 A I'm, I'm telling you---

4 Q You're telling this truth that you to, just to be safe,
5 you don't use your phone while you're driving?

6 A No, sir, not unless I got Bluetooth.

7 Q All right. But you get up behind a little red car, and
8 you flash your lights, right?

9 A Exactly.

10 Q And when he slams on his brakes, you keep staying after
11 him, don't you?

12 A No, I didn't stay after him. I was just going to work.

13 Q And then you try to pass him, and you could put a piece
14 of paper in-between y'all, but that's not, that's not a
15 problem.

16 You got past him, right?

17 A Exactly. I didn't hit him.

18 Q But you're talking -- you're, you're saying that the
19 reason you didn't take out your cell phone is because you
20 thought it might be what, dangerous?

21 A Yes, sir, I don't drive, I don't drive and using my
22 phone not without Bluetooth.

23 Q Did you think what you and he were doing out there was
24 dangerous?

25 A I would had -- thought I had eliminated the problem

1 until he started following me.

2 Q well, he was following you the whole time, right?

3 A Yes, sir.

4 Q So, you hadn't eliminated the problem.

5 A That's right.

6 Q All right. So, you didn't call law enforcement. You
7 didn't pull off to the side of the road. You kept going.
8 Right?

9 A I kept going. If I could of made it to work I would of
10 went on to work.

11 Q And he's behind you?

12 A Yes, sir.

13 Q Changing lanes while you're changing lanes?

14 A Exactly.

15 Q Do you finally end up taking the Hearon Circle exit?

16 A That's it, yes, sir.

17 Q How close was he to you?

18 You said a couple of car lengths.

19 was he ever closer than that?

20 A At times.

21 Q How close was he to your back bumper?

22 A He would get within about two lengths, you know, behind
23 me, somewhere there about.

24 Q Okay. was he ever glued to your back bumper?

25 That was a phrases I think you've used.

1 A At times. Pretty much. He'd get -- you know, his, his
2 headlights would disappear behind my tailgate. You could
3 tell he was back there.

4 Q All right. You got off Business 85 at Hearon Circle,
5 correct?

6 A Yes, sir.

7 Q And, and why again did you take that exit?

8 A Cause I was going to go to my old job. You know, that
9 was another route I could take.

10 Q why were you gonna go to your old job?

11 A why did I go to my---

12 Q why would you -- why were you going to your old job?

13 A Because I worked there 21 years, and everybody knew me,
14 and I, I could go there and get help.

15 Q Okay. When you got off the Hearon Road -- the, the
16 Hearon Circle exit, there is a QT to your right, correct?

17 A Yes, sir.

18 Q And, by the way, it is on the other side of the
19 interstate from where this accident occurred?

20 A Let me think a minute. QT's right there beside where
21 you get off the ramp.

22 Q Yeah.

23 A Let me think. If you're going -- yeah, it's right
24 there on the, yeah, south bound side.

25 Q It's on the opposite side.

1 A I use that QT on the way to work now, yeah.

2 Q Right.

3 A It's right there.

4 Q Okay. I'm only bringing that up cause there was
5 discussion of a QT before. All right.

6 A Oh, well, that wasn't the QT I met you at though.

7 Q No, I'm not referring to when you and I -- I'm not
8 referring to when you and I met.

9 A Oh, okay.

10 Q I'm referring to the QT where you and your -- and Mr.
11 Hudgins, your codefendant, pulled off the exit at Hearon
12 Circle.

13 A Yes, sir. Okay. That's the landmark. Okay.

14 Q Yeah.

15 All right. Now, this incident took a while, didn't it?

16 A Are you talking about from the time it first got
17 started till -- yes, sir, probably 15 minutes.

18 Q Okay.

19 A Twenty at the most.

20 Q Fifteen to 20 minutes, and you had 15 to 20 minutes to
21 decide to do something different, didn't you?

22 A Yes, sir. To get -- and he also had 15 or 20 minutes
23 to just leave me alone and go on about his way.

24 Q All right. We'll get to that. I agree.

25 A Uh-huh. (Affirmative).

1 Q You're telling this jury you were scared?

2 A Yes, sir.

3 Q Nervous?

4 A Yes, sir, I --.

5 Q Rattled?

6 A It wouldn't take much back then after being out of work
7 for 16 months, and, and being in the hospital for two months
8 and three weeks.

9 Q So, from the Hearon Circle exit, you tried to get away
10 from him, correct?

11 A From -- you talking about the Hearon Circle exit?

12 Q Yes.

13 A Yes, sir, I mean I was just gonna go around there and
14 go on toward my old job.

15 Q Right.

16 But when you did, what did he do, Mr. Hudgins?

17 A He was still back there following me. He got off at
18 the ramp the same time I did.

19 Q Right.

20 He was right behind you, correct?

21 A Uh-huh. (Affirmative).

22 Q Yeah.

23 And were you still scared and nervous?

24 A I didn't know what he was up to. If I'd of pulled into
25 the QT and been well, well lit, I would of figured he could

1 of seen me better to pop a shot on me or something with a
2 pistol. I didn't know.

3 Q All right.

4 A I didn't want to go into a well lit area. I mean I, I
5 didn't know what was going on.

6 MR. BRADSHAW: Objection.

7 Q All right. So, you---

8 THE COURT: Yes, sir.

9 MR. BRADSHAW: Your Honor, move to strike as
10 speculative. Speculation.

11 THE COURT: Okay.

12 MR. CHURDAR: He's not -- he's, he's not my client, but
13 I, I will say he's, he's explaining his, his, his sense
14 of---

15 THE WITNESS: Thinking.

16 MR. CHURDAR: ---of emotion---

17 THE COURT: Okay, sir.

18 MR. CHURDAR: ---which is why he did what he did.

19 THE COURT: Pardon me, sir.

20 When there's an objection---

21 THE WITNESS: Oh, okay.

22 THE COURT: ---just be silent until I rule.

23 Okay. And so the objection is that this is speculative
24 in nature, correct?

25 MR. BRADSHAW: Yes, Your Honor.

1 THE COURT: Okay. And I am going to sustain that
2 objection, and ask you to rephrase. Thank you.

3 Q All right. In any event -- so, you get onto Hearon
4 Circle, correct?

5 A Yes, sir.

6 Q He's behind you?

7 A Yes, sir, somehow or another he wiggled his way in
8 there. I don't know how.

9 Q But he's right behind you?

10 A Yes, sir.

11 Q You pick up your speed to get away, correct?

12 A Picked it up a little bit.

13 Q All right.

14 A Yes, sir.

15 Q Did you run over a curb?

16 A Not that I remember. I don't remember doing that.
17 I've seen it in his statements, but I do not remember
18 hitting a curb.

19 Q Okay.

20 A And my memory's pretty good. I remember my sixth grade
21 combination. So --.

22 Q All right. So, you got onto Simuel Road, correct?

23 A Yes, sir.

24 Q Are there any vehicles between your truck and Mr.
25 Hudgins red car?

1 A No, sir.

2 Q Okay. What are you thinking at this point?

3 A Well, I'm not -- I'm still saying I gave him every
4 opportunity to go on and he's still back there. And when I
5 get down to the end of Simuel Road, the road does a sharp
6 right bend.

7 Q Yes.

8 A Well, I look in my mirror to see if he's still back
9 there, and that's when I went over the center line and hit
10 her. And if it had been at 65-mile an hour like the trooper
11 said, I don't think she'd be here in the courtroom today,
12 and not hitting me in a 2500 pickup truck.

13 Q Well, you went down Simuel Road.

14 The red car's behind you?

15 A Yes, sir.

16 Q The red car's distracting you obviously?

17 A Exactly.

18 Q You're, you're, you're worried about this guy. Then it
19 causes you to take your eyes off the road---

20 A Exactly.

21 Q ---correct?

22 And the red car's -- is back there the entire time?

23 A Yes, sir. And, matter of fact, let me say -- tell you.
24 When I hit her, I went ahead and pulled through the
25 intersection. I don't know how I did that because the whole

1 left front wheel was gone on my truck. But I went on
2 through the intersection to get -- to keep from blocking the
3 traffic flow, and parked in the grass. And as soon as my
4 feet touched the ground, he's pulling up beside my truck
5 mouthing off something. But I didn't realize it was him
6 until I thought about it because I was more worried about
7 what her condition was than what was going on. I was
8 wanting to make sure she was all right. But they would not
9 let me go up there to find out.

10 Q Well, if you just got through hitting her with your
11 truck, and you put your feet on the, on the ground, what was
12 stopping you from going and seeing how she was doing?

13 A The police was right there at the accident scene
14 telling me to stay with my vehicle. There was a policeman
15 just happened to be there. He was at the four way stop
16 coming from Howard Street toward -- coming away from the
17 UPS.

18 Q All right.

19 A He was coming -- if he would had the -- where the
20 accident happened, he'd of had to made a right right there.
21 I don't know that -- his name or anything like that, but he
22 was there. He explained it. He was there.

23 Q Let's assume for a second that -- see if this will warm
24 up in a second.

25 would you let me know when that warms up when you see

1 it?

2 All right. So, when you're going down Simuel Road,
3 you'd been down Simuel Road before?

4 A I had been to the motorcycle shop on the left. I
5 didn't go that road very much. It -- that road kind of
6 bothered me a little bit because I had two friends get
7 killed at that -- it use to be a two way stop. They turned
8 it into a four way stop, and I did not like that area.

9 Q So, you knew it was a dangerous intersection?

10 A Yes, sir, I did.

11 Q All right. You're driving down Simuel Road. You're
12 coming up on a dangerous intersection.

13 Correct?

14 A Uh-huh. (Affirmative).

15 Q Hudgins here is behind you, right?

16 A Yes, sir.

17 Q You're scared?

18 A (WHEREUPON, the witness nods affirmatively.)

19 Q You're scared?

20 A Yes, sir.

21 Q Do you know what the speed limit is out there?

22 A I'm gonna say 35.

23 Q It's 25.

24 A well, I didn't know.

25 MR. COULTER: Objection, Judge.

1 Can we approach.

2 THE COURT: Yes?

3 (WHEREUPON, a bench conference was held out of the
4 hearing of the jury at this time.)

5 THE COURT: All right. I will sustain that objection.

6 Q Mr., Mr. McGee, are you sure about the speed limit out
7 there?

8 A Well, the vehicle I drive right now -- I went there the
9 other day to see what -- about the curbing. I didn't know
10 if there was curbs. It tells you the speed limit when
11 you're driving it. It's got what you call heads-up display,
12 and I believe it said 35 when I went down through there.

13 Q Did you look at the signs?

14 A I didn't pay it any attention.

15 Q All right. Are you, are you a hundred percent
16 confident it was 35 out there?

17 A I'm not sure. I'm not sure if they've changed it or if
18 it's 35 then, 25 now, or --.

19 Q All right. Well, let me ask you this.

20 Regardless -- let's assume -- I'll assume it's 35.
21 Were you going 35 miles an hour?

22 A I was probably going 45.

23 Q So, you're going 45 through here?

24 A I'm gonna---

25 Q Were you---

1 A ---say I was.

2 Q All right. And you said earlier that this is a very
3 dangerous intersection?

4 A You talking about Hearon Circle or that Hearon --
5 that -- oh, the four way stop?

6 Q Yes.

7 A It use to be just a two way stop a long time ago.

8 Q Right.

9 A And --.

10 THE COURT: Mr. Churdar, what exhibit is that?

11 MR. CHURDAR: It is Exhibit 2.

12 THE COURT: Thank you.

13 MR. CHURDAR: Uh-huh. (Affirmative).

14 THE COURT: Go ahead.

15 MR. CHURDAR: And it's in evidence.

16 All right. So -- but you were gonna have to come up
17 here, and take a sharp right turn, right?

18 A I didn't know about that turn. I didn't have any idea
19 the road did that. I, I -- in, in my mind, I didn't know
20 that.

21 Q Okay. So, you're driving down a road you don't even
22 know what's coming up?

23 A No, sir, I didn't. I thought it was straight across.

24 Q And, and you're speeding?

25 A I'm running about 45.

1 Q If you had gotten past Shannon Green -- was she
2 coming -- was she right here where I'm showing --?

3 A Well, I'm gonna say she went straight across at that
4 four way stop. I wasn't sure how she came -- where she came
5 from.

6 Q All right. You say that you went back out to the
7 accident scene. I want to show you a picture. It's
8 Plaintiff's Exhibit 4, and I'm gonna ask you if you, if you
9 would --.

10 A Yes, sir, that's it.

11 Q Right.

12 Now, what is the jury looking at with Plaintiff's
13 Exhibit 4?

14 A You're looking at the four way stop, and the curve that
15 I was in that bends back to the right.

16 Q Was this the curve over here?

17 A Yes, sir.

18 Q All right.

19 A And straight ahead is -- if you see that pickup truck?

20 I'm not sure if that's my truck or somebody just
21 happened to be in the picture. That's about where I was
22 when I pulled across the intersection.

23 Q Okay. So, when you came around this curve right here,
24 Shannon Green was right here?

25 A Exactly.

1 Q Okay. And you went over the center line cause you lost
2 it on that curve, didn't you?

3 A I barely went across the center line because I did not
4 catch her with my frame rail.

5 Q So---

6 A She went to the left of frame -- left frame rail.

7 Q It was a glancing blow?

8 A Yes, sir.

9 Q All right. But you did see the vehicle, correct?

10 A Yes, sir.

11 Q And you do agree there was a lot of intrusion into that
12 passenger---

13 A I saw the---

14 Q ---or that driver's door?

15 A I saw the pictures. I never saw the vehicle.

16 Q But---

17 A They never let me -- would let me go back up there. I
18 had to just flip my tailgate down, and sit down, and keep
19 asking questions how she was doing.

20 Q Okay. So, you were right over here when this happened,
21 and you're telling me you weren't able to approach her over
22 here?

23 A No, sir.

24 Q All right. Now, so, you're going around this curve,
25 and you're going, you said, 45-miles an hour?

1 A I'd say in that -- and that's a pretty -- that's too
2 much speed for that curve really---

3 Q Yeah.

4 A ---right there.

5 Q And, and what's that right there?

6 A That's the stop sign. I already knew about it prior to
7 getting there. I knew about the stop sign.

8 Q Okay. So you're coming around this curve 45-miles an
9 hour and you were gonna stop or were you gonna blow through
10 it trying to get away?

11 A No, I wasn't gonna blow through it. I was gonna be
12 able to stop. I was on, on the brake pedal when I hit her.

13 MR. CHURDAR: Okay. Go ahead and put the lights up
14 please. Thank you.

15 (WHEREUPON, the bailiff complies.)

16 Q And I believe you testified that, after this collision,
17 as soon as you put your feet on the ground, the red car
18 pulled up?

19 A Yes, sir, beside me with the right window down.

20 Q And---

21 A I don't know what he said. Didn't even know who it was
22 until way later I processed it that that was the guy that
23 was following me. I didn't really think about it at the
24 time because I was thinking about Sharon (sic) Green, how is
25 she, is she all right, is she gonna make it, and I was --

1 kept asking the officers over and over how is she doing, you
2 know, and --.

3 Q Okay. Well, we'll, we'll get to that in a second.

4 A Yes, sir, but I just -- I mean I'm just stressing that
5 point.

6 Q Did you and Mr. Hudgins talk?

7 A I didn't talk to him. He said something to me that I
8 don't even have any idea what it was. I don't have any
9 idea.

10 Q All right.

11 A I mean I, I didn't talk to him. I didn't say anything
12 back to him, no.

13 Q But did he approach you?

14 A Well, he pulled up in his car and then he went on.

15 Q Did you and he talk later about what happened?

16 A No, I mean---

17 Q At all?

18 A Well, just at the -- when we was fixing to -- at the --
19 when they called me over to the Highway Patrol car, he was
20 mouthing something off at me about if you'd just tell this
21 how it happened, everything would be okay, and I said I told
22 the truth and exactly what happened, and that's what I said
23 to him, and I didn't say anything else.

24 Q All right. Did you and he disagree -- did you hear
25 what he said?

1 A No, sir.

2 Q All right.

3 A No, I didn't. All I did was get my ticket and go on
4 with my wife and son.

5 Q Now, you said you didn't go over to Shannon Green, and
6 it's Shannon. You were concerned about her.

7 Did you ever talk to her?

8 A I didn't know how to get in touch with her, but I did
9 through -- I guess it was through you. You told me that
10 she'd had surgery and all this, and just through lawyers and
11 things like that. But I was thinking that I was invading
12 her privacy if I would of tried to contact her in any way.
13 I didn't know how she would take it, me being the one that
14 hit her.

15 Q Well, did you ever think about -- I, I believe you said
16 you went to the hospital.

17 A I did.

18 Q All right. And you said that, that she was gone?

19 A Yeah, they released her.

20 Q Okay.

21 A I, I went with my wife and son. I didn't eat, but ate.
22 I told them I wasn't really hungry, and then, as soon as we
23 got through, I was trying to rush them up. I said I want to
24 go by the hospital---

25 Q Okay.

1 A ---and we went by there and checked on her cause I had
2 had the ticket with her name on it.

3 Q Right.

4 A And I just asked how she was, and they said well, we
5 released her.

6 Q Okay.

7 A So, made me feel a little bit better that, you know,
8 she, you know, didn't get admitted.

9 Q well, what if you found out that she didn't get out of
10 the hospital till two o'clock the next morning?

11 A well, they didn't tell me that.

12 Q All right.

13 A You know, that's, that's all I -- I, I told them, you
14 know, what I -- I said I was, you know, there at the
15 accident, and all that, and I wanted to know how she was
16 doing. And they said she had been released and sent on.
17 That's all, you know, the only knowledge I had from there.
18 I did go by the hospital though.

19 Q And during the next two or three weeks or months, did
20 you wonder how she was doing?

21 A Yes, sir.

22 Q You knew how to reach her, correct?

23 A No, I didn't have any phone number or anything.

24 So, how would I of known?

25 Q Did you, did you get a copy of the form that the

1 officer gave you at the scene?

2 A It was a -- like a traffic ticket.

3 Q well, but there was a form with contact information.

4 Did you see it?

5 A I don't remember it.

6 Q All right.

7 A I don't remember any kind of phone numbers or anything
8 being on there.

9 Q Did you say earlier that you had her phone number?

10 A No, I, I never have said that I had her phone number
11 the best of my knowledge.

12 Q Okay. Do you remember when you gave your deposition?

13 A Yes, sir.

14 You mean to you at the QT?

15 Q No, a deposition.

16 A what -- I mean --.

17 Q At, at the lawyer's office in Greenville.

18 A Oh yes, sir. Yes, sir.

19 Q All right.

20 A Definitely, yes, sir.

21 Q Do you remember seeing Shannon there?

22 A I do.

23 Q You do, and you didn't go up to her and say I'm sorry
24 this happened, did you?

25 A well, really didn't have the opportunity to. I mean I

1 left right after I gave my deposition.

2 Q How about before?

3 A Well, I mean I didn't see her until we went in the
4 room. I didn't know who she were -- was until we got in the
5 room.

6 Q All right. So, once you found out who she was, and did
7 you say you were sorry this had happened, you're sorry---

8 MR. COULTER: Objection.

9 Q ---she got hurt?

10 MR. COULTER: Judge -- excuse me.

11 THE COURT: Okay. Come forward again. There's been an
12 objection made.

13 (WHEREUPON, a bench conference was held out of the
14 hearing of the jury at this time.)

15 THE COURT: Yes, sir, please move along with this.

16 MR. CHURDAR: Your Honor, I am. I don't have any other
17 questions for Mr. McGee.

18 THE COURT: Okay. And it's a little bit unusual to
19 break up examination of a witness, but it's after five
20 o'clock, and I gave my word to the jurors that they would
21 leave as close to five o'clock as possible.

22 And so, Mr. McGee, sir, I will instruct you in front of
23 the jury that you're not to discuss your testimony with
24 counsel because counsel will have an opportunity to
25 cross-examine you tomorrow or examine you tomorrow.

1 THE WITNESS: Okay.

2 THE COURT: Both, both of them will.

3 THE WITNESS: All right.

4 THE COURT: All right. Now, you stay put, if you don't
5 mind, and let me just talk to the jury for just a minute.

6 THE WITNESS: All right. That's fine.

7 THE COURT: Thank you all so much for your service
8 today. I'm going to release you all. I want you back at
9 9:30 in the morning. You've been great about being prompt.
10 I really appreciate it. And, again, we won't get started
11 until you get there. And so please be prompt tomorrow.

12 Remember, don't discuss this with anybody. I'm gonna
13 tell my husband that I want to cook this for supper and I
14 want to talk more about football, okay, but, but not about
15 this case today. And so if you all will please remember
16 that. It would be unfair to all parties for you all to do
17 any independent research or to make any decisions regarding
18 the case until you have all the evidence. You've seen just
19 a tiny bit of what you're going to see.

20 So, with that, Madam Forelady, and members of the jury,
21 I will release you until 9:30. I'm gonna check with the
22 people in charge of you.

23 Mr. Alford, Mr. Plexico, where should they report in
24 the morning?

25 THE BAILIFF: Assembly room.

1 THE BAILIFF: In the assembly room.

2 THE COURT: The, the main room---

3 THE BAILIFF: The main room.

4 THE COURT: ---that you came into the first time this
5 morning. Y'all have had a long day. I appreciate your,
6 your assistance with this case so much.

7 Have a nice night. Thank you.

8 Sir, you stay put until they leave.

9 THE WITNESS: Yes, ma'am.

10 (WHEREUPON, the following takes place outside the
11 presence of the jury.)

12 THE COURT: Okay, sir. You may stand down. Watch your
13 step.

14 All right?

15 THE WITNESS: Yes, thank you.

16 THE COURT: Thank you.

17 THE WITNESS: Okay.

18 (Whereupon, the following takes place outside the
19 presence of the jury.)

20 THE COURT: Okay. Is there anything we need to take up
21 before we adjourn?

22 The room will be locked and the electronic equipment
23 will remain in the room. If you all know how to turn it
24 off, though, Mr. Churdar, I would appreciate your doing that
25 since I don't know how to do that.

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MR. CHURDAR: Oh, that's fine.

THE COURT: Okay.

(WHEREUPON, Court was in recess for the evening.)

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Tuesday, October 15, 2019

THE COURT: I understand all the jurors are now here.
Is that correct?

THE BAILIFF: Yes, ma'am.

THE COURT: Okay. Are we ready to go?

MR. COULTER: Defense is ready.

MR. BRADSHAW: Yes, Your Honor.

MR. CHURDAR: Yes, Your Honor.

THE COURT: Okay. And while they're coming in, I will
put on the record that there were no strikes for cause on
yesterday, and there were no objections to the qualification
of the jury.

(WHEREUPON, the following takes place within the
presence of the jury.)

THE COURT: Morning. Madam Forelady, are we ready to
go?

THE FORELADY: Yes, Your Honor.

THE COURT: Okay. Thank you all so much for being here
with us, and thank you for being prompt. Again, we can't do
this without you, and we are back on the record with regard
to the matter of Shannon Green and Darrell Russell versus
Edward McGee and David Hudgins. Civil Action Number
17-CP-42-3523. We are in Day 2 of the trial. I believe
that Mr. McGee was on the witness stand when we broke

1 yesterday.

2 So, I will ask Mr. McGee, sir, to come back up. You
3 are still under oath, and it is cross-examination.

4 Is that correct?

5 MR. BRADSHAW: That's correct, Your Honor.

6 MR. COULTER: Yes, ma'am.

7 THE COURT: Okay. Yes, sir, just take your time.

8 THE WITNESS: Thank you.

9 THE COURT: Make yourself comfortable again, and adjust
10 that microphone as needed.

11 THE WITNESS: I'm fine.

12 THE COURT: All right. Thank you.

13 Mr. Bradshaw.

14 MR. BRADSHAW: Yes, Your Honor.

15 May it please the Court?

16 THE COURT: Yes, sir.

17 CROSS-EXAMINATION

18 BY MR. BRADSHAW:

19 Q Morning, Mr. McGee.

20 A Hello.

21 Q Now, at time of this accident, on November 19, 2015,
22 you worked at the BMW Plant in Greer.

23 Is that correct?

24 A Still work there.

25 Q Okay. And you testified that this incident with Mr.

1 Hudgins began on 85 around Mile Marker 81 and a half.

2 Is that right?

3 A Somewhere thereabout. That's the best of my knowledge.

4 I mean --

5 Q Okay.

6 A -- I don't really -- I know it's around that general
7 area, but I don't know exactly, but I know it's in that
8 general area.

9 Q Okay.

10 A I travel the interstate -- well, I use to. I don't now
11 that they do construction, but I, I traveled it every day.

12 Q Okay. And it was around seven o'clock, 7:00PM, when,
13 when that---

14 A Somewhere---

15 Q ---first started out?

16 A ---thereabout. It's in that timeframe.

17 Q Okay. So -- and to get to BMW, the route you usually
18 took was the Highway 101 exit or I think that's Exit 60 on
19 85.

20 Is that right?

21 A Yes, sir, that is Exit 60 exactly, yes, sir.

22 Q Okay. So, around the time this accident -- this
23 incident began around the 81 and a half mile marker. You
24 still had over 20 miles to get---

25 A 21 miles---

1 Q ---to your exit?

2 A ---there. Give or take, but about 21 miles --

3 Q Okay.

4 A -- if you do the math.

5 Q And you testified yesterday that you thought your shift
6 started about 7:20.

7 Is that right?

8 A Yes, sir, that's when I had to clock in. I think we
9 was actually due to work at 7:30, but you got a 10 minute
10 window before you clock in.

11 Q Okay. But didn't -- your shift actually started at
12 7:00PM, didn't it?

13 A No, it starts at like 7:20. I, I mean I had to be
14 there early, but, you know, to make sure everything -- you
15 know, I'm not sure. I'm not on that shift anymore. I
16 hadn't been on it in a long time, and they changed our
17 hours, even the dayshift hours.

18 Q Okay.

19 A It's real confusing the way they've done things.

20 Q All right. All right. Do you recall, since it's about
21 a year ago, you gave a deposition in this case?

22 A I sure did.

23 Q Okay. And you took an oath to give -- tell the truth,
24 the whole truth, nothing but the truth?

25 A I'm telling the truth.

1 Q Okay. Did you tell the truth in that deposition?

2 A Yes, sir.

3 MR. BRADSHAW: Okay. Your Honor, may I---

4 Q I wasn't---

5 MR. BRADSHAW: May I---

6 A I wasn't on the day -- night shift when I did it.

7 MR. BRADSHAW: Okay. May I unseal this transcript?

8 THE COURT: Yes, sir, I'm happy to do it.

9 A I got it in my pocket too.

10 THE COURT: Sir?

11 THE WITNESS: Oh, I'm sorry. I'm sorry.

12 THE COURT: Please just respond to the questions as
13 they are presented to you.

14 Okay?

15 Yes, sir, I'm happy to unseal it or allow you to do so.

16 MR. BRADSHAW: Thank you, Your Honor.

17 THE COURT: Any objection to the deposition being
18 unsealed?

19 MR. CHURDAR: No objection from Plaintiff.

20 MR. COULTER: No, ma'am.

21 THE COURT: Okay. So, Mr. Bradshaw, sir, after you
22 unseal it, if you will identify the date of the deposition,
23 the deponents, and who was present.

24 Okay?

25 MR. BRADSHAW: All right, Your Honor.

1 For the record, this was Mr. McGee's -- Edward Clary
2 McGee's deposition dated November 29, 2018. Present were
3 myself, Mr. Steven Anderson on behalf of Mr. McGee,
4 Mr. Churdar on behalf of the Plaintiffs.

5 THE COURT: Okay. Thank you.

6 Q All right. Mr. McGee, so, again, you, you testified
7 that you, you told the whole truth in this deposition,
8 right?

9 A Well, I did.

10 Q Okay. And you recall in that deposition -- I asked you
11 about what time, what time your shift started.

12 A It doesn't matter what time it started. I was on the
13 way to work, and I was gonna be early.

14 Q Okay.

15 A I got it in my pocket too.

16 Q All right. And I asked you, on that day, okay. All
17 right. And you said what time -- do you think your shift
18 started at seven o'clock.

19 If you can read, on Page 13, Line 25, what is your
20 answer there?

21 A I'm -- it says I am thinking around seven o'clock.
22 It's -- it doesn't say exactly that. It says I'm thinking
23 about seven o'clock.

24 Q Can you read the -- just read the text there for me,
25 sir, on Line 25?

1 A Okay. All right. And you said what time -- you think
2 your shift started at seven o'clock. I said I'm thinking
3 about seven o'clock. I was not on that shift anymore.

4 Q And what's the next line?

5 A I'm pretty sure -- what's it got to do with my son
6 though?

7 Q Okay.

8 A It says my son has just started over there, and he
9 starts about that time. So, that's what I'm thinking. But
10 he works at a different plant than me.

11 THE COURT: Sir, you just need to read from the
12 deposition at this time.

13 Okay?

14 THE WITNESS: Yeah, but I'm thinking there---

15 THE COURT: Yes, sir, you need to answer the questions
16 as they are presented---

17 THE WITNESS: Well, that's fine.

18 THE COURT: ---to you and not argue with---

19 THE WITNESS: No, I'm not arguing.

20 THE COURT: ---this attorney, yes, sir.

21 THE WITNESS: It's two different plants.

22 THE COURT: Sir, are you reading?

23 THE WITNESS: Yes, ma'am.

24 MR. BRADSHAW: Your Honor?

25 THE COURT: When the -- it says my son's just started

1 there, and he starts about that time. But he works at a
2 different plant. So, they are on a different schedule than
3 us.

4 Q Okay. And you agree when I asked you --

5 A I agree.

6 Q -- at seven o'clock, you said I'm thinking about 7:00.
7 I'm pretty sure.

8 Right?

9 A Yeah.

10 Q Okay. All right. So, on the day of this accident,
11 what -- the time this incident started, it was around seven
12 o'clock.

13 A Yes, sir.

14 Q And you testified, in your deposition, you were pretty
15 sure you had to be at work about seven o'clock.

16 A I was running early.

17 Q Okay. But actually, according to those times, you were
18 running late for work, right?

19 A No, I wasn't running late. I'll tell you that now.

20 Q Okay. All right. So, when you drive down Interstate
21 85, you had to leave your house in Gaffney, right?

22 A Yeah, I have to leave at 6:00, 6:00, or a little after,
23 6:10.

24 Q Okay. And when you're on 85, you're driving in the
25 left lane, right?

1 A Not always.

2 Q Okay. At the time that---

3 A Yeah, at the time that the, the incident occurred, yes,
4 sir.

5 Q All right. At the time that you approached behind Mr.
6 Hudgins, he was up -- you were in the left lane?

7 A Yes, sir.

8 Q Okay. And you said yesterday you were in a big truck,
9 right?

10 A 2500. It sits way higher than his vehicle.

11 Q Okay. And that's -- you anticipated my next question.
12 He's in a Nissan Altima. It's a much smaller vehicle
13 than yours.

14 A Exactly.

15 Q Okay. And your truck sits up pretty high, right?

16 A It's not got a lift kit under it. It's a regular
17 standard, you know, from the factory truck.

18 Q Okay. But from your vantage point in your truck, you
19 couldn't even see into Mr. Hudgins vehicle to see what he
20 was doing, right?

21 A Not, not -- I wasn't trying to.

22 Q Okay. And you don't know what he was doing in his
23 vehicle at that time on Interstate 85, right?

24 A It just looked like he was distracted to or some -- for
25 some unknown reason.

1 Q At -- but you didn't actually see him -- see what he
2 was doing in his vehicle, did you?

3 A No, I just saw his vehicle and at what speed he was
4 running.

5 Q Okay. And the speed limit in that section is 65 miles
6 per hour, right?

7 A Yes, sir.

8 Q Okay.

9 A It was.

10 Q And as you traveled in the lane behind Mr. Hudgins, you
11 were going over that speed limit, right?

12 A Probably no further than 68 or some that were --
13 thereabout.

14 Q But you were going over the 65-mile per hour speed
15 limit?

16 A Yes, sir.

17 Q Okay.

18 A I'll agree to that.

19 Q And, and when you approached him in the left lane, you
20 thought he was driving too slow --

21 A Yes, sir.

22 Q -- right?

23 And I think you testified yesterday, him being in front
24 of you in the left lane, that was a problem for you, right?

25 A Well, going too slow. I mean he was being passed by

1 cars in the right lane.

2 Q Okay. And you testified yesterday that the traffic was
3 heavy in the right lane, right?

4 A Very heavy.

5 Q Okay. And you couldn't get over -- you couldn't get
6 around Mr. Hudgins in the right lane, could you?

7 A If I would of, I could -- if I -- I could of I would
8 of.

9 Q Okay. And, likewise, Mr. Hudgins couldn't move over to
10 the right lane to, to let you pass, could he?

11 A Well, that's probably why everybody was in the right
12 lane cause he was running too slow.

13 Q Okay.

14 A I just think about that now.

15 Q That, that wasn't my question.

16 A What---

17 Q There was room for Mr. Hudgins to get in the right
18 lane, was there?

19 A No, sir.

20 Q Okay. So, you come up behind him, and he's a problem
21 being in front of you running slower, and you flash your
22 lights at him, right?

23 A Yes, sir, like let's, you know, get this, you know,
24 let's get on up the road. You know, we're running -- I'm
25 running the speed limit. You're not.

1 Q And you were trying to tell him let's go, right?

2 That's what you said---

3 A Basically.

4 Q All right. And you, at times, you got -- they're times
5 when you got within 2 or 3-feet of his bumper, right?

6 A No, not until he slammed on brakes.

7 Q But, even before that, you were running no more than a
8 car length behind him, right?

9 A Thereabout or a couple of car lengths or whatever it
10 took just to, you know, get his attention, let's wake up
11 here.

12 Q Okay. So, you were being aggressive behind -- as you
13 drove behind him, weren't you?

14 A Just trying to wake him up, and let's go, you know, and
15 really let's just run the speed limit, and let's get on up
16 the road.

17 Q All right. And you're telling this jury -- I think you
18 testified yesterday about the, the traffic on 85.

19 You're telling this jury it was heavy in the right lane
20 at that time, but there was no traffic in the left lane.

21 Is that what you're saying?

22 A Nothing, nothing -- if, if it was a car in front of
23 him, it was a quarter mile on up the road probably running
24 the speed limit. But there was nothing in front of him to
25 obstruct him or keep him from having to run that slow.

1 Q Okay. There were cars in front of him.

2 Is that right?

3 A A quarter mile is a good little ways. That's a drag
4 strip length.

5 Q All right. So, when Mr. Hudgins -- as soon as it
6 switched to three lanes, you, you, as soon as you could, you
7 switched to the middle lane, right?

8 A Yes, sir, when it got cleared, I switched to the middle
9 lane.

10 Q Okay. And then when you came up on another car in
11 front of you in the middle lane that was running slower than
12 you, the first chance you had you tried to pass back into
13 the left lane, right?

14 A Well, I went into the left lane also to get him behind
15 me to keep him from being in front of me hitting his brakes
16 like he had. That was gonna eliminate the problem as far as
17 I was concerned supposedly.

18 Q Okay.

19 A And I was not gonna mash on my brakes or hit my brakes
20 in retaliation. I was just gonna go on to work and about my
21 business.

22 Q And you testified yesterday, when you changed to the
23 left lane, you got so close to Mr. Hudgins that you could of
24 maybe put a piece of paper in-between your truck and his,
25 right?

1 A Hold on a second there. If you'll read on into my
2 statement, it says that, that I was just using that
3 terminology. It was -- could of been 2-feet or whatever.
4 That was just a -- like a sarcastic remark of putting a
5 paper between there. I missed him -- it don't matter how
6 far I missed him. I missed him, and we didn't make any
7 contact. It don't matter if it was a mile or a piece of
8 paper.

9 Q Okay. So, you're saying a piece of paper, maybe
10 2-feet, and, and, since you missed him, that wasn't a
11 problem, right?

12 A Yeah, I didn't like that term he used yesterday
13 flipping lanes. That was not in my statement either. I
14 changed lanes is what it says. It didn't say flipped. He
15 changed my wording. I did not like that.

16 Q Okay. Now, you admit that it's your responsibility,
17 when you're changing lanes, to make sure that there's enough
18 room to change lanes, right?

19 A Yes, sir, and there was until he speeded up on me, and
20 I already started over.

21 Q Okay. And then -- and, again, you didn't hit him. So
22 you think that's okay.

23 A Yes, sir.

24 Q All right. Then, as you continue to drive on 85,
25 you -- I think you said you saw Mr. Hudgins behind you,

1 right?

2 A Yeah.

3 Q But even, even at that time, Mr. Hudgins kept at least
4 a, a car length to two car lengths behind you, didn't he?

5 A There's too close. There is a following rule, if you
6 look it up, for how much -- what speed you're going and how
7 far you're suppose to be back. It was a little too close.

8 Q That wasn't my question. It was did -- he kept a car
9 length to two car lengths in front of you -- not in---

10 A Yeah, but it was too close. I mean yeah, he was back
11 there.

12 Q Okay. In other wise -- in other words, he wasn't right
13 on your bumper, was he?

14 A No. But it was too close. I don't know -- I don't
15 have a -- my tape measure with me when I was doing that, but
16 I don't know how far he was behind me.

17 Q All right. So, you then drove on and you took the
18 Hearon Circle exit, right?

19 A Yes, sir, and if all -- you'll let me say, the reason I
20 didn't get off at any other exits, the first exit you come
21 to is Bryant Road. Nothing's there. The next road you come
22 to is Highway 9. There's nothing there. The next exit is
23 176, Pine Street. There's nothing there. The next exit is
24 Hearon Circle exit. There's plenty of stuff there. Plus my
25 work is only less than a mile from there, my old job.

1 Q Okay. So, you took this Hearon Circle exit, and you've
2 testified before there were vehicles, other than Mr. Hudgins
3 vehicle, also took that, that exit with you, right?

4 A Not right directly behind me. They were behind him.

5 Q Okay. But they were other vehicles, other than Mr.
6 Hudgins, taking that exit at the same time, right?

7 A I would say. I was paying more attention to him then I
8 was other vehicles.

9 Q Okay. And on the day of the accident, you don't know
10 where Mr. Hudgins was going, do you?

11 A Have no idea where he was going, but you don't normally
12 follow somebody turn by turn.

13 Q Okay. Again, that wasn't my question.

14 You don't know where he was going?

15 A I don't have any idea.

16 Q Okay. And, and you don't even know if, if he had a
17 des -- destination that he was going to that was right off
18 of Hearon Circle, do you?

19 A I wouldn't of thought it's been identical to mine.

20 Q Okay. But, again, you don't know if he had a
21 destination -- there's a lot of places around Hearon Circle.

22 You don't know if he had a, had a destination that was
23 somewhere around there, do you?

24 A I have no idea.

25 Q Okay.

1 A I just felt like he was -- it didn't matter where I
2 went, he was gonna follow me. It don't matter if I would of
3 went to BMW. I think he would of followed me that night.

4 Q Okay. But you don't know that, do you?

5 A No, but I felt like it.

6 Q Okay.

7 A I felt threatened.

8 MR. BRADSHAW: And, Your Honor, I would, I would move
9 to strike the speculation.

10 THE COURT: Okay. I will grant that and sustain that.

11 MR. BRADSHAW: Thank you, Your Honor.

12 Now, as you, as you exit Hearon Circle, you said you
13 saw him behind you, right?

14 A Yes, sir.

15 Q All right. And you agree that there was a number of
16 other things you could of done at that point in time if you,
17 if you felt that he was following you, right?

18 A I agree. I could of, but I was gonna -- my destination
19 was my old job.

20 Q And -- okay. And you said yesterday there's that QT
21 Gas Station right there.

22 You could of pulled there?

23 A Yeah, and it's well lit, but I figured he could see me
24 better and pop a shot at me if he had a pistol.

25 Q Okay.

1 A I felt threatened.

2 Q And I, I understand that, and you said -- and, and you
3 could of pulled into the grass or pulled to the side of the
4 road to, to let him pass on or go on about his way.

5 Is that right?

6 A I gave him every opportunity to leave me alone.

7 Q Okay. But -- and that's something that you could of
8 done.

9 You could of pulled to the side of the road, right?

10 That's what you said yesterday.

11 A I could have. I did it this morning when somebody got
12 on my bumper. I got on a bridge and I pulled on the edge of
13 the road, and let them go on cause they was right on my
14 bumper. Did it on the way here.

15 Q Okay. So, again, that's something that you've done
16 before, and, done, done since, and something that would of
17 been possible?

18 A Exactly.

19 Q Okay. You, you never called 9-1-1 on the date of the
20 accident either, did you?

21 A I had a flip phone and, you know, that's really
22 something you want to be trying to do is dial a phone while
23 you're driving.

24 Q Okay. So, you didn't call 9-1-1?

25 A Well, actually I stated this yesterday. I'm not -- I

1 could of pulled over and called 9-1 (sic), yeah. But I'm
2 not suppose to be using my phone if I'm in uniform at BMW.
3 If I have an accident and they prove I'm on the phone, I
4 ain't got a job anymore matter if I'm in my personal vehicle
5 or a leased vehicle or what. If they prove you was on a
6 phone and you're in uniform, you're representing the
7 company.

8 Q All right. So, you didn't call 9-1-1?

9 A No, sir.

10 Q Okay. And, again, there were a lot of other things you
11 could of done other than to choose to drive the way you did
12 down Simuel Road and cause this accident?

13 Yes?

14 A Yes, sir, I mean I could of done a lot of different
15 things. I could of not went to work that night and I didn't
16 anyway, but --.

17 Q And when you actually go down Simuel Road off of, off
18 of Hearon Circle, Mr. Hudgins never got right on your bumper
19 on Simuel Road, did he?

20 A I'm not sure. It was stated yesterday that Sharon
21 (sic) said she saw two sets of headlights and -- coming at
22 her. So---

23 Q I---

24 A ---as far as I know, he was still right behind me. I
25 looked in my mirror and he was, was back there. That's what

1 distracted me.

2 Q Mr. McGee, I'm not asking what, what the other
3 testimony may or may not be in this case.

4 what I'm asking is on the -- what you recall from the
5 day of the accident, he wasn't right on your bumper as you
6 drove down Simuel Road, was he?

7 A I'm not really sure.

8 Q Okay.

9 A I was trying to drive. I -- but as far as I know, I
10 looked in my mirror, and he was still back there.

11 Q And you said -- you've testified he kept two or three
12 car lengths between his vehicle, and your vehicle the entire
13 time on Simuel Road, right?

14 A I knew he was following me, and I felt threatened so --
15 he was back there.

16 Q But, again, my question is he kept two or three car
17 lengths between his car and your vehicle on Simuel---

18 A Right.

19 Q ---Road, didn't he?

20 A Yeah.

21 Q All right. He never got closer than that, right?

22 A I really don't know. I was trying to drive, but I knew
23 he was still back there.

24 Q Okay. And you never saw him with a gun or a weapon?

25 A No, but I assumed.

1 Q Okay. But you never saw him with a gun or a weapon,
2 did you?

3 A No, I didn't, but, you know, somebody following you,
4 you just had heart surgery, you're kind of nervous.

5 Q And you didn't even know if it was a man or a woman in
6 the car, did you?

7 A That's exactly right.

8 Q Okay. Mr. Hudgins never tried to run you off the road,
9 did he?

10 A No, he never tried to. He tried to wreck me on the
11 interstate by wrecking -- hitting his brakes three times.
12 That's enough to, you know, make yourself feel threatened.

13 Q And I understand that's what, what you think, and, and
14 that's your testimony, but I'm talking about on Simuel Road.

15 He never tried---

16 A No.

17 Q ---to run you off the road?

18 A I'm in the front there. So, I mean how is he gonna run
19 me off the road?

20 Q Okay. And, in fact, his -- Mr. Hudgins vehicle never
21 came in contact with your vehicle at all, did it?

22 A No, sir.

23 Q Okay. In fact, you weren't worried about his car
24 coming into contact with your big truck, were you?

25 A No.

1 Q All right.

2 A why would I be?

3 Q Right.

4 And as big as your truck was, if his car hit the back
5 of your truck, his car probably wouldn't of been drivable,
6 right?

7 A Exactly.

8 Q Okay. And, again, Mr. Hudgins didn't push your truck
9 into Ms. Green's vehicle, right?

10 A No, sir.

11 Q Okay. Mr. Hudgins never hit Mr. Green's vehicle, did
12 he?

13 A No, sir.

14 Q All right. And at the time of the accident actually,
15 you weren't even paying him any attention, were you?

16 A Right after the accident, no, because I was more
17 concerned, concerned about Sharon (sic) Green. I, I forgot
18 about him even being back there. I just wanted to make sure
19 she was all right.

20 Q All right. And you admit that you wouldn't even know
21 he was anywhere around unless he showed up.

22 Is that right?

23 A And he did.

24 Q Okay. And that -- and that's what you say.

25 He -- you wouldn't even know he was anywhere around

1 unless he showed up?

2 A He showed up right as my feet hit the ground when I got
3 out of my vehicle trying to go check on her.

4 Q And I think you said yesterday you didn't even realize
5 who Mr. Hudgins was at that---

6 A No, sir.

7 Q ---at that time, did you?

8 A It, it finally came to my realization as the little red
9 car came up beside me, and him running his mouth.

10 Q Right.

11 A So, it came to my -- you know, but I wasn't concerned
12 about that at the time.

13 Q All right. Right.

14 So, it took you a minute or so to figure out who, who
15 this red car was, and, and, and who was in there, and where
16 he had been, right?

17 A Yeah, he's right -- he had to be right real close on me
18 to have -- when we -- as soon as I come out of the truck, to
19 be right there at my door.

20 Q Okay. And then, again, it -- your big truck was the
21 only vehicle that struck Ms.---

22 A Exactly.

23 Q ---Ms. Green's vehicle?

24 A I stated that.

25 Q And you were in total control of your, of your truck

1 that day?

2 A I was driving it, and I was in total control.

3 Q No one, other than you---

4 A That's right.

5 Q ---was pushing the accelerator?

6 A That's right.

7 Q No one, other than you, was steering the steering
8 wheel?

9 A That's right.

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

12 A Exactly.

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

15 A Yes, sir.

16 Q Okay. And you admit you were driving too fast for
17 conditions?

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

19 Q And you're in total control of, of your---

20 A Correct.

21 Q ---vehicle when you crossed the center line?

22 A Yes, sir.

23 Q And, in fact, you were viewing vehicles in front of you
24 go through the four way stop there on -- at Simuel and
25 Howell -- Howard at the time of the accident, weren't you?

1 A Yes, sir.

2 Q Okay. And you had driven on Simuel Road before this
3 accident, right?

4 A Not much. It's mostly Viaduct Road. When I looped
5 around to go to my old job, I didn't use that exit -- that
6 area much. As I stated yesterday, I had some friends got
7 killed at that section when it was a two way stop, and
8 converted it right after that accident to a four way stop.

9 Q Okay. But you---

10 A Two, two of my best friends got killed at that
11 intersection.

12 Q Right.

13 So, you had been there and were, were at least familiar
14 somewhat with Simuel Road, correct?

15 A Right. Exactly.

16 Q Okay. And you admit that you took that curve too fast
17 and hit Ms. Green's vehicle?

18 A I'd forgot the curve was even there to tell you the
19 truth.

20 Q Okay. But you admit that you took it too fast---

21 A Yes, sir, I did.

22 Q ---and hit her vehicle?

23 A I did.

24 Q Okay. And you're at fault for hitting Ms. Green,
25 right?

Edward McGee - Cross-examination
By Mr. Coulter

1 A I've never denied that.

2 Q Okay. Thank you. No further questions.

3 THE COURT: Mr. Coulter.

4 MR. COULTER: Thank you, Judge.

5 CROSS-EXAMINATION

6 BY MR. COULTER:

7 Q Good morning, Clary.

8 A Yes, sir. Good morning.

9 Q Hey. Let's tell the jury a little bit about yourself.
10 okay?

11 A Yes, sir.

12 Q All right. Where do you live?

13 A I live in Gaffney, South Carolina.

14 Q How long you been living in Gaffney?

15 A Well, since I was seven years old. Well, actually six
16 years old. We moved in with my grandmother, and then found
17 a house a year later. Started the first grade in Gaffney.

18 Q Okay. So, you're how old now?

19 A I am 61 and a half or so.

20 Q All right. Fifty-seven -- well, I'm sorry, 53, 54
21 years you been living in Gaffney?

22 A Yes, sir.

23 Q Okay. You married?

24 A Yes, sir.

25 Q All right. Do you have any children?

1 A I have three.

2 Q All right. Tell me about your oldest.

3 A My oldest, well, if you want to say my stepson, he's my
4 oldest. He's 37. He, he just turned 37 the day after my
5 wife's birthday. That's her son by a previous marriage.

6 Q Okay.

7 A He's over UPS as a -- he's over all the salesmen in
8 Georgia up to Spartanburg and part of Alabama.

9 Q All right.

10 A He got -- he just now moved here from Tampa actually to
11 Georgia.

12 Q Okay. So, he lives in Georgia?

13 A Yes, sir.

14 Q All right. Tell me about your second oldest.

15 A Second oldest, he's 27 years old. He's a -- my son by
16 my first marriage.

17 Q I'm sorry. I forgot to ask you.

18 what's, what's your stepson's name?

19 A My stepson's name is Jimmy Marshal Fowler.

20 Q Okay. And your son's name, your---

21 A Ethan Travis McGee is my oldest --

22 Q Okay.

23 A -- by my first marriage.

24 Q And how old is Ethan?

25 A He's 27.

1 Q All right. What does he do for a living?

2 A He's got his Ph.D., which is a doctor's degree, in
3 computer science. He teaches at Bob Jones University and he
4 also has a job with a company called AFS, and does computer
5 programming.

6 Q All right.

7 A He starts his day at eight o'clock and finishes up
8 about eleven o'clock every night.

9 Q And so he's a professor at Bob Jones?

10 A Yes, sir.

11 Q And he got his Ph.D. at Clemson?

12 A Yes, sir. That's right. Exactly.

13 Q Okay. And your second -- well, actually your third
14 oldest, that would be your daughter, Jessica, correct?

15 A Exactly. And she---

16 Q And how old is she?

17 A She is -- oh, 25.

18 Q Okay. All right.

19 A And she's -- she works at The Clock Restaurant. She
20 bakes cakes as a sideline job. I mean beautiful cakes.
21 She's took a class in cake decorating, and she also does
22 t-shirts and things like that to make money on the side.
23 But she's a waitress at The Clock Restaurant at Gaffney, and
24 she's got three grandkids -- well, my, my three
25 grandchildren.

1 Q So, she doesn't have three grandchildren.

2 A Well, she -- well, no, she got my three, she got my
3 three, my three grandkids.

4 Q Okay.

5 A Exactly three children. That's -- yeah.

6 Q That's okay.

7 All right. So, hey, by the way, have you ever
8 testified before?

9 A Not -- no, sir. Me not like this, no.

10 Q All right. Okay. So, you've got three grandkids from
11 your daughter Jessica, all right, and your youngest, his,
12 his name is?

13 A Edward Blake McGee.

14 Q And he goes by Blake?

15 A Yes, sir.

16 Q Okay. And Blake's 21?

17 A Yes, sir.

18 Q And that's---

19 A He just turned 21---

20 Q Okay.

21 A ---a while back in---

22 Q And that's who you kind of touched on a minute ago.

23 He works at BMW, doesn't he?

24 A He sure does, yes, sir.

25 Q All right. You heard -- helped get him on there?

1 A No, I didn't help him.

2 Q Okay.

3 A He did it on his own. He actually went to school to be
4 a, a mechanic, and BMW paid for it. He was in what they
5 call a scholar program.

6 Q Okay.

7 A And he did it on his own. I didn't -- he didn't have
8 any help from me.

9 Q Gotcha.

10 Hey, and is he married?

11 A Yeah, he just married about a month ago or three weeks
12 or so. Thereabouts.

13 Q Okay. All right. All right. Are you a member of a
14 church anywhere?

15 A Yes, sir, Hope, Hope Church in Spartanburg at the
16 corner of John Dodd Road and 176.

17 Q You been going there for a while?

18 A Yes, sir, it was in combination of a church called
19 Restoration.

20 Q Okay. All right. And your wife does work with the
21 church as well?

22 A Well, yes, sir. Yes, she sure -- she just did a
23 women's group thing the other night --

24 Q Okay.

25 A -- with them.

1 Q All right. As far as your education, where did you go
2 to high school?

3 A Gaffney High.

4 Q Okay. Graduated when?

5 A 1977.

6 Q All right. And any education after that?

7 A Yes, sir, I went to Spartanburg Tech thereafter, and
8 took automotive one year with a diploma, and then, from
9 there, I went to Nashville Auto Diesel College and took one
10 year with a diploma, and, from there, I went to work at
11 Ryder Truck Leasing 21 years, and then I went back to school
12 while I was at Ryder and took auto body repair.

13 Q Okay. So, how long did you work for Ryder?

14 A 21 years.

15 Q All right. And what was your job position?

16 A I was a diesel mechanic, but there at the end I was
17 more like -- if you was at a car dealership, it'd be like a
18 service writer.

19 Q Okay.

20 A When you go in, you tell the people what the problem is
21 and I was more like that, and a parts clerk, and, and taking
22 phone calls at the end when I left there for, you know,
23 helping people on the side of the road. If their truck was
24 broken down, I'd get them help.

25 Q Gotcha.

1 Okay. Now, you been working at BMW for now how long?

2 A It's fixing to be 19 years next month on the 27th.

3 Q All right. And do you have any plans, at the end of
4 this year, with BMW?

5 A Exactly. On the 20th of December I will retire.

6 Q All right.

7 A That is my retirement date.

8 Q Okay. All right. And, by the way, when you retire, do
9 you have any idea what type of income you're gonna have once
10 you retire?

11 A I don't have any idea. That's why I'm trying to -- I,
12 I could of retired this month. They gave us three choices,
13 and my choice was December to where I could have time to tie
14 up loose ends I should say or what -- anything -- not any
15 surprises.

16 Q All right.

17 A It doesn't really matter. Because of my health, I'm
18 leaving there. It's just I need to do that. Not, not --
19 it's not wearing on me very well.

20 Q All right. Well, we'll talk about that in just a
21 minute.

22 A Yeah.

23 Q Okay. Okay. But, but going -- a little bit going
24 further, the day of the accident, December 19th of, or,
25 excuse me, November 19th of 2015, had you consumed any

1 alcohol before that accident?

2 A I've never drank in my life. So I mean no, sir, I
3 didn't.

4 Q Okay. Had you taken any type of illegal drugs that
5 night?

6 A No, sir, only thing I take is my blood pressure
7 medicine that's prescribed to me.

8 Q Okay. Now, at -- I'm assuming you probably started
9 driving when you were about 15, 16 years old?

10 A I was a little late because mama and them finally got
11 on to me. They was having to take me everywhere. So, they
12 didn't like that.

13 Q Okay.

14 A So, they made me get my license. I didn't really want
15 it, but they was having to take me to work and stuff like
16 that. So, I---

17 Q So, when did you---

18 A ---was a little later.

19 Q So when did you get your license?

20 A I was probably 16 or maybe -- I could of got it at 15,
21 but I didn't.

22 Q All right. So, the bottom line is you've been driving
23 for about 45 years about?

24 A Yes, sir.

25 Q That sound about right?

1 A Yes, sir.

2 Q Okay. And other than this night on November 19th of
3 2015, have you been in any other motor vehicle accidents---

4 A No, sir.

5 Q ---at all?

6 A No, sir.

7 Q None?

8 A None.

9 Q Okay. Have you ever been arrested before?

10 A No, sir.

11 Q Okay. And you've never been in any other lawsuits
12 before?

13 A No, sir.

14 Q All right. So, let's go to the 19th. You talked
15 about you were taking prescription medication.

16 A Yes, sir.

17 Q What were you taking prescription medication for?

18 A Well, I had heart surgery. So, I'm taking blood
19 pressure medication and fluid pills to keep fluid off my
20 left leg and things like that.

21 Q Right. And as I understand, in our discussions, you,
22 you first underwent heart surgery back in 1997?

23 A '96 actually.

24 Q Oh, '96. I'm sorry.

25 A Yes, sir.

1 Q Okay. All right. That was the first time?

2 A Yes, sir.

3 Q And then the next time it was in July of 2014?

4 A Exactly. July, 2014.

5 Q And, as I understand, that was to replace your aorta?

6 A My aortic valve.

7 Q Aortic valve.

8 A They put a, a mechanical heart valve in. It sounds
9 like a watch ticking.

10 Q Mechanical watch -- I mean -- okay. So, a mechanical
11 valve to your heart back in July of 2014, and how long did
12 you stay in the hospital for that?

13 A Three weeks that time.

14 Q Okay. And then, in November, as I understand, of 2014,
15 you had to go back in to have another procedure done which
16 is called debranching?

17 A Yes, sir.

18 Q Okay. Now, you're not really sure what that is, right?

19 A I don't -- I have -- I, I still hadn't got a good
20 description of why they had to do that surgery.

21 Q I got you.

22 But something went wrong with that surgery, right?

23 A Exactly.

24 Q Okay.

25 A Really bad.

1 Q And you had that surgery here in Spartanburg, right?

2 A Yes, sir.

3 Q Okay. And, as a result of the surgery going bad, they
4 had to actually take you by helicopter to Charlotte?

5 A Exactly.

6 Q Correct?

7 A Yes, sir.

8 Q All right. And you underwent the same surgery once
9 again to fix it?

10 A Yes, sir, with a doctor in Charlotte that really I
11 praise him for what he did. He did a good job of -- but it
12 was a long hospital stay.

13 Q Okay. So, how long was that hospital stay?

14 A Well, in Spartanburg, where it went wrong, was three
15 weeks, and then five weeks in Charlotte.

16 Q Okay.

17 A Two months.

18 Q All right. Now, as you'd already testified to I
19 believe, you were out of work for about 15 months total?

20 A Sixteen.

21 Q Sixteen months total.

22 A You can't be out but 18.

23 Q Okay. Sixteen months from the time of the July
24 surgery, correct?

25 A Yes, sir.

1 Q Okay. Did you expect to be out for 16 months?

2 A No, sir.

3 Q Now, why did you say you could only get 18?

4 A Because BMW will terminate -- they will not let you
5 return -- I already had my letter in the mail with the date
6 on it. If I didn't get back in there before that time
7 period, I didn't have a job anymore.

8 Q Okay. So, you went back to work after 16 months, and
9 you weren't a hundred percent at that point---

10 A No, sir.

11 Q ---were you?

12 A No, sir, but I, I had to get back. It was a hard
13 routine to get back in there. A lot of rehab.

14 Q All right. So, let's go to the night that this
15 happened.

16 Okay. You leave your home, and there's some discussion
17 already, a couple times, about when you needed to be at
18 work.

19 A Yes, sir.

20 Q Okay. Were you in a hurry?

21 A No, sir, wasn't even a need to be.

22 Q Okay. So, do you still work the same shift now that
23 you did back then?

24 A No, sir.

25 Q Okay. When you gave your deposition, were you working

1 the same shift then that you were working at the time---

2 A No, sir.

3 Q ---of this accident?

4 A No, sir.

5 Q Okay. So, as far as whenever it was you were supposed
6 to get to work, you had actually left early enough to get
7 there early?

8 A Yes, sir.

9 Q That's right?

10 A Yes, sir.

11 Q So, it's not true that you were in a hurry?

12 A No, sir, there was no need to be in a hurry.

13 Q Okay. All right. And so -- and I'm not gonna go
14 through all of what occurred out there. It's gone over
15 pretty well to this point.

16 But it's true though that, when you came up behind him,
17 Mr. Hudgins, he was going slower than the vehicles on the
18 right?

19 A Yes, sir.

20 Q Okay. And I assume you ascribed by the position that,
21 if you're not passing somebody, you should be in the right
22 lane?

23 A Exactly.

24 Q Okay. All right. So, you come up behind him and you
25 flash your lights once?

1 A Yes, sir.

2 Q Is that right?

3 Okay. All right. And then he slams on his brakes
4 those three times?

5 A Yes, sir.

6 Q All right. Now, when you go around him, there's some
7 discussion about the fact that there was this thin piece of
8 paper, so to speak, between you and his vehicle.

9 Didn't you also testify too that, as you were making
10 your move back into the left lane, he accelerated?

11 A Exactly.

12 Q Okay. So, if he hadn't accelerated, would that have
13 been a paper thin space between---

14 A No, sir.

15 Q ---you and him?

16 A No, sir.

17 Q Okay. And also we talked about the different exit you
18 took.

19 When you went from Interstate 85 to Business 85, would
20 you have taken that Business 85 exit had you been going on
21 to work?

22 A I would of stayed on the -- what they called the bypass
23 loop.

24 Q Okay. When you---

25 A Not anymore though.

1 Q All right. Right.

2 A Not now.

3 Q When you went to get off on Hearon Circle, would you
4 have taken the Hearon Circle exit---

5 A No, sir.

6 Q ---to get to work?

7 A Not unless I wanted to go get some coffee or chewing
8 gum at the QT.

9 Q Were you?

10 A No, sir.

11 Q Okay. What were you thinking about when you took the
12 Hearon Circle exit?

13 A I was just wanting to get -- give him the opportunity
14 to leave me alone.

15 Q Okay. Were you afraid at that point?

16 A Yes, sir.

17 Q Okay. When you went to take the Simuel Road exit, was
18 that a road you would take to get to BMW?

19 A No, sir.

20 Q Okay. And when you took each one of these exits, what
21 did Mr. Hudgins do?

22 A He was right there doing the same thing.

23 Q Every time you changed lanes on the highway before you
24 got to those exits, what did Mr. Hudgins do?

25 A He was right there.

1 Q Okay. Now, when you were having your recovery through
2 the heart surgery of those months, you also had the
3 opportunity to do something similar to here, and that is
4 serve on a jury, correct?

5 A Exactly.

6 Q Okay. And that was in Gaffney, right?

7 A Yes, sir, it was.

8 Q And you served on a murder trial?

9 A Exactly.

10 Q Correct?

11 A Yes, sir.

12 Q And that crime was committed with a gun, wasn't it?

13 A Yes, sir, it was.

14 Q Okay. And that's something that was on your mind, was
15 it not?

16 A It was. It's -- I mean it's---

17 MR. BRADSHAW: Objection, Your Honor, to leading.

18 MR. COULTER: Can -- I'm sorry.

19 THE COURT: Okay. Can y'all come up for just one
20 moment?

21 (WHEREUPON, a bench conference was held out of the
22 hearing of the jury at this time.)

23 THE COURT: All right. Thank you.

24 Mr. Coulter, you may continue, sir.

25 MR. COULTER: Thank you, Judge.

1 I'm sorry. I -- when we left off, that fact that you
2 were on that murder trial so recently, and it involved a
3 gun, was something you were -- had on your mind, correct?

4 A Exactly.

5 Q Okay. All right. Now, as far as the accident itself,
6 you admit that you'd gone over the center line?

7 A Yes, sir.

8 Q And you admit that you hit Ms. Green?

9 A Yeah, I admit it. Never denied it.

10 Q Okay. And as soon as you realized that this accident
11 happened, you tried to get out of your vehicle, and go to
12 the -- go see Ms. Green?

13 A I did.

14 Q Okay.

15 A The police wouldn't let me go.

16 Q And, and it did -- it just so happened that an officer
17 was right there at the four way stop, wasn't he?

18 A Yes, sir.

19 Q And he told you to stay at the truck?

20 A He did.

21 Q Okay. And you did what he told you to do?

22 A Exactly.

23 Q All right. And, at that same time, as I understand,
24 Mr. Hudgins rolled down his window after he saw an accident
25 had happened, and started yelling something at you?

1 A I have no idea what he said to this day.

2 Q Okay.

3 A I didn't even realize it was him until I had time to
4 process it.

5 Q You, you don't remember him saying I've got the cops
6 coming after you, boy?

7 A I didn't have any idea what he said. I was not paying
8 him a whole lot of attention. I just knew somebody was
9 hollering at me, and then I realized who it was after I had
10 time to process it. I was more concerned about Sharon (sic)
11 Green. I didn't even know if it was a woman or a man or who
12 was driving that car that I hit. All I knew is I wanted to
13 check on the particular person that was involved with me.

14 Q You actually went to the hospital that night to check
15 on her?

16 A I did.

17 Q Okay. All right. And, at some point, the Plaintiff's
18 attorney actually contacted you---

19 A Yes.

20 Q ---directly?

21 A Yes, sir.

22 Q Did he not?

23 A He did.

24 Q He did.

25 He contacted you and wanted to talk to you about the

1 accident, right?

2 A He did.

3 Q Okay. He talked to you and wanted you to fill out an
4 affidavit form, didn't he?

5 A Right.

6 Q Okay. He talked to you and asked you to go to the QT
7 and meet with him to talk about this accident, didn't he?

8 A Yes, sir.

9 Q And that's what you did?

10 A He tried to come to my house, but I didn't really know
11 who he was or who I needed to be talking to, and I had
12 another lawyer that I no longer have, and that's for reasons
13 not related to this case.

14 Q Okay. But, but you were willing to go see him and help
15 him, correct?

16 A Yes, sir.

17 Q Okay.

18 A Yes, sir, I -- and I did, and I didn't, I didn't try to
19 stall out on him or anything. I went and met with him
20 just -- and I have it right here, but --.

21 Q Well --.

22 A Yeah, exact same thing.

23 Q All right. That's an affidavit.

24 Did you -- and it's typed out, is it not?

25 A Yes, sir, and it's got my signature on the back page.

1 My best friend, which is closer to me than my real brother
2 or as close, he signed it as a witness cause I took him with
3 me because I really need -- I felt like I needed a witness.

4 It -- you know, I didn't know really what was going on.

5 Q All right. Did you type that statement out?

6 A I sure did.

7 Q You typed it yourself?

8 A I, I typed it. Well, actually I -- I either had a
9 handwritten or typed it -- statement that he took with him,
10 and then he reworded it to whatever his satisfaction, and
11 then he gave it to me and let me read it, and then I said
12 well, you did a good job. It sounds the same thing about
13 what I said.

14 Q Yeah, but this particular---

15 A It's just---

16 Q Clary, this particular affidavit though, did you type
17 that document?

18 A No. No, I did not, no.

19 Q That's what I meant.

20 A Not this exact one, no.

21 Q Okay.

22 A I have another one that---

23 Q That was typed by the Plaintiff's attorney's staff?

24 A I guess, yes, sir. Some---

25 Q Okay.

1 A Somebody with his group, yeah.

2 Q Okay. And look at the notary signature. Let me
3 hand -- let me take it from you for a second. I'm not
4 sure -- I don't know if you know what the notary is.

5 A Yeah, I know what---

6 Q Okay.

7 A I've used them back, back when.

8 Q Okay. And the notary on this particular document was
9 the Plaintiff's attorney himself, wasn't it?

10 A Yes, sir.

11 Q Signed by Mr. Churdar?

12 A Yes, sir, I see that now, yes, sir.

13 MR. COULTER: Okay. Judge, I'm gonna move to have the
14 affidavit entered into evidence.

15 MR. CHURDAR: I don't object.

16 MR. BRADSHAW: Your Honor, may we approach?

17 THE COURT: Certainly.

18 (WHEREUPON, a bench conference was held out of the
19 hearing of the jury at this time.)

20 THE COURT: Mr. Bradshaw, sir, you are objecting to the
21 affidavit coming in.

22 Is that correct?

23 MR. BRADSHAW: Yes, ma'am.

24 THE COURT: And would that be on the basis of hearsay?

25 MR. BRADSHAW: Yes, Your Honor.

1 THE COURT: All right. I will sustain that objection.
2 Gentlemen, I'm not going to allow that affidavit in.
3 Has it already been marked for identification?

4 I'm, I'm a little bit confused about what was marked.

5 MR. COULTER: It has not been. I'll be happy to mark
6 it.

7 THE COURT: No, no, no, no.

8 MR. COULTER: Oh.

9 THE COURT: I, I just wanted to make sure that we keep
10 that out of the exhibits.

11 MR. CHURDAR: I don't believe it's been marked.

12 MR. COULTER: It has not.

13 THE COURT: Okay. All right. Thank you.

14 All right. Please continue, Mr. Coulter.

15 Q All right. Clary, and how long did you meet with, with
16 the Plaintiff's attorney?

17 Do you recall?

18 A Probably in the neighborhood of 20 minutes maybe. At
19 the longest it would be 30 minutes --

20 Q Okay.

21 A -- you know. My buddy went with me. It was after
22 work. We scheduled an appointment, and I didn't -- I, I
23 told him I would be there and I was. I didn't, I didn't
24 stall out on him or anything like that or try not to meet
25 with him. I was cooperative. Every situation that I had to

1 do, I, I always cooperated.

2 Q All right, sir. Okay. Clary, that's all the questions
3 I got. Thank you.

4 A Yes, sir.

5 REDIRECT EXAMINATION

6 BY MR. CHURDAR:

7 Q All right. Mr. McGee, I want to start with a claim you
8 just made earlier. I said yesterday that you flipped lanes,
9 and you took issue---

10 A I didn't like that.

11 Q You didn't like that.

12 A No, because that's an aggressive term. If you want to
13 read the affidavit, it says I changed lanes.

14 Q well---

15 A It's it -- it's right there. You changed my wording.
16 I didn't like that.

17 Q I changed your wording when, yesterday?

18 A Yes, sir, you said you was reading from the paper, but
19 you wasn't.

20 Q well, I'm reading from your deposition.

21 All right?

22 A well, I changed lanes is what I said.

23 Q All right. I'm gonna let you read to the jury what you
24 said under oath.

25 where is your deposition?

1 A well, isn't this your signature right here?

2 THE COURT: Okay. Mr. McGee, sir, I caution you to
3 please be responsive to the questions that you're being
4 asked.

5 okay?

6 Q But just to be clear, you represented that I said
7 yesterday you flipped lanes, correct?

8 A Yes, sir.

9 Q Okay. And you didn't like that, correct?

10 A I didn't like the word flipped. It sounds aggressive.

11 Q It does sound aggressive. I'll agree.

12 All right. I'm gonna direct you to you Page 23 of the
13 deposition that you already had in your hands. This was the
14 deposition that you gave in this case on November 29, 2018.

15 okay?

16 A I've given so many statements and, and affidavits I
17 don't know which is which.

18 Q well, you've given a deposition and one affidavit.

19 A Yeah, I probably gave that over in the office when I
20 met with everybody.

21 Q Exactly.

22 A Uh-huh. (Affirmative).

23 Q And you raised your hand, and you swore to tell the
24 truth, the whole truth, and---

25 A I did and I told the truth.

1 Q Yeah.

2 Mr. Bradshaw was the one asking you questions, correct?

3 A When was this?

4 Q At the deposition.

5 A I'm not -- I had so many people in there---

6 Q All right.

7 A ---a year ago I guess. So, I'm not sure who all asked
8 me. A lot of people talked to me that day.

9 Q All right. I am going to take you to your deposition,
10 and I'm going to go to Page 23. I've got it turned there.

11 A Uh-huh. (Affirmative).

12 Q And I am going to -- on Line 13, I -- no. Excuse me.
13 Mr. Bradshaw asked you this question.

14 A I see it.

15 Q All right. And I want you to read your answer to this
16 jury.

17 Question that Mr. Bradshaw asked you. So, when you
18 came up on this traffic in the middle lane, do you know how
19 fast it was going?

20 Please read the answer.

21 A Probably 68 or something like that, but I just -- and
22 then I guess I paused. I was running 70. So, I was coming
23 up on it, whatever that means, so I just flipped lanes, you
24 know, flipped to the left. And that's the same thing as
25 changed -- and then right down here it says---

1 Q Hang on. Hang on.

2 A Okay.

3 Q I didn't say flipped lanes.

4 A I---

5 Q That's your, that's your testimony, correct?

6 A Yeah, and if you go one line below there, 19, it says
7 okay, and when you changed -- oh, somebody says okay. when
8 you changed lanes.

9 Q Right. That's---

10 A Okay. I got you.

11 Q That's, again, Mr. Bradshaw---

12 A Yeah. Okay.

13 Q I'm not involved in this question and answer.

14 A Uh-huh. (Affirmative).

15 I see that.

16 Q All right. So, my question is did you say, under oath,
17 in response to questions by Mr. Bradshaw, I just -- so, I
18 just flipped lanes you know. Flipped to the left.

19 A Exactly.

20 Q Okay.

21 A I see it's in there, but this thing -- one is
22 contradicting the other. I got this one saying I changed
23 lanes.

24 Q we'll talk about this in a minute.

25 A Okay. That's fine.

1 Q All right. But the point is I didn't put words in your
2 mouth. I didn't---

3 A Well, I felt like you did. I didn't know -- I ain't
4 know---

5 Q You said it in your Complaint---

6 A ---I said a year ago---

7 Q ---right?

8 A I said it. Okay.

9 Q Okay.

10 A Yeah.

11 Q All right. Let's talk briefly about the affidavit.
12 It's not in, but with regard to that affidavit, you did have
13 an attorney, correct, John Strickland?

14 A Yeah, I -- but for other reasons, I don't have him
15 anymore. It don't even relate to nothing to do with this.

16 MR. COULTER: Judge, I'm gonna object.

17 Could we approach?

18 THE COURT: All right. Gentlemen, please come forward.

19 (WHEREUPON, a bench conference was held out of the
20 hearing of the jury at this time.)

21 Q All right. Mr. McGee, perhaps the jury would find it
22 unusual that people who have a lawyer or, or a lawyer for
23 people that you have injured might meet with you, correct?

24 A Who are you referring to?

25 Q I'm referring to the Plaintiffs. I represent the

1 Plaintiffs.

2 A Okay. You're, you're talking about you meeting with
3 me?

4 Q Correct.

5 A I cooperated fully.

6 Q I understand. And you had -- you, you had a lawyer who
7 knew about our meeting, correct?

8 A Yes, sir, and he actually instructed to me to that---

9 Q All right.

10 A ---that it was okay to meet with you. I talked to him
11 first.

12 Q All right.

13 A I'm not sure who came to my house wanting the
14 statement. It might of been you.

15 Q Well, I don't know what to say about that. I've never
16 been to your house.

17 A Okay. But somebody with your firm or somebody came to
18 my house, and I told them who my attorney was, and they
19 could contact him, and then he could contact me if it was
20 okay to talk to anybody.

21 Q All right.

22 A I was protecting my interest.

23 Q But, at the time, the issue that was addressed in the
24 affidavit was Mr. Hudgins involvement in all of this,
25 correct?

1 A Yes, sir.

2 Q Okay. And I used your words in the affidavit?

3 A Well, that's fine, and I, and I stated and -- on the
4 stand that it's true. I just didn't know about that word
5 cause I don't know that I have a copy of that.

6 Q Okay.

7 A I may have. I'm not sure.

8 Q But, but in the affidavit I used your words.

9 A You did.

10 Q Okay. I didn't put my words in the affidavit.

11 A No, I thought you did yesterday, but now I'm seeing
12 that you didn't.

13 Q All right. And, and you read the -- that affidavit
14 front and back several times?

15 A Yes, sir, I just felt like one was conflicting the
16 other or, you know.

17 Q All right. But, but that affidavit was truthful and
18 accurate?

19 A Both of them are.

20 Q All right. Now, I believe you testified that you, you
21 pled guilty to driving too fast for conditions, correct?

22 A Yes, sir, I've never denied it.

23 Q All right. And you paid a fine of \$82.00.

24 A I'm not sure what it was. That's irrelevant. I, I
25 don't feel like the money matters really.

1 Q All right. Would it help refresh your memory if I
2 showed you---

3 A I don't need---

4 Q ---the record?

5 A I don't really need to know what it costs. All I
6 know's is I did pay a fine. I didn't know -- I don't
7 remember how much.

8 Q Do, do you dispute it was \$82.00?

9 A I'm not sure. I -- it didn't matter if it was 500 or a
10 1,000. I would of had to pay it, you know.

11 Q All right. And you had counsel for that, correct?

12 A I guess it was John Strickland. I would say. I'm not
13 sure. It probably was. I used him in two different cases,
14 and one of them don't even have anything to do with this,
15 and that's why he's not with me anymore.

16 Q All right. Now, several times you have expressed your
17 concern about Shannon Green, right?

18 A Yes, sir.

19 Q Okay. And I guess you're really sorry this happened?

20 A I am very sorry it happened. I wished it never would
21 of.

22 Q Well, it could of been---

23 A I wished I'd of never went to work that night or left
24 the house.

25 Q Okay. You have, in this lawsuit, claimed that it is

1 more than -- this accident was more than 50 percent her
2 fault.

3 A I, I never -- I don't even think it would be anything
4 to do with her fault.

5 Q You, you agree with that?

6 A I do. I don't even think it would be nothing to --
7 she's not at fault at all. I was.

8 MR. CHURDAR: Your Honor, I'd like to publish his third
9 defense.

10 MR. COULTER: Judge, I -- this is, this is really
11 getting -- I don't -- you don't want me to do speaking
12 objections.

13 THE COURT: All right. I tell you what. I think we
14 may have to -- we are going to send the jury out at this
15 time.

16 Mr. Plexico, if you will lead Ms. Earls and the jury
17 into the jury room.

18 (WHEREUPON, the following takes place outside the
19 presence of the jury where arguments on the objection were
20 made. Mr. Churdar asked that this portion not be
21 transcribed.)

22 THE COURT: Okay. Unless there's anything else, we
23 will have the jury come back at this time.

24 All right?

25 (WHEREUPON, the following takes place within the

1 presence of the jury.)

2 THE COURT: Okay. Madam Forelady, we're all back and
3 ready to go?

4 THE FORELADY: Yes, ma'am.

5 THE COURT: All right. Thank you.

6 All right. I am sustaining the objection of
7 Mr. Coulter.

8 Mr. Churdar, any other questions of this witness?

9 MR. CHURDAR: Your Honor, I don't have any further
10 questions for this witness.

11 THE COURT: All right. Thank you.

12 All right. Thank you. Mr. McGee, sir, if you would
13 step down. Watch your step.

14 THE WITNESS: Yes, ma'am.

15 THE COURT: All right.

16 THE WITNESS: Thank you.

17 THE COURT: All right. And any of those documents that
18 you have, you might want to give them back to the person---

19 THE WITNESS: That's fine.

20 THE COURT: ---that handed them to you.

21 THE WITNESS: That's fine.

22 THE COURT: Thank you.

23 Mr. Churdar.

24 MR. CHURDAR: All right. Your Honor, at this time, the
25 Plaintiff, Darrell Russell, Rusty Russell, will testify.

Darrell Russell - Direct examination
By Mr. Churdar

1 THE COURT: Okay. Mr. Russell, good morning, sir. If
2 you'll come forward.

3 DARRELL RUSSELL, being first duly
4 sworn, testified as follows:

5 THE COURT: Sir, if you'll make yourself comfortable
6 and fix that microphone.

7 THE WITNESS: This thing fell off, Your Honor.

8 THE COURT: Yes, sir, if you'll state your full name
9 and spell your last.

10 THE WITNESS: Darrell Travis Russell. R-U-S-S-E-L-L.

11 THE COURT: Thank you.

12 DIRECT EXAMINATION

13 BY MR. CHURDAR:

14 Q Okay. I -- earlier I said you go by Rusty.

15 Is that true?

16 A True.

17 Q All right.

18 A Ever since I was a child.

19 Q Okay. Now, you are Shannon's husband?

20 A Correct.

21 Q And how long have y'all been married?

22 A This past December was our 25th year anniversary.

23 Q I want to tell the jury or I want you to tell the jury
24 a little bit about your background.

25 okay?

1 A Sure.

2 Q Where did you grow up?

3 A I grew up in Fort Pierce, Florida.

4 Q Okay. And Fort Pierce is on the east coast of Florida?

5 A Yes, sir, it's on the east coast about an hour north of
6 Palm Beach.

7 Q And did you attend school in Fort Pierce?

8 A Yes, sir, I went to private school for my primary and
9 my secondary, and then college in -- down there. I took an
10 Associate's Degree at the community college down there.

11 Q Okay. And do you get -- do you attend any other
12 college or get any other --?

13 A Years later, after I went to work, I got a Bachelor's
14 Degree from Ashford University in criminal justice.

15 Q Now, did you serve in the military?

16 A Yes, sir, from 1983 to 1985 I served active duty in the
17 U.S. Army, and then I did about one year additional in the
18 Army Reserves, and then I did three years in the inactive
19 reserves.

20 Q Okay. And after you got -- what -- when did you get
21 out of the U.S. Army?

22 A I got out in '85 off of active duty, and then, about, I
23 believe it was early '87, I was discharged from the
24 Reserves.

25 Q Upon---

1 A So, that was about a year.

2 Q And then what did you do for work after you got out of
3 the United States Army?

4 A I -- when I got out of the Army I took a job at the
5 County Parks Department, and then, later, I moved over to
6 the County Public Works Department. I was a heavy equipment
7 operator part-time and truck driver part-time.

8 Q All right. Well, did you eventually become involved in
9 law enforcement?

10 A Yes, sir, in 1986 I went to the Police Academy in
11 Florida, and January 5th of '87 I started working at Saint
12 Lucie County Sheriff's Office as a deputy sheriff.

13 Q And how long did you work for the Saint Lucie County
14 Sheriff's Department?

15 A I retired in November of 2009. So, 22 years and ten
16 months.

17 Q Okay. Before and/or during the time you worked for the
18 Saint Lucie County Sheriff's Department, did you, yourself,
19 work collisions?

20 A Yes, sir. So, for the first nine years I was at the
21 Sheriff's Office I was assigned to patrol division, and, as
22 a patrol officer out on the street, we work crashes,
23 collisions quite regular.

24 Q And did you, in addition to working them, did you
25 receive training in working them?

1 A Yes, sir, when -- in Florida, when you go to the police
2 academy, you receive a training course that's a couple weeks
3 in crash investigation. They talk to you about how to, you
4 know, tell who was at fault in the crash, and that kind of
5 stuff, how to investigate, how to document.

6 Q Did you receive training regarding estimating speed?

7 A Yes, sir. So, in '88, I went to an additional school,
8 it's a 40-hour school, for radar certification, and
9 basically what you have to do is, in addition to learning
10 how the radar works, and how you estimate speed, you have to
11 be able to visually estimate speed. And you use the radar
12 as a tool to, to verify your estimation.

13 Q Well, how do you pass and get -- how do you get your
14 radar certification?

15 what do you have to do?

16 A So, there's a written exam that goes with the course at
17 the end of the week. And then once you've passed the
18 written exam, you actually go out and you ride with an
19 instructor, and they basically, for lack of better terms,
20 blindfold you with like a little hood so you can't see
21 ahead. And then they'll tell you okay, here comes a car.
22 You look up and you see the car, and then you gauge -- you
23 estimate the vehicle's speed, and you need to be within
24 about fives miles an hour of what the vehicle is doing. And
25 then you confirm it by turning the radar on.

1 Q All right. And, and that's how you got radar
2 certified?

3 A Yes, sir.

4 Q And you were radar certified with the Port Saint Lucie
5 Sheriff's Department for how long?

6 A Saint Lucie County Sheriff's Office, and, once you
7 become radar certified, there's no recertification process
8 that takes place. So, as long as you keep using it, you're
9 certified. And so -- but I left the patrol division in 1996
10 and I became a detective. So, thereafter, I never used
11 radar.

12 Q When you left the, the Saint Lucie County Sheriff's
13 Department, it was what year?

14 A I left in November of 2009.

15 Q And what was your rank?

16 A I was a detective.

17 Q Okay. And did you then move up here to Landrum?

18 A Yes, sir. So, I left in 2009 because I left the
19 Sheriff's Office, and I went to work for a company called
20 the National Insurance Crime Bureau.

21 Q And what is the National Insurance Crime Bureau?

22 A So, the National Insurance Crime Bureau's a nonprofit
23 organization. It's kind of difficult to summarize it, but
24 probable the easiest things I liken it to is as a -- it's a
25 nonprofit that does, for lack of better terms, they do

1 counseling or they, they offer services in insurance fraud
2 to law enforcement free of charge basically.

3 Q All right. And what do you specifically do for the
4 National Insurance Crime Bureau?

5 A So, currently, today, I serve as director of vehicle
6 operations from the nation, and, in my job or in my role, I
7 oversee all vehicle programs that the National Insurance
8 Crime Bureau does nationwide, and that means that issues
9 that affect vehicles as far as theft, staged accidents, that
10 kind of thing.

11 Q All right. And you've worked for the National
12 Insurance Crime Bureau since 2009?

13 A Yes, sir.

14 Q And when you first got up here, what was your -- when
15 you came up to Landrum from Florida, what was your position?

16 A So, I, I was assigned to north -- western North
17 Carolina as a special agent. So, I worked in the field and
18 I worked -- I covered the whole western half of North
19 Carolina.

20 Q And at the time that you were doing that, and also at
21 the time of this collision that we're here to talk about,
22 you were living in Landrum?

23 A Yes, sir.

24 Q Okay. And tell, tell the jury, you and Shannon, y'all
25 live in the country basically, right?

1 A Yes, sir, we, we live out in the country. Our, our
2 address is Landrum. Not it -- I don't know if you're
3 familiar, but really we live closest to Gowansville up off
4 of Highway 11.

5 Q Okay. And what, what kind of stuff do you and Shannon
6 like to do for hobbies and as a couple?

7 A Well, years ago we use to -- we, we like to -- we're
8 kind of outdoorsy kind of people. We use to do a lot of
9 whitewater rafting. We've gone skydiving. We've gone hot
10 air ballooning. We've gone repelling. I mean if there's an
11 adrenaline sport out there, she's all about doing it.

12 Q Okay. And you said that, that was early on.

13 A That was early on.

14 Q Okay. What do y'all -- y'all live on some---

15 A We---

16 Q ---property?

17 A Yeah, we have a little acreage that -- and so we
18 probably have a couple acres that we maintain now. And so a
19 lot of times we're cutting grass, doing weed eating, you
20 know, kind of maintaining the farm so to speak.

21 Q Okay. And does Shannon or did Shannon -- did Shannon
22 and does Shannon help?

23 A Oh, absolutely. She's pretty much a hands-on
24 country -- I -- what I call a country girl. And so, she's
25 a, she's a little bit different from a typical girl because

1 she likes to -- if -- you make her happy if you give her a
2 weed eater for her birthday as opposed to a piece of
3 jewelry.

4 Q All right. That wouldn't work for most of us.

5 A I understand.

6 Q Okay. So -- but she does yard work and---

7 A well, she did.

8 Q Okay. Does she still do some?

9 A She tries. But she, she can't maintain like she use
10 to.

11 Q what---

12 A I mean her arm gives out.

13 Q All right. we'll talk more about that, but what kind
14 of things did she do before this accident?

15 A So, she would do a lot of weed eating. She would --
16 one of the things she does is we have a big wood fired
17 boiler that we heat our house with. And so we would cut
18 wood and split wood. And she would run the chainsaw and cut
19 the wood, and help run the splitter and stuff like that, and
20 then stack the wood, and, and she -- that's her little baby.
21 She likes to take care of the boiler.

22 Q All right. well, everybody's probably wondering why
23 the screen's dropping down, but I'm gonna show some pictures
24 in a minute if that's all right.

25 But, in any event -- so, at this point -- so, we, we

1 touched on a little bit about the kind of work she, she
2 likes to do, and I'm gonna show the jury a picture of the
3 boiler and stuff like that. But you -- right now your job
4 is -- you're not working out of, of Landrum, are you?

5 A No, when I got promoted to director, one of the things
6 is, because I am in management, I had to go back to our
7 headquarters, and our headquarters is in Chicago. But I
8 don't -- I live part-time in Chicago, but mainly I travel
9 quite frequently. I think I'm up to about 60,000 miles --
10 air miles this year so far. So, I go, I go a lot.

11 So, I'll go to Chicago for a couple weeks. I'll come
12 back to Greenville. I may leave Greenville and go out to
13 take care of work, and then I'll come back to Greenville,
14 maybe go back to Chicago.

15 Q Okay. Now, we're here because of a collision that
16 occurred in November of 2015.

17 Do you remember it?

18 A Yes, sir.

19 Q Okay. And tell the jury where it occurs. They --
20 they've heard, but tell them from your perspective.

21 A So, the collision occurred just past the intersection
22 of Howard Street and Simuel Road.

23 Q Okay. And on -- it's in -- November 19th.

24 What time does it occur?

25 A I, I believe it was just after seven o'clock. I can

1 tell you it was certainly dark. I don't recall the exact
2 time. I know it was probably between 6:30 and 7:00. It had
3 gotten dark. I --.

4 Q All right. Who's driving?

5 A So, it's kind of odd because usually I drive pretty
6 everywhere we go. But, on that evening, my truck had gotten
7 scratched, and I had taken it over to have the scratch
8 repaired, and it was at Circle Auto Body.

9 And so we had left -- we had been at Costcos (sic). We
10 were leaving Costcos (sic) to go pick up my truck, and I
11 just tossed her the keys as we walked out, and said here,
12 you drive so that, when we get to Circle, I'll just get in.
13 You know, I'll, I'll get out, I'll get in the truck, and
14 then we can go on home.

15 Q Okay. So, Shannon's driving. You're a passenger.
16 Correct?

17 A Yes, sir.

18 Q All right.

19 A Front seat.

20 Q Front seat.

21 Okay. All right. So, y'all are heading to Circle Body
22 Shop I believe you said, but you're on Simuel Road.

23 A Yes, sir. So, when we left Costcos (sic), there's a
24 way you can cut through the back way there. You go past the
25 mall, and then you take a right, and you go through the

1 neighborhood, and you come out on the road that there's like
2 a road that parallels Business 85 there. And you can take
3 it down. You go under the underpass. You're on Simuel.
4 You go under the underpass and you come up to the stop sign
5 at the four way stop at Howard.

6 Q Okay. So, the intersection -- I'm showing you what's
7 already been put into evidence as Plaintiff's Exhibit 2.

8 Do you recognize this intersection?

9 A Yes, sir, that's the intersection of Howard and Simuel.

10 Q All right. Now, I'm gonna give you this laser pointer,
11 and I'm gonna let you show the jury where you and Shannon
12 were coming from.

13 THE WITNESS: Can I step down so I can---

14 THE COURT: Yes, sir.

15 THE WITNESS: ---kind of -- okay.

16 THE COURT: Of course you can.

17 MR. CHURDAR: I'm sorry.

18 THE WITNESS: I'm sorry. I don't mean to turn my back
19 on you.

20 So, we came this way on Simuel. This is the stop sign
21 right here at the intersection, and we had just crossed the
22 intersection, and we were right here in this little upside
23 down triangle.

24 Q All right. So, describe the intersection.

25 Is, is that accurate?

1 It is Howard Street?

2 A Yes, sir, it is Howard Street.

3 Q All right. And so Shannon's driving, and does she have
4 her lights on?

5 A Yes, sir, she had her lights on.

6 Q Okay. You guys both were in seatbelts?

7 A Oh, absolutely. I've seen too many instances over the
8 years not to wear a seatbelt.

9 Q Okay. So, y'all are driving up to where Simuel crosses
10 Howard. She comes to a stop sign.

11 Does she stop?

12 A Yes, sir, she comes to a full stop. In fact, she
13 tried -- I'm sorry. She tried to -- she thought she was --
14 needed to turn right here on to Howard, and I said no, no,
15 no, don't turn right. You got to go straight. She's not
16 familiar with where we were going.

17 Q Okay.

18 A And so she continued straight. There, there was maybe
19 a car or two here on Howard. There was nothing coming this
20 way. So, she tried to -- she was gonna turn right, and I
21 said no, no. You got to go straight. So, she, she crossed
22 through the intersection, and I mean shortly thereafter's
23 when we got hit.

24 Q Well, we'll get to that.

25 So -- but when she crossed Howard, we're y'all going --

1 this leads to, to Hearon Circle, right?

2 A Yes, sir, that leads to Hearon Circle.

3 Q So, where were y'all going?

4 A So, Circle Auto Body is -- it's -- it's a little
5 further off the map here, but you would have to go back up
6 Asheville Highway. You'd have to basically come down
7 Simuel, go around Hearon Circle, and go out.

8 Q Okay. In any event, so we're back at the, at the
9 intersection.

10 As she crosses Howard, how fast is Shannon going?

11 A We couldn't of been doing maybe 10 miles an hour.

12 Q All right. Is she in her lane?

13 A Oh, yes, sir. She's definitely in her lane.

14 Q And at that point there's a sharp curve that -- Simuel
15 takes a sharp curve. We can all see that.

16 Right?

17 A Yes, sir.

18 Q Okay. Tell the jury, if you would, she's -- you're
19 sure she's in her lane?

20 A I'm absolutely sure she's in her lane.

21 Q She's going 10 miles an hour or less?

22 A Absolute -- no, no -- fact -- it couldn't of been going
23 any faster. We had just crossed the intersection.

24 Q Okay. Is she a cautious driver?

25 A Very.

1 Q All right. Tell the jury what happened next.

2 A So, we crossed through the intersection there. Just as
3 we started around the curve, I can -- I mean we weren't
4 really even in the curve. I could hear tires squealing, and
5 I look up. In a flash of a second, I look up, and I see
6 headlights coming, and I reached over to grab the wheel and
7 try to pull the car to the right, and we got hit.

8 Q Did you grab the wheel?

9 A I think I did. I, I, I know I reached for it, and I
10 believe I touched it. I don't know if I actually pulled the
11 wheel to the right or not. What I was trying to avoid was
12 being hit head on.

13 Q Okay. But y'all were hit?

14 A Yes, sir.

15 Q Tell the jury, if you would, a little bit about the
16 collision, what you remember.

17 How hard were y'all hit?

18 A Oh, it was a pretty hard hit. So, as soon as we got
19 hit, the car stopped moving. The horn was going off. I
20 opened my -- I, you know, I checked -- I got my door opened.
21 I got out. I was in the -- like I said, I was in the front
22 passenger seat. I got out. I could see that she was -- she
23 had blood on her face. So, I ran around to her -- to the
24 driver's door. I tried to open the door, but I couldn't get
25 the door opened. The door had collapsed into the car.

1 Q All right. Let me stop you there. I'll get back to
2 that.

3 A Okay.

4 Q Let's go back to when you -- when y'all got hit. You,
5 you described how hard it was.

6 Did you remember -- do you remember the noise?

7 A You know, the noise is something that you, you don't
8 really forget, but I mean it -- when I saw the headlights,
9 and I grabbed the wheel, we were hit. I mean it's that much
10 of a split second.

11 We were hit. The noise was -- I mean it's like that
12 people -- you know, people say oh, it sounds like a freight
13 train kind of thing. It's, it's glass shattering, metal
14 crunching. Unfortunately I've heard that noise over the
15 years whether I -- you know, just being a bystander down the
16 street --

17 Q Uh-huh. (Affirmative).

18 A -- from it. But -- so, I heard the noise, and, and we
19 were -- it was already over.

20 Q Can you describe for the jury the force y'all felt?

21 A It was a solid force because the vehicle would -- the
22 other vehicle was going pretty fast.

23 Q Okay. Did you go outside -- did you take pictures of
24 Shannon's car?

25 A Yes, sir, the -- I believe it was the -- I'm pretty

1 sure it was the next day I went over to the tow yard to take
2 photographs -- well, we went -- I went over to the tow yard
3 to clean-up, you know, our personal belongings out of the
4 car because the car was toast quite candidly. But I went
5 over to get -- like I had a pair of sunglasses. We had been
6 out before dark, and I had just raised my sunglass up and
7 stuck them on my head.

8 And so, when I -- when we got hit, I had just left
9 them -- I leave them on my head even after dark so I don't
10 leave them in a car and get up and go to work the next
11 morning without them.

12 So, my glasses had flown off. Her glasses had flown
13 off. She wears prescription glasses. Her glasses had been
14 knocked off in the, the crash. And so I went over to get
15 that kind of personal stuff out of the vehicle.

16 Q So, when you're -- you were there to get personal items
17 out of the vehicle, did you take pictures of the vehicle?

18 A I did.

19 Q All right.

20 A I took pictures of the vehicle.

21 Q I want to show y'all -- all right. Rusty, I want to
22 show you pictures that have already been marked Exhibits 5,
23 6, and 7, and I ask you to take a look at them.

24 A Yes, this is---

25 Q Well, I'm, I'm gonna put them up---

1 A Okay.

2 Q ---in a second.

3 A Okay. These are photos---

4 Q Do you recognize them?

5 A I do.

6 Q Are---

7 A Yes, sir.

8 Q Are those pictures that you took of Shannon's car?

9 A Yes, sir.

10 MR. CHURDAR: Okay. Your Honor, at this time I'd like
11 to show them to the jury.

12 THE WITNESS: Can I see that last one before you walk
13 off --

14 MR. CHURDAR: Sure.

15 THE WITNESS: -- please?

16 I just -- yeah.

17 MR. CHURDAR: Okay.

18 THE COURT: Okay. Counsel, again, these are in by
19 stipulation.

20 Is that correct?

21 MR. COULTER: That's correct.

22 THE COURT: All right. Plaintiffs Exhibits 5, 6, and 7
23 are in without objection. Thank you.

24 (WHEREUPON, Plaintiff's Exhibit Nos. 5 through 7 were
25 received into evidence at this time.)

1 Q All right. First I'm gonna show Plaintiff's Exhibit 5,
2 and is this Shannon's car after the wreck?

3 A Yes, sir, that's her Kia Spectra.

4 Q Okay. Now, was there intrusion into her driving
5 compartment?

6 A Oh, yes, sir. So, you can't -- I mean you can't tell
7 it here, but basically I couldn't get the door opened. They
8 had to -- the fire department had to extricate her from the
9 vehicle, but you can see how much collapse there was in the
10 front fender carrying on through the door, and even in --
11 some in the back-door.

12 Q All right. Let me show you from another angle. I'll
13 show you now Plaintiff's Exhibit 6, and does that accurately
14 reflect the damage you saw from the left side of the car?

15 A Yeah, the door was in a -- the door was closed
16 obviously after, after the collision. But it was crumpled
17 into the vehicle, and the window -- and I, I remember, when
18 I pulled on the door trying to get the door opened, and then
19 I, I thought I'll have to break the window, and then I
20 realized I don't have to break the window. It's, it's gone.

21 Q All right. And I'm, I'm looking here.

22 Did you observe the underside of the, of the, of the
23 dash right here?

24 Was that deformed in any way?

25 A I don't recall, to tell you the truth, if it was

1 deformed. I, I, I don't believe it was. I think most of
2 the damage was contained to the side of the car.

3 Q Okay. How, how -- did you, did you visually -- you
4 visually inspected the intrusion into the driver's door,
5 correct---

6 A Correct.

7 Q ---or the driver's compartment?

8 A Yes, sir.

9 Q How deep was it?

10 A No, it had to be probably 6-inches or more.

11 Q All right. I'm gonna show you now what's been marked
12 as Plaintiff's Exhibit 7, and ask you to take a look at
13 that, and does that also show the damage to Shannon's car?

14 A Yes, sir.

15 Q All right. Now, I believe you were talking about what
16 happened immediately after the -- you can go ahead and bring
17 the lights up. I'm gonna, I'm gonna turn this picture off.

18 Immediately after the impact, and I, I cut you off.
19 So, let's go back to the time of the, of the accident.

20 As, as soon as the, the cars came to rest, where does
21 Shannon's car come to rest?

22 A It was pushed over to the side a little bit. It was
23 right there before you get to where that road forks off, but
24 it was pushed sideways in the road.

25 Q Okay. Is there any noise?

1 A Any noise after the crash you mean?

2 Q Yeah.

3 we're, we're -- you're sitting there. The crash is
4 just happened. The car comes to a rest.

5 A Oh, the horn's---

6 Q what happens next?

7 A The horn's going off. It's just a constant blare for
8 the horn.

9 Q And, and then what happens?

10 You, you started to talk about what you did and I cut
11 you off to---

12 A No, it's okay.

13 Q ---look at pictures of the car. Sorry.

14 A So, I got out of the vehicle. I went around to her
15 side of the vehicle. I tried to open the door. I couldn't
16 get -- I, I -- as soon as I grabbed the handle and pulled on
17 it, I looked at it and realized there's no way I'm gonna get
18 the door opened. So, I thought oh, I'll have to break the
19 window, and I realized there's no window. So, I, I leaned
20 in the car. She had blood all over her face, and my first
21 initial action was basically, you know, I'm trained in first
22 aid.

23 So, I wanted to check ABC's, airway, breathing,
24 circulation. You know, has she been impaled, where's the
25 blood coming from, how bad is she bleeding, that kind of

1 thing. So, that's what I did.

2 Q All right. And---

3 A I assessed -- I'm sorry.

4 Q No, go ahead.

5 A I assessed -- I was, I was basically trying to assess
6 her injuries to see okay, what am I dealing with here.

7 Q All right. Can she talk?

8 A No, she -- I would, I would use the term she was very
9 exasperated in trying to talk. She was complaining of
10 having trouble breathing. She was complaining that she
11 couldn't -- her arm was hurting. She couldn't move her arm,
12 and she was maybe labored might be another way to say it.
13 She was gasping for air.

14 Q Okay. So, did she did -- describe, describe her more.
15 You said she had -- did you say she had blood on her
16 face?

17 A Yes, sir, her face was pretty well covered in blood.
18 She -- again, she was gasping for air, complaining. She was
19 saying what happened, what happened, what happened. She --
20 I suspect she probably momentarily lost consciousness, maybe
21 in a state of shock even, you know, but she, she was not
22 aware even of the crash.

23 Q All right. Did she have glass -- did you---

24 A Oh, she had glass fragments all over her face. She
25 kept saying something's in my mouth. I kept telling her

1 it's glass, quit trying to talk. The -- I -- you know, just
2 stay with me. I didn't want her to go completely into
3 shock. So, I was trying to talk to her.

4 Q Did she have glass anywhere else other than---

5 A Oh, she had it in her hair, in her -- we went the next
6 day and had to go to a -- an eye doctor and she had to get a
7 piece extracted from her eye.

8 Q All right. Does she complain about any pain to any
9 body parts?

10 A Oh, yes, sir. She had pain in her chest, her arm, her
11 shoulder, left shoulder.

12 Q After checking on Shannon, would you tell the jury what
13 you did next?

14 A So, I, I, I checked on her. I turned around to look.
15 I was trying to get my phone out and call 9-1-1. There was
16 a uniform -- I thought he was a uniform road patrol deputy
17 from the Sheriff's Office from Spartanburg, but there was a
18 uniformed deputy there, and I made the comment to him -- I,
19 I could see the other vehicle way over through the
20 intersection.

21 Q Which vehicle?

22 A It was the pickup truck.

23 Q Okay.

24 A It had -- after it had hit us, it had continued on
25 through the intersection --

1 Q Right.

2 A -- past the four way --

3 Q Right.

4 A -- and ended up over on the right shoulder.

5 Q Okay.

6 A And so I said to the deputy, I, I think I said
7 something like that guy must be drunk because he had to be
8 doing between 60 and---

9 MR. BRADSHAW: Objection, Your Honor.

10 MR. COULTER: Objection.

11 A ---and 80 miles an hour.

12 THE COURT: Okay. Sir, when there is an objection, I
13 need you---

14 THE WITNESS: Yes, ma'am.

15 THE COURT: ---to stop speaking.

16 Mr. Coulter.

17 (WHEREUPON, a bench conference was held out of the
18 hearing of the jury at this time.)

19 THE COURT: Okay. That objection is overruled.

20 Mr. Churdar, you may continue.

21 Q All right. So, you're talking to this -- is he
22 off-duty or what?

23 A It turned out to be he said he worked in corrections.

24 Q All right.

25 A He was in uniform though.

1 Q All right. Did he end up working the accident?

2 A No. No, sir.

3 Q All right. Was he just standing off to the side?

4 A I think he may have called, called it in or something.
5 I don't really know to tell you the truth, but he was not
6 the investigating officer, and he -- I -- cause I said to
7 him -- I made, I made the comment and I -- and he said oh,
8 I'm just -- I'm from corrections or maybe he said from the
9 jail and that was it, and I said well, just get us an
10 ambulance and get us a firetruck.

11 Q Okay. And did an ambulance come?

12 A Yes, sir, the firetruck got there first, but then the
13 ambulance came a few minutes later.

14 Q And who got Shannon out of the truck -- the Kia?

15 A The fire department had to extricate her from the car.
16 They had to use the Jaws of Life, and cut her out of the
17 car, and then put her on a backboard, and they transported
18 her.

19 Q Okay. And where was she transported?

20 A Spartanburg Regional.

21 Q Did, did you go with the ambulance?

22 A I did. I rode in the front of the ambulance cause they
23 were assessing her injuries in the back, but we went to
24 Spartanburg Regional.

25 Q All right. Did you ever speak to the man who was

1 driving the truck?

2 A No, sir.

3 Q Did he ever come over to you and ask if y'all were
4 okay?

5 A Oh, no, sir.

6 Q Did you see him at the hospital?

7 A Oh, no, sir, I did not.

8 Q Did anybody at the hospital tell you somebody here's
9 checking on Shannon?

10 A No, sir.

11 Q Did you see him later in Traffic Court?

12 A I -- in, in Traffic Court, I didn't know who he was,
13 but I heard the case get called. We went twice to Traffic
14 Court.

15 Q Was Shannon there?

16 A Yes, sir, she was there both times.

17 Q Was her, was her arm in a sling?

18 A I believe, yes.

19 Q Okay.

20 A I know the first time.

21 Q All right.

22 A But I'm pretty sure the second.

23 Q Did anybody come up to y'all in Traffic Court and say
24 anything?

25 A Other than the trooper, no.

1 Q How many times did, did y'all end up going to Traffic
2 Court?

3 A I believe we went twice.

4 Q And when y'all are going to Traffic Court, is she
5 missing work?

6 A Yes, sir, she's missing work.

7 Q Are you missing work?

8 A Yes, sir, I'm missing work.

9 Q Okay. I want you, if you would, to tell the jury about
10 Shannon's condition in the weeks following this incident.

11 All right. Is she in pain?

12 A She is in pain. So, basically, she lost pretty much
13 the use of her left arm. She could not really -- I mean it
14 was so bad that she couldn't sleep in bed. She had to sleep
15 in a recliner. She couldn't -- she basically couldn't do
16 daily functions. She couldn't curl her hair. I don't know
17 how far along there you want me to go, but --.

18 Q Well, we'll, we'll go as far as we need to for the jury
19 to understand---

20 A Okay.

21 Q ---her situation.

22 A I mean she couldn't put her pants on. She couldn't
23 hardly take her pants off to go to the restroom. She
24 couldn't put her bra on for sure. So, I basically had to
25 help dress her and, and see after her.

1 Q All right. Did you -- was she able to do anything
2 around the house?

3 A Oh, no. She could not do anything with that arm.

4 Q Was she able to do anything to take care of herself?

5 A No. Well, by and large she couldn't -- like I said,
6 she could barely brush her teeth. You know, anything she
7 did she had to do one handed. So -- and she performed a lot
8 of the functions like curling her hair with her, her
9 left-hand. So, she couldn't -- I, I had to shave her legs
10 and shave her armpits.

11 Q Okay. Was she even able to use the bathroom by
12 herself?

13 A Not -- at first, no. She could not -- I mean she -- I
14 had to help her.

15 Q Okay. Was this embarrassing for her?

16 A Oh, I'm sure it was very, very embarrassing for her.

17 Q All right. And how long -- and, and I assume she was
18 out of work?

19 A Yeah, she was out of work.

20 Q Let's talk about initially.

21 A I believe a week or two. I don't really recall off the
22 top of my head, but I know for at least a week she was out
23 of work for --.

24 Q All right. And when she went back to work, did you
25 have to be involved in that?

1 A Yeah. So, she could not drive herself to start with,
2 and, one, we had her car and I have a great big huge truck,
3 and -- like an F350. So, she didn't want to have to try to
4 muscle that around on one hand. So, I drove her -- I would
5 drive her -- from where we live to where she works is about
6 45 minutes.

7 I would drive her to work and drop her off and then I
8 would go to work up in North Carolina, and then I would
9 come -- Ash -- around Asheville area or wherever I may be
10 going, and then I would come back in the afternoons and pick
11 her up and drive her home.

12 Q And this went on for how long?

13 A Probably a solid month.

14 Q All right. You mentioned she was sleeping out in
15 the -- a recliner, affects her sleep.

16 Was she getting sleep from your observation?

17 A Not much. She was not getting much sleep, and she was
18 in pain trying to sleep. So, she would, you know, she
19 would -- what -- the phrase I would use was catnap. She
20 would catnap in-between having to get up, and walk around,
21 and then get back in the chair.

22 Q All right. Let's talk about a, a few months after the
23 injury, and then we'll start talking about what's, what's
24 going on right now.

25 A few months after the injury -- well, let me ask you

1 this.

2 Did you miss work during this time yourself?

3 A Yes, sir, I took the week immediately following the
4 crash off --

5 Q All right.

6 A -- to be with her, and then, later on, when she had
7 surgery, I had to take time off.

8 Q All right. And when she had the surgery, we'll get --
9 this is just in case I forget that later.

10 A Yeah.

11 Q How much time did you take off then?

12 A I took another week off I believe.

13 Q All right. Now, a couple of months after this
14 accident, is she still in pain?

15 A Oh, yeah, the pain continued even past the surgery.

16 Q All right. Well -- and we're not even to the surgery
17 yet, but I'm talking about leading up to that, is she still
18 in pain?

19 A Yes, sir, she's still in pain.

20 Q Is she able to use her left arm?

21 A No, no. She could barely lift her arm.

22 Q Okay.

23 A In fact, they told her not to -- they, they don't want
24 you to freeze it, and not be able to use it. But she had
25 very limited mobility with that arm.

1 Q Okay. Still affecting her sleep?

2 A Yes, sir, she slept in that chair for probably at least
3 a year.

4 Q Okay. How about -- I mean this is a couple months
5 later.

6 This -- all this yardwork you're talking about, the
7 weed eater that you gave her for your anniversary, is she
8 able to use that?

9 A No.

10 Q Okay. You mentioned the boiler. I'll -- I'm gonna
11 show the jury a, a picture of something I find kind of
12 interesting when I came to your, your house. I'm gonna show
13 you Plaintiff's Exhibit 8.

14 Okay. Take a look at that.

15 Do you recognize that?

16 A Yes, sir, that's the boiler.

17 Q All right. I, I was wanting the jury to see the
18 boiler.

19 THE COURT: Any objection by counsel?

20 MR. CHURDAR: Oh, I'm sorry.

21 MR. BRADSHAW: No objection, Your Honor.

22 MR. COULTER: No objections.

23 THE COURT: All right. Thank you. Plaintiff's Exhibit
24 No. 8 in without objection.

25 (WHEREUPON, Plaintiff's Exhibit No. 8 was received into

1 evidence at this time.)

2 THE COURT: Yes, sir.

3 Q All right. So, you, you, you referred to this.

4 what's this boiler all about?

5 A So, basically what we use it for is it's kind of a
6 cheaper way to heat your house. We, we, we use to take
7 our -- kind of collect our own wood off our property and
8 stuff like that, cut it up, split it, and burn it in the
9 boiler. It's---

10 Q Right.

11 A It's the same principle as if you lived up North and
12 you had an oil boiler, you know, or in a big building where
13 it heats water and then the heated water goes in the house,
14 and then it blows the hot air throughout the house.

15 Q All right.

16 A But we just use wood.

17 Q Okay. But this boiler is what y'all -- we can go ahead
18 and bring the lights up.

19 Y'all use that boiler for, for heating the house?

20 A Correct.

21 Q Okay. And so this accident happened in November. So,
22 you're going through the winter -- bring the lights up
23 please.

24 You're going through the winter, and who, who did the
25 bulk of the cutting the wood for the boiler?

1 A Well, I tried to keep up, but it's not -- it's really
2 not a one man job to be honest. I mean, when you're working
3 all the time, it's kind of hard to keep up with all that
4 stuff. And so sometimes we just couldn't even use the
5 boiler. We had to just go -- we relied on the old fashion
6 electric heat in the house, which wasn't the same.

7 Q Okay. But did Shannon herself, before this accident,
8 she cut wood?

9 A Yeah. So, the boiler was a thing back when her father
10 was alive that her and her, her dad use to do, and I think
11 it has sentimental value to her. And so, she -- that was --
12 kind of like I said earlier. That's kind of her baby. She
13 saw after it, takes care of it, that kind of thing.

14 Q Does she have equipment for the wood, chainsaws and
15 stuff?

16 A Yes, sir, she's got a -- I think she owns at least two
17 chainsaws herself, not including the ones I own.

18 Q All right.

19 A And we have a splitter and some other things.

20 Q Okay. So, during this time, she's not able to do any
21 of that?

22 A No, sir.

23 Q Okay. Now, let's talk about now.

24 Does Shannon -- can she fully use her left arm?

25 A No, sir, she can not. So, back to the weed eater. If

1 she goes out and wants to do anything like that -- she, she
2 can't run a chain saw. That's a little probably -- I don't
3 know. Too much vibration or something like that. But if
4 she tries to weed eat or something like that, she, she
5 can't -- she doesn't have the stamina. She can do it for a
6 few minutes and -- but she's done.

7 Q All right. How about her ability to move her arm
8 fully?

9 A She, she does not have what I would call full mobility
10 of her arm.

11 Q Her -- why, why do you say that?

12 A Because she has a lot of issues. Something, you know,
13 like your notebook, if she tries to carry it, her muscle,
14 will start -- you can visibly see it starting to switch, and
15 she just doesn't have that strength or that mobility to be
16 able to pick up and carry something as simple as a laptop
17 opened, holding it out like this.

18 Q Okay. Well, we'll hear more from her about that.

19 Are you aware that she does use a laptop for her work?

20 A Yes, sir.

21 Q And how, how does she do that?

22 A She's a nurse practitioner, and so they chart on their
23 laptops.

24 Q All right. I understand. I'm asking you how she uses
25 a laptop---

1 A Oh.

2 Q ---if she can't carry one.

3 A Well, what she has to do is she has to -- I think she
4 has to either get her assistant or whatever to help her move
5 it from room to room or she has to fold it up and tuck it up
6 under the other arm and carry it.

7 Q Her right arm?

8 A Yes, sir.

9 Q Okay. Does she, does she still have pain as, as, as
10 you've observed it?

11 A Yes, sir, she still has pain.

12 Q All right. Tell the jury about that.

13 How do you know?

14 A So, I mean, again, it's -- she's limited -- she's,
15 she's not the same person that she use to be. There's
16 things that she just simply can not do today. Back to the
17 boiler, no, she -- we just -- we barely use it. I mean we
18 buy wood today, already cut up in order to use it in the
19 boiler, which costs a lot more money than what it use to.

20 Q Okay. How else do you know she has pain?

21 A She'll tell me when she's hurting, and I can see her
22 arm hurting her at times. And, again, she was an outdoorsy,
23 farm kind of girl. She doesn't do those things any more,
24 and we don't do a lot of the other fun activities we use to
25 do. No more, you know, whitewater rafting, that kind of

1 stuff.

2 Q How about her strength in her left arm?

3 Has that been affected?

4 A Oh, yes, sir, it has. I mean again she -- you know, to
5 carry a tray or pick something up, and put something up over
6 your head, she, she doesn't have that mobility or that
7 strength anymore.

8 Q Have you seen a change in her level of energy?

9 A Oh, absolutely.

10 Q Tell the jury about that please.

11 A So, you know, again, we use to be pretty active. She
12 was very active today. A lot of times -- she, she can't
13 ride hardly from here to, to our house without falling
14 asleep in the car, and she, like I said, she sleeps in
15 stages so to speak, you know. She tries to sleep in a bed
16 now. She's largely uncomfortable. She probably sleeps
17 better sitting upright than she does laying down.

18 Q How -- does she still go out to the recliner?

19 A Yeah, she'll sleep in the recliner probably a couple
20 nights a week. Sometimes she'll go out there and sleep.

21 Q Okay. Has all of this affected y'all's relationship?

22 A Yes, it has. I mean we're -- a lot of, like I said, a
23 lot of things we use to enjoy doing we don't do. A lot of
24 the things we used to do as a married couple we don't do.

25 Q All right. And I'm not gonna get into detail, but has

1 it affected your, your level of intimacy with her?

2 A Yes, sir, it has.

3 Q All right. Has her condition improved?

4 A From what point?

5 From the---

6 Q Well obviously from the wreck.

7 A Yeah, it's improved a little, but it's, it's no where
8 as close to what it was before the wreck.

9 Q Okay. In, in your view, in your observations, has it
10 stabilized meaning has it changed?

11 A Has it -- yeah, I mean I, I think it is definitely
12 changed. I'm not sure exactly from what point in time, but
13 --.

14 Q Okay. Is, is it -- I guess what I'm saying is has it
15 plateaued?

16 Is she getting worse or getting better right now?

17 A No, it's plateaued. She's does -- she does not seem to
18 be getting -- I don't know that it can get better, to be
19 honest. I'm not a medical person. I've not seen any
20 improvement in the last couple years really.

21 Q All right. Now, you have heard one of these
22 witnesses -- one of these Defendants, Mr. McGee, testify
23 that he pled guilty.

24 A Yes, sir.

25 Q All right. And did you learn that he paid a fine?

1 A I did later, yes, sir.

2 Q And do remember that it was \$82.00?

3 A That sounds correct, yes, sir.

4 Q How does this make you feel?

5 A Well, I feel like, quite honestly, that the system has
6 let us down. I mean Shannon and I had gone out for dinner
7 that evening. We, we had gone to dinner. We'd gone to
8 Costcos (sic) to get a couple things. We were headed over
9 to pick up my truck. By and large, we were not doing
10 anything wrong. We were in our lane. We weren't speeding.
11 We were doing nothing wrong when we became a victim, and I
12 believe, maybe because of my background, that the system
13 would take care of things like that.

14 It didn't. It let us down. He got one ticket. One.

15 Q All right. I don't have any further questions. Please
16 answer questions -- any questions that the defense -- the
17 defense counsel would have for you.

18 THE COURT: Yes, sir.

19 MR. COULTER: Thank you, Judge. Briefly.

20 THE COURT: Mr. Coulter.

21 MR. COULTER: Thank you. Yes.

22 CROSS-EXAMINATION

23 BY MR. COULTER:

24 Q Good morning.

25 A Morning. It's a -- good morning.

1 Q Good.

2 You're, you're actually 53 years old, correct?

3 A Yes, sir.

4 Q Okay. You and I are the same age.

5 Your wife is 52?

6 A Yes, sir, she's a year younger.

7 Q Okay. Now, you made a comment before about being at
8 the accident scene, and saying that guy's is -- must be
9 drunk.

10 You remember saying that?

11 A Uh-huh. (Affirmative).

12 Q Okay. Of course, he wasn't?

13 A Uh-huh. (Affirmative).

14 Q You understand that, right?

15 A Yes, I understand that. There was a second part of
16 that. No, I said he was doing between 60 and 80.

17 Q That was my question though. My question was about
18 whether or not he was drunk, and he wasn't, was he?

19 A Well, I don't -- I mean I was told he wasn't. I don't
20 know.

21 Q Okay. You don't have any evidence that he was?

22 A No, sir.

23 Q Okay. And, of course, you don't have any understanding
24 to what he was thinking about when all this happened, do
25 you?

1 A No, sir.

2 Q Okay. Now, it's correct that there was an officer on
3 the scene just about immediately, correct?

4 A If you're talking about the, the deputy from
5 Spartanburg.

6 Q Sure.

7 A Yes.

8 Q Yeah.

9 Okay. And he showed up right -- he was right there
10 right then almost right after the accident occurred?

11 A Yeah, I mean I -- after I checked on her, when I turned
12 around and looked, he was standing there.

13 Q Okay. And you don't -- did you see him talk to Mr.
14 McGee?

15 A No, I didn't see him talk to anyone.

16 Q Okay. You don't deny that he might have talked to
17 Mr. McGee?

18 A Well, again, I don't know. I didn't, I didn't see him
19 talking to anyone.

20 Q Well, I understand that. That's what I'm saying.

21 You don't deny that that officer could of talked---

22 A I'm not denying that, no.

23 Q Okay. And, and you don't deny that that officer may of
24 told Mr. McGee not to have any contact or come over to your
25 vehicle?

1 A I would have no idea what that officer told him.

2 Q Okay. Because your attorney asked about whether or not
3 my client came over. You don't know if he was told not to
4 go over.

5 A No.

6 Q Okay. All right. And, of course, your wife went to
7 the hospital, and fortunately she was discharged that, that
8 same night basically?

9 A No. Well, it was the next morning.

10 Q Right. But the same general timeframe.

11 A No, I wouldn't say it was the---

12 Q Okay.

13 A ---the same general timeframe. I mean the accident
14 occurred around 7:00, and I think we left the hospital
15 somewhere around 2:00AM.

16 Q Okay. And you don't deny that my client may have come
17 to the hospital, right?

18 A Well, I -- no, I wouldn't -- have no idea. I can tell
19 you I didn't see your client at the hospital.

20 Q I understand that, but you were asked, on, on direct
21 examination, about whether or not anybody came to the
22 hospital.

23 My question to you is simply you don't deny that my
24 client may have come to the hospital?

25 A No, I don't deny that.

1 Q Okay. Very good.

2 Now, as far as the, the job that you've gotten
3 recently, that actually takes you away from Landrum for
4 large periods of time, correct?

5 A I'm out a couple weeks and I come back for a week,
6 maybe two, depending on my travel schedule.

7 Q And I just recall reading in your deposition that you
8 estimated that you're out of Landrum approximately 60
9 percent of the time.

10 A That may be right, yeah.

11 Q Okay.

12 A If you add it all up, correct.

13 Q Okay. All right. So, that leaves your wife at home
14 doing most of the things she needs to do on her own?

15 A Correct.

16 Q Okay. All right. And your wife is a nurse
17 practitioner?

18 A Yes, sir.

19 Q Okay. And she works that full-time?

20 A Yes, sir.

21 Q All right. Not only does she work that full-time just
22 in the office, she's got an awful lot of work that she does
23 for that job out of the office, right?

24 A That's correct.

25 Q Okay. So, she works long hours?

1 A That's correct.

2 Q Okay. All right. And, matter of fact, she works such
3 long hours she's not even able to do any type of gym
4 exercising or any of that because of the long hours that she
5 works?

6 A Well, I, I don't know about that. I mean --.

7 Q Okay.

8 A We don't own a gym membership if that's what you're
9 asking.

10 Q That's okay. I'll ask her about that.

11 A Okay.

12 Q Okay. I just wasn't sure if you knew or not.

13 As far as the, the timeframe that your wife was out of
14 work, just to be sure, your attorney's already submitted an
15 exhibit, and it suggests that your wife was out of work,
16 initially, for eight days after the accident.

17 A That sounds about right.

18 Q That sounds about right.

19 Okay. And then, after the surgery, it appears that she
20 was out for, it looks like, about two weeks.

21 Does that, that sound about right?

22 A That sounds about right. I don't remember exactly.

23 Q So, after the eight days, the initial eight days, she
24 was then able to go back to work full-time?

25 A She went back to work correct, yes, sir.

1 Q Well, it was full-time, correct?

2 A Yes, sir.

3 Q Okay.

4 A I think it was on light duty or something.

5 Q I, I understand.

6 But, but it would of been the full 45 and a half plus
7 hours that she worked?

8 A I don't, I don't know if 45 and a half hours is correct
9 because Thursdays is a half day for her.

10 Q Sure.

11 A So --.

12 Q But that's, that's always the case, right?

13 I mean she would take half days on Thursday before the
14 accident, right?

15 A Right, right, right. But I'm saying I don't know that
16 that calculates out. You're saying 45 and a half hours. I
17 don't know how you get 45 and a half hours if you take four
18 hours off on four -- one day out of five. So --.

19 Q I'm sorry. I just remember trying -- reading the
20 deposition.

21 A Oh.

22 Q Bottom line is, when she went back to work, she went
23 back to work full-time?

24 A She went back to work full-time, that's correct.

25 Q Okay. Now, only after the eight days after the

1 accident, but the two weeks after the surgery she went back
2 to work full-time?

3 A Yes, sir.

4 Q Okay. And, obviously, you're not there helping her
5 during the time that she's at work?

6 A No, she wouldn't want me there.

7 Q Sure.

8 A I wouldn't make a good medical person.

9 Q Got you. Thank you.

10 THE COURT: Mr. Bradshaw.

11 MR. BRADSHAW: Yes, ma'am.

12 CROSS-EXAMINATION

13 BY MR. BRADSHAW:

14 Q Good morning, Mr. Russell.

15 A Good morning.

16 Q I'll take you back to the accident. You testified that
17 you and your wife, you drove in a Kia on Simuel Road. You
18 just passed that Howard, Howard Street intersection---

19 A Yes, sir.

20 Q ---correct?

21 And you testified that, just before the accident, you
22 saw a set of headlights coming at you, right?

23 A Yes, sir.

24 Q Okay. And I believe you testified, and you say in your
25 deposition, you only saw one set of headlights coming at

Darrell Russell - Cross-examination
By Mr. Bradshaw

1 you, right?

2 A That's correct.

3 Q Okay. And those headlights were from the truck of
4 Clary McGee, correct?

5 A That's correct.

6 Q Okay. And you didn't see any other headlights coming
7 at you prior to that, did you?

8 A No, sir.

9 Q Okay. And the only vehicle that impacted you and
10 Mr. Green's vehicle was the truck of Clary McGee, right?

11 A Yes, sir.

12 MR. BRADSHAW: Okay. No further questions.

13 MR. CHURDAR: No redirect.

14 THE COURT: Okay. All right. So, Mr. Russell, you may
15 step down, sir.

16 THE WITNESS: Thank you, ma'am.

17 THE COURT: Watch your step.

18 MR. CHURDAR: Your Honor, at this time I'd call Shannon
19 Green.

20 THE COURT: Yes, ma'am, please come forward.

21 SHANNON GREEN, being first duly
22 sworn, testified as follows:

23 THE COURT: Ma'am, watch your step. Make yourself
24 comfortable.

25 All right. And, if you will, say your full name

Shannon Green - Direct examination
By Mr. Churdar

1 spelling your last.

2 THE WITNESS: Shannon Pamela Green. G-R-E-E-N.

3 DIRECT EXAMINATION

4 BY MR. CHURDAR:

5 Q All right. Shannon, how are you doing?

6 A A little nervous.

7 Q Okay. I'm gonna ask a little bit about your
8 background, and just kind of let you warm up.

9 Is that right?

10 A Yep.

11 Q Okay. First of all, where did you grow up?
12 Tell the jury please.

13 A I was born in Virginia, but I grew up in Fort Pierce,
14 Florida.

15 Q All right. And do you have brothers and sisters?

16 A I have one brother.

17 Q And tell me a little bit about your family.

18 A I -- my mother and father, Bill and Pamela Green. My
19 father's deceased. He died in 2011, and my brother is three
20 years older than me. His name's Dennis Green.

21 Q Okay. And your mother, do you see her very often?

22 A Yes, every day.

23 Q All right. So, y'all live together?

24 A Yes.

25 Q Okay. Does -- she live -- you guys have like a, a two

1 level living situation?

2 A We have a two level living situation. When we moved up
3 from Florida, the house was built for all of us so that we
4 all moved as a family. My mom, at that time, my mom and dad
5 and I lived upstairs, and Rusty was upstairs also with me,
6 and my brother and his wife and three kids lived downstairs.
7 At one point, after my grandmother got sick, she moved in
8 with us also.

9 Q Okay. And, at this point, you and your mother still
10 lived together and Rusty still lives in --

11 A Yes.

12 Q -- Landrum with y'all when he's here?

13 A Yes.

14 Q Okay. Did you go to high school in Fort Pierce?

15 A I went to high school in Fort Pierce and in Apopka,
16 Florida. I went to Palm Vista Christian School and -- for
17 ninth and tenth grade, and then eleventh and twelfth I went
18 in Apopka, Florida. It was a boarding school.

19 Q Did you graduate from high school in Apopka -- it's
20 Apopka?

21 A I believe it's called Altamonte Springs where the
22 school actually sits, but the biggest city around I guess
23 would be Apopka.

24 Q All right. Now, the jury has heard that you are a
25 nurse practitioner.

1 A Yes.

2 Q When did you decide that you wanted to become a
3 nurse -- well, I guess you started off as a nurse?

4 A I worked as a nurse first, yes.

5 Q All right. Did you decide you wanted to be a nurse
6 when you were a child?

7 A No.

8 Q When did you decide that and how?

9 A Probably when I was around -- when I decided to be a
10 nurse was later I suppose. I initially thought I was gonna
11 be an attorney because my mother is a court reporter.

12 Q Okay.

13 A And I had been around them, but she says nah, you don't
14 want to do law, and then, when I was diagnosed with Type I
15 diabetes at age 11, right before my 12th birthday, I decided
16 I needed to find a cure for myself, and all the other kids.

17 Q Okay. And that's what motivated---

18 A That's when -- I, I was really motivated to be a
19 doctor, but, in school, it was just like this is so much --
20 I had a cousin who was a nurse who said well, you'll be in a
21 hospital faster if you're a nurse. You'll get more
22 experience, and then I fell in love with nursing when I
23 started school to be a nurse.

24 Q All right. Where did you start school to be a nurse?

25 A At Southern College of Seventh Adventist.

1 Q And where---

2 A It's now called Seventh -- Southern Adventist
3 University.

4 Q And that's located where?

5 A In College Dale, Tennessee. It's famous for the Little
6 Debbie snack cakes.

7 Q Okay. Good to know.

8 Now, so you, you studied at that, at that school, the
9 Seventh Adventist University---

10 A Uh-huh. (Affirmative).

11 Q ---to become a nurse.

12 A Yes.

13 Q And did you leave with an RN?

14 A Yes, I left with a Bachelor's in Nursing as a
15 registered nurse.

16 Q And did you start working as a nurse?

17 A Yes.

18 Q What areas did you work in, like medical areas did you
19 work in as a nurse?

20 A I worked in a cardiac unit. It was a cardiac step down
21 unit more like telemetry when they're monitoring your heart
22 initially, and then I moved to be a -- surgical intensive
23 care unit.

24 Q Okay. And did you get additional education and
25 training after getting your RN?

1 A Yes, there was additional training, and I went to --
2 through courses for being certified in critical care, and as
3 well as then, in 19 -- I'm sorry. I can't remember---

4 Q Approximately. That's fine.

5 A Approximately. In the 1990s I, I decided I wanted to
6 move on to do a higher level of nursing.

7 Q Okay. And what -- what did you get as far as training
8 and education goes for that?

9 A I -- when -- I got an acture care nurse practitioner
10 degree.

11 Q All right. And did that involve a, a, a Master's
12 Degree?

13 A Yes, my Master's Degree came from University of
14 Phoenix, and then I went to University of South Carolina for
15 the acute care nurse practitioner program.

16 Q And other than that, have you had any other education
17 or training?

18 A Well, there's continuing education all the time in
19 nursing.

20 Q All right. Well, let's not get into that.

21 A Okay.

22 Q All right. So, where do you work?

23 A Right now I work at Internal Medicine and Diagnostics
24 Clinic. It's at Millennial Building in Greenville, South
25 Carolina.

1 Q And, and how long have you worked there?

2 A I've been with Doctor Anderson there since I believe
3 that was 2007.

4 Q Do you enjoy your work?

5 A Oh, yeah, some parts of it are obviously not enjoyable.
6 That's that computer, charting, documentation.

7 Q All right. What is it that you enjoy about your work?

8 A I really enjoy teaching the patients, and helping them
9 with controlling their disease processes. I really enjoy
10 connecting with them.

11 Q All right. What do you do in your free time when
12 you're not working?

13 Do you work full-time?

14 A Yeah, I work full, full-time.

15 Q Okay. And, and Mr. Coulter was asking about that.
16 Before this accident you worked full-time, correct?

17 A Yes.

18 Q Before the accident.

19 A I've always worked full-time.

20 Q All right. And, and you're working full-time there
21 now, correct?

22 A Yes.

23 Q All right. What types of things do you enjoy doing in
24 your free time?

25 A I love being out in the yard. That's always been my

1 thing. I love mowing the grass. I love trying to keep a
2 nice flower bed, I guess that's what you call it, flower
3 bed, garden. I think I like the word flower bed. I don't
4 grow food.

5 Q All right. And Rusty was telling us y'all live in the
6 country, in Landrum?

7 A Yes.

8 Q Actually Gowansville, but you have a Landrum address,
9 right?

10 A Yes, it's the closest post office. As we were told,
11 that's the name they gave us.

12 Q All right. I want to take you to November 15, 2000,
13 excuse me, November 19 of 2015. It's about 7:00PM. We've
14 already heard Rusty testify basically about what happened.
15 So, we're not gonna beat that dead horse and go into a lot
16 of detail there.

17 But, just to be clear, you, you were wearing your
18 seatbelt, correct?

19 A Absolutely.

20 Q You were in your lane, correct?

21 A Yes.

22 Q How fast were you going?

23 A I had just cleared the intersection, and I estimate
24 five to 10-miles an hour. I, I don't really look at the
25 speedometer when I'm taking off --

1 Q Okay.

2 A -- from a stop sign.

3 Q And you had come through the intersection. We've
4 already shown the jury that. You've come through the
5 intersection of Simuel Road and Howard Road, and you're
6 going to take a sharp left onto Simuel Road, correct?

7 A Yes.

8 Q And you guys were going to Hearon Circle yourself,
9 right?

10 A Yes.

11 Q Okay. What do you remember after that?

12 A I remember coming to. The horn was blaring. The -- I
13 had glass in my mouth. I could feel it. It was grinding
14 between my teeth. I couldn't breathe. I hurt. I couldn't
15 move my arm. I thought I had broken the collarbone or
16 something else. I wasn't exactly sure, but I couldn't lift
17 like a shoulder shrug.

18 I could not lift my arm. I could feel my fingers. So,
19 I knew that I wasn't paralyzed in the arm, and breathing was
20 very hard cause of the chest, the chest pain that came with
21 that.

22 Q All right. I want to stop you for a second.

23 Did you lose consciousness?

24 A I think I did because I don't remember -- I don't -- I,
25 I didn't hear the impact. I, I don't remember the impact.

1 So, I believe I probably lost consciousness. I just -- it
2 was quite a cloud. I, I don't recall hearing it at all.
3 So, I don't remember it.

4 Q Do you remember seeing the vehicle that hit you?

5 A No.

6 Q Do you remember seeing any lights?

7 A I was going through an intersection and further ahead
8 of me I saw a light. I think it was a street lamp though.
9 I don't think it was a light of a car.

10 Q Okay. Do you remember being -- you don't remember
11 being hit?

12 A No.

13 Q And you have no memory of the collision at all?

14 A Well, only---

15 Q I mean---

16 A ---after.

17 Q ---the actual collision.

18 A No.

19 Q Okay. Let's go back to after the collision. You've
20 regained consciousness. You said the horn is blaring.
21 Glass in your eyes and mouth. Can't move your left arm.
22 Trouble breathing.

23 What happens next?

24 A I couldn't see either. I was asking my husband what
25 happened. It was very painful to breathe. The seatbelt was

1 still across me, and I, I, I remember not being able to
2 breathe the most. That really worried me because of working
3 in the surgical intensive care unit. I thought oh, my gosh,
4 I'm gonna get ready to get intubated when they get here.
5 That thought that -- did cross my mind. I was scared to
6 death.

7 Q All right. Intubated meaning what?

8 A Put a tube down your throat, into the trachea to
9 breathe for you.

10 Q Okay. And, and you didn't want that?

11 A No, sir.

12 Q All right. Now, did you -- did Rusty -- do you
13 remember when Rusty came around trying to open the door?

14 Do you remember any of that?

15 A I remember he came around to the side of the car and
16 was trying to open the door. I know he told me he couldn't
17 open it. Well, that's something that he and I have always
18 joked about a little bit. I hate to be trapped, and that
19 was, you know, he -- I think he said don't think about it or
20 something. I don't know. I know I was feeling trapped. I
21 felt really nervous. I was -- I couldn't breathe. I
22 thought I was -- I felt like I was going to die.

23 Q You said that, that -- do you remember when the EMS
24 arrived?

25 A I remember somebody arrived yes, but, obviously, I

1 remember somebody helped me get out of that car.

2 Q And they put you on a backboard?

3 A Yeah, that was kind of a -- post-wreck. I think of it
4 as -- you know, I think I had to help them by getting myself
5 partially onto that board. But, yeah, I remember a
6 backboard. I remember being fastened down to it, and they
7 had a strap across my forehead. They had me in a cervical
8 collar, the blocks to prevent your neck from moving.

9 Q All right. And you were taken to Spartanburg Regional?

10 A Yes.

11 Q You -- what did -- just generally what did they do for
12 you at Spartanburg Regional?

13 A Well, at Spartanburg Regional, the -- I suppose it was
14 the ER doctor that was talking to me, was asking me where
15 the injuries were, where was I having, having pain, and he
16 told me I was gonna go for a CAT Scan. That was also a
17 concern of mine, but I, I remember that, and -- what sticks
18 out in my mind is I remember they asked me when I had my
19 tetanus -- last tetanus shot, and it was just two nights
20 before cause a co-worker was anticipating having a baby, and
21 she says it's the last three weeks. Go get your TDAP, which
22 is the Pertussis vaccination, so you can be around a little
23 baby.

24 Q So, you were there, and, and, obviously, with your
25 training, probably had some general idea what was going on

1 around you?

2 A Yes.

3 Q Okay. How long were y'all there?

4 A I think it was around 2:00AM when we left.

5 Q All right. And you guys went home?

6 A Yes.

7 Q You -- were you able to sleep that night?

8 A Not very well.

9 Q How did you try to sleep?

10 A I tried to lay down in the bed. I can remember I did
11 get laid down, and I remember, the next morning, I -- Rusty
12 had to help me get out of the bed because I couldn't really
13 move. I, I don't even know what my position was. I just
14 know I could not get out of that bed.

15 Q During the following weeks, how did you, how did you
16 do?

17 You, you heard Rusty talk a little bit about it, and I
18 don't want to go into a lot of detail now, but, just
19 generally, how were you doing?

20 Were you able to take care of yourself?

21 A No. As he said, he had to take me to the bathroom and
22 pull down my pants so I could go to the bathroom. I, I
23 could not use my left arm to get my pants unbuttoned. I put
24 on sweatpants. So, he still had to pull them down because I
25 couldn't push down with my left arm.

1 Q All right. But -- for, for that first week or two,
2 were you -- I'm just curious how you would describe your
3 condition.

4 A I was, I was very sore. In fact, I was given a
5 prescription for pain medicine, which I -- I'm absolutely
6 opposed to taking cause it usually makes you nauseated or
7 constipated, but I had to take it cause I hurt that bad, and
8 I never would of taken it before. He had a quick lesson in
9 how to use the curling iron, and had to kind of fix my hair.
10 For the first two to three weeks, there was no bra because
11 I -- it went around me. You know, a bra goes around you
12 obviously, but I fractured two ribs as well, and that was
13 very uncomfortable to wear a bra.

14 Q All right. Did you go to your family doctor?

15 A Yes, I did.

16 Q And that is whom?

17 A Doctor Cassandra Bray.

18 Q Okay. And when you went to see her, did you tell her
19 about all of your issues and problems?

20 A Yeah.

21 Q Did you tell her about your left arm?

22 A I told her about my left arm.

23 Q All right. And what did she do for you?

24 A Well, I had -- I mean I already had some pain medicine
25 used, but I think she -- I'm not sure if she actually

1 ordered any x-rays or anything at that time. I can't
2 recall. I know that I was there to follow-up, and then I
3 wound up still hurting, and it was the weekend, and I went
4 to a walk-in clinic that we have at St. Francis.

5 Q All right. Were you still complaining about your left
6 shoulder?

7 A Yes.

8 Q Had you had any kind of report about what was wrong
9 with your left shoulder?

10 A Not at that time.

11 Q Did you know what was wrong with your left shoulder?

12 A I was concerned because I couldn't lift it. I was
13 concerned that I had torn the rotator cuff, but I was not
14 sure exactly what it was. The arm was bruised from the top
15 of the shoulder all the way down to the elbow. The, the arm
16 was considerably more swollen, and well, I should say
17 swollen, and I would of estimated up to one and a half times
18 of my right arm.

19 Q Okay. Did Doctor Bray end up referring you to a
20 specialist?

21 A Yeah, I went to an orthopedic physician, but -- and you
22 got to understand that orthopedic specialty is you can go to
23 one special -- they kind of subspecialize underneath
24 orthopedics. So, I had an appointment with one for my back
25 that was also hurting as well as a, a guy for the shoulder.

1 Q All right. Let me stop you a second cause I hadn't
2 done a really good job of letting you tell the jury what was
3 bothering you.

4 So, you've talked about your left shoulder, correct?

5 A Uh-huh. (Affirmative).

6 Q You talked about your left side?

7 A Uh-huh. (Affirmative).

8 Q You just talked about your back, and I hadn't even
9 asked you about that.

10 A Yeah, the -- right between the shoulder blades I was
11 having this intense pain, and that it was, you know, if I
12 tried to roll my shoulder backwards or if I moved, I could
13 feel them. When I laid down, it was worse. When I was
14 sitting up -- I couldn't get comfortable just sitting or
15 anything.

16 Q All right. So, you said you went to the orthopedic
17 doctor, and you saw one doctor for your shoulder?

18 A Yes.

19 Q And one doctor for your back?

20 A It was a nurse practitioner for my back.

21 Q All right. But was the nurse practitioner, just
22 looking at the records, she was working with which doctor,
23 which doctor?

24 At, at---

25 A I'm not sure of her attending at that time who she's

1 actually assigned under.

2 Q All right. So, who, who treated your left shoulder?

3 A Doctor Cook.

4 Q And who treated your back?

5 A Jaime Elliotte.

6 Q All right. And did -- what did Doctor Cook end up
7 doing for your left shoulder?

8 A Well, initially I had an injection right under where
9 you feel your shoulder go up at that bicep tendon because,
10 after examining me, he was concerned that the bicep tendon
11 tore. He gave the initial injection underneath this point
12 in your shoulder.

13 Q Okay.

14 A And the second injection was approximately three to
15 four weeks later. It, it -- he said -- he described it as
16 being diagnostic and seeing which was the worst part of the
17 shoulder injury. He gave a shoulder -- I sat in front of
18 the fluoroscopy machine, which is the x-ray that shows you
19 like what's going on, and put the needle straight in as
20 opposed to coming into the shoulder joint from a different
21 approach. He wanted to make sure it was in the joint.

22 Q Okay. So, you had these injections?

23 A Yes.

24 Q You had two of them?

25 A Yes.

1 Q All right. Did they help?

2 A They help for a short time.

3 Q All right. Did you end up finding out what was wrong
4 with your shoulder?

5 A Yes, he -- the bicep tendon was torn. It was -- the
6 tear in the capsule was limiting it as well as the
7 impingement there.

8 Q All right. Where is the bicep tendon on your arm?

9 Just, just, just show --.

10 A Well, in the -- I'm sorry. I wore a sweater. It's
11 freezing in here. There is a bicep groove right here in the
12 front of the shoulder. You can feel it if you roll your
13 finger over it. I still get a pinpoint pain when I'm
14 pushing on it, yes. It's uncomfortable, but it's not -- you
15 know, I feel it there. So, that's where it attaches
16 upside -- up in the shoulder capsule.

17 Q Okay. And this -- you say this was torn?

18 A Yes.

19 Q And then you mentioned an impingement.

20 Just what's a normal, common every day word for that?

21 A An entrapment.

22 Q Okay. So, you weren't able to move your shoulder?

23 A I could move it some.

24 Q Okay.

25 A But it was -- it hurt to move.

1 Q All right. Had you ever had these conditions before
2 this accident?

3 A No.

4 Q You said Doctor Cook did two injections for you, and
5 that they did help short term?

6 A They helped short term.

7 Q Did they have any other affects on you?

8 A Oh, yeah. I'm Insulin dependent. So, my blood sugars
9 soared.

10 Q And, and for those of us who aren't familiar with
11 diabetes or aren't diabetics, what does, what does that
12 mean?

13 A Well, I'm Type I. I'm insulin dependent. So, my
14 pancreas doesn't make Insulin. So, when I eat something, I
15 have to take an injection. When I -- you also have a basic
16 amount of Insulin of daily requirements. So, you might be
17 using a long acting Insulin along with a short acting
18 Insulin just prior to your meals or in a correction of a
19 high blood sugar.

20 I'm on an Insulin pump. So, my blood sugars went --
21 they skyrocketed. I had to keep correcting and giving
22 myself some more Insulin to bring that blood sugar down.
23 The, the effect of the steroid is that it causes an Insulin
24 resistance, which is similar to actually a Type II diabetes,
25 which is an Insulin resistant type diabetes.

1 Q All right. So, is that a long way of saying it's
2 serious when your blood sugars skyrocket?

3 A Yes.

4 Q Does that make you unwilling to have steroid
5 injections?

6 A Yes, unwilling. It's very -- it's not very pleasant to
7 have blood sugars that are into the three and four hundreds.
8 It really makes you feel sick. You feel like it -- you're,
9 you're nauseated. You're thirsty. You got to go to the
10 bathroom to urinate several times. It's very uncomfortable.

11 Q All right. And does that make your pain more difficult
12 to treat?

13 A Yeah, in a round about way I guess you could say yes
14 because I'm -- I work as a nurse practitioner. I can not be
15 impaired. So I can not take a controlled substance while
16 I'm at work. That would be really unethical too.

17 So, I won't take a pain medicine. So then I'm left
18 with either using an antiinflammatory such as Advil, Aleve,
19 or one of the prescription antiinflammatories or Tylenol.
20 The antiinflammatory medications, they can bother your
21 stomach.

22 Q Okay. So, after the injections, what did Doctor Cook
23 end up doing?

24 A He ended up having to do a -- they call it a biceps
25 tenodesis, which is basically he goes in, he cuts the tendon

1 to the bicep, and replants it on the humerus bone, which
2 it's this long arm bone here. He replanted it and I can
3 still feel where it's planted cause, when I contract the
4 muscle, I can feel there. So, that was one part of it.

5 The other part is that, on the collarbone here, he had
6 to take off a, a -- I think he said a centimeter or an
7 inch -- I'm, I'm not quite sure it would of been a
8 centimeter though, but he took a centimeter off of the
9 collarbone. So, I -- if I had an x-ray today, a chest
10 x-ray, you could see that I got a shorter collarbone.

11 Q Okay. So, on your left side, your collar bone, a
12 centimeter was taken out?

13 A Yes.

14 Q Okay. And so you're -- that is intended you -- to
15 shorten your collarbone, and what's the result suppose to
16 be?

17 A That actually stops the entrapment also.

18 Q Okay.

19 A It -- it's attached into the AC joint where the --
20 forgive me. I can't pronounce that without seeing it right
21 out -- acru -- acru -- the AC joint.

22 Q All right. Very good.

23 Now, this surgery, did it take you out of work, and I
24 didn't talk about your lost, your lost income from the first
25 time.

1 were you out of work, Mr. Coulter said eight days of
2 missed work, after the initial hospital---

3 A Yes.

4 Q ---going to the hospital?

5 Okay. And, by the way, when you went back to work
6 full-time, were you able to do full duty?

7 This -- this is after the accident, and after you've
8 been home for eight days.

9 were you able to go back full duty?

10 A The office manager adjusted my schedule because I had
11 to call for help too many times. If a patient gets up onto
12 the exam table, I could not help them onto the exam table
13 independently. I had to call for my assistant to come in
14 and help them because I don't want a person to fall stepping
15 up on antique exam tables.

16 Q All right. Were there any other ways that this
17 impacted your ability to do your job?

18 There was a discussion of---

19 A Yes.

20 Q ---computers.

21 A Yeah. I have a laptop that I do documentation in my,
22 in my office like between patients. If it's any distance,
23 or at my lunch break, or after I'm completed with the
24 patients, I go to my office and do my notes there. We
25 have -- that computer is an -- is there. It was difficult

1 because you couldn't really hold on to -- it's attached to a
2 docking station. And so it projects the screen onto -- on a
3 different screen. I've got a little bit bigger one now.

4 But I couldn't hold my arm up to use the keyboard.

5 So, I asked for Dragon software, and, unfortunately,
6 they would not give it to me for just doing a dictation. I
7 still had to type. So, I had to put my keyboard into my
8 lap.

9 The other thing is, when I was examining patients, I
10 had one come in with abdominal pain during that time, and,
11 with an abdominal exam, you use both your hands, pressing on
12 the abdomen so that you're feeling for pain, and any organ
13 system or mass that may be there. So, I could not push with
14 that left arm during that time.

15 So, I had to have my assistant also help me with that.
16 She would -- I would put my hand down. She would put her
17 hand on top of mine.

18 Q All right. So let's go back now.

19 That was at the very beginning, right?

20 A That was at the very, very beginning, yes.

21 Q After you went back?

22 A Uh.

23 Q After the eight days.

24 A After the initial crash, yes.

25 Q All right. Now, you have surgery. Doctor Cook does

1 this surgery you just described for the jury, and---

2 A Yes.

3 Q ---you're out of work for how long approximately?

4 A I was out for two weeks and then I had a limited
5 release back to work. I could not lift or contract that
6 bicep muscle. So, if you contract the bicep muscle, it's
7 lifting your arm. So if -- anything like that I could not
8 do. I was -- I had to remain in a sling the entire six
9 weeks.

10 Q All right. I want to -- and we'll get back to that in
11 a second, but I want to show an exhibit or at least have you
12 identify an exhibit, and then move it into evidence. This
13 is Plaintiff's Exhibit No. -- all right. I'm gonna show you
14 what's been marked as Plaintiff's Exhibit 9. Ask you to
15 take a look at it.

16 THE COURT: No objection, correct, counsel?

17 MR. COULTER: Correct. No objection.

18 THE COURT: All right.

19 Q All right. Just tell the jury what that is before I
20 move it into evidence.

21 A It's a wage and salary verification.

22 Q Okay. And does that tell -- explain how many hours you
23 missed as a result of this, this collision, and what your
24 hourly rate is?

25 A Yes.

1 Q And then we'll show, on a later exhibit, what that
2 total is?

3 A Yes.

4 Q Okay. Very good.

5 Your Honor, Plaintiff's Exhibit 9, at this time, I'd
6 like to move it in.

7 Is it in?

8 THE COURT: It is in now without objection. Thank you.

9 MR. CHURDAR: Thank you.

10 (WHEREUPON, Plaintiff's Exhibit No. 9 was received into
11 evidence at this time.)

12 Q All right. So, anyway, you mentioned that you couldn't
13 move your arm.

14 A That's correct.

15 Q Tell the jury how -- I mean how -- what did your arm
16 look like?

17 A Well, the arm was in a sling, and I -- and it was
18 entirely in a sling. I mean I -- what did it look like?

19 It had some paleness to it and some swelling. I
20 actually went back in cause I was very concerned I might
21 have a clot in my arm because of the amount of swelling way
22 after that three day initial postoperative swelling time.

23 Q All right. But you kept your arm in a sling for how
24 long?

25 A Six weeks.

1 Q Literally six solid weeks it, it was not -- you weren't
2 moving it?

3 A Literally six solid weeks I was not moving it. I could
4 not straighten the arm. That was my instructions, to make
5 sure the bicep tendon stayed in the re -- the transplanted
6 site.

7 Q And I've got this feeling that you did exactly what you
8 were told.

9 A I did. I was---

10 Q Okay.

11 A I did not want to end up with a Popeye muscle.

12 Q All right. How did all this affect you at home?

13 A Well, it was like starting over again with being able
14 to do anything for myself. Obviously, I wasn't -- could not
15 undo my pants. I had to have my husband take me to the
16 bathroom every time. He had to dress me. At that time of
17 the surgery, he was able to put my bra on as there was --
18 you know, you certainly can't do that with an arm in a
19 sling. He had to do most -- probably all of the housework.

20 Q All right. And you went back to work after a couple of
21 weeks, and you said you were on restrictions.

22 Did this again change how you could do your job?

23 A Yes.

24 Q Okay.

25 A Again, I could not use my left arm in palpating a

1 person's abdomen. I couldn't help people on or off of the
2 exam table. I work in internal medicine. So, our
3 population is primarily the Medicare age people. You know,
4 we have some patients that are 98, 96, 94-years old, and
5 they can't get onto an exam table without assistance.

6 Q After this surgery, did you go to physical therapy?

7 A Yes.

8 Q And did you do that throughout the Summer and Fall of
9 2016?

10 A Yes.

11 Q To work on range of motion?

12 A Yes, the first time that I did the physical therapy it
13 was for range of motion. That was the goal of that therapy
14 was to obtain the best range of motion I could achieve.

15 Q Okay. And did you go back to physical therapy for a
16 second round?

17 A Yes, after the first round, I was so, so weak in the
18 arm I asked Doctor Cook if I could return to physical
19 therapy to work on the strength because I felt like I
20 couldn't do anything with it. I had some range of motion,
21 but I didn't have any strength in the arm.

22 Q Okay. Did you do everything Doctor Cook told you to
23 do?

24 A Yeah.

25 Q And did you ever do everything the physical therapists

1 told you to do?

2 A Yes.

3 Q Do you continue to do what they told you to do to this
4 day?

5 A I---

6 Q We'll get into that.

7 Is that true though?

8 A Yes, I still stretch in the shower, try to push the arm
9 as much as I can.

10 Q All right. Now, did you end up having any problems in
11 recovery after your shoulder surgery?

12 A I'm sorry. I don't understand.

13 Q Did you have any problems in recovery?

14 You ended up with something called a frozen shoulder?

15 A Oh, yes. I thought you meant when I -- after the
16 surgery itself.

17 Q I'm sorry. No, I don't -- I don't do medical talk.
18 That's not what I meant. I mean---

19 A Okay.

20 Q ---as you're rehabilitating.

21 A With the rehabilitation, I ended up having a
22 posttraumatic shoulder, frozen shoulder.

23 Q Okay.

24 A Yes.

25 Q And just tell the jury very briefly what that means.

1 A That was the limitation -- especially after holding
2 in -- the arm in a sling for six weeks, I -- the shoulder, I
3 couldn't get much movement out of it then at all. I could
4 only lift it maybe a couple of inches off of my -- moving
5 the elbow off of my waste or that's called abduction. I
6 couldn't move it out but a couple of inches.

7 Q All right. Had you ever had a problem with -- is --
8 let me ask you this.

9 The fact that you were diabetic, did that help the
10 situation or hurt the situation?

11 A Well, it --.

12 Q Or do you think it mattered at all.

13 A I don't think that mattered at all. This was -- that
14 was completely different than a diabetic frozen shoulder.

15 Q Well, you did have -- did you have a diabetic frozen --
16 right shoulder before?

17 A Yes.

18 Q Okay.

19 A My right shoulder, I had a frozen shoulder.

20 Q Okay. Was that had -- did that have anything to do
21 with an injury like this one did?

22 A No.

23 Q Now, did you eventually get better, plateau---

24 A From the right or the left---

25 Q I'm sorry. I forget---

1 A ---or the---

2 Q ---the right at this point. We're talking about your,
3 your recovery for your left shoulder.

4 A Okay. Yes, I mean I can move the arm. I have no
5 stamina with the muscle. Like Rusty described, I'm a person
6 that does work. I mean I was raised to go to work, and I do
7 things around the house, and, at one point, you know, even
8 in the last year, I was moving something. I have to drop --
9 essentially drop it. I didn't drop it and damage it, but I
10 have to move things and differently. I can't -- I don't
11 have the stamina to move some things across the floor.

12 Q All right. Well, let's talk first about range of
13 motion, which is --

14 A Uh-huh. (Affirmative).

15 Q -- how much you can move your arm back and forth and in
16 and out, right?

17 A Correct.

18 Q How -- as you are today, is your range of motion
19 affected by this injury from the collision?

20 A Yes.

21 Q How is that?

22 Please tell the jury.

23 A I can not reach tuber point in the bron (phonetic). I
24 can't reach around my back to hook my bra. That's an
25 internal rotation. If I reach -- if I'm reaching over my

1 shoulder, I can't reach the shoulder blades completely. I
2 can not externally rotate it. It locks there. I can go all
3 90-degrees here, but -- so, it -- so, it's limited there.

4 Q All right. How about pain?

5 Do you still experience pain in your left shoulder?

6 A Yeah.

7 Q What do you do about it?

8 A Well, I've had to cut back on using Advil. You know, a
9 shoulder is a joint. So, you need to use an
10 antiinflammatory for best pain control. However, I took
11 to -- took it too frequently meaning I took it probably two
12 to three times in a day. Enough that I wound up having a
13 gastritis, and the gastro -- gastroenterologist told me I
14 should lay off the Advil.

15 So, I now use Aspercreme. I've used ice. I've used
16 heat. Yesterday, during the courtroom, Court session, it
17 was so cold in here I -- my shoulder was throbbing.
18 Shoulder pain can be referred down to the deltoid insertion
19 site, which is approximately right here. So, yesterday, the
20 whole arm felt uncomfortable until I got home, and it was
21 warmed up. It improved some with the warmth -- with the
22 heat.

23 Q All right. How does this affect your ability to sleep?

24 A Sleeping's a little difficult. You know, if I'm laying
25 on my right side -- I've always been a side sleeper. So, if

1 I'm laying on my right side, and the left arm falls off of
2 my hips so to speak, and it comes across midline, I wake up
3 very stiff. It's like what did I do, who did I, you know,
4 who did I wrestle during the nighttime.

5 But -- so I either use a pillow or hold onto Rusty with
6 that arm so that the elbow doesn't slip past midline meaning
7 the left elbow doesn't go to my right side. If I'm laying
8 on my left arm -- it depends if I'm -- and how I roll if
9 it's gonna -- if I'm gonna wake up with pain, but I have to
10 wake up a few times during the night, turn myself over
11 because it's bothering me.

12 Q Okay. And I'm, I'm really trying to, to wrap this up
13 in a minute for the jury, but how about weakness?

14 Is your arm as strong as it was?

15 A Oh, no way. No way.

16 Q Tell me about that very briefly.

17 A Very briefly, I've got a chainsaw that weighs about
18 10-pounds, and it's very difficult to lift it. Using the
19 weed wacker, some people call that a trimmer, you're using
20 your left arm primarily and you're holding it away from your
21 body, and that is -- that makes it throb. I, I just feel
22 like I'm gonna drop it. I can not endure that long using
23 that weed wacker.

24 Q Okay. What happens when your arm gets tired?

25 A I have to stop what I'm doing.

1 Q Rusty mentioned cramps.

2 Tell the jury about that.

3 A Oh, yeah. I can have cramps in the bicep muscle.

4 Sometimes it feels like spasm, but I think it's more like

5 cramping. If I'm lifting, especially if I'm lifting

6 something outwards, like a pitcher of tea -- I use to carry

7 two pitchers of tea upstairs to my mother after church so

8 that we have sweet and unsweet tea. And so if I had one in

9 my left-hand, and one in my right, well, that was only done

10 once because I spilled tea because it was shaking so much.

11 It, it just quivers. It's like I can't endure that holding

12 that pitcher of tea.

13 Q All right. Do you have any other changes?

14 You mentioned creaking or crepitus.

15 A Yeah, the, the joint feels like -- I call it, to my

16 patients, the Rice Krispie joint, or snap, crackle, pop,

17 when you hear your joint moving or cracking. I'm feeling

18 that more so and it seems to be progressing.

19 Q Okay. Generally has this -- and we heard a lot from

20 Rusty. So, I'm just asking you generally has this affected

21 the types of things you can and can not do?

22 A Yes.

23 Q What are the most important things that you like to do

24 that you can't do now?

25 A Well, obviously, the yardwork. I love doing that and

1 that's limiting quite a bit. I've had to change the way I
2 pick up my dog and hold her.

3 Q We talked earlier about the computer at work.

4 Is it -- does this, does this injury still affect how
5 your work?

6 A Yes, I'm -- I, you know, they keep wanting me to speed
7 up, see more patients, see more patients. So, if you're
8 going from computer to computer, meaning from the computer
9 in Room 1, to the one in Room 2, and the one in Room 3,
10 you're having to sign out and then resign in. Obviously
11 they're medical records. You have to have them locked.

12 Q Okay. Back -- we talked about your back.

13 Do you still have pain in your back?

14 A Yes.

15 Q What hurts it?

16 What aggravates it?

17 A Sitting in a, a chair that's -- especially leaning back
18 is bothersome when it's like, you know, I -- like move
19 myself forward. I change my position. So, I shift hip to
20 hip so that -- it's just uncomfortable.

21 Q Okay. You still -- you mentioned physical therapy
22 exercises.

23 Do you still do the exercises you were told to do?

24 A Yes.

25 Q Has, has this affected your relationship with Rusty in

1 a variety of ways?

2 A Yeah, I have to ask him to do things. I feel, you
3 know, like always -- I've never been dependent on him. It's
4 always been like he's my buddy. He's my husband, my best
5 friend. I have to ask him to do things, and it still
6 bothers me, you know, and sometimes, when I'm uncomfortable,
7 my arms are uncomfortable, I've been doing some work during
8 the day, pushing it as much as I can, I wind up sleeping in
9 the chair because it's more comfortable. Prop up with a
10 pillow under the arm, and it's -- feels more comfortable.

11 Q Okay. I'm not gonna ask you any detail, but this --
12 has this affected y'all's intimacy?

13 A Yeah.

14 Q Okay. I want to ask you about your financial losses in
15 closing.

16 Gentlemen, Plaintiff's Exhibit 10.

17 THE COURT: Any objection, counsel?

18 MR. COULTER: No, sir -- no, ma'am.

19 MR. BRADSHAW: No, Your Honor.

20 THE COURT: Okay.

21 Q All right. I'm gonna show you what's been marked as
22 Plaintiff's Exhibit 10. I'll ask you to take a look at it.

23 would you tell the jury what that is so I -- it's
24 now -- it's in evidence.

25 Is that correct, Judge?

1 THE COURT: Have her identify it.

2 Q All right. Please identify it.

3 A It's the financial costs. It looks like it's mostly --
4 yes, it's medical costs.

5 Q Did, did all---

6 A Lost wages.

7 Q Did, did, did all the medical bills come to your house?

8 A Yes.

9 Q All right. Have you been able to review that outline?

10 A Yes.

11 Q And does that outline accurately reflect the charges
12 that you received for all the medical bills relating to this
13 collision?

14 A Yeah.

15 Q All right. How about the lost income?

16 There's a number for lost income.

17 First of all, what is the number for the medical bills?

18 A 82,560.04.

19 Q All right. And then how about for the lost income?

20 A \$5,903.68.

21 Q There's a number there for miscellaneous cell phone
22 reimbursement.

23 what happened to your cell phone in this accident?

24 well, where was, where was this cell phone in this
25 accident?

1 A Okay. I had that cell phone and I had just purchased
2 it. It was the Droid, the one that was suppose to be
3 dropped from 200 feet, and it wouldn't break, and it was in
4 my left front pocket, which the seatbelt lays right across
5 it, and it bent.

6 Q All right. So --.

7 A So --.

8 Q It, it bent---

9 A It bent---

10 Q It couldn't work?

11 A It wouldn't work.

12 Q All right.

13 A My Bluetooth, we never found that, yeah.

14 Q All right. Just, in closing, you think there's
15 anything you could of done, anything at all, to avoid this
16 collision?

17 A I could of stayed at home. I mean I was just doing my
18 own thing. I, I don't -- I mean --.

19 Q All right.

20 A I was driving on the road. I don't -- I couldn't avoid
21 it. I never saw it happen.

22 Q All right. Thank you very much. I don't have any
23 further questions.

24 THE COURT: Okay. And Plaintiff's No. 10 is in without
25 objection.

1 (WHEREUPON, Plaintiff's Exhibit No. 10 was received
2 into evidence at this time.)

3 THE COURT: All right. So, at this time, we are going
4 to break for lunch. I'm gonna let the jury go. I'll ask
5 that you-all be back at two o'clock. It's 12:30 by this
6 clock. 12:32 by the clock on the computer.

7 Okay. So, you-all go. Have a nice lunch. Remember,
8 don't discuss the case, and I'll see you back in this jury
9 room, is that correct?

10 This jury room?

11 THE BAILIFF: Yes, ma'am.

12 THE COURT: In this jury room. Thank you.

13 (WHEREUPON, the following takes place outside the
14 presence of the jury.)

15 THE COURT: Okay. Thank you.

16 Ma'am, you may step down, of course, for lunch, and
17 then you can't discuss the case with your lawyer or your
18 testimony with your lawyer---

19 THE WITNESS: Uh-huh. (Affirmative).

20 THE COURT: ---because you will -- you're still under
21 oath, and you're still technically on the stand. We're
22 breaking for lunch. You'll come back. It will be
23 cross-examination and possibly redirect examination by your
24 lawyer.

25 So, ma'am, you can talk with your lawyer about where to

1 eat lunch or where the restrooms are, and that kind of
2 thing, but not about testimony.

3 THE WITNESS: Okay.

4 THE COURT: All right. Thank you. Watch your step
5 please.

6 (WHEREUPON, there were some matters taken up at this
7 time, which were asked by Mr. Churdar not to be transcribed,
8 followed by Court being in recess for the lunch hour.)

9 THE COURT: All right. Are we ready to go, counsel?

10 MR. CHURDAR: Yes, Your Honor.

11 MR. COULTER: Yes, Judge. I will tell you that, at
12 break, I just marked some medical records that I will use on
13 cross as, as identification, Defense Exhibit 2, for
14 identification.

15 THE COURT: Okay. And I guess we'll take that up as we
16 get to it, Mr. Churdar?

17 MR. CHURDAR: We will. Thank you. Yes, that's fine.

18 THE COURT: Okay. I guess I can go ahead and ask now
19 with regard -- why don't y'all come up and let me just --.

20 (WHEREUPON, a bench conference was held at this time.)

21 THE COURT: Okay. Is there anything else before we
22 bring in the jury?

23 MR. COULTER: Not from defense.

24 MR. BRADSHAW: No.

25 MR. CHURDAR: Not from the Plaintiffs.

1 THE COURT: And so, Mr. Coulter, you said that would be
2 Defendant McGee's No. 2 for identification?

3 MR. COULTER: Correct.

4 THE COURT: All right. Thank you. Yes, sir.

5 (WHEREUPON, the following takes place within the
6 presence of the jury.)

7 THE COURT: Okay. Madam Forelady, and members of the
8 jury, are we ready?

9 THE FORELADY: Yes, Your Honor.

10 THE COURT: Okay. Thank you. And, again, thank
11 you-all for being prompt. That is very important.

12 And, with that, I believe that the Plaintiff, Shannon
13 P. Green, was on the stand.

14 Is that correct?

15 MR. CHURDAR: Yes, Your Honor.

16 THE COURT: I would ask Ms. Green to please resume the
17 witness stand. She's still under oath. I'm not sure if Mr.
18 Churdar had officially rested had -- on direct.

19 MR. CHURDAR: I think I had.

20 THE COURT: Okay. All right.

21 MR. CHURDAR: Thank you.

22 THE COURT: And, Mr. Coulter, anything before we begin?

23 MR. COULTER: No, ma'am.

24 THE COURT: All right. Ma'am, you're now on
25 cross-examination.

1 THE WITNESS: Okay.

2 THE COURT: Thank you.

3 Yes, sir.

4 MR. COULTER: Thank you, Judge.

5 CROSS-EXAMINATION

6 BY MR. COULTER:

7 Q Good afternoon, Ms. Green.

8 A Hi.

9 Q Of course, we -- we've talked about the fact and it's
10 already been brought up that you're working now as a --
11 full-time as a nurse practitioner, and have done that for
12 how long about?

13 A Since 2005.

14 Q Okay. And as far as, as your work as a nurse
15 practitioner, you're not paid by the hour?

16 You're on salary, correct?

17 A Yeah.

18 Q Meaning you're -- you have to work until the work gets
19 done?

20 A Yeah.

21 Q Okay. All right. And so, despite how much time you
22 may work in the office, there's also more work that you have
23 to do once you get home?

24 A Uh-huh. (Affirmative).

25 Yes.

1 Q That's a yes?

2 Okay. All right. And I just talked to your husband
3 about it. I got it all wrong. But I understand you do a
4 half a day on Thursdays. So, you actually work in the
5 office about 36 hours.

6 Does that sound about right?

7 A That's correct.

8 Q Okay. And then the additional hours that you have at
9 home doing what you need to do?

10 A Yeah.

11 Q Okay. And since this accident happened, which is now
12 been essentially four years, other than the, the eight days
13 that you missed immediately after the accident, and a couple
14 weeks after the surgery, you've maintained that full-time
15 job?

16 A Yes.

17 Q Okay. All right. Now, and one of the things I happen
18 to notice, in some of your records, one of your records, but
19 from November -- and I'll give this to you just to take a
20 look at. I just marked some medical records that we may
21 take a look at.

22 Okay?

23 A Okay.

24 Q And in that it says, essentially, that first page it
25 talks about your working hours, and it says you work late

1 hours, and you often fall asleep on the couch when you do
2 charts.

3 A Yeah.

4 Q So, that's pretty common?

5 A Yes.

6 Q Just fall asleep doing your charts, and you're doing
7 medical patient charts, right?

8 A Yeah, it can happen.

9 Q Yeah, and it happens often, correct?

10 A There for a while it did. When we were first starting
11 the, the medical records on a computer.

12 Q Okay. All right. And you recall we took your
13 deposition almost just about a year ago. I, I wasn't there
14 but your deposition was taken.

15 Do you remember that?

16 A Uh-huh. (Affirmative).

17 Q Okay. And if you need -- is that a yes?

18 A Yes.

19 Q I'm sorry. We just want to make sure the record's
20 clear.

21 A I forgot.

22 Q Okay. So, if, if you want to take a look at your
23 deposition at anytime, I don't know if you'll need to, but,
24 if you do, just let me know. We'll get it.

25 okay?

1 A Okay.

2 Q And one of the things we were talking about is are you
3 under some sort of -- do you do an exercise program or
4 anything like that, and, as I understand, your response was
5 you don't have enough time with your work schedule.

6 A Not a formal exercise program, correct.

7 Q Right.

8 Okay. All right. Very good. Regarding your treatment
9 following the accident, of course, you went to the hospital
10 that, that evening.

11 A Yes.

12 Q And, and we understand that you were released some time
13 early the next morning, two o'clock or so.

14 A Yes.

15 Q Okay. And they did a number of diagnostic tests on
16 you.

17 A Yes.

18 Q Okay. And so, for the jury, if they don't know,
19 diagnostic tests is like an x-ray or a CT Scan or something
20 of that nature.

21 A Correct.

22 Q Okay. And you underwent a CT Scan to your head and
23 that was normal, correct?

24 A Yes.

25 Q Okay. You went -- a CT Scan of your cervical spine,

1 and that was normal, correct?

2 A Yes.

3 Q Did a CT Scan of your pelvis and chest, and that came
4 back normal?

5 A Yes.

6 Q Okay. And a few days later you mentioned, I think you
7 said, that you went to an Express Care with, within St.
8 Francis, right?

9 A Yes.

10 Q Okay. Yeah, it was three days later, and, at that
11 time, they actually took an x-ray of your left shoulder, and
12 that was normal meaning no fracture?

13 A Yeah, meaning no fracture.

14 Q Right.

15 A Yes.

16 Q Exactly.

17 Okay. All right. Now, I'm showing that, on
18 November 30th of 2015, which will be roughly two weeks
19 after the accident --

20 A Uh-huh. (Affirmative).

21 Q -- you went to Doctor Bray?

22 A Yes.

23 Q And she's your family physician so to speak, correct?

24 A Yes.

25 Q Okay. And so, at that time, and if you want to turn to

1 Page 9 of that, that exhibit, and just let me know when
2 you're there.

3 A I'm there.

4 Q Okay. And would you agree that's a medical record
5 from -- for you from Doctor Bray on November 30, two weeks
6 after the accident?

7 A Yes.

8 Q Okay. And, of course, by this time, you had already
9 returned to work at, at your place of employment as the
10 nurse practitioner?

11 A Yes.

12 Q Okay. And, at this point, when you presented to Doctor
13 Bray, at that point you had complaints of left shoulder,
14 chest, and upper back pain, which was moderate.

15 would you agree with that?

16 A Yes.

17 Q I'm sorry. I didn't hear it. Did---

18 A Yes.

19 Q Okay. All right. So, moderate pain at that point. As
20 a matter of fact, it, it -- I've reviewed these records and
21 I'm sure your attorney will, will indicate if I'm incorrect,
22 but that's actually the last time that you made complaints
23 of any type of chest pain to a physician.

24 would you agree with that?

25 A Yes.

1 Q Okay. All right. And, at that time, they also did an
2 x-ray of, of your back, the thoracic spine, upper back, and
3 that was normal, correct?

4 A Yes.

5 Q Okay. All right. Now, if we go to Page 11 -- and just
6 let me know when you're there.

7 A I'm there.

8 Q Okay. Would you agree that this is a, a treatment
9 visit that you had at the orthopedist on December 29th of
10 2015, which would, roughly, be two months after the
11 accident.

12 Sound about right?

13 A Yes.

14 Q Okay. And, on this visit, you'd indicated to the
15 doctor that your back pain had improved?

16 A It wasn't as severe as it was, correct.

17 Q Well, you agree that, based on these records, you'd
18 indicated that it had, it had improved?

19 A Yes.

20 Q Okay. And as a matter of fact, your attorney can
21 correct me if I'm wrong, that was the last time, two months
22 after the accident, that you complained of any type of back
23 pain to a doctor?

24 A Yes.

25 Q Okay. All right. Now, let's go to -- well, we know

1 that, on March, March 23rd, 2015---

2 A Excuse me. My Insulin pump's alarming.

3 Q Oh, okay.

4 A And I need to---

5 Q Absolutely.

6 A ---just address it for a minute.

7 THE COURT: Oh, yes, ma'am.

8 Q Absolutely.

9 THE COURT: why don't, why don't I let you stand down,
10 and if you need to leave the courtroom, that's fine.

11 THE WITNESS: I just need to shut the alarm off.

12 THE COURT: Okay.

13 THE WITNESS: Otherwise it's gonna sound like a siren.
14 It's been vibrating quite a bit.

15 (Pause.)

16 THE WITNESS: Okay. I'm done.

17 Q Okay.

18 THE COURT: Okay. Thank you. Please continue.

19 Q Sure. Just let me know if you need any time.

20 Okay. All right. Thank you.

21 A I'm good.

22 Q All right. By the way, I'm going back to the initial
23 ER visit. We'll talk about that cause I remember now, as,
24 as I was thinking, that you'd talked about having a concern
25 that you would be intubated at some point while you were

1 there at the scene, right?

2 A Yes.

3 Q It -- and that did not happen, did it?

4 A No, it did not.

5 Q Okay. All right. Now, you mentioned having the
6 surgery, and you mentioned a few days, as I remember on
7 direct examination, you mentioned that, during the days
8 following the surgery, you were becoming concerned about a,
9 a clot because of some swelling in your left arm.

10 A Yes.

11 Q That didn't happen though, did it?

12 A That did not happen.

13 Q Okay. All right. And then if you'll go to Page 13 of
14 this particular exhibit, Defense 2, for identification, and
15 let me know when you're there.

16 A I am there.

17 Q Okay. And would you also agree that this is a, a visit
18 to the orthopedist on April 4th of 2016?

19 It's kind of funny how they -- it -- you want me to
20 point it out to you?

21 A Oh, it's Piedmont Orthopedic, yes.

22 Q Okay.

23 A It's just---

24 Q And you agree on the day?

25 A Where is that day?

1 Q I'll show you.

2 A I see their records all the time. It's very -- yeah,
3 here it is. It's right there, yeah.

4 Q Okay. Would you agree that's April 4th of 2016?

5 A Yes.

6 Q All right. And that's roughly two weeks after this --
7 after your surgery?

8 A That would be roughly a week or two -- yeah, about two
9 weeks I'd say.

10 Q Okay. And as you look at the history of present
11 illness, when the doctor asked you about how things were
12 going, you said you were doing well.

13 A Yeah.

14 Q Okay. And that's when you returned to work?

15 A I'm not sure of the exact date.

16 Q Well, if you look---

17 A Yeah.

18 Q I'll help you out. If you look down at the---

19 A I didn't go back to work the day I was at his office.

20 Q I understand.

21 would you -- if we look at the -- down at the bottom,
22 and I, and I should of pointed this out.

23 A Okay.

24 Q If you look down at the bottom, it says work, and then
25 it says return to light duty.

1 Do you see that cause you---

2 A Yes.

3 Q Okay. So, it was roughly around this time period that
4 you were returning to work, and I understand you had some
5 restrictions on lifting, correct?

6 A Yes.

7 Q All right. Now, if you go to Page 14, and just let me
8 know when you're there.

9 A I am there.

10 Q Okay. This is, this is a, would you agree, the medical
11 record from your family practitioner, Doctor Bray?

12 A Yes.

13 Q And it's dated October 26th of 2016---

14 A Yes.

15 Q ---correct?

16 All right. So, this is less than a year after the
17 accident, right?

18 A Uh-huh. (Affirmative).

19 Yes.

20 Q And you would agree, just, just in -- and you -- and I
21 think your husband testified to it. You're 52 years old.

22 Is that correct?

23 A Well, I just had a birthday. I'm 53 now.

24 Q You're 53. You're the same age as me.

25 And you would agree that not only did you have the

1 problem with the shoulder, you were having other issues that
2 are interfering with your activities of daily living
3 regardless of the left shoulder, correct?

4 A I wouldn't say that they were interfering with my
5 activities of daily living.

6 Q Okay.

7 A I mean I continued to function.

8 Q Well, you continued to function with, with everything,
9 right?

10 A Yes.

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

14 A Yes.

15 Q Okay. And here's the record that I'm showing where you
16 were having chronic issues with hip pain, correct?

17 A Yes.

18 Q Okay. And that became a problem, and it, and it did
19 have some affect on your activities of daily living,
20 correct, aside from your shoulder issues?

21 A Yes.

22 Q Okay.

23 A Can I clarify that these are computerized records that
24 I use every day. And when you enter that you got hip pain,
25 and then you want to say chronic versus -- you only get two

1 choices. So then trying acute versus chronic. This is a
2 problem we all -- all of our providers have with these
3 electronic records.

4 Q Well, are you---

5 A So---

6 Q Well, let me ask you.

7 Are you telling me that this was not a chronic problem?

8 A It was a chronic problem based on---

9 Q Okay.

10 A ---that it wasn't acute that I was there for an injury
11 or within a two week period of time.

12 Q All right. And chronic means longstanding?

13 A Yes.

14 Q Okay. And you agree, despite you only have those two
15 choices, that's actually what it was, right?

16 A Yes.

17 Q Okay. All right. And, and as you put it, it was
18 gradually worsening, your left hip pain?

19 A Yes.

20 Q All right. And that was the result of no trauma?

21 A Correct.

22 Q Okay. And not related to this accident?

23 A No, it was definitely not related to the accident.

24 Q Matter of fact, we'll get to it in a second, I think
25 that you'd had that problem ongoing for roughly since 2010,

1 correct?

2 A Yeah.

3 Q Okay.

4 A Well, I don't know exactly when it started, but I
5 estimated that it'd been there for a while.

6 Q I got you. I got you. And, in this record,
7 interestingly, you know, we talked about the fact that,
8 that, two months after the accident, seemed to be the last
9 time you made a specific complaint of back pain. If you
10 look in this record, it actually says positive -- there's a
11 pertinent negative, which is no back pain.

12 A It probably does. I have not read that, but it
13 probably does.

14 Q Well -- okay. If you look at one, two, three, four --
15 fifth sentence there.

16 A What page are you on?

17 Q I'm still on Page 14.

18 A Yes, it does say no back pain.

19 Q Right. And if you turn to Page 15, you have a review
20 of sym, symptoms, right, or systems?

21 A Correct.

22 Q All right. And that's questioning you about specific
23 areas of, of, of problems that you may have, and it says
24 positive for, and I'm gonna get that wrong, what's that,
25 arthralgias?

1 A I'm sorry.

2 where are you at on here?

3 Q Musculoskeletal.

4 A Oh, I see.

5 Q My fault.

6 A Positive for arthralgias, yes.

7 Q And that's arthritis?

8 A That's joint pain.

9 Q Joint pain.

10 Okay. All right. And then specifically negative for
11 back pain?

12 A And specifically negative for back pain.

13 Q Okay. All right. Let's go to Page 16. If you would,
14 let me know when you get there.

15 A Okay. I'm there.

16 Q All right. And this is -- to let the jury know, this
17 is an orthopedic record from November 17th of 2016, right?

18 A Yes.

19 Q And this was a follow-up to the surgery, right?

20 A I'm -- again, I'm looking to see who wrote it, yes.

21 Q Okay. All right. And if you go to the history of
22 present illness, would you agree that you had reported that
23 you were doing much better at that point?

24 A I was doing better, yes. It does say much better.

25 Q It does say much better, and that your range of motion

1 had really come along.

2 A Yes, it does.

3 Q Okay. And that, if you look at the physical
4 examination, and I think you demonstrated this on, on direct
5 examination, but, at that point, you had nearly full range
6 of motion except for, except for extremities of internal
7 rotation.

8 A Correct.

9 Q All right. And when they did the strength testing, it
10 was slightly decreased on the left side as compared to the
11 right, but appropriate is what was noted.

12 A Correct.

13 Q All right. And, at that point, you were discharged
14 from the orthopedist for your left shoulder?

15 A Yes.

16 Q And, again, that's November of 2016, roughly three --
17 well, it's -- that's seven, sixteen -- three years ago,
18 correct?

19 A Correct.

20 Q And you haven't been back to see a doctor for any left
21 shoulder problems since?

22 A Correct.

23 Q All right. Go ahead to Page 17 if you will though.

24 A Okay.

25 Q You there?

1 A Uh-huh. (Affirmative).

2 Q Okay. And, and this is an orthopedic record from
3 January 5th of 2017.

4 would you agree that -- with the same orthopedist, same
5 orthopedic facility?

6 A The same orthopedic facility.

7 Q Right.

8 Okay. All right. And this is just -- this is January,
9 2017, and, and what I'm showing here is you've presented, on
10 this occasion, for other problems that you continued to have
11 that we talked about just a minute ago. These are problems
12 that you continued to experience, and that was hip pain with
13 radiation -- well, actually it's low back pain with
14 radiation into your hip, correct?

15 A Yes.

16 Q Okay.

17 A It was, it was related to the crash.

18 Q Sure. I get it.

19 But it was another problem that was causing you
20 problems with your activities of daily living?

21 A Yes.

22 Q Right.

23 As a matter of fact, it says -- it actually says that
24 down towards the end of the paragraph. It talks about some
25 of the problems you were having, and that is walking with a,

1 a slight limp, and that you're somewhat limited in
2 activities of daily living.

3 Do you see that?

4 A Yes.

5 Q And it also mentions, in regards to your left hip pain,
6 that, or the low back pain that radiates into the left hip,
7 that that would cause you pain at night.

8 A Yes.

9 Q Okay. while you were sleeping?

10 A Yes, this is a left hip pain that turned out to be a
11 trochanter bursitis --

12 Q Okay.

13 A -- which, you know, it was acute at the time, and then
14 it's -- has resolved.

15 Q Okay. And that was something that had been ongoing for
16 six years?

17 A It would flare, but it was never as intense as it was.

18 Q All right. And, and another issue that you had had
19 that's unrelated to this accident that also continues to
20 cause you some sort of problems is the issue with your right
21 shoulder when you had right shoulder frozen pain.

22 A I don't have right shoulder frozen pain.

23 Q Oh, I thought I read in your deposition where you had
24 some after this, some pain to your right shoulder.

25 No?

1 A No, I'm good with that.

2 Q Okay. Well, I -- and let me just -- I just want to
3 show it to you just to make sure that I'm, I'm clear. Maybe
4 I misread it.

5 Can I just show it to you?

6 A Sure.

7 MR. COULTER: Is that okay, Judge, if I open this up?

8 THE COURT: Yes.

9 Any objection?

10 MR. CHURDAR: No objection.

11 MR. BRADSHAW: None, Your Honor.

12 Q And, again, I may of misread it. I just want to make
13 sure that I'm on the same page.

14 Here you go.

15 THE COURT: Mr. Coulter, if you will, to establish a
16 foundation for that, let's just state the date the
17 deposition was taken and who was present.

18 MR. COULTER: Yes, ma'am.

19 And would you agree, Ms. Green, this is a deposition,
20 if you look at the cover for you, that was taken on
21 November 29th, 2018?

22 A Yes.

23 Q Okay. And, again, I -- let's just go to Page 32 so I
24 can clear this up just to make sure I know what's going on.

25 Let's go to Line 14, and I'll, I'll read the question.

1 You read the answer.

2 A I'm sorry. You'll need to tell me the page number
3 again.

4 Q Oh, 32.

5 A Okay.

6 Q You there?

7 I'm gonna read from Page -- just Line 14, and then you
8 read the answer, and then we can talk about it more.

9 Following that manipulation of your right shoulder, did
10 you continue to have any pain or problems with your right
11 shoulder, and if you'll just read the answer.

12 A The day of, the day of the manipulation, as soon as I
13 was able to, I was active with the shoulder. Have I had
14 pain since then? Yes.

15 Q Okay. So, during the deposition, you'd agree that you,
16 maybe I read that wrong, but at least it seemed you
17 indicated that you had right shoulder pain since then?

18 A Yes, but I, I don't have pain with the range of motion
19 from the frozen shoulder on the right.

20 Q Okay.

21 A And let's get this straight. The right shoulder was
22 frozen from---

23 Q Okay.

24 A ---diabetes.

25 Q Well, I understand.

1 A And I had a manipulation. The day after -- the day of
2 surgery, I was moving the shoulder and it felt fine. I
3 could move it in all the range.

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

7 A May I clarify?

8 I think of day-to-day pain as just being something that
9 I got to live with. I, I mean do I have pain?

10 Yeah, I have pain in my joints. When I'm laying on
11 shoulders, yes, I have pain in them.

12 But is it something that I dwell on?

13 No, the right one is no where near like the left one.
14 I can cramp through the day, especially if I've laid on the
15 right shoulder, and the left elbow crosses midline,
16 especially if I've laid onto the left shoulder and stayed on
17 that for a prolonged period of time and it was very
18 uncomfortable. It wakes me up at nighttime.

19 Q Okay. But, but your point is you don't dwell on the
20 pain, you go on through with whatever you need?

21 A I don't dwell on pain that's like that right arm, no.
22 It's just a little pain.

23 Q Okay. All right. Thank you.

24 MR. BRADSHAW: No questions from us, Your Honor.

25 THE COURT: Mr. Bradshaw, no questions?

1 MR. BRADSHAW: No.

2 THE COURT: All right. Mr. Churdar---

3 MR. CHURDAR: Thank you.

4 THE COURT: ---any redirect?

5 MR. CHURDAR: Very briefly.

6 REDIRECT EXAMINATION

7 BY MR. CHURDAR:

8 Q I want to go to this record for you at Piedmont
9 Orthopedic. It's Page 11 of this exhibit, and just to be
10 clear, you're not contending that this injury -- this
11 collision caused low back pain for you?

12 A No, it did not cause low back pain for me.

13 Q It -- what did it cause for you as far as back pain?

14 A In the upper back between the shoulder blades.

15 Q Just like you explained earlier?

16 A Yes.

17 Q All right. Did -- were you treated for that by Jaime
18 Elliotte at Piedmont Orthopedic?

19 A She gave me an antiinflammatory. I believe it was the
20 antiinflammatory maybe with Pepcid in it or something for
21 the stomach protection. She offered another steroid -- a
22 steroid injection into and I declined because, again, the
23 blood sugars go high. I feel miserable.

24 Q Okay. So, if you look at the end of that appointment
25 where she talks about what she'll do for you, did she offer

1 that you could go to pain management and undergo thoracic
2 injections if you would like to do so?

3 Last paragraph.

4 A Yes.

5 Q Okay. And is that what you're referring to that makes
6 your blood sugar go crazy?

7 A Yes, they use a Cortisone or Kenalog type -- a steroid
8 injection to decrease the inflammation of the target point
9 of pain. You have -- for me, I have some significant
10 elevations of my blood sugars after I've been on a steroid
11 of any sorts. I even decline them when they use them for
12 surgery for -- to control postop nausea. I'd rather be
13 nauseated for a little bit after surgery than to use a
14 steroid.

15 Q All right. So, would it be fair to say that this, this
16 practice had really nothing to offer you?

17 A Correct.

18 Q Okay. And you'd rather live with the pain then get
19 these injections that cause your blood sugars to go through
20 the roof?

21 A Correct.

22 Q Is that what you're doing?

23 A Yes.

24 Q Is that partially why you're taking the -- you were
25 taking the pain meds or using the cream, whatever you called

1 it?

2 A I used Advil, yes, and then the Aspercreme with
3 lidocaine in it.

4 Q All right. She was willing to make a referral for pain
5 management for you?

6 A Correct.

7 Q Okay. Now, one other thing. Mr. Coulter, you know,
8 mentioned all these -- mentioned our -- all of our ages,
9 and, of course, we do start to have issues that come up as
10 we get a little bit older. He brought up a complaint you'd
11 had about a hip problem.

12 You said that was bursitis?

13 A It was a trochanter bursitis, correct.

14 Q And then you were talking about some low back pain with
15 somebody?

16 A Yeah, I had some low back pain with it. It was not
17 actually related to the lumbar spine. It's actually related
18 to a muscle. I went to physical therapy for that to run
19 some exercises to help keep that under control.

20 Q All right. Well, I just want the jury to understand.
21 We were -- Mr. Coulter was saying, you know, that there are
22 pains that all of us get just from, from walking this earth.

23 A Uh-huh. (Affirmative).

24 Q Are you, are you asking this jury to reimburse you for
25 the pains that you get for walking this earth?

1 A No.

2 Q Okay.

3 A I mean we're gonna all have pain. I mean, as long as
4 we live long enough, most of us are gonna have some type of
5 joint pains.

6 Q Are you, are you limiting this complaint and your
7 request to them for the injuries that were caused by these
8 Defendants in November of 2015?

9 A I don't understand that question.

10 Q Are you limiting your request and your complaint in
11 this lawsuit to the injuries you sustained in the accident?

12 A I'm not asking to be compensated -- I guess I really
13 don't understand cause I'm not asking to be compensated for
14 low back pain and trochanter bursitis --

15 Q That's my point.

16 A -- or even the right frozen shoulder.

17 Q All right.

18 A That's not, that's not part of this claim. I---

19 Q Okay.

20 A That's not part of this.

21 Q Thank you very much. No other questions.

22 THE COURT: Okay. Thank you, ma'am. You may step
23 down. Watch your step.

24 Okay. And I guess you need to give those documents
25 back to Mr. Churdar, and he will give them back to Mr.

1 Coulter if those are medical records. Thank you.

2 All right. Yes, sir.

3 MR. CHURDAR: Your Honor, that is the Plaintiff's case.

4 THE COURT: All right. Anything before we begin,
5 defense counsel?

6 MR. BRADSHAW: Your Honor, at this time there's some
7 matters of law that we need to take up outside of the
8 presence of the jury.

9 THE COURT: Okay. Thank you.

10 Okay. Madam Foreperson, and members of the jury, if
11 you-all will follow Mr. Plexico into the jury room.

12 (Whereupon, the following takes place outside the
13 presence of the jury where motions were made. This part Mr.
14 Churdar also asked not be transcribed.)

15 THE COURT: Okay. All right. Yes.

16 (WHEREUPON, the following takes place within the
17 presence of the jury.)

18 THE COURT: Okay. Madam Forelady, are we ready?

19 THE FORELADY: Yes, ma'am.

20 THE COURT: All right. Thank you.

21 All right. Counsel.

22 MR. BRADSHAW: Yes, Your Honor.

23 At this time we would like to call Mr. David Hudgins.

24 THE COURT: Okay. Mr. Hudgins, sir, if you'll please
25 come forward.

David Hudgins - Direct examination
By Mr. Bradshaw

1 DAVID HUDGINS, being first duly
2 sworn, testified as follows:

3 THE COURT: All right, sir. Just step up. Make
4 yourself comfortable. I can't see if that bottle of water
5 is still up there or not.

6 THE WITNESS: Oh, yes, ma'am.

7 THE COURT: Okay. All right. And if you will, state
8 your full name, and spell your last.

9 THE WITNESS: My name is David Hudgins. My last name
10 is spelled H-U-D-G-I-N-S.

11 THE COURT: Thank you, sir. Yes, sir.

12 MR. BRADSHAW: Thank you, Your Honor.

13 THE COURT: Mr. Bradshaw.

14 DIRECT EXAMINATION

15 BY MR. BRADSHAW:

16 Q Mr. Hudgins, can you tell the jury where you currently
17 live?

18 A I live in Taylors, South Carolina.

19 Q Okay. And at the time of this accident back in
20 November 19, 2015, where did you work?

21 A I worked for a company called Elbit Vision Systems in
22 Greenville.

23 Q Okay. And, and what did you -- what did you do for
24 that job?

25 A I do field service with textile companies all around

1 the Upstate.

2 Q Okay. And let me back up and, and get into a little
3 bit of your background.

4 Are you married?

5 A I am.

6 Q Okay. And what's your wife's name?

7 A Marin.

8 Q All right. And she's seated here with us?

9 A She's sitting over here with me, yes, in Court.

10 Q Do y'all have any children?

11 A We do. Together we have six kids, grown kids.

12 Q All right. You have any grandkids?

13 A Six grandkids. Five dogs.

14 Q Okay.

15 A Maybe some more coming. We don't know.

16 Q Okay. Do y'all stay busy?

17 A All the time. It never stops.

18 Q Now, Mr. Hudgins, getting back to your work with Elbit
19 vision Systems, what, what was your training in college?

20 A Electronic engineering.

21 Q Okay. Are you an electrical engineer?

22 A I'm (sic) actually have Associate's Degree in Science
23 with some training in electronic engineering, yes.

24 Q Okay. And where did you get that degree from?

25 A Wayne Community College in North Carolina, Goldsboro,

1 North Carolina.

2 Q Okay. And, again, what were -- can you just kind of --
3 as part of your job with Elbit Vision Systems, you traveled
4 around the Upstate, right?

5 A Yes, sir, all over the Upstate.

6 Q Okay. And, and you went from different plants to
7 plants in your---

8 A Plants, to plant, to plant, yes, all the time.

9 Q Okay. And worked on their equipment?

10 A Yes, sir.

11 Q Okay. And on the date of this accident, where had you
12 been working before the accident occurred?

13 A I was up at the Milliken Plant up in Blacksburg, South
14 Carolina. Milliken Magnolia facility.

15 Q Okay. And after you had finished your job there, where
16 were you heading?

17 A I was heading down to the Cos -- Sage Cossom -- Cotton
18 Blossom Plant down here in Spartanburg.

19 Q Okay. And, and what route were you gonna take from --
20 to get from Blacksburg to this Sage Cotton Blossom Plant?

21 A I come down -- I was gonna come down 85 to 85 Business,
22 and then, around Simuel Road, over to -- it's a little back
23 way into the Cotton Blossom.

24 Q Okay. And what, what was the exit that you, that you
25 were gonna take?

1 A I can't remember. I think it's -- I can't remember the
2 number. If it's the one that -- with the Hearon Circle
3 exit.

4 Q Okay. All right. So, you had planned to take that
5 Hearon Circle exit when you started your trip from
6 Blacksburg?

7 A Yeah.

8 Q Okay. And what type of vehicle were you driving on
9 November 19, 2015?

10 A It's a red Nissan Altima.

11 Q Okay. And what time of day -- what time of day was it
12 when you first got on the interstate?

13 A When I first got on the interstate at Blacksburg?

14 Q Yes, sir.

15 A Probably about -- I don't know. Close to six o'clock
16 PM.

17 Q Okay. And was it -- so, it was right on rush hour?

18 A We hadn't really hit rush hour till we got closer to
19 Spart -- I got -- till I got closer to Spartanburg.

20 Q And do you recall when you were out on Interstate 85
21 and you first encountered codefendant Clary McGee?

22 A I do. We were -- I had come down 80 -- was coming down
23 85 South, and we ran into a lot of traffic -- I ran into a
24 lot of traffic, and came to a stop.

25 Q Okay. Did---

1 A And -- sorry. And that's when I saw the truck.

2 Q Okay. And in that section of interstate there, how
3 many lanes are there?

4 A It's two lanes.

5 Q Okay. And you're driving in which lane?

6 A I was in the left lane.

7 Q Okay. And when you saw -- first saw Mr. McGee, which
8 lane was he in?

9 A He was in the left lane.

10 Q Okay. And you kind of touched on this already.
11 what was traffic like at that time?

12 A It was very heavy. It, it come to a stop. It was stop
13 and go kind of at that point.

14 Q Was it heavy in the right lane?

15 A In the right lane, yes, and the left lane was heavy.

16 Q Okay. So, it's also heavy in the left lane?

17 A Yes, sir.

18 Q Okay. Was it stop and go traffic?

19 A Stop and go, yes.

20 Q Okay. And was there traffic -- cars in front of you?

21 A Yes, traffic -- yes, there were cars in front of me,
22 yes.

23 Q Okay. And were you having to apply brakes due to
24 those, those cars slowing down or stopping?

25 A Yeah, we were going and we would, and then we would go

1 and stop.

2 Q Okay. And were there times when you had to come to a
3 complete stop?

4 A Yes, sir.

5 Q All right. When you first saw Mr. McGee, what type of
6 vehicle was he in?

7 A Well, when I first saw just a big truck is all I could
8 tell, but after -- finally come to find out it was a big
9 Chevrolet 2500 pickup truck.

10 Q And when you first saw him, were you moving at all?

11 A No, that's -- come to stop and I -- and then that's
12 when he come up on the rear end of my car.

13 Q All right. So, when you first saw him, and he came up
14 behind you, what was he doing?

15 A He came up very close to the rear of my car, kind of
16 revved up, and flicked the lights. You know, flicked them a
17 bunch of times and then --.

18 Q All right. And what did you do at that point?

19 A He would, he would stop very close to my bumper till we
20 started moving again, and then he'd do the same thing, drive
21 up, flick the lights.

22 Q Were you trying to brake check him at all?

23 A No.

24 Q Okay. Were you trying to slam on brakes to cause an
25 accident with him?

1 A No, sir.

2 Q Okay. Now, how, how close to his -- to your bumper did
3 he get when he would do this?

4 A He was very close. I don't know. It was very close.
5 I -- maybe a couple feet.

6 Q All right. And, at some point, at -- how -- at some
7 point after Mr. McGee's behind you, I-85 opened up to three
8 lanes?

9 A Right. We were going stop and go. It was slowly and
10 then it got into the three lanes and things started to pick
11 up.

12 Q All right. At that point, what did Mr. McGee do?

13 A Then Mr. McGee came around the right side, and
14 immediately come around, and just went right in front of me,
15 and I had to turn real hard to the left and hit my brakes to
16 keep him from -- prevent him from hitting me.

17 Q Okay. So, did you almost have an accident with him?

18 A It was very close. If I hadn't of done it -- if he
19 hadn't -- if I hadn't of turned I would of hit him.

20 Q Did -- well, when he was coming over, did you try to
21 speed up to block him at all?

22 A No.

23 Q All right. So, when you almost had an accident with
24 him, how did that make you feel?

25 A I felt like -- I, I kind of -- I was in shock that he

1 tried to hit me. I said, man, this guy just tried to hit
2 me, and when he did I called 9-1-1.

3 Q Okay. So---

4 A Cause I thought he was, I thought he was going on a
5 rampage.

6 Q All right. So, you, at that point, you, you decided to
7 call 9-1-1?

8 A I called 9-1-1, yes.

9 Q Okay. And you've testified and you've heard the
10 Plaintiff attorney say that -- talking about just letting
11 things go.

12 why didn't you let things go here?

13 A well, I didn't let it go cause he tried to hit me, you
14 know, and I felt like I had to do something. I felt like I
15 had to call 9-1-1.

16 Q Okay. And---

17 A Do something about it.

18 Q And what time did you make that 9-1-1 call?

19 Do you know?

20 A It was a little bit before seven o'clock. I can't
21 remember the exact time.

22 Q Do you know how many minutes?

23 A It was about 10 minutes I think.

24 Q Okay. And have you had a chance to listen to the 9-1-1
25 call in this case?

1 A Yeah, I've listened to it a couple times, yes.

2 Q Okay. And is that your voice on the 9-1-1 call?

3 A Yeah, it is my voice. It's hard to believe it's my
4 voice. It's me.

5 Q All right. And we've marked, as Hudgins No. 1, that
6 copy of the 9-1-1 call, and, Your Honor, I'd like to publish
7 that to the jury at this point.

8 THE COURT: Okay. Counsel, any objection?

9 MR. CHURDAR: No objection.

10 MR. COULTER: No, ma'am.

11 THE COURT: Okay. Yes, sir.

12 Q And, Mr. Hudgins, I'm gonna play the 9-1-1 call all the
13 way through, and then I'll ask you some questions---

14 A Okay.

15 Q ---about it.

16 okay?

17 A Okay.

18 THE COURT: Mr. Bradshaw, is -- sorry. You may want to
19 just go ahead though and lay a foundation as to the exact
20 time of the call, and where you received that, that disk.

21 MR. BRADSHAW: Yes, and, and, again, this, this disk we
22 received from Spartanburg, Spartanburg Emergency Operations
23 Center, and the call is actually beginning at 6:59PM.

24 THE COURT: On what day?

25 MR. BRADSHAW: On November 19, 2015.

1 THE COURT: Thank you.

2 MR. BRADSHAW: Thank you.

3 (WHEREUPON, Defendant Hudgins Exhibit No. 1 was played
4 for the jury at this time.)

5 MR. BRADSHAW: I apologize for the length of that, but
6 I did want to get it out to the jury.

7 THE COURT: Yes, sir.

8 Q Yes.

9 So, Mr. Hudgins, I want to go back and ask you just a
10 few things about what, what, what we all just heard going
11 back to I-85 after Mr. McGee got around you there.

12 At that point, as you, as you were behind him, did you,
13 you continue to drive on towards your exit at Simuel -- at
14 Hearon Circle?

15 A I did, yes.

16 Q Okay. How close did you ever get to the rear of
17 Mr. McGee's vehicle at that point?

18 A I was -- I stayed several car lengths back behind him.
19 I was actually in the other lane too. I didn't want to get
20 close to him.

21 Q Okay. And during that long time on the, on the audio
22 recording there where, where it's just ringing, were you --
23 did you say anything to the 9-1-1 operators during that
24 time?

25 A No, no. Everything was kind of calm during that whole

1 period actually. We're just going down the road at a decent
2 speed. It wasn't fast because it's still heavy traffic, but
3 we were just driving at regular speed.

4 Q Okay. And then you took the Hearon Circle exit?

5 A I did.

6 Q Did any other vehicles, other than yourself and, and --
7 well, let me ask you this.

8 Did Mr. McGee take that exit as well?

9 A He did, yes, sir.

10 Q Okay. Did any other vehicles take that exit?

11 A They did, yes.

12 Q When you're on the exit ramp there, were there any
13 other vehicles in-between your car and Mr.---

14 A There were.

15 Q ---McGee's truck?

16 A There were.

17 Q Okay.

18 A A couple cars ahead of us, yes, sir.

19 Q All right. And then, at that point, you saw Mr. McGee
20 go around Hearon Circle as we heard?

21 A What happened was we come to the stop sign, and, Mr.
22 McGee, that's when he took off, and he blew through the stop
23 sign almost hitting somebody else on the Hearon Circle.

24 Q Okay.

25 A And he started going around a bunch of cars.

1 Q All right. And on the, the audio recording there, at
2 that point, did -- was that you that said he's gone, I'm not
3 gonna chase him?

4 A Yeah, that's me.

5 Q Okay. And did you, did you chase Mr. McGee---

6 A No.

7 Q ---as he went down Simuel Road?

8 A No, I was never chasing him.

9 Q Okay. As Mr. McGee was on Simuel Road, how close did
10 you get to the back of his vehicle?

11 A To Simuel Road, I was a pretty good distance back cause
12 he was going really fast. I wasn't chasing him. It was
13 probably about four -- four, five, or six car lengths at
14 least. It could of been further.

15 Q Okay.

16 A I could still see him, but it wasn't, you know, clear.

17 Q All right. And did you see him run into a curb at some
18 point?

19 A I saw him hit a curb, and come back on, and kept going,
20 and then I saw him hit something. I thought he run off the
21 road.

22 Q Okay. And, and on, on that recording, you say he's
23 wrecked.

24 A Yes.

25 Q Did you realize, at that point, that he had hit another

1 vehicle?

2 A No.

3 Q Okay. How long did it take you to realize that he hit
4 another vehicle, hit another vehicle?

5 A It, it was a little bit of time. I got out with -- got
6 out of car on the way, walked back up to the -- and there
7 was other police officers already there, and then I saw the
8 car sitting -- laying there on the -- sitting on the side of
9 the road.

10 Q Okay. And it was over two minutes after the time that
11 you first saw the wreck that you realized that he hit
12 somebody else?

13 A That's right.

14 Q Okay. As -- so, did you even observe Mr. McGee hit Ms.
15 Green's car?

16 A No.

17 Q Okay. And, again, did you even realize he struck
18 another car from your vantage point?

19 A Well, I saw him and it looked like something -- I
20 thought he was running off the road. The truck was bouncing
21 around.

22 Q Okay.

23 A And -- but I didn't see him hit the -- hit a car. I
24 didn't see another car.

25 Q And, and so it wasn't until you drove past Mr. McGee's

1 car, got out, and then saw Ms. Green's car that you, that
2 you realized he hit somebody?

3 A I went out, and come back. I saw --.

4 Q Okay. Now, after you stopped and, and saw Mr. McGee
5 had a wreck, were you -- how were you feeling at that point?

6 A I tell you the whole time I was really kind of in
7 shock. You can kind of tell the way I'm talking. I
8 remember -- I'm talking about Simpsonville, not Spartanburg,
9 and it was, it was a real shocking event.

10 Q All right. And let me -- had you -- do you travel that
11 route regularly?

12 A At the -- I was just starting to go around that area
13 working with Cotton Blossom on a project down there. So, I
14 was going down in that area a little bit. So, I knew it a
15 little bit.

16 Q Okay.

17 A Beginning to learn it.

18 Q But you weren't familiar with all the different streets
19 and---

20 A No, I don't know street names, and I'm, I'm still bad
21 with street names.

22 Q Okay. Were you upset that Mr. McGee had almost had a
23 wreck with you, and then caused an accident with someone
24 else?

25 A Yeah, I was, I was very much upset, and, excuse me,

1 there was already a lot of troopers there, and they asked me
2 to move down, and get out of the way while they were doing,
3 doing their, doing their thing. And so I stayed away from
4 the crash area.

5 Q Okay. And did you tell the police that were at the
6 scene about the way Mr. McGee was driving?

7 A I did. I did.

8 Q Okay. And did you tell them how far back you were at
9 the time of the accident?

10 A Oh, I did, yes.

11 Q Okay.

12 A I was quite a few car lengths away.

13 Q All right. Now, as Mr. McGee went down Simuel Road,
14 did you somehow make Mr. McGee press the accelerator the way
15 he did?

16 A No, sir.

17 Q Did you have any control over his steering wheel?

18 A No, sir.

19 Q Did you ever get right on his bumper?

20 A Never. No.

21 Q Did you ever flash your lights at him?

22 A Nope.

23 Q Okay. Did you what -- did you -- did you have a gun in
24 your car?

25 A No, sir.

1 Q Okay. Did you ever point a gun at Mr. McGee?

2 A No.

3 Q Did you ever honk your horn at him?

4 A No.

5 Q Did you ever do anything to try to get his attention or
6 get him to stop?

7 A No.

8 Q Okay. Did you ever -- did you run him into another
9 vehicle?

10 A No.

11 Q Okay. Did you ever hit Ms. Green's vehicle?

12 A No, sir.

13 Q Okay. Did you ever even come close to Ms. Green's
14 vehicle as you drove down Simuel Road?

15 A No.

16 Q All right. Did you do anything to cause this accident?

17 A No, sir.

18 Q All right. Thank you. Nothing further.

19 THE COURT: Okay. Mr. Churdar.

20 MR. CHURDAR: Thank you.

21 CROSS-EXAMINATION

22 BY MR. CHURDAR:

23 Q All right. Mr. Hudgins, when you first encountered Mr.
24 McGee out on the interstate, I believe you said he, he
25 almost ran up into the back of you, right?

1 A That's right.

2 Q Flashed his lights?

3 A He did.

4 Q And that happened three times?

5 A About three times, yes.

6 Q And each time he did that, was there almost a
7 collision?

8 A Very close.

9 Q Okay. Matter of fact, did you believe he was
10 intentionally trying to hit you?

11 A Not really not at that time. I think if he wanted to
12 hit me, he could of hit me already, but I didn't think it
13 was hit -- I just thought he was trying to, you know, or
14 something --.

15 Q Did you later think he was intentionally trying to hit
16 you?

17 A He tried to hit me. Yes, I thought he was trying to
18 hit me.

19 Q Okay.

20 A When he ran me off the road, I said he's trying to hit
21 me.

22 Q All right. In any event, when he started to pass you
23 on the right, is that what you're talking about?

24 A That's right.

25 Q Okay. He -- you say he cut you off?

1 A He did.

2 Q Obviously it was close. He used the phrase could of
3 put a piece of paper between the two of you.

4 A I think it was less than that.

5 Q All right. Well -- and he almost crashed you?

6 A He almost crashed me.

7 Q Okay. And when this happened, were there a lot of
8 other cars around y'all?

9 A There were.

10 Q All right. And would you agree this was a road rage
11 incident?

12 A I think Mr. McGee was a road rage situation, but I
13 wasn't in a rage.

14 Q You're saying you're not enraged, but you think he was
15 in a road rage situation?

16 A That's right. I think he was in a rage.

17 Q All right. Now, you've been on the road before?

18 A A lot.

19 Q And you've encountered people who've done similar
20 things or is this as bad as it's ever been?

21 A I think everybody sees people who get on their tail,
22 and flashed their lights. That's fairly common, but rarely
23 do you see people who try to run you off the road.

24 Q All right.

25 A That's -- you're getting into another area there I

1 think.

2 Q Now, after he tried, you say he tried to run you off
3 the road, you called 9-1-1, correct?

4 A Exactly. And he did run me off the road. He didn't
5 try. He did it.

6 Q Okay. I didn't hear that before. So --.

7 A I said I had to swerve, and I had to spin this way and
8 hit the brakes, and I was, I was in the, the area -- I
9 almost hit the median.

10 Q Okay.

11 A Absolutely.

12 Q You gave a description of his truck to 9-1-1, correct?

13 A That's right.

14 Q You gave the license tag to 9-1-1, correct?

15 A I did.

16 Q And you heard that the Highway Patrol was being
17 contacted, correct?

18 A That's right.

19 Q And you heard Trooper Helmly testify that three cars
20 headed out to find McGee after you made that call, correct?

21 A That's right.

22 Q Okay. Because of your call?

23 A That's right.

24 Q Okay.

25 A I think.

1 Q So, at that point, the Highway Patrol was on it, right?

2 A Well, I didn't know the Highway Patrol was on it at
3 that time, but also, at the same time, when we were riding
4 down 85, things were -- actually got calm. I thought it
5 was -- we were coming to a conclusion to the whole thing
6 anyway, and I was gonna end it. But then I saw Mr. McGee
7 wreck later. It was pretty calm the whole way until we got
8 to the Hearon Circle.

9 Q But from your experience, you do know it's best to let
10 it go, correct?

11 A It is best to let it go if it's things like somebody
12 blinking on your lights -- on your -- coming up on your tail
13 and blinking their lights, and not doing anything to hurt
14 you. But when they come around and they run you off the
15 road, I think you have a responsibility to report that.

16 Q I couldn't agree more, and you had reported it,
17 correct?

18 A That's right.

19 Q You'd given law enforcement enough information to do
20 their job, which isn't your job.

21 A Well, I don't know. You know, we're on the phone a
22 long time. The Highway Patrol didn't answer the phone until
23 almost to the end of the whole incident. So, we, we were
24 waiting on the Highway Patrol to answer the phone the whole
25 time.

1 Q It's best to just stay out of it, correct?

2 A If you can.

3 Q Okay. Once you called the Highway Patrol, once you
4 gave them a description of Mr. McGee's truck, once you gave
5 them his license tag number, what, what in the world did you
6 need to do following him?

7 A Well, I gave the description to -- actually it was
8 9-1-1. I think that's run by the Sheriff's Office I think.
9 But then we were trying to, we were trying to contact the
10 Highway Patrol, I guess, to relay the message, and we just
11 really -- that really never happened very well.

12 Q This took 15 to 20 minutes, did it not, from start to
13 finish?

14 A I think it's about 10 minutes.

15 Q Well, 10 minutes from the time you called, but how
16 about from Mile Marker 80?

17 A It, it wasn't very long. Like I said, it wasn't very
18 long after we got into the -- he, he started getting on my
19 tail. I can't remember how long, but it wasn't, it wasn't a
20 long time before I made that 9-1-1 call.

21 Q You would agree you had plenty of time to make
22 different choices?

23 A I, I don't think I had any options. I was stuck in
24 traffic, cars were on all sides of me. There was no one --
25 nothing else I could do.

1 Q Do, do you agree you were behind him?

2 A At first he was behind me.

3 Q No, no, no. I know that. But I -- look, we're, we're
4 past that.

5 A Oh, after it -- when we were driving, I was, I was as
6 far back as I could get from him.

7 Q You said you were a couple of car lengths.

8 A Yeah, but we were in traffic. I was, I was moving
9 back. I stayed behind him the whole way.

10 Q Did -- do you ever think about moving over, moving into
11 a different lane?

12 A I was in a different lane.

13 Q Did you -- why didn't you let more, more room go, more
14 room past?

15 A Well, it's kind of hard to do when you're in traffic.
16 I don't know.

17 Q Okay.

18 A I don't think that's -- it's -- I don't think that's
19 really an, an option.

20 Q So, you had to stay just a couple car lengths behind
21 him?

22 A Well, you know, and, you know, we're still moving, you
23 know. We're moving in the same -- the traffic's moving and
24 we're moving in the same, in the same direction, and
25 everything was peaceful at that time.

1 Q And when, when y'all got to Business 85, you had to
2 stay behind him, just a couple of car lengths, right?

3 A I stayed back as far as I could.

4 Q A couple of car lengths?

5 A It was several car lengths, a couple, two, three, or
6 more. I don't know how many.

7 Q Well, was it two, three, or four?

8 A I don't remember.

9 Q Okay.

10 A I wasn't counting.

11 Q You heard---

12 A But I was staying behind him. I mean I was staying
13 back.

14 Q Yeah, you were behind him.

15 A I wasn't following him. I was staying behind him to
16 stay out of trouble.

17 Q Well, we'll get to that, where you were going, but the
18 point is you did have opportunities. You could of pulled
19 off at other places. You passed other exits.

20 Correct?

21 A Yeah, I suppose I could of, yeah.

22 Q You were concerned -- you were concerned for your
23 safety?

24 A I, I was, but I'm saying we were behind, and things
25 were pretty peaceful. I really wasn't, at that point,

1 concerned for my safety to be honest. I didn't think there
2 was gonna be -- I didn't think there was gonna be any more
3 trouble.

4 Q Now, you said, on the one hand, you said you were
5 familiar with this route.

6 A I'm (sic) said I was a little bit familiar. I'm from,
7 from Georgia. I moved up six years ago from Georgia to this
8 area.

9 Q Right.

10 A And I am -- we just started the, the project in Cotton
11 Blossom area not -- shortly before that.

12 Q Okay.

13 A Very shortly before that.

14 Q So --

15 A Simuel, I kind of knew it. I knew it because we'd go
16 to dinner. That's the place you go to lunch from the Cotton
17 Blossom.

18 Q All right. So, you're saying you -- do you use GP, GPS
19 at all?

20 A Back then, not a lot, no.

21 Q Okay. I mean Cotton Blossom's on the other side of the
22 interstate.

23 A Yeah, but it's a way to get there from that direction.

24 Q That is a way.

25 A That's a way, yes.

1 Q That's not the most common way, is it?

2 A It is the most common way from that direction, yes, I
3 think so. It's pretty hard to get into Cotton Blossom.

4 Q Are you aware there's an exit that gets you off next---

5 A It's further down and over, yes, I think so. You had
6 to go down New Cut Road and come back on I believe.

7 Q In, in any event, you---

8 A I think---

9 Q You indicated you thought you were in Simpsonville.

10 A Yeah, I was in shock. That's the whole point. Yeah, I
11 was in shock. I said I thought I was -- at first I said
12 Simpsonville by mistake, but it's -- I knew I was in
13 Spartanburg.

14 Q Okay. But you didn't know how to pronounce even the
15 name of that road that you drove.

16 A No, I did not know how -- I, I didn't know how to, to
17 pronounce the name, right.

18 Q You, you didn't even know the name of Hearon Circle at
19 the time.

20 A No, I didn't. I did not know any of the names of the
21 roads.

22 Q All right. So, you were in unfamiliar surroundings?

23 A Oh, yeah, it, it wasn't entirely unfamiliar, but it was
24 not well past -- you know what I mean. I know the circle,
25 but I did -- all the other roads, I don't know the names of

1 them.

2 Q So, you didn't name -- you didn't know the names of any
3 of the roads, and you hadn't been going down those roads for
4 very long, right?

5 A I've gone down there several times, but when I traveled
6 to the plant, I normally come up to my home from Taylors.
7 This is a -- kind of a different path to take. I usually
8 took it when we were down at lunch. I've been through it
9 several times.

10 Q All right. So, anyway, when you did take the Hearon
11 Circle exit -- so, you said he almost wrecked you three
12 times running into your rear end out on the interstate,
13 right?

14 A He was running up on my tail flashing the lights. He
15 was, you know --.

16 Q And then you said he tried to run you off the road?

17 A And then he tried to run me off the road, yes.

18 Q And you felt like that was intentional?

19 A Yes, it was intentional.

20 Q Did, did you think he was intentionally trying to hurt
21 other people?

22 A Yeah, I thought he was trying to hurt other people,
23 yes.

24 Q Okay. And that's why you called 9-1-1?

25 A Absolutely.

1 Q And when you got to Hearon Circle, y'all are sitting
2 there, and you're behind him again, right?

3 A I was not close. It was a long way because, when he
4 got on Hearon Circle, he -- that's when he took off. He
5 started going really fast.

6 Q Would, would you agree he seemed to know you were
7 there?

8 A I don't know that he knew I was there.

9 Q All right.

10 A I didn't know what he -- I didn't know what was going
11 on in his mind. I thought he was going on a rampage, to be
12 honest with you, trying to hurt somebody.

13 Q All right.

14 A Thought he was drunk.

15 Q When he pulls onto Simuel, you say he's going 90 miles
16 an hour?

17 A He took off really fast. He was going around a lot of
18 cars, yes, around that circle. That's why -- how he got way
19 ahead of me. He took off from a lot of cars. yes.

20 Q He got ahead of you, but you could see him?

21 A I could see him, yeah, in the distance, yes.

22 Q And you were four to six car lengths behind him?

23 A Yes, something like that.

24 Q So, you're driving behind a guy who's going 90 miles an
25 hour. You're going in an area where you're not even

1 familiar, and you're four to six car lengths behind him,
2 correct?

3 A Something like that, yes.

4 Q You were speeding, weren't you?

5 A No, I had other cars that were in front of me. We
6 weren't -- nobody was speeding but Mr. McGee.

7 Q Okay. So, you didn't -- you didn't speed yourself?

8 A Nope.

9 Q How was it you could see him if he was going 90 miles
10 an hour when you were four -- and you were four to six car
11 lengths, and you, you weren't speeding?

12 A Well, I, I tell you, when he came off Hearon Circle, he
13 was doing 90 miles an hour. I don't know how fast he was
14 doing around down Simuel. He maybe slowed down a little
15 bit, but I did see him. I don't know the physics behind it,
16 but I do know I saw him, but I wasn't going fast.

17 Q Okay. So, there were cars between you and him. You
18 saw him go 90 miles an hour on Hearon Circle. You saw him
19 jump the curb and go on Simuel, and you weren't speeding,
20 but, but you somehow got four to six car lengths behind him,
21 and you could see him---

22 A Yes.

23 Q ---going down Simuel Road.

24 A Yes.

25 Q All right.

David Hudgins - Cross-examination
By Mr. Churdar

1 A The way the somehow is is, I don't know, maybe he
2 wasn't doing 90 miles an hour. I'm not a speed -- don't
3 have a radar gun. I couldn't tell how fast he was going.
4 He was going fast.

5 Q Now, you did get charged in this incident, correct?

6 A I did.

7 Q And you decided to fight it?

8 A I did.

9 Q But you pled guilty.

10 A Based on my lawyer's recommendation. He thought it was
11 the best option---

12 THE COURT: Okay.

13 A ---for me.

14 THE COURT: Sir, you, you can't go into communications
15 with between you and your lawyer.

16 All right?

17 THE WITNESS: Okay.

18 THE COURT: That's privileged.

19 Okay. So, I'll strike that portion of his testimony,
20 counsel.

21 Yes, sir.

22 MR. CHURDAR: All right. Thank you.

23 THE COURT: Be very careful here, Mr. Churdar.

24 Q All right. And you paid a fine of \$82.00, correct?

25 A I don't remember. I'm sure you've got the notes on it.

1 I don't remember how much I paid.

2 Q All right. And, in this lawsuit, you're denying any
3 responsibility at all?

4 A Yes, sir.

5 Q As a matter of fact, you wouldn't do, you wouldn't do
6 anything different?

7 A As far as what do you mean?

8 Q As far as what you did that night.

9 A I think I did what I thought was the best option
10 especially at the time. I can't think of anything else I
11 could of done better.

12 Q You, you played no part in this collision whatsoever?

13 A No, sir.

14 Q You don't feel like you did anything wrong?

15 A No, sir.

16 Q And you don't feel like you would do anything different
17 if -- under the same circumstances?

18 A That's right.

19 Q Very same thing?

20 A That's right.

21 Q Yes?

22 A Yes, sir.

23 Q Please answer any questions Mr. Coulter has.

24 THE COURT: Mr. Coulter.

25 MR. COULTER: Thank you, Judge.

1 CROSS-EXAMINATION

2 BY MR. COULTER:

3 Q Good afternoon, Mr. Hudgins.

4 A Good afternoon.

5 Q So, as I understand, your testimony is you just
6 happened to be going to that plant that night?

7 A Well, it wasn't happening. I was going to that plant,
8 yes, sir.

9 Q And it just so happened that you were gonna take the
10 exact same route that my client was taking?

11 Just by extraordinary coincidence, you took that exact
12 same route?

13 A Yes, sir, I think everybody that went that route were
14 extraordinarily unfortunate to take it, yes.

15 Q Because, when you're going down 85, and my client gets
16 on Business 85, you get behind him?

17 A That's right.

18 Q You take that same exit?

19 A That's right. I'm going in that direction.

20 Q Okay. When you get off -- when he gets off on Hearon
21 Circle, you get off on Hearon Circle, right?

22 A Yes, sir.

23 Q When he takes a right onto Simuel, you take a right
24 onto Simuel, correct?

25 A That's right.

1 Q Okay. And you had been to that plant before is what
2 you said, right?

3 A Yes.

4 Q You had worked at that plant before?

5 A That's right, yes, sir.

6 Q And when 9-1-1 asks where are you at, you said I don't
7 know. I'm not from around here. I'm in the sticks.

8 A That's right. I couldn't remember the names of the
9 road. Even if I had went by and saw them, I couldn't recall
10 the names.

11 Q And yet you couldn't tell them hey, I'm at Cotton
12 Blossom or wherever the plant was, I'm, I'm just a half a
13 mile away. You said you're in the sticks.

14 A Well, I didn't say I was at Cotton Blossom cause I
15 wasn't there, but I was trying to give them some specific
16 information.

17 Q Well, that would be pretty good general information,
18 wouldn't it?

19 A Maybe it would of, yes. But I think they knew that I
20 was on the circle also. So, I think that's probably better
21 information.

22 Q I mean particularly since this is the exact route
23 you've taken before, and just so happens, as Mr., as Mr.
24 McGee is trying to get away, you continue behind him.

25 A Yeah, that's right.

1 Q Okay.

2 A He wasn't trying to get away, but we were going in the
3 same general direction.

4 Q Well, you'll agree that, at some point, you told the
5 9-1-1 operator I've lost him.

6 A I did. I said I lost view of him. That's what I
7 meant.

8 Q And you can't lose somebody that you're not following,
9 can you?

10 A I think you can, yes.

11 Q Okay.

12 A Yes, I lost view of him.

13 Q And you came up and you were close enough that, after
14 you said you lost him, within a second or so you said he
15 wrecked.

16 A Yeah, after I did it -- yeah, that's what I said.

17 Q Sure.

18 Okay. So, that's how close you were behind him, and
19 that is, after you said you lost him, within a second or so
20 you said he wrecked?

21 A Yeah, I think it's -- you got to remember the roads are
22 curved and winding. So -- and then I saw him far down the
23 road, yes.

24 Q Okay. And, and there's no question that, as a result
25 of this, you were charged with driving too fast for

1 conditions?

2 A I was charged with too fast for conditions, yes.

3 Q And that driving too fast for conditions was the result
4 of this motor vehicle accident, correct?

5 A Yeah, the, the State Trooper determined, yes, that was
6 the cause of it.

7 Q And as a result of that charge regarding this accident
8 for driving too fast for conditions, you went in a courtroom
9 and you pled guilty?

10 A Yeah, I pled guilty based on some recommendation---

11 Q Is that a yes?

12 A ---from my lawyer.

13 Q Well, did you plead guilty?

14 THE COURT: Okay. Again, we're not getting into
15 communications of legal counsel in that case.

16 Okay. Mr. Coulter, let him answer.

17 MR. COULTER: Absolutely.

18 THE COURT: Okay. Let him answer without -- I'm sorry.
19 I may of muddied the water a little bit.

20 THE WITNESS: It's not something I wanted to do, but I
21 did because I thought it was the best option. It was a plea
22 deal.

23 Q All right.

24 A But I was not pleading guilty to speeding or following
25 behind Mr. McGee or causing the accident.

David Hudgins - Cross-examination
By Mr. Coulter

1 Q All right. But you did go into a courtroom in front of
2 a judge?

3 A Well, during that time -- no, not, not for that part of
4 it I wasn't in front of a judge. It was with my lawyer and
5 he was, he was negotiating with the trooper.

6 MR. COULTER: Judge, I'm not asking that question.

7 THE COURT: Okay. And, sir, again, and maybe you
8 didn't understand, but please stay away from communications
9 with legal -- with your own legal counsel.

10 THE WITNESS: Okay. I'm sorry.

11 THE COURT: Okay.

12 THE WITNESS: Yes, Your Honor.

13 THE COURT: All right. Mr. Coulter, I think everybody
14 understands he pled guilty.

15 okay?

16 MR. COULTER: Okay. That's all I've got. Thank you.

17 THE COURT: Yes, sir, redirect.

18 MR. BRADSHAW: Yes, Your Honor.

19 REDIRECT EXAMINATION

20 BY MR. BRADSHAW:

21 Q Now, Mr. Hudgins, Mr. Coulter just asked you about
22 coincidences in this case.

23 Now, there's no question, on, on November 19th, 2015,
24 was Hearon Circle the exit that you intended to take when
25 you left Blacksburg?

1 A Yes, it was.

2 Q Okay. And speaking of coincidences where -- when you
3 took, took that exit, were there other vehicles that also
4 exited with you in addition to Mr. McGee?

5 A There were. There was a lot of traffic on that circle.
6 It's pretty common.

7 Q All right. And then, as Mr. McGee went around Hearon
8 Circle, were there other vehicles on Hearon Circle and
9 in-between your vehicle and Mr.---

10 A There were, yes.

11 Q ---McGee?

12 Okay. And then, when Mr. McGee got on Simuel Road,
13 were there other vehicles in-between your vehicle and his
14 vehicle?

15 A There were, yes.

16 Q Okay. All right. And are any of those drivers of
17 those other vehicles in this courtroom today?

18 A No, sir.

19 Q And was that coincidence -- was it just -- was it a
20 coincidence that they were there on Simuel Road, and taking
21 that route as well?

22 A Yeah, I think you can call it -- everyone was there, I
23 guess it was a coincidence, yes.

24 Q Okay. All right. And on November the 19, 2015,
25 were -- did you plan to -- let me back up.

1 You had -- you knew this was the route that you were
2 gonna take to get to Sage Cotton Blossom?

3 A That's right.

4 Q Right?

5 And you, you had taken that route before?

6 A That's right.

7 Q Right.

8 But you didn't necessarily know the name Simuel Road or
9 Howard Street at that time?

10 A No, I don't recall the names.

11 Q Okay. Is that the reason you were having difficulty
12 remembering the road names on the 9-1-1 call?

13 A That's right, yes.

14 Q Okay. But you knew the route, right?

15 A That's right, yes.

16 Q Okay. Then he mentioned that you had pled guilty to,
17 to driving too fast for conditions.

18 Did you want to fight that charge?

19 A I did, yes.

20 Q Okay. It's not something that you wanted to do?

21 A I'm sorry.

22 Q It's not something---

23 A It's not something I wanted to do.

24 Q Okay.

25 A No.

1 Q Was that -- rather than incurring other financial
2 costs, was that the best decision for you financially?

3 A That's right, yes.

4 Q Okay. And the fine -- what was the fine that you
5 ultimately had to pay for that?

6 A I don't remember. It was 82 bucks, and I think I paid
7 a Court fine for that too.

8 Q Okay. Now, again, I think Mr. Churdar mentioned --
9 tried to say that you were right behind Mr. McGee on Simuel
10 Road.

11 Were you ever right behind him?

12 A No, never.

13 Q Okay. And when you say you were four, or five, six car
14 lengths away from him, when he was on Simuel, did -- as he
15 drove down Simuel Road, did that distance ever increase?

16 A Oh, yes.

17 Q Okay. So, he was -- was he going faster than you?

18 A Oh, yes.

19 Q Okay. Were you right on his tail chasing him?

20 A No.

21 Q Okay. And you had decided not to chase him?

22 A Right.

23 Q Okay. And when you said you saw the accident again,
24 you didn't realize he -- you, you were so far away you
25 didn't even see that he hit another car, did you?

David Hudgins - Redirect examination
By Mr. Bradshaw

1 A That's right.

2 Q Okay. And you never did anything to try to distract
3 Mr. McGee or try to make him cross the center line and hit
4 Ms. Hudgins (sic), did you?

5 A No, sir.

6 Q Ms. Green, did you?

7 A Correct. No, sir.

8 Q Thank you. Nothing further.

9 THE COURT: Okay. All right. Thank you, sir. Please
10 watch your step.

11 THE WITNESS: Thank you.

12 THE COURT: Okay.

13 MR. BRADSHAW: Thank you, Your Honor. At this time
14 we'll rest.

15 THE COURT: Okay. Thank you.

16 And, Mr. Bradshaw, I think it -- I think you, you
17 started and you published the 9-1-1 recording, but it is in
18 evidence, and it would be Defendant Hudgins Exhibit 1.

19 MR. BRADSHAW: Yes, Your Honor.

20 THE COURT: All right. Thank you.

21 Mr. Coulter, anything from the Defendant?

22 MR. COULTER: No, Judge. My client's been called. We
23 rest.

24 THE COURT: All right. Thank you.

25 MR. CHURDAR: Nothing in reply. Nothing in reply.

1 THE COURT: Okay.

2 MR. BRADSHAW: And, Your Honor, again, at this time, we
3 have matters of law that do need to be taken up outside the
4 presence of the jury.

5 THE COURT: Okay. And so, just for planning purposes,
6 counsel, if you-all can come up for one moment?

7 (WHEREUPON, a bench conference was held out of the
8 hearing of the jury at this time.)

9 THE COURT: All right. Ladies and gentlemen of the
10 jury, there are some matters of law that I need to take up,
11 and then I need to have a conference with the lawyers as
12 well regarding my instructions to you that you're going to
13 receive tomorrow. And so I'm going to have you-all released
14 at this time, and come back at ten o'clock in the morning.

15 At that time, we will have -- as I understand it from
16 counsel, everyone has rested. I don't want to misstate
17 that, but is that correct?

18 MR. CHURDAR: That is correct.

19 THE COURT: And so tomorrow you will have closing
20 arguments of counsel, and then a charge from me regarding
21 the law that you are to consider, and then you will commence
22 your deliberations.

23 And so I am going to now release you, and will caution
24 you, again, not to do any independent research. Don't
25 discuss the case because, as you can see, today you heard a

1 lot more evidence, and, and -- so, again, let's not take
2 anything up too soon.

3 Have a nice evening, and I will see you-all in the
4 morning. I'll see you-all at 10:00. I'm gonna be here with
5 them later, and be here earlier with them in the morning.

6 All right. And wait, wait, wait. I don't want to mess
7 y'all up.

8 where are they reporting tomorrow?

9 THE BAILIFF: They will go back to the big room, but I
10 need all the tags.

11 THE COURT: Okay.

12 THE BAILIFF: Name tags.

13 THE COURT: Yeah.

14 All right. So, y'all will turn in your juror badge.
15 Thank you-all. Have a nice evening.

16 (WHEREUPON, the following takes place outside the
17 presence of the jury. Mr. Churdar also asked this part of
18 the transcript not be transcribed, and Court was adjourned
19 for the evening.)

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25

1 wednesday, October 16th, 2019

2

3 (WHEREUPON, the following is the only portion of the
4 trial for this asked to be transcribed by Mr. Churdar.)

5 THE COURT: All right. Mr. Alford, let's have our
6 jury.

7 THE BAILIFF: Yes, ma'am.

8 THE COURT: And, Mr. Churdar, you will have a chance to
9 reply.

10 MR. CHURDAR: Yes, Your Honor. Thank you.

11 THE COURT: Okay. And y'all are gonna do that in the
12 same order?

13 MR. COULTER: We will.

14 MR. BRADSHAW: Yes, Your Honor.

15 THE COURT: Okay.

16 MR. CHURDAR: Hold on. Your Honor, will I have reply
17 to each individually or---

18 THE COURT: Why don't you do it all at once?

19 MR. CHURDAR: All right. All right. Very good.

20 THE COURT: I think that's easier.

21 MR. CHURDAR: Okay.

22 (WHEREUPON, the following takes place within the
23 presence of the jury.)

24 THE COURT: Hi. Good morning. Thank you all for your
25 patience today. We had some matters that we needed to take

1 up this morning as well. We did work for several hours last
2 evening trying to make sure that we were all on the same
3 page with regard to the law, and the verdict form. And so
4 we're trying to make your time here as efficient as
5 possible.

6 So, Madam Forelady, are you ready to go?

7 THE FORELADY: Yes, ma'am, Your Honor.

8 THE COURT: Okay. And, again, you-all have heard all
9 of the evidence that you're going to hear. In just a moment
10 you're going to have what's called closing arguments of
11 counsel, after which I'm going to give you the charge on the
12 law, and then you all will retire to your jury room to
13 commence your deliberations.

14 Now, the exhibits that have been marked throughout this
15 trial will go back with you. So, don't be concerned about
16 that. Those are gonna go back into the jury room, and you
17 will be able to review those that were admitted into
18 evidence during the trial. So, don't be concerned about
19 that.

20 I will also give you a verdict form at the conclusion,
21 one verdict form. That will be given to the foreperson.
22 And our alternate, at the commencement of deliberations,
23 will come out before that happens, and I've got a sticky
24 note up here to remind me to do that just in case.

25 Okay. But, again, I want to thank all of you for being

1 prompt. I appreciate that. And so now I am gonna give you
2 a brief intro into the closing arguments of counsel.

3 The parties have presented their evidence in this case.
4 It is now time for the attorneys to make their closing
5 arguments. The arguments of the attorneys are not evidence
6 in this case. Their statements and arguments are meant to
7 help you understand the evidence and apply the law to the
8 evidence. You should disregard any remarks, statement, or
9 argument which is not supported by the evidence presented
10 during the trial, or the law that I will explain to you
11 after the arguments.

12 And so, at this time, is Plaintiff ready, Mr. Churdar?

13 MR. CHURDAR: Yes, Your Honor.

14 THE COURT: Okay. Yes, sir.

15 MR. CHURDAR: May it please the Court.

16 THE COURT: Yes, sir.

17 MR. CHURDAR: Good morning.

18 Folks, in a little while you're gonna go into the jury
19 room, and you will have three jobs. One of your jobs will
20 be to answer the verdict form that is going to be given to
21 you by the judge. You'll answer the questions that are in
22 the verdict form.

23 Your second job is going to be make sure -- making sure
24 that you and your fellow jurors follow the law that the
25 judge gives you, and then third, before you answer those

1 questions on the jury verdict form, you'll have to explain
2 to each other why you feel the way you do about each
3 question.

4 So, for the next few minutes, I'd like to give you some
5 ways to do that. When I use to try cases just coming out of
6 law school, I'd sit up and tell the jury pretty much
7 everything they had heard, and I've decided that's just
8 unnecessary and obnoxious. Y'all've been here and y'all
9 have probably had your fill of the facts of this case.

10 So, I'm only gonna talk about the facts as they apply
11 to the issues that you're gonna have to decide. But, just
12 by way of background, just remember we are suing the
13 Defendants because they very deliberately, deliberately,
14 over a period of 15 to 20 minutes and over many miles, chose
15 to get back at each other with no regard for the safety of
16 other people, and, by doing that, they became distracted.

17 This is commonly called road rage. That's what this
18 case is about. Instead of being enraged, and instead of
19 being distracted, either one of these could, during that 15
20 to 20 minutes, have backed off, even after the 9-1-1 call,
21 have backed off, have pulled off the road, and have cooled
22 off, and Shannon would not have been seriously injured that
23 night.

24 Now, as I said, I'm not going to repeat everything that
25 you've already heard, but I want to talk about the questions

1 that you're gonna see on the verdict form. It, it -- when
2 you first look at it, you might go oh, my, this is
3 complicated, and it's really not. Just go through it
4 question by question, like paint by numbers, and, as you
5 answer the questions, you'll get to the end, and you'll get
6 to your verdict, which is to speak the truth.

7 The first thing y'all are gonna have to answer is
8 whether these two individuals were at fault for the
9 collision.

10 Now, Mr. McGee, Mr. McGee, despite fighting this,
11 fighting the charge, arguing about it, and, in his answer,
12 official answer filed in this Court, in this lawsuit saying
13 no, it was not my fault, no, she was not hurt, he is now
14 admitting fault. When I read that Complaint, and I read
15 that Answer, I just wanted you to see that for what it was.
16 Because, as I told you, this business of fighting, fighting,
17 fighting, fighting, and then coming in and looking contrite
18 is not -- it's not valid. It's not repentance. It's not --
19 it's not sorrow. I've seen it. But, anyway, he has now
20 admitted he is at fault.

21 Mr. Hudgins, the guy in the red car, he says nope, I'm
22 not at fault. Nope, I didn't do anything wrong.

23 would I do anything differently?

24 Nope, I wouldn't.

25 So, he -- you have to decide whether Mr. Hudgins was at

1 fault. In doing so, I want to draw your attention to a
2 charge that you'll hear from the jury, and the charge is
3 about something called negligence per se. Basically
4 negligence on its face. When a person violates a law or a
5 statute that is designed to protect the public, such as you
6 shouldn't go over 25 or 35 miles an hour on a certain road,
7 when that law is violated, that is negligence per se because
8 the public is endangered by that law.

9 All right. Mr. Hudgins did, did admit in Court,
10 finally, after he lawyered up, he finally pled guilty to
11 driving too fast for conditions.

12 Now, I'm not talking about a couple miles over the
13 speed limit. I'm talking about seriously endangering
14 people. He pled guilty. That is negligence per se. Listen
15 for the charge on that.

16 But the other thing I would encourage you to do is just
17 use your common sense. The Judge is gonna tell you that he
18 would be held to the standard of an ordinary, reasonable
19 person. If I get into it -- I can't, I can't imagine what
20 all that happened out there, but if I'm having nearly four
21 wrecks with a guy, and, and then I see him almost wreck
22 somebody else, and I don't even really know where I am, I
23 think I'm in Simpsonville, I, I don't know the name Hearon
24 Circle, I don't know Simuel Road, I don't even know how to
25 pronounce it, I am not gonna speed. I'm not gonna follow

1 him.

2 I've called law enforcement. I have reported him. I
3 have given him his tag. I have given him a description of
4 the vehicle. I'm gonna back off. I think that's what the
5 ordinary, reasonable person would have done. And so ask
6 yourself this question.

7 If Mr. Hudgins had let it go, after he called 9-1-1,
8 would this have happened?

9 would Shannon have been injured, and would we all have
10 been here for three days?

11 The answer is no.

12 Now, the second question y'all are gonna have to answer
13 is did this collision cause damage to Shannon and Rusty.
14 The answer is very clear. Yes. If you agree with that, the
15 next question you'll answer is how much, in a monetary
16 amount, should you return in your verdict for Shannon and
17 Rusty in this case. And, in doing so, we're gonna talk
18 about their damages.

19 But before we do that, I want to remind you of a couple
20 of ground rules as you're analyzing this, and the Judge will
21 talk to you about some of this I believe.

22 Y'all made a commitment to follow the law. So, she's
23 gonna charge -- Judge Knie's gonna charge you on what the
24 law is. But these were some questions that y'all were asked
25 in voir dire. She said if you decide two defendants were

1 careless, and their carelessness hurt somebody, and caused
2 them to receive medical bills, what problem would you have
3 in, in, you know, including money in a verdict for that, and
4 please stand if you got a problem. Nobody stood. If, if
5 you decide that two people are careless, and they cause
6 somebody to lose income, you have any kind of a problem,
7 even a little one, returning money for that, the answers
8 were no.

9 The reason she's asking these questions is because it's
10 not enough just to say will y'all follow the law. You are
11 being asked about specific application of the law because,
12 as she'll tell you, there are various components of the
13 damages in this case. They include the medical bills. They
14 include lost income, but they also include some other
15 things.

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

25 The same with physical impairment, the same with things

1 that cause a person to lose partially some aspects of their
2 enjoyment of life, the things that they use to do, the
3 things that they can't do now. And then you were also asked
4 about punitive damages, whether you would have a problem, in
5 a case where people were reckless and willful, would you
6 have, even a little problem, awarding punitive damages.
7 That's because, if you find that the Defendants are reckless
8 and willful in what they did, not necessarily that they
9 intended for her to get hurt, but intended to do what they
10 did, and they clearly should of known somebody could of been
11 injured, then you are to put something in your verdict for
12 punitive damages. That's why she asked those things.

13 So, the first thing that I want to talk about is your
14 commitment to the law, and I'm not gonna go on and on about
15 it. Just understand that commitment was made and y'all need
16 to talk about this case within the context of the
17 commitments to follow the law.

18 The second thing I want to mention is we're gonna talk
19 about Shannon and Rusty's harms and losses. The way they've
20 been harmed -- you know, we use terms like damages. These
21 aren't every day terms. I hope you understand harms and
22 losses. But we're gonna talk about their harms and losses,
23 and, to be very, very clear, we're gonna talk about their
24 harms and losses from this collision.

25 Shannon is not seeking to recover anything for bursitis

1 she had on her hip several years ago or for a problem she
2 had with her right shoulder, which has nothing to do with
3 this, 10 or 12 years ago. We are focusing on the harms and
4 losses from this case.

5 The third thing I'd like to point out is sympathy.
6 This isn't about sympathy. This isn't about sympathy for
7 the Plaintiffs, and it's not about sympathy for the
8 Defendants. This is about putting something in the verdict
9 that is directly related to the harms and losses.

10 So, as you go through this, I'm not asking you please,
11 feel sorry for Shannon, please feel sorry to Rusty. I'm
12 asking you to look at the way that they have been impacted
13 in the way they live and will be for the next 30 years, and
14 how its cost them, and to return a verdict that speaks the
15 truth about that. By the same token, if you're back there
16 in and you start feeling sorry for the Defendants, that's
17 not appropriate either. This is not about sympathy.

18 Finally, evidence only. All the evidence that you are
19 to consider came from either these documents that you'll
20 get, you'll get the documents, and then the testimony that
21 you heard up here.

22 Okay. The worst thing you can do is get back in the
23 jury room and start guessing about things. If you have
24 questions that are really important to you that you feel
25 like you need to guess about, ask the judge. Don't guess.

1 So, I want to talk about Shannon and Rusty's harms and
2 losses briefly cause you'll hear a charge on each of these
3 things. The first harm and loss is pain.

4 Now, I don't know about you. There's all kinds of
5 jokes made about men and woman, and child birth, and men
6 being babies and all, and there's some truth to it actually.
7 I am a baby. I'm adverse to pain. I think most people
8 don't enjoy pain. They hate pain. They're willing to do
9 whatever it takes to avoid it.

10 Shannon testified and, by the way, she'll -- the judge
11 will also talk about credibility. I feel -- I have not had
12 a more understated plaintiff -- client than Shannon. You
13 know, she's -- I, I thought -- I think you can judge her
14 credibility, whether you felt like she was believable,
15 whether you felt like she exaggerated, or whether you just
16 felt she was being straight up. I would submit to you she's
17 being very straight up, and she said her pain in her back
18 and in her shoulder are constant.

19 Now, the problem with that, as we know, is she's a
20 diabetic. So, what you and I might be able to do for our
21 pain she can't do. I've had steroid injections in my knee.
22 I've had a steroid injection in my back a time or two. She
23 can't have that because it causes her blood sugar to go
24 through the roof, and she's literally in danger by taking a
25 steroid injection. So, she can't do that.

1 Because of her job in the medical field, she can't go
2 to work on stronger prescription drugs to deal with the
3 pain. She use to take a lot of Advil. She testified she
4 was taking two to three a day until she went with stomach
5 problems to her gastroenterologist, and was told you got
6 gastritis. You need to lay off the Inseds (phonetic) or the
7 Advil. So now she takes one of those occasionally, and then
8 she uses as Aspercreme. I don't know how many of y'all know
9 what that is. But she basically lives with it. She lives
10 with the back pain, and she lives with the shoulder pain.

11 what does this do?

12 well, obviously, it impairs in her some ways, but you
13 heard about the problems that she has sleeping. We all know
14 how important a good nights rest is. I, I, I didn't get a
15 real good nights rest last night. I was dying, I was dying
16 to fall asleep and I couldn't, and, and I feel it, and I'll
17 feel it tomorrow and tonight. But it's important. If you
18 routinely don't get a good nights rest, that's a big deal,
19 and she doesn't get a good nights rest very often.

20 You heard her say that it's, it, even now at least two
21 weeks -- two times out of the week she ends up sleeping in a
22 recliner, and what does that tell you about her quality of
23 sleep?

24 It's poor.

25 She has less energy, which is very common when you are

1 in pain, and you have sleep issues. She's dealing with
2 that.

3 So, when you're back there, you're gonna look at this,
4 and I want you to talk about it. I'm not here -- you know,
5 this isn't -- I'm not trying to say this is somebody who
6 literally can't function, somebody who's here, you know, in
7 a wheelchair, or a walker. But you know what?

8 She didn't ask for this, and this didn't just happen.
9 Her life was changed and Rusty's life was changed because
10 decisions were made, vengeance over public safety.

11 Okay. So, look at this and consider whether, for
12 having already experienced this pain, and then she'll have
13 it for the next 30 years with nothing she can do about it.

14 Full enjoyment of life. The judge will talk about loss
15 of enjoyment of life. Basically whether you're able to do
16 all the activities that you use to like to do.

17 When I first met Shannon, she talked to me about liking
18 to do yardwork. I couldn't get over that cause that's a --
19 I'll let the weeds grow up in my yards (sic) to my knees
20 before I'll do anything about it. I don't like yardwork.
21 It brings me no pleasure.

22 What I do like is cycling and hiking. When I'm not
23 cycling and hiking, I'm thinking about cycling and hiking.
24 When I'm not thinking about it, I'm talking, I'm talking
25 about it. It's what I do and it brings me tremendous joy.

1 I'm sure everyone in this room has something they just
2 love to do. Shannon loved yardwork and gardening. Can't do
3 it now. Unable to because of the weakness in her arm, and
4 the back pain, and even things as simple as carrying a
5 pitcher of tea. Very, very, very basic homemaking and
6 entertaining. She can't even do that because of the
7 weakness and the pain in her shoulder.

8 And, again, her relationship with her husband. And I,
9 I try, when I talk about that, to not be -- kind of be
10 gentle and not embarrass and to -- but that's important in a
11 marriage. It's important in a marriage. And when that is
12 affected, it is a big deal, and it does change the
13 relationship. And we'll talk about that a little bit more.

14 Impairment, losing full use of your body. She can't
15 move her arm like she could. She favors it. It's weak.

16 How does this affect her?

17 well, it's not just in her inability to do yardwork,
18 but you heard her say, even at work, she has to carry -- you
19 know, she's got this computer. It's a 5-pound computer.
20 She can't carry it in her left arm. She has to carry it in
21 her right arm. There are certain things she does with
22 patients that she can't do without help. So, there is an
23 impairment there.

24 Mental distress.

25 You know what?

1 She's not seeing a psychologist or a psychiatrist, but
2 I want you to think about what it feels like when you wake
3 up not having known, literally, what hit you, the horn's
4 blaring, and you got glass in your mouth, glass in your
5 eyes, your face is cut, it's bleeding, and the horn is
6 blaring, and you think -- and you can't breathe, and you
7 think you're gonna die. That's something anyone will
8 remember.

9 Finally, you're gonna hear the judge talk about loss of
10 consortium. That is -- has to do with Rusty's claim. I
11 want to talk about that for a second. I wouldn't have
12 brought that up except the law allows for it, and it's not
13 just about we don't have as much sex anymore. It's about
14 when the person you marry -- and Scripture tells, when you
15 marry somebody, you become one flesh. It's like you're the
16 same person. You're knit together.

17 And when that person, who is your best friend, can't
18 get out of bed, can't pull her pants up, can't wipe herself,
19 can't sleep, can't do anything really, and you got to drive
20 her to work while you go to work in North Carolina, you got
21 to do this for a couple of months, it's, it's a loss. When
22 your husband or your wife really hurts, you hurt. And,
23 again, I wouldn't even bring this up, but this isn't a case
24 where this just happened.

25 It didn't just happen. It didn't just happen.

1 Decisions were made.

2 So, when you look at these things, at these elements,
3 there are different ways -- I'm gonna come to this one in a
4 second, but there's a reason it's last. There are ways you
5 can look at these. You can say, you know, well, a hundred
6 thousand dollars sounds like a nice number. You can -- you
7 can look at it and think well, this is gonna go on for a
8 long time.

9 What about, you know, a couple hundred dollars a month
10 for each of these. It adds up. That's a reasonable way to
11 deal with it. You know, some people you come in, and, and,
12 and their cases is tried in, in every county where people
13 come in, and they've got -- they -- maybe they've been rear
14 ended, and maybe their backs hurt, and they may have gone to
15 the chiropractor, and may of had a little bit of pain, and
16 that case might be worth, in a verdict, a couple thousand
17 dollars. And then, in some cases, somebody may be in a
18 wheelchair, and they may not be able to work. And that,
19 ind -- case and a verdict might be millions of dollars.

20 This case is clearly in-between those. I'm not saying
21 it's a million dollar case. But it's a big case. It's a
22 very big case. So, hundreds of thousands of dollars for
23 this would not be, at all, inappropriate. Again, she didn't
24 ask for any of this. It was forced on her. Decisions were
25 made.

1 I want to talk about this financial, and I leave this
2 at the very end, and there's a reason for that because this
3 case is not just about oh, let's go beg this jury for enough
4 money to pay these doctors. Exhibit, Exhibit 10 shows the
5 financial -- the actual financial costs. It doesn't include
6 the, the amount of lost income from Rusty or any of the time
7 off for the trips to the doctor or the mileage or things
8 like that. But it is her medical expenses, her lost wages,
9 which you'll see that, and then her phone replacement when
10 her phone literally got bent on her hip and destroyed. But
11 this is not -- this case is about these harms and losses,
12 changes to her life that were forced upon her.

13 This is \$88,546.78 this adds up to. You can do the
14 math. It's, it's penny for penny what it is. But, you
15 know, when I look at this, I think of that old Master Card
16 commercial that was popular about 10 years ago, and it says
17 something like if you have a father with his son or
18 whatever, and they talk about, you know, being with his boy,
19 it was priceless or they talk about the cost of the hot
20 dogs, and the tickets, and then he'd saying, being with my
21 son, priceless.

22 well, if this were a Master Card commercial, what I
23 would say is getting a good nights rest or rather 88 --
24 82,560 in medical expenses, \$5,903 in lost wages, phone
25 cell -- cell phone replacement, \$83.06, being able to enjoy

1 your life, priceless. Being able to get a good nights rest,
2 priceless. Being able to work without physical impairment,
3 priceless. That's the way I look at this case.

4 So, again, you'll get this \$88,546.78 out of pocket,
5 but the case is so much more.

6 Now, early on, this, this, this case kind of got
7 started off with some fireworks I guess, and one thing Mr.
8 Coulter said, and Mr. Churdar is gonna get up here, and he's
9 gonna talk about punitive damages, and I thought well yes, I
10 certainly am, without apology by the way.

11 Now, I, in my career, have asked for punitive damages
12 twice before this. Twice. I don't ask for punitive damages
13 when they're not warranted, and juries don't give punitive
14 damages where they're not warranted. So, I want to talk
15 about punitive damages for a second, and I want to start by
16 talking about the purpose for them cause Judge Knie's gonna
17 talk to you about the purpose for punitive damages.

18 The primary purpose is deterrent. That's kind of a --
19 that's a legal -- I mean y'all know, know what that means,
20 but a legal word in a way. Warning, teaching other people,
21 these Defendants, this isn't the way you do it.

22 Okay. So, thoughts. I know y'all know what that is.
23 Nascar. I want to start with five times. This, this -- I
24 have -- I've not handled a case like this before where
25 egregious conduct occurs, and then it still doesn't seem

1 like people, I mean even in front of y'all, it doesn't seem
2 like people get it.

3 So, five times. Five times is the number of accidents
4 that almost happened before Shannon got hit, okay, out on
5 the interstate. Mr. McGee, in his big truck, comes up
6 roaring up behind Mr. Hudgins three times, flashing his
7 lights, according to Mr. Hudgins, three times. And, you
8 know, one of them says the other was roaring up, and the
9 other one, Mr. McGee says Hudgins is slamming on the brakes.
10 Either way, there was almost a wreck three times. And it
11 would be one thing if it were just the two of them. I mean
12 foolish, not, not good, but bumper to bumper, rush hour, on
13 the right, and they both have acknowledged yes, other
14 people, other men, women, and children in the community
15 could have been injured and they could have been killed.
16 Others.

17 Mr. McGee said it was like Nascar. I thought about
18 that this morning as I'm driving over here. God forbid I'm
19 driving next to anybody who thinks this is Nascar cause it
20 ain't Nascar for me. I just want to get -- I'm not in
21 competition. I'm not trying to beat anybody. I'm not
22 interested in putting myself or anyone else at risk. I just
23 want to get safely to my destination. That was everybody
24 else out there that night. Nascar.

25 Piece of paper. Again, I could hardly believe my ears

1 from the stand. Yeah. Well, you know, yeah, you could of
2 fit a piece of paper between us, but yeah, I got pass him.
3 So, move on, move on. No big -- basically no big deal.

4 Wow. I, I -- I've never been that close to a car. I
5 don't ever want to be.

6 But has he learned?

7 I would say no.

8 Choices and options. Choices and options.

9 Mr. Hudgins called -- he could of backed off after he
10 called 9-1-1. You know, the troopers -- three cars were
11 headed out there. They didn't need Mr. Hudgins. They did
12 not need Mr. Hudgins, and I'm gonna tell you, Mr. Hudgins,
13 all he really wanted to do was see Mr. McGee like this on a
14 cop car. You wondering why did he keep following him, why
15 did he keep following him. They did not need him.

16 I don't think he was gonna hurt -- I don't think he had
17 a gun. I don't think he was gonna shoot Mr. McGee. I don't
18 think he was gonna, you know, drag him out of the car and,
19 you know, beat him up. But he wanted to see -- he wanted
20 revenge in the form of I am -- I got the cops coming after
21 you, boy. He wanted to see Mr. McGee leaning up on a cop
22 car. That would of just made his day.

23 But they had options. Mr., Mr. McGee had options. He
24 could of pulled off too. He could of gone into -- I don't
25 think he was gonna pop a cap in his head. He could of gone

1 into the QT. He could of gone any number of places, but he
2 didn't. They both chose to keep it going.

3 This is a pathetic attempt at drawing a flip phone.
4 That's a flip phone.

5 Now, I just -- when Mr. McGee said -- I said well, you
6 could of called law enforcement. Don't you -- but I don't,
7 I don't get on the phone when I'm driving. I guess out of,
8 you know, just out of principle. We're gonna almost rear
9 end somebody, run him off the road, almost run other people
10 off the road, but, but no, I'm not gonna talk on the phone
11 to the cops while I'm driving. He had that option. Could
12 of used his flip phone.

13 Now, afterward, do they get it?

14 I put down fight, fight, fight. That's all they've
15 done. They've both lawyered up. They both went to Court a
16 couple times, and they ended up pleading guilty to driving
17 too fast for conditions. It was a plea deal, and I forgot
18 to put 82 down here. That's what they paid, \$82.00.

19 So, let's talk about punitive damages. The purpose of
20 punitive damages, as I said, is to deter, and I'm asking for
21 an award of punitive damages, and it would not be unusual,
22 and it would not be inappropriate for an award of punitive
23 damages to be at least what the actual damages or even
24 double that, and I'm gonna tell you why. The point of
25 punitive damages is to deter the Defendants.

1 Now, I might not even bring this up but for the fact
2 that neither of these guys get it. That's very clear. They
3 don't get it. One of them -- I mean -- I wouldn't do
4 anything different. That's Mr. Hudgins. Wouldn't do a --
5 wouldn't change a thing.

6 Then, to deter others, other people in the community --
7 this happens. This happens. If you pick up the newspaper,
8 it happens. It happened in Greenville a couple weeks back.
9 It happens and people need to know \$82.00 is not a
10 deterrent.

11 Okay. It's not. People need to know this will not be
12 acceptable, and then you can speak to the community, and,
13 again, teach them what is and is not acceptable.

14 So, think about these things as you consider what would
15 be an appropriate punitive damage award, which, under the
16 law, if you find they were willful and reckless, your jury
17 verdict should include.

18 Now, I want to close with this one, the mirror test.
19 Y'all, we, we heard about a bad wreck. We heard about
20 serious injuries. We've heard about changes in life-style.
21 We've heard about lost income, and a bunch of medical
22 expenses, and, and, and physical injury. Y'all saw the
23 pictures of those -- that car.

24 This could of been a death case. This could of been a
25 death case. It could of been a death case for five other

1 people. I didn't mention, on Hearon Circle, Mr. Hudgins
2 said oh, yeah, when he got ahead of me on Hearon Circle he
3 almost hit somebody else. That would be the fifth before,
4 before Shannon, you know, took one for the team.

5 I call it the mirror test. Y'all are here -- I told
6 you at the very beginning -- I told you at the very
7 beginning this is an important case. I told you, at the
8 very beginning, that you are chosen to be here. You guys
9 are here for a reason, and you can have an impact on this
10 community by your verdict, and you can say we're gonna give
11 partial justice, and let them pass on, on these other things
12 or you can say it ends here, it ends now, and we're gonna
13 deliver a verdict that is basically a monument to our
14 opinion that this kind of stuff is not an \$82.00 issue. And
15 it's not just you do this to people, and you come in here,
16 and yeah, here, here are your medical bills. It's not what
17 it's about.

18 When you pick up the newspaper or watch on the news, in
19 the future, and you hear that a little boy or a little girl
20 or a family was killed as a result of a road rage incident,
21 I call this the mirror test, I want you to be able to look
22 in---

23 MR. COULTER: Judge, I'm gonna have to object. I just
24 don't believe that's appropriate. It's directing to the
25 jurors specifically.

1 THE COURT: Come up.

2 (WHEREUPON, a bench conference was held out of the
3 hearing of the jury at this time.)

4 THE COURT: Okay. Madam Forelady, and members of the
5 jury, I'm gonna send you all out at this time so that I can
6 hear this objection.

7 Mr. Plexico, if you'll lead the jury out.

8 Thank you.

9 (WHEREUPON, the following takes place outside the
10 presence of the jury.)

11 THE COURT: Okay. Yes, sir, Mr. Coulter.

12 MR. COULTER: Yes, Judge. I'm sorry, but I, I hate to
13 object during closings, but Mr. Churdar was telling this
14 jury if somebody dies in a future -- as a result of road
15 rage, and you don't give me a big verdict, you have to look
16 at yourself in the mirror, and that's just not an
17 appropriate argument to make in this setting. It just is
18 not. That's putting them in the, in the -- basically being
19 told it's your fault if you don't do it in the future, and
20 that's just outside the box in terms of making a closing
21 argument.

22 MR. CHURDAR: Your---

23 THE COURT: Mr. Churdar, I, I don't know that you got
24 that far with it, but tell me your position, sir.

25 MR. CHURDAR: Well, Your Honor, it's very consistent

1 with the law that says their, their role here is deterrence
2 when a -- when they look at punitive damages, and I think,
3 for their verdict to do what it's suppose to do, they,
4 they -- that they should be able to say that their verdict
5 worked as a deterrent.

6 MR. COULTER: I, I object---

7 MR. CHURDAR: I made this argument many times, never
8 had an objection, and I don't think it's objectionable.

9 MR. COULTER: Many times. He just said he's only made
10 a punitive argument twice just a minute ago. So, many times
11 seems suspicious.

12 Okay. But, secondly, he's telling this jury, if a
13 young child dies and you don't give me a verdict, and it's
14 your fault, by looking in the mirror, that's just putting a
15 juror in a horrible spot. That's just not appropriate.

16 THE COURT: Okay. Mr. Bradshaw, anything?

17 MR. BRADSHAW: Yes, Your Honor. I would just concur
18 with Mr. Coulter.

19 Again, certainly he can testify about what or he can
20 tell the jury about what the law is, that the purpose is
21 deterrent. But to say that some future actions or, or
22 future accidents or, or referred to matters that's outside
23 of the cases before the jury is completely inappropriate,
24 and to try to guilt trip them into, into giving you a large
25 verdict is, is just inappropriate, and, and goes well

1 outside -- it is extremely prejudicial to the defense in
2 this case.

3 THE COURT: Okay. Mr. Churdar, anything else?

4 MR. CHURDAR: In addition to the fact it's closing
5 argument, I would say that my, my argument that I was about
6 to make is consistent with reminding them they are suppose
7 to deter with their verdict.

8 THE COURT: Okay. Well, why don't we leave it at that.

9 Okay. I believe, in looking back over my notes, you
10 have stated that there was a possibility of other accidents.
11 There could of been other accidents. I think you said that
12 the Plaintiff took one for the team. And so, I, I -- again,
13 I, I think that you've made your point about it being a
14 deterrent, okay, in nature --

15 MR. CHURDAR: All right.

16 THE COURT: -- or a deterrent.

17 All right.

18 MR. CHURDAR: How about if I just repeat that to kind
19 of back out of this little---

20 THE COURT: Yes, sir. Yes, sir, and I think that's
21 fine.

22 MR. COULTER: I'm sorry. Repeat, repeat what?

23 MR. CHURDAR: Just repeat that so that I just don't
24 start up on a completely different topic. I, I just---

25 MR. COULTER: And I'm just trying to figure out what

1 you're gonna repeat.

2 MR. CHURDAR: I'm not---

3 MR. COULTER: Are you gonna tell the jury that---

4 MR. CHURDAR: I'm not---

5 MR. COULTER: ---if there's a baby---

6 MR. CHURDAR: No, no, no.

7 MR. COULTER: ---that it might die---

8 MR. CHURDAR: I -- there's been a ruling. I'm, I'm --

9 I understand that.

10 MR. COULTER: Can I just -- all I'm asking is just for

11 clarification as to what you want to repeat.

12 MR. CHURDAR: That -- the fact that your verdict should

13 be a deterrent.

14 MR. COULTER: Oh.

15 MR. CHURDAR: That's it.

16 MR. COULTER: I don't want to cause the jury to go out.

17 I'm just trying to understand.

18 MR. CHURDAR: Yeah.

19 MR. COULTER: Okay. That's fine.

20 MR. CHURDAR: Yeah.

21 THE COURT: All right.

22 MR. CHURDAR: All right.

23 THE COURT: Okay. Thank you.

24 Mr. Alford?

25 THE BAILIFF: Yes, ma'am.

1 THE COURT: If you can bring the jury back in?

2 THE BAILIFF: Yes, ma'am.

3 THE COURT: So, I am sustaining the objection, and Mr.
4 Churdar will move forward.

5 MR. CHURDAR: Understood.

6 THE COURT: All right.

7 MR. CHURDAR: Understood.

8 THE COURT: All right.

9 (WHEREUPON, the following takes place within the
10 presence of the jury.)

11 THE COURT: Okay. Madam Forelady, thank you.
12 Mr. Churdar.

13 MR. CHURDAR: Yes, Your Honor. Thank you.

14 Members of the jury, all I want to say is literally the
15 last thing that I will say. Do what needs to be done to
16 deter, and to make this community a safer place.

17 Thank you.

18 (WHEREUPON, a closing argument was made by Mr. Coulter
19 followed by a closing argument by Mr. Bradshaw. Both of
20 these were asked not to be transcribed by Mr. Churdar.)

21 THE COURT: Thank you, Mr. Bradshaw.

22 Mr. Churdar.

23 MR. CHURDAR: Thank you.

24 I'm limited in what I can say. So this will be brief.
25 But basically it will serve to address a couple of specific

1 things that were said.

2 First of all, basically, from the defense lawyer for
3 Mr. McGee, what you sort of heard was a she's not a spring
4 chicken anymore defense. She had other problems, and, you
5 know what, we all have other problems. If they just
6 happened to us, that's one thing. I got a bad knee. If,
7 if, if these guys, who clearly don't get it, hit my car and
8 damaged my left knee, and severely damaged my left knee, and
9 I have to have surgery, and I have to miss work, please, I
10 don't want to hear he already had arthritis in his right
11 knee. That has nothing to do with it.

12 Regarding the medical records, you won't see those. I
13 will tell you that saying to somebody who has come back
14 after having a surgery, and had had their left shoulder
15 literally pinned to their body for six weeks with no
16 movement whatsoever, and saying range of motion is much
17 better, doesn't mean you got full range of motion, and
18 things are great. Strength is less than the right, but
19 appropriate. Appropriate for just having had your shoulder
20 worked on, and then had, had it pinned to your body for six
21 weeks.

22 And then the back. We already discussed that. There's
23 nothing that could be done about the back. You can't take
24 injections. You can't take narcotics. You can't keep
25 taking Advil where it's gonna give you problems, and she was

1 told by her doctor stop taking Advil.

2 So, she keeps going back every time and go, doc, I want
3 to talk about my back again. We'll, we've already discussed
4 that. Doc, I want to talk about my back again. We've
5 already discussed that. She's living with it. She's living
6 with it.

7 I'm not running from the burden of proof on punitive
8 damages, by, by the way. It -- to me, the fact that the
9 burden is, is -- has been so obviously met is really the
10 reason I didn't talk about it, but I will say this.

11 Is it clear, and are you convinced, these words are the
12 words you'll hear, is it clear and are you convinced that
13 McGee and Hudgins were reckless in what they did, that they
14 willfully engaged each other, ran up and almost put -- McGee
15 almost put his grill and pushed the, the, the back seat up
16 into Hudgins car, and that they wouldn't let it go, and that
17 they have plenty of time to make choices.

18 Is it clear?

19 Are you convinced?

20 That's the question. I don't run from that burden of
21 proof. It's not a problem.

22 The affidavit, just to be clear, y'all heard it. Mr.
23 McGee had a lawyer.

24 Why did Mr. McGee meet with me?

25 Because Mr. Hudgins, as, as I said, is trying to act

1 like he is a good samaritan. He's not a good samaritan.
2 That bothered Mr. McGee. Mr. McGee wanted to let me know
3 about that.

4 We talked about the affidavit. He said I put in that
5 affidavit his very words, word for word, and he read it
6 front and back several times, and it was the gospel truth.
7 He wasn't manipulated. He had counsel. There was nothing
8 inappropriate about that.

9 One last thing. Punitive damages. Not embarrassed to
10 be asking for it. I don't think it's greedy to be asking
11 for punitive damages. When you look at the, at the purpose
12 for what punitive damages serve, it's entirely appropriate.
13 I'm not saying Clary McGee's not a good grandfather. I'm
14 not saying he's not a good employee.

15 He goes to church, but I can tell you this. On the
16 road, he's made it clear to y'all he is a menace on the
17 road. If you go too slow in front of him, he's come right
18 up behind you and he's gonna flash his lights, and he's
19 gonna whip around you, and he's gonna almost cause a wreck.
20 And if you start to follow him, he's gonna speed, and he's
21 gonna even speed on roads that he's not familiar with. He's
22 gonna go 80 and 90 miles an hour down a road with a 25 or 35
23 mile per hour speed limit, and he could hurt or kill
24 anybody.

25 So, if he does that to me or my family or anybody else,

1 I don't want to hear what a great grand, grandfather he is
2 or he's a good employee. Doesn't matter.

3 Regarding money, Mr. McGee and Mr. Hudgins have had the
4 money to fight, fight, fight. They haven't spared any
5 expense. Got a ticket. I feel real bad about it. I'm
6 gonna hire a lawyer and fight, fight, fight. Got off for
7 \$82.00. I'm gonna -- I'm not gonna admit any, any
8 responsibility in this case, and I'm gonna hire really good
9 defense lawyers who are gonna come in here, represent me for
10 a year and a half, and we're gonna fight, fight, fight.

11 These lawyers have been paid to fight hard and they
12 have. But I can tell you, I'm confident you know the stakes
13 in this case, and your verdict is important.

14 Thank you.

15 THE COURT: Thank you.

16 Okay. Now, why don't we all stand up for a moment, you
17 all notice I stood for a few moments, before I give you the
18 charge on the law. Everybody stretch a little bit.

19 As, as I explained to you -- okay. We can all be
20 seated. Thank you.

21 I am now going to give you the charge on the law, and,
22 after this, you-all are going to retire to your jury room.
23 The exhibits will come back there. The verdict form will
24 come back there. We will have our alternates step out, and
25 then you're going to, when I tell you through the bailiff,

1 to commence your deliberations.

2 Okay. I, I told you at the beginning that we have
3 different roles in this type of trial, and you have duties
4 and I have duties to perform.

5 As the trial judge, it is my responsibility to preside
6 over the trial. I also have the duty to rule on the
7 admissibility of evidence offered during the trial. You are
8 to consider only the evidence before you. If there was any
9 testimony that was ordered stricken from the record during
10 the trial, you must disregard that testimony. You are to
11 consider only the testimony which has been presented from
12 the witness stand, and any exhibits which have been made a
13 part of the record in the case, and any stipulations by
14 counsel.

15 I have the additional duty to charge you on the law
16 applicable to this case. It is your duty, as jurors, to
17 accept the law as I give it to you now. If you think you
18 have any idea as to what the law is or what the law ought to
19 be, and it does not agree with what I tell you the law is,
20 you must forget that idea because you are sworn to accept
21 the law and apply it exactly as I state it to you.

22 In every case tried in this Court before a jury, the
23 jury becomes the sole and exclusive judge of the facts. A
24 trial judge can not comment on or make any statement about
25 the facts in a case. Since you are the sole judges of the

1 facts, do not think, by anything that I have said during the
2 trial, that I have any opinion about the facts in the case.
3 The law does not allow me to have an opinion about the
4 facts.

5 Now, you've heard, in the closing arguments of counsel,
6 references to burden of proof. The burden of proof in the
7 case is as to a preponderance of the evidence or by a
8 preponderance of the evidence. Now, I'll talk about a
9 different burden when we talk about punitive damages.

10 Okay. But a preponderance of the evidence is evidence,
11 which, as a whole, shows that the facts sought to be proved
12 is more likely true than not true. This can be illustrated
13 by imagining a set of scales. When the case begins, the
14 scales are even. After all of the evidence has been
15 presented, if the scales remain even, or if they tip even
16 slightly in favor of the Defendant, then the Plaintiff has
17 failed to meet the burden of proof, and would not be
18 entitled to recover in this case.

19 If, on the other hand, the scales tip even slightly in
20 favor of the Plaintiff, the Plaintiff will have met the
21 burden of proof, and you should return a verdict for the
22 Plaintiff. The preponderance of the evidence is not
23 determined by the number of witnesses. Instead, it must be
24 determined by the greater weight of all of the evidence.

25 Now, there are two types of evidence. There are direct

1 evidence, which is testimony of a person who claims to have
2 actual knowledge of a fact such as an eye witness. It is
3 evidence which immediately establishes the main fact to be
4 proven.

5 Circumstantial evidence is proof of a chain of facts
6 and circumstances indicating the existence of a fact. It is
7 evidence which immediately establishes collateral facts from
8 which the main fact may be inferred. Circumstantial
9 evidence is based on inference, and not on personal
10 knowledge or observation. It is proof that does not
11 actually establish the fact in question, but that asserts or
12 describes something else from which you may either
13 reasonably infer the truth of the fact or at least
14 reasonably infer an increase in the probability that the
15 fact is true. For circumstantial evidence to be sufficient
16 to warrant the finding of a fact, the circumstances must
17 lead to that fact with reasonable certainty.

18 The facts and circumstances should be considered in
19 light of ordinary experience and common sense. The
20 existence of a fact can not be based on speculation,
21 surmise, or conjecture. The law makes absolutely no
22 distinction between the weight or value to be given either
23 to direct or circumstantial evidence nor is a greater degree
24 of certainty required of circumstantial evidence than of
25 direct evidence.

1 Now, in this case, there were witnesses who testified
2 from the witness stand. Necessarily, you must determine the
3 credibility of witnesses who have testified in the case.
4 Credibility simply means believability. It becomes your
5 duty, as jurors, to evaluate the evidence, and determine
6 which evidence convinces you that it is true.

7 In determining the believability of witnesses who have
8 testified in this case, you may believe one witness over
9 several witnesses or several witnesses over one witness.
10 You may believe a part of the testimony of a witness, and
11 reject the remaining part of the testimony of that same
12 witness. You may consider whether the witness has an
13 interest in the result of the trial, whether the witness is
14 prejudiced towards either the Plaintiff or the Defendant,
15 the opportunity for the witness to have seen the matters,
16 and things about which the witness testified, and the way
17 the witness acted on the witness stand.

18 Now, in this action, the Plaintiffs claim that the
19 Defendants were negligent, and should compensate the
20 Plaintiffs for the injuries the Plaintiffs suffered as a
21 result of the Defendant's negligence. In order to prove
22 that the Defendants were negligent, the Plaintiffs must
23 prove, by a preponderance or greater weight of the evidence,
24 the following things:

25 First, the Plaintiffs must prove, by preponderance or

1 greater weight of the evidence, that the Defendants owed the
2 Plaintiffs a duty of care. This is a question of law for me
3 to decide, and I find that that duty of care existed. There
4 was a duty of care owed between the Defendants and
5 Plaintiffs.

6 In order to prevail on a negligence claim, Plaintiffs
7 must establish three elements by the greater weight of or
8 preponderance of the evidence, that the Defendants were
9 negligent, that the Plaintiffs were damaged, and that the
10 Plaintiff's damages were proximately caused by the
11 Defendant's negligence. If Plaintiffs fail to prove any or
12 all of these elements, you must find in favor of the
13 Defendants.

14 Now, negligence per se is when there is a duty arising
15 from a statute. A statute is a law, okay, and the
16 Plaintiffs must show that the Defendants violated the
17 statute. The violation of a statute is negligence per se.
18 The violation of any of the provisions of a statute is
19 negligence per se. That is negligence in and of itself,
20 negligence as a matter of law.

21 Negligence per se simply means the jury need not decide
22 if the Defendants acted as would a reasonable man in the
23 circumstances the statute fixes the standard of conduct of
24 the Defendants leaving you merely to decide whether the
25 Defendants breached the statute. If they did, their failure

1 to take due care is established as a matter of law. The
2 only issue then left for you to determine is whether the
3 Defendant's conduct proximately caused damage to, to the
4 Plaintiffs. Accordingly, proof of a violation of a statute
5 is, in fact, proof of negligence so that your only concern
6 then would be whether such violation of the statute was the
7 proximate cause of the injury and damage.

8 The violation of a statute does not constitute
9 recklessness, willfulness, and wantonness per se. Yet, such
10 violation, if shown, is evidence of recklessness,
11 willfulness, and wantonness, and may be considered in
12 connection with all other facts and circumstances
13 surrounding the case in determining whether the Defendant
14 has been or the Defendants have been reckless, willful, and
15 wanton. The violation of a statute will support a recovery
16 of damages if such a violation proximately caused or
17 proximately contributed to the injuries or damages
18 complained of.

19 In this case, the Plaintiffs claim the Defendants
20 failed to follow certain statutes or laws of the state of
21 South Carolina. Those statutes include a law that says any
22 person who drives any vehicle in such a manner as to
23 indicate either a willful or wanton disregard for the safety
24 of persons or property is guilty of reckless driving.

25 Also, in South Carolina, our law provides that it is

1 unlawful for any person to do any act forbidden or fail to
2 perform any act required under the traffic laws of the State
3 of South Carolina.

4 Another statute or law states as to speed. A person
5 shall not drive a vehicle on a highway at a speed greater
6 than is reasonable and prudent under the conditions, and
7 having regard to the actual and potential hazards then
8 existing. Speed must be controlled to avoid colliding with
9 a person, vehicle, or other conveyance on or entering the
10 highway in compliance with legal requirements, and the duty
11 of a person to use care.

12 South Carolina law allows the Department of
13 Transportation to determine and declare a reasonable and
14 safe maximum speed limit which shall be effective when
15 appropriate signs are giving -- given or appropriate signs
16 are posted giving notice thereof. South Carolina law
17 requires the driver of any vehicle to obey the instructions
18 of any official traffic controlled device, which includes
19 signs, signals, markings, and devices. A driver has a duty
20 to adjust his speed to conditions and hazards. The driver
21 of every vehicle is required to drive in an appropriately
22 reduced speed when hazards exist with respect to weather or
23 highway conditions.

24 Now, in South Carolina, the operator of a motor vehicle
25 is required to use the same care that would be used by a

1 person of ordinary reason and prudence if that person were
2 driving the same vehicle at the same time and place and
3 under the same circumstances. A driver has a duty to keep
4 proper lookout. The driver of an automobile has a duty to
5 keep a proper lookout for other vehicles on the road. This
6 duty requires the driver to watch attentively, attentively
7 so that the driver is able to see a person or object in the
8 highway.

9 A driver is also required to keep their automobile or
10 their vehicle under control. The driver of an automobile
11 has a duty to keep the automobile under proper control so
12 that the driver is able to slow down, stop, or turn the
13 automobile to avoid colliding with other vehicles,
14 pedestrians, or objects lawfully in the road.

15 You must now decide the, the remaining questions. The
16 first of these is whether the Plaintiffs have proven, by a
17 preponderance or greater weight of the evidence, that the
18 Defendants reached the duty of care by a negligent act or
19 omission. Negligence means that a person has done something
20 that a reasonable person would not have done or has failed
21 to do something that a reasonable person would have done in
22 the same situation.

23 The Plaintiffs must also prove, by a preponderance or
24 greater weight of the evidence, that they suffered damages
25 as a result of the Defendants breach of that duty. Finally,

1 the Plaintiffs must prove, by a preponderance or greater
2 weight of the evidence, that the damages were proximately
3 caused by the Defendants breach of duty. Proximate cause is
4 something that produces a natural chain of events, which, in
5 the end, brings about the injury. It is the direct cause of
6 the injury.

7 To prove that the Defendant's negligence proximately
8 caused the Plaintiff's injuries, the Plaintiffs must first
9 prove causation in fact. This is proven by showing that the
10 injury would not have occurred but for the Defendant's
11 negligence.

12 The Plaintiffs must also prove legal cause. Legal
13 cause is proven by showing that the injury was foreseeable.
14 This means that the injury occurred as a natural and
15 probable consequence of the Defendant's negligence. The
16 Plaintiffs must prove that some injury from the Defendant's
17 negligence was foreseeable, but does not have to prove that
18 the particular injury that occurred was foreseeable.
19 However, the Defendants can not be held responsible for the
20 things which could not be expected to happen.

21 Proximate cause does not mean the only cause. The
22 Defendant's act can be a proximate cause of the Plaintiff's
23 injuries if it was at least one of the direct, concurring
24 causes of the injury. Proximate cause is the direct cause
25 of an injury. For an act to be proximate cause of the

1 injury, the injury must be foreseeable -- a foreseeable
2 consequence of the act. Foreseeability is not determined
3 from hindsight, but rather from the Defendant's prospective
4 at the time of the act complained of.

5 When the cause of the Plaintiff's injury may be as
6 reasonably attributed to an act for which the Defendant is
7 not liable, as to one for which he is liable, the Plaintiffs
8 have failed to carry the burden of establishing that their
9 injuries were the proximate result of the Defendant's
10 negligence. An act or omission that does no more than
11 furnish the condition or give rise to the occasion by which
12 the injury is made possible is not the proximate cause of
13 the injury.

14 An intervening cause is an independent cause which
15 intervenes between the original wrongful act or initial --
16 omission and the injury turns aside to the natural sequence
17 of events, and produces a result which would not otherwise
18 have followed, and which would not have been reasonably
19 anticipated. When a Defendant's negligence appears merely
20 to have brought about a condition of affairs or a situation
21 in which another and entirely independent and efficient
22 agency intervenes to the -- to cause the injury, the latter
23 is to be deemed the direct and proximate cause, and the
24 former the only indirect or remote cause. A prior and
25 remote cause can not be made the basis of an action if such

1 remote cause did nothing more than furnish the condition or
2 give rise to the occasion by which the injury was made
3 possible. If there intervened between such prior or remote
4 cause and the injury a distinct, successive, and unrelated
5 and efficient cause of the injury even though such injury
6 would not have happened but for such condition or occasion.
7 If no danger existed in the condition, except because of an
8 independent cause, such condition was not the proximate
9 cause.

10 Now, in this case, as you-all have already heard,
11 Defendant, Mr. McGee, is admitting fault in this accident.
12 Defendant Hudgins is denying fault in this accident.
13 Defendant Hudgins has also raised a defense, and that
14 defense is known as comparative negligence.

15 What that means is that, while Defendant Hudgins denies
16 that he was negligent, if the jury were to find that he was
17 negligent, then Defendant Hudgins asks the jury to consider
18 that the collision was caused by the combined negligence of
19 the Defendants. Comparative negligence would be appropriate
20 for you to consider if you find that more than one party was
21 negligent and at fault in causing the collision.

22 Comparative negligence means what the name suggests.
23 If you find that more than one Defendant was at fault, you
24 are asked to compare the degree of that negligence of each
25 Defendant. Comparative negligence is a claim that another

1 Defendant was more negligent, more at fault, and that it was
2 the combined negligence that proximately caused the
3 collision. Comparative negligence is negligence, negligence
4 on the part of one party that combines and concurs with the
5 negligence of another party to act as a proximate cause of
6 the collision without which the collision would not have
7 occurred.

8 The Plaintiffs must prove the negligence of the
9 Defendants. By asserting comparative negligence, Defendant
10 Hudgins must prove the negligence and fault of Mr. McGee,
11 and the degree of that negligence. In comparing the
12 negligence of the parties, you are not to measure the
13 negligence solely by its character nor solely by the number
14 of ways that a party is found to be at fault. What you need
15 to do is consider the conduct of each party as a whole. If
16 you determine that more than one party was at fault, you
17 must then weigh the contributions of each party to the
18 result, and tell us the percentages of fault.

19 In deciding the percentages of fault, you may consider,
20 among other things, the following factors:

21 whether each party's conduct was on -- only inadvertent
22 or whether it was engaged in with an awareness of the danger
23 involved, the magnitude of the risk created by each party's
24 conduct including the number of persons endangered,
25 endangered, and the possible severity of the injury, the

1 significance of the goal that each party was trying to
2 reach, and the need to achieve the goal in that manner, each
3 party's capabilities and abilities to realize and eliminate
4 the risk involved, the particular circumstances confronting
5 each party at the time the conduct occurred such as the
6 existence of an emergency requiring a quick decision, the
7 relative closeness of the causal relationship of the
8 negligent conduct of the Defendants, and the harm to the
9 Plaintiffs, whether the conduct of either party involved a
10 violation of a safety statute or regulation.

11 Now, on the verdict form that I'm going to give you for
12 you to reach your verdict, there will be spaces for you to
13 write down your decisions about the percentages of
14 negligence, if any, of both of the Defendants which
15 proximately caused the Plaintiff's injuries. The Defendant
16 has the same burden of proof, by a preponderance of
17 evidence, to show that the other Defendant had violated a
18 roadway statute, and the same instruction that I have given
19 you previously on the burden of proof applies to the
20 Defendant's allegation of comparative negligence against the
21 other. Likewise, the violation of a roadway statute by the
22 Defendant would constitute negligence per se by that
23 Defendant.

24 I will give you on -- again, on your verdict form,
25 there will be again the spaces for you to write down your

1 decisions regarding these questions.

2 All right. Now, you've heard testimony and statements
3 by counsel concerning damages. If you decide that the
4 Plaintiffs are entitled to a verdict, your next step would
5 be to decide how much money the Defendant should be required
6 to pay.

7 Actual damages are to compensate the Plaintiffs for the
8 Plaintiffs injuries or loss, and to put the Plaintiffs in as
9 near as possible in the same position that the Plaintiffs
10 were in before the incident occurred. In other words,
11 actual damages would be the actual losses and expenses which
12 the Plaintiffs have suffered because of the Defendant's
13 negligence.

14 Now, there has been testimony and arguments of counsel
15 regarding personal injuries as to the Plaintiff Shannon
16 Green. The Plaintiff must prove that expenses caused by the
17 injury were necessary and reasonable. Actual damages for a
18 Plaintiff who has been physically injured include pain and
19 suffering, both past and future, as well as mental anguish,
20 impairment of health or physical condition, and
21 disfigurement.

22 In determining the amount of compensation for personal
23 injuries, it is proper to consider past and present aspects
24 of the injury. This would include physical and mental pain
25 and suffering, expenses incurred for reasonable and

1 necessary medical treatment, loss of time which resulted
2 from the impairment of the ability to work and earn a
3 livelihood, the loss of enjoyment of life suffered as a
4 result of the injury, and any other losses which are
5 reflected by the character of the injury.

6 The injured party may recover for those future damages
7 that are reasonably sure to result from the injuries. The
8 principle underlying compensation for future damages is that
9 only one action can be brought, and, therefore, only one
10 recovery had. It is proper to include in the estimate for
11 future damages which may include compensation for pain and
12 suffering which will, with reasonable certainty, result.

13 I further will inform you that the Plaintiff, Shannon
14 Green, is not entitled to recover for preexisting
15 conditions, injuries, or ailments unrelated to the
16 Defendant's negligence.

17 Shannon Green is also requesting compensation for pain
18 and suffering. Pain and suffering compensates the Plaintiff
19 for physical discomfort, and emotional -- and emotional
20 response to the sensation of pain caused by the injury
21 itself. There is no definite standard by which to
22 compensate the Plaintiff for pain and suffering. You have
23 the authority to determine the amount, if any, to be allowed
24 for pain and suffering using calm and reasonable judgment to
25 ensure that the damages are just and reasonable in light of

1 the testimony and evidence presented in the case.

2 Also, as to Shannon Green, you are -- you have heard
3 arguments regarding loss of enjoyment of life. Loss of
4 enjoyment of life compensates the Plaintiff for limitations
5 on the Plaintiff's ability to participate in and derive
6 pleasure from the normal activities of daily life. And, as
7 to Plaintiff, Shannon Green, there is a request for
8 compensation for mental suffering, apprehension, shock,
9 fright, emotional upset, humiliation, and, and anxiety
10 either present or expected in the future, and that could be
11 properly considered as a element of damages. The amount of
12 damages for mental suffering can not be exactly measured.

13 If you find that the Plaintiff, Shannon Green, was
14 permanently injured as a result of the Defendant's actions,
15 you must then decide how, if at all, that injury will affect
16 the rest of the Plaintiff's life. A person's life
17 expectancy is determined by a Life Expectancy Table, which
18 is a part of the laws of the State of South Carolina. The
19 Life Expectancy Table is only an estimate of the probable
20 average remaining length of the life for all persons in our
21 state at a given age.

22 In this matter, the Plaintiff, Shannon Green, is a 53
23 year old female, with a life expectancy, according to the
24 Life Expectancy Table, of 30.01 years. This fact is to be
25 considered by you along with any other facts and

1 circumstances and evidence bearing on the Plaintiff's life
2 expectancy including occupation, habits, and health at the
3 time of injury in deciding the amount of damages to be
4 awarded to the Plaintiff.

5 A plaintiff is never entitled to recover conjectural or
6 speculative damages, but if you find the Plaintiff is
7 entitled to a verdict for actual damage -- damages, your
8 verdict should include an amount to cover any past, present,
9 and future damages which were proximately caused by the
10 Defendants. Any future damages must be reasonably certain
11 to occur in the future as a result of the Defendant's acts.
12 Actual damages need not be proven by a mathematical
13 certainty or based -- or be based on evidence of the precise
14 amount of damages the Plaintiff has suffered. Instead, the
15 evidence must allow you to determine what amount of damages
16 is fair, just, and reasonable.

17 Now, in this action, you also heard that the Plaintiff,
18 Mr. Darrell Russell, is making a claim for loss of
19 consortium because of injuries received by his spouse,
20 Shannon Green. The companionship and society of a spouse
21 are not articles of commerce which can be weighed or
22 measured or bought and sold. No expert is competent to
23 testify to their value. The consideration on which they are
24 given is not monetary, but the Plaintiff, Darrell Russell,
25 is entitled to compensation and money for the loss. The

1 amount of that compensation is to be determined by you, not
2 from evidence of value, but from your own observation,
3 experience, and knowledge conscientiously applied to the
4 facts and circumstances of the case.

5 The Plaintiff, under a loss of consortium claim,
6 Mr. Russell, would be entitled to recover the value of those
7 services of his spouse which were lost including the loss of
8 his spouse's society and companionship in the home. He's
9 also entitled to recover for any expenses incurred from the
10 care and treatment of his spouse because of the illness or
11 bodily harm suffered by the spouse, and for any medical
12 expenses which the spouse has incurred. Punitive damages
13 are not recoverable in a loss of consortium action.

14 Now, you have also heard, in this case, that the
15 Plaintiff, Shannon Green, is seeking not only actual
16 damages, but also punitive damages. If you award actual
17 damages, you may also consider an award of punitive damages
18 as to the Plaintiff, Shannon Green.

19 Punitive damages are intended to punish the Defendants
20 for extraordinary and outrageous misconduct, and to prevent
21 the Defendants and others from committing similar facts in
22 the future. Punitive damages can only be awarded when
23 conduct of the Defendants has been something more than mere
24 negligence. The evidence must establish the Defendant's
25 acts were reckless, willful, and wanton meaning there was a

1 conscious failure to exercise due care or a conscious
2 indifference to the rights and safety of others or a
3 reckless disregard thereof.

4 If you find that the Defendant's conduct was willful,
5 wanton, or reckless, you may award the Plaintiff punitive
6 damages. To support an award of punitive damages, the
7 Plaintiff must prove, by clear and convincing evidence, that
8 the conduct complained of included a consciousness of
9 wrongdoing at the time of the conduct.

10 Now, as I explained to you earlier, this is a different
11 burden of proof. Clear and convincing is more than just a
12 preponderance or greater weight of the evidence, which
13 requires only proof which persuades you that a party's claim
14 is more likely than not true. On the other hand, clear and
15 convincing proof is not as high a standard as the burden of
16 proof in criminal cases, which is proof beyond a reasonable
17 doubt. Clear and convincing proof leaves no substantial
18 doubt in your mind. It means that the evidence is not
19 ambiguous, doubtful, equivocal, or contradictory.

20 Convincing means persuading by proof or argument
21 causing one to believe in the truth of what is asserted.
22 Clear and convincing proof establishes in your mind not only
23 that the fact is probable, but that it is highly probable.
24 Before awarding punitive damages, you must consider and
25 weigh four elements which may be pertinent to the facts of

1 this case.

2 You must consider the relationship between the punitive
3 damage award and the harm caused. Any penalty imposed
4 should take into account the reprehensibility of the conduct
5 the harm caused, the Defendant's awareness of the conduct's
6 wrongfulness, the duration of the conduct, and any
7 concealment. Thus, any penalty imposed should bear a
8 relationship to the nature and extent of the conduct and the
9 harm caused including the compensatory damage award made by
10 you.

11 Secondly, any penalty imposed should take into account,
12 as a mitigating factor, any other penalty that may have been
13 imposed or which may be imposed for the conduct involved
14 including any criminal or civil penalty or any other
15 punitive damages award arising out of the same conduct.

16 Next, you should consider whether the award of the
17 amount of any punitive damages award may deprive the
18 Defendants of any profits derived from the improper conduct,
19 and whether the ill gotten profit should be properly awarded
20 to the Plaintiffs -- Plaintiff.

21 Finally, any award of punitive damages must be limited
22 to punishment, and, thus, may not affect economic
23 bankruptcy. To this end, the Defendant's ability to pay any
24 punitive damage award should be considered. However, the
25 economic bankruptcy factor is not an absolute bar to an

1 award of punitive damages.

2 Now, I have your verdict form, and, first of all, I
3 want to tell you, on the verdict form, there are several
4 questions.

5 Okay. The document is four pages, but the fourth page
6 is just a signature.

7 Okay. So, there are three pages, and let me state,
8 first of all, there's no significance whatsoever to the
9 order of the questions except there's an attempt to make
10 them logical in nature, but one question had to go first.

11 Okay. So, just don't, don't overemphasize and pace --
12 and place a lot of weight as to which question is first, and
13 which defendant is asking about it.

14 Okay. So, you will go through and, for instance -- and
15 I won't go through every question. But, for instance, the
16 first -- number one is actually a statement. Defendant
17 Edward McGee has admitted fault in this accident. Please go
18 to Question 2.

19 Question 2. Do you find that Defendant Edward McGee's
20 negligence proximately caused the Plaintiff's damages.
21 Check yes or no. Either way, you then go to Question 3. Do
22 you find that Defendant David Hudgins was negligent. Answer
23 yes or no. Go to Question 4 or go to Question 6.

24 What I would encourage you to do is go through the
25 entire form first before answering any questions, and then

1 you can go through it.

2 Okay. Again, at the conclusion of your deliberations,
3 our foreperson, Katitlyn E. Earls, will sign this as, as
4 your representative.

5 All right. You -- someone will knock on the door.
6 They will be a bailiff seated outside the door. That person
7 will then find me in chambers to tell me that you-all have
8 reached your decision. We will come back in here. The
9 bailiff will hand me the verdict. I will have our clerk
10 publish it.

11 Okay. And so that's the way it will work. And so
12 everyone must agree on the verdict. Again, that means that
13 it has to be unanimous, and, again -- and I know y'all have
14 heard me say this so much, but don't commence your
15 deliberations until I tell you to do so.

16 I am going to now let you-all go into the jury room
17 right now with the alternate. I need to ask the lawyers if
18 they object to anything that I have just told you, and I'm
19 not gonna have you come back out here yet.

20 Okay. But if it was something that was objectionable,
21 I may need for you to. But, if not, then we're gonna gather
22 up the exhibits with the attorney's help. We'll have the
23 exhibits come in with the verdict form. We'll have our
24 alternate come out, and then you-all can commence once the
25 bailiff tells you to.

1 So, at that time -- at this time, Mr. Plexico, if you
2 will lead the jury into the jury room please.

3 (WHEREUPON, this is the end of the parts of this
4 transcript requested by Mr. Churdar.)

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6
7 * * *END OF REQUESTED TRANSCRIPT OF RECORD* * *

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C E R T I F I C A T E

I, Pamela E. Green, Official Court Reporter for the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of Common Pleas for Spartanburg County, South Carolina, on the 14th, 15th, and 16th days of October, 2019.

I do further certify that I am neither of kin, counsel nor interest to any party hereto.

May 2nd, 2020

PAMELA E. GREEN, Court Reporter

1 STATE OF SOUTH CAROLINA)
2 COUNTY OF SPARTANBURG) IN THE COURT OF COMMON PLEAS

3
4 SHANNON P. GREEN AND)
DARRELL RUSSELL,)
5) TRANSCRIPT OF RECORD
PLAINTIFFS,) 2017-CP-42-03523
6)
-vs-) DECEMBER 20, 2019
7) SPARTANBURG, SOUTH CAROLINA
8 EDWARD C. MCGEE AND)
DAVID HUDGINS,)
9 DEFENDANTS.

10
11
12 B E F O R E:

13 THE HONORABLE GRACE GILCHRIST KNIE, JUDGE.
14
15

16 A P P E A R A N C E S:

17 DOUGLAS A. CHURDAR, ESQUIRE
ATTORNEY FOR THE PLAINTIFF

18 JAMES ANDREW BRADSHAW, ESQUIRE
19 ATTORNEY FOR DEFENDANT DAVID HUDGINS

20 MICHAEL T. COULTER, ESQUIRE
21 ATTORNEY FOR DEFENDANT PROGRESSIVE INSURANCE
COMPANY

22
23
24 MICHAEL R. WATTS
CIRCUIT COURT REPORTER
25

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WITNESSES

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(NO WITNESSES CALLED)

1	EXHIBITS			
2	NO.	DESCRIPTION	ID.	EV.
3	(NO EXHIBITS MARKED)			
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1 (PROCEEDINGS, DECEMBER 20, 2019)

2 THE COURT: All right. We are back on the record
3 with regards to the matter of Shannon P. Green and Darrell
4 Russell versus Edward C. McGee and David Hudgins, civil
5 action number 17-CP-42-3523.

6 We were last before this court at the conclusion
7 of a jury trial on October the 16th of 2019, and counsel was
8 given ten days at that time to make any post-trial motions
9 and we are here today for those motions, and so I am happy
10 for counsel to identify themselves for the record, please.

11 MR. CHURDAR: Your Honor, Doug Churdar
12 representing the plaintiffs Shannon Green and Darrell
13 Russell.

14 THE COURT: Yes, sir.

15 MR. COULTER: Mike Coulter representing the
16 underinsured motorist carrier Progressive.

17 THE COURT: Yes.

18 MR. BRADSHAW: And Drew Bradshaw representing
19 David Hudgins.

20 THE COURT: All right. Thank you all. Nice to
21 see you again. I'm sure you all probably can't say the
22 same, but we tried to get this scheduled as quickly as
23 possible and then tried to accommodate by putting it at the
24 end of the list today. Scheduling is just the most
25 difficult -- it seems to be it's one of the most difficult

1 things anyway, so have you all been able to resolve any of
2 the issues?

3 MR. CHURDAR: No, Your Honor.

4 THE COURT: Okay.

5 MR. BRADSHAW: No.

6 THE COURT: And so I'm happy to hear from you all
7 with regard to your motions, and so Mr. Churdar?

8 MR. CHURDAR: Your Honor, I don't mind going
9 first; however, Mr. Bradshaw was the first to file motions,
10 so I don't know whether we want to go in the order in which
11 they were filed. I think maybe they are even on the docket
12 this morning with Mr. Bradshaw up first, but --

13 MR. BRADSHAW: That's fine. I mean, I'm happy to
14 do that and --

15 THE COURT: Okay. That's fine.

16 All right, Mr. Bradshaw, I'm happy to hear from
17 you.

18 MR. BRADSHAW: Sure.

19 Yes, Your Honor, may it please the court, we filed
20 two post-trial motions in this matter on behalf of Mr.
21 Hudgins, the first being a motion for judgment
22 notwithstanding the verdict against Mr. Hudgins, and the
23 second a motion for statutory setoff under South Carolina
24 Code 15-38-50.

25 Your Honor, let me -- I believe the flow of this

1 may work better if I do the motion for JNOV first, Mr.
2 Churdar goes, and then we can address the setoff last, if
3 that's fine with the court.

4 THE COURT: Yes, sir, that's fine.

5 MR. BRADSHAW: All right.

6 Your Honor, as you are well aware, this case came
7 before you on October 14th was the beginning of the trial.
8 It involved an accident that occurred on November 19th,
9 2015, involving the plaintiff Shannon Green and Darrell
10 Russell. It occurred on Simuel Road here in Spartanburg and
11 their vehicle was struck by a truck driven by Edward McGee.

12 Your Honor, you sat through the trial. You heard
13 the evidence in that trial and at the end of that trial the
14 jury returned a -- did return a verdict against both Mr.
15 McGee -- or ostensibly it was being essentially represented
16 by Progressive at that point and Mr. Hudgins. They found
17 Mr. Hudgins 40 percent at fault, Mr. McGee 60 percent. They
18 awarded actual damages in the amount of 88 --

19 THE COURT: -- 546.78.

20 MR. BRADSHAW: Thank you, Your Honor.

21 88,546.78, and punitive damages against each
22 co-defendant for 35,000.

23 Your Honor, we are here today on this motion to
24 ask that the judgments against Mr. Hudgins be reversed or
25 through a motion for JNOV.

1 Your Honor, in determining such a motion, the
2 court should grant a motion for JNOV when the evidence
3 presented at trial is subject to only one inference. And,
4 Your Honor, having listened to the evidence, it's our
5 argument that the only inference that a reasonable jury
6 could have come to in this case is that the sole proximate
7 cause of the accident was Edward McGee.

8 Your Honor, you heard his testimony that as he
9 drove down Simuel Road on the day of the accident. He was
10 in total control of his truck. He was the one driving. He
11 was the one steering the steering wheel. He was the one who
12 chose to press the accelerator and drive at an excessive
13 speed as he did. He was the one that crossed the center
14 line and he was the one that struck the plaintiffs' vehicle.

15 Importantly you also heard the evidence that has
16 it pertained to Mr. Hudgins. Your Honor, the evidence
17 showed that on November 19th, 2015 he was simply minding his
18 own business as he was on the interstate heading to his next
19 job site that was off of Simuel Road. And as he was sitting
20 in traffic Mr. McGee comes up behind him flashing his
21 lights, goes to the center lane, almost cuts him off, and
22 then Mr. Hudgins proceeded to call 9-1-1. You heard that
23 9-1-1 call played at the trial. It does not show someone
24 who was angry, in a fit of rage, trying to run somebody off
25 the road. In fact, Mr. McGee admitted that Mr. Hudgins was

1 not trying to run him off the road, flashing his lights at
2 him, pointed a gun at him, doing anything as he traveled
3 down Simuel Road to make Mr. McGee choose to drive the way
4 that he did.

5 On the 9-1-1 call you also heard that -- you know,
6 one of the arguments that Mr. Churdar continues to -- has
7 made was that, you know, Mr. Hudgins could have chose to
8 back off, the highway patrol had it. Well, on the 9-1-1
9 call you heard for over two minutes he sat with the operator
10 while the phone rang trying to contact the highway patrol.
11 Meanwhile he's just giving information about Mr. McGee's
12 vehicle, the license plate. He says "he's exiting. We are
13 here at Simuel Road." And then importantly he says "he's
14 gone. He's driving crazy. I'm not going to chase him." So
15 he did back off, but to suggest that the highway patrol was
16 in pursuit and had this covered is incorrect, as shown by
17 that call.

18 And importantly as well you heard testimony about
19 how much distance there was between Mr. Hudgins' vehicle and
20 Mr. McGee's vehicle on Simuel Road.

21 You know, in addition to admitting that Mr.
22 Hudgins wasn't trying to run him off the road or flash his
23 lights, do anything like that to try to distract Mr. McGee,
24 Mr. McGee also said "he was two and three car lengths behind
25 me," which is the proper following distance that we are all

1 taught when we took through driver's ed. Mr. Hudgins
2 actually said it was more like six car lengths. But,
3 regardless, he was not right on his bumper, you know,
4 forcing him, pushing him down the road.

5 So, Your Honor, there is clearly no proximate
6 cause on the part of Mr. Hudgins for this accident.

7 If anything, you know, there is clear South
8 Carolina case law talking about the remote cause of
9 accidents and that law states that when something -- an
10 action merely creates a condition and then there is an
11 independent intervening act that -- negligent act that
12 causes an accident, the act that created merely created a
13 condition for that subsequent act is the remote cause, not a
14 proximate cause. So that's -- if anything, that's what we
15 have here.

16 If Mr. McGee truly felt threatened by Mr. Hudgins
17 behind him, he could have done a number of different things,
18 but he was in control of his truck and he was the one who
19 chose to take the actions that he did.

20 There is a clear South Carolina Supreme Court
21 case, Gray v. State Highway Department, and that case
22 involved -- there was a defect in the roadway. The highway
23 department put a flag man out on the road to stop cars and
24 hold them up. A car came and stopped short and the car
25 behind it ran into the -- ran into the back of that vehicle

1 and the driver of the car that ran into the back of the
2 vehicle in front of it sued both the driver of that front
3 vehicle and the highway department. And what the court held
4 was that merely the condition of the roadway or the flag man
5 being there merely created the circumstances of that
6 accident, created the condition, but it was the driver, the
7 front driver who was in control operating the car that chose
8 to stop the way he did. That was the actual proximate
9 cause, if any, of that accident.

10 And, Your Honor, that's similar to what we have
11 here. Again, Mr. McGee chose to drive the way he did. He
12 chose to speed. He chose to continue on down the roadway.
13 He testified, admitted he could have done a number of
14 different things. He could have pulled to the side of the
15 road. He could have pulled to the gas station. He could
16 have slowed down. He could have done anything, other than
17 drive the way he did and cross the center line.

18 And that's -- and those --

19 You know, in addition to that the evidence also
20 showed that he wasn't even really concerned about Mr.
21 Hudgins being behind him, as he admitted that if Mr.
22 Hudgins' vehicle hit his truck, then he would expect Mr.
23 Hudgins vehicle to not be drivable. And he also said that
24 after the accident he didn't even realize who Mr. Hudgins
25 was.

1 So, Your Honor, for those reasons we would ask
2 that the award of -- the entire award against Mr. Hudgins be
3 overturned.

4 Should the court choose to keep the actual damage
5 award, certainly we believe that the punitive damage award
6 was not warranted, based on the evidence in this case.

7 The court is well aware that in order to award
8 punitive damages, there must be reckless, willful or wanton
9 conduct on the part of the defendant. And the courts have
10 just defined that reckless, willful, wanton as a conscious
11 disregard for the plaintiffs' rights. There was no
12 conscious disregard for any -- for Ms. Green's or Mr.
13 Russell's rights on the part of Mr. Hudgins in this case.

14 For all the reasons I have stated, he was simply
15 minding his own business, tried to call in and do the right
16 thing, certainly do not rise to the level of reckless,
17 willful, or wanton in this case.

18 The court heard Mr. Hudgins did plead guilty to
19 driving too fast for conditions following this accident.
20 Well, that statutory violation the courts have held can be
21 evidence of reckless conduct. There is -- that is a mere
22 inference. It does not automatically constitute reckless
23 conduct.

24 And, additionally, in order for a statutory
25 violation to support an award of punitive damages, it has to

1 be a cause of a statutory violation. And, Your Honor, as I
2 have just explained, there was no proximate cause here on
3 the part of Mr. Hudgins for causing this accident. And
4 there is certainly no evidence presented at trial for the
5 jury to be able to reasonably find that there was punitive
6 damages were entitled to be held against Mr. Hudgins.

7 Your Honor, additionally, there is another reason
8 that the entire award should be overturned against Mr.
9 Hudgins. As we argued at trial -- you heard from all the
10 fact witnesses in this case. You heard from no medical
11 experts in this case, and Ms. Green's injuries are not
12 common clear-cut injuries that you would -- such as a broken
13 leg, broken arm. She claimed that she had had shoulder
14 injury, rotator-cup type injury and also some soft tissue
15 back pain.

16 Your Honor, the evidence at trial that you heard
17 from Ms. Green is that in addition to claiming these
18 injuries, she also has many preexisting issues; severe type
19 one diabetes, insulin dependent for over 40 years. She's
20 had preexisting back pain. She's had previous issues with
21 her shoulder in 2010, 2011, with the right shoulder and then
22 developed -- she developed frozen shoulder at that time,
23 conditions she also developed following this accident.
24 So -- and the court correctly gave a preexisting injury jury
25 instruction as well and told the jury to consider these

1 preexisting issues.

2 Your Honor, the law in South Carolina is when you
3 have these complicated injuries, such as Ms. Green's, that
4 can't be left to guess or left for the jury or laymen to
5 speculate as to what caused those injuries. You have to
6 have medical experts testimony and we didn't have that in
7 this case. Her surgeon did not come in. Nobody came in and
8 said yes, these injuries most probably to a reasonable
9 degree of medical certainty were related to this accident.
10 That was not before the court. It was not before the jury.
11 And, therefore, Your Honor, we would ask that the entire
12 award that they rendered in this case it could be argued is
13 based on speculation, conjecture, or surmise. And for that
14 additional reason, Your Honor, the award against Mr. Hudgins
15 should be overturned.

16 And, Your Honor, I believe that's all that I have
17 at this time. Thank you.

18 THE COURT: Okay. Thank you very much.

19 I appreciate that summary and background and
20 refresher on all this, even though I have reviewed
21 everything prior to this in anticipation of it. Thank you
22 very much.

23 Okay, Mr. Churdar --

24 Or Mr. Coulter, anything to add before I hear from
25 Mr. Churdar?

1 MR. COULTER: Judge, I'm actually going to be
2 arguing against both of them on the same issue, so I'll be
3 happy to go first and I would just say very briefly that
4 it's correctly pointed out that, you know, the JNOV should
5 be granted, that no reasonable jury could reach that
6 particular verdict. And I would tell the court, or argue to
7 the court, that, in fact, this jury was very reasonable in
8 all respects.

9 One piece of evidence that was brought out during
10 the trial is the first thing that Hudgins said after the
11 accident was "I have got the police coming after you, boy,"
12 which clearly in my mind shows, and I believe the jury's
13 mind too, that he was actively involved in this pursuit and
14 that's what led to it. So his involvement was such that he
15 certainly had some negligence in this. The jury saw that
16 and also went so far as to believe that he acted recklessly.
17 And I certainly believe, although we may disagree with the
18 jury and their outcome, that certainly is not unreasonable
19 what they found. Thank you.

20 THE COURT: Thank you.

21 Okay, Mr. Churdar.

22 MR. CHURDAR: Thank you.

23 Your Honor, these are basically the same arguments
24 that were made at the summary judgment stage in front of
25 Judge Hayes and then at the directed verdict stage in front

1 of this court.

2 I think the jury agreed that the damages -- the
3 injuries to Shannon Green were proximally caused by Mr.
4 Hudgins clearly.

5 And I would -- I would point out just a couple of
6 things very briefly. Mr. Hudgins said he was six car
7 lengths -- well, Mr. McGee said Mr. Hudgins was two to three
8 car lengths behind him. Now, we are on Simuel Road by now
9 just before this accident occurs. Just before it occurs Mr.
10 Hudgins said the guy is going 90 miles an hour and he later
11 said he's six car lengths behind Mr. McGee, which only
12 suggests he was going at a very high rate of speed himself.

13 Something that I pointed out at summary judgment
14 and at directed verdict is that, you know, there are cases
15 where law enforcement is held liable because they are
16 expected to stop a pursuit when it becomes apparent that the
17 one they are pursuing is not going to stop and they are
18 going into an area where the public will be endangered. And
19 here Mr. Hudgins is not law enforcement. He had no real
20 reason to follow, except I honestly believe he wanted to see
21 Mr. McGee with his hands on the hood of a cop car. So he
22 was there for no good reason and he -- he did violate a
23 statute.

24 And, you know, as far as -- as far as the issue of
25 an award of punitive damages, he had 15 to 20 minutes to

1 decide to do something else and he just followed and
2 followed and followed and the evidence suggests he was right
3 real close to him.

4 And then, again, he did drive too fast for
5 conditions, which was directly related to the injuries.

6 Your Honor, as far as the complexity of the
7 medical injuries go, the medical damages go, as Mr. Bradshaw
8 pointed out, this is not a case where the plaintiff broke
9 arms or legs, but she did break ribs and she did sustain a
10 torn rotator cuff, all on the left side, and it was -- it's
11 not so complex as to require medical testimony come in and
12 say "well, this person who didn't have these conditions
13 before, she was hit hard in the driver's door. Those were
14 caused by this six inch intrusion into her Kia subcompact
15 car."

16 So I think it's very obvious that there was plenty
17 of evidence for the jury to return a verdict against Mr.
18 Hudgins and would ask the court to deny Mr. Hudgins' motion
19 for JNOV.

20 THE COURT: Okay. Thank you.

21 Anything in reply, Mr. Bradshaw?

22 MR. BRADSHAW: Yes, Your Honor, just briefly.

23 With respect to Mr. Churdar's argument about Mr.
24 Hudgins not ending the pursuit or having 15 to 20 minutes to
25 do something else, again, as I said, the 9-1-1 call makes it

1 clear that he -- one, that he did end the pursuit and he
2 said "I'm not going to chase him."

3 And, two, that, again, the highway patrol was not
4 there and he's simply reporting to the 9-1-1 "there is a
5 dangerous driver on the road. Here is where he is."

6 So it's not like he made a conscious decision to
7 go and -- you know, go on a rampage and try to do something
8 against this guy. It was very clear from that
9 contemporaneous call what the facts of this case were.

10 And, Your Honor, for that matter, when you are
11 considering the punitive damages award, too, you are looking
12 at the conduct of Mr. Hudgins and not the subjective belief
13 of Mr. McGee and the conduct of Mr. Hudgins is shown
14 throughout the evidence that regardless of Mr. McGee thought
15 he was chasing him or not, what Mr. Hudgins said, what all
16 the evidence shows, is that he was, in fact, not chasing
17 him. So for that additional reason the reckless -- when you
18 are looking at is there any reckless or conscious disregard
19 on the part of Mr. Hudgins in his mind for the injuries to
20 the plaintiff, there is none, and there was no evidence of
21 that at trial, Your Honor.

22 Also looking at the course of the medical issues,
23 Mr. Churdar just mentioned trying to compare the shoulder
24 injury or the rib fractures to the broken leg or broken
25 ankle, or something of that nature, he didn't talk about her

1 claim of back pain, which we also have -- which she's also
2 claimed in this case and soft damages for, and the reason is
3 she's had that -- soft tissue injury, that is -- and she
4 also had preexisting back pain, preexisting issues, that is
5 exactly the type of complex injury there that you need a
6 doctor to say "yeah, this back pain was caused by this
7 accident, it was exacerbated by this accident; or, no, it
8 wasn't caused by this accident." We didn't have that in
9 this case, Your Honor.

10 So, therefore, again, we would ask for a JNOV with
11 respect to Mr. Hudgins.

12 THE COURT: Okay. Thank you.

13 Okay. Let's move on to the setoff, okay? Let's
14 just -- I'm taking all of these up. I'm going to rule --
15 I'm probably going to review everything one more time,
16 because I'm assuming that even though you all have put all
17 of this in writing, you are going to make it a lot more
18 clearer to me as to the setoff in your arguments today, and
19 so I am -- I will be issuing either written instructions or
20 just my own order regarding all of this, okay? So we will
21 just take them all up. Okay?

22 So with regard to the motion for setoff. That was
23 also Mr. Hudgins motion, correct?

24 MR. BRADSHAW: That's correct, Your Honor.

25 THE COURT: Okay. And, again, this was filed on

1 October the 25th.

2 According to my math --

3 All right, if Mr. Hudgins was 40 percent
4 responsible for the 88,546.78, okay, and that -- that's the
5 way I was looking at it. You can tell -- why don't you
6 just -- I'm sorry, I'm preempting you. You go ahead and you
7 state your position.

8 MR. BRADSHAW: Sure, Your Honor.

9 And just to address your question there, the 40
10 percent of the total award was -- let me pull that figure.
11 35,418.71 is what that equates to.

12 THE COURT: Yes, sir, that's what I got. That's
13 good.

14 MR. COULTER: What was it again, Drew?

15 MR. BRADSHAW: \$35,418.71.

16 And, yes, Your Honor, the second motion --
17 May it please the court?

18 THE COURT: Yes, sir.

19 MR. BRADSHAW: The second motion we filed was a
20 motion for setoff under South Carolina Code 15-38-50, and,
21 Your Honor, prior to Mr. Churdar bringing this case there
22 was a settlement with Ms. Green with the co-defendant
23 McGee's primary insurance carrier, Nationwide. And there
24 included with my motion there is a covenant not to execute
25 entered into by Ms. Green. There was also a covenant not to

1 execute entered into by her husband Darrell Russell. Ms.
2 Green, she received -- they received a \$100,000. Mr.
3 Russell was for 2,500.

4 And, Your Honor, under 15-38-50, that statute, Mr.
5 Hudgins is entitled to a setoff of any judgment against him
6 by that settlement with a joint tort-feasor.

7 Again, to begin with, we need to determine what
8 the amount of that setoff is. Your Honor, we would argue
9 that it's a \$100,000 that Ms. Green received.

10 We cited a recent Supreme Court decision, the
11 Green Bauerle, B-A-U-E-R-L-E, case. It's an unpublished
12 decision, but some of the only authority that's out there
13 regarding allocation of a settlement with respect to
14 15-38-50.

15 Mr. Churdar had argued in his reply that that
16 \$100,000 should have been split somehow between Mr. Russell
17 and Ms. Green.

18 Your Honor, that -- the Greenbae Bauerle decision
19 says that the court needs to determine -- in making that
20 decision needs to consider all relevant circumstances. And
21 while that case, the court had -- the trial court had looked
22 at this jury's verdict, which returned a certain amount
23 against the wife and a certain amount against the husband,
24 and then determined what those percentages were and then
25 took the underlying settlement and applied those percentages

1 to the judgment and setting off against the husband's award
2 and the wife's award. And the court had -- the Supreme
3 Court sent the case back to the trial court saying you can't
4 just look at that, you need to look at all the relevant
5 circumstances. The court did not say that's irrelevant in
6 their relevant determination. The court said it may very
7 well be relevant, you just need to consider everything.

8 Well, here is the facts that we have here, Your
9 Honor. Again, we have the two covenants not to execute; one
10 that was given to Ms. Green, and then Mr. Russell was also
11 included on that.

12 There was also a second covenant not to execute
13 given to Mr. Russell and that is Exhibit 2 to our motion and
14 it includes a release for all claims, any and all claims,
15 including loss of services, which would encompass the loss
16 of consortium claim that he brought in this case.

17 Two, you had the jury on a three-day trial
18 consider all the evidence and at the end of this case they
19 found that there was no loss of consortium sustained by Mr.
20 Russell and they found that there was 88,000 and some odd in
21 actual damages for Ms. Green.

22 So, therefore, Your Honor, you are looking at
23 these two things, how do you -- do you break up this
24 \$100,000 between Ms. Green and Mr. Russell? And, Your
25 Honor, arguably you should not. Mr. Hudgins should be

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

4 And, Your Honor, there is also, just looking at
5 the amount that Ms. Green had, \$88,586.78, it's reasonable
6 to assume that that relief for \$100,000 encompassed at least
7 that amount, plus the additional that was on there.

8 So, therefore, we would say that the setoff in
9 this case should be a \$100,000.

10 So moving to the second part of the formula to
11 speak under 15-38-50, if the JNOV is granted as to the
12 punitive damages award against Mr. Hudgins, I want to take
13 that up first is how the setoff would apply.

14 So Mr. -- 15-38-15 (a), as we discussed, says that
15 if the co-defendant is found less than 50 percent at fault,
16 then they are only liable for that percentage of the actual
17 damages award, which again is 35,418.71, when you posit the
18 40 percent that was found against Mr. Hudgins.

19 Now, in this case it's a little unusual because we
20 have got Mr. Hudgins and then you have Mr. McGee named as a
21 defendant who was given the covenant not to execute in this
22 case and the UIM carrier is here. So you need to look at
23 how does 15-38-50 apply to UIM carriers, when you have a UIM
24 involved. Your Honor, it's pretty clear under South
25 Carolina law and by a plain reading of the statute that it

1 does -- that 15-38-50 setoff, so to speak, does not apply to
2 UIM carriers. The statute itself states "when a release or
3 covenant not to sue or not to enforce judgment is given in
4 good faith to one of two or more persons liable in torts for
5 the same injuries or the same wrongful death, it does not
6 discharge any of the other tort-feasors from liability for
7 the injury or wrongful death, unless its terms so provide;
8 that it reduces the claim against the others to the extent
9 of any amount stipulated by the relief or the covenant or in
10 the amount of the consideration paid for, whichever is
11 greater."

12 So, again, Your Honor, you have to look at the
13 statute and give it a plain reading and 15-38-51 says that
14 the setoff applies to other tort-feasors.

15 Your Honor, a UIM carrier is not an other
16 tort-feasor. One, we have had a -- there are several
17 decisions talking about 15-38-50 and UIM setoff. There
18 is --

19 With respect to UIM setoff, Ellis v. Oliver, a
20 decision that we cited, says that UIM setoff is a different
21 type of setoff from 15-38-50, which makes sense. UIM is a
22 contractual insurance obligation and the setoff comes from
23 the UIM statute.

24 What that UIM statute basically says is that you
25 can only recover UIM if there is a judgment that's entered

1 against that underlying policyholder above the limits of
2 that policy. So in this case you are looking at, okay, you
3 have got Mr. McGee, who settled for \$100,000, and the UIM is
4 saying if you don't get a judgment against him in addition
5 over the \$100,000 limit, then there is no recovery under the
6 UIM contract.

7 It's different from 15-38-50, which, again,
8 applies to other tort-feasors. UIM is not an other
9 tort-feasor. Even if they could be somehow step into the
10 shoes, and what they essentially did in this case, step into
11 the shoes of Mr. McGee, he's the one who settled in the
12 first place, right? So he's not an other tort-feasor under
13 the statute.

14 So, again, we are looking at 15-38-50 and how it
15 applies to Mr. Hudgins.

16 With -- that's -- the statute is very clear under
17 case law that the statute gives the court really no
18 discretion to determine the equities between the parties.
19 The court is mandated to apply the setoff before entering
20 the judgment.

21 And that, again, it's a -- it's a legislative
22 issue. The Ellis v. Oliver case facts state, it says very
23 clearly in interpreting the statute, Section 15-38-50 grants
24 the court no discretion in determining the equities involved
25 in applying a setoff, once a release has been executed in

1 good faith between a plaintiff and several joint
2 tort-feasors."

3 So, Your Honor, looking at the \$100,000 setoff in
4 this case, should the court choose to grant JNOV on the
5 punitive damages award against Mr. Hudgins, the judgment
6 against him in this case would be for the \$35,418.71. You
7 apply the \$100,000 setoff for that. Therefore, Ms. Green,
8 by virtue of the setoff under 15-38-50, would not be
9 entitled to recover anything against Mr. Hudgins.

10 Now, should the court choose to keep the \$35,000
11 punitive award against Mr. Hudgins, that still resulted --
12 you have the same result.

13 It's very clear, and I'll hand this case to the --
14 up for the court. I'm trying to find the right page for
15 you.

16 This is the Smith v. Whitner decision. And that
17 case, Your Honor, dealt with 15-38-50 and whether punitive
18 damages are part of the same claim for same injury for
19 purposes of setoff. And the court ruled very clearly in
20 that case that "plaintiff's claim for actual and punitive
21 damages arising from the same injury is the same claim for
22 purposes of setoff under Section 15-38-51."

23 So, therefore, Your Honor the setoff under
24 15-38-50 does apply to both the actual and punitive damages
25 award against Mr. Hudgins.

1 Mr. Churdar, of course, argued in his motion that
2 Section 15-38-15 (f) of the contribution among tort-feasors
3 act says that this -- that the entire act does not apply
4 when you have conduct that's been found to be willful,
5 wanton, or reckless. It's not exactly what it says. It
6 says that the section does not apply. Section 15-38-15 does
7 not apply to a defendant whose conduct is determined to be
8 willful, wanton, or reckless. So, therefore, that has no
9 effect on 15-38-50.

10 In fact, the Supreme Court in Donze v. G.M. case
11 from 2017 says "the effect of this statute merely means that
12 the tort-feasors are subject to pure, joint, and several
13 liability, regardless of their at-fault percentage."

14 So, with joint and several liability generally
15 means that a plaintiff can recover the full amount of the
16 actual damages award from either two joint tort-feasors, but
17 it's very clear in South Carolina case law that it doesn't
18 mean that the plaintiff can recover the full \$88,000 from
19 both Mr. McGee and Mr. Hudgins. They can choose one of the
20 other, or you can have some sort of split.

21 Now, in applying the setoff and how does that all
22 affect the setoff, well, the court has to look at the
23 equities here in determining the setoff and they need to be
24 calculated based upon the entirety of relevant
25 circumstances.

1 So here, Your Honor, you have the 35,000 plus the
2 38 -- 35,418.71, you're at 70,418.71 for Mr. Hudgins.

3 In determining the award there, Your Honor, the
4 equities here is the jury has found -- has apportioned the
5 liability here. You have 60 on McGee, 40 on Hudgins. So,
6 therefore, if you have got the punitive -- if you factor
7 that in with the punitive damages, what the court should say
8 that the award for purposes of setoff should be 40 percent
9 on McGee -- or 40 percent on Hudgins, 60 percent on McGee.
10 And then because you have punitive damages awards against
11 each individual defendant, they are not joint and several,
12 add that on top, and then you have to apply the 15-38-50
13 setoff, again it's \$100,000, more than \$70,000. Therefore,
14 again, even if you have punitive damages, Ms. Green cannot
15 recover from Mr. Hudgins.

16 So, somewhat like a math professor at this point,
17 Your Honor, trying to go through all the calculations, but
18 that's essentially how it works and I think it's clear under
19 the law.

20 And, again, while it may seem odd in this case
21 that to have a verdict against one defendant and then
22 because the plaintiff is not being able to recover against
23 that defendant, that is -- again, it's done by the Ellis
24 case. In that case the plaintiff had argued the trial court
25 erred in applying 15-38-50 because in these circumstances

1 where the plaintiff did not get the full recovery that she
2 was asking for, the doctrine of setoff did not serve its
3 intended purpose in preventing a double recovery.

4 Again, the court in there said "the trial court
5 has no discretion applying 15-38-50 and appellate court has
6 no legislative powers. Our sole function is to determine
7 and, within constitutional limits, give effect to the
8 intention of the legislature while the responsibility for
9 justice or wisdom of legislation rests exclusively with the
10 legislature, whether or not we agree with the laws it
11 enacts.

12 And also it says "we recognize that a strict
13 application of the statute may lead to unintended results;
14 however, this is a matter for the legislature to correct if
15 our interpretation is contrary to its intent."

16 So, therefore, Your Honor, under the current
17 interpretation of 15-38-50 and the different types of
18 setoffs that you have with the UIM carrier and the 15-38-50
19 setoff, given the verdict in this case, Ms. Green cannot
20 recover anything from Mr. Hudgins. Thank you.

21 THE COURT: Thank you.

22 Mr. Churdar, I guess.

23 MR. CHURDAR: Thank you.

24 After I saw this motion and memorandum, I sent an
25 e-mail asking for more time. I think I said my head was

1 swimming, and it still is, actually.

2 This is a very complex argument that Mr. Hudgins
3 puts forth, but I think that it's so complicated, because it
4 really -- it just doesn't make sense.

5 To start with, it's my understanding that Mr.
6 Hudgins is saying that there are actually two setoffs here,
7 two \$100,000 setoffs, that he gets one and that Mr. McGee
8 gets another type of setoff, also a \$100,000. Am I correct?

9 THE COURT: I don't -- I don't believe so, but I
10 don't want to interrupt your train of thought.

11 MR. BRADSHAW: I will be happy to address it, but
12 I can --

13 MR. CHURDAR: Okay. I --

14 In any event, I think that there is only one
15 setoff and I think it is against a joint and several
16 verdict.

17 Ms. Green is not entitled to two recoveries. I'll
18 agree with that, but she is also -- she also got a punitive
19 damages verdict against both of these defendants for their
20 willful and reckless conduct, and, therefore, I would
21 disagree with Mr. Bradshaw when he said that the Section
22 15-38-15 (f) does not basically render the whole -- that
23 whole setoff scheme in that section void as relates to this
24 case. I think there is one setoff. I think it should be
25 applied to the actual damages verdict initially. If there

1 is additur, that may not -- it may not resolve at all, and I
2 will be prepared to get into that in a second, because I
3 have got a suggested application of all these motions I hope
4 simplify this, but I think that initially the issue is, you
5 know, how does the setoff apply and it is -- it is just one
6 setoff and it is one setoff to the actual damages award,
7 whatever that is. And the actual damages award is a joint
8 and several -- it's a joint and several judgment.

9 THE COURT: Yes, sir. I think he's narrowing this
10 just a little bit. The question is whether or not it
11 applies to punitive damages, okay; whether or not the setoff
12 would apply to punitive damages.

13 I have been giving this considerable thought.
14 There is a case that came down. It was a slip and fall
15 case, the Hucks case, that where a judge did not apply a
16 setoff in a confidential settlement and that was a different
17 set of facts. I understand that, but I think that it's
18 clear there is a setoff on actual damages, okay?

19 And I'm not saying that I'm granting motions or
20 denying motions at this point, but I believe -- and there's
21 no loss of consortium award to Mr. Russell, and so his
22 \$2,500 is not coming into this, all right, but this deals
23 with the \$100,000 received by -- I want to call her the
24 wife, but I know she takes a different last name, Ms. Green.

25 And then whether -- and really -- the gray area is

1 as to punitive damages, and I'm not trying to interrupt your
2 train of thought, but I think the law is pretty clear. Even
3 though I don't think you pled joint and several liability,
4 did you?

5 MR. CHURDAR: I think I did, but I don't remember
6 which --

7 THE COURT: No, I don't -- I think I remember --
8 and I could look back at the complaint. I don't think that
9 you did, but, anyway, so what are your thoughts as to
10 punitives?

11 MR. CHURDAR: I don't think it applies to
12 punitives.

13 THE COURT: Okay.

14 MR. CHURDAR: I don't think it applies to
15 punitives.

16 I would also point out at some point we are going
17 to get into how much the setoff is going to be also and I
18 would point out that Mr. Russell did injure his leg and the
19 \$2,500 was for that.

20 When a covenant was -- and I think he also signed
21 a covenant. I think they both signed a similar document.

22 THE COURT: They both signed a covenant and those
23 are both exhibits --

24 MR. CHURDAR: Right.

25 THE COURT: -- attached to Mr. Bradshaw's

1 memorandum.

2 MR. CHURDAR: Right, but clearly he was -- Mr.
3 Russell was required to sign the covenant for the payment of
4 the \$100,000 that he and Mrs. -- that he and Shannon Green
5 received and that language did include his -- a claim for
6 loss of consortium. So he -- he signs the covenant for the
7 \$100,000 and gave up a loss of consortium claim.

8 Our position that this court has the ability to
9 attribute some of that \$100,000 to Mr. Russell, and,
10 therefore, the setoff is not necessarily a \$100,000.

11 I got involved in this case after that original
12 settlement was made, but had I been involved early on, I
13 would have encouraged there to be an attribution of \$20,000
14 at least for the loss of consortium to Mr. Russell in that
15 case.

16 And I would ask the court, you know, to look back
17 at the evidence that was in front of it. I think that the
18 court heard enough that there doesn't necessarily need to be
19 a separate hearing, but we saw Shannon Green seriously,
20 seriously injured and Mr. Russell having to spend time with
21 her, taking off a couple of weeks of work himself, and also
22 while working in North Carolina taking her down to Grove
23 Road every day and picking her up every day after she was
24 able to go back to work. So whatever -- you know, she
25 indicates that she sleeps out on a recliner a couple of

1 nights a week now and has trouble doing a lot of things and
2 that their relationship has changed. And so, you know, I
3 think that the court clearly has the right and the duty to
4 look at the entirety of the circumstances. And the fact
5 that the jury, which gave, by the way, Mrs. Green nothing
6 for pain and suffering and a very serious injury, also
7 happened to give him nothing for loss of consortium, that is
8 not binding on this court.

9 So I'm asking the court -- and the case -- I cited
10 in the brief and Mr. Bradshaw talked about it, but it is the
11 unpublished opinion of Green v. Bauerle. I don't know how
12 to pronounce that name, but it's cited in my memo in
13 opposition to --

14 THE COURT: So both of y'all are citing the same
15 case?

16 MR. CHURDARD: Correct.

17 THE COURT: Okay.

18 MR. CHURDAR: But I'm citing it for the
19 proposition that they're basically saying it's not
20 sufficient for the trial judge to go, which the trial judge
21 did in this case, "oh, the jury gave them nothing for loss
22 of consortium," or, no, excuse me, whatever the percentage
23 is for that the jury awarded, that's what I'm going to do."
24 And the court -- the appellate court said no, no, no, the
25 judge gets to consider what the jury did, but that's not at

1 all binding on the judge's finding as the judge determines
2 how much to apply for the setoff.

3 So I would -- I'm simply saying that this court is
4 not bound by a \$100,000 setoff. And if this court finds
5 that Mr. Russell did lose anything when his wife was
6 seriously injured, then that reduces the setoff from a
7 \$100,000 to the extent of his loss, since he signed the
8 covenant giving up his loss of consortium. That's the --
9 that's the setoff they are looking for is a full hundred,
10 but it's our position -- it's my client's position that only
11 a portion of that should apply to Shannon Green and then a
12 portion of that should be attributed to Mr. Russell.

13 THE COURT: Well, can you give me more information
14 about how you think that 100,000 should be divided? I'm
15 looking at the covenant and I see that they both were
16 required to sign her covenant, or the covenant that I'm
17 calling her covenant, a \$100,000.

18 MR. CHURDAR: Right.

19 THE COURT: And then he is the only person that
20 signed his, the \$2,500, and I'm not certain that that is as
21 why that \$100,000 would be considered for loss of
22 consortium, if he signed a separate covenant, or if it was a
23 legal matter because they are married and consent was
24 required for both so that he could not later bring some type
25 of claim as a spouse but not a loss of consortium claim. Do

1 you follow me?

2 MR. CHURDAR: I understand that there may be --
3 are you thinking like under the necessities doctrine, or
4 something?

5 THE COURT: Well, and I may defer to defense
6 counsel on that issue. They may have some more thoughts on
7 that, but --

8 Anyway, but you are saying that some -- you
9 believe that some portion of the \$100,000 --

10 MR. CHURDAR: This is correct, because the 2,500
11 was paid for his leg injury. I mean, none of this is in the
12 record, other than what we've put here, and these are
13 obviously --

14 THE COURT: So it was for his personal injuries,
15 not for loss of consortium?

16 MR. CHURDAR: Correct, he received \$2,500 for his
17 personal injuries. She was not required to sign that, so
18 clearly there was nothing there for loss of consortium.

19 And then he was required to sign her covenant for
20 a hundred, giving up his claims, any other claims he had
21 relating from her injuries, which could only be loss of
22 consortium, essentially.

23 THE COURT: Okay. But do you have any other
24 argument with regard to percentages as to the 100,000? I'm
25 not asking you to pull percentages out of the thin air,

1 but --

2 MR. CHURDAR: Your Honor, if I may, I have
3 prepared -- I prepared something. It's called Plaintiff's
4 Suggested Application of Post-Trial Motions and it's just
5 how I think this ought -- this all ought to work out.

6 THE COURT: And that's fine. You can show that to
7 opposing counsel. I'll take that as a summary of your
8 argument, okay?

9 MR. CHURDAR: All right.

10 May I approach?

11 THE COURT: Yes, sir.

12 Thank you.

13 MR. CHURDAR: Okay.

14 Your Honor, I suggest -- I suggested \$20,000 to be
15 applied to the consortium claim and there are basically a
16 couple of reasons I did that. I think it was supported.
17 First of all, that is what I typically do when I get these
18 cases early and I would get a "easy settlement" like this, I
19 would attribute 20 percent to loss of consortium claim, and
20 I think that's pretty common. As a matter of fact, in the
21 case I think that was heard before this one, it was
22 considerably higher, but a lot of plaintiffs do that,
23 plaintiff's attorneys do that.

24 But in this case, Your Honor, you know, if we look
25 back at the injuries that she sustained and what was

1 required of Mr. Russell, he basically helped her get
2 dressed. He took care of all of her -- I mean, he said she
3 couldn't use the bathroom. She couldn't wipe herself. She
4 couldn't dress herself. She couldn't put on her underwear,
5 bra. She couldn't drive. He drove her to work early in the
6 morning and then went to work in North Carolina, then came
7 back and got her at the end of the day.

8 You know, their relationship has changed in terms
9 of their sexual relationship, their ability to sleep
10 together, because she's out of the bed so much, and she's
11 a -- you know, this happened when she was I think about
12 50 years old and this is going to go on for -- not to this
13 level, but some of these will go on for 30 years, according
14 to the life expectancy tables, so I think that's a
15 reasonable amount.

16 If -- you know, and we will talk about the amount
17 of the additur, but if you add the additur to the judgment,
18 then apply a setoff, I suggested that adding a \$100,000 for
19 pain and suffering, loss of enjoyment of life and permanent
20 impairment, I would say emotional distress too, which I will
21 explain that there was that, especially at the scene when
22 this woman thought she was going to die. You apply an
23 \$80,000 -- so you add those two together, you come up with
24 188,546 as the judgment. You give an \$80,000 setoff against
25 Shannon Green's verdict.

1 And I said in the second argument that, you know,
2 the court heard the testimony from both plaintiffs. This
3 was a very serious accident. I won't just repeat what I
4 just said, but the court can make this determination. It's
5 not bound by what the jury did. You know, again, as I said,
6 this is the same jury that gave her nothing for pain and
7 suffering.

8 And then once you apply the setoff to the actual
9 damages, this judgment for actual damages is joint and
10 several, if it's in excess of the setoff anyway, the issue
11 of whether punitive damages are affected is really beside
12 the point, so it doesn't really become a controverted issue
13 if there is enough additur, because it eats up the setoff.

14 And so the way I look at it, it would be the
15 verdict of 108,000 actual damages, which would be a joint
16 and several verdict, because there were -- they were found
17 to have acted willfully and recklessly, both defendants, and
18 then the punitive damages award would not be affected in any
19 way.

20 I realize we got a little bit ahead of ourselves.
21 I started talking about the amount of the additur, but I
22 would like to address that more specifically in a minute.

23 THE COURT: Yes, sir. Okay. And so --

24 Well, why don't you go ahead and do that and then
25 I'll hear from defense counsel.

1 MR. CHURDAR: Okay.

2 Well, Your Honor, it doesn't appear that anyone is
3 disputing the fact the jury did not return a verdict for
4 anything in its verdict, other than medical. It was to the
5 penny, and nothing for pain and suffering, nothing for
6 emotional stress, nothing for loss of enjoyment of life,
7 nothing for temporary permanent impairment. And the case
8 that I cited, Waring v. Johnson, said basically it would be
9 painfully untenable for anyone to argue that they included
10 anything in their verdict for these noneconomic damages.

11 The question for the court in addressing this
12 additur issue is whether the jury's failure to add anything
13 for these noneconomic damages makes the verdict grossly
14 inadequate and results from the jury's disregard --
15 disregard of the court's instructions.

16 And I would submit that the jury clearly
17 disregarded two things; one, at the very beginning the court
18 graciously expanded voir dire and specifically asked,
19 because I think asking the jury whether they could follow
20 the law as you give it is insufficient, and the court did
21 ask "how many of you would have a problem returning a
22 verdict of money in your verdict for pain and suffering?"
23 Asked the same thing -- the court asked the same thing for
24 permanent impairment and loss of the enjoyment of life.
25 They all committed they had no problem with it, no problem

1 with it.

2 I argued the same thing in closing and then the
3 jury was gave appropriate charges and I would submit that
4 the court -- or the jury arbitrarily decided not to return
5 anything, other than economic damages, to the very penny.
6 And if the court's ruling on this issue ends up being
7 evaluated by an appellate court, the question is which
8 ruling would be wholly unsupported by the evidence; that is,
9 whether Shannon Green did not experience any of these
10 noneconomic damages, that is, pain and suffering, emotional
11 distress, lose of enjoyment, or impairment; whether she
12 didn't or whether she did. And I think everyone who heard
13 the testimony would agree it is not humanly possible, it's
14 inconceivable, that a 50 year old woman who gets hit in her
15 subcompact car by a big truck going -- we heard estimates,
16 but it was basically 60 to 70 miles an hour with an
17 intrusion into her door, knocked her unconscious. She said
18 woke up to the horn blaring. This is all on pages two
19 through five. I put all this down what was fresh in my
20 mind, I outlined it, but basically the woman came to, the
21 horn is blaring, she got a mouthful the glass, a bloody
22 face. She thinks she's going to die. She can't breath.
23 She got broken ribs. She can't move her shoulder.

24 It turns out she sustained fractured ribs, a torn
25 biceps tendon. She misses -- overall, Your Honor, she

1 missed almost a month of work. When she went back to work,
2 she had restrictions. She couldn't lift anything more than
3 five pounds. She had her arm pinned against her left side
4 after her surgery for -- I think she said six weeks. Her
5 orthopedic suggested pain management, but she couldn't do
6 it.

7 The only significance of her diabetic condition,
8 by the way, is it made it worse for her. Her diabetes was
9 not obviously caused by this, but she took so much Alleve
10 that she got gastritis. She couldn't do the pain
11 management.

12 When she had the surgery, her biceps tendon was
13 reattached. Her collarbone was cut, a section take out. A
14 one centimeter section was removed.

15 Your Honor, this case is absolutely indisputable
16 that that would have caused pain and suffering, that she
17 would have experienced emotional stress, and this is going
18 on for the next 30 years. She testified very believably
19 that she still takes Alleve and she has trouble sleeping
20 many nights.

21 There were cases cited by both defendants for the
22 proposition that returning a verdict for medical bills only,
23 or less than the medical bills, does not mandate an additur
24 and they -- you know, in those cases, I think there were
25 about five of them, it was the Court of Appeals actually

1 reversing additur award, and I didn't see any of those in my
2 research, but these gentlemen both cited several, and I
3 would point out to the court that in all those cases there
4 were disputes over causation. These were cases involving --
5 you know, in the first one that Mr. Bradshaw cites plaintiff
6 claimed injuries of cervical strain, left elbow contusion
7 and tennis elbow.

8 And in the one -- Todd v. Joiner is one he cites
9 where the court returned -- or the jury returned a verdict
10 for the medicals and the judge apparently added, and on
11 appeal the Court of Appeals found, well, there was evidence
12 that would have supported the jury's review of the return
13 money for pain and suffering and they said there was
14 evidence to support -- the defendant argued that all of the
15 plaintiff's claimed damages were not proximately caused;
16 they weren't reasonably necessary; there was a low impact;
17 the plaintiff was showed limited injury immediately
18 following the accident. So, you know, there was evidence.

19 Here we don't have -- this isn't one of those
20 cases. This is a case where I can say with confidence it's
21 absolutely inconceivable that a person would not experience
22 severe pain and suffering, which is the way she described
23 it, by the way, severe pain and suffering for weeks and
24 weeks following this injury, these injuries, and then with
25 all of the treatment that she sustained, and then the

1 ongoing loss of use in the form of impairment.

2 So this is not like any of the cases cited by the
3 defendants. And I would suggest that it would be -- I think
4 the Court of Appeals, the appellate court, would have more
5 problem with nothing added than with something added.

6 And, you know, the court heard two and a half days
7 of trial and has a good understanding of the case, and I
8 think -- I hope -- I certainly hope I didn't overreach. I
9 don't think I did in requesting or suggesting a figure of
10 \$100,000 for these noneconomic damages under all these
11 circumstances. And if a figure like that is used, I think
12 this application and the way it's done not only works, it
13 resolves issues about whether the punitive damages award are
14 even affected. So I would suggest -- I would ask for
15 something similar to what is outlined in this document that
16 I just handed up. Thank you.

17 THE COURT: Thank you.

18 Counsel?

19 MR. COULTER: Judge, I -- you know, just -- I
20 don't disagree with Mr. Churdar that this cause I had to
21 swim a little bit too. When I got this and the verdict came
22 out after this, after the case, I was trying to figure out
23 what obligations, if any, my carrier would have.

24 My -- I haven't even filed a motion for a setoff
25 because it doesn't affect me right now. And in anything

1 that's determined, as far as setoff goes, my carrier's
2 position is going to be different. It's a contractual
3 obligation when it exceeds a particular defendant's
4 liability coverage. And so all of these are interesting,
5 but I don't really have anything to add to that at this
6 time, but I would point out one think about the proposal,
7 which is new to me that I just had a chance to look at. One
8 is assigning \$20,000 to Mr. Russell in a case where he got
9 zero would seem to be extremely inequitable and
10 unreasonable. If what he's attempting -- what I'm thinking
11 Mr. Churdar is trying to do is to reduce the offset to my
12 client's contractual obligation, which again of a verdict
13 exceeding a particular amount. To give Mr. Russell \$20,000
14 when a jury gave him nothing just -- I don't know how that
15 could be based on any type of reason, one.

16 Two, in as far as -- and I'll address this additur
17 issue of \$100,000, first of all you heard that I believe
18 during the trial that the plaintiff went back to work five
19 days after this accident. He said there was weeks of severe
20 pain and suffering and the jury just didn't see it that way.
21 A \$100,000 return for pain and suffering on an actual
22 damages award of 88,000, her treatment costs, I followed,
23 and I know the court does too, verdicts across the Upstate
24 and it's just -- this would be the exception as opposed to
25 the rule where a jury would return more than the actual

1 damages award -- I mean the actual damages presented. It
2 just doesn't happen 1.7 percent of the time, or 1.2, or
3 whatever this comes to. It just -- it just doesn't happen,
4 so I believe that would be unreasonable in terms of an
5 additur for pain and suffering.

6 So I'm jumping around, but I would also say,
7 judge, you know, of the ten or so roster meetings I have
8 been to with jury selection, each judge has said to the jury
9 that "this is the best system in the world, because you as
10 twelve jurors get to decide this case." I have heard that
11 every single time this year, and what the plaintiff's
12 attorney is asking to do is to take that right away from the
13 jury. And we all as attorneys know there is a risk when we
14 go to a trial. And when we -- I look at these verdicts
15 because I know I have to do something reasonable in that
16 same realm when I'm trying to resolve these cases and I
17 think to take this jury award away creates -- you know, it
18 creates a bigger problem for the court in the long run,
19 because this is what we use to try to get these things
20 resolved before we get this case in this court to begin
21 with. That's what we do. And to allow that to be taken
22 away from the jury I think would be improper in this
23 particular case.

24 THE COURT: Thank you.

25 Mr. Bradshaw?

1 MR. BRADSHAW: Yes, Your Honor, I'll address the
2 additur motion first and then kind of circle back to this
3 issue.

4 What Mr. -- just to echo what Michael has been
5 saying, what Mr. Churdar is doing, as you heard him stand
6 up, is trying to give you his thoughts and feelings about
7 what was going through the jury's mind. That's all well and
8 good, Your Honor, but you know it's very clear in South
9 Carolina case law we can't invade the province of the jury
10 just willy nilly and we don't know what the jurors were
11 thinking when they gave this award. Can't speculate to
12 that.

13 Your Honor, what Mr. Churdar is asking for is
14 really an extraordinary remedy where he's asking the court
15 to take away the case from the jury and use the court's own
16 judgment to determine what the damages were in this case.

17 Your Honor, a motion for additur, the court has to
18 state compelling reasons on the record for invading the
19 province of the jury, and jury awards are entitled to
20 substantial difference, is the term that's used under the
21 law in our system.

22 Moreover, it's not an abuse of discretion for the
23 court to deny a motion for additur when there is evidence to
24 support the verdict. Your Honor, we would argue that there
25 is evidence in this case to support the amount of the actual

1 damages that the jury awarded here.

2 There is several recent cases where an appellate
3 court has upheld a jury award when the award came back and
4 was the same amount as the client's medical.

5 And Mr. Churdar is incorrect when he says we
6 don't -- that nobody here has disputed that the jury didn't
7 award pain and suffering. We certainly dispute that,
8 because we don't -- just because the figures are the same
9 for the claimed medical expenses and the actual damages
10 award, again, we can't know what's going through the jury's
11 mind.

12 There is -- these cases that I'm talking about
13 Nestler v. Sills, Todd v. Joiner, Lynch v. Carolina Self
14 Storage -- I have copies here for the court if that would
15 assist you in your determination.

16 THE COURT: Yes, sir, certainly. Thank you.

17 MR. BRADSHAW: May I approach?

18 THE COURT: Thank you.

19 MR. BRADSHAW: These are all outlined in my brief,
20 but, you know, for the Nestler v. Sills case, just briefly,
21 the jury -- the amount of claimed damages medical expenses
22 were \$7,117.50. That's exactly what the jury awarded, but
23 there was extensive -- and the court said "by the extensive
24 evidences as to permanent impairment, pain and suffering,
25 and other damages, the jury awarded the amount of the

1 medical bills." And the Court of Appeals affirmed the trial
2 court's decision to deny the motion for additur in that case
3 because it says "the trial court is in the best position to
4 gauge the evidence."

5 Todd v. Joiner saying the same thing, the medical
6 bills total \$37,191.11. The jury award was that amount.
7 There -- the appellate court said there was some evidence at
8 the trial that or arguments at the trial that not all
9 damages were proximately caused by the accident in that
10 case. Therefore, because there is evidence in the record,
11 there is no -- that supported that award, there is no abuse
12 of discretion in denying the motion for additur.

13 The same thing with the Lynch case. The exact
14 amount of the claimed medical expenses was awarded, but the
15 court said "the trial court properly denied Lynch's motion
16 for new trial or P.T. additur because there was evidence
17 that the medical expenses Lynch incurred were not
18 proximately caused by the defendant's negligence."

19 So, Your Honor, what we have here, and it's
20 incorrectly was argued by the plaintiff in his motion,
21 again, you had given the court -- the jury very clear
22 instruction on preexisting medical issues. There was
23 evidence at trial to support the verdict. There -- again,
24 Ms. Green had preexisting shoulder issues, diabetes, several
25 instances of back -- preexisting back pain. The jury could

1 have -- we don't know what the jury found or how they came
2 to their decision. They could have easily found that some
3 of these medical bills that she was claiming for some of
4 these expenses were not related to the accident.

5 Mr. Churdar -- we also dispute that it's
6 undisputed that there was pain and suffering or extended
7 pain and suffering that Ms. Green will have or she will have
8 that pain and suffering for a lifetime. Again, there is no
9 medical evidence at trial. No doctor came in here and said
10 yes, to a reasonable degree of certainty she's going to have
11 extensive pain in her shoulder or her back for the remainder
12 of her life that's caused by this accident.

13 The evidence that was put in the record was she
14 was back at work within two weeks of the accident as a nurse
15 practitioner. She is able to care for herself. Her husband
16 is gone 60 percent of the time. She is able to get around
17 the house by herself, drive, do all sorts of things, so it's
18 certainly disputed as to any amount of pain and suffering
19 here, and it's certainly an unreasonable and arbitrary to
20 give her a \$100,000, given what the actual evidence at trial
21 for that claimed pain and suffering.

22 And, again, we don't even know if the jury took
23 some of the medical expenses off and then there was an award
24 of pain and suffering.

25 Mr. Churdar went through close to an hour

1 presentation about pain and suffering damages and
2 non-economic damages. The court gave clear instructions on
3 that, so we can't just sit here and say, oh, the jury didn't
4 consider that, without a compelling reason to do that and
5 when there is evidence in the record to support what the
6 jury came back with in terms of actual damages.

7 Mr. Churdar mentioned the Waring v. Johnson case.
8 That is the one appellate court case where the appellate
9 court had found that the additur was okay. That case is
10 completely different from this case. One, the plaintiff's
11 attorney or plaintiff's medical providers actually testified
12 in that case. It was undisputed in that case that all of
13 her injuries were related to the accident. Also undisputed
14 that she had gone -- had five years of treatment. Also
15 undisputed medical testimony in that case that she would
16 have a lifetime of pain and suffering. And, therefore, you
17 know, there was really no dispute at all as to the amount of
18 pain and suffering or no evidence to the contrary in the
19 record and, therefore, the trial court had awarded additur
20 in that case. It's not this case, Your Honor, and this case
21 is in line with the three cases I have handed you, or some
22 of the other cases cited in the brief, where the appellate
23 courts have said no, there is evidence in the record to
24 support what the jury did.

25 The jury is the arbiter of the facts. We are not

1 going to -- there is -- there is simply no compelling reason
2 to invade the province of their verdict here or their
3 decision.

4 So, therefore, Your Honor, we would ask that the
5 additur in this case be denied.

6 Getting back to the motion for setoff, looking --
7 again, this is my -- like Mr. Coulter, this is my first time
8 seeing Mr. Churdar's calculations here, but this is all well
9 and good and a pie in the sky type of calculation. The
10 problem is everything in here is completely contrary to the
11 South Carolina law on 15-38-50 and setoff under that
12 statute.

13 Your Honor, again, we can start at the beginning
14 here. One, again, the \$100,000 for additur, as I have just
15 expressed, I don't believe that there is any evidence here
16 to support that or to allow for that.

17 The hundred -- getting back to the \$100,000
18 covenant not to execute. One of the things -- and I know we
19 keep citing to the unpublished Supreme Court decisions.
20 And, again, that's not binding on this court. It's really
21 no precedential value, but really one of the only things
22 that's out there that speak to this topic, but in that
23 another thing the court said in that case is that the -- if
24 you break into the -- you know, try to allocate a settlement
25 or the amount of the settlement in a release can't be -- it

1 can't be arbitrary or capricious. You have to determine --
2 have all the relevant evidence. Here there is \$20,000 to
3 Mr. Russell out of that \$100,000, what is that based on?
4 There was -- that is completely arbitrary here and it's --
5 what we have here is a hard concrete findings of the jury
6 is, one, no loss of consortium.

7 You have, two, his -- Mr. Russell's own covenant
8 not to execute, which, while Mr. Churdar I understand may
9 not have been present when all that was going on, you know,
10 the only evidence we have of what that covenant was for at
11 this time is the document itself and the four corners of
12 that document and what it says is that Mr. Russell is
13 releasing any and all claims, including claims for loss of
14 services, not just his knee injury, as Mr. Churdar claimed.
15 So, Your Honor, it's clear here that where he may have
16 signed off, we don't know why he signed off as the spouse
17 under Ms. Green's covenant, but we do know he got his own
18 separate release for any and all claims he may have and that
19 he was paid \$2,500 for that. So there is just simply no
20 complete -- to be completely arbitrary to try to say, based
21 on all this relevant evidence, that we should somehow
22 allocate some more money to Mr. Russell out of the \$100,000
23 that went to Ms. Green.

24 Additionally, I know the court has raised the
25 question -- Mr. Churdar raised the question. Section number

1 four, he said "punitive damages award for \$35,000 per
2 defendant are not affected." So he basically wants to not
3 apply the setoff to the punitive damages award.

4 Your Honor, the only -- the appellate court
5 decision again in Smith v. Whitner is directly -- their
6 holding there was directly on point. It says "the
7 plaintiff's claim for actual and punitive damages arising
8 from the same injury is the same claim for purposes of
9 setoff under 15-38-50."

10 So if we look at 15-38-51, which is what's cited
11 there, the section states "when a release is given, it does
12 not discharge any of the other tort-feasors from liability
13 for the injury or wrongful death, unless its terms so
14 provides, but it reduces the claim against the others to the
15 extent of any amount stipulated by the release or the
16 covenant or in the amount of the consideration paid for it,
17 whichever is greater."

18 So the only mention of claim there, it's talking
19 about reduction of the claim, and the claim, as the Court of
20 Appeals says, includes actual and punitive damages.

21 So, therefore, Your Honor, you have to -- it's
22 mandated by the statute to reduce the actual and punitive
23 damages award. They have already gone through when you do
24 that with the \$100,000 setoff in this case, Ms. Green cannot
25 recover anything from Mr. Hudgins. And it's --

1 Again, there is no equities that come into play.
2 That's essentially what Mr. Churdar is arguing for here is
3 that he -- he didn't cite you any case law. He just said "I
4 don't think the punitive damages should be a setoff," you
5 know, but, again, it's statutory mandates, it's a
6 legislative issue. You have to apply the statute the way
7 it's written, the way it's been interpreted, and when you do
8 that, there is nothing that can be recovered.

9 And just briefly, again, I was not arguing that
10 there is two setoffs for some reason. The UIM setoff, if
11 you want to call it that, it's not really a setoff at all.
12 It's just a contractual. You know, if you can -- if you
13 don't get above the liability limits of the insured, then
14 you can't get any UIM. It's completely different from what
15 15-38-50 is talking about.

16 So, Your Honor, again, for those reasons we would
17 ask that the motion for additur be denied and that the
18 setoff be applied, as I have outlined to the court.

19 THE COURT: Okay. Thank you.

20 With regard to Mr. McGee and the punitive damage
21 award, if there is setoff with regard to punitives to him,
22 again, I'm just saying this hypothetically, then is it the
23 argument of Mr. McGee that his obligation has also been
24 fulfilled?

25 MR. COULTER: Yes, judge. And, in fact, there is

1 actually an additional argument as well about the potential
2 contractual setoff, based on the reverse of the application
3 of Geico v. Poole, which I didn't bring. I really didn't
4 think about bringing that at this time, but that's a case
5 that talks about the fact that punitive damages can be
6 applied to remaining property damage coverage, and I'm not
7 exactly sure what the remaining property damage coverage is
8 under the other -- under Nationwide. I think it was
9 Nationwide. Whoever the other carrier was from the
10 defendant McGee, but there was unused property damage that
11 would apply, and I would argue the additional amount of
12 setoff when applying punitive damages.

13 So we have a hundred -- as I understand it,
14 100,000 B.I., \$50,000 property damage coverage from the
15 initial liability carrier, and that -- my argument would be,
16 if it were to come to this, that Progressive would get the
17 setoff for the -- contractual setoff for the full one
18 hundred, plus the additional unused property damage, which
19 is going to be somewhere in the neighborhood of I think
20 about with 30,000, \$35,000.

21 And so, yes, in essence that would extinguish the
22 carrier's obligation, based on the standing verdict, as well
23 as the current award.

24 THE COURT: Mr. Churdar, anything else?

25 MR. CHURDAR: I assume -- well, I assume that we

1 have to come back over here, depending on the ruling.

2 MR. COULTER: And that's -- and I apologize.

3 I'm -- I'm not sure what -- you know, really I know that we
4 need judicial economy to argue all these things at the same
5 time, but, you know, with that -- I mean, the issue -- right
6 now is I have got no argument, is what I'm saying
7 contractually, but if there -- if there were to be some
8 other -- if, depending on the court's ruling as to additur,
9 then maybe there is an issue that would come up, but as of
10 right now I don't have an argument, because there is not a
11 verdict that's exceeded either of the liability limits. So
12 I don't have -- that's why I'm saying I really don't have an
13 argument right now.

14 MR. CHURDAR: I think we probably need some
15 rulings. So far though on what --

16 I think I understand from his side is against
17 \$157,000 worth of verdicts, we apply a \$100,000 setoff and
18 my client gets nothing, I think. I'm confused by this, but
19 I think that's what they are saying, implying.

20 MR. COULTER: What I'm saying is there is -- the
21 only reason my carrier would have to make payment in this
22 case is under the contractual obligation of paying excess
23 verdict over whatever the policy limits are of a
24 tort-feasor. And right now, as this thing stands with the
25 60 percent allocation to one, 40 percent to the other, even

1 with the \$35,000 apiece, there is not -- it hasn't exceeded
2 either of the liability carrier's policy limits, and that's
3 when -- that's when my people would stand in.

4 It's different than what he's got going on. I get
5 that, but mine is completely -- mine is contractual. It's
6 got nothing to do with really any of the setoff issues we
7 are discussing today, I don't believe.

8 MR. BRADSHAW: And, Your Honor, I would just add
9 that Mr. Churdar's statement then about, you know, what we
10 are arguing, they shouldn't get anything from the \$150,000
11 verdict, again, I'm -- I'll leave it to Mr. Coulter to
12 determine how the UIM is going to apply here and how that
13 contract applies, but, again, Mr. Churdar is trying to
14 appeal to the equity -- equitable jurisdiction of the court
15 and that's just not what you do under 15-38-50. It applies,
16 it's mandatory, and the court in Ellis even said that for
17 some reason that, you know, if there is some inequities
18 there, that's not for the court to determine. That's a
19 legislative change that's needed, but -- so, therefore, Your
20 Honor, it's really no discretion here in applying the law as
21 it's currently standing.

22 MR. CHURDAR: Your Honor, I think that the
23 situation is resolved by under -- I believe applying
24 15-38-50, the section which says it does not apply when the
25 parties have acted willfully and recklessly.

1 And then we have got at least, at this point, an
2 \$88,000 and change judgment, which is joint and several. If
3 there is anything added to that, that's also joint and
4 several. And that's -- and in that context, aside from what
5 the language of the statute says, but also just doing the
6 math, the punitive damages awards are not affected. That's
7 what I meant when I said that.

8 As far as -- you know, I'm not applying to the --
9 when Mr. Bradshaw says I'm applying to the sympathy of the
10 court's equity, I'm really not. I'm saying it's an absurd
11 result and that's why the statute shouldn't be read the way
12 that Mr. Bradshaw was suggesting it should be read.

13 As far as additur, you know, there was a lot of
14 talk about taking this away from the jury. I think it's
15 really simple. They cited several cases where additur has
16 been reversed. There are a bunch of cases where additur has
17 been upheld. And if Shannon Green experienced pain and
18 suffering, which I don't think can be disputed, and if the
19 jury did nothing for that, then certainly an appellate court
20 would uphold this court's decision to do something about
21 that. That is -- that is different from some of the issues
22 that exists in the cases that Mr. Bradshaw gave up to the
23 court do not exists here. The fact that she had
24 preexisting -- a preexisting right shoulder injury has
25 nothing to do with this case. I didn't want any of that

1 stuff brought in, because I think frankly it's intended to
2 basically say to the jury she wasn't exactly the picture of
3 health anyway, but it had nothing to do with her injuries,
4 the fact that her right shoulder was injured years ago, or
5 the fact that she had a low back injury, when, in fact,
6 she's only claiming an upper back injury in this case.

7 So I would -- I would ask -- I would ask for
8 rulings consistent with the document that I handed up today
9 and I think many of these issues will take care of
10 themselves.

11 THE COURT: Okay. All right. Thank you all.

12 I will issue a decision as quickly as I can.
13 Thank you again for your argument and for your memorandum,
14 the case law. I do appreciate it. I know it's a great
15 effort. I will be in touch with you all as soon as I can.

16 MR. COULTER: Thank you, judge.

17 MR. BRADSHAW: Thank you, Your Honor.

18 THE COURT: Thank you.

19 (END OF REQUESTED TRANSCRIPT OF RECORD)
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22
23
24
25

CERTIFICATE

I, the undersigned, Michael R. Watts, Official Court Reporter for the Seventh Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and the evidence introduced in the trial of the captioned case, relative to appeal, in the Court of Common Pleas for Spartanburg County, South Carolina, on the 20th day of December, 2019.

I do further certify that I am neither of kin, counsel nor interest to any party hereto.

MAY 8, 2020



Michael R. Watts
Circuit Court Reporter





JUL/14/2016/THU 05:36 PM

Maggi Fields Bailey

FAX No. 8642320486

P. 009

MAGGI FIELDS BAILEY**Attorney at Law**700 E. North Street Suite 7
Greenville, South Carolina 29601Telephone (864) 232-0455
Facsimile (864) 232-0486**WAGE AND SALARY VERIFICATION**Name of Employee: Shannon Pamela GreenAddress: 1124 Highway 11, Landrum, SC 29356DOB: 9/06/1966 Last 4 of SSN#: ***-**-7878* Dates of Employment: From 12/01/2003 to Present* Hours normally worked per week: 40* Hourly Pay Rate \$ 38.84 or Annual Salary \$* Bonus, Commissions, or Overtime \$ NO(a) As a direct result of the automobile accident which occurred on November 19, 2015, the above-named employee incurred lost time from work for the following period:From 11/20/2015 to 11/28/2015
3/23/2016 to 4/11/2016; OR(b) Total # of Hours or Days Missed from work: 152 Hours, 19 Days* Employee's Regular Job Duties: Nurse Practitioner* Has the employee's job duties changed since accident: Yes X NoIf yes, please explain: she had a reduced work load -
restricted to 5 pounds or less lifting.Dated this 22 day of July, 2016.Name of Employer: Bon Secours Health SystemAddress: 8565 Magnolia Pkwy, Suite 9000Phone: 855-336-7100 Fax: 855-575-2940Name of Person Completing this Form: Linda ElliottSignature of Person Completing this Form: Linda ElliottTitle: HR EDA Coordinator

SHANNON GREEN'S FINANCIAL COSTS

	MEDICAL PROVIDER	DATES OF SERVICE	CHARGES
1)	Spartanburg County EMS	11/19/15	\$ 712.80
2)	Spartanburg Regional Medical Center	11/19/15	12,435.89
3)	Carolinas Pathology	11/19/15	45.23
4)	Medical Group of the Carolinas	11/19/15	470.00
5)	Upstate Eye Care	11/20/15	320.36
6)	St. Francis Urgent Care	11/22/15	324.00
7)	Cassandra E. Bray, M.D.	11/30/15	124.00
8)	St. Francis Hospital (X-ray)	11/30/15	795.00
9)	Upstate Carolina Radiology	11/19/15-11/30/15	890.00
10)	S.C. Diagnostic Imaging	12/10/15	1,650.00
11)	S.C. Diagnostic Imaging	12/28/15	1,870.00
12)	St. Francis Hospital (EKG)	3/17/16	409.00
13)	Palmetto Anesthesiology	3/23/16	3,245.00
14)	St. Francis Hospital (Surgery)	3/23/16	41,392.28
15)	St. Francis Hospital P.T.	4/12/16-9/13/16	13,157.00
16)	Piedmont Orthopaedic Associates	12/18/15-11/17/16	4,637.00
17)	Medical Supplies		35.63
18)	Prescription Medications		46.85
Total Medicals			\$ 82,560.04
19)	Miscellaneous (Cell Phone Replacement)		\$ 83.06
20)	Lost Wages		\$ 5,903.68
TOTAL FINANCIAL COSTS			\$ 88,546.78

COVENANT NOT TO EXECUTE

CLAIM NUMBER: 388016-GC

WHEREAS, Darrell Russell, hereinafter referred to as the undersigned, and DEBRA OR EDWARD MCGEE were involved in an automobile accident on or about the 19 day of November, 2015, at or near , South Carolina; and

WHEREAS, the undersigned subsequently claimed bodily injuries and damages as a result of this accident, and

WHEREAS, Nationwide Affinity Insurance Company of America has issued a policy of automobile liability insurance to DEBRA OR EDWARD MCGEE, policy number 6139D 225555, with liability limits of \$100,000; and

WHEREAS, the undersigned alleges to have sustained substantial damages arising out of the above accident and the undersigned alleges that these damages will exceed the amount of the liability insurance coverage available to Darrell Russell; and

WHEREAS, DEBRA OR EDWARD MCGEE and Nationwide Affinity Insurance Company of America would wish to limit any liability for damages in excess of \$2,500.00

NOW THEREFORE, known all men by these presence that I, Darrell Russell, for and in consideration of Two thousand five hundred dollars and no/100 dollars to me in hand paid by DEBRA OR EDWARD MCGEE and Nationwide Affinity Insurance Company of America, the receipt and sufficiency whereof is hereby acknowledged, by these presence, for myself, my heirs, executors, administrators, successors and assigns, do hereby covenant, promise and agree as follows:

1. That the undersigned does hereby promise and covenant for himself/herself, his/her executors, administrators, successors, and assigns not to execute against DEBRA OR EDWARD MCGEE and/or Nationwide Affinity Insurance Company of America, their heirs, executors, administrators, legal representatives, successors or assigns, on any judgment that may be obtained by the undersigned on account of any and all claims, demands, damages, costs or expenses, including, but not limited to, any medical or hospital expenses, loss of services, actions and cause of action, arising from any act, omission, or occurrence, resulting or to result from the above referenced automobile accident.
- 2 That furthermore, the undersigned does further covenant and promise that if he/she should attain a judgment against the DEBRA OR EDWARD MCGEE he/she will not execute on any judgment against DEBRA OR EDWARD MCGEE and/or Nationwide Affinity Insurance Company of America and that, upon a final determination of whether any underinsured motorist benefits will be paid, he/she or his or her attorney will cause the judgment to be marked and entered as satisfied.
3. That should the undersigned or his/her attorney refuse to mark and enter any judgment obtained against DEBRA OR EDWARD MCGEE and/or Nationwide Affinity Insurance Company of America as satisfied as provided herein above, the undersigned and his/her attorney do hereby authorize the Clerk of Court for the county in which any action is pending, to mark and enter the judgment as satisfied upon receiving a copy of this agreement from counsel for DEBRA OR EDWARD MCGEE and/or Nationwide Affinity Insurance Company of America.

Initial(s): DR

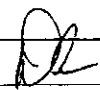
Date: 8-22-17

COVENANT NOT TO EXECUTE

CLAIM NUMBER: 388016-GC

4. That the undersigned agrees that the payment made by DEBRA OR EDWARD MCGEE and Nationwide Affinity Insurance Company of America is in compromise of a doubtful and disputed claim and that the payment made is not to be construed as an admission of liability on the part of DEBRA OR EDWARD MCGEE or of any other person hereby benefiting from this Covenant.
5. That the undersigned hereby declares and represents that no promise or inducement or agreement not herein expressed has been made to him/her and that this Covenant contains the entire agreement between the parties hereto, and the terms of this Covenant are contractual and not merely a recital and that DEBRA OR EDWARD MCGEE and Nationwide Affinity Insurance Company of America have made no representations as to the possibility of recovery of any monies by the undersigned against any underinsured motorist carrier.
6. The undersigned further covenants and agrees that this Covenant shall apply to all known, unknown, anticipated, and unanticipated injuries and damages resulting from the above accident.
7. That the undersigned and his/her attorney does further agree that should there be any liens for health care services provided, ~~whether by statute or contract or otherwise, that they will cause the health care~~ provider to be reimbursed from the proceeds of this payments for said liens and that they will indemnify and hold harmless DEBRA OR EDWARD MCGEE and Nationwide Affinity Insurance Company of America, their heirs, executors, administrators, legal representatives, successors and assigns, from any and all claims, demands, actions or cause of action of whatsoever kind or nature, including the reimbursement of a reasonable attorney's fee in defending such actions brought by any such purported lienholders.
8. That the undersigned hereby acknowledges that he/she relies wholly upon his/her own judgment, belief, and knowledge of the nature, extent of duration of his/her injuries and damages, and the possibility of recovery from said injuries and damages, and that no representations or statements of any kind regarding these injuries and damages or any other matter made by DEBRA OR EDWARD MCGEE or Nationwide Affinity Insurance Company of America or by their agents or representatives, have been relied on to any extent whatsoever in making this Covenant.

It is mutually understood and agreed that this Covenant is not intended as a release or discharge, nor as an accord and satisfaction with any person whatsoever, but only as a Covenant Not to Execute against DEBRA OR EDWARD MCGEE and Nationwide Affinity Insurance Company of America, their heirs, executives, administrators, legal representatives, successors and assigns, and is executed simply to purchase freedom from the threat of execution upon any judgment that may be attained against DEBRA OR EDWARD MCGEE and/or Nationwide Affinity Insurance Company of America.

Initial(s):	
Date:	8-22-17

COVENANT NOT TO EXECUTE

CLAIM NUMBER: 388016-GC

The undersigned hereby expressly reserves the rights to prosecute a legal action in court against DEBRA OR EDWARD MCGEE solely for the purpose of establishing a claim for underinsured motorist benefits under an automobile policy applicable to this accident.

Nor does this Covenant intend to release any other person, firm, corporation, who is liable or may be liable to the undersigned for any injuries and/or damages that may have been suffered from the above referenced accident.

IN WITNESS WHEREOF, I hereunto set my hand and seal this 22nd day of August, 2017.

WITNESS: Kristen H. Owens

WITNESS:

PLAINTIFF:

SPOUSE:

STATE OF SOUTH CAROLINA

COUNTY OF Greenville

On this 22nd day of August, 2017, before me personally came Darrell Russell, to me known to be the person who is described in and who executed the foregoing instrument, and that he/she acknowledged to me that they executed the same and the same is their free act and deed.

NOTARY PUBLIC, SOUTH CAROLINA:

MY COMMISSION EXPIRES:

Kristen H. Owens
3/24/2018

COVENANT NOT TO EXECUTE

CLAIM NUMBER: 388016-GC

WHEREAS, Shannon Green and Darrell Russell, hereinafter referred to as the undersigned, and DEBRA OR EDWARD MCGEE were involved in an automobile accident on or about the 19 day of November, 2015, at or near Spartanburg, South Carolina; and

WHEREAS, the undersigned subsequently claimed bodily injuries and damages as a result of this accident, and

WHEREAS, Nationwide Affinity Insurance Company of America has issued a policy of automobile liability insurance to DEBRA OR EDWARD MCGEE, policy number 6139D 225555, with liability limits of \$100,000; and

WHEREAS, the undersigned alleges to have sustained substantial damages arising out of the above accident and the undersigned alleges that these damages will exceed the amount of the liability insurance coverage available to Shannon Green and Darrell Russell; and

WHEREAS, DEBRA OR EDWARD MCGEE and Nationwide Affinity Insurance Company of America would wish to limit any liability for damages in excess of \$100,000

NOW THEREFORE, known all men by these presence that I, Shannon Green and Darrell Russell, for and in consideration of One hundred thousand dollars and no/100 dollars to me in hand paid by DEBRA OR EDWARD MCGEE and Nationwide Affinity Insurance Company of America, the receipt and sufficiency whereof is hereby acknowledged, by these presence, for myself, my heirs, executors, administrators, successors and assigns, do hereby covenant, promise and agree as follows:

1. That the undersigned does hereby promise and covenant for himself/herself, his/her executors, administrators, successors, and assigns not to execute against DEBRA OR EDWARD MCGEE and/or Nationwide Affinity Insurance Company of America, their heirs, executors, administrators, legal representatives, successors or assigns, on any judgment that may be obtained by the undersigned on account of any and all claims, demands, damages, costs or expenses, including, but not limited to, any medical or hospital expenses, loss of services, actions and cause of action, arising from any act, omission, or occurrence, resulting or to result from the above referenced automobile accident.
2. That furthermore, the undersigned does further covenant and promise that if he/she should attain a judgment against the DEBRA OR EDWARD MCGEE he/she will not execute on any judgment against DEBRA OR EDWARD MCGEE and/or Nationwide Affinity Insurance Company of America and that, upon a final determination of whether any underinsured motorist benefits will be paid, he/she or his or her attorney will cause the judgment to be marked and entered as satisfied.
3. That should the undersigned or his/her attorney refuse to mark and enter any judgment obtained against DEBRA OR EDWARD MCGEE and/or Nationwide Affinity Insurance Company of America as satisfied as provided herein above, the undersigned and his/her attorney do hereby authorize the Clerk of Court for the county in which any action is pending, to mark and enter the judgment as satisfied upon receiving a copy of this agreement from counsel for DEBRA OR EDWARD MCGEE and/or Nationwide Affinity Insurance Company of America.

Initial(s):

Date:

COVENANT NOT TO EXECUTE

CLAIM NUMBER: 388016-GC

4. That the undersigned agrees that the payment made by DEBRA OR EDWARD MCGEE and Nationwide Affinity Insurance Company of America is in compromise of a doubtful and disputed claim and that the payment made is not to be construed as an admission of liability on the part of DEBRA OR EDWARD MCGEE or of any other person hereby benefiting from this Covenant.
5. That the undersigned hereby declares and represents that no promise or inducement or agreement not herein expressed has been made to him/her and that this Covenant contains the entire agreement between the parties hereto, and the terms of this Covenant are contractual and not merely a recital and that DEBRA OR EDWARD MCGEE and Nationwide Affinity Insurance Company of America have made no representations as to the possibility of recovery of any monies by the undersigned against any underinsured motorist carrier.
6. The undersigned further covenants and agrees that this Covenant shall apply to all known, unknown, anticipated, and unanticipated injuries and damages resulting from the above accident.
7. That the undersigned and his/her attorney does further agree that should there be any liens for health care services provided, whether by statute or contract or otherwise, that they will cause the health care provider to be reimbursed from the proceeds of this payments for said liens and that they will indemnify and hold harmless DEBRA OR EDWARD MCGEE and Nationwide Affinity Insurance Company of America, their heirs, executors, administrators, legal representatives, successors and assigns, from any and all claims, demands, actions or cause of action of whatsoever kind or nature, including the reimbursement of a reasonable attorney's fee in defending such actions brought by any such purported lienholders.
8. That the undersigned hereby acknowledges that he/she relies wholly upon his/her own judgment, belief, and knowledge of the nature, extent of duration of his/her injuries and damages, and the possibility of recovery from said injuries and damages, and that no representations or statements of any kind regarding these injuries and damages or any other matter made by DEBRA OR EDWARD MCGEE or Nationwide Affinity Insurance Company of America or by their agents or representatives, have been relied on to any extent whatsoever in making this Covenant.

It is mutually understood and agreed that this Covenant is not intended as a release or discharge, nor as an accord and satisfaction with any person whatsoever, but only as a Covenant Not to Execute against DEBRA OR EDWARD MCGEE and Nationwide Affinity Insurance Company of America, their heirs, executives, administrators, legal representatives, successors and assigns, and is executed simply to purchase freedom from the threat of execution upon any judgment that may be attained against DEBRA OR EDWARD MCGEE and/or Nationwide Affinity Insurance Company of America.

Initial(s): <u>AG/OL</u>
Date: <u>8-22-27</u>

COVENANT NOT TO EXECUTE

CLAIM NUMBER: 388016-GC

The undersigned hereby expressly reserves the rights to prosecute a legal action in court against DEBRA OR EDWARD MCGEE solely for the purpose of establishing a claim for underinsured motorist benefits under an automobile policy applicable to this accident.

Nor does this Covenant intend to release any other person, firm, corporation, who is liable or may be liable to the undersigned for any injuries and/or damages that may have been suffered from the above referenced accident.

IN WITNESS WHEREOF, I hereunto set my hand and seal this 22nd day of August, 2017.

WITNESS: Kristen H. Owens

WITNESS:

PLAINTIFF: Shannon Green

SPOUSE: Daniel Russell

STATE OF SOUTH CAROLINA

COUNTY OF Greenville

On this 22nd day of August, 2017, before me personally came Shannon Green and Daniel Russell, to me known to be the person who is described in and who executed the foregoing instrument, and that he/she acknowledged to me that they executed the same and the same is their free act and deed.

NOTARY PUBLIC, SOUTH CAROLINA:

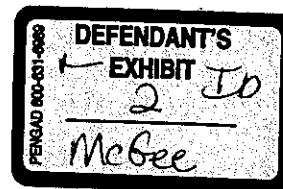
MY COMMISSION EXPIRES:

Kristen H. Owens
3124/2018

Miscellaneous signed by Paige Meacham Gault, MD at 7/29/2016 4:44 PM (continued)**Progress Notes by Paige Meacham Gault, MD at 11/10/2016 1:50 PM**Author: Paige Meacham Gault, MD Service: (none)
Filed: 11/10/2016 3:19 PM Encounter Date: 11/10/2016
Editor: Paige Meacham Gault, MD (Physician)Author Type: Physician
Status: Signed**Subjective**

PCP: Erica S Moore

Referred by No ref. provider found for Type 1 Diabetes

**HPI**

Shannon is a 50 y.o. nurse practitioner who practices primary care, presents for f/u of her type 1 diabetes, dx age 12, on pump therapy. She has never had an A1c <7.0%. Has no associated microvascular or macrovascular diabetic complications. She does have some degree of hypoglycemia unawareness. Has a DexCom CGMS. She has had diabetes education. She tends to eat convenience foods and eats out frequently. She really does not cook at home so she finds it difficult to know how many carbohydrates she is eating.

Labs are done at her place of employment. A1c 11/8/2016: 8.8%. TSH was 0.588, free T4 normal at 1.5, creatinine normal at 0.78.

Reviewed pump/glucometer download with patient in detail. This shows BG testing 3.3 times/day. BG avg is 217. 82% are above target range, and 2% are below. TDD 44.3units, 59% basal and 41% bolus. She uses the pump appropriately, very few manual boluses or overrides. Changes her site every 3-4 days. No problems with site infections. She continues to forget to bolus for all snacks, particularly in the afternoon when she is finishing up charting at work. She works late hours and often falls asleep on the couch charting so she does not check her sugars at bedtime necessarily and does not do a correction consistently. DexCom shows stable sugars overnight. She's not having significant issues with hypoglycemia.

Plans to start Belviq weight loss in the near future.

Patient denies chest pain, shortness of breath, open sores on feet/legs, and lower extremity numbness/tingling.

Current Outpatient Prescriptions:

- budesonide (RINOCORT AQUA) 32 mcg/actuation nasal spray, 2 sprays. 2 sprays by both nostrils daily, Disp: , Rfl:
- buPROPion XL (WELLBUTRIN XL) 300 mg 24 hr tablet, 300 mg. 1 daily, Disp: , Rfl:
- GLUCAGON, HUMAN RECOMBINANT (GLUCAGON EMERGENCY KIT, HUMAN, INJ), 1 mg. Inject 1 mg IM prn for hypoglycemic crisis, Disp: , Rfl:
- levothyroxine (SYNTHROID) 150 mcg tablet, Take 1 tab po daily -- DO NOT SUBSTITUTE, Disp: , Rfl:
- lisinopril (use for ZESTRIL) 10 mg tablet, 10 mg. 1 tab po daily, Disp: , Rfl:
- lispro (use for HumaLOG) 100 units/mL patient supplied pump, Use as directed in Medtronic pump. Basal rates mn 1.0u/hr, 7am 1.2u/hr, noon 1.1u/hr, I:C 1:10 mn, 1:8 noon, SF 45 from 2a-9p, 60 from 9p-2a., Disp: 10 mL, Rfl: 12
- lorcaserin (BELVIQ XR) 20 mg tablet extended release 24 hr, Take 20 mg by mouth. 1 tab po qd, Disp: , Rfl:

I have reviewed the patient's medical history, surgical history, family history and social history and updated the computerized patient record where appropriate.

Patient: **Green, Shannon**
Arrival: 11/19/2015 1936
Pt Acct: 1532302453
Med Rcd: 000628742

ED RECORD

Patient: **Green, Shannon**
Home Address: 1124 Hwy 11

DOB: 9/6/1966
Age: 49yr
Sex: F

City: Landrum
State: SC Zip: 29356
Home Ph: (864) 895-4592

Patient Code Alert:

Insurance Companies

Insurance Company

LITIGATION/LIABILITY F/C LI
COMM/MGD CARE F/C CI, HE, MG, RH
COMM/MGD CARE F/C CI, HE, MG, RH

Acuity: 2
Advance Directive: No
Mode of Disposition: Home Driver
Condition at Dispo: Stable

Created Record: 11/19/2015 1932
Mode of Arrival: Ambulance
Decision To Admit:
Dispo Summary Printed: 11/19/2015 2138
Time Left ED: 11/20/2015 0005
BMI: 32.5

BSA: 2.07 m2

Pt Weight: 91.6 kg (202 lbs)
Pt Height: 5'6" (168cms)
Triage Impression: Trauma Alert
CUC Early Warning Sx: None Identified

Nature of EMS Call: Trauma Alert

RN Triage: Kilian, Alyse R.N.
RN Primary: Alyse Kilian, R.N.
RProvider: Smith, Ryan M.D.

POP: Brav, Cassandra M.D.
POP Ph: 864-281-9999
Referring Phys:
Referring Phys Ph:
Consult Phys:
Cnst Phys Ph:

Created and Electronically Authenticated By: Kunde, Derek (Scribe) Created: 11/19/2015 1950 Last Entry: 2143

PHYSICIAN H&P MVC

Patient seen at: 11/19/2015 1939.

PREHOSPITAL CARE: Arrived by EMS.

History not limited.

Chief Complaint: MVC.

HPI: Pt is a 49 year old female presenting to the ED status post MVC, which occurred prior to arrival. Pt states that she was the restrained driver of the vehicle that was struck in the driver's side door by another vehicle. Per EMS, there was airbag deployment and the pt required extraction from the vehicle. Pt states that she currently has pain to her left clavicle and sternum at this time. Pt states that she is unsure if she lost consciousness or not. Pt does not report any fever, headache, cough, SOB, abd pain, nausea, vomiting,

2

Patient: Green, Shannon
Arrival: 11/19/2015 1938
Pt Acct: 1532302453
Med Rcd: 000628742

diarrhea, back pain, numbness, neck pain, or weakness. Pt has no other complaints at this time.

ROS:

() Unable to obtain full ROS due to non ros reason

CONST(System): () fatigue (-) headache, (-) fever.

ENT(System): () tooth pain, () nose bleed.

EYES(System): () blurry vision, () pain, () eye pain.

CV(System): () palpitations, (-) chest pain.

RESP(System): (-) cough, () wheezing, (-) SOB, () hemoptysis.

GI(System): (-) abdominal pain, (-) nausea, (-) vomiting, (-) diarrhea.

GU(System): () difficulty urinating, () hematuria.

MS(System): (-) back pain, (+) joint pain, () leg pain, () extremity pain, (-) neck pain. (+) sternal pain

SKIN(System): () redness, () abrasions, () lacerations.

NEURO(System): (-) numbness, (-) weakness () difficulty walking, () difficulty with speech, () confusion.

PSYCH(System): () anxiety, () depression.

(+) Except as marked, all systems above reviewed and found negative or are noted in HPI.

PMH List (See PMH Table) PSH List (See PSH Table)

(+) PMH, PSH, Family Hx, and Social Hx reviewed and agree with or are modified the table.

(+) Medications and allergies reviewed and confirmed or modified in table.

(+) MLP triage assessment and/or nursing notes reviewed and agree unless otherwise noted or supplemented in chart.

FH: no significant inheritable diseases.

SH: never smoker; lives at home; no recent ETOH use

IMMUNIZATIONS:

unknown.

Tetanus: Immunization status:.

PHYSICAL EXAM: < Click to add Extremities or other body area

(+) VITAL SIGNS REVIEWED

GENERAL APPEARANCE: well nourished, alert, cooperative, no obvious discomfort.

HEAD: no abrasions/lacerations on the head.

EYES: conjunctiva clear PERRL, EOMI

EARS: TMs clear.

NOSE: (-) injury, no swelling/tenderness.

THROAT: no airway obstruction

NECK: trachea midline.

C-SPINE: no cervical spine tenderness.

RESPIRATORY: (-) respiratory distress, good air exchange bilateral, no wheezing, no rhonchi, no rales.

CHEST WALL: upper sternal and left clavicle pain; no crepitus

CVS: normal rhythm, normal rate. (-) friction rub, no murmur.

ABDOMEN/GI: (-) rebound, (-) guarding, soft, normal BS, no abd tenderness, no abd masses, (-) distended.

SKIN: good color, other trauma: none.

EXTREMITIES: other trauma: none.

(+) pulse in all extremities

HIP: Bilateral (-) external rotation of the leg, (-) shortening of the leg, (-) deformity, no swelling/tenderness.

(-) decreased range of motion.

BACK: no back tenderness.

NEURO: motor intact, sensory grossly intact.

MENTAL STATUS: speech clear, oriented X 3, responds appropriately to questions.

Patient: Green, Shannon
Arrival: 11/19/2015 1936
Pt Acct: 1532302453
Med Rcd: 000628742

PSYCH: normal affect,

CLINICAL DECISION TOOLS:

Canadian CT Head Rule:

- () GCS Score < 15 at 2 hrs after injury
- () Suspected open or depressed skull fracture
- () Any sign of basal skull fracture
- () Vomiting 2 or more episodes
- () Age 65yrs or over
- () Amnesia before impact 30 minutes or longer
- (+) Dangerous mechanism - (Pedestrian struck, occupant in vehicle deceased, fall from elevation greater than or equal to 3 feet or 5 stairs)

EXCLUSIONS:

- () Currently on anticoagulation or antithrombotic therapy
- () Return visit for reassessment of same head injury
- () Unstable vital signs
- () Acute neurologic deficit
- () Injury not from blunt trauma
- () Seizure prior to ED assessment

CANADIAN RULE: Head CT Indicated.

NEXUS CRITERIA:

GLASGOW COMA SCORE:

DATA REVIEWED:

EKG/TELEMETRY:

COUNSELING:

Created and Electronically Authenticated By: Kunda, Derek (Scribe) Created: 11/19/2015 1950 Last Entry: 1950

Provider Note:

SCRIBE NOTE - This documentation has been scribed by me as dictated by Smith, Ryan M.D..

Created and Electronically Authenticated By: Wallace, Douglass M M.D. Created: 11/19/2015 2023 Last Entry: 2023

Results Reviewed by ED Provider:

ER CHEST P**

COMPLETE BLOOD COUNT

Created and Electronically Authenticated By: Smith, Ryan M.D. Created: 11/19/2015 2138 Last Entry: 2141

Provider Note: Discharge (MDM)

DECISION MAKING: Patient presents after fairly high mechanism MVC with anterior chest wall pain Of her upper sternum and left clavicle. Given mechanism of injury CT scans obtained which are negative for acute traumatic pathology. Patient ambulated received ibuprofen for pain report symptomatically improvement. This point in time she is discharged in stable condition with return precautions. Patient is to follow-up if she has worsening of her condition other questions or concerns. Patient's tetanus shot is up-to-date. I recommended outpatient primary care follow-up for reevaluation next week. I did provide her with incentive spirometer to prevent sequela from chest wall contusion.

RESULTS REVIEWED:

All labs interpreted by Smith, Ryan M.D..

RADIOLOGY INTERPRETATION: I independently reviewed the radiology: study.

COUNSELING:

DISCHARGE - Plan of care discussed with patient or caregiver. Questions were answered. Verbal and printed instructions were provided. If prescription(s) were given, the prescribed medications were reviewed, including relevant side effects and interactions. The patient is to seek outpatient follow up as noted in the discharge instructions. They verbalized understanding and ability to comply. The patient is discharged in stable condition. They were instructed to return to the emergency department for worsening symptoms or

Patient: Green, Shannon
Arrival: 11/19/2015 1938
Pt Acct#: 1532302453
Med Rcd#: 000628742

Pneumonia Scale (continued)		
Pneumonia Criteria	Present	Points
Temperature < 95F or > 103.9F		+15
Pulse > 124 beats/min		+10
pO ₂ < 7.35		+30
BUN > 25mg/dl		+20
Sodium < 130 mmol/liter		+20
Clucose > 250mg/dl		+10
Hematocrit < 30%		+10
Oxygen saturation < 90%		+10
Pleural Effusion on X-ray		+10
===== TOTAL Score		
===== MORTALITY RISK		
===== Performed on		
===== User Name		

MH Stroke Scale (new)

No Entries

Procedures

Procedure	Performed By	Quantity Entered	Billing No.
No Entries			

Inpatient Medication Orders

Medication	Dose	Route	Comments	Entered	Administered By
No Entries					

Created and Electronically Authenticated By: McBride, Tiffany RN. Created: 11/19/2015 1958 Last Entry: 1958

Trauma Patient - See Trauma Flow Sheet.

Assessment performed at 11/19/2015 1938.<NP> Completed by Eric K. RN

Created and Electronically Authenticated By: Klean, Alyse RN. Created: 11/19/2015 2032 Last Entry: 2038

Clinical Note: Pt presents to 51M from the trauma bay. Pt was involved in head on collision at a speed of 15mph. Pt was restrained driver of vehicle. Airbags deployed. Pt lost consciousness. Pt appears to have abrasions on the left side of the mouth and broken shards of glass covering the chest. P1A&Ox3. C-collar in place. Pt refuses pain meds at this time. Family at bedside.

REASSESS MUSCULOSKELETAL: ~~PHYSICAL EXAM:~~

AIRWAY: (-)patent, (-)obstructed.

5

Patient: Green, Shannon

Arrival: 11/19/2015 1936

Pt Acct: 1532302453

Med Rcd: 000628742

BREATHING: no breathing compromise. (-) accessory muscle use, good air exchange bilateral.

CIRCULATION: no circulatory compromise.

MENTAL STATUS: speech clear, oriented X 3, normal affect, responds appropriately to questions, alert, cooperative.

MUSCULOSKELETAL: (-) deformity, (-) distal neuro deficits, (-) altered sensation.

EXTREMITIES: good pulses all extremities, no swelling/tenderness in the extremities, no edema.

Report received from Amber.

Created and Electronically Authenticated By: Kilian, Alyse R.N. Created: 11/19/2015 2113 Last Entry: 2113

Clinical Note:

Smith, Ryan M.D. at bedside at 11/19/2015 2112

C COLLAR - 11/19/2015 2112. C Collar removed per Smith, Ryan M.D..

Created and Electronically Authenticated By: Kilian, Alyse R.N. Created: 11/19/2015 2136 Last Entry: 2136

Order(s) performed by "Task":

- Remove Cervical Collar

Created and Electronically Authenticated By: Kilian, Alyse R.N. Created: 11/19/2015 2141 Last Entry: 2146

Pt states "I am not ready to be discharged, I'm in too much pain!" Dr. Smith notified and 600 mg Motrin given per verbal order Dr. Smith. Pt placed in discharge/hold

Created and Electronically Authenticated By: Kilian, Alyse R.N. Created: 11/19/2015 2145 Last Entry: 2145

Order(s) performed by "Task":

- INCENTIVE SPIROMETER

Created and Electronically Authenticated By: Kilian, Alyse R.N. Created: 11/19/2015 2207 Last Entry: 2207

Orders Performed by Nurse:

- MOTRIN TAB (ibuprofen) 600mg (1 tablet of 600mg/tablet) by mouth once: (Faxed) - Gave 600mg. Verified: 2 patient IDs and allergies. Given At: 11/19/2015 2147

Created and Electronically Authenticated By: Kilian, Alyse R.N. Created: 11/19/2015 2247 Last Entry: 2247

Orders Performed by Nurse:

- ZOFRAN . IV (ondansetron hcl) 4mg (2mL of 4mg/2mL) IV once - Gave 4mg. Verified: 2 patient IDs and allergies, IV Med Site: antecubital right. Given At: 11/19/2015 2244

- MORPHINE SULFATE . IV 2mg IV once - Gave 2mg. Verified: 2 patient IDs and allergies, IV Med Site: antecubital right. Given At: 11/19/2015 2246

Created and Electronically Authenticated By: Kilian, Alyse R.N. Created: 11/19/2015 2329 Last Entry: 2329

Clinical Note: Pt states increased nausea. Dr. Smith notified. Pt provided with bedside commode. Pt states "I'm too sick to leave."

Created and Electronically Authenticated By: Kilian, Alyse R.N. Created: 11/19/2015 2341 Last Entry: 2341

Orders Performed by Nurse:

- ZOFRAN . IV (ondansetron hcl) 4mg (2mL of 4mg/2mL) IV once - Gave 4mg. Verified: 2 patient IDs and allergies, IV Med Site: antecubital right. Given At: 11/19/2015 2331

Created and Electronically Authenticated By: Kilian, Alyse R.N. Created: 11/19/2015 2341 Last Entry: 2341

Order(s) performed by "Task":

- REASSESS PAIN

Order Notes: Pt states pain improved after 2 mg IV morphine. Pt able to breath with less discomfort.

Created and Electronically Authenticated By: Kilian, Alyse R.N. Created: 11/19/2015 2356 Last Entry: 2356

Clinical Note:

DSP DISCHARGE AND IV DC WITH PRESCRIPTION(S) - IV discontinued, catheter intact, dressing applied.

Plan of care discussed with patient. Patient discharged with printed instructions. Prescriptions given to patient. Reviewed prescribed medications with patient; including potential interactions with other substances. Patient verbalized understanding and ability to comply.

The following items were received by the patient on discharge:

(+) Discharge/Dx

(+) Diagnostic specific discharge instructions

(+) Medication Reconciliation Form

(+) Follow up plans

(+) A list of major procedures or test done in EC.

Pt discharged to home. Respirations even, nonlabored. Pt transported to exit via wheelchair.

SSA BON SECOURS EXPRESS CARE GREEN, SHANNON PAMELA
 75 E MCBEE AVE MRN: 815148799
 GREENVILLE SC 29601-2723 DOB: 9/6/1966, Sex: F
 Enc. Date: 11/22/15

Progress Notes by Juan J Teruel, DO at 11/22/15 1054

Author: Juan J Teruel, DO
 Filed: 11/22/15 1155
 Status: Signed

Service: (none)
 Note Time: 11/22/15 1054
 Editor: Juan J Teruel, DO (Physician)

Author Type: Physician
 Note Type: Progress Notes

HISTORY OF PRESENT ILLNESS

Shannon Pamela Green is a 49 y.o. female.

Motor Vehicle Crash

The history is provided by the patient and spouse. The accident occurred more than 24 hours ago (thursday night). She came to the ER via walk-in. At the time of the accident, she was located in the driver's seat. She was restrained by an airbag and seat belt with shoulder. The pain is present in the left shoulder and left arm (left ribcage). The pain is at a severity of 10/10. The pain is severe. The pain has been constant since the injury. Associated symptoms include numbness, loss of consciousness, tingling and shortness of breath.

Associated symptoms comments:

. She lost consciousness for a period of less than one minute. The accident occurred at 6 to 20 MPH. It was a front-end accident. She was not thrown from the vehicle. The vehicle's windshield was shattered after the accident. The vehicle was not overturned. The airbag was deployed. She was ambulatory at the scene. She was found responsive to voice (conscious, responsive to pain, confused) by EMS personnel. Treatment on the scene included a backboard, a c-collar, extremity immobilization and extrication. Tetanus status: utd.

Was evaluated at Spartanburg Regional and released on Tylenol 3 and Motrin; C/O pain in the L arm, L lateral sternum, L upper back and the L lateral chest wall. Has SOB with ambulation; She thinks the chest xray and states they did a CT of the head chest abdomen/ pelvis. +DM: BG 109 this am; On an insulin pump

Review of Systems

Respiratory: Positive for shortness of breath.

Neurological: Positive for tingling, loss of consciousness and numbness.

BP 146/78 mmHg | Pulse 88 | Temp(Src) 98.1 °F (36.7 °C) (Oral) | Resp 16 | Ht 5' 5.5" (1.664 m) | Wt 211 lb 9.6 oz (95.981 kg) | BMI 34.66 kg/m² | SpO2 98%

Physical Exam

Constitutional: She is oriented to person, place, and time. She appears well-developed and well-nourished. No distress.

Cardiovascular: Normal rate, regular rhythm and normal heart sounds.

Pulmonary/Chest: Effort normal and breath sounds normal. She has no wheezes. She has no rales. She exhibits tenderness (L anterior parasternal and L lateral chest).

Musculoskeletal:

Superficial hematoma over the upper 1/2 of the R lateral arm

Limited ROM of the shoulder due to pain

Distal grip and touch sensation unremarkable

Tender with spasm of the paraspinal muscles of the L thoracic, scapular area

Neurological: She is alert and oriented to person, place, and time.

Skin: Skin is warm and dry.

Psychiatric: She has a normal mood and affect. Her behavior is normal.

Chest Xray: blunting of the L CP angle likely atelectasis

To:

From: Greenville_Hospital_Systems

1-23-15 4:34pm p. 1 of 1

GREENVILLE HEALTH SYSTEM
GREENVILLE, SOUTH CAROLINA

Fusion Report

PATIENT NAME: GREEN, SHANNON
DOB: 09/06/1966
SEX: F
PT. CLASS: H3

MED. REC. NO.: 970349701
PT. NS/ROOM: -
CORP. ACCOUNT NO.: -
ADMISSION NO.: 99023879044

ORDERING MD: JUAN TERUEL, DO,

OF LOCATION: -

317 ST. FRANCIS DRIVE
GREENVILLE, SC

UMG73030L - LEFT SHOULDER COMPLETE 2+VIEWS ACCESSION NO:14960541
ORDERED BY: Dr. JUAN TERUEL, DO,

Date of Exam: 11/22/2015 15:52
REASON FOR EXAM: Left shoulder pain, MVA

Admission Date: 11/22/2015

FINDINGS: Left Shoulder: Internal rotation, external rotation
The left glenohumeral and acromioclavicular joints are unremarkable. Soft
tissues are unremarkable. There is no evidence of acute fracture or
subluxation of the left shoulder.

IMPRESSION:
No evidence of acute fracture or subluxation of the left shoulder.

TRANSCRIPTIONIST: mrg
TRANSCRIBE TIME/DATE: 11/23/2015 04:30 pm
READ BY: MATTHEW RYAN GOSSAGE, MD
ELECTRONICALLY SIGNED BY:
11/23/2015 4:30 PM: MATTHEW RYAN GOSSAGE, MD

Patient Name: GREEN, SHANNON MRN: 970349701

Page 1 of 1

CONTAINS CONFIDENTIAL INFO - NOT TO BE DISTRIBUTED TO UNAUTHORIZED INDIVIDUALS
Diagnostic Imaging Report

Progress Notes

Shannon Pamela Green (MR# 815148799)

Progress Notes Info

Author	Note Status	Last Update User	Last Update Date/Time
Cassandra E Bray, MD	Signed	Cassandra E Bray, MD	11/30/2015 10:51 AM

Progress Notes**HISTORY OF PRESENT ILLNESS**

Shannon Pamela Green is a 49 y.o. female.

HPI Comments: Went to ER Spartenburg Regional and had C spine films, head CT and CXR. Lost consciousness at the scene. Hit in the drivers side front panel at around 70 miles an hour. Given Tylenol with codeine and flexeril and Zofran, 3 days later went to Urgent Care where rib fractures on the left side were found. Also left shoulder. Given Percoset for pain and taking Motrin 600 mg tid now. Now has pain between her shoulder blades and in the sternum. Taking Percoset at night.

Motor Vehicle Crash

The history is provided by the patient. The accident occurred more than 24 hours ago. She came to the ER via walk-in. At the time of the accident, she was located in the driver's seat. The pain is present in the left shoulder, chest and upper back. The pain is moderate. Length of episode of loss of consciousness: not sure but thinks brief. The accident occurred at greater than 40 MPH. It was a front-end accident. She was not thrown from the vehicle. The vehicle's windshield was cracked after the accident. The vehicle was not overturned. She was found conscious by EMS personnel.

Rib Pain

The history is provided by the patient. This is a new problem. The current episode started more than 1 week ago. The problem has not changed since onset. The pain is associated with exertion and breathing. The pain is present in the lateral region and left side. Associated symptoms include back pain.

Shoulder Pain

The history is provided by the patient. The incident occurred more than 1 week ago. The left shoulder is affected. The pain has been constant since onset. There is a history of shoulder injury. She has other injuries.

Review of Systems

Cardiovascular: Positive for chest pain.

Musculoskeletal: Positive for back pain and joint pain.

Physical Exam

Constitutional: She appears well-developed and well-nourished.

Musculoskeletal:

Thoracic back: She exhibits bony tenderness. She exhibits no swelling, no edema and no laceration.

Skin: Bruising noted.

Over left clavicle and left upper arm

Psychiatric: She has a normal mood and affect. Her behavior is normal.

ASSESSMENT and PLAN

Shannon was seen today for motor vehicle crash, rib pain and shoulder pain.

Diagnoses and all orders for this visit:



BON SECOURS HEALTH SYSTEM, INC.

ST FRANCIS HOSPITAL INC MOB
2 Innovation Drive
Greenville SC 29607-5261

GREEN, SHANNON PAMELA
MRN: 791004642
DOB: 9/6/1966, Sex: F
Acct #: 32153340074
Arrived 11/30/2015, D/C: 11/30/2015

RADIOLOGY RESULTS

Radiology Results (11/30/15 - 11/30/15)

Resulted: 11/30/15 1456, Result status: Final
result

XR SPINE THORAC 3 V [275154679]

Resulted by: Barry M Lazenby, MD
Resulting lab: GRNVL SFO(MOB) RADIANT
Narrative: Thoracic spine radiographs 11/30/2015
Performed: 11/30/15 1309 - 11/30/15 1435

CLINICAL HISTORY: MVA over a week ago with severe upper back pain.
Patient with
known left rib fracture.

Findings:

AP and lateral views of the thoracic spine are submitted. No definite
vertebral
body height or alignment abnormality is seen. There is a normal
progression of
interpedicular distance. Defects are seen in the left anterolateral
third and
lateral sixth ribs which may represent the patient's known left rib
fractures.
No acute findings are seen of the partially visualized lungs.

Impression: IMPRESSION:

1. No acute osseous abnormality of the thoracic spine. If there is high
clinical
concern for acute thoracic spine injury, then a noncontrast CT or MRI
can be
considered.

Specimen Information

Type	Source	Collected On
		11/30/15 1454

Testing Performed By

Lab - Abbreviation	Name	Director	Address	Valid Date Range
50 - SFO	GRNVL SFO(MOB) RADIANT	Unknown	Unknown	01/15/13 1547 - Present

END OF REPORT

Name: Green, Shannon
 DOB: 1966-09-06
 Age: 49 years
 Gender: Female
 Chart#: 17399



piedmont
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associates



BON SECOURS MEDICAL GROUP
 Bon Secours St. Francis Health System

Insurance: Aetna U.S. Healthcare;

Office Visit: 99212 EST Level 2		Diagnosis: M54.6 Pain in thoracic spine	
Proc 1:		Laterality:	Med 1:
Proc 2:		Laterality:	Med 2:
FX 1:	Laterality:	FX2:	Laterality:
Casting:		Cast Supply:	
DME:	Laterality:	DME:	Laterality:
XRAY	RIGHT:	LEFT:	BILAT:

Follow up: As Needed

BMI:32.3

Date of Service: 2015-12-29

Work
Status:

Allergies: Lortab; Vicodin

Medications: HumaLOG; Lisinopril; Robaxin-750 (750 MG, take 1 tablet q 6 hours pm muscle spasm); Synthroid; Wellbutrin; Xanax (1 MG, Take 1 tablet by mouth 45 minutes prior to MRI)

CC: Follow-up back pain

HPI: A 49-year-old female with a one-month history of pain in the thoracic spine after being involved in a motor vehicle accident. X-rays of the thoracic spine were negative. At last visit patient has tried Motrin and Flexeril. I started her on Duexis in addition to Robaxin. I also referred patient for an MRI of the thoracic spine. Today she reports that she is doing better and is tolerating the Duexis well. She still has some intermittent complaints and feels that this is controlled with medication at this time.

MRI of the thoracic spine images independently reviewed: At T8-9 and T9-10 there is disc degeneration with Schmorl's nodes. There is also narrowed disc space at T6-7 T5-6 and somewhat at T4-5 at T7-8. No spinal stenosis or disc herniations noted.

Assessment: Thoracic back pain which has improved with conservative medications due to multilevel degenerative disc disease of the thoracic spine status post motor vehicle accident

Plan: At this time patient will continue her Duexis regimen. I offered that she may go to pain management and undergo thoracic injections if she would like to do so. At this time she would like just to continue the medications and she will call if she changes her mind about a pain management referral.

Electronically Signed By Jaime E Elliott APRN

**BON SECOURS HEALTH
SYSTEM**1 Saint Francis Dr
Greenville SC 29601
864-255-1000Patient: Shannon Pamela
Green
MRN: XXXXX4642
DOB: 9/6/1966

Op Notes Signed by KOCH, BENJAMIN S, MD

Op Notes by Benjamin S Koch, MD at 03/23/16 1121

Author: Benjamin S Koch, MD	Service: Orthopedic Surgery	Author Type: Physician
Filed: 03/23/16 1609	Note Time: 03/23/16 1121	Status: Addendum
Editor: Benjamin S Koch, MD (Physician)		
Related Notes: Original Note by Benjamin S Koch, MD (Physician) filed at 03/23/16 1131		

Operative Note

Preoperative diagnosis: Primary osteoarthritis, left shoulder [M19.012]
 Unspecified dislocation of left acromioclavicular joint, initial encounter [S43.102A]
 Biceps tendinitis of left shoulder [M75.22]

Postoperative diagnosis: Arthritis of AC Joint, Biceps tendinopathy

Surgeon(s) and Role:

* Benjamin S Koch, MD - Primary

Assistant: Melissa Compton, CFA

Anesthesia: General, regional block

Antibiotics: Ancef 2 grams IV

Procedures: Procedure(s):

LEFT SHOULDER ARTHROSCOPY CLAVICLE RESECTION 29824
 LEFT OPEN SUBPEC BICEPS TENODESIS 23430

Findings:

1. EUA - FROM
2. Intra-articular - RTC appeared normal throughout. The Biceps anchor/tendon complex showed significant degeneration and tearing with a positive peel back sign. It was felt to be likely causing some of her left shoulder pain. The rest of the cartilage and labrum appeared normal.
3. Subacromial - RTC intact without signs of fraying or tearing. The subacromial space did not appear with severe fraying or CA ligament abnormality.
4. AC joint - Tight degenerative change in the AC joint. Stable though both pre and post distal clavicle resection.

Indications / Consent: this is a patient who has persistent pain with some weakness in the left shoulder. After previous discussions and treatments using both conservative and/or non-operative treatment options the patient elected to proceed with surgery due to continued symptoms. They were desirous of evaluation arthroscopic DCR and possible biceps tenodesis. A review of the risks and benefits, including but not limited to infection, stiffness, injury to nerves and vessels, DVT, PE, MI, need for further operations and other anesthesia related risks was performed with the patient. After this review and the review of the likely outcome and potential complications of the procedure, preoperative verbal and written consents were obtained. The operative procedure and postoperative

Name: Green, Shannon
 DOB: 1966-09-06
 Age: 49 years
 Gender: Female
 Chart#: 17399



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BON SECOURS MEDICAL GROUP
 Bon Secours St. Francis Health System

Insurance: Aetna U.S. Healthcare;

Office Visit: 99024 Post-Op		Diagnosis: Z09 Surgery follow-up	
Proc 1:		Laterality:	Med 1:
Proc 2:		Laterality:	Med 2:
FX 1:	Laterality:	FX2:	Laterality:
Casting:		Cast Supply:	
DME:	Laterality:	DME:	Laterality:
XRA	RIGHT:	LEFT:	BILAT:
Y			

Follow up: 4 Weeks

BMI:32.3

Date of Service: 2016-04-04

Work Status:

Allergies: Lortab; Vicodin

Medications: Aspirin EC (325 MG, Take 1 tablet(s) by mouth once a day for 14 days); Dulcolax (5 MG, Take 1-2 tablet(s) by mouth 2 times a day as needed [PRN]); Humalog; Lisinopril; Pennsaid (2 %, Apply 2 PUMPS 2 times a day as needed [PRN]); Percocet (7.5-325 MG, Take 1-2 tablet(s) by mouth every 4-6 hours as needed [PRN]); Robaxin-750 (750 MG, take 1 tablet q 6 hours pm muscle spasm); Synthroid; Wellbutrin; Xanax (1 MG, Take 1 tablet by mouth 45 minutes prior to MRI); Zofran ODT (4 MG, Take 1 not specified by mouth every 4-6 hours as needed [PRN])

CC: 12 days status post left shoulder arthroscopy with distal clavicle resection and open subpectoral biceps tenodesis, 3/23/2016

HPI:

Doing well. States the muscle spasms cramps were worse beginning. She has been taking a little bit of muscle relaxant at night but otherwise doing well.

PmHx: Any changes to the patient's PmHx since our last visit were updated on the POA PmHx form.

PE:

Incisions appear to be healing well. Tolerates passive range of motion the shoulder and elbow well. Near full elbow flexion and extension. No Popeye abnormality.

X-ray/MRI:

A/P:

Work: Return to light duty no lifting greater 5 pounds on 4/11/2016 with the left shoulder. Physical therapy protocols were provided. She would like to go to Mellinism.

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Appendix - 000478

13

Progress Notes

Progress Notes by Cassandra E Bray, MD at 10/26/16 1430

Author: Cassandra E Bray, MD

Service: (none)

Author Type: Physician

Filed: 10/26/16 1738

Encounter Date: 10/26/2016

Status: Signed

Editor: Cassandra E Bray, MD (Physician)

PROGRESS NOTE

SUBJECTIVE:

Shannon Pamela Green is a 50 y.o. female seen for a follow up visit regarding Weight Gain (pt wants belviq) and Hip Pain (lt side)

Hip Pain

The history is provided by the patient. This is a chronic problem. The problem occurs daily. The problem has been gradually worsening. The pain is present in the left hip. The pain is mild. Pertinent negatives include no back pain. She has tried arthritis medications (taking Motrin 800 mg tid to qid) for the symptoms. The treatment provided no relief. There has been no history of extremity trauma.

Weight Management

The history is provided by the patient. This is a chronic problem. The problem has been gradually worsening. Nothing relieves the symptoms.

Past Medical History, Past Surgical History, Family history, Social History, and Medications were all reviewed with the patient today and updated as necessary.

Current Outpatient Prescriptions

Medication	Sig	Dispense	Refill
• buPROPION SR (WELLBUTRIN SR) 150 mg SR tablet	TAKE ONE TABLET BY MOUTH TWICE DAILY	180 Tab	3
• lorcaserin (BELVIQ XR) 20 mg Tb24	Take 20 mg by mouth daily. Max Daily Amount: 20 mg.	30 Tab	5
• lisinopril (PRINIVIL, ZESTRIL) 10 mg tablet	Take 1 Tab by mouth daily. Indications: renal perfusion in diabetic	90 Tab	3
• Insulin lispro (HUMALOG) 100 unit/mL Injection	by Continuous SubCUTaneous Infusion route.		
• levothyroxine (SYNTHROID) 150 mcg tablet	Take 150 mcg by mouth Daily (before breakfast)		
• ibuprofen (MOTRIN) 600 mg tablet	Take 600 mg by mouth every six (6) hours as needed for Pain. Hold for surgery - last dose to be 3/16//16		
• budesonide (RHINOCORT AQUA) 32 mcg/actuation nasal spray	2 Sprays by Both Nostril route daily. (Patient taking differently: 2 Sprays by B Nostrils route daily as needed.)	1 Bottle	
• amoxicillin (AMOXIL) 500 mg capsule	4 tablets one hour before dental procedure.	12 Cap	2

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NOV 13 2017

A085059⁵

Progress Notes (continued)

Progress Notes by Cassandra E Bray, MD at 10/26/16 1430 (continued)

- frozen shoulder manipulation*
- Hx partial thyroidectomy
 - Hx orthopaedic
- Dr Koch, biceps tendon tenodesis and clavicle resection*
- Left 2010
3/23/16

Family History

Problem	Relation	Age of Onset
No Known Problems	Mother	
Heart Attack	Father	
Hypertension	Father	
High Cholesterol	Father	
Cancer	Father	
prostate		
Heart Disease	Father	
Hypertension	Brother	

Social History

Substance Use Topics	
Smoking status:	Never Smoker
Smokeless tobacco:	Never Used
Alcohol use	No

Review of Systems

Constitutional: Positive for weight gain.

Musculoskeletal: Positive for arthralgias. Negative for back pain.

OBJECTIVE:

Visit Vitals

- BP 137/75
- Pulse 86
- Ht 5' 6" (1.676 m)
- Wt 214 lb 8 oz (97.3 kg)
- SpO2 98%
- BMI 34.62 kg/m2

Physical Exam

Constitutional: She appears well-developed and well-nourished.

Musculoskeletal:

Left hip: She exhibits bony tenderness.

Tender over lateral trochanter

Psychiatric: She has a normal mood and affect. Her behavior is normal.

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NOV 13 2017

A085059

Medical problems and test results were reviewed with the patient today.

Printed on 10/27/2017 2:18 PM

Page 15

Appendix - 000480

15

Name: Green, Shannon
 DOB: 1966-09-06
 Age: 50 years
 Gender: Female
 Chart#: 17399



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BON SECOURS MEDICAL GROUP
 Bon Secours St. Francis Health System

Insurance: Aetna U.S. Healthcare;

Office Visit: 99212 EST Level 2		Diagnosis: E10.618 Diabetic frozen shoulder associated with type 1 diabetes mellitus Z09 Surgery follow-up	
Proc 1:		Laterality:	Med 1:
Proc 2:		Laterality:	Med 2:
FX 1:	Laterality:	FX2:	Laterality:
Casting:		Cast Supply:	
DME:		Laterality:	DME:
XRA	RIGHT:	LEFT:	BILAT:
Y			

Follow up: As needed

BMI:32.3

Date of Service: 2016-11-17

Work Status:

Allergies: Lortab; Vicodin

Medications: BuPROPion HCl ER (SR) (150 MG); Lisinopril; Synthroid; Wellbutrin; Xanax (1 MG, Take 1 tablet by mouth 45 minutes prior to MRI)

CC: 8 months status post left shoulder arthroscopy with distal clavicle resection and open subpectoral biceps tenodesis, postsurgical diabetic frozen shoulder

HPI:

She is doing much better. Her range of motion is really come along with her home exercises. Still fatigues at time and gets a little bit of biceps cramping.

PmHx: Any changes to the patient's PmHx since our last visit were updated on the POA PmHx form.

PE:

Incision is well-healed. Biceps contour is great. She has near full range of motion except for extremes of internal rotation. Strength is slightly decreased compared to the right side but appropriate.

X-ray/MRI:

A/P: Postsurgical diabetic frozen shoulder

Progress activity and follow up as needed

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Name: Green, Shannon
 DOB: 1966-09-06
 Age: 50 years
 Gender: Female
 Chart#: 17399



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orthopaedic
associates



BON SECOURS MEDICAL GROUP
 Bon Secours St. Francis Health System

Insurance: Aetna U.S. Healthcare;

Office Visit: 99213 EST Level 3		Diagnosis: M70.72 Bursitis of left hip M51.36 DDD (degenerative disc disease), lumbar	
Proc 1: 20610 Lg Joint(Knee/Hip/Shld) X 1		Laterality: Left	Med 1: J1030 40mg Depo Medrol X 2
Proc 2:		Laterality:	Med 2:
FX 1:	Laterality:	FX2:	Laterality:
Casting:		Cast Supply:	
DME:	Laterality:	DME:	Laterality:
XRAY	RIGHT:	LEFT:	BILAT:

Follow up: 4 Months

BMI: 34.7

Date of Service: 2017-01-05

Work
Status:

Allergies: Lortab; Vicodin

Medications: BuPROPion HCl ER (SR) (150 MG); Lisinopril; Novolog (100 UNI... UNIT/ML); Synthroid (150 MCG); Wellbutrin; Xanax (1 MG, Take 1 tablet by mouth 45 minutes prior to MRI)

CC: Left lateral hip and thigh pain.

HISTORY: Ms. Green is a 50-YO female who is a nurse practitioner. She is seen today with the complaint of pain and discomfort over her buttock, left lateral hip area, and left thigh. Symptoms have been present for over 6 years and she has seen various people for this in the past. She had x-rays back in 2010 by her PCP suggesting some OA of the left hip. Most of her pain is located in the buttock and left lateral hip area. It is made worse with prolonged standing or walking. She also experiences some pain at night when she lies on her left side. She describes it as a tingling sensation with some numbness over the lateral hip. She denies any significant groin pain other than intermittent. She walks with a slight limp. She does not use a cane. She is somewhat limited in her ADL's.

PMH: The POA Patient Health Form was filled out by the patient, reviewed with the patient and signed. This included a list of current medications, drug allergies, current medical problems, FH, SH, and ROS. Those symptoms and problems related to HPI were discussed with the patient. All others are being managed by PCP.

Important to note, patient is a diabetic with insulin pump.

PE: On exam today, the patient is alert and oriented x 3.

There is no tenderness to palpation over the lower lumbar spine. Weakly positive SLR on the left side, weakly positive stretch, and weakly positive popliteal compression test; negative on the right. There is tenderness to palpation over the left greater trochanter; no tenderness over the right. There are no palpable nodes in the groin. There is good ROM of both hips with only the complaint of left lateral hip pain with ROM of the left hip.

On examination of both knees, skin is intact, mild valgus deformity of both knees. No effusion present and no point tenderness to palpation. ROM is 0 to 130 degrees. No popliteal masses. Calves are soft, nontender. NV exam is normal in BLE's.

X-RAYS: AP pelvis and lateral left hip reveals normal appearing hips without evidence of arthritis.

AP, lateral lumbar spine and spot lateral of L5-S1 reveals no significant scoliosis. There is some mild DDD and facet arthropathy noted in the lower lumbar spine.

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 www.getmovinwithpoa.com

Name: Green, Shannon
DOB: 1966-09-06
Age: 50 years
Gender: Female
Chart#: 17399



X-RAY DIAGNOSES: 1) Degenerative arthritis/DDD lumbar spine.
2) Normal appearing hips.

DIAGNOSES: 1) POSSIBLE NERVE ROOT COMPRESSION IN THE LOWER BACK IN EITHER THE L5 OR S1 DERMATOME.
2) TROCHANTERIC BURSITIS LEFT HIP.

MEDICAL DECISION-MAKING: The patient is having pain and discomfort in the buttock/left lateral hip area. She does have some symptoms consistent with trochanteric bursitis and we will inject her hip today, refer her to PT to begin a back and hip exercise program. Hopefully this will improve some of her symptoms.

The patient does have some symptoms consistent with nerve root compression in the lower back, especially her complaints of tingling and numbness in the leg. I have recommended conservative management at this point in time for her back with the back exercise program.

PROCEDURE NOTE: The left lateral hip area was sterilely prepped. The trochanteric bursa was injected with 2 cc of Depo-Medrol and 5 cc of 1% Xylocaine. The patient tolerated this procedure without difficulty.

A handwritten signature in black ink, appearing to read 'J. E. Jennings'.

Electronically Signed By James E Jennings MD

JEJ/cwr

Green, Shannon Pamela (MR # 791004642)

Encounter Date: 01/25/2017

Green, Shannon Pamela

MRN: 791004642
Description: 60 year old female

Progress Notes Date of Service: 01/25/17 1444

Mary Weir
Physical Therapy

Co-signed by: Kristin M Dennis, DPT at 01/25/17 1718

Shannon Pamela Green DOB: 9/6/1968		Therapy Center at St. Francis Millennium 2 Innovation Drive, Suite 250, Greenville 29607 Phone: (864) 400-3630 Fax: (864) 400-3621		791004642
OUTPATIENT PHYSICAL THERAPY: Initial Assessment 1/25/2017				
ICD-10: Treatment Diagnosis: Low back pain (M54.6), Other bursitis of hip, left hip (M70.72), Pain in left hip (M25.552)		MEDICAL/REFERRING DIAGNOSIS: Other bursitis of hip, left hip [M70.72] Other intervertebral disc degeneration, lumbar region [M51.36]		
Precautions/Allergies: Demerol [meperidine] and Lortab [hydrocodone-acetaminophen]		DATE OF ONSET: 6 years ago REFERRING PHYSICIAN: Jennings, James E Jr.		
Fall Risk Score: 1 MD Orders: Evaluate and treat		RETURN PHYSICIAN APPOINTMENT: 6-11-17		
INITIAL ASSESSMENT: Ms. Green presents to physical therapy with left hip bursitis and low back pain. She demonstrates weakness bilaterally with hip flexion and extension. She also demonstrates weakness on the left with hip abduction. She reports palpable tenderness over the left greater trochanter and over the left gluteus medius region. She had difficulty getting up from squatting and required assistance. Ms. Green would benefit from skilled physical therapy to address the strength deficits in her hip to improve her mobility and maximize her function.				
PROBLEM LIST (Impacting functional limitations):		INTERVENTIONS PLANNED:		
1. Decreased Strength 2. Decreased ADL/Functional Activities 3. Increased Pain 4. Decreased Activity Tolerance		1. Cold 2. Gait Training 3. Heat 4. Manual Therapy 5. Neuromuscular Re-education/Strengthening 6. Range of Motion (ROM) 7. Therapeutic Activities 8. Therapeutic Exercise/Strengthening 9. Transcutaneous Electrical Nerve Stimulation (TENS)		
TREATMENT PLAN: Effective Dates: 1-25-17 TO 4-25-17. Frequency/Duration: 2 times a week for 4 weeks GOALS: (Goals have been discussed and agreed upon with patient.) Short-Term Functional Goals: Time Frame: 2 weeks				
1. Patient will demonstrate an increase in LEFS score by 5 points to show improvement in mobility and function. 2. Patient will demonstrate an increase in bilateral hip flexion strength to a 4/5 so that she is able to put her pants on with minimal difficulty. 3. Patient will demonstrate an increase in strength to 4/5 for hip extension on the left so that she is able to return to standing from a squatting position.				

CERTIFICATE OF COUNSEL

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

RECEIVED
Oct 30 2020
SC Court of Appeals

/s/ Douglas A. Churdar

Douglas A. Churdar, Esq.

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Sep 30 2020

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

Grace Gilchrist Knie, Circuit Court Judge

Trial Court Case No. 2017CP4203523

Appellate Case No. 2020-000203

Shannon P. Green,
and Darrell Russell,

Appellant-Respondent,

v.

Edward C. McGee,
and David Hudgins,

Respondent,
Respondent-Appellant,

**AMENDED AND SUPPLEMENTAL DESIGNATION OF MATTER TO BE
INCLUDED IN THE RECORD ON APPEAL**

In addition to documents designated by Appellant-Respondent Shannon P. Green and Respondent Progress Direct Insurance Company, Respondent-Appellant David Hudgins proposes the following be included in the Record on Appeal:

- 1 Transcript of Record of Trial, October 14-16, 2019
- 2 Defendant Hudgins Exhibit 1, 9-1-1 Call
- 3 Defendant McGee Exhibit 2, Medical Records
- 4 Verdict Form Executed October 16, 2019
- 5 Transcript of Record of Post-Trial Motions Hearing, December 20, 2019
- 6 Order Regarding Plaintiffs' Motion for a New Trial and Defendant David
Hudgins' Motion for Judgment Notwithstanding the Verdict and, in the
alternative, Motion for Setoff, filed January 8, 2020
- 7 David Hudgins' Motion for JNOV filed October 25, 2019
- 8 David Hudgins' Motion for Setoff filed October 25, 2019
- 9 Covenant Not to Execute for Amount of \$100,000.00
- 10 Covenant Not to Execute for Amount of \$2,500.00
- 11 Complaint
- 12 David Hudgins' Answer to Complaint

13 Progressive's Answer to Complaint

I certify that this designation contains no matter which is irrelevant to this appeal.

September 30, 2020

s/James A. Bradshaw
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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Appellate Case No. 2020-000203

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

Grace Gilchrist Knie, Circuit Court Judge

Case No. 2017-CP-42-03523

Shannon P. Green and
Darrell Russell,
v.

Plaintiff(s),

Edward C. McGee and
David Hudgins,

Respondent(s),

Of whom Shannon P. Green is Appellant/Respondent

And

Of whom David Hudgins is the Respondent/Appellant.

FINAL BRIEF OF APPELLANT/RESPONDENT SHANNON GREEN

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Nov 17 2020

SC Court of Appeals

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STATEMENT OF ISSUES ON APPEAL

- 1. DID THE TRIAL COURT ABUSE ITS DISCRETION BY DECLINING TO GRANT ADDITUR WHEN A JURY DECIDED TO AWARD NOTHING TO AN INJURED PLAINTIFF FOR PAIN AND SUFFERING?**
- 2. DID THE TRIAL COURT ERR BY APPLYING AN OFFSET AGAINST PLAINTIFF'S AWARD FOR PRE-TRIAL SETTLEMENT WHEN, IN FACT, THE SETTLEMENT PAYMENT ALSO COVERED CLAIMS BY CO-PLAINTIFF?**
- 3. DID THE TRIAL COURT ERR BY DIVIDING PUNITIVE DAMAGE AWARDS AGAINST TWO DEFENDANTS ON A PRO-RATA BASIS?**

STATEMENT OF CASE

Appellant/Respondent (“Green”) and Plaintiff Darrell Russell filed a Complaint against Defendant Edward C. McGee (“Defendant McGee”) and Respondent/Appellant David Hudgins (“Defendant Hudgins”) for injuries arising from a collision. The case was tried, and a verdict was returned on October 16, 2019. The following Post-Trial Motions were timely filed with the Court on October 25, 2019: Green’s Rule 59 Motion for a New Trial *Nisi Additur* or, in the alternative, New Trial Absolute; and Defendant Hudgins’ Rule 50(b) Motion for Judgment Notwithstanding the Verdict and, in the alternative, Motion for Setoff. The Trial Court filed its Order on January 8, 2020 and denied Green’s Motion for New Trial *Nisi Additur* and Motion for New Trial Absolute. Further, it denied Defendant Hudgins’ Motion for Judgment Notwithstanding the Verdict. Finally, it granted Defendant Hudgins’ Motion for Setoff. Green timely filed her Notice of Appeal on February 5, 2020.

FACTS

This is a car wreck case where Plaintiff (“Green”) was not comparatively negligent, nor was it argued she was. Likewise, this is not a minor impact case resulting in soft tissue injury. This case involves a substantial impact to Green’s driver door by a large truck traveling at a high rate of speed, resulting in a left shoulder injury (a torn bicep tendon requiring surgery), two (2) fractured ribs, and upper back pain. None of these injuries are even arguably pre-existing.

Green was seriously injured on November 19, 2015 because of a road rage incident between the Defendants. R. p. 31, lines 10-16. The incident began on I-85 near the Cherokee County/Spartanburg County line about 15-20 minutes before Green was injured. R. p. 90, lines 4-5; p. 93, lines 18-21; p. 109, lines 20-23. Defendant Edward C. McGee (hereafter “Defendant McGee”), driving a large Chevrolet 2500 pickup truck, ran up behind Defendant David Hudgins (hereafter “Defendant Hudgins”) driving a red Nissan. Defendant McGee was driving 65-70 mph. R. p. 94, lines 1-2. Traffic was heavy. R. p. 92, lines 15-21. Defendant Hudgins slammed on his brakes, and Defendant McGee came within 2 to 3 feet of hitting him. R. p. 94, line 20-p. 96 line 10. According to Defendant McGee, Defendant Hudgins came close to “wearing my grill.” R. p. 96, lines 22-25. This happened at least three (3) more times as they continued southwest on I-85. R. p. 96, lines 7-12; p. 312, lines 5-8. The two Defendants swerved around and in front of each other going 70 mph, and at times they were so close “you could have slipped a piece of paper between [them].” R. p. 98, line 14-p. 102, line 2; p. 103, lines 13-15. Defendant McGee got in front of Defendant Hudgins, and Defendant Hudgins followed him- “drafting” on him- onto Business I-85, then Hearon Circle, and then onto Simuel Road. R. p. 103, lines 19-24, p. 106, line 25-p. 114, line 3. Defendant McGee, attempting to get away from Defendant Hudgins, then traveled 60-90 mph down Simuel Road. R. p. 77, lines 9-14; p. 208, lines 6-11; p. 323, line 9 – p.

324, line 4. Defendant McGee was being “chased” by Defendant Hudgins. R. 80, lines 12-15. Simuel Road has a speed limit of 25 or 35 mph. R. p. 77, lines 12-14. Defendant McGee came to a sharp right curve. R. p. 113, lines 3-6. Meanwhile, Green was driving her small black Kia on that same sharp curve but from the opposite direction. She was traveling 5-10 mph, having just stopped at a stop sign. R. p. 198, lines 10-11; p. 237, lines 23-25. She was in her lane. R. p. 198, lines 12-13. Defendant McGee lost control of his Chevrolet 2500 truck, crossed the center line, and struck Green’s Kia in the driver door. R. p. 76, line 25- p. 76, line 8; p. 199, line 25.

It is significant that Green is a nurse practitioner with an acute nurse practitioner degree from the University of South Carolina. R. p. 235, lines 9-15. She has worked in surgical intensive care and currently works in internal medicine. R. p. 240, lines 2-3.

The following are uncontradicted facts that support Green’s contention the collision was not minor, that her injuries were both serious and proximately caused by the collision, and that her injuries were not pre-existing.

1. Green’s Kia sustained a severe blow from Defendant McGee’s Chevrolet 2500 truck. Her driver’s door “crumpled into the vehicle.” There was 6+ inches of intrusion into the driver compartment. R. p. 453-p. 454; R. p 199, lines 18-25; p. 203, line 6-p. 204, line 10.
2. The cell phone on Green’s left hip was actually bent and would not function after the collision. R. p. 265, line 23-p. 266, line 5.
3. Green was initially unconscious. She remembers nothing about the collision itself but woke up to a blaring horn. R. p. 238, line 12; p. 239, lines 10-18.
4. Green’s face was covered in blood. She had glass in her mouth, eyes, and hair. R. p. 199, lines 21-25; p. 206, line 23-p. 207, line 7; p. 238, lines 12-17.
5. Green could not see. R. p. 239, line 24.

6. Green could not breathe; she was gasping for air. R. p. 206, lines 8-13; p. 238, line 18-p. 240, line 2.
7. Because Green could not breathe, she was afraid she would be intubated. R. p. 240, lines 4-11.
8. Green could not talk. R. p. 206, lines 7-8.
9. Green thought she was going to die. R. p. 240, line 22.
10. Green felt extreme pain in her chest and sternum. R. p. 238. Line 18-21.
11. Green felt pain in her left side. It was later determined she sustained two (2) broken ribs. R.: 243, line 11-13.
12. Green felt pain in her left arm and left shoulder. R. p. 206, lines 11-13; p. 238, lines 14-17.
13. Green could not move her left arm or left shoulder and believed her collar bone was fractured. R. p. 238, lines 14-17.
14. Green had to be extricated from her Kia using the "jaws of life." R. p. 209, lines 15-18.
15. Green was placed on a backboard, transferred to Spartanburg Regional Hospital, and was discharged at 2 a.m. the next morning. R. p. 209, lines 16-18; p. 241, line 2-p. 242, line 4.
16. After returning home, Green could not sleep and could not get herself out of bed. R. p. 242, lines 11-14.
17. For several weeks, Green could not sleep in her bed at all and had to use a recliner chair. R. p. 211, lines 13-15. She could not use the bathroom by herself or even wipe herself. She could not put her clothes or underwear on or remove them. R. p. 211, line 15-p. 212, line 14. She could not do her hair or shave her legs or armpits. She could not accomplish any activities of daily living without help from her husband. R. p. 211, line 12-p. 212, line 14; p. 242, lines 21-25.

18. Green's left arm was bruised from the top of her shoulder to the elbow and swollen 1.5 times the size of her right arm. R. p. 144, lines 14-18.
19. Green had "intense pain" in her upper back- "between the shoulder blades." R. p. 245, lines 10-13; p. 247, lines 5-7. (It is important to note here that she has never claimed injury to her lower back.)
20. For treatment, Green initially went to her family doctor. R. p. 243, lines 14-15. She complained about pain in her left shoulder, chest, and upper back. R. p. 275, lines 12-16. She later went to a walk-in clinic because she was still hurting, and she was diagnosed with two (2) fractured ribs. R. p. 243, line 11-p. 244, line 4.
21. Green missed eight (8) days of work. R. p. 212, lines 2-4; p. 251, lines 1-3.
22. For a solid month, Green could not drive, and her husband transported her everywhere. R. p. 213, lines 4-13.
23. Green could not sleep in her bed for approximately a year. Instead, she slept in a recliner chair. R. p. 215, line 2. Green still sleeps in a recliner chair a couple of nights per week. R. p. 220, lines 19-20.
24. When Green returned to work, she was unable to perform all of her work without help from her fellow employees. R. p. 251, lines 10-15.
25. Green's family doctor referred her to Piedmont Orthopedic Associates, where she began receiving treatment for her left shoulder by a surgeon, Shay Koch, MD., and her upper back by a nurse practitioner, Jaime Elliotte. R. p. 244, line 21- p. 246, line 5.
26. The pain in Green's back was "right between the shoulder blades." R. p. 245, lines 10-15.
27. Dr. Koch eventually diagnosed Green with a torn bicep tendon in her left shoulder, as well as impingement/entrapment of her left shoulder. R. P. 247, lines 5-7.

28. Dr. Koch gave Green two injections for her left shoulder. R. p. 246, lines 8-24. Green is diabetic, so the injections caused her blood sugar to skyrocket. R. p. 246, line 7- p. 249, line 10. Thus, the injections made Green feel sick, nauseated, thirsty and caused her to urinate. R. p. 249, lines 8-10.
29. Dr. Koch referred Green for physical therapy on her left shoulder but eventually scheduled her for surgery in April of 2016. R. p. 249, line 24- p. 250, line 22.
30. Meanwhile, Jaime Elliotte, who treated Green's upper back, offered steroid injections for Green's upper back and a referral to pain management. R. p. 291, line 17- p. 293, line 5.
31. Because of Green's diabetes, she could not undergo the steroid injections. R. p. 248, line 8 – p. 249, line 10; p. 292, lines 5-14.
32. Likewise, because of her work as a nurse practitioner, Green could not take narcotic prescriptions. R. p. 249, lines 13-17.
33. So to treat her pain, Green took two to three Advil per day until she got gastritis. R. p. 260, lines 17-21.
34. Green's gastroenterologist instructed her to stop taking so many NSAIDS. R. p. 260, lines 8-14.
35. Currently she takes one (1) Advil per day and uses Aspercreme. R. p. 260, line 15.
36. Dr. Koch performed surgery on Green's left shoulder in April 2016. R. p. 249, line 24-p. 250, line 21. He cut her biceps tendon away from the shoulder and reattached it to the humerus bone in a different spot near the shoulder. R. p. 249, line 24- p. 250, line 21. He also cut a centimeter out of her collar bone to shorten it and take pressure off her left shoulder. R. p. 249, line 24- p. 250, line 21.

37. After the surgery, Green testified “it was like starting over.” Her arm was in a sling and pinned against her body for six (6) weeks. R. p. 253, line 4- p. 255, line 19. She could not dress herself, go to the bathroom, or do housework. R. p. 255, lines 14-19. She missed two (2) more weeks of work. R. p. 253, lines 4-5.

38. Once again, Green could not drive for several weeks, and her husband had to transport her everywhere. R. p. 254 – p. 255.

39. She underwent more physical therapy- first to address range of motion and then to address strength. R. p. 256, lines 6-10.

40. By July 2016, Green had developed a posttraumatic or post-surgical frozen left shoulder, because her arm was in a sling for six (6) weeks. This is “completely different from a diabetic frozen shoulder.” R. p. 257, line 13- p. 258, line 14.

41. Green underwent a release of the frozen shoulder under anesthesia. She missed more work.

42. When she returned to work, she again could not do her job without help from others.

43. It has been more than four (4) years since the collision. Green plateaued a few years ago. R. p. 221, lines 14-20. She has daily pain in her left shoulder and upper back, which she self-treats with Advil and Aspercreme. R. p. 260, lines 4-22; p. 263, line 13. She does not have full range of motion in her shoulder. She cannot reach over her head with her left arm or behind her- cannot latch her bra in the back. R. p. 259, line 12 – p. 260, line 3. She does not have full strength. R. p. 261, lines 14-18. She has crackling/crepitus in her left shoulder. R. p. 262, lines 14-18. Her lack of strength affects her work each day, as she cannot carry her laptop in her left arm and type with her right hand. She cannot do things she enjoys, like gardening. R. p. 262, line 25- p. 263, line 2. She pays someone to do home maintenance that she used to do and to chop/cut wood

for the wood boiler that heats her house. She has spasms in her left bicep when she attempts to use her arm much. R. p. 262, lines 3-12. She cannot safely carry a pitcher of tea and has dropped one, so she doesn't attempt it. R. p. 262, lines 3-12. Her energy level is lower. Her sleep is affected- she must put a pillow under her left arm and sleep only on her right side. R. p. 260, line 24- p. 261, line 4. At least two (2) nights per week, she ends up sleeping in a recliner. R. pp. 260-261. Green's intimate relationship with her husband has been affected-their sexual activity is less frequent. R. p. 264, lines 5-10. Green's physical therapist taught her exercises and stretches to do at home. In an attempt to maintain her current level of pain and functioning, she does them every morning. R. p. 256, line 14- p. 257, line 9.

44. Green has a life expectancy of thirty (30) years. R. p. 384, lines 22-25.

45. Green's husband has been affected by her injuries. After the collision, he had to take care of her most basic daily needs, including dressing her, shaving her legs and armpits, curling her hair, and helping her use the bathroom. R. p. 212, lines 4-16. When she returned to work, he had to drive her to work- 45 minutes from their home. R. p. 213, lines 1-13. He would then go to work in North Carolina and later in the afternoon drive another 45 minutes to pick her up and return her home. R. p. 213, lines 1-13. This went on "for a solid month." R. p. 213, lines 1-13.

46. Because of Green's limitations and lower energy, the couple doesn't do "a lot of things we used to do as a married couple," and he provided the example of whitewater rafting. R. p. 219, lines 21- p. 220, line 1. He also indicated Green's injuries have affected the couple's level of intimacy, which Green confirmed. R. p. 220, line 25 - p. 221, line 1; p. 264, lines 11-13.

Green's economic damages, including medical bills of \$82,560.04, the cost of getting a new cell phone in the amount of \$83.06, and lost income of \$5,903.68 were accurately outlined on a trial exhibit "Financial Costs" R. p. 456. At the end of the evidence, the jury received standard

charges on noneconomic damages, including pain and suffering. The jury returned a verdict for the exact amount of Green's economic damages outlined on Exhibit 10, namely \$88,546.78. R. p. 7. The jury also returned a verdict of "0" for Plaintiff Russell's loss of consortium claim. R. p. 8.

ARGUMENT

1. THIS IS "THE CASE" WHERE A TRIAL COURT ABUSED ITS DISCRETION BY DECLINING TO GRANT ADDITUR WHEN A JURY DECIDED TO AWARD NOTHING TO AN INJURED PLAINTIFF FOR PAIN AND SUFFERING.

When the Plaintiff filed her Motion for New Trial Nisi Additur, the trial court was "require[d]... to consider the adequacy of the verdict in light of the evidence presented." *Krepps v. Ausen*, 324 SC 597, 479 SE2d 290 (Ct App 1996). Although the trial court has considerable discretion in this regard, "such discretion is not absolute." *Waring v. Johnson* 341 SC 248, 257, 533 SE2d 906 (Ct. App 2000). It is appropriate to grant additur when "it cannot be seriously argued that [an injured plaintiff] was adequately compensated for the injuries she sustained. *Graham v. Whitaker, MD*, 282 SC 393, 402, 321 SE2d 40 (SC 1984). Here, the trial court abused its discretion by declining to grant additur after the jury awarded nothing for Green's pain and suffering and impairment.

It is indisputable that the jury did not award anything to Plaintiff other than her economic damages. To the penny. This court has found that awarding a Plaintiff's medical expenses "to the penny" renders any argument that the jury included anything in its verdict for pain and suffering "patently untenable." *Waring v. Johnson*, 341 SC at 260. It is also indisputable that Plaintiff experienced pain and suffering and impairment as a result of Defendants' actions. Plaintiff will not repeat here the litany of undisputed facts provided previously. However, anyone reading this brief knows it is not humanly possible for a 50-year-old woman who is struck by a vehicle traveling 60-90 mph; who cannot breathe and thinks she's going to die; who sustains a torn biceps tendon

requiring surgery and two (2) fractured ribs, not to experience pain and suffering. It is significant that Green's orthopedic practice gave her injections to deal with the pain and suggested pain management. Because Green could not endure the results of such injections, she ate NSAIDS until she got gastritis.

Pre-existing injuries are not an issue here. There was no evidence or argument made that Green had a torn left biceps tendon or two (2) fractured ribs or intense pain "right between the shoulder blades" before being violently struck on her left side by Defendant McGee's truck. All of the evidence relating to her impairment is completely consistent with the type of injuries she sustained.

In response to Green's Motion for New Trial *Nis Additur*, Defendants cited other cases where this court has upheld the decision of trial courts to deny additur, even those in which verdicts were returned for medicals only, or reversed the decision of trial courts to grant additur. Defendants will undoubtedly cite those cases here. However, those cases are easily distinguished from this case. In those cases, the plaintiffs had one or more serious proof problems, and very importantly those proof problems were actually raised and argued by defendants' lawyers. The proof problems are summarized below:

1. Collisions that are so minor as to make injury reasonably questionable.

Vinson v. Hartley, 324 SC 396, 410, 477 SE2d 715 (Ct App 1996) ("Vinson's own description of the collision showed it was minor and inconsequential... in the nature of a 'bump'.... While questioning Vinson, defense counsel introduced photographs of Vinson's car to demonstrate the small amount of damage."); *Todd v. Joyner*, 385 SC 509, 518, 685 SE2d 613 (Ct App 2008) ("The jury awarded Todd \$37,191.11, her exact medical costs... Joyner cited the relatively low impact of

the collision along with Todd's apparently limited injury immediately following the accident in support of her position.")

2. Proximate cause of the injury or injuries is disputable. *Vinson v. Hartley*, 324 SC at 397 ([“Vinson] did not complain of any injuries at the scene. No evidence was introduced that Vinson went to the emergency room...or even went to the hospital....Defense counsel stated Vinson ‘was not injured as a result of this accident...’”) *Green v. Fritz*, 356 SC 566, 568-569, 590 SE2d 39 (Ct. App. 2003) (“[A]t the hospital, Green did not complain of, and was not treated for, neck, back or muscle pain...Four weeks after the accident, Green sought treatment from Dr. Shay, a chiropractor. Dr. Shay diagnosed Green with cervical subluxation...[D]efense counsel challenged the causal link between the accident and Green’s subluxation diagnosis....Dr. Shay was asked whether Green’s back injury could have been caused by something other than the car accident, and Dr. Shay admitted that was possible.”) *Todd v. Joyner*, 385 SC at 518. (“Joyner argued that all of Todd’s claimed damages were not proximately caused by the accident and that all of the medical treatment was not reasonably necessary.”); *Luchok v. Vena*, 391 SC 262, 264, 705, SE2d 71 (SC App. 2010) (“The only two points made by defense counsel in her opening statement were to argue that Plaintiff did not prove causation...and...whether those treatments were reasonable and necessary....[Luchok] testified she did not need an ambulance, she did not go to the emergency room, and she drove herself home after the accident.”) *Lynch v. Carolina Self Storage*, 409 SC 146, 150, 760 SE2d 111 (Ct App 2014) (“The jury returned a verdict for Lynch and awarded her \$246,068.42- the exact amount of the medical expenses she claimed resulted from her injury...Carolina Self Storage argued Lynch failed to prove proximate cause for the majority of her medical expenses because...she was the sole cause of the medical expenses associated with the surgery.”); *Nestler v. Fields*, 426 SC 34, 36, 824 SC2d 461 (Ct App 2019) (“Nestler did not

introduce...his medical bills into evidence....[Defendant] offered them. Nestler's trial strategy focused on his pain and suffering. The jury awarded him \$7,159.70 [the amount of his medical bills]...Nestler boasted a semi-photographic memory, but could not recall a prior lawsuit he had brought alleging permanent injuries to his neck and back."

3. **Plaintiff has substantial credibility problems.** *Vinson v. Hartley*, 324 SC at 410 ("Vinson stated he missed time from work as a result from the accident. Evidence concerning a lost wages claim was developed during direct examination. However, Vinson acknowledged he was not working at the time of the accident...Vinson's credibility may have been seriously weakened by his first claiming lost wages, then withdrawing that claim when confronted with deposition testimony which indicated he had no lost wages and was not making such a claim....During closing argument, defense counsel argued about the credibility of witnesses and Vinson's referral to the doctors by his attorney."); *Nestler v. Fields*, 426 SC at 41-42, ("The jury had before it evidence that, if believed, that undercut Nestler's credibility....Nestler boasted a semi-photographic memory, but could not recall a prior lawsuit he had brought alleging permanent injuries to his neck and back arising from a different wreck. Nestler did not disclose the lawsuit and discovery, and the trial court instructed the jury they could infer the information withheld would have been unfavorable to Nestler. Fields assailed the veracity of Nestler's permanency rating, bringing to light that the doctor's initial eight percent impairment rating for the entire person shot up to 32% after Nestler (his good friend) asked him to revisit it in an effort to resolve the case....The jury could have found serious credibility gaps...")

Again, these proof problems must be "real" issues, not contrived. And if they are real issues, they will be argued by Defendants' attorneys. None of that happened here. Nowhere in the

record did Defendants' attorneys argue that Green's injuries from this collision were caused by some other event or were caused by Green herself or were pre-existing.

Defendant McGee did use a common and often effective strategy in defense of injury cases, that is to make sure the jury knows a plaintiff is no "spring chicken" and doesn't have perfect health. Defendant McGee brought up other conditions of Green's that are completely unrelated to this case and for which she clearly was not attempting to recover. He referred to the conditions as "pain in other areas just from walking this earth for 50 years, right." He raised three issues. First, he raised the issue of past lower back pain, though Green was clear that this collision "did not cause lower back pain for me...[rather] upper back pain between the shoulder blades." R. p. 282-284. Second, he raised the issue of past hip pain, which Green testified "was not the result of trauma" and "was definitely not related to the accident." R. p. 282, lines 17-23. The "hip pain turned out to be a trochanter bursitis." R. p. 287, lines 10-11. Third, he raised the issue of a past right frozen shoulder that both he and Green acknowledged was "also unrelated to this accident." It was clear that "the right shoulder was frozen from diabetes." R. p. 289, lines 21-25. Green was adamant she was not attempting to recover for "pains that all of us get from walking this earth." R. p. 293, lines 24-25. She testified that she was limiting her request to injuries sustained in the collision. "I'm not asking to be compensated for low back pain and trochanter bursitis...or even the right frozen shoulder...[T]hat's not part of this claim." R. p. 294, lines 12-18. As a result of the fact Green wasn't claiming pre-existing and unrelated conditions in this case, neither Defendant argued she was not credible or that the injuries she did claim were not caused by Defendant McGee's collision with her.

If pain and suffering and impairment are actually elements of a claim that, if proven to be caused by Defendants, must be compensated under South Carolina law, and if a motion for additur

can be considered a viable option, there must be a case where failure to add money to a verdict for pain and suffering is reversible. This is “the case.” This case provides an opportunity for guidance to the bench and bar, such as adoption of the following: In a case where property damage is not minor, and where a plaintiff sustains objective injury, e.g. broken bones or a torn tendon, and where such injuries would naturally cause pain and suffering to a normal human being, and where there is no reasonable argument as to proximate cause, and where there is no realistic argument that a plaintiff was comparatively negligent, then the jury must return a verdict that includes money for pain and suffering. If the jury will not do so, the trial court must grant a motion for additur.

2. THE TRIAL COURT ERRED BY APPLYING AN OFFSET AGAINST PLAINTIFF’S AWARD FOR A PRE-TRIAL SETTLEMENT WHEN, IN FACT, THE SETTLEMENT PAYMENT ALSO COVERED CLAIMS BY CO-PLAINTIFF.

Before trial, Defendant MGee’s liability carrier, Nationwide, paid Green and her husband, Plaintiff Russell, \$100,000.00 in settlement¹. R. pp. 460-462 In exchange for that payment, Nationwide required both Green and Plaintiff Russell to sign a Covenant Not to Execute. Plaintiff Russell gave up the right to execute a judgment against Defendant McGee for “any and all claims...including...loss of services.” R. 460-462. Accordingly, the trial court should have attributed some amount of the \$100,000.00 payment to Plaintiff Russell and subtracted that amount from the offset amount applied to Green’s verdict.

To be sure, Plaintiff Russell had a real and valid claim for loss of consortium as a matter of law². In *Page v. Crisp*, 303 SC 117, 118, 399 SE2d 161 (Ct. app. 1990) a wife was seriously

¹ Plaintiff Russell also received a settlement from Nationwide for a leg injury, and he signed a Covenant Not to Execute in exchange for \$2500.00. R. 457-459. However, Green was not required to sign the Covenant for Russell’s leg injury.

² Plaintiff Russell did not file an appeal, but he should have received a money award in the verdict for his loss of consortium as a matter of law. This supports Green’s contention that the \$100,000.00 settlement payment covered his loss of consortium claim.

injured, and the jury returned a verdict for \$44,000.00. The same jury simultaneously returned a verdict on her husband's loss of consortium claim for "zero dollars." *Id.* The trial court refused to send the jury back to award money damages to the husband or to grant a Motion to Amend the Judgement. *Id.* at 119. This court reversed and remanded. It held that the "seriousness of the wife's injuries [were] reflected in the \$44,000.00 jury award." *Id.* at 188. It noted that the husband had testified about how the wife's injuries had affected the couple's daily lives and relationship, including a sex life that was "just put on a back burner." *Id.* at 118. Because there was no actual credibility issue with husband's testimony, some amount should have been awarded for loss of consortium. *Id.* at 119.

Plaintiff Russell's case for loss of consortium is as strong as, if not stronger than, the husband's claim in *Page*. For starters, his wife's medical bills were much higher than the wife's in *Page*. For many weeks Plaintiff Russell had to dress Green and take care of her most basic needs, from wiping her to shaving her armpits. For months, he had to drive Green around and also to and from work in Greenville before going to work himself in North Carolina. He testified that he and his wife don't do a lot of the fun activities they used to do together. Finally, he testified that the couple's sex life has been affected. R. p. 220, line 25- p. 221, line 2.

Guidance on handling the type of allocation this situation requires is limited. However, in *Green v. Bauerle*, No. 2019-MO-026, 2019 SC Unpub. LEXIS 27. (S.C. Unpub. May 29, 2019), an unpublished opinion cited by Defendant Hudgins in support of his Motion for Setoff, such guidance is found. (Plaintiff's counsel refers to this case only because it has already been cited by Defendant Hudgins and is directly on point.) Procedurally, this allocation requires a hearing to consider all relevant circumstances.

In *Green v. Bauerle*, a husband and wife, Mr. and Mrs. Green, filed suit against three (3) defendants. Mr. Green alleged malpractice, and Mrs. Green alleged loss of consortium. *Id.* Before trial, Mr. and Mrs. Green settled with two (2) of the defendants, but (as in this case) neither of the settlements was allocated between Mr. and Mrs. Green's claims. *Id.* Verdicts were returned in favor of both Mr. and Mrs. Green against the non-settling third defendant, and he moved for setoff of Mr. and Mrs. Green's settlements against the jury verdicts. The trial court "found it 'reasonable, fair, and just to utilize the jury's verdict as to the [Green's] claims' and, as a result, '[applied] the percentage of the total verdict given to each [spouse] by the jury to apportion the settlements between Mr. Green's claim for medical malpractice and Mrs. Green's claim for loss of consortium.'" *Id.*

The Supreme Court "conclude[ed] the trial court's determination of the specific amounts to be setoff from the verdicts was arbitrary, as the determination was based solely upon the ratios both verdicts bore to the whole." *Id.* It held that while such ratios may be "relevant...", they are not necessarily the sole relevant circumstance." *Id.* Accordingly, the Supreme Court vacated the trial court's order on the allocation and remanded the issue to the trial court with instructions to hold a hearing to consider all relevant circumstances. *Id.*

So two things are clear with respect to the amount of the setoff that should have been applied to the verdict in favor of Plaintiff Green: 1.) The setoff should not have been \$100,000.00; and 2.) The fact that the jury returned zero to Plaintiff Russell in a clear case for loss of consortium is not controlling, i.e. not the "sole relevant circumstance" in determining the amount of the setoff against Green's verdict. Reliance on the jury verdict alone in establishing the proper amount of setoff would be deemed arbitrary.

Assume the shoe was on the other foot. Assume Green received her verdict of \$88,546.78 in actual damages, and Plaintiff Russell received a verdict on his loss of consortium claim in the amount of \$20,000.00. In such a case, the parties and the trial court would have to deal with setoff in light of the \$100,000.00 settlement, which was paid in part for Plaintiff Russell's willingness not to execute a judgement against Defendant McGee for "any and all claims...including...loss of services." If the \$100,000.00 were applied only to the verdict in favor of Green, the liability payment would not be exhausted. A balance of \$11,453.22 would exist. Clearly Defendant McGee and Defendant Hudgins would argue that such balance of \$11,453.22 (if not also the \$2,500.00 payment to him alone) must be subtracted from Plaintiff Russell's \$20,000.00 verdict for loss of consortium. It is clear Plaintiff Russell's loss of consortium claim was real and valid and covered by the \$100,000.00 settlement. Before applying the setoff, a determination should have been made by the trial court as to the value of the claim Plaintiff Russell gave up when he signed the covenant for \$100,000.00. That value should have been subtracted from the setoff amount applied to Green's verdict.

3. THE TRIAL COURT ERRED BY DIVIDING PUNITIVE DAMAGES AWARDS AGAINST TWO DEFENDANTS ON A PRO-RATA BASIS.

The jury returned a verdict for \$88,546.78 in actual damages and found that Defendant McGee was 60% at fault and that Defendant Hudgins was 40% at fault. R. p. 6- p. 9. The jury also returned a verdict for \$35,000.00 in punitive damages against Defendant McGee and \$35,000.00 in punitive damages against Defendant Hudgins. R. p. 6- p. 9. Defendant Hudgins filed a Motion for a Setoff, which the trial court granted as to both Defendants in the amount of \$100,000.00 R. p. 1- p. 4. The trial court then found that the remaining amount of the verdict to be paid to Green would be \$58, 546.78 and that said amount must be shared by Defendants on a pro-rata basis based upon the fault assigned to each of them by the jury. R. p. 1- p. 4. Thus, Defendant McGee is

responsible for 60% of the remaining amount owed to Green, and Defendant Hudgins is responsible for 40% of the remaining amount owed to Green. This division was error.

In this case, Defendants acted together to cause indivisible injury to Green, and the South Carolina Contribution Among Tortfeasors Act applied to the actual damages award. That is why the jury was required to apportion percentages of fault, and Defendant Hudgins filed his Motion for Setoff pursuant to Section 15-38-50 SC Code. The setoff is part of the comprehensive scheme outlined in the Act. Section 15-38-10, *et seq* SC Code. At the same time, punitive damages are not subject to joint and several liability. When punitive damages are awarded against more than one defendant, the “punitive damages award must be specific to each defendant and each defendant is liable only for the amount of the award made against that defendant.” Section 15-32-520 (G) SC Code.

Since Defendant McGee and Defendant Hudgins each had punitive damages awarded against them in the amount of \$35,000.00, each is responsible for those judgements, regardless of the percentage of fault assigned to them by the jury for the actual damages. Assuming a setoff of \$100,000.00 against Green’s verdict of \$88,546.78 is appropriate (and it is not), there remains a “credit” of \$11,453.22. That credit cannot be divided based upon Section 15-38-15 SC Code. Defendants are not entitled to an apportionment of the actual damages since they were found by the jury to have engaged in conduct that was willful, wanton, reckless, etc. Likewise, it is not valid for the trial court or Defendants to apply the credit based on such apportionment. That credit must be applied pursuant to Sections 15-38-20 and/or 15-38-40, and it was not. Under those sections, Defendant McGee and/or Defendant Hudgins could have made a motion under 15-38-40 (B) seeking a determination of how the remaining “credit” should be applied. Whether the court

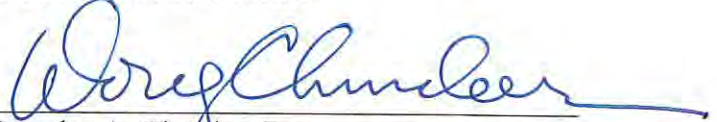
ultimately decided that the credit should be split 60-40 is one issue, but it is clear that only the credit should be divided and not the separate punitive damages awards³

CONCLUSION

Based on the foregoing, the Trial Court's Order should be reversed and remanded with instructions to issue an additur, to determine the amount of the \$100,000.00 settlement payment to be applied as an offset to Green's total verdict, and not to divide the punitive damages awards against each Defendant.

Respectfully submitted this 17th day of **November 2020**.

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³ This is a real issue that affects the amount of the judgment against each Defendant. Under the court's order, Defendant McGee would pay 60% of \$58,546.78, which is \$35,128.07, and Defendant Hudgins would pay 40% of \$58,546.78, which is \$23,418.71. If only the remaining \$11,453.22 of the credit is divided 60/40, Defendant McGee gets a 40% credit (\$4,581.29) against the punitive damages award of \$35,000.00 against him, so he would pay \$30,418.71, and Defendant Hudgins gets a 60% credit (\$6,871.93) against the punitive damages of \$35,000.00 against him, so he would pay \$28,128.07.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Appellate Case No. 2020-000203

APPEAL FROM SPARTANBURG
COUNTY
Court of Common Pleas

Grace Gilchrist Knie, Circuit Court Judge

Case No. 2017-CP-42-03523

Shannon P. Green and
Darrell Russell,

Plaintiff(s),

v.

Edward C. McGee and
David Hudgins,

Respondent(s),

Of whom Shannon P. Green is Appellant/Respondent

And

Of whom David Hudgins is the Respondent/Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that the Final Brief of Appellant/Respondent Shannon Green complies with Rule 211(b), SCACR.

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Nov 17 2020

SC Court of Appeals

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Of whom Shannon P. Green is

Appellant/Respondent And

Of whom David Hudgins is the Respondent/Appellant.

FINAL BRIEF OF APPELLANT/RESPONDENT SHANNON GREEN
TO RESPONDENT/APPELLANT DAVID HUDGINS' CROSS APPEAL

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SC Court of Appeals

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STATEMENT OF ISSUES ON APPEAL

1. **WHETHER THE TRIAL COURT PROPERLY DENIED DEFENDANT HUDGINS' JNOV MOTION AS TO BOTH NEGLIGENCE AND GROSS NEGLIGENCE.**
2. **WHETHER PROOF OF CAUSATION FOR PLAINTIFF GREEN'S INJURIES REQUIRED EXPERT TESTIMONY.**
3. **WHETHER THE TRIAL COURT ERRED IN APPLYING THE SETOFF FOR DEFENDANT MCGEE'S LIABILITY PAYMENT TO THE TOTAL ACTUAL DAMAGES VERDICT**

FACTS

Respondent/Appellant Hudgins (hereinafter Defendant Hudgins) actively participated in a road rage incident that caused serious injury to Appellant/Respondent Shannon P. Green (hereinafter Plaintiff Green). The incident began around rush hour on November 19, 2015 on I-85 near the Cherokee County/Spartanburg County line. R. pp. 90, lines 4-5; 93, lines 18-21. The incident began 15-20 minutes before Plaintiff Green was injured. R. p. 109, lines 20-23.

While driving in heavy traffic, Respondent Edward C. McGee (hereinafter Defendant McGee) ran up behind Defendant Hudgins. Both Defendants were in the left lane, and the traffic was bumper to bumper in the right lane. R. p. 94, lines 1-2. Defendant Hudgins slammed on his brakes and almost caused an accident. R. p. 95, lines 13-17. (“Yeah, he’s slamming on brakes. Not just putting his brake lights on.” R. p. 95 lines 13-16.) Defendant Hudgins slammed on his brakes and almost caused an accident three times. R. p. 96, lines 1-25; R. p. 312, lines 2-8. When I-85 widened from two lanes to three, Defendant McGee passed Defendant Hudgins on the right and then attempted to make a lane change in front of Defendant Hudgins, who was still in the left lane. R. pp. 99, line 19 – R. p. 100, line, 2. Defendant Hudgins attempted to block Defendant McGee. They almost collided again. R. p.101, line 16- p. 102, line 18. Defendant McGee testified you could have “slipped a piece of paper” between the two vehicles. R. p. 102 lines 6-18. Defendant Hudgins testified: “I think it was less than that.” R. p. 313, lines 2-6.

Defendant McGee then got ahead of Defendant Hudgins at this point. Defendant McGee wanted to get away from him. R. p. 103, lines 8-9. Defendant Hudgins knew it was “best to just stay out of it”. R. p. 316, lines 1-2. Nonetheless, Defendant Hudgins followed Defendant McGee – “a couple of car lengths behind me”. R. p. 103, lines 12-17. “I would turn my turn signal on to move over, get around another car...it was like, you know, ... you were NASCAR or something

or another, and, you know, they're drafting on you." R. p. 103, lines 18-24. Defendant McGee was fearful for his life. R. p. 104, lines 6-17.

Defendant McGee exited I-85 at Hearon Circle in Spartanburg, and Defendant Hudgins was right behind him. "Somehow or another he wiggles his way in there, I don't know how." R. p. 112, lines 3-10. Defendant McGee took the Hearon Circle exit at a high rate of speed. According to Defendant Hudgins, "he was doing 90 miles an hour". R. p. 323, lines 9-24. Defendant McGee turned right on Simuel Road, and Defendant Hudgins was still right behind him. According to Defendant McGee, Defendant Hudgins was "two or three car lengths" behind him. R. p. 148, lines 11-20. Defendant Hudgins was distracting Defendant McGee, causing him to take his eyes off the road. R. p. 113, lines 13-23. Defendant McGee, driving his very large Chevy 2500 truck, took a sharp right turn, crossed the center line, and hit Plaintiff Green. R. p. 91, line 17-23; p. 113, lines 2-12. "I look in my mirror to see if he's still back there, and that's when I went over the center line and hit her." R. p. 113, lines 8-10. At the scene, Defendant McGee told the investigating officer he was being chased by Defendant Hudgins. R. p. 80, lines 12-17.

STANDARD OF REVIEW

When reviewing the trial court's ruling on a motion for a directed verdict or a JNOV, this Court must apply the same standard as the trial court, i.e. by viewing the evidence and all reasonable inferences in the light most favorable to the nonmoving party, *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 602 S.E.2d 772 (2004).

The trial court must deny a motion for a directed verdict or JNOV if the evidence yields more than one reasonable inference or its inference is in doubt. *Strange v. S.C. Dep't of Highways & Pub. Transp.*, 314 S.C. 427, 445 S.E.2d 439 (1994). Moreover, "[a] motion for JNOV may be granted only if no reasonable jury could have reached the challenged verdict."

Gastineau v Murphy, 331 S.C. 565, 568, 503 S.E.2d 712, 713 (1998). An appellate court will reverse the trial court's ruling only if no evidence supports the ruling below. Welch v. Epstein, 342 S.C. 279, 536 S.E.2d 408 (Ct. App. 2000). In deciding such motions, neither the trial court nor the appellate court has the authority to decide credibility issues or to resolve conflicts in the testimony or the evidence. *Id.* at 300, 536 S.E.2d at 419.

ARGUMENT

1. THE TRIAL COURT PROPERLY DENIED DEFENDANT HUDGINS' JNOV MOTION AS TO BOTH NEGLIGENCE AND GROSS NEGLIGENCE.

Applying the standard of review outlined above, this Court must simply determine if there was any evidence to support the jury's finding of negligence and gross negligence against Defendant Hudgins. If such evidence exists, then the trial court properly denied Defendant Hudgins' JNOV Motion with respect to both.

There is evidence that Defendant Hudgins acted negligently and was grossly negligent from the moment he encountered Defendant McGee on I-85. The Interstate was crowded; bumper to bumper in the right lane. R. p. 92, lines 7-21; p. 94, lines 1-3. Defendants were driving 65-70 miles per hour. R. p. 94, lines 1-3. When Defendant McGee pulled up behind Defendant Hudgins, Defendant Hudgins chose to slam on his brakes. He could have continued driving at the same speed or increased his speed until he could eventually move into the right lane. He didn't even "tap" his brakes. "He's slamming on brakes. Not just putting his brake lights on." R. p. 95, lines 13-16. He is "almost causing an accident". This happened three separate times in crowded traffic.

There is also evidence that Defendant Hudgins then attempted to cut Defendant McGee off. Defendant McGee passed him on the right and started to move over into the

left lane in front of Defendant Hudgins. Defendant Hudgins “speeds up as I look over, you know, like he’s gonna try to block me from coming over.” R. p. 99, lines 19 – p. 100, line 2. This incident also almost caused a collision. This is the point at which you could have “slipped a piece of paper” between the two Defendants’ vehicles. R. p. 102, lines 6-18; p. 303, lines 2-6. Defendant Hudgins said it was Defendant McGee who tried to cut him off but that “he almost crashed me.” R. p. 313, lines 2-6.

Finally, there is evidence that Defendant Hudgins “chased” Defendant McGee until he struck Plaintiff Green. “NASCAR” says everything you need to know. Defendant McGee testified that Defendant Hudgins was driving like NASCAR.

Q. Did he follow you?

A. He sure did.

Q: How close was he?

A: A couple of car lengths behind me. I mean, you know, you could – it was evident he was back there every time I changed lanes.

Q. What happened when you changed lanes?

A. I would turn my turn signal on to move over, get around another car, turn my turn signal and he was – it was like ... you were NASCAR or something or another, and, you know, they’re drafting on you.

Q. With Mr. Hudgins drafting on you?

A. Yeah, that’s what I’m saying. He was right behind me.

Q. So, you change lanes, and he changes lanes?

A. Exactly.

Q. You change lanes, and he changes lanes?

A. Exactly.

Q. You change lanes, and he changes lanes?

A. Exactly.

Q. Alright, did you become concerned?

A. Real concerned.

R. p. 103, lines 12 – p. 104, line 7. According to Defendant McGee, Defendant Hudgins was right behind him; there were no other vehicles between them. R. p. 112, lines 9-10; p. 112, line 22- p. 113, line 1; p. 113, lines 13-15. Defendant Hudgins was distracting Defendant McGee, which caused him to take his eyes off the road. R. p. 113, lines 13-20. That, along with Defendant McGee's excessive speed, caused him to hit Plaintiff Green.

This evidence of Defendant Hudgins' speeding, following too closely, and almost crashing (repeatedly) would support a finding of negligence and gross negligence. However, there is further evidence of Defendant Hudgins' gross negligence. First, he knew better. He knew from past experience it was "best to just stay out of it... if you can." R. p. 316, lines 1-2. Yet, after reporting Defendant McGee to the Highway Patrol and providing a description of his truck and license tag number, he chose to chase Defendant McGee. Second, based on Defendant McGee's testimony, Defendant Hudgins had fifteen (15) to twenty (20) minutes to back off and let Defendant McGee go. R. p. 109, lines 15-23. (According to Defendant Hudgins, he had 10 minutes. R. p. 316, lines 12-14.) That's a lot of time to make a conscious decision, i.e. "For the safety of all those on the road, maybe I should back off." Instead, he "drafted" behind Defendant McGee and followed him at a high rate of speed. Third, Defendant Hudgins pled guilty to driving too fast for conditions. R. p. 328, line 24 – p. 329, line 10. This guilty plea alone required the issue of punitive damages to be submitted to the jury. "Violation of a statute is some evidence

the defendant acted recklessly, willfully and wantonly.” Austin v. Specialty Transportation Services, Inc., 358 SC 298, 315, 594 SE2d 867 (Ct. App. 2004). And fourth, it was obvious to the jury and to the court that Defendant Hudgins had not learned a lesson as a result of Plaintiff Green’s injury. As a matter of fact, he would do the very same thing again under the same circumstances.

Q. You played no part in this collision whatsoever?

A. No, sir.

Q. You don’t feel like you did anything wrong?

A. No, sir.

Q. And you don’t feel like you would do anything different... under the same circumstances?

A. That’s right.

Q. The very same thing?

A. That’s right.

Q. Yes?

A. Yes, sir.

R. p. 325, lines 12-22. Thus, Defendant Hudgins personifies the need for punitive damages, i.e. deterrence.

In Clark v. S.C. Dept. of Public Safety, 362 SC 377, 608 SE2d 573 (2005), a woman, Clark’s daughter, was killed when her vehicle was struck by a man being pursued by a State Trooper. The trial court submitted the issue of gross negligence on the part of the Department to the jury, and the jury returned a verdict against the Department. The Department filed a motion for JNOV, and the trial court denied the motion. In affirming

both the trial court and this court, the Supreme Court found that the trial court properly submitted the case to the jury to consider whether the Trooper was grossly negligent in initiating and failing to terminate the pursuit. *Id.* at 383. Construing the evidence in a light most favorable to Clark, the pursuit should have been called off once it was obvious the fleeing driver was willing to do whatever it took to get away and after he attempted to run the Trooper off the road, almost colliding with another vehicle. *Id.* at 385.

Clark is analogous to this case with one glaring distinction. The Trooper in *Clark* was a law enforcement officer who was actually charged with enforcing the law and whose job required him to pursue people. In this case, we have Defendant Hudgins who is simply angry, frustrated, and vengeful, so he continued to pursue Defendant McGee even when it was obvious he was not going to stop. And as in *Clark*, the pursuit almost caused other collisions and ultimately did cause the collision with Defendant Green's vehicle. Based upon *Clark*, it is clear that both the issue of negligence and gross negligence were properly submitted to the jury.

2. PROOF OF CAUSATION FOR PLAINTIFF GREEN'S INJURIES DID NOT REQUIRE EXPERT TESTIMONY.

Plaintiff Green's KIA sustained a severe blow from Defendant McGee's Chevrolet 2500 truck. Her driver's door "crumpled into the vehicle". There was 6+ inches of intrusion into the driver compartment, which was on Plaintiff Green's left side. R. pp. 453-454; 199, lines 18-25; 203, line 6-204 line 10. The cell phone on Plaintiff Green's left hip was actually bent and would not function after the collision. R. pp. 265, line 23-266, line 5. The evidence of severe trauma, e.g. unconsciousness, face covered in blood, glass in mouth, eyes and hair, etc. is outlined further in the facts section of the Initial Brief of Appellant/Respondent.

Thus, it should not be a surprise that Plaintiff Green sustained significant injury on the left side of her body. She sustained two broken ribs. R. p. 243, lines 11-13. She immediately felt pain in her left arm and left shoulder and believed her left collar bone was fractured. R. p. 238, lines 14-17. The morning after she was injured, Plaintiff Green's left arm was bruised from the top of her shoulder to the elbow and swollen 1.5 times the size of her right arm. R. p. 244, lines 14-18. When she went to see her family doctor, she complained about pain in her left shoulder, chest, and upper back. R. pp. 243 lines 17-20; 275, lines 12-14. The pain in Plaintiff Green's upper back was "right between the shoulder blades". It turned out that the problem with her left shoulder was a torn bicep tendon. R. p. 247, lines 5-7.

Expert testimony on the cause of Plaintiff Green's injuries was not required here. In Wilder v. Blue Ribbon Taxicab Corp., 396 SC 139, 719 SE2d 703 (Ct. App. 2011), this Court outlined circumstances in which expert testimony is not required to prove the cause of an injury.

"Expert testimony is not required to prove proximate cause if the common knowledge or experience of a layperson is extensive enough." O'Leary-Payne v. R.R. Hilton Head, II, Inc., 271 S.C. 340, 349, 638 SE2d 96, 101 (Ct. App. 2006). "[W]here physical injury is coincident with or immediately follows an accident and is naturally and directly connected with it lay testimony may be sufficient to carry to the triers of the facts the issue of whether or not the accident proximately caused it..." Roscoe v. Grubb, 237 S.C. 590, 596, 118 SE2d 337, 340 (1961); see Armstrong v. Weiland, 267 S.C. 12, 16, 225 SE2d 851, 853 (1976). ("When the testimony of an expert witness is not relied upon to establish proximate cause, it is sufficient for plaintiff to put forth some evidence which rises above mere speculation or conjecture...").

Id. at 147. Plaintiff Green's physical injuries were "coincident with" the accident, and her complaints were consistent throughout her treatment. Clearly, she "put forth some evidence which rises above mere speculation or conjecture..."

Defendant Hudgins raises several completely unrelated prior conditions in an attempt to make Plaintiff Green's injuries appear medically complex so as to require expert testimony. Those injuries include past lower back pain, a past right frozen shoulder caused by diabetes, and hip pain from trochanter bursitis. However, Plaintiff Green was very clear about the fact that these were entirely separate and unrelated conditions and that she was not requesting compensation for them. "I'm not asking to be compensated for low back pain and trochanter bursitis... or even the right frozen shoulder...[T]hat's not part of this claim." R. p. 294, lines 12-18.

It is significant that Plaintiff Green is a nurse practitioner with an acute nurse practitioner degree from the University of South Carolina. R. p. 235, lines 9-15. She has worked in surgical intensive care and currently works in an internal medicine practice. R. p. 240, lines 2-3. Though she did not offer expert testimony, when it came to explaining her injuries, she was very plain and clear. The jury did not need more.

3. THE TRIAL COURT DID NOT ERR IN APPLYING THE SETOFF FOR DEFENDANT MCGEE'S LIABILITY PAYMENT TO THE TOTAL ACTUAL DAMAGES VERDICT.

Regardless of the amount¹, the setoff from Defendant McGee's liability payment was properly applied to Plaintiff Green's total actual damages verdict and not to 40% of the actual damages verdict, which is the application proposed by Defendant Hudgins. This is the proper application for at least two reasons.

First, although the jury found Defendant Hudgins 40% at fault for the collision that caused Plaintiff Green's injuries, it also found that his actions were willful, wanton, reckless, etc. *See verdict form*. Thus, S.C. Code §15-38-15 does not apply to the actual damages verdict; it is a pure

¹ The setoff should not have been \$100,000.00, because a portion of the \$100,000.00 liability payment was made to Plaintiff Green's husband, Co-Plaintiff Darrell Russell, to satisfy his claim for loss of consortium.

joint and several verdict. Defendant Hudgins is liable for 100% of the actual damages. S.C. Code § 15-38-15 (f).²

Second, applying the setoff to 40% of the actual damages verdict would not be just or equitable. Nor would it be consistent with the purpose for setoff. Specifically, the calculation proposed by Defendant Hudgins would result in Plaintiff Green receiving less than the full verdict.

The Supreme Court discussed and analyzed setoff in *Riley v. Ford Motor Co.*, 414 S.C. 185, 777 SE2d 824 (2015). It stated that “[t]he right to setoff has existed at common law in South Carolina for over 100 years.” *Id.* at 195. It noted that the concept of setoff is “equitable in its nature” and that it grew out of “the inherent equitable jurisdiction which the Court exercises over suitors in it”, *Id. citing Rookard v. Atlanta and Charlotte Air Line Ry Co.*, 891 S.C. 371, 71 SE 992, 995 (1911). The Court found that “these equitable principals were codified as part of the South Carolina Contribution Among Tortfeasors Act”, which includes § 15-38-50. *Id.* (Emphasis provided).

The Court recognized, as Defendant Hudgins points out, that setoff is intended to prevent double recovery. *Id.* at 196. “Allowing setoff ‘prevents an injured person from obtaining a double recovery for the damage he sustained, for it is almost universally held that there can be only one satisfaction for an injury or wrong’”. *Id., citing Rutland v. S.C. Dept. of Transp.*, 400 S.C. 209, 216, 734 SE2d 142, 145 (2012). In other words, preventing double recovery is the legislative intent and purpose behind § 15-38-50. It was clearly not the legislature’s intent, and the Supreme

² Applying the same reasoning and as noted in Argument 3 of the Initial Brief of Appellant/Respondent, when the setoff for Defendant McGee’s \$100,000.00 liability payment is applied to the actual damages verdict of \$88,546.78, there remains an unused portion of the setoff or a credit in the amount of \$11,453.22. Even that amount cannot be applied based upon the jury’s apportionment of fault. The remaining credit must be applied pursuant to § 15-38-20 and/or 15-38-40, and it was not.

Court's language makes this clear, to apply a setoff so as to prevent an injured person from receiving a full single recovery. Yet, that is the interpretation Defendant Hudgins proposes.

Take 40% of the actual damages verdict (\$88,546.78), which is \$35,418.71. Add to it the \$35,000.00 punitive damages award against Defendant Hudgins, and you have \$70,418.71. Defendant Hudgins contends that \$78,418.71 is all he owes Plaintiff Green and that a \$100,000.00 setoff applies to that amount. According to Defendant Hudgins' argument, Plaintiff Green has already received from Defendant McGee more than she is entitled to from him.³ Assuming she is also entitled to the \$35,000.00 punitive damages award from Defendant McGee and is able to collect it, she would receive \$105,418.71 out of the jury's total verdict of \$158,546.78. So while Plaintiff Green would not receive a double recovery, she would also not receive a full single recovery.

The Supreme Court has made clear that the legislative intent of § 15-38-50 was to prevent double recovery and that the equitable principals of setoff, i.e. "to do justice between parties", was codified in § 15-38-50. Riley, 414 SC at 195. Defendant Hudgins' interpretation of § 15-38-50 does not effectuate the legislative intent behind it, which is this Court's primary concern. Ellis v. Oliver, 335 SC 106, 109, 515 SE2d 268 (Ct. App. 1999). Defendant Hudgins' interpretation of § 15-38-50 would not be just or equitable. He even concedes this. ("While application of this setoff provision under § 15-38-50 may seem to lead to an inequitable result for Appellant Green...") Rather, it leads to an absurd result. "This Court must reject an interpretation of a statute leading to an absurd result that was not possibly intended by the legislature." Allstate Ins. Co. v. Estate of

³ Defendant Hudgins writes on pg. 28 of his Brief: "Because the \$100,000.00 is more than the \$78,418.71 attributable to Mr. Hudgins application of the setoff under § 15-38-50 to Mr. Hudgins results in Appellant Green being precluded from any recovery from Mr. Hudgins".

Hancock, 345 S.C. 81, 87, 545 SE2d 845 (Ct. App. 2001), citing *Hamm v. South Carolina Pub. Serv. Comm'n*, 287 S.C. 180, 181, 336 SE2d 470, 471 (1985).

CONCLUSION

Based on the foregoing, the Trial Court's Order should be affirmed as to its denial of Defendant Hudgins' Motion for JNOV and the application of the setoff (albeit in the wrong amount)⁴ from Defendant McGee's liability payment to the total actual damages verdict.

Respectfully submitted this 17th day of November 2020.

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⁴ The issue of the amount of setoff has been raised in the Initial Brief of the Appellant/Respondent Shannon Green.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Appellate Case No. 2020-000203

APPEAL FROM SPARTANBURG
COUNTY
Court of Common Pleas

Grace Gilchrist Knie, Circuit Court Judge

Case No. 2017-CP-42-03523

Shannon P. Green and
Darrell Russell,

Plaintiff(s),

v.

Edward C. McGee and
David Hudgins,

Respondent(s),

Of whom Shannon P. Green is Appellant/Respondent

And

Of whom David Hudgins is the Respondent/Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that the Final Brief of Appellant/Respondent Shannon Green to Respondent/Appellant David Hudgins' Cross Appeal complies with Rule 211(b), SCACR.

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Nov 17 2020

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED

Nov 18 2020

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas
The Honorable Grace Gilchrist Knie, Circuit Court Judge

SC Court of Appeals

Civil Action No. 2017-CP-42-03523
Appellate Case No.: 2020-000203

Shannon P. Green
and Darrell Russell

Appellant-Respondent,

v.

Edward C. McGee
and David Hudgins

Respondent,
Respondent-Appellant

**FINAL BRIEF OF RESPONDENT PROGRESSIVE DIRECT INSURANCE
COMPANY, AS UIM CARRIER**

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I. STATEMENT OF THE ISSUES ON APPEAL AND CROSS-APPEAL

- 1) DID THE TRIAL COURT CORRECTLY DENY THE MOTION FOR A NEW TRIAL *NISI ADDITUR*?
- 2) DID THE TRIAL COURT CORRECTLY DECLINE TO APPLY THE SETOFF TO MR. RUSSELL?
- 3) DID THE TRIAL COURT CORRECTLY DENY MR. HUDGINS' MOTION FOR A JUDGMENT NOTWITHSTANDING THE VERDICT?
- 4) DID THE TRIAL COURT CORRECTLY APPLY THE SETOFF TO THE FINAL JUDGMENT?

II.

STATEMENT OF THE CASE

This matter arises out of a motor vehicle accident that occurred on or about November 19, 2015 in Spartanburg, South Carolina. Appellant, Shannon Green, was traveling on Simuel Road when Respondent, Edward McGee, collided with her vehicle. [R. pp. 0010-0012]. Just prior to the collision, Respondent-Appellant, David Hudgins, had been driving too fast for conditions behind Mr. McGee, which ultimately resulted in Mr. McGee and Ms. Green colliding. [R. p. 0329, Lines 20-25]. On September 27, 2017, Ms. Green, along with Darrell Russell, her husband, filed the subject lawsuit for alleged injuries sustained in the accident. [R. pp. 0010-0012].

Prior to the filing of the lawsuit, Ms. Green settled with Mr. McGee and his liability insurer, Nationwide Insurance Company (“Nationwide”), for \$100,000.00 and executed a Covenant Not to Execute. [R. pp. 0460-0462]. Ms. Green’s husband, Darrell Russell, also executed a separate Covenant Not to Enforce Judgment against Mr. McGee for a settlement of two thousand five hundred dollars (\$2,500.00). [R. pp. 0457-0459]. Importantly, this separate covenant with Mr. Russell was for “any and all claims, demands, damages, costs, or expenses, including, but not limited to, any medical or hospital expenses, loss of services, actions and cause of action, arising from any act, omission, or occurrence, resulting or to result from the above-referenced accident.” Id. Mr. Hudgins filed his Answer to the Complaint on December 12, 2017, and denied the allegations of negligence. [R. pp. 0013-0018]. In effort to pursue underinsured motorist benefits (“UIM”) under her own insurance policy, Ms. Green served Progressive Direct Insurance Company (“Progressive”), who timely answered on May 30, 2018. [R. pp. 0019-0025].

This matter was tried before a jury in Spartanburg County on October 14-16, 2019, with the Honorable Grace Gilchrist Knie presiding. Following the conclusion of the testimony, argument, and charge, the jury found Mr. Hudgins and Mr. McGee were negligent, and the proximate cause of the injuries sustained by the Plaintiffs in the subject motor vehicle accident.

[R.pp. 0006-0009]. The jury found that Mr. McGee was sixty percent (60%) at fault and Mr. Hudgins was forty percent (40%) at fault. Id. The jury returned a verdict for Ms. Green in the amount of \$88,546.78 in actual damages. The jury further awarded \$35,000.00 in punitive damages against Mr. McGee and \$35,000.00 in punitive damages against Mr. Hudgins. Id. The jury further found that Mr. Russell was not entitled to any damages for his loss of consortium claim. Id.

Ms. Green and Mr. Hudgins, through their respective counsel, timely filed post-trial motions. On October 25, 2019, Ms. Green filed a Motion for New Trial *Nisi Additur* or in the alternative, a Motion for a New Trial Absolute. [R. p. 0026]. That same day, Mr. Hudgins filed a Motion for Judgment Notwithstanding the Verdict (“JNOV”) pursuant to Rule 50(b), SCRPC, and sought to have the verdict against him set aside in its entirety and judgement entered in his favor, or to at least have the punitive damages award set aside. [R. pp. 0027-0038]. Additionally, Mr. Hudgins filed a Motion to Setoff, pursuant to S.C. Code Ann. § 15-38-50, seeking to have the court apply and give Mr. Hudgins credit for the \$100,000.00 paid on behalf of Mr. McGee prior to trial as part of the Covenant Not to Execute. [R. pp. 0039-0045].

All post-trial motions were heard before Judge Knie on December 20, 2019. On January 8, 2020, Judge Knie issued an Order and denied Ms. Green’s Motion for New Trial *Nisi Additur* and Motion for New Trial Absolute. [R. pp. 0001-0005]. Judge Knie also denied Mr. Hudgins’ Motion for JNOV, but granted his Motion for Setoff. Id. Counsel for Ms. Green filed her Notice of Appeal on February 5, 2020. On February 10, 2020, counsel for Mr. Hudgins timely submitted a Notice of Appeal for a Cross Appeal.

III. STANDARD OF REVIEW

The granting of a motion for new trial *nisi additur* rests within the sound discretion of the trial court, but substantial deference must be afforded to the jury's determination of damages. Green v. Fritz, 356 S.C. 566, 570, 590 S.E.2d 39, 41 (Ct. App. 2003). Compelling reasons must be given to justify invading the jury's province in this manner. Chapman v. Upstate RV & Marine, 364 S.C. 82, 89, 610 S.E.2d 852, 856 (Ct. App. 2005)(citing Pelican Bldg. Ctrs. V. Dutton, 311 S.C. 56, 61, 427 S.E.2d 673, 676 (1993)). Howard v. Roberson, 376 S.C. 143, 154-55, 654 S.E.2d 877, 883 (Ct. App. 2007). The denial of a motion for new trial *nisi additur* is within the trial court's discretion and will not be reversed on appeal absent an abuse of discretion. O'Neal v. Bowles, 314 S.C. 525, 527, 431 S.E.2d 555, 556 (1993).

When reviewing the trial judge's decision on directed verdict motions or judgment notwithstanding the verdict, an appellate court must apply the same standard as applies to the lower court by viewing the evidence and all inferences that reasonably can be drawn therefrom in the light most favorable to the nonmoving party. Weir v. Citicorp Nat'l Servs., Inc., 312 S.C. 511, 435, S.E.2d 864 (1993); Welch v. Epstein, 342 S.C. 279, 299, 536 S.E.2d 408, 418 (Ct. App. 2000). The appellant court may only reverse the denial of a motion for directed verdict or JNOV if no evidence supports the trial court's ruling. Swinton Creek Nursery v. Edisto Farm Credit, 334 S.C. 469, 514 S.E.2d 126 (1999). When considering directed verdict and JNOV motions, neither the trial court nor the appellate court has authority to decide credibility issues or to resolve conflicts in the testimony or evidence. Welch v. Epstein, 342 S.C. 279, 300, 536 S.E.2d 408, 419 (Ct. App. 2000); Erickson v. Jones Street Publishers, LLC, 368 S.C. 444, 463, 629 S.E.2d 653, 663 (2006). A motion for JNOV may be granted only if no reasonable jury could have reached the challenged verdict. Crossley v. State Farm Mut. Auto. Ins. Co., 307 S.C. 354, 415 S.E.2d 393 (1992). The

jury's verdict will not be overturned if any evidence exists that sustains the factual findings implicit in its decision. Smalls v. South Carolina Dep't of Educ., 339 S.C. 208, 528 S.E.2d 682 (Ct. App. 2000); Hunter v. Staples, 335 S.C. 93, 515 S.E.2d 261 (Ct. App. 1999).

A respondent may argue any additional reasons why an appellant court should affirm the appealed ruling, "regardless of whether those reasons have been presented to or ruled on by the lower court." I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 419, 526 S.E.2d 716, 723 (2000). A reviewing court may, in its discretion, review the additional reasons presented by the respondent and "if convinced it is proper and fair to do so, rely on them or any other reason appearing in the record to affirm the lower court's judgment." Id. at 420, 526 S.E.2d at 723. See also Rule 220(c) SCACR.

IV. ARGUMENT

A. The Trial Court Did Not Err In Denying Appellant's Motion for New Trial *Nisi Additur*, Because the Evidence and Testimony Presented at Trial Reasonably Supported the Jury's Determination.

"The consideration of a motion for a new trial *nisi additur* requires the court to consider the adequacy of the verdict in light of the evidence presented." Waring v. Johnson, 341 S.C. 248, 257, 533 S.E.2d 906, 911 (Ct. App. 2000). If an award is merely inadequate or unduly liberal, the trial judge alone has the discretion to grant a new trial *nisi additur*. Easler v. Hejaz Temple, 285 S.C. 348, 356, 329 S.E.2d 753, 758 (1985). Compelling reasons, however, must be given to justify invading the jury's province in this manner. Pelican Bldg. Centers v. Dutton, 311 S.C. 56, 427 S.E.2d 673, 676 (1993). The mere listing of the plaintiff's claimed damages compared to the jury verdict "does not constitute compelling reasons for invading the jury's province." Green, 356 S.C. at 570, 590 S.E.2d at 41. Furthermore, "[a] jury verdict should be upheld when it is possible to do

so and carry into effect the jury's clear intention. Johnson v. Parker, 279 S.C. 132, 135, 303 S.E.2d 95, 97 (1983).

A trial court does not abuse its discretion in denying a motion for a new trial *nisi additur* where evidence in the record supports the jury's verdict. See Steel v. Dillard, 327 S.C. 340, 345, 486 S.E.2d 278, 281 (Ct. App. 1997) (finding no abuse of discretion where the evidence in the record supports the amount of the jury award even though other evidence in the record indicated the jury could have awarded a larger verdict). Todd v. Joyner, 385 S.C. 509, 517-18, 685 S.E.2d 613, 618 (Ct. App. 2008), *aff'd*, 385 S.C. 421, 685 S.E.2d 595 (2009).

Throughout the trial of this case, substantial evidence was presented that challenged Ms. Green's medical damages and supported the jury's verdict. Contrary to counsel for Ms. Green's contention that "pre-existing conditions are not an issue here," Ms. Green testified that she had a superfluity of pre-existing medical issues upon which the jury could have found that some or all of her claimed damages were unrelated to the accident. [See App. Green's Initial Brief, p.9]. Ms. Green testified that she has for years been a severe Type I diabetic and has had complications from her diabetes. [R. p. 0289, Line 24]. She admittedly has suffered from prior back pain and hip pain. [R. p. 0287, Lines 5-17]. Ms. Green further testified she also had pre-existing joint pain prior to the accident. [R. p. 0290, Line 10]. Ms. Green testified herself regarding her own medical history and the alleged injuries sustained in the accident. No doctor or other qualified medical expert testified at trial regarding medical causation or attempted to rule out these other possible causes. There was no medical expert testimony opining to a reasonable degree of medical certainty that her injuries were most probably related to the accident. Therefore, it was reasonable for the jury to have found that Ms. Green's alleged injuries, were unrelated to the accident and were instead caused by these other pre-existing conditions.

Additionally, Ms. Green's alleged pain and suffering was heavily contested throughout trial. Ms. Green, but no medical doctors or experts, provided testimony regarding the medical treatment and timeline of medical treatment she sought after the accident. Ms. Green testified she did not even have an x-ray of her shoulder performed at the hospital following the accident, and she also testified it was not until three days after the accident that she sought any medical treatment at all for her left shoulder. [R. p. 0273, Line 22 – p. 0274, Line 15]. The jury heard Ms. Green further testify that she stopped seeking any medical treatment for any back pain two months after the accident. [R. p. 0276, Lines 20-24]. Ms. Green testified that she was able to return to work full-time only eight days after the accident, and was also able to return full-time to work two-weeks after her left shoulder surgery. [R. p. 0280, Line 3]. Finally, Ms. Green admitted before the jury that, despite alleged continued complaints of left shoulder pain, she has not presented for treatment with any physician for the past three years. [R. p. 0285, Lines 16-22].

After considering all the evidence at trial and listening to the Court's thorough instructions, the jury returned a verdict of \$88,546.78 in actual damages for Ms. Green. [R. pp. 0006-0009]. Counsel for Ms. Green now asks this Court to invade the province of the jury based on the fact she is unsatisfied by the amount the jury awarded. In this trial, Ms. Green presented no testimony regarding her subjective pain levels and injuries besides that of her own and that of her husband. The only conclusion that can be drawn from the jury's verdict is that the jury did not find the testimony offered by the plaintiff regarding her pain and suffering to be credible.

As the case law cited above requires, Ms. Green fails to present and prove any errors of law and fails to put forth any evidence that the trial court abused its discretion when it properly denied Ms. Green's Motion for New Trial *Nisi Additur*. Therefore, this Court should affirm the January 8, 2020 Order, which denied Ms. Green's Motion for New Trial *Nisi Additur*.

B. The Trial Court Did Not Abuse Its Discretion When Applying the Offset to Ms. Green Only Because The Jury Awarded Mr. Russell Nothing In Actual Damages.

As a preliminary matter, counsel for Ms. Green incorrectly states in her initial brief that Mr. McGee's liability carrier, Nationwide, paid Ms. Green and her husband, Mr. Russell, \$100,000.00 in "UIM benefits." [See App. Green's Initial Brief, p.14]. However, and instead, Mr. McGee's liability carrier paid \$100,000.00 in liability limits, not UIM benefits. [R. pp. 0457-0462]. Counsel for Ms. Green argues that because both Mr. Russell and Ms. Green signed the Covenant Not to Execute in consideration of \$100,000.00 for "UIM Benefits" that setoff would apply to both Ms. Green and her damages and Mr. Russell for his loss of consortium claim. [See App. Green's Initial Brief, p. 14]. However, the jury after hearing and seeing all the evidence presented at trial, deliberated, and chose not award any money to Mr. Russell for his loss of consortium claim. [R. pp. 0006-0009]. Mr. Russell has not appealed that judgment. [See App. Green's Initial Brief, p.14, footnote 2]. Counsel for Mr. Russell argues that the trial court was charged with determining the value of Mr. Russell's claim. Such a contention flies in the face of the twelve jurors who patiently sat through a three-day trial and determined that the value of Mr. Russell's claim amounted to zero dollars.

Counsel for Ms. Green has failed to show any error of law and has failed to put forth any evidence that the trial court abused its discretion when it did not award Mr. Russell money from the setoff. Therefore, the post-trial Order should be affirmed.

C. The Trial Court Did Not Err When It Denied Mr. Hudgins' Motion For a Judgment Notwithstanding The Verdict and Declined to Set Aside the Punitive Damages Award Against Mr. Hudgins Because There Was Evidence That A Reasonable Jury Could Find That Mr. Hudgins Willful Actions Contributed To The Accident.

When ruling on a Motion for JNOV, a trial court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing

the motions. Pye v. Estate of Fox, 369 S.C. 555, 563 S.E.2d 505, 509 (2006). If the evidence as a whole is susceptible of more than one reasonable inference, a jury issue is created and a JNOV motion should be denied. Parrish v. Allison, 376 S.C. 308, 319, 656 S.E.2d 382, 388 (Ct. App. 2007). On JNOV motions, the trial court does not have “the authority to decide credibility issues or to resolve conflicts in the testimony or evidence.” Thomas v. Dootson, 377 S.C. 293, 297, 659 S.E.2d 253, 255 (Ct. App. 2008) (“[I]t is the jury that must decide what part of the witness's testimony it wants to believe and what part it wants to disbelieve.”). When considering a Motion for JNOV, a trial judge is concerned with the existence of evidence and not its weight. State v. Wakefield, 323 S.C. 189, 197, 473 S.E.2d 831, 835 (Ct. App. 1996). Therefore, a jury's verdict should not be overturned if any evidence exists that sustains the factual findings implicit in its decision. Id.

This case involves several parties, two plaintiffs and two defendants. Throughout trial, the jury had the opportunity to hear from each party as to what they believed happened to cause the subject accident. There is a factual dispute amongst Mr. McGee and Mr. Hudgins regarding the nature of their actions leading up to the accident. However, substantial evidence was presented such that a reasonable jury could find Mr. Hudgins contributed to the accident. There was also substantial evidence that Mr. Hudgins actions were reckless, willful, and wanton. Mr. Hudgins admitted that he had pled guilty to driving too fast for conditions. [R. p. 0329, Lines 20-25]. An officer who had arrived at the scene testified that Mr. McGee reported he had been chased by Mr. Hudgins. [R. p. 0080, Lines 12-13]. Mr. McGee was unwavering in his testimony that he was fearful of Mr. Hudgins because Mr. Hudgins had tried “wreck” him on the interstate. [R. p. 0149, Lines 10-12]. He further testified that he wanted to get away from Mr. Hudgins, but Mr. Hudgins continued to follow him. [R. p. 0103, Lines 8-13]. In attempt to limit his own potential liability,

Mr. Hudgins had a different “story” regarding the accident and he had the opportunity to present his “story” to the jury. Counsel for Mr. Hudgins contends that Mr. Hudgins’ “story” was so persuasive that the trial court erred when denying his JNOV Motion. However, as the case law cited above firmly requires, in ruling on a JNOV motion, the trial court does not have “the authority to decide credibility issues or to resolve conflicts in the testimony or evidence.” It is clear that there was more than enough evidence that existed to create factual disputes regarding liability amongst the parties, which was an issue for the jury to resolve. As the law cited above provides, the standard is that all inferences are to be drawn in support of the jury’s determination. Therefore, the Order denying Mr. Hudgins’ JNOV Motion should be affirmed.

D. Mr. Hudgins Is Not Exempt From Paying His Allocation of the Judgement Rendered by the Jury Because He Is an Additional Tortfeasor and Such Exemption would be in Violation of the Collateral Source Rule, S.C. Code 15-38-15(A), and Basic UIM Principles in South Carolina Law

Mr. Hudgins’ argues that he and his liability carrier are *solely* entitled to claim a setoff for the \$100,000.00 previously paid by Mr. McGee’s liability insurer.¹ As such, Mr. Hudgins contends that Progressive, as UIM carrier, is not entitled to the setoff. According to Mr. Hudgins, Progressive owes the remainder of the judgement, and Mr. Hudgins, who is a tortfeasor, is relieved from paying anything to Ms. Green, the injured party. This contention flies in the face of the jury verdict finding Mr. Hudgins 40% liable for Ms. Green’s damages and contravenes the UIM statute and established law interpreting the same. Further, claiming that a plaintiff’s UIM carrier, and not the tortfeasor, must pay a judgment against said tortfeasor violates the collateral source rule.

¹ \$100,000.00 is the bodily injury liability limits. The property damage liability limits remains unpaid. Arguably, pursuant to *Geico v. Poole*, Progressive would be entitled to any additional setoff from the unpaid property damage liability limits.

The statutory purpose of underinsured motorist coverage is “to provide coverage in the event that damages are sustained in excess of the liability limits carried by an at-fault insured or underinsured motorist....” S.C. Code §38–77–160. “The very definition of UIM insurance mandates set-off.” Broom v. Watts, 319 S.C. 337, 341, 461 S.E.2d 46, 48 (1995). It is axiomatic in South Carolina, that a UIM carrier is entitled to a setoff of the liability limits of the at-fault motorists. This Court, in Cobb v. Benjamin held, “a UIM carrier is entitled to a credit for any amount of liability insurance coverage not exhausted in a settlement with its insured.” Cobb v. Benjamin, 325 S.C. 573, 482 S.E.2d 589 (Ct. App. 1997). Therefore, Progressive is entitled to a setoff of the liability limits of the at-fault motorists in this case prior to providing UIM benefits.

In this case, Mr. McGee’s liability insurer, tendered its full \$100,000.00 of liability coverage limits prior to the suit being filed. [R. pp. 0460-0462]. However, Mr. Hudgins’ carrier has not made any payment on behalf of Mr. Hudgins. Once the suit was filed, Ms. Green pursued UIM benefits with her insurer, Progressive.

At the conclusion of the trial, the jury awarded \$88,546.78 in actual damages to Ms. Green, as well as \$35,000.00 in punitive damages against each defendant. [R. pp. 0006-0009]. The total of all damages awarded is \$158,546.71. The jury found that Mr. McGee was sixty percent at fault for the accident, and therefore, his allocation of the actual damages award is \$53,128.07. Mr. McGee’s allocation of the actual damages plus the \$35,000.00 in punitive damages totals \$88,128.07. As previously stated, Mr. McGee’s liability carrier, Nationwide, tendered its \$100,000.00 liability limit prior to the lawsuit. As such, Mr. McGee has fully paid, and actually has overpaid, his portion of the final judgement the jury rendered at trial.

The jury found that Mr. Hudgins, as an additional tortfeasor, was forty percent at fault for Ms. Green’s actual damages. Forty percent of \$88,546.78 (actual damages award) is approximately

\$35,418.71. That amount in plus the punitive damages awarded against Mr. Hudgins, totals approximately \$70,418.71. It is important to note for this Court that Mr. Hudgins has \$1,000,000.00 in liability coverage. Neither Mr. Hudgins nor his liability carrier has paid anything towards the judgement. Mr. Hudgins appears to argue that the \$100,000.00 setoff should be applied only to his share of the liability (though the funds were paid by Mr. McGee's liability carrier on behalf of Mr. McGee) and not to the total damages of \$158,546.71 awarded to Ms. Green by the jury. He then argues that Progressive, as UIM carrier, must pay the balance of the judgment awarded by the jury to Ms. Green. However, pursuant to the basic principles of UIM coverage in South Carolina, Mr. Hudgins and his liability carrier are responsible for the remaining sums owed towards judgement, not Progressive.

“South Carolina has long followed the collateral source rule that compensation received by an injured party from a source *wholly independent of the wrongdoer* should not be deducted from the amount of the damages owed by the wrongdoer to the injured party.” Rattenni v. Grainger, 298 S.C. 276, 277 379 S.E.2d 890 (1989)(emphasis added). This rule has been liberally applied in South Carolina to preclude the reduction of damages. Citizens & S. Nat'l Bank v. Gregory, 320 S.C. 90, 92, 463 S.E.2d 317, 318 (1995). “The only requirement for qualification as a collateral source is that the source be wholly independent of the wrong doer” Id. The collateral source rule acts to prevent a benefit directed to the injured party from resulting in a windfall for the tortfeasor. Dixon v. Besco Eng'g, Inc., 320 S.C. 174, 182, 463 S.E.2d 636, 640 (Ct. App. 1995). A tortfeasor cannot take advantage of a contract between an injured party and a third person, no matter whether the source of the funds received is “an insurance company, an employer, a family member, or other source.” Johnston v. Aiken Auto Parts, 311 S.C. 285,287, 428 S.E.2d 737, 738 (Ct. App. 1993); see Dixon, 320 S.C. at 181, 463 S.E.2d at 640. “It is the tortfeasor's responsibility to compensate

the injured party for all the harm that he causes, not the net loss the injured party receives.” Dixon, 320 S.C. at 182, 463 S.E.2d at 640. Therefore, requiring Progressive as UIM carrier for Ms. Green to pay for Mr. Hudgins’ liability violates the collateral source rule and allows Mr. Hudgins to escape his responsibility for the injury the jury has determined that he caused to Ms. Green.

Additionally, S.C. Code §15-38-15(A) is applicable in the present case as it involves two tortfeasors, one of which was found to be less than fifty percent at fault by the jury. Section §15-38-15(A) of the South Carolina Code states that a “defendant whose conduct is determined to be less than fifty percent of the total fault shall only be liable for that percentage of the indivisible damages determined by the jury or trier of fact.” Therefore, Mr. Hudgins, as the 40% at-fault tortfeasor, is liable for his portion of the damages. He is not entitled to escape this liability simply because a joint tortfeasor, Mr. McGee has paid his share.²

V. CONCLUSION

The trial court did not abuse its discretion when denying Ms. Green’s Motion for a New Trial *Nisi Additur*. The trial court did not abuse its discretion when denying Mr. Hudgins’ JNOV motion. The trial court also correctly applied the offset amount against Ms. Green’s award only. Finally, Mr. Hudgins, as an additional tortfeasor, is not relieved from paying his allocation of the judgement.

[signature on following page]

² To the extent Mr. McGee has overpaid for his share of the liability, Mr. Hudgins may benefit from the overpayment.

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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Nov 18 2020

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas
The Honorable Grace Gilchrist Knie, Circuit Court Judge

SC Court of Appeals

Civil Action No. 2017-CP-42-03523
Appellate Case No.: 2020-000203

Shannon P. Green
and Darrell Russell

Appellant-Respondent,

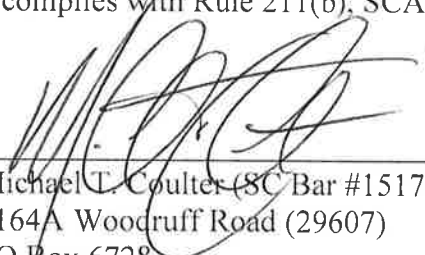
v.

Edward C. McGee
and David Hudgins

Respondent,
Respondent-Appellant

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.



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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

Grace Gilchrist Knie, Circuit Court Judge

Trial Court Case No. 2017CP4203523

Appellate Case No. 2020-000203

Shannon P. Green,
and Darrell Russell,

Appellant-Respondent,

v.

Edward C. McGee,
and David Hudgins,

Respondent,
Respondent-Appellant,

FINAL BRIEF OF RESPONDENT-APPELLANT DAVID HUDGINS

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SC Court of Appeals

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STATEMENT OF ISSUES ON APPEAL

1. DID THE TRIAL COURT ABUSE ITS DISCRETION BY DECLINING TO GRANT A NEW TRIAL *NISI ADDITUR* AND FINDING THAT THERE WERE NO COMPELLING REASONS TO INVADE THE PROVINCE OF THE JURY?
2. DID THE TRIAL COURT PROPERLY UTILIZE THE FULL AMOUNT OF THE \$100,000 RECEIVED BY APPELLANT FOR A PRE-SUIT COVENANT NOT TO EXECUTE IN APPLYING THE SETOFF MANDATED BY S.C. CODE ANN. 15-38-50 AND DECLINING TO RE-ALLOCATE ANY PORTION OF THAT SETTLEMENT TO DARRELL RUSSELL'S LOSS OF CONSORTIUM CLAIM ON WHICH HE WAS AWARDED NOTHING BY THE JURY?
3. DID THE TRIAL COURT ERR IN CALCULATING THE SETOFF OF \$100,000 DAVID HUDGINS' IS ENTITLED TO UNDER S.C. CODE ANN. § 15-38-50 BY ADDING THE ACTUAL DAMAGE AWARD OF \$88,546.78 TO THE \$35,000 PUNITIVE DAMAGE AWARD AWARDED INDIVIDUALLY BY THE JURY AGAINST MR. HUDGINS AND THE \$35,000 PUNITIVE DAMAGE AWARD AWARDED INDIVIDUALLY BY THE JURY AGAINST EDWARD MCGEE FOR A TOTAL OF \$158,546.78, SUBTRACTING \$100,000 FROM THAT AMOUNT, AND HOLDING THAT MR. HUDGINS IS RESPONSIBLE FOR 40% OF THE REMAINDER, WHILE MR. MCGEE IS RESPONSIBLE FOR 60% OF THE REMAINDER, RATHER THAN ADDING THE \$35,000 INDIVIDUAL PUNITIVE DAMAGE AWARD AGAINST MR. HUDGINS TO 40% OF THE ACTUAL DAMAGES AWARD AND SUBTRACTING THE \$100,000 FROM THAT AMOUNT?

STATEMENT OF THE CASE

Appellant Shannon P. Green (hereinafter “Appellant Green”), along with her husband, Darrell Russell, filed this action on September 27, 2017 alleging a cause of action for negligence against Edward C. McGee and David Hudgins for an automobile accident that occurred on November 19, 2015 on Simuel Road in Spartanburg, South Carolina in which Mr. McGee’s Chevrolet 2500 pickup truck crossed the center line and collided with Appellant Green’s vehicle. *See Compl.* R. p. 10-12. While Appellant Green sought recovery for personal injury, Mr. Russell only sought damages for an alleged loss of consortium. *Id.*

Mr. Hudgins filed his Answer to the Complaint on December 12, 2017, denying his allegations of negligence and asserting multiple affirmative defenses. *See Hudgins’ Answer.* R. pp. 13-18. Prior to suit being filed, Appellant Green settled with Edward C. McGee and his liability insurer for One Hundred Thousand Dollars (\$100,000.00) and executed a “Covenant Not to Execute.” *See Green Covenant Not to Execute.* R. pp. 460-462. Appellant Green’s husband, Darrell Russell, also settled with Edward McGee and his liability insurer for Two Thousand Five Hundred Dollars (\$2,500.00) and executed a “Covenant Not to Execute,” which included a release for all claims Mr. Russell had against Mr. McGee, including claims for “loss of services.” *See Russell Covenant Not to Execute.* R. pp. 457-459. Hoping to pursue underinsured motorist benefits under her own insurance policy with Progressive Direct Insurance Company (hereinafter “Progressive”), Appellant Green served Progressive with the Complaint, and Progressive answered on May 30, 2018. *See Progressive Answer.* R. pp. 19-25.

The case went to trial before a Spartanburg County jury on October 14, 2019, with the Honorable Grace Gilchrist Knie presiding. At the close of Plaintiffs’ case and the close of Defendants’ case, both Mr. Hudgins and counsel for Progressive moved for directed verdict,

which was denied. On October 16, 2019, the jury returned a verdict in favor of Appellant Green. *See Verdict Form*. R. pp. 6-9. The jury determined that both Mr. Hudgins and Edward C. McGee were negligent and proximately caused the November 19, 2015 accident and found that Mr. Hudgins was forty percent (40%) at fault, while Mr. McGee was sixty percent (60%) at fault. The jury further found that Appellant Green was entitled to actual damages in the amount of \$88,546.78, while Darrell Russell was not entitled to any damages for Loss of Consortium. Finally, the jury also awarded \$35,000 in punitive damages against Mr. Hudgins and \$35,000 in punitive damages against Mr. McGee. *Id.*

Both Appellant Green and Mr. Hudgins filed timely post-trial motions. On October 25, 2019, Mr. Hudgins submitted a Motion for Judgment Notwithstanding the Verdict (“JNOV”) pursuant to Rule 50(b), S.C.R.C.P., seeking to have the verdict against him set aside in its entirety and judgment entered in his favor, or to at least have the punitive damages award set aside. *See Mtn. for JNOV*. R. pp. 27-38. Mr. Hudgins also filed a Motion for Setoff, pursuant to S.C. Code Ann. § 15-38-50, seeking to have the Court properly apply and give Mr. Hudgins credit for the \$100,000 Appellant Green received from Mr. McGee prior to trial as part of the Covenant Not to Execute. *See Mtn. for Setoff*. R. pp. 39-45. Appellant Green also filed a Motion for New Trial *Nisi Additur* or, in the alternative, a Motion for a New Trial Absolute. R. p. 26.

A hearing was held before Judge Knie on December 20, 2019 on all post-trial motions with representative of all parties in attendance. On January 8, 2020, Judge Knie issued an Order ruling on all post-trial motions. *See Order on Post-Trial Mtns.* R. pp. 1-5. The trial court denied all post-trial motions except for the Motion for Setoff. With respect to that motion, the Court held and entered judgment as follows:

Defendant David Hudgins’ Motion for a Setoff of the verdict against him pursuant to S.C. Code Ann. § 15-38-50 of the proceeds received by Plaintiff Shannon P.

Green should be and is therefore granted as to both Defendants in the amount of One Hundred Thousand Dollars and no/100 (\$100,000.00); and

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

Id. On February 5, 2020, Appellant Green submitted a Notice of Appeal. *See Notice of Appeal.* On February 10, 2020, Mr. Hudgins timely submitted a Notice of Appeal for a Cross Appeal. *See Notice of Cross Appeal.*

STATEMENT OF FACTS

This case arises from an accident that occurred on November 19, 2015 on Simuel Road in Spartanburg, South Carolina, in which the only two vehicles involved were the vehicle driven by Appellant Green, and the Chevrolet 2500 truck that was driven by Edward C. McGee. David Hudgins's vehicle did not impact either of the other vehicles, and he was not involved in the impact whatsoever.

Prior to the accident on November 19, 2015, Mr. Hudgins was working and was driving a Nissan Altima on Interstate 85 from a plant in Blacksburg to his next job at a plant in Spartanburg near Heron Circle. R. pp. 298:11-299:7. Traffic was very heavy on the interstate at that time and was "stop and go." R. p. 300:10-19. While Mr. Hudgins was in the left lane on Interstate 85 North, Edward McGee approached him from behind in a Chevrolet 2500 truck. The evidence showed that Mr. McGee was running late for work at the BMW plant in Greer at that time, as he had to be at work at 7:00 and the events of the accident occurred at 7:00. Trial R. p. 136:10-19. Mr. McGee admitted that as he approached Mr. Hudgins on the interstate, he was speeding and flashed his lights at Mr. Hudgins to tell him he was driving too slow and "let's go."

R. pp. 139:20-140:16. Mr. Hudgins had to apply his brakes, as vehicles in front of him were slowing down or stopping. R. pp. 300:23-301:4.

As Mr. Hudgins applied his brakes on these occasions, Mr. McGee admitted that he was traveling so close behind him that he almost hit him. R. p. 96:11-19. Mr. McGee then moved to the middle lane and then “flipped” back to the left lane to get in front of Mr. Hudgins and got so close to him that you may could have gotten “a piece of paper” between them. R. p. 101:12-22. Mr. Hudgins had to slam on brakes and swerve off of the roadway to avoid having an accident. R. p. 314:2-9. He was in shock and called 911 to report Mr. McGee’s aggressive and reckless driving. R. pp. 302:23-303:8.

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

Mr. Hudgins testified that as Mr. McGee went down Simuel Road, he was six car lengths or more behind him. R. p. 307:9-14. Even Mr. McGee admitted that Mr. Hudgins was at least “two or three carlengths” behind him on Simuel Road. R. p. 148:11-20. Mr. Hudgins never tried to run Mr. McGee off the roadway or pointed a gun at him or did anything else to distract Mr.

McGee's attention from the roadway. R. pp. 148:24-25; 149:8-19; 334:2-5. Mr. McGee testified that he was not really concerned with Mr. Hudgins smaller vehicle coming into contact with his and admitted that at the time of the accident, he was looking ahead at cars going through the intersection and not at Mr. Hudgins' vehicle. R. pp. 149:18-150:7; 152:23-153:1.

As he drove on Simuel Road, Mr. McGee's truck crossed the center line and struck the vehicle driven by Appellant Green. Mr. Hudgins' Nissan Altima never struck Appellant Green's vehicle and never struck Mr. McGee's truck. R. p. 230:9-11. Mr. McGee admitted that he was in "total control" of his truck at the time of the accident. R. p. 151:25-152:2. He also testified that he was in "total control" of his truck as he admittedly sped down Simuel Road and admitted:

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

A. Exactly.

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

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

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

Appellant Green alleges that she injured her left shoulder and back in the accident and developed a frozen left shoulder. However, Appellant Green has been a severe Type I diabetic for over 40 years, and is insulin dependent. R. p. 248:10-19. She also has pre-existing joint pain. R. p. 290:10. She previously had a frozen shoulder in her right shoulder that she admitted was related to her diabetes and required surgery. R. p. 258:15-19. She further admitted that she had pain in her right shoulder even after the surgery. R. p. 289:12-19. She also admittedly has pre-existing back pain. R. p. 287:10-17. Ms. Green admitted that she had chronic hip pain since

2010 unrelated to the accident. R. pp. 281:15-282:2. No medical physician or other medical expert testified at trial regarding Appellant Green's alleged injuries.

Moreover, following the accident Appellant Green was released from the hospital around 2:00 a.m. and did not stay for any significant length of time. R. p. 273:8-14. The CT scans of Appellant Green's head, cervical spine, pelvis, and chest were all normal. R. pp. 273:15-274:5. No imaging was done of Plaintiff's left shoulder until three days after the accident at an Express Care, and the X-ray showed no fracture. R. p. 274:6-13. Moreover, X-rays of Appellant Green's thoracic spine taken on November 30, 2015 were all normal. R. p. 276:1-4. Appellant Green also went back to work full time as a nurse practitioner within eight (8) days of the accident and within two weeks of her surgery without any assistance and has always worked full time other than these two brief periods. R. pp. 228:25-229:6; 236:18-22; 271:11-16; 278:17-280:6. The last time she made complaints of any type of chest pain to a physician was on November 30, 2015. R. p. 275:19-25. Appellant Green last complained of any type of back pain to a physician on December 29, 2015. R. p. 276:20-24. She has also not sought treatment for her left shoulder since November 2016. R. p. 285:13-19.

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

STANDARD OF REVIEW

“‘The grant or denial of new trial motions rests within the discretion of the trial [court,] and [its] decision will not be disturbed on appeal unless [its] findings are wholly unsupported by the evidence or the conclusions reached are controlled by error of law.’” *Hassell v. City of Columbia*, No. 2017-001750, 2020 WL 3551781, at *8 (Ct. App. July 1, 2020) (quoting *Proctor v. Dep’t of Health & Invtl. Control*, 368 S.C. 279, 319-20, 628 S.E.2d 496, 518 (Ct. App. 2006)).

“‘Great deference is given to the trial [court, which] ‘heard the evidence and is more familiar with the evidentiary atmosphere at trial,’ and . . . thus ‘possesses a better-informed view of the damages than this [c]ourt.’” *Id.* “The jury’s determination of damages . . . is entitled to substantial deference.” *Vinson v. Hartley*, 324 S.C. 389, 404, 477 S.E.2d 715, 723 (Ct. App. 1996). If a court chooses to grant a new trial *nisi additur*, “the trial judge must state compelling reasons for invading the province of the jury.” *Green v. Fritz*, 356 S.C. 566, 570, 590 S.E.2d 39, 41 (Ct. App. 2003); see *Bailey v. Peacock*, 318 S.C. 13, 14, 455 S.E.2d 690, 691 (1995) (“Compelling reasons . . . must be given to justify invading the jury’s province in this manner.”).

“A trial court does not abuse its discretion in denying a motion for new trial *nisi additur* where there is evidence in the record to support the jury’s verdict.” *Ligon v. Norris*, 371 S.C. 625, 635, 640 S.E.2d 467, 473 (Ct. App. 2006). In fact, even when other evidence in the record indicates that the jury could have awarded a larger verdict, there is no abuse of discretion in denying a motion or new trial *nisi additur* where the evidence in the record supports the amount of the jury award. *Steele v. Dillard*, 327 S.C. 340, 345, 486 S.E.2d 278, 281 (Ct. App. 1997).

ARGUMENTS

1. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION AND PROPERLY DECLINED TO GRANT A NEW TRIAL *NISI ADDITUR*, AS THERE WERE NO COMPELLING REASONS TO INVADE THE PROVINCE OF THE JURY.

Contrary to Appellant Green’s assertion, this is not “the case,” where the trial court’s failure to grant a motion for new trial *nisi additur* and add money to a jury’s duly considered verdict is reversible. “‘The grant or denial of new trial motions rests within the discretion of the trial [court,] and [its] decision will not be disturbed on appeal unless [its] findings are wholly unsupported by the evidence or the conclusions reached are controlled by error of law.’” *Hassell v. City of Columbia*, No. 2017-001750, 2020 WL 3551781, at *8 (Ct. App. July 1, 2020) (quoting *Proctor v. Dep’t of Health & Invtl. Control*, 368 S.C. 279, 319-20, 628 S.E.2d 496, 518 (Ct. App. 2006)). “‘Great deference is given to the trial [court, which] ‘heard the evidence and is more familiar with the evidentiary atmosphere at trial,’ and . . . thus ‘possesses a better-informed view of the damages than this [c]ourt.’” *Id.* “The jury’s determination of damages . . . is entitled to substantial deference.” *Vinson v. Hartley*, 324 S.C. 389, 404, 477 S.E.2d 715, 723 (Ct. App. 1996). If a court chooses to grant a new trial *nisi additur*, “the trial judge must state compelling reasons for invading the province of the jury.” *Green v. Fritz*, 356 S.C. 566, 570, 590 S.E.2d 39, 41 (Ct. App. 2003); see *Bailey v. Peacock*, 318 S.C. 13, 14, 455 S.E.2d 690, 691 (1995) (“Compelling reasons . . . must be given to justify invading the jury’s province in this manner.”). “A trial court does not abuse its discretion in denying a motion for new trial *nisi additur* where there is evidence in the record to support the jury’s verdict.” *Ligon v. Norris*, 371 S.C. 625, 635, 640 S.E.2d 467, 473 (Ct. App. 2006). In fact, even when other evidence in the record indicates that the jury could have awarded a larger verdict, there is no abuse of discretion in denying a motion or new trial *nisi additur* where the evidence in the record supports the amount of the jury award. *Steele v. Dillard*, 327 S.C. 340, 345, 486 S.E.2d 278, 281 (Ct. App. 1997).

This Court recently held that a trial court did not abuse its discretion in denying a plaintiff’s motion for a new trial *nisi additur*, even though the jury awarded the plaintiff the exact

amount of his claimed medical bills and nothing else. In *Nestler v. Fields*, 426 S.C. 34, 824 S.E.2d 461 (Ct. App. 2019), the plaintiff and defendant were involved in a car accident, and the defendant “admitted he was at fault in causing the wreck and [the plaintiff’s] injuries, so the trial concerned only the amount of [the plaintiff’s] damages.” 426 S.C. at 37, 824 S.E.2d at 463. The plaintiff claimed injuries of a cervical strain, left elbow contusion, tennis elbow, and a permanent impairment rating of 53% for his left upper extremity, which translated to a 32% impairment rating for the whole person. 426 S.C. at 37, 824 S.E.2d at 463. The plaintiff’s counsel focused at trial on the extent of the plaintiff’s pain and suffering and the permanency of his injuries and presented evidence regarding these issues. 426 S.C. at 40, 824 S.E.2d at 465. The medical bills submitted into evidence for the plaintiff’s alleged injuries totaled \$7,117.50, and the jury awarded \$7,117.50 in actual damages. As in this case, the plaintiff moved for both a new trial *nisi* and a new trial *nisi additur* and argued that he was entitled to such relief because, “despite the extensive evidence as to his permanent impairment, pain and suffering, and other non-economic damages, the jury awarded him the amount of his medical bills.” 426 S.C. at 39-40, 824 S.E.2d at 464. This Court found that the trial court did not abuse its discretion in denying these motions. As to the denial of the motion for new trial *nisi*, the Court noted that “[t]he jury had before it evidence that, if believed, undercut [the plaintiff’s] credibility,” i.e., that the plaintiff had not disclosed a previous car accident in which he had brought a lawsuit and claimed permanent injuries to his neck and back, and that the plaintiff’s impairment rating increased after the plaintiff asked his friend, the doctor, to revise it to help resolve the case. 426 S.C. at 40, 824 S.E.2d at 465. With respect to the denial of the motion for a new trial *nisi additur*, the court stated that “the trial court here found no compelling reason to impose its will on the parties and invade the jury’s domain. We must accord the trial court’s decision ‘great deference,’ and

respect its superior position to gauge credibility and the field of evidence.” 426 S.C. at 41, 824 S.E.2d at 465.

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

The jury awarded Todd \$ 37,191.11, her exact medical costs. In the jury instructions, the circuit court provided the jury with a thorough explanation of how it could determine a monetary value for the damages to which it believed Todd was entitled. This included a full explanation of actual damages, including: “past and future medical charges related to the injury, pharmacy charges, related expenses, pain and suffering, loss of enjoyment of life, as well as mental anguish and impairment of health or physical condition.” We find evidence in the record to support the jury’s verdict. Joyner argued that all of Todd’s claimed damages were not proximately caused by the accident and that all of the medical treatment was not reasonably necessary. Joyner cited the relatively low impact of the collision along with Todd’s apparently limited injury immediately following the accident in support of her position. Because there was evidence in the record to support the jury’s verdict, we find no error in the circuit court’s denial of Todd’s motion for new trial *nisi additur*.

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

Moreover, in *Lynch v. Carolina Self Storage Ctrs.*, 409 S.C. 146, 760 S.E.2d 111 (Ct. App. 2014), the jury returned a verdict for the exact amount of medical expenses the plaintiff claimed--\$246,068.42. However, at trial the defendant argued that the plaintiff “failed to prove proximate cause as to the vast majority of her medical expenses because, by ignoring her physician’s medical advice to stay off her foot and keep her cast dry, she was the sole cause of the medical expenses associated with the surgery to repair her ruptured Achilles tendon and the treatment for the resulting infection.” 409 S.C. at 150, 760 S.E.2d at 113. As such, this Court held, “The trial court properly denied Lynch’s motion for new trial *nisi additur* because there

was evidence that the medical expenses Lynch incurred to treat her injury and her resulting noneconomic losses were not proximately caused by Carolina Self Storage's negligence." 409 S.C. at 163, 760 S.E.2d at 120-21.

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

The case of *Waring v. Johnson*, 341 S.C. 248, 533 S.E.2d 906 (Ct. App. 2000), on which Plaintiffs' entire argument rests, is clearly distinguishable from this case. In *Waring*, the undisputed medical evidence presented at trial was that the plaintiff's alleged pain and suffering

was caused by the accident. The court noted, “[e]ach doctor who testified expressed his opinion that Waring’s various pains were associated, at least in part, with the accident. Even if the greatest portion of Waring’s pain was caused by her pre-existing conditions, there is no question that the accident aggravated or accelerated those conditions.” 341 S.C. at 260, 533 S.E.2d at 912-13. Thus, unlike this case, in *Waring*, each of the plaintiff’s treating physicians testified at trial and related her injuries to the accident, and there was no evidence presented by the defendant to the contrary. Moreover, the evidence of the amount of pain and suffering endured by the plaintiff in *Waring* was also not in dispute nor was it in dispute that the pain and suffering was at least an aggravation of preexisting conditions. The undisputed evidence from trial was that the plaintiff had sought medical treatment for over five years following the accident, and the court noted:

Waring visited numerous doctors for years after the accident, seeking relief from varying degrees of pain and discomfort. She underwent surgery for a condition which numerous doctors testified was aggravated by the wreck. Waring took advantage of every recommendation of her physicians and, unfortunately, will most likely suffer pain for the remainder of her life. In addition to the pain she has and will continue to suffer, Waring found herself unable to continue her previous active lifestyle.

341 S.C. at 260, 533 S.E.2d at 912. As such, the Court found that the trial court did not err in granting a new trial *nisi additur* for the jury’s failure to consider the undisputed pain and suffering associated with the plaintiff’s injuries from the accident.

Here, there is substantial evidence in the record to support the jury’s verdict, and the trial court did not abuse its discretion in declining to grant Appellant Green’s motion for a new trial *nisi additur*. Contrary to Appellant Green’s assertion, her pre-existing injuries were very much an issue at trial as well as the medical causation of all of her claimed injuries and pain. See *Appellant’s Brf.*, at 9. At trial, Ms. Green admitted that she had a host of pre-existing medical

issues that caused her significant pain upon which the jury could have based a determination that some or all of Appellant Green's claimed medical expenses and noneconomic damages were unrelated to the accident. Appellant Green testified that she has been an Insulin-dependent Type I diabetic for years and has had previous complications. R. p. 248:7-25. She has even had a previous frozen right shoulder that was admittedly caused by her diabetes and not related to any trauma. R. 258:15-19. She admitted that she continued to have pain in her right shoulder even after the accident. R. pp. 289:15-290:22. She further testified that she had been positive for arthralgias or joint pain. R. pp. 283:22-284:8. She testified:

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

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

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

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

A. Yes.

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

Conversely, as to Appellant Green's medical treatment following the accident, the evidence at trial showed that Appellant Green was released from the hospital around 2:00 a.m.

the night of the accident and did not stay for any significant length of time. R. p. 273:8-14. The CT scans of Appellant Green's head, cervical spine, pelvis, and chest were all normal. 273:15-274:5. No imaging was done of Plaintiff's left shoulder until three days after the accident at an Express Care, and the X-ray showed no fracture. R. p. 274:6-13. Moreover, X-rays of Appellant Green's thoracic spine taken on November 30, 2015 were all normal. R. p. 276:1-4.

Unlike in *Waring*, there was absolutely no expert medical testimony presented in this case. None of Ms. Green's treating physicians testified or offered opinions that her alleged injuries to her left shoulder and back were proximately caused or exacerbated by the November 19, 2015 accident, and there was no medical testimony ruling out the other above conditions possibly being the cause of Appellant Green's pain. See *Herndon v. Morgan Mills, Inc.*, 246 S.C. 201, 217, 143 S.E.2d 376, 384 (1965), ("Reliance on lay testimony is not justified when the medical question is a complicated one and likely to carry the fact-finding body into realms which are more properly within the province of medical experts.").

Moreover, all of the above issues were "actually raised and argued by defendants' lawyers." See *Appellant's Brf.*, at 10. Without any objection from Appellant Green's counsel and based on the testimony above, the trial court gave the following instruction to the jury: "I further will inform you that the Plaintiff, Shannon Green, is not entitled to recover for preexisting conditions, injuries, or ailments unrelated to the Defendant's negligence." R. p. 383:13-16. In fact, while counsel for Progressive's closing argument is not transcribed, Appellant Green's counsel acknowledged in his closing that Progressive had argued that Appellant Green had other issues unrelated to the accident and stated: "First of all, basically, from the defense lawyer for Mr. McGee, what you sort of heard was a she's not a spring chicken anymore defense. She had other problems, and, you know what, we all have other problems."

R. p.365:2-5. Furthermore, even if testimony from Plaintiff was not expressly contradicted, “[j]uries do not have to accept even uncontradicted testimony, much less testimony that contradicts itself.” *Nestler*, 426 S.C. at 41, 824 S.E.2d at 465. Thus, as there was no undisputed medical testimony in this case stating otherwise and based on the jury instructions from the trial court, the jury could have found that some of Appellant Green’s alleged injuries, such as her frozen left shoulder that occurred after the accident, were unrelated to the accident and were instead caused solely by these other pre-existing conditions, such as her diabetes or previous joint pain. The jury could have also found that some of Appellant Green’s claimed noneconomic damages for pain and suffering and her claimed inability to perform daily tasks were related solely to these other issues she had previously experienced. As the evidence in the record could support either finding and the jury’s verdict, the trial court did not abuse its discretion, and this Court should continue to provide deference to the jury’s verdict.

In addition to causation of Appellant Green’s injuries and alleged pain being at issue, the amount of Appellant Green’s alleged pain and suffering and other non-economic damages was also highly contested at trial. Although Appellant Green claimed significant continuing pain and suffering from the accident, again, the evidence showed that she was discharged from the hospital the night of the accident. R. p. 273:8-14. She also took no pain medications other than over-the-counter drugs like Advil and Tylenol. R. p. 249:11-21. Appellant Green also went back to work full time as a nurse practitioner within eight (8) days of the accident and within two weeks of her surgery without any assistance and has always worked full time other than these two brief periods. R. pp. 228:25-229:6; 236:18-22; 271:11-16; 278:17-280:6. The last time she made complaints of any type of chest pain to a physician was on November 30, 2015—roughly two weeks after the accident. R. p. 275:19-25. Appellant Green last complained of any type of

back pain to a physician on December 29, 2015. R. p. 276:20-24. She has also not sought treatment for her left shoulder since November 2016. R. p. 285:13-19. Appellant Green's husband, Darrell Russell, further testified that while the couple lives in Landrum, he works and lives part-time in Chicago, Illinois and will be there for a "couple weeks" at a time and travels quite frequently. R. pp. 193:22-194:14; 226:2-6. He estimated that he is away from Landrum approximately 60% of the time. R. p. 226:7-12. While Mr. Russell is away, Appellant Green is at home and able to do everything she needs to do on her own and work full-time as a nurse practitioner. R. pp. 226:13-227:1. While the *Waring* plaintiff's physicians stated that she would suffer pain for the rest of her life, there was no medical testimony to that effect at this trial.

Further, Appellant Green admitted that despite certain medications and treatments helping decrease her pain, she was unwilling to take them. For instance, she testified that while two injections helped her pain in her shoulder short term, she was unwilling to take any more of them due to her Diabetes. R. p. 249:4-10. She also refused to take any type of pain medication other than Advil, Aleve, or Tylenol. R. p. 249:11-21. Moreover, she testified that she does not do any formal exercise program because she does not have enough time with her work schedule. R. p. 273:2-6.

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

Shannon Green is also requesting compensation or pain and suffering. Pain and suffering compensates the Plaintiff for physical discomfort, and emotional – and emotional response to the sensation of pain caused by the injury itself. There is no definite standard by which to compensate the Plaintiff for pain and suffering.

You have the authority to determine the amount, if any, to be allowed for pain and suffering using calm and reasonable judgment to ensure that the damages are just and reasonable in light of the testimony and evidence presented in the case.

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

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

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

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

R. p. 352:20-25.

Accordingly, given all of the above evidence disputing Appellant Green's claims, and the thorough explanation of "pain and suffering" by the trial court and Appellant Green's counsel, it is clear that the jury considered pain and suffering in this case. Simply because the jury thoughtfully considered the law and evidence outlined above and returned a verdict below the amount Appellant Green requested is not a compelling justification for invading the jury's province and granting additur. Because there is evidence in this case supporting the jury's verdict of \$88,546.78 in actual damages, the trial court did not abuse its discretion in denying the extraordinary remedy of a new trial *nisi additur*, and this Court should affirm.

2. THE TRIAL COURT PROPERLY UTILIZED THE FULL AMOUNT OF \$100,000 RECEIVED BY APPELLANT FOR A PRE-SUIT COVENANT NOT TO EXECUTE IN APPLYING THE SETOFF MANDATED BY S.C. CODE ANN. 15-38-50.

As fully addressed in Respondent/Appellant Hudgins' initial brief on his cross-appeal and incorporated herein by reference, the trial court erred in the manner in which it applied the setoff of the \$100,000 received by Appellant Green from Edward McGee in exchange for a Covenant Not to Enforce Judgment. However, contrary to Appellant Green's assertion, the trial court did not err in utilizing the entire \$100,000 settlement proceeds in its setoff analysis, as it is clear that that is the amount received by Appellant Green pre-suit from Mr. McGee's insurer.

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

In arguing that the trial court incorrectly used the entire \$100,000 settlement in applying a setoff, Appellant Green discloses in her brief that prior to filing suit, she received the full policy limits of one hundred thousand dollars (\$100,000) under Edward C. McGee's liability policy from Nationwide and executed a Covenant Not to Enforce Judgment against Mr. McGee for that amount. *See Green Covenant Not to Execute*. R. pp. 460-462. However, Appellant Green only briefly addresses the fact in a footnote that her husband and co-Plaintiff, Darrell Russell, also executed a completely separate Covenant Not to Enforce Judgment against Mr. McGee for a settlement of two thousand five hundred dollars (\$2,500.00) from Nationwide and completely ignores what the language of Mr. Russell's Covenant actually states. *See Russell*

Covenant Not to Execute. R. pp. 457-459. This separate Covenant with Mr. Russell clearly and unambiguously states that it was given to Mr. Russell for valuable consideration in exchange for a release of “any and all claims demands, damages, costs or expenses, including, but not limited to, any medical or hospital expenses, **loss of services**, actions and cause of action, arising from any act, omission, or occurrence, resulting or to result from the above referenced automobile accident.” *Id.* (emphasis added). Mr. Russell only made a claim for loss of consortium in this case and did not seek any recovery for personal injuries. Both covenants were provided and considered by the trial court at the post-trial motion stage. *See Mtn. for Setoff*. R. pp. 39-45.

“It is well settled in South Carolina that one spouse’s cause of action for medical expenses and loss of consortium resulting from negligent injuries to the other spouse is a different and distinct cause of action from one maintained by the injured spouse; judgment in favor of the defendant in one action is not a bar to the other action.” *Graham v. Whitaker*, 282 S.C. 393, 397, 321 S.E.2d 40, 43 (1984). In other words, “loss of consortium is an independent action, not derivative.” *Stewart v. State Farm Mut. Auto. Ins. Co.*, 341 S.C. 143, 156, 533 S.E.2d 597, 604 (Ct. App. 2000). Thus, Mr. Russell’s Covenant with Edward McGee, in which Mr. Russell agreed for a total of \$2,500 not to pursue a judgment against Mr. McGee for “any and all claims . . . including, but not limited to . . . loss of services,” clearly shows that this second Covenant applied to any loss of consortium claim brought by Mr. Russell, as such a claim belongs only to Mr. Russell and is separate and independent of any claim belonging to Appellant Green. *See Russell Covenant Not to Execute*. R. pp. 457-459 In fact, while Appellant Green’s Covenant includes both her name and Mr. Russell on the Covenant, only Appellant Green signed as the “Plaintiff,” while Mr. Russell only signed as her “Spouse,” providing further indication that the Covenant was only given for Appellant Green’s claims. *See Green Covenant Not to*

Execute. R. pp. 460-462. Therefore, the trial court did not abuse its discretion in utilizing the full \$100,000 from Appellant Green's Covenant in calculating the setoff of the judgment in Appellant Green's favor in this case.

Furthermore, even if Appellant Green's Covenant also applies to the loss of consortium claims of Mr. Russell, there was still no error by the trial court in refusing to allocate any portion of the \$100,000 to his loss of consortium claims. This Court has held that "when a settlement is argued to involve two claims, one of which involves the same injury as the claim tried to verdict and one of which does not, the circuit court must make the factual determination of how to allocate the settlement between the two claims." *Smith v. Widener*, 397 S.C. 468, 473, 724 S.E.2d 188, 191 (Ct. App. 2012). For instance, in *Rutland v. South Carolina Dept. of Transportation*, 390 S.C. 78, 700 S.E.2d 451 (Ct. App. 2010), some of the co-defendants had reached settlements with the plaintiff prior to trial, and the settlement agreements had allocated portions of the total settlement amount between the wrongful death claim and survival claim. GM's settlement agreement with the plaintiff totaled \$275,000, but the agreement allocated \$137,500 to the wrongful death claim and \$137,500 to the survival claim. 390 S.C. at 82, 700 S.E.2d at 453. During settlement approval, another \$30,000 settlement had \$29,500 allocated to the wrongful death claim and \$500 allocated to the survival claim. *Id.* The total amount of all settlements was \$305,000. At trial, the jury awarded the plaintiff \$300,000 against SCDOT on the wrongful death claim. Although the total in the settlement agreements allocated to the wrongful death claim was \$167,000, and the total allocated to the survival claim was \$138,000, in ruling on SCDOT's motion for setoff, the trial court reduced the verdict against SCDOT to zero because it "concluded the settlement agreement should be reallocated based on the insufficiency of the evidence to support a survival claim." 390 S.C. at 82, 700 S.E.2d at 453. On

Appeal, this Court affirmed this reallocation and setoff and held, “After reviewing the record, we conclude the trial court did not err in granting SCDOT’s motion for set-off based on the insufficiency of the evidence to support a survival claim. The record does not reveal any evidence tending to show the decedent endured conscious pain and suffering.” 390 S.C. at 84, 700 S.E.2d at 454; *see Welch v. Epstein*, 342 S.C. 279, 536 S.E.2d 408 (Ct. App. 2000) (finding that a trial judge did not err in reallocating a \$450,000 settlement that had \$5,000 allocated to the wrongful death claim and \$445,000 allocated to the survival claim to \$28,535.88 for the survival claim and \$421,464.12 for the wrongful death claim).

Here, the jury heard the same evidence at trial regarding Mr. Russell’s claimed loss of consortium that is outlined in Appellant Green’s brief. *See Appellant’s Brf.*, at 15. The jury also heard the conflicting evidence above regarding Appellant Green’s pre-existing conditions, her ability to go back to work full time following the accident, and Mr. Russell’s testimony regarding him being away from home 60% of the time and that he did not have to assist his wife at work. R. pp. 226:1-229:6. In his closing argument, Appellant Green’s counsel reiterated the evidence he believed favored an award for loss of consortium to the jury, and the trial judge gave a thorough jury instruction explaining the law on loss of consortium. R. p. 351:9-25. Having heard all of the evidence, the jury found unanimously that there was not sufficient evidence to support Darrell Russell’s claim that he suffered a loss of consortium as a result of the November 19, 2015 accident and awarded him nothing on that claim. *See Verdict Form*. R. pp. 6-9.

Again, great deference is given to a jury’s findings, and “[a] jury’s resolution of factual issues in a law case is binding on trial and appellate courts.” *Erickson v. Jones Street Publishers, LLC*, 368 S.C. 444, 480, 629 S.E.2d 653, 672 (2006). Moreover, the jury’s finding regarding the lack of a loss of consortium claim was not challenged by Mr. Russell in post-trial motions

nor was it appealed, and it is now binding and the law of the case. *See First Union Nat. Bank of South Carolina v. Soden*, 333 S.C. 554, 566, 511 S.E.2d 372, 378 (Ct. App. 1998) (holding that an “unchallenged ruling, right or wrong, is the law of the case and requires affirmance”). In fact, in the *Page v. Crisp*, 303 S.C. 117, 399 S.E.2d 161 (Ct. App. 1991) decision cited by Appellant Green in her brief, the jury’s award of \$0 to the husband on his loss of consortium claim was actually challenged in post-trial motions and on appeal. Thus, in this case, the jury’s unappealed finding that there was insufficient evidence to support Darrell Russell’s loss of consortium claim is binding on the trial court and this Court, and Appellant Green’s claim that despite this finding, “Plaintiff Russell had a real and valid claim for loss of consortium as a matter of law” is simply nonsensical. *See Appellant’s Brf*, at 18.

While the unpublished and non-precedential of *Green v. Bauerle*, No. 2019-MO-026, 2019 WL 2289678 (S.C. Unpub. May 29, 2019) relied on by Appellant Green does state that the trial court should consider “all relevant circumstances” in determining the proper amount of setoff, the Court did find that the amounts the jury determined the husband and wife were entitled to “may well be relevant to the ultimate determination of a proper setoff.” *Id.* at *4. Moreover, all of the relevant circumstances in this case were properly considered by the trial court in making its determination to utilize the full \$100,000 in applying the setoff. Not only did the trial court consider the finding by the jury in making this decision, but the court also had before it Mr. Russell’s separate and independent Covenant discussed above on which he was paid for releasing claims for “loss of services.” Both of these items were explicitly argued by undersigned counsel during the post-trial motion hearing:

So, therefore, Your Honor, you are looking at these two things, how do you – do you break up this \$100,000 between Ms. Green and Mr. Russell? And, Your Honor, arguably you should not. Mr. Hudgins should be entitled to the full

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

Post-trial Hrg. Tr. R. pp.. 413:22-414:3.

Accordingly, the trial court properly considered all relevant circumstances surrounding Appellant Green's Covenant and Mr. Russell's Covenant as well as the jury's unchallenged finding that there is no evidence to support a loss of consortium claim. Thus, the trial court did not abuse its discretion in declining to re-allocate any of the \$100,000 in Ms. Green's covenant to any claims of Mr. Russell and utilizing the full \$100,000 settlement for the setoff under S.C. Code Ann. § 15-38-50.

3. THE TRIAL COURT ERRED IN CALCULATING THE SETOFF OF \$100,000 DAVID HUDGINS' IS ENTITLED TO UNDER S.C. CODE ANN. § 15-38-50 BY ADDING THE ACTUAL DAMAGE AWARD OF \$88,546.78 TO THE \$35,000 PUNITIVE DAMAGE AWARD AWARDED INDIVIDUALLY BY THE JURY AGAINST MR. HUDGINS AND THE \$35,000 PUNITIVE DAMAGE AWARD AWARDED INDIVIDUALLY BY THE JURY AGAINST EDWARD MCGEE FOR A TOTAL OF \$158,546.78, SUBTRACTING \$100,000 FROM THAT AMOUNT, AND HOLDING THAT MR. HUDGINS IS RESPONSIBLE FOR 40% OF THE REMAINDER, WHILE MR. MCGEE IS RESPONSIBLE FOR 60% OF THE REMAINDER, RATHER THAN ADDING THE \$35,000 INDIVIDUAL PUNITIVE DAMAGE AWARD AGAINST MR. HUDGINS TO 40% OF THE ACTUAL DAMAGES AWARD AND SUBTRACTING THE \$100,000 FROM THAT AMOUNT.

Finally, Appellant Green argues that the trial court erred in calculating the setoff under S.C. Code Ann. § 15-38-50 by dividing the punitive damages awarded to Appellant Green against Mr. Hudgins and Mr. McGee on a pro-rata basis. As set forth fully in Respondent/Appellant Hudgins' Initial Brief on his cross-appeal and incorporated herein by reference, Respondent/Appellant Hudgins agrees with Appellant Green that the trial court in some ways improperly calculated the setoff to which he is entitled under S.C. Code Ann. § 15-38-50. As set forth below, however, Respondent/Appellant Hudgins disagrees with Appellant Green's suggestion as to how the setoff should be recalculated.

In any event, Appellant Green made several concessions in her initial brief regarding the setoff calculated by the trial court with which Respondent/Appellant Hudgins also agrees. Appellant Green does not challenge on appeal the propriety of the trial court applying the setoff under S.C. Code Ann. § 15-38-50 to punitive damages awards, nor could she give the clear South Carolina authority allowing for such a setoff. *See Smith v. Widener*, 397 S.C. 468, 472, 724 S.E.2d 188, 191 (Ct. App. 2012) (holding that with respect to setoff under S.C. Code Ann. § 15-38-50, “when a plaintiff seeks actual and punitive damages in the same claim, both types of damages arise out of the same injury”). Thus, the ability of the trial court to apply the setoff under § 15-38-50 to both actual and punitive damages is not in dispute and is now the law of the case. *See First Union Nat. Bank of South Carolina v. Soden*, 333 S.C. 554, 566, 511 S.E.2d 372, 378 (Ct. App. 1998) (“It is a fundamental rule of law that an appellate court will affirm a ruling by a lower court if the offended party does not challenge that ruling.”); *Shirley’s Iron Works, Inc. v. City of Union*, 403 S.C. 560, 573, 743 S.E.2d 778, 785 (2013) (“Failure to challenge the ruling is an abandonment of the issue and precludes consideration on appeal.”).

Moreover, as fully set forth in Respondent/Appellant Hudgins’ Initial Brief on his cross-appeal, Mr. Hudgins agrees with Appellant Green that in calculating the setoff under § 15-38-50, the trial court improperly combined the \$35,000 punitive damages awarded against Mr. Hudgins and Mr. McGee individually, instead of dealing with them as separate awards against each defendant. Again, with respect to awards of punitive damages, S.C. Code Ann. § 15-32-520(G) makes clear that “[i]n an action with multiple defendants, a punitive damages award must be specific to each defendant, and **each defendant is liable only for the amount of the award made against that defendant.**” S.C. Code Ann. § 15-32-520(G) (emphasis added). In recognition of this statute, the jury’s verdict awarded \$35,000 in punitive damages against Mr.

Hudgins and \$35,000 in punitive damages against Mr. McGee and not a \$70,000 joint punitive damages award. However, in starting its setoff calculation with a total of \$158,546.78, the trial court improperly bundled damages awarded solely against Mr. McGee with the damages awarded solely against Mr. Hudgins, particularly the \$35,000 punitive damage award against Mr. McGee. The parties agree that this portion of the setoff calculation was improper, and there is no dispute that the \$35,000 punitive damages award against Mr. Hudgins and the \$35,000 punitive damages award against Mr. McGee should have been considered separately by the trial court when calculating the setoff under § 15-38-50.

The real disagreement between the parties on this appeal is how the setoff of the award under S.C. Code Ann. § 15-38-50 should be calculated after the above items are taken into consideration. Appellant Green suggests that the \$100,000 from her Covenant Not to Execute be applied first to the \$88,546.78 actual damages award, which would leave an additional “credit” of \$11,453.22 to be applied to the punitive damages awards. *See Appellant’s Brf.*, at 18. She then states that if the trial court decided to apply this credit based on the 60-40 split found by the jury, this would result in judgments against Mr. McGee and Mr. Hudgins as follows: “If only the remaining \$11,453.22 of the credit is divided 60-40, Defendant McGee gets a 40% credit (\$4,581.29) against the punitive damages award of 35,000 against him, so he would pay \$30,418.71, and Defendant Hudgins gets a 60% credit (\$6,871.92) against the punitive damages of \$35,000 against him, so he would pay \$28,128.07.” *See Appellant’s Brf.*, at 19 n.3.

However, in calculating the setoff under S.C. Code Ann. § 15-38-50 this way, Appellant Green completely fails to take into account the circumstances of this case and the differences between S.C. Code Ann. § 15-38-50’s application to “tortfeasors” and the setoff an underinsured motorist (“UIM”) carrier is entitled to through its contract with the plaintiff. As set forth in

Respondent/Appellant Hudgins' Initial Brief on his cross appeal, the clear and unambiguous language of S.C. Code Ann. § 15-38-50 shows that its setoff provisions do not apply to underinsured motorist carrier, Progressive, as the statute speaks in terms of "other tortfeasors" and states that a settlement "does not discharge any of the **other tortfeasors** from liability for the injury or wrongful death unless its terms so provide, but it reduces the claim against the others to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is greater." S.C. Code Ann. § 15-38-50(1) (emphasis added). Progressive, as the underinsured motorist carrier, is not one of these "other tortfeasors" under the statute. See *McCrary ex rel. McCrary v. Byrd*, 559 S.E.2d 821, 827 (N.C. App. 2002) ("An underinsured motorist carrier is not a tort-feasor and thus has no right of contribution."); *Broome v. Watts*, 319 S.C. 337, 340, 461 S.E.2d 46, 48 (1995) ("Although the UIM carrier 'steps into the shoes' of the underinsured motorist, it has rights separate and distinct from those of the underinsured motorist.").

Instead, UIM setoff does not arise under S.C. Code Ann. § 15-38-50, but is "a different type of set-off" entirely and is really not a setoff at all, but is based on contract principles. See *Ellis by Ellis v. Oliver*, 335 S.C. 106, 111, 515 S.E.2d 268, 271 (Ct. App. 1999). "An insurance policy is a contract between the insured and the insurance company, and the terms of the policy are to be construed according to contract law." *Nationwide Insurance Company of America v. Knight*, 428 S.C. 451, 455, 835 S.E.2d 538, 540 (Ct. App. 2019). "[U]nderinsured motorist coverage is optional coverage provided by an insurance carrier in the event damages are sustained by the insured in excess of the at fault driver's liability coverage, recovery therefrom being additional to any recovery from the at fault motorist, *total recovery not to exceed the damages sustained.*" *Broome v. Watts*, 319 S.C. 337, 341, 461 S.E.2d 46, 48 (1995) (emphasis

in original). Courts hold that “[t]he very definition of UIM insurance mandates a set-off.” *Broome*, 319 S.C. at 341, 461 S.E.2d at 48. In other words, the setoff inherent in Appellant Green’s contractual UIM coverage with Progressive is different from the setoff mandated by S.C. Code Ann. § 15-38-50 for other tortfeasors and can hardly be termed a setoff. Thus, any “setoff” for Progressive arises not from S.C. Code Ann. § 15-38-50, but from the contractual provisions of Appellant Green’s policy with Progressive, and the analysis is different than the analysis applicable to Mr. Hudgins, as Progressive simply looks to see if the amount awarded by the jury against underinsured motorist, Edward McGee, was greater than the \$100,000 already paid on his behalf from his liability insurer. As such, because Progressive is not an “other tortfeasor,” and the provisions of § 15-38-50 are inapplicable to Progressive, the statute must be applied only to Mr. Hudgins. In other words, as the only “other tortfeasor” from Mr. McGee, under § 15-38-50, Mr. Hudgins receives the full benefit of the \$100,000 settlement paid to Appellant Green, as that is the “amount stipulated by . . . the covenant.” S.C. Code Ann. § 15-38-50.

With respect to the amount of the judgment recoverable against Progressive and Mr. Hudgins and the amount to which the \$100,000 setoff will be applied, Appellant Green argues, “Defendants are not entitled to an apportionment of the actual damages since they were found by the jury to have engaged in conduct that was willful, wanton, reckless, etc.” *See Appellant’s Brf.*, at 18. However, this ignores the fact that the trial court must apply the setoff under S.C. Code Ann. § 15-38-50 “before entering judgment on a jury verdict.” *Smith v. Widener*, 397 S.C. 468, 471-72, 724 S.E.2d 188, 190 (Ct. App. 2012). It also ignores the fact that with an award for which two defendants are jointly and severally liable, a plaintiff “is entitled to only one recovery, and the collection of a judgment against one wrongdoer extinguishes any claim against the

other.” *Rourk v. Selvey*, 252 S.C. 25, 27-28, 164 S.E.2d 909, 910 (1968). Thus, because the setoff must be calculated prior to judgment being entered, and Appellant Green cannot recover the full amount actual damages from both Mr. Hudgins and Progressive, the trial court must determine an equitable way and non-arbitrary way to apportion the \$88,546.78 between Mr. Hudgins and Progressive when calculating the setoff. The jury found that Mr. McGee was 60% at fault for the accident and that Mr. Hudgins was 40% at fault. *See Verdict Form*. R. p. 7. To avoid an arbitrary and capricious setoff calculation, the actual damage award should be apportioned using these percentages for the setoff calculation.

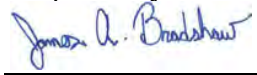
Thus, this would make Mr. Hudgins liable for 40% of the total actual damages, or \$35,418.71. When the punitive damages award of \$35,000 is combined with that figure, the total amount of the claim against Mr. Hudgins for setoff purposes would be \$70,418.71. Because this is less than the \$100,000 received by Appellant Green for her Covenant, then Appellant Green would not be entitled to recover anything from Mr. Hudgins.

CONCLUSION

For the reasons stated herein and Respondent/Appellant Hudgins’ Initial Brief for his cross-appeal, this Court should find that the trial court did not abuse its discretion in denying Appellant Green’s Motion for New Trial *Nisi Additur*. The Court should further find that the trial court did not abuse its discretion in using the full \$100,000 pre-suit settlement obtained by Appellant Green in calculating the setoff under S.C. Code Ann. §15-38-50. Finally, the Court should find that the trial court improperly calculated the setoff of the \$100,000 settlement Appellant Green received from Edward McGee that Mr. Hudgins is entitled to under S.C. Code Ann. § 15-38-50, and instead direct that the setoff be calculated as described above and in Mr. Hudgins’ Initial Brief for his cross-appeal.

November 19, 2020

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

Grace Gilchrist Knie, Circuit Court Judge

Trial Court Case No. 2017CP4203523

Appellate Case No. 2020-000203

Shannon P. Green
And Darrell Russell

Appellant - Respondent,

v.

Edward C. McGee,
And David Hudgins,

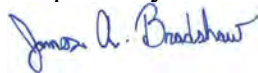
Respondent.
Respondent – Appellant,

CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief of Respondent-Appellant David Hudgins complies with Rule 211(b), SCACR.

November 19, 2020

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Respondent,
Respondent-Appellant,

**FINAL BRIEF OF RESPONDENT-APPELLANT DAVID HUDGINS FOR
HIS CROSS-APPEAL**

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STATEMENT OF ISSUES ON APPEAL

1. DID THE TRIAL COURT ERR IN DENYING DAVID HUDGINS' MOTION MADE PURSUANT TO RULE 50(B), SCRPC, FOR A JUDGMENT NOTWITHSTANDING THE VERDICT ("JNOV") AND DECLINING TO SET ASIDE THE VERDICT AGAINST MR. HUDGINS IN ITS ENTIRETY AND ENTER JUDGMENT IN HIS FAVOR?
2. DID THE TRIAL COURT ERR IN DENYING DAVID HUDGINS' MOTION MADE PURSUANT TO RULE 50(B), SCRPC, FOR A JUDGMENT NOTWITHSTANDING THE VERDICT ("JNOV") AND DECLINING TO SET ASIDE THE PUNITIVE DAMAGES AWARD AGAINST MR. HUDGINS?
3. DID THE TRIAL COURT ERR IN CALCULATING THE SETOFF OF \$100,000 DAVID HUDGINS' IS ENTITLED TO UNDER S.C. CODE ANN. § 15-38-50 BY ADDING THE ACTUAL DAMAGE AWARD OF \$88,546.78 TO THE \$35,000 PUNITIVE DAMAGE AWARD AWARDED INDIVIDUALLY BY THE JURY AGAINST MR. HUDGINS AND THE \$35,000 PUNITIVE DAMAGE AWARD AWARDED INDIVIDUALLY BY THE JURY AGAINST EDWARD MCGEE FOR A TOTAL OF \$158,546.78, SUBTRACTING \$100,000 FROM THAT AMOUNT, AND HOLDING THAT MR. HUDGINS IS RESPONSIBLE FOR 40% OF THE REMAINDER, WHILE MR. MCGEE IS RESPONSIBLE FOR 60% OF THE REMAINDER, RATHER THAN ADDING THE \$35,000 INDIVIDUAL PUNITIVE DAMAGE AWARD AGAINST MR. HUDGINS TO 40% OF THE ACTUAL DAMAGES AWARD AND SUBTRACTING THE \$100,000 FROM THAT AMOUNT?

STATEMENT OF THE CASE

Appellant Shannon P. Green (hereinafter “Appellant Green”), along with her husband, Darrell Russell, filed this action on September 27, 2017 alleging a cause of action for negligence against Edward C. McGee and David Hudgins for an automobile accident that occurred on November 19, 2015 on Simuel Road in Spartanburg, South Carolina in which Mr. McGee’s Chevrolet 2500 pickup truck crossed the center line and collided with Appellant Green’s vehicle. *See Compl. R. pp. 10-12.*

Mr. Hudgins filed his Answer to the Complaint on December 12, 2017, denying his allegations of negligence and asserting multiple affirmative defenses. *See Hudgins’ Answer. R. pp. 13-18.* Prior to suit being filed, Appellant Green settled with Edward C. McGee and his liability insurer for One Hundred Thousand Dollars (\$100,000.00) and executed a “Covenant Not to Execute.” *See Covenant Not to Execute. R. pp. 460-462* Hoping to pursue underinsured motorist benefits under her own insurance policy with Progressive Direct Insurance Company (hereinafter “Progressive”), Appellant Green served Progressive with the Complaint, and Progressive answered on May 30, 2018. *See Progressive Answer. R. pp. 19-25.*

The case went to trial before a Spartanburg County jury on October 14, 2019, with the Honorable Grace Gilchrist Knie presiding. At the close of Plaintiffs’ case and the close of Defendants’ case, both Mr. Hudgins and counsel for Progressive moved for directed verdict, which was denied. On October 16, 2019, the jury returned a verdict in favor of Appellant Green. *See Verdict Form. R. pp. 6-9.* The jury determined that both Mr. Hudgins and Edward C. McGee were negligent and proximately caused the November 19, 2015 accident and found that Mr. Hudgins was forty percent (40%) at fault, while Mr. McGee was sixty percent (60%) at fault. The jury further found that Appellant Green was entitled to actual damages in the amount of

\$88,546.78, while Darrell Russell was not entitled to any damages for Loss of Consortium. Finally, the jury also awarded \$35,000 in punitive damages against Mr. Hudgins and \$35,000 in punitive damages against Mr. McGee. *Id.*

Both Appellant Green and Mr. Hudgins filed timely post-trial motions. On October 25, 2019, Mr. Hudgins submitted a Motion for Judgment Notwithstanding the Verdict (“JNOV”) pursuant to Rule 50(b), S.C.R.C.P., seeking to have the verdict against him set aside in its entirety and judgment entered in his favor, or to at least have the punitive damages award set aside. *See Mtn. for JNOV*. R. pp. 27-38. Mr. Hudgins also filed a Motion for Setoff, pursuant to S.C. Code Ann. § 15-38-50, seeking to have the Court properly apply and give Mr. Hudgins credit for the \$100,000 Appellant Green received from Mr. McGee prior to trial as part of the Covenant Not to Execute. *See Mtn. for Setoff*. R. pp. 39-45. Appellant Green also filed a Motion for New Trial *Nisi Additur* or, in the alternative, a Motion for a New Trial Absolute. R. p. 26.

A hearing was held before Judge Knie on December 20, 2019 on all post-trial motions with representative of all parties in attendance. On January 8, 2020, Judge Knie issued an Order ruling on all post-trial motions. *See Order on Post-Trial Mtns.* R. pp. 1-5. The trial court denied all post-trial motions except for the Motion for Setoff. With respect to that motion, the Court held and entered judgment as follows:

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

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

shall be responsible for 60% of the remaining amount owed to Plaintiff Green and Defendant Hudgins shall be responsible for 40% of the remaining amount owed to Plaintiff Green.

Id. On February 5, 2020, Appellant Green submitted a Notice of Appeal. *See Notice of Appeal.* On February 10, 2020, Mr. Hudgins timely submitted a Notice of Appeal for a Cross Appeal. *See Notice of Cross Appeal.*

STATEMENT OF FACTS

This case arises from an accident that occurred on November 19, 2015 on Simuel Road in Spartanburg, South Carolina, in which the only two vehicles involved were the vehicle driven by Appellant Green, and the Chevrolet 2500 truck that was driven by Edward C. McGee. David Hudgins's vehicle did not impact either of the other vehicles, and he was not involved in the impact whatsoever.

Prior to the accident on November 19, 2015, Mr. Hudgins was working and was driving a Nissan Altima on Interstate 85 from a plant in Blacksburg to his next job at a plant in Spartanburg near Heron Circle. R. pp. 298:11- 299:7. Traffic was very heavy on the interstate at that time and was "stop and go." R. p. 300:10-19. While Mr. Hudgins was in the left lane on Interstate 85 North, Edward McGee approached him from behind in a Chevrolet 2500 truck. The evidence showed that Mr. McGee was running late for work at the BMW plant in Greer at that time, as he had to be at work at 7:00 and the events of the accident occurred at 7:00. R. p. 136:10-19. Mr. McGee admitted that as he approached Mr. Hudgins on the interstate, he was speeding and flashed his lights at Mr. Hudgins to tell him he was driving too slow and "let's go." R. pp. 139:20-140:16. Mr. Hudgins had to apply his brakes, as vehicles in front of him were slowing down or stopping. R. pp. 300:23-301:4.

As Mr. Hudgins applied his brakes on these occasions, Mr. McGee admitted that he was traveling so close behind him that he almost hit him. R. p. 96:11-19. Mr. McGee then moved to the middle lane and then “flipped” back to the left lane to get in front of Mr. Hudgins and got so close to him that you may could have gotten “a piece of paper” between them. R. p. 101:12-22. Mr. Hudgins had to slam on brakes and swerve off of the roadway to avoid having an accident. R. p. 314:2-9. He was in shock and called 911 to report Mr. McGee’s aggressive and reckless driving. R. pp. 302:23-:303:8.

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

Mr. Hudgins testified that as Mr. McGee went down Simuel Road, he was six car lengths or more behind him. R. p. 307:9-14. Even Mr. McGee admitted that Mr. Hudgins was at least “two or three carlengths” behind him on Simuel Road. R. p. 148:11-20. Mr. Hudgins never tried to run Mr. McGee off the roadway or pointed a gun at him or did anything else to distract Mr. McGee’s attention from the roadway. R. p.148:24-25; 149:8-19; 334:2-5. Mr. McGee testified that he was not really concerned with Mr. Hudgins smaller vehicle coming into contact with his

and admitted that at the time of the accident, he was looking ahead at cars going through the intersection and not at Mr. Hudgins' vehicle. R. pp. 149:18-150:7; 152:23-153:1.

As he drove on Simuel Road, Mr. McGee's truck crossed the center line and struck the vehicle driven by Appellant Green. Mr. Hudgins' Nissan Altima never struck Appellant Green's vehicle and never struck Mr. McGee's truck. R. p. 230:9-11. Mr. McGee admitted that he was in "total control" of his truck at the time of the accident. R. pp. 151:25-152:2. He also testified that he was in "total control" of his truck as he admittedly sped down Simuel Road and admitted:

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

A. Exactly.

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

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

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

Appellant Green alleges that she injured her left shoulder and back in the accident and developed a frozen left shoulder. However, Appellant Green has been a severe Type I diabetic for over 40 years, and is insulin dependent. R. p. 248:10-19. She also has pre-existing joint pain. R. p. 290:10. She previously had a frozen shoulder in her right shoulder that she admitted was related to her diabetes and required surgery. R. p. 258:15-19. She further admitted that she had pain in her right shoulder even after the surgery. R. p. 289:12-19. She also admittedly has pre-existing back pain. R. p. 287:10-17. Ms. Green admitted that she had chronic hip pain since

2010 unrelated to the accident. R. pp. 281:15-283:2. No medical physician or other medical expert testified at trial regarding Appellant Green's alleged injuries. .

STANDARD OF REVIEW

“When reviewing a motion for directed verdict or JNOV, an appellate court must employ the same standard as the trial court.” *Wright v. Craft*, 372 S.C. 1, 18, 640 S.E.2d 486, 495 (Ct. App. 2006). Rule 50(b) of the South Carolina Rules of Civil Procedure allows the Court discretion to grant a judgment notwithstanding a jury's verdict. Rule 50(b), S.C.R.C.P. “A party making a motion for a directed verdict must state the specific grounds relied upon therefor, and the trial court may grant the motion when the case presents only issues of law.” *RFT Mgmt. Co., L.L.C. v. Tinsley & Adams L.L.P.*, 399 S.C. 322, 331, 732 S.E.2d 166, 170 (2012). “If the motion is denied, the party may thereafter move for a JNOV in order to have the verdict and judgment set aside and a judgment entered in accordance with the party's directed verdict motion.” *Id.* “A motion for JNOV may be granted only if no reasonable jury could have reached the challenged verdict.” *Gastineau v. Murphy*, 331 S.C. 565, 568, 503 S.E.2d 712, 713 (1998). A court “cannot ignore facts unfavorable to [the nonmoving] party and it must determine whether a verdict for the party opposing the motion would be reasonably possible under the facts.” *Hopson v. Clary*, 321 S.C. 312, 314, 468 S.E.2d 305, 307 (Ct. App. 1996). Moreover, the “rule does not authorize submission of speculative, theoretical, and hypothetical views to the jury,” and “verdict may not be permitted to rest upon surmise, conjecture, or speculation.” *Small v. Pioneer Mach.*, 329 S.C. 448, 461, 494 S.E.2d 835, 841 (Ct. App. 1997). “[W]hen only one reasonable inference can be deduced from the evidence, the question becomes one of law for the court.” *Id.* In other words, “[i]f only one reasonable inference can be drawn from the evidence,

the motion must be granted.” *Brady Dev. Co. v. Town of Hilton Head Island*, 312 S.C. 73, 78, 439 S.E.2d 266, 269 (1993).

ARGUMENTS

1. THE TRIAL COURT ERRED IN DENYING DAVID HUDGINS’ MOTION MADE PURSUANT TO RULE 50(B), SCRPC, FOR A JUDGMENT NOTWITHSTANDING THE VERDICT (“JNOV”) AND DECLINING TO SET ASIDE THE VERDICT AGAINST MR. HUDGINS IN ITS ENTIRETY AND ENTER JUDGMENT IN HIS FAVOR.

- a. *The Only Reasonable Inference Is that Edward McGee Was the Sole Cause of the Accident.*

The South Carolina Supreme Court has long held that when the evidence is susceptible of only one inference, proximate cause becomes a matter of law for the court. *Wright v. PRG Real Estate Mgmt.*, 426 S.C. 202, 222, 826 S.E.2d 285, 295 (2019). The only reasonable inference from the evidence presented at trial was that Edward McGee’s negligence was the sole proximate cause of the November 19, 2015 accident.

Mr. McGee admitted fault for the November 19, 2015 accident. He testified:

Q. Okay. And you’re at fault for hitting Ms. Green, right?

A. I’ve never denied that.

R. pp. 153:24-154:1. The evidence showed that the only vehicle that struck Appellant Green’s vehicle was Mr. McGee’s Chevrolet Silverado truck 151:20-24. The evidence also showed that Mr. Hudgins’ Nissan Altima never struck Appellant Green’s vehicle and never struck Mr. McGee’s truck. R. p. 230:9-11. Mr. McGee admitted that he was in “total control” of his truck at the time of the accident. R. pp. 151:25-152:2. No one other than Mr. McGee was pushing the accelerator or steering the steering wheel. R. p. 152:3-9. He also testified that he was in “total control” of his truck as he admittedly sped down Simuel Road and admitted:

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

A. Exactly.

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

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

R. p. 152:10-18. Mr. McGee further admitted that he was in “total control” of his truck when he took the curve too fast and crossed the centerline and struck Appellant Green’s vehicle. R. pp. 152:18-22; 153:16-23. Thus, the only reasonable inference that can be drawn from the evidence in this case is the Mr. McGee was solely responsible for the accident and was the sole proximate cause of the accident.

b. *No Evidence Was Presented At Trial Upon Which A Reasonable Jury Could Conclude That Mr. Hudgins Breached a Duty or Proximately Caused the Accident.*

There was simply no evidence presented at trial upon which a reasonable jury could conclude that there was any breach of duty on the part of David Hudgins or that any actions on his part proximately caused the November 19, 2015 accident. “Negligence is not actionable unless it is the proximate cause of the plaintiff’s injury.” *Hubbard v. Taylor*, 339 S.C. 582, 589, 529 S.E.2d 549, 552 (Ct. App. 2000). “Proximate cause requires proof of (1) causation in fact and (2) legal cause.” *Bramlette v. Charter Medical-Columbia*, 302 S.C. 68, 72, 393 S.E.2d 914, 916 (1990). “Causation in fact is proved by establishing the injury would not have occurred ‘but for’ the defendant’s negligence,” and “[l]egal cause is proved by establishing foreseeability.” *Id.*

The evidence at trial showed that on November 19, 2015, Mr. Hudgins was minding his own business as he drove on Interstate 85 from a plant in Blacksburg to his next job at a plant in Spartanburg near Heron Circle. R. pp. 298:11-299:7. All the evidence clearly showed that Mr. McGee drove aggressively on the interstate and was running late for work at the BMW plant in

Greer. R. p. 136:10-19. Mr. McGee admitted that as he approached Mr. Hudgins on the interstate, he was speeding and flashed his lights at Mr. Hudgins to tell him he was driving too slow and “let’s go.” R. pp. 139:20-140:16: He testified:

Q. Okay. So, you were being aggressive behind – as you drove behind him, weren’t you?

A. Just trying to wake him up, and let’s go, you know, and really let’s just run the speed limit, and let’s get on up the road.

R. p. 140:12-16. He further admitted that when Mr. Hudgins applied his brakes on the interstate, he was traveling so close behind him that he almost hit him. R. p. 96:11-19. Mr. McGee then moved to the middle lane and then “flipped” back to the left lane to get in front of Mr. Hudgins and got so close to him that you may could have gotten “a piece of paper” between them. R. p. 101:12-22. Mr. McGee admitted that it was his responsibility to make sure that there was enough room to pass. R. p. 142:16-20. Mr. Hudgins testified that he had to slam on brakes and swerve off the roadway to avoid having an accident. R. p. 314: 2-9. He was in shock and called 911 to report Mr. McGee. R. pp. 302:23-303:8.

This 911 call was played at trial and admitted into evidence as Defendant Hudgins’ Exhibit 1. *See Def. Hudgins Ex. 1 to Trial Tr.*, 911 Call. This contemporaneous 911 call made by Mr. Hudgins unequivocally shows that he did not proximately cause the accident. Mr. Hudgins is heard telling the 911 operator Mr. McGee’s license plate number as he continues to travel down the interstate. He then sat calmly and not in a state of rage as the 911 operator attempted to get in touch with the South Carolina Highway Patrol for over two minutes—which took almost until the time the accident occurred. This is consistent with Mr. Hudgins’ testimony at trial that the South Carolina Highway Patrol was not “on it” at that point and that he was calm on the telephone call. R. p. 315:1-8.

Mr. Hudgins then exited onto Exit 4B on Interstate 85 Business—the very exit he planned to take from the beginning of his trip—along with Mr. McGee and other vehicles. R. pp. 330:23-331:15. He observed Mr. McGee go around Heron Circle at a high rate of speed and almost have another accident. R. p. 306:19-25. Importantly, as Mr. McGee turned onto Simuel Road, Mr. Hudgins stated, “He’s gone. I’m not going to chase him.” *See Def. Hudgins Ex. 1 to Trial Tr.*, 911 Call. Then approximately twelve (12) seconds later Mr. Hudgins is heard saying that Mr. McGee “just wrecked.” *Id.* However, he was so far back at that time that it was not until over a minute later after Mr. Hudgins went to the accident scene that he realized that Mr. McGee had struck another vehicle. *Id.* This contemporaneous evidence blatantly contradicts any contention otherwise that Mr. Hudgins was chasing Mr. McGee at the time of the accident or was right behind him at the time of the accident. *See Scott v. Harris*, 550 U.S. 372, 380 (2007) (“When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonably jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment.”).

In fact, all of the evidence at trial showed that Mr. Hudgins was far away from Mr. McGee’s truck at the time of the accident and not chasing him or trying to run him off the road. Trooper J.R. Helmly testified that on the day of the accident, Mr. Hudgins told him that he was not close to Mr. McGee’s truck at the time of the accident. R. p. 82:14-16. Plaintiff Darrell Russell also testified that just prior to the accident he only saw one set of headlights from Mr. McGee’s truck coming toward their vehicle. R. pp. 229:21-230:11. Mr. Hudgins testified that he was six car lengths or more away from Mr. McGee’s truck. R. p. 307:9-14. In fact, Mr. McGee admitted that as he drove down Simuel Road, Mr. Hudgins was at most “two or three car lengths” away from him. R. p. 148:11-20. He admitted that Mr. Hudgins was not trying to run

him off the road and never pointed a gun at him. R. pp. 148:24-25; 149:8-19. In other words, Mr. Hudgins was not doing anything to distract Mr. McGee's attention from the roadway. R. p. 334:2-5.

Mr. McGee also admitted that at the time of the accident, he was paying attention to cars in front of him going through the intersection of Howard and Simuel. He testified:

Q. And, in fact, you were viewing vehicles in front of you go through the four way stop there on – at Simuel and Howell – Howard at the time of the accident, weren't you?

A. Yes, sir.

R. pp. 152:23-153:1. He was not really concerned with Mr. Hudgins being behind him and stated that if Mr. Hudgins' small car hit his truck, then Mr. Hudgins' car would not be drivable, as he testified:

A. I'm in the front there. So, I mean how is he gonna run me off the road?

Q. Okay. And in fact, his – Mr. Hudgins vehicle never came in contact with your vehicle at all, did it?

A. No, sir.

Q. Okay. In fact, you weren't worried about his car coming into contact with your big truck, were you?

A. No.

Q. All right.

A. Why would I be?

Q. Right. And as big as your truck was, if his car hit the back of your truck, his car probably wouldn't of been drivable, right?

A. Exactly.

R. p. 149:18-150:7. Following the accident, Mr. McGee did not even immediately recognize Mr. Hudgins' car, and it took him a minute to figure out who he was. R. p. 151:4-12.

Thus, again, the only inference susceptible from the evidence presented at trial is that Mr. McGee was the sole proximate cause of the accident. The evidence does not show that Mr. Hudgins ever hit Mr. McGee's truck or ever hit Appellant Green's vehicle. In fact, the evidence shows that Mr. Hudgins did absolutely nothing on Simuel Road to cause Mr. McGee to choose to drive the way he did.

c. *Edward McGee Was An Independent Intervening Cause of the Accident, and At Most, Mr. Hudgins Was a Remote Cause and Not a Proximate Cause.*

While Mr. McGee testified that he somehow felt threatened by Mr. Hudgins being that far behind him, this does not transform Mr. Hudgins into a proximate cause of this accident. "One is not charged with foreseeing that which is unpredictable or which would not be expected to happen as a natural and probable consequence of the defendant's negligent act." *Vinson v. Hartley*, 324 S.C. 389, 401, 477 S.E.2d 715, 721 (Ct. App. 1996). Thus, "[w]here the injury complained of is not reasonably foreseeable there is no liability." *Id.*; see *Mellen v. Lane*, 377 S.C. 261, 283, 659 S.E.2d 236, 247 (Ct. App. 2008) (stating same). Additionally, the South Carolina Supreme Court has long held that "when the negligence appears merely to have brought about a condition of affairs, or a situation in which another and entirely independent and efficient agency intervenes to cause the injury, the latter is to be deemed the direct or proximate cause, and the former only the indirect or remote cause." *Woody v. South Carolina Power Co.*, 202 S.C. 73, 84-85, 24 S.E.2d 121, 125 (1943). In making this determination, courts are instructed to apply the following test:

The test, therefore, by which the negligent conduct of the original wrongdoer is to be insulated as a matter of law by the independent negligent act of another, is

whether the intervening act and the injury resulting therefrom are of such character that the author of the primary negligence should have reasonably foreseen and anticipated them in the light of attendant circumstances.

202 S.C. at 85, 24 S.E.2d at 125.

For instance, in *Gray v. State Highway Dep't*, 165 S.C. 248, 163 S.E. 793 (1932), the plaintiff was the passenger in a truck that struck the rear of a sedan that suddenly stopped in front of it. The Highway Department had placed an employee in the road with a flag to warn motorists of a slippery and wet spot in the road. Upon seeing this guard, the driver of the sedan came to a sudden stop. The plaintiff alleged that her injuries were due to this defect in the highway. While the South Carolina Supreme Court acknowledged that plaintiff made a persuasive argument that the alleged defect brought about a succession of other causes that led to plaintiff's injuries, it held, "under the facts disclosed, the defective highway was not the direct or proximate cause, but was either the remote cause, or no cause whatever, of plaintiff's injuries." 165 S.C. at 252, 163 S.E. at 794. With respect to the Highway Department guard, the Court held, "[a]ll that the guard did was to flag the automobile; the manner of its slowing down or stopping was in the control of its driver, and, if the collision and resulting injuries were due to the sudden stopping of the sedan, it is clear that they were due to that cause independently of the condition of the highway." 165 S.C. at 253, 163 S.E. at 794; see *Gibson v. Gross*, 280 S.C. 194, 197, 311 S.E.2d 736 (Ct. App. 1983).

Here, based on the actions of Mr. Hudgins in keeping at least two to three car lengths behind Mr. McGee, not flashing his lights, not trying to run him off the road, not getting right on his bumper, and not doing anything to distract Mr. McGee's attention from the roadway, no reasonable jury could find that Mr. Hudgins was a proximate cause of the accident. If Mr. Hudgins had been following Mr. McGee at all, then this had ended well before the accident, as

shown by the contemporaneous 911 call in which Mr. Hudgins stated that he was not going to chase Mr. McGee. *See Skipper v. Hartley*, 242 S.C. 221, 226, 130 S.E.2d 486, 489 (1963) (“A participant who abandons the race, to the knowledge of the other participants, before the accident and injury, may not be held liable.”); *see also Johnson v. Johnson*, 171 So.2d 710, 712 (La. App. 1965) (finding that when a vehicle following another vehicle was about two blocks from the vehicle when it was involved in an accident, there was “not even the remotest causal connection between the pursuit . . . and the accident or injury.”). Furthermore, if Mr. McGee truly felt threatened by Mr. Hudgins, in addition to being unreasonable from the standpoint of an ordinary prudent person, Mr. McGee’s actions in driving at a high rate of speed down Simuel Road and then crossing the centerline and striking Appellant Green constitutes an independent intervening cause. Mr. McGee admitted that he had a number of other options other than driving down Simuel Road in the manner in which he did on November 19, 2015 and causing this accident. He could have called 911, pulled into the QT gas station off of Heron Circle, or even pulled to the side of the roadway and let Mr. Hudgins pass. R. p. 145:15-147:9. He testified:

Q. Okay. And, again, there were a lot of other things you could of done other than to choose to drive the way you did down Simuel Road and cause this accident? Yes?

A. Yes, sir, I mean I could of done a lot of different things. I could of not went to work that night and I didn’t anyway, but --.

R. p. 147:10-16.

Yet, Mr. McGee chose to continue down the roadway in such a manner that caused this accident. Thus, even if Mr. McGee did somehow feel threatened by Mr. Hudgins keeping a distance of between two and three car lengths behind him, no reasonable juror could find that it would be reasonably foreseeable that such actions would lead to an accident. If that were the

case any motorist following at a safe distance behind another vehicle that is involved in an accident could be drug into a lawsuit based merely on the other driver's subjective statement that he somehow felt threatened by the vehicle having been behind him for some distance.

Accordingly, as the only reasonable inference from the evidence presented at trial is that the November 19, 2015 accident was proximately caused solely by Edward McGee and not by David Hudgins, Mr. Hudgins respectfully requests that Court reverse the trial court's ruling on his Motion for JNOV and direct that the verdict against him be set aside in its entirety and that judgment in his favor be entered on all claims.

d. *No Medical Evidence Was Presented At Trial Upon Which a Jury Could Determine That Appellant Shannon Green's Alleged Injuries Were Proximately Caused by the Accident.*

In addition to there being absolutely no evidence presented at trial upon which a reasonable jury could find that David Hudgins proximately caused the accident, there was also no evidence presented at trial upon which a jury could find that Appellant Shannon Green's alleged injuries were proximately caused by the accident. Again, a "verdict may not be permitted to rest upon surmise, conjecture, or speculation." *Small v. Pioneer Mach.*, 329 S.C. 448, 461, 494 S.E.2d 835, 841 (Ct. App. 1997). "The general rule in South Carolina is that where a subject is beyond the common knowledge of the jury, expert testimony is required." *Babb v. Lee County Landfill SC, LLC*, 405 S.C. 129, 153, 747 S.E.2d 468, 481 (2013). In fact, "[A]ll jurisdictions require expert testimony at least where the issues are medically complex and outside common knowledge and lay experience." *In re Lipitor (Atorvastatin Calcium) Mktg., Sales Practice and Prods. Liab. Litig.*, 226 F. Supp. 3d 557 (D.S.C. 2017). The South Carolina Supreme Court has held that "[r]eliance on lay testimony is not justified when the medical question is a complicated one and likely to carry the fact-finding body into realms which are

more properly within the province of medical experts.” *Herndon v. Morgan Mills, Inc.*, 246 S.C. 201, 217, 143 S.E.2d 376, 384 (1965).

Here, Appellant Green claimed that she injured her left shoulder and back in the November 19, 2015 accident. However, Appellant Green did not even have an X-ray of her shoulder performed at the hospital following the accident, and it was not until three days after the accident that she sought medical treatment for her left shoulder at an Express Care and obtained an X-ray that showed no fractures. R. p. 274:6-16. She also stopped seeking any medical treatment for any back pain two months after the accident. R. p. 276:20-24. Moreover, evidence was presented at trial that showed that Ms. Green has several pre-existing issues that make it questionable whether these injuries were in fact related to the accident. Ms. Green has pre-existing joint pain. R. p. 290:10. She has also been a severe Type I diabetic for over 40 years, and is insulin dependent. R. p. 248:10-19. She previously had a frozen shoulder with her right shoulder in 2010 through 2011 that had no traumatic cause and was related to her diabetes and required surgery. R. p. 258:15-19. Appellant Green testified that she continued to have pain in her right shoulder even after the surgery. R. p. 289:12-19. She also admittedly has pre-existing back pain. R. p. 287:10-17. Further, Ms. Green admitted that she had chronic hip pain since 2010 unrelated to the accident. R. pp. 281:15-283:2. Now Ms. Green claims that the accident caused her to develop back pain and left shoulder pain and eventually a diabetic frozen left shoulder.

However, no doctor or other qualified medical expert testified at trial regarding medical causation or attempted to rule out these other possible causes. There was also no medical expert testimony opining to a reasonable degree of medical certainty that her injuries were most probably related to the accident. Without such evidence, the jury was left to only speculate and

conjecture as to the cause of Appellant Green's alleged injuries. In other words, without expert testimony linking Appellant Shannon Green's alleged soft tissue injuries to this accident rather than her other pre-existing issues or other possible causes, the jury's verdict cannot stand. For this additional reason, the Court should reverse the trial court's ruling on his Motion for JNOV and direct that the verdict against him be set aside and judgment be entered in his favor.

2. THE TRIAL COURT ERRED IN DENYING DAVID HUDGINS' MOTION MADE PURSUANT TO RULE 50(B), SCRPC, FOR A JUDGMENT NOTWITHSTANDING THE VERDICT ("JNOV") AND DECLINING TO SET ASIDE THE PUNITIVE DAMAGES AWARD AGAINST MR. HUDGINS.

Should the Court not aside the entire verdict against Mr. Hudgins, the jury's award of punitive damages in the amount of \$35,000 against Mr. Hudgins should be set aside and judgment on the question of punitive damages should be entered in Mr. Hudgins' favor. There was absolutely no evidence presented at trial against Mr. Hudgins that could sustain an award of punitive damages. In order to recover punitive damages, a plaintiff must establish, by clear and convincing evidence, that a defendant's behavior was willful, wanton, or reckless and caused the accident. S.C. Code Ann. § 15-32-520(D). The test for willful, wanton, or reckless behavior is whether it is:

committed in such a manner or under such circumstances that a person of ordinary reason or prudence would then have been conscious of it as an invasion of plaintiff's rights. It is this present consciousness of wrongdoing that justifies the assessment of punitive damages against the tortfeasor. In other words, at the time of his act or omission to act the tortfeasor must be conscious, or chargeable with consciousness, of his wrongdoing.

Cody P. v. Bank of America, N.A., 395 S.C. 611, 625, 720 S.E.2d 473, 479 (Ct. App. 2011).

In addition to not providing any evidence at trial that Mr. Hudgins was negligent, Appellant Green certainly did not provide any evidence upon which a jury could find by clear and convincing evidence that there was willful, wanton, or reckless conduct on the part of Mr.

Hudgins that caused the November 19, 2015 accident. As set forth above, no reasonable jury could find that Mr. Hudgins' actions in being at a minimum of two or three car lengths from Mr. McGee's truck, not trying to run him off the road, not flashing his lights at Mr. McGee, and not otherwise distracting Mr. McGee somehow constitutes willful, wanton, or reckless conduct. In fact, the contemporaneous 911 call made by Mr. Hudgins at the time of the accident proves that there was no conscious disregard for the rights of Appellant Green at the time of the accident, as it shows that he calmly waited on the line with the 911 operator while he reported Mr. McGee's conduct, waited patiently while the operator tried to contact the Highway Patrol, and stated that he was not going to chase him as Mr. McGee traveled at a high rate of speed down Simuel Road. *See Def. Hudgins Ex. 1 to Trial Tr.*, 911 Call.

While Mr. Hudgins did admit that he pled guilty to driving too fast for conditions, it is only "[t]he causative violation of a statute [which] constitutes negligence *per se* and is evidence of recklessness and willfulness." *Wise v. Broadway*, 315 S.C. 273, 276, 433 S.E.2d 857, 859 (1993) (emphasis added). Again, as explained above, there is no evidence that any action on the part of Mr. Hudgins proximately caused this accident or caused Mr. McGee to drive in the manner in which he did. Additionally, the Supreme Court had held that a "[v]iolation of a statute does not constitute recklessness, willfulness, and wantonness *per se*, but is some evidence that the defendant acted recklessly, willfully, and wantonly." *Id.* In other words, "it is not obligatory as a matter of law for the jury to make such a finding in every case of a statutory violation." *Id.* Here, Mr. Hudgins emphatically denied that he was driving too fast for conditions and explained that his guilty plea was merely a financial decision. R. pp. 329:20-25; 332:16-333:7. Given the totality of the other evidence presented at trial, no reasonable jury could find that Mr. Hudgins acted recklessly on November 19, 2015. To the contrary, the only reasonable inference in this

case is that he was not acting recklessly but merely trying to report on a dangerous driver. Therefore, Mr. Hudgins should not be punished for his actions and the evidence presented at trial does not provide a reasonable basis for a punitive damages award. As such, should the Court not entirely reverse the trial court's decision on his Motion for JNOV, Mr. Hudgins respectfully requests that the Court reverse the trial court regarding the punitive damages award against him and find that such an award was improper.

3. THE TRIAL COURT ERRED IN CALCULATING THE SETOFF OF \$100,000 DAVID HUDGINS' IS ENTITLED TO UNDER S.C. CODE ANN. § 15-38-50 BY ADDING THE ACTUAL DAMAGE AWARD OF \$88,546.78 TO THE \$35,000 PUNITIVE DAMAGE AWARD AWARDED INDIVIDUALLY BY THE JURY AGAINST MR. HUDGINS AND THE \$35,000 PUNITIVE DAMAGE AWARD AWARDED INDIVIDUALLY BY THE JURY AGAINST EDWARD MCGEE FOR A TOTAL OF \$158,546.78, SUBTRACTING \$100,000 FROM THAT AMOUNT, AND HOLDING THAT MR. HUDGINS IS RESPONSIBLE FOR 40% OF THE REMAINDER, WHILE MR. MCGEE IS RESPONSIBLE FOR 60% OF THE REMAINDER, RATHER THAN ADDING THE \$35,000 INDIVIDUAL PUNITIVE DAMAGE AWARD AGAINST MR. HUDGINS TO 40% OF THE ACTUAL DAMAGES AWARD AND SUBTRACTING THE \$100,000 FROM THAT AMOUNT.

Finally, the trial court erred in calculating the setoff Mr. Hudgins is entitled to under S.C. Code Ann. § 15-38-50 for the \$100,000, Appellant Green received from Edward McGee prior to suit. Under South Carolina law, "there can be only one satisfaction for an injury or wrong." *Truesdale v. South Carolina Highway Dep't*, 264 S.C. 221, 235, 213 S.E.2d 740, 746 (1975). Section 15-38-50 of the South Carolina Code states in full as follows:

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

- (1) it does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms so provide, but it reduces the claim against the others to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is greater; and

(2) it discharges the tortfeasor to whom it is given from all liability for contribution to any other tortfeasor.

S.C. Code Ann. § 15-38-50. Thus, under this statute, “[a] non-settling defendant is entitled to credit for the amount paid by another defendant who settles for the same cause of action.” *Riley v. Ford Motor Co.*, 414 S.C. 185, 195, 777 S.E.2d 824, 830 (2015). “Allowing this credit prevents an injured person from obtaining a double recovery for the damage he sustained.” *Rutland v. S.C.D.O.T.*, 400 S.C. 209, 216, 734 S.E.2d 142, 145 (2012). This settlement credit is “statutorily mandated,” and “Section 15-38-50 grants the court no discretion in determining the equities involved in applying a set-off once a release has been executed in good faith between a plaintiff and one of several joint tortfeasors.” *Ellis by Ellis v. Oliver*, 335 S.C. 106, 113, 515 S.E.2d 268, 272 (Ct. App. 1999).

Here, as stated above, the jury found that Appellant Green is entitled to actual damages in the amount of \$88,546.78. *See Verdict Form*. The jury further awarded punitive damages to Appellant Green in the amount of \$35,000.00 solely against Edward C. McGee. *Id.* The jury then separately awarded Appellant Green punitive damages in the amount of \$35,000.00 solely against Mr. Hudgins. Finally, the jury found that Mr. Hudgins was forty percent (40%) at fault for the accident, and Mr. McGee was sixty percent (60%) at fault.

In calculating the setoff under S.C. Code Ann. § 15-38-50 of the \$100,000 settlement amount received by Appellant Green from Edward C. McGee pre-suit in exchange for a Covenant Not to Execute, the trial court simply added the \$88,546.78 in actual damages to the \$35,000 in punitive damages awarded individually against Mr. Hudgins and the \$35,000 in punitive damages awarded individually against Mr. McGee for a total of \$158,546.78. The court then subtracted the \$100,000 settlement from that amount and held that “the remaining amount

of the verdict to be paid to Plaintiff Shannon P. Green of Fifty-Eight Thousand, Five Hundred Forty-Six and 78/100's Dollars (\$58,546.78) shall be shared by the Defendants on a pro-rata basis according to the fault assigned to the Defendants by the Jury Verdict; and Defendant McGee shall be responsible for 60% of the remaining amount owed to Plaintiff Green and Defendant Hudgins shall be responsible for 40% of the remaining amount owed to Plaintiff Green." See Jan. 8, 2020 Order, at 4. R. p. 4.

To be clear, in this appeal, Mr. Hudgins does not appeal or take issue with the propriety of the trial court applying the setoff amount to the punitive damages awards. Mr. Hudgins also does not appeal the trial court's use of the jury's apportionment of 40% of fault to Mr. Hudgins and 60% of fault to Mr. McGee in calculating the setoff or the application of these percentages to actual damages. Nor does Mr. Hudgins appeal or take issue with the trial court using the full amount of the \$100,000 settlement in making the setoff. Upon information and belief, Appellant Green is also not appealing the trial court's holding on Mr. Hudgin's Motion for a Setoff nor any of the issues discussed above or relating to the calculation of the setoff.

"It is a fundamental rule of law that an appellate court will affirm a ruling by a lower court if the offended party does not challenge that ruling." *First Union Nat. Bank of South Carolina v. Soden*, 333 S.C. 554, 566, 511 S.E.2d 372, 378 (Ct. App. 1998); *Shirley's Iron Works, Inc. v. City of Union*, 403 S.C. 560, 573, 743 S.E.2d 778, 785 (2013) ("An unappealed ruling is the law of the case and requires affirmance"). "Failure to challenge the ruling is an abandonment of the issue and precludes consideration on appeal." *Id.* In fact, even "[a] portion of a judgment that is not appealed presents no issue for determination by the reviewing court and constitutes, rightly or wrongly, the law of the case." *Ulmer v. Ulmer*, 369 S.C. 486, 490, 632 S.E.2d 858, 861 (2006). Moreover, the "law of the case" doctrine applies "both to those issues

explicitly decided and to those issues [that] were necessarily decided.” *Ross v. Med. Univ. of S.C.*, 328 S.C. 51, 62, 492 S.E.2d 62, 68 (1997). As such, the trial court’s decisions that the setoff under S.C. Code Ann. § 15-38-50 applies to punitive damages, that the full \$100,000 settlement should be setoff, and that the finding by the jury of 40% of fault for Mr. Hudgins and 60% of fault for Mr. McGee should be used in apportioning the amount of the actual damages each is responsible for paying are all the law of the case.

In fact, as to whether setoff under S.C. Code Ann. § 15-38-50 applies to punitive damages, regardless of the “law of the case” doctrine, South Carolina law clearly answers this question in the affirmative. The South Carolina Court of Appeals has held that with respect to setoff under S.C. Code Ann. § 15-38-50, “when a plaintiff seeks actual and punitive damages in the same claim, both types of damages arise out of the same injury.” *Smith v. Widener*, 397 S.C. 468, 472, 724 S.E.2d 188, 191 (Ct. App. 2012). As such, “a plaintiff’s claim for actual and punitive damages arising from the same injury is the same claim for purposes of setoff under section 15-38-50(1).” *Id.* In other words, reading this holding into S.C. Code Ann. § 15-38-50(1) and the word “claim” in that section, the setoff “reduces the claim **[for actual and punitive damages]** against the others to the extent of any amount stipulated by the release or covenant.” S.C. Code Ann. § 15-38-50(1). The Court of Appeals has consistently applied the setoff under § 15-38-50(1) to punitive damages awards. For instance, in *Vortex Sports & Entertainment, Inc. v. Ware*, 378 S.C. 197, 662 S.E.2d 444 (Ct. App. 2008), the jury awarded the plaintiff \$2,200,000 in actual damages and \$500,000 in punitive damages against a single defendant. *Vortex*, 662 S.E.2d at 448. The total amount of settlements from the other defendants was \$700,000. The trial court setoff the amount of damages against the remaining defendant to \$2,000,000, and the Court of Appeals held, “we find the trial court did not err in setting off

Vortex's award with its settlement from Ware.” *Id.* at 451. Thus, S.C. Code Ann. § 15-38-50 clearly allows setoff of punitive damages in addition to actual damages.

In any event, the only portion of the trial court's order regarding the setoff that Mr. Hudgins appeals is the trial court's decision to simply add together the full actual damage award along with the individual punitive damage awards against Mr. Hudgins and Mr. McGee and then applying the setoff under S.C. Code Ann. § 15-38-50 to that total of \$158,546.78. Again, the jury found that Appellant Green had \$88,546.78 in actual damages and also found that she was entitled to punitive damages against Mr. Hudgins in the amount of \$35,000 and punitive damages against Mr. McGee in the amount of \$35,000. *See Verdict Form. R.* pp. 7-8. While the total amount of actual damages and punitive damages is \$158,546.78, it was improper for the court to simply add all of the various damages up this way for purposes of applying the setoff, as it improperly subjects Mr. Hudgins and Mr. McGee to liability for damages for which the jury did not find them liable.

The South Carolina Supreme Court has long held that a “court can not properly order judgment entered against a defendant for an amount not found by the jury.” *Rourk v. Selvey*, 252 S.C. 25, 35, 164 S.E.2d 909, 914 (1968). In *Rourk*, the jury returned a verdict against two defendants on a special verdict form in the amount of \$5,000 against one defendant and \$45,000 against the other. On appeal, the plaintiff asked the court to “construe the verdict as an award of \$50,000.00 against both defendants and authorize the entry of judgment accordingly.” *Id.* However, the Court held, “This, we may not do.” *Id.*

With respect to awards of punitive damages, S.C. Code Ann. § 15-32-520(G) makes clear that “[i]n an action with multiple defendants, a punitive damages award must be specific to each defendant, and **each defendant is liable only for the amount of the award made against that**

defendant.” S.C. Code Ann. § 15-32-520(G) (emphasis added). In recognition of this prohibition, the verdict form had two separate sections for the jury to calculate punitive damages awards against Mr. McGee and Mr. Hudgins, respectively, and the jury concluded as follows:

11. Please state the amount of Punitive Damages you award to the Plaintiff Shannon P. Green against the Defendant Edward C. McGee?

\$ 35,000 punitive damages

13. Please state the amount of punitive damages you award to the Plaintiff Shannon P. Green against the Defendant David Hudgins?

\$ 35,000 punitive damages

See Verdict Form. R. p. 8. Thus, the jury awarded separate punitive damages awards against Mr. Hudgins and Mr. McGee for \$35,000 each and did not somehow improperly award a joint award of \$70,000 in punitive damages against them both.

However, in calculating the setoff under § 15-38-50 by adding the actual damages award to the two separate individual punitive damages awards for a total of \$158,546.78, the trial court did just that and improperly imposed a judgment against Mr. Hudgins for an “amount not found by the jury.” *Rourk*, 252 S.C. at 35, 164 S.E.2d at 914. In other words, in starting its setoff calculation with a total of \$158,546.78, the trial court improperly bundled damages awarded solely against Mr. McGee with the damages awarded against Mr. Hudgins, particularly the \$35,000 punitive damage award against Mr. McGee. Thus, the trial court thereby increased the “claim” against Mr. Hudgins to be reduced by the setoff amount under S.C. Code Ann. § 15-38-50. As such, the \$35,000 punitive damages award against Mr. Hudgins and the \$35,000 punitive damages award against Mr. McGee must be considered separately when calculating the setoff under § 15-38-50.

The next question in calculating the setoff under § 15-38-50 then becomes how to deal

with the \$88,546.78 in actual damages. The South Carolina Supreme Court, albeit in an unpublished decision, has stated that “setoffs should be calculated based upon the entirety of relevant circumstances.” *Green v. Bauerle*, No. 2019-MO-026, 2019 WL 2289678, at *4 (S.C. May 29, 2019) (Unpublished). As the Court well knows, under joint and several liability principles, a plaintiff “is entitled to only one recovery, and the collection of a judgment against one wrongdoer extinguishes any claim against the other.” *Rourk*, 252 S.C. at 27-28, 164 S.E.2d at 910. Thus, Appellant Green would never be entitled to a double recovery of the full \$88,546.78 from Mr. Hudgins and Progressive, and therefore, the full \$88,546.78 cannot be added to each of the \$35,000 punitive damages awards in calculating the setoff.

As such, because setoff is required to be calculated by the court under § 15-38-50 “before entering judgment on a jury verdict,” the trial court must somehow apportion the amount of actual damages to be paid by each defendant before applying the setoff. *See Smith v. Widener*, 397 S.C. 468, 471-72, 724 S.E.2d 188, 190 (Ct. App. 2012). Here, as the trial court recognized, the jury assigned fault for the accident to Mr. Hudgins and Mr. McGee in the amounts of 40% and 60%, respectively. As stated above, Mr. Hudgins does not appeal or take issue with the trial court’s application of these percentages to the actual damages award in this case in calculating the setoff. In fact, so as to not have a setoff that was arbitrary and capricious, the only split of the actual damages the trial court could have made was this 40%/60% split between Mr. Hudgins and Mr. McGee, respectively. In other words for purposes of calculating the setoff between the Mr. Hudgins and Progressive in this case prior to entering the judgment, the amount of damages attributable to Mr. Hudgins was the \$35,000 in punitive damages plus 40% of the actual damages or \$35,418.71, which is a total of \$70,418.71.

In calculating the setoff Mr. Hudgins is entitled to under § 15-38-50, the next question

then becomes how to deduct the \$100,000 payment made to Appellant Green by Mr. McGee pre-suit in exchange for a Covenant Not to Execute. A cursory reading of the statute shows that the setoff provisions of S.C. Code Ann. § 15-38-50 do not apply to underinsured motorist carrier, Progressive. “It is axiomatic that statutory interpretation begins (and often ends) with the text of the statute in question.” *Smith v. Tiffany*, 419 S.C. 548, 555, 799 S.E.2d 479, 483 (2017). “Absent an ambiguity, there is nothing for a court to construe, that is, a court should not look beyond the statutory text to discern its meaning.” *Id.* As stated above, the statutory setoff provision explicitly states that it applies to “other tortfeasors.” See S.C. Code Ann. §15-38-50(1). Progressive, as the underinsured motorist carrier, is not one of these “other tortfeasors” under the statute. See *McCrary ex rel. McCrary v. Byrd*, 559 S.E.2d 821, 827 (N.C. App. 2002) (“An underinsured motorist carrier is not a tort-feasor and thus has no right of contribution.”); *Broome v. Watts*, 319 S.C. 337, 340, 461 S.E.2d 46, 48 (1995) (“Although the UIM carrier ‘steps into the shoes’ of the underinsured motorist, it has rights separate and distinct from those of the underinsured motorist.”). In fact, even if Progressive could ostensibly be said to be the same as Mr. McGee, the statute would still not apply because Mr. McGee is the one who gave Appellant Green the covenant and is not an “other tortfeasor.”

Instead, the type of setoff that a UIM carrier is entitled to is “a different type of set-off,” and is really not a setoff at all, but is based on contract principles. See *Ellis by Ellis v. Oliver*, 335 S.C. 106, 111, 515 S.E.2d 268, 271 (Ct. App. 1999). “An insurance policy is a contract between the insured and the insurance company, and the terms of the policy are to be construed according to contract law.” *Nationwide Insurance Company of America v. Knight*, 428 S.C. 451, 455, 835 S.E.2d 538, 540 (Ct. App. 2019). “[U]nderinsured motorist coverage is optional coverage provided by an insurance carrier in the event damages are sustained by the insured in

excess of the at fault driver's liability coverage, recovery therefrom being additional to any recovery from the at fault motorist, *total recovery not to exceed the damages sustained.*" *Broome v. Watts*, 319 S.C. 337, 341, 461 S.E.2d 46, 48 (1995) (emphasis in original). UIM coverage arises of the underinsured motorist statute, S.C. Code Ann. § 38-77-160, which provides that the purpose of UIM coverage is "to provide coverage in the event that damages are sustained in excess of the liability limits carried by an at-fault insured or underinsured motorist." S.C. Code Ann. § 38-77-160. Courts hold that "[t]he very definition of UIM insurance mandates a set-off." *Broome*, 319 S.C. at 341, 461 S.E.2d at 48. In other words, the setoff inherent in Appellant Green's contractual UIM coverage with Progressive is different from the setoff mandated by S.C. Code Ann. § 15-38-50 for other tortfeasors and can hardly be termed a setoff. Instead, it arises from the contractual provisions of Appellant Green's policy with Progressive, which provide that the coverage under the policy is only triggered if the amount awarded by the jury against underinsured motorist, Edward McGee, was greater than the \$100,000 already paid on his behalf from his liability insurer.

Therefore, because Progressive is not an "other tortfeasor," and the provision of § 15-38-50 are inapplicable to Progressive, the statute must be applied only to Mr. Hudgins. Thus, as the only "other tortfeasor" from Mr. McGee, under § 15-38-50, Mr. Hudgins receives the full benefit of the \$100,000 settlement paid to Appellant Green, as that is the "amount stipulated by . . . the covenant." S.C. Code Ann. § 15-38-50. Because the \$100,000 is more than the \$70,418.71 attributable to Mr. Hudgins, application of the setoff under § 15-38-50 to Mr. Hudgins results in Appellant Green being precluded from any recovery from Mr. Hudgins. The result would be the same if the Court chooses to reverse the trial court's finding on motion or JNOV on the punitive damages award against Mr. Hudgins, as \$35,418.71 is less than \$100,000.

While application of this setoff provision under § 15-38-50 may seem to lead to an inequitable result for Appellant Green, “Section 15-38-50 grants the court no discretion in determining the equities involved in applying a set-off once a release has been executed in good faith between a plaintiff and one of several joint tortfeasors.” *Ellis v. Oliver*, 335 S.C. 106, 113, 515 S.E.2d 268, 272 (Ct. App. 1999). This Court has even held, “We recognize that a strict application of the statute may lead to unintended results; however, this is a matter for the legislature to correct if our interpretation is contrary to its intent.” *Id.* Moreover, it should be noted that it is Appellant Green who chose to bring suit against Mr. Hudgins in addition to pursuing underinsured motorist benefits from Progressive, and she cannot now be heard to complain of the consequences of applying these various applicable setoff provisions to her award. *See Smith v. Tiffany*, 419 S.C. 548, 563, 799 S.E.2d 479, 487 (2017) (“Indeed, this right of the plaintiff to choose her defendant has been recognized in South Carolina jurisprudence for almost two hundred years.”).

Therefore, should the Court not reverse the trial court on Mr. Hudgins’ Motion for JNOV and set aside the verdict against him in its entirety, the Court should find that the trial court erred in calculating the setoff under S.C. Code Ann. § 15-38-50 and instead calculate it as outlined above and preclude Appellant Green from recovery against Mr. Hudgins.

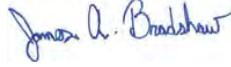
CONCLUSION

For the reasons stated, this Court should reverse the trial court’s ruling on Mr. Hudgins’ Motion for JNOV and set aside the verdict against Mr. Hudgins in its entirety and enter judgment in his favor. Alternatively, the Court should reverse the trial court’s ruling on Mr. Hudgins’ Motion for JNOV and set aside the punitive damages award against him. Finally, the Court should find that the trial court improperly calculated the setoff of the \$100,000 settlement

Appellant Green received from Edward McGee that Mr. Hudgins is entitled to under S.C. Code Ann. § 15-38-50, and instead direct that the setoff be calculated as described above.

November 19, 2020

Respectfully submitted,



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Attorneys for Respondent-Appellant,
David Hudgins

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

Grace Gilchrist Knie, Circuit Court Judge

Trial Court Case No. 2017CP4203523

Appellate Case No. 2020-000203

Shannon P. Green
And Darrell Russell

Appellant - Respondent,

v.

Edward C. McGee,
And David Hudgins,

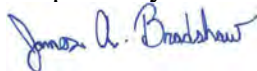
Respondent.
Respondent – Appellant,

CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief of Respondent-Appellant David Hudgins for His Cross-Appeal complies with Rule 211(b), SCACR.

November 19, 2020

Respectfully submitted,



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RECEIVED

Nov 19 2020

SC Court of Appeals



UPSTATE LAWYER
CHURDAR LAW FIRM

RECEIVED

May 11 2023

SC Court of Appeals

May 10, 2023

Via email: ctappfilings@sccourts.org

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

Re: Shannon P. Green v. Edward C. McGee
Appellate Case No. 2020-000203

Dear Ms. Kitchings:

This case was heard on March 1, 2023, by Judges Hewitt, McDonald, & Thomas. Pursuant to Rule 208(b)(7) of the SC Rules of Appellate Procedure, I am bringing to the Court's attention the case of Glenn v. 3M Company, Appellate Case No. 2019-001600, which was filed April 5, 2023. Section "V. Setoff" of that opinion pertains to Argument 2 of the Final Brief of Appellant/Respondent Shannon Green, namely "*The Trial Court erred by applying an offset against Plaintiff's award for a Pre-Trial settlement when, in fact, the settlement payment also covered claims by co-Plaintiff.*"

Thank you very much.

Sincerely,



Douglas A. Churdar

DAC/jmf

cc: Michael Coulter, Esq. (via email only)
Curtis Ott, Esq. (via email only)

Rita Joyce Glenn, individually and as personal representative of the Estate of Thomas Harold Glenn, deceased, Respondent,

v.

3M Company, f/k/a Minnesota Mining and Manufacturing Co.; Air & Liquid Systems Corporation, Individually and as Successor-In-Interest to Buffalo Pumps; Airgas USA, LLC; Aurora Pump; BW/IP Inc., a Subsidiary of Flowserve Corporation; CBS Corporation, a Delaware Corporation f/k/a Viacom, Inc., Successor By Merger to CBS Corporation, a Pennsylvania Corporation, f/k/a Westinghouse Electric Corporation; CGR Products, Inc., f/k/a Carolina Gasket and Rubber Company, Inc.; Carboline Company; Crane Co. d/b/a Crane Chempharma & Energy d/b/a Aloyco, n/k/a Crane Energy Flow Solutions; Crosby Valve, Inc.; Dana Companies, LLC; Daniel International Corporation; Fisher Controls International, LLC.; Flowserve Corporation, Individually and as Successor in Interest to Anchor/Darling Valve Company; Flowserve Corporation, Individually and as Successor to Byron Jackson Pump Company; Fluor Daniel, Inc., f/k/a Daniel Construction Company, Inc.; Fluor Daniel Services Corporation; Foster Wheeler Energy Corporation; General Electric Company; Goodyear Tire & Rubber; Goulds Pumps, Inc.; Grinnell LLC, f/k/a Grinnell Corp, f/k/a ITT Grinnell Corp., Individually and as Successor to Kennedy Valve Manufacturing Co., Inc.; Hajoca Corporation; Imo Industries, Inc., Individually and as Successor-in-Interest to De Laval Turbine, Inc.; Ingersoll Rand Company; ITT Corporation; John Crane, LLC; Linde LLC, a Delaware Limited Liability Company, formerly known as the BOC Group, Inc. and/or Airco, Inc.; MP Supply, Inc. f/k/a Mill Power Supply; Metropolitan Life Insurance Company, a wholly-owned subsidiary of MetLife Inc.; Sepco Corporation; The J.R. Clarkson Company Solely as a Successor by Merger to Anderson Greenwood & Co., f/k/a Kunkle Valve Company, Inc.; The SherwinWilliams Company; Trane U.S. Inc., f/k/a American Standard, Inc.; United Conveyor Corporation; United Seal & Rubber Company, Inc.; Uniroyal, Inc., f/k/a United States Rubber Company, Inc.; Velan Valve Corporation; Viking Pump, Inc.; and Weir Valves & Controls USA, Inc., Individually and as Successor in Interest to Atwood & Morrill Co., Inc., Defendants.

Of which Fisher Controls International LLC is the Appellant.

Opinion No. 5975.

Court of Appeals of South Carolina.

Heard October 3, 2022.

Filed April 5, 2023.

Appeal From Anderson County, Appellate Case No. 2019-001600, Jean Hoefer Toal, Acting Circuit Court Judge.

AFFIRMED IN PART AND REMANDED.

C. Mitchell Brown, Allen Mattison Bogan, and Nicholas Andrew Charles, all of Nelson Mullins Riley & Scarborough, LLP, of Columbia, for Appellant.

Theile Branham McVey, of Kassel McVey, of Columbia, and Lisa White Shirley, Jessica M. Dean, and Jonathan Marshall Holder, all of Dallas, TX, for Respondent.

GEATHERS, J.

In this complex asbestos case, Appellant Fisher Controls International LLC (Fisher) seeks review of the circuit court's (1) denial of Fisher's motion for a judgment notwithstanding the verdict (JNOV), (2) denial of Fisher's new trial motion, (3) partial denial of Fisher's motion for setoff, and (4) imposition of discovery sanctions. Among a legion of arguments made in its brief,

Fisher maintains that the circuit court should have granted a setoff in the full amount of the settlement proceeds obtained by Respondent Rita Joyce Glenn (Rita) prior to trial against the jury's compensatory damages award. We affirm in part and remand for reconsideration of the respective amounts to be set off against the jury's compensatory damages awards for Rita's claims for wrongful death, survival, and loss of consortium.

FACTS/PROCEDURAL HISTORY

From the mid-1970s to at least 1990, Rita's husband, Thomas Harold Glenn (Tommy), worked as an instrument technician at the Oconee Nuclear Station operated by Duke Power Company (Duke) in Seneca. His work regularly required him to be within close proximity to co-workers' removal of gaskets and packing from valves manufactured by various companies,^[1] including control valves sold by Fisher to Duke. The gaskets and packing often included asbestos, which could stand up to extremely high temperatures and high pressure. There were numerous Fisher valves at the plant, and some of them ranged from one inch to sixteen inches in diameter at the pipe connection, while others were approximately six feet tall. When the gaskets and packing in these valves were disturbed, Tommy was exposed to large quantities of asbestos.

Fisher anticipated that the gaskets and packing in their valves would deteriorate after normal use, so it sold replacements to Duke. As these gaskets deteriorated, they became brittle. Therefore, replacing one of these gaskets involved removing it from the valve component with which it was paired using a wire brush or power grinder so that the component's surface was clean enough to prevent future leaks. This process created visible dust. The removal of worn packing from valves also created dust.

Whenever a reactor unit at the plant would shut down for refueling, Tommy was routinely working alongside a crew performing maintenance work on Fisher valves and its components, which included scraping off the internal bonnet gaskets. One of Tommy's co-workers explained that every 18 months, a reactor unit would shut down to refuel, i.e., "put new uranium in the core," which gave employees "the opportunity to do massive repairs" and maintenance. It was important to get as much work done as possible during these outages; therefore, the instrumentation crew had to work 12 hours a day, seven days a week, "because Duke was losing money if it wasn't generating."

Because the Oconee plant had three units, it had a minimum of two outages per year, and an outage would last at least sixty days. During outages, it was common for many different crews, including various instrumentation crews, to simultaneously occupy the same area while performing their respective tasks. This included Tommy's close proximity to another crew's removal of gaskets and packing from control valves, and, at times, they would even be working "on the same scaffold together."

In addition to the gaskets located inside the control valves, gaskets were used on the control valves' external flanges connecting the valves to piping in the plant,^[2] and these gaskets were periodically replaced when Tommy was nearby. Although Fisher sold replacements for only those gaskets that were used inside its valves, its control valve handbook stated that gaskets made of asbestos were an option for the user to apply to its valves' external flanges.

Ultimately, Tommy was diagnosed with asbestos-related mesothelioma.^[3] He underwent extensive medical treatments and took large amounts of pain medication. After an unsuccessful surgery for his condition, Tommy died on February 17, 2015. Subsequently, Rita filed the present products liability action against Fisher and numerous co-defendants, alleging that Tommy was exposed to asbestos emanating from the defendants' products. Rita asserted claims for wrongful death, survival, and loss of consortium based on theories of relief that included negligence, breach of implied warranty, and strict liability.

Prior to trial, the circuit court denied Fisher's motion in limine to exclude the testimony of Rita's medical experts but granted Rita's motion in limine to exclude a tissue study performed by Fisher's pathologist. Also prior to trial, the circuit court approved a settlement between Rita and some of Fisher's co-defendants. The circuit court also approved Rita's designated allocation of 90 percent of the settlement proceeds to her wrongful death claim and 10 percent to the survival claim.

In January 2019, the circuit court conducted a trial on Rita's claims against Fisher and two co-defendants. Fisher's position at trial was that the asbestos gaskets in its valves were not harmful because they were encapsulated. At the conclusion of trial, the jury returned a verdict against Fisher on the negligence and breach of warranty theories of relief and awarded Rita \$1 million for Tommy's survival damages, \$1 million for wrongful death damages, and \$1 million for Rita's loss of consortium

damages. Additionally, the jury found "by clear and convincing evidence that the conduct of [Fisher was] willful, wanton or reckless" and awarded Rita \$2,125,000 for punitive damages.

Fisher submitted several post-trial motions, including a motion for a setoff of Rita's pre-trial settlement proceeds against the jury's respective compensatory damages awards on Rita's three claims. The circuit court granted this motion in part, allocating 90 percent of the proceeds to the wrongful death claim and 10 percent to the survival claim and denying a setoff against the loss of consortium claim. The circuit court denied Fisher's remaining post-trial motions and granted Rita's posttrial motion for discovery sanctions. This appeal followed.

LAW/ANALYSIS

I. Inconsistent Verdicts

Fisher argues it is entitled to a new trial because the jury's verdicts on the strict liability and negligence theories of relief were inconsistent and the circuit court failed to instruct the jury to correct the inconsistency. Fisher asserts that the jury's finding for Fisher as to strict liability and its finding for Rita as to negligence were inconsistent because the elements of strict liability are subsumed within the elements of negligence. We conclude that the circuit court acted within its discretion in denying the new trial motion. See Austin v. Stokes-Craven Holding Corp., 387 S.C. 22, 49, 691 S.E.2d 135, 149 (2010). ("Whether to grant a new trial is a matter within the discretion of the trial judge, and this decision will not be disturbed on appeal unless it is unsupported by the evidence or is controlled by an error of law.").

While giving instructions to the jury, the circuit court stated:

Plaintiff's claims in this case are based on three theories. The first theory is negligence, the second one is called strict liability, and the third is called breach of implied warranty. *The plaintiffs are not required to prove all of these theories to recover. Proof of a claim under any one of these theories would enable you to find that the plaintiffs are entitled to a verdict.* But the plaintiff must meet their burden of proof as to at least one of these theories in order to recover.

(emphasis added). The circuit court also instructed the jury to place the focus on the product rather than the defendant's conduct when evaluating a strict liability claim but to focus on the defendant's conduct when evaluating a negligence claim.

During their deliberations, the jury sent a question to the circuit court:

Under Charge 13, strict liability, the plaintiffs must prove three things: First, that the product was in a defective condition, unreasonably dangerous to the plaintiff; two, that at the time of the injury the product was in essentially the same condition as it was when it left defendants' hands; three, plaintiff was injured by the product.

As to Question 4 on the verdict form, which is one of three questions that asks the same thing for three different defendants, and the Question 4 is: We, the jury, find the Defendant Fisher Controls is strictly liable for selling products that proximately caused injury to the plaintiff, yes or no. And that same question is asked for all three defendants. As to strict liability question.

As to Question 4 on the verdict form, determining strict liability, must all three things mentioned above be found true, or do Charges 14 for reasonable alternative design, 15 for design defect, or Charge Number 16 negate the fact that all three things under 13 must be true? In other words, is 13 an overarching umbrella for answering strict liability and 14, 15 and 16 follow underneath?

The circuit court provided the following response:

In all circumstances, all three elements of Charge 13 must be proven in order to find strict liability. A defective condition, which is the heart of the strict liability issue, may be established in two ways: One, a design defect, and Instructions 14 and 15 discuss a design defect; or, two, a warning defect, which is addressed by 16. That is my instruction, ladies and gentlemen.

A portion of the verdict form asked jurors to select blanks corresponding to "Yes" or "No" for a series of statements. For instance, the jury indicated "Yes" to a statement concluding that Fisher "was negligent, and its negligence was a proximate cause of the Plaintiff's injuries." As to strict liability, in response to the statement "We the jury find [Fisher] is strictly liable for selling products that proximately caused injury to Plaintiff," both blanks were marked in some fashion. It appears that initially, the foreman marked the blank in front of "Yes" but scratched out the mark and then marked the blank in front of "No." What appears to be a "CK" notation is written beside "No." Notably, the jury marked the "Yes" option to Finding 7, which states that Fisher "breached the Implied Warranty in selling its products and its breach was a proximate cause of Plaintiff's injury and damages." The jurors also found "by clear and convincing evidence" that Fisher's conduct was "willful, wanton, or reckless,"^[4] and they completed a "Punitive Damage Verdict Form" indicating they assessed punitive damages against Fisher in the amount of \$2,125,000.

In its order addressing Fisher's post-trial motions, the circuit court stated, "Fisher has not shown that the jury's finding on strict liability was due to the absence of an element shared by the companion negligence claim in this case." The circuit court also stated, "The jury's questions about the strict liability instructions indicated division regarding whether to find for Plaintiff or Fisher on this claim. Their unanimous verdict on all three claims, finding in favor of Plaintiff on two and in favor of Fisher on one, was the jury's prerogative."

"A jury verdict should be upheld when it is possible to do so and carry into effect the jury's clear intention. However, when a verdict is so *confused that the jury's intent is unclear*, the safest and best course is to order a new trial." Vinson v. Jackson, 327 S.C. 290, 293, 491 S.E.2d 249, 250 (1997) (emphasis added) (quoting Johnson v. Parker, 279 S.C. 132, 303 S.E.2d 95 (1983)). "Verdicts [that] are irreconcilably inconsistent should not stand, and a new trial should be granted, because the parties and the judge 'should not be required to guess as to what a jury sought to render.'" Austin, 387 S.C. at 49, 691 S.E.2d at 149 (quoting Prego v. Hobart, 287 S.C. 116, 118, 336 S.E.2d 725, 726 (Ct. App. 1985)). On the other hand, "[I]t is the duty of the court to sustain verdicts when a logical reason for reconciling them can be found." *Id.* at 49-50, 691 S.E.2d at 149 (quoting Rhodes v. Winn-Dixie Greenville, Inc., 249 S.C. 526, 530, 155 S.E.2d 308, 310 (1967)).

Here, the general verdict form, in its entirety, clearly shows the jury's intent to hold Fisher liable for the unreasonably dangerous products it sold to Duke (the asbestos gaskets and packing) regardless of the theories on which Rita sought recovery, especially when viewed in light of the circuit court's instructions to the jury regarding products liability in general and the elements for each theory of recovery, which we discuss in more detail below.

One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm caused to the ultimate user or consumer, or to his property, if
(a) The seller is engaged in the business of selling such a product, and (b) It is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

S.C. Code Ann. § 15-73-10 (2005). "A products liability case may be brought under several theories, including strict liability, warranty, and negligence." Small v. Pioneer Mach., Inc., 329 S.C. 448, 462, 494 S.E.2d 835, 842 (Ct. App. 1997).

[R]egardless of the theory on which the plaintiff seeks recovery, he must establish three elements: (1) he was injured by the product; (2) the injury occurred because the product was in a defective condition, unreasonably dangerous to the user; and (3) that the product at the time of the accident was in essentially the same condition as when it left the hands of the defendant.

Id. at 462-63, 494 S.E.2d at 842. "[U]nder a negligence theory, the plaintiff bears the additional burden of demonstrating the defendant (seller or manufacturer) failed to exercise due care in some respect, and, unlike strict liability, the focus is on the conduct of the seller or manufacturer, and liability is determined according to fault." Bragg v. Hi-Ranger, Inc., 319 S.C. 531, 539, 462 S.E.2d 321, 326 (Ct. App. 1995). Further, "liability may be imposed upon a manufacturer or seller notwithstanding subsequent alteration of the product when the alteration could have been anticipated by the manufacturer or seller. . . ." Small, 329 S.C. at 466, 494 S.E.2d at 844.

Fisher cites Branham v. Ford Motor Co., 390 S.C. 203, 210, 701 S.E.2d 5, 8 (2010), in support of its argument that the strict liability verdict "is a finding that Fisher's product was *not* in a defective condition unreasonably dangerous to the user." (Fisher's emphasis). However, it is speculative to attribute the strict liability verdict to a specific finding regarding the product's condition because the strict liability theory of recovery has two other elements that the jury could have determined were not present. See *supra*. Nonetheless, it appears the jury found one of the three elements of strict liability was missing,

and all three of these elements are also required for a negligence claim. See *supra*. Although the facts in *Branham* are distinguishable from the facts in the present case, our supreme court's analysis in that case is instructive.

In *Branham*, the circuit court concluded that as a matter of law, the product at issue was not in a defective condition and, therefore, declined to send the plaintiff's strict liability claim to the jury. *Id.* at 210, 701 S.E.2d at 8. Our supreme court held that the circuit court should have also dismissed the plaintiff's negligence claim because that claim also included the product's defective condition as an element. *Id.* at 212, 701 S.E.2d at 9. The court stated, "When an element common to multiple claims is *not established*, all related claims must fail." *Id.* at 210, 701 S.E.2d at 8 (emphasis added).

Rita cites *Bragg v. Hi-Ranger, Inc.* for the following proposition: "Strict liability and negligence are not mutually exclusive theories of recovery; that is, an injury may give rise to claims that can be established either under principles of strict liability or negligence, and failure to prove one theory does not preclude proving the other." 319 S.C. 531, 539, 462 S.E.2d 321, 326 (Ct. App. 1995). In *Bragg*, this court affirmed the circuit court's refusal to direct a verdict on the plaintiff's negligence claims despite affirming the circuit court's directed verdict as to the plaintiff's strict liability claim. *Id.* at 537-47, 462 S.E.2d at 325-30. This court illustrated its reasoning with cases from other jurisdictions, including *Bilotta v. Kelley Co.*, 346 N.W.2d 616 (Minn. 1984) and *Bigham v. J.C. Penney Co.*, 268 N.W.2d 892 (Minn. 1978). In *Bilotta*, the Supreme Court of Minnesota explained, "Whether strict liability or negligence affords a plaintiff the broader theory of recovery will depend largely on the scope of evidence admitted by the trial court and on the jury instructions given under each theory. . . ." *Bragg*, 319 S.C. at 540, 462 S.E.2d at 326 (quoting 346 N.W.2d at 622). In *Bigham*,

the Supreme Court of Minnesota held the jury's findings that the [plaintiff's] work clothes were not "in a defective condition unreasonably dangerous to the plaintiff" and that [the defendant] breached neither an expressed nor implied warranty, but was nevertheless causally negligent, were not irreconcilable where there were no warning tags with respect to the flammability of the work clothes. *The strict liability instructions required the jury to assess a defect dangerous to the ordinary consumer, whereas the [plaintiff] lineman's work subjected him to fire hazards. Therefore, while the failure to warn of the flammable characteristics of the clothing was negligent as to the plaintiff, those characteristics did not necessarily render the clothing "defective and unreasonably dangerous" toward an ordinary consumer not exposed to unusual fire hazards. Thus, the Court concluded that "the claimed inconsistencies in the verdict could be resolved to read that the work clothing was not 'defective' because it was not unreasonably dangerous to the average consumer, but that [the defendant] was negligent in selling it without warnings of its flammability."*

Bragg, 319 S.C. at 541, 462 S.E.2d at 327 (emphases added) (citations omitted) (quoting *Bigham*, 268 N.W.2d at 896-98).

However, in *Branham*, our supreme court counseled:

While we agree that strict liability and negligence are not mutually exclusive theories of recovery, we caution against a broad reading of *Bragg* in this regard. An analytical framework that turns solely on whether strict liability and negligence are mutually exclusive theories of recovery may miss the mark. As noted, the negligence claim must have a fault-based element, which is not required for a strict liability claim. *Where one claim is dismissed and a question arises as to the continuing viability of the companion claim, the critical inquiry is to ascertain the basis for the dismissal. If one claim is dismissed and the basis of the dismissal rests on a common element shared by the companion claim, the companion claim must also be dismissed.*

390 S.C. at 211-12, 701 S.E.2d at 9 (emphasis added). Fisher argues that the basis for the jurors' rejection of Rita's strict liability claim was a finding that Fisher's product was not unreasonably dangerous to the user. However, as we previously stated, this is speculative.

Rita also argues that in the present case, the circuit court's instructions to the jury concerning negligence presented it as "a broader theory of recovery than strict liability," and therefore, the verdicts for strict liability and negligence may be reconciled.^[5] Rita specifically cites the following language that the circuit court included in its instruction on negligence but did not include in its strict liability instruction:

A manufacturer who incorporates a defective *component* or part into its finished product and places the finished product in the stream of commerce is liable for injuries caused by defects in the component part. A defendant cannot, however, be liable for an allegedly defective product that it did not design, *recommend*, *specify*, require, manufacture, sell, or place in the stream of commerce.

(emphases added). Rita contends this language is "much broader than the strict liability instruction that the plaintiff must show that 'the product was defective and unreasonably dangerous when placed in the stream of commerce.'"^[6] We agree that if the jurors understood "the product" to be Fisher's valves rather than the asbestos gaskets themselves, they could perceive the above instruction to provide more flexibility than the strict liability instruction given because it would allow them to consider the gaskets as a component of Fisher's valves. Also, the presence of the words "recommend" and "specify" in the above instruction provides an additional basis for negligence liability that was not present (and should not have been present) in the circuit court's strict liability instruction—Fisher recommended asbestos gaskets as an option for use on their valves' external flanges even though they did not sell those particular gaskets.

These differences in the jury instructions for strict liability and negligence provide a logical reason for reconciling the verdicts on these claims. Having been presented with two additional considerations during the negligence instruction, i.e., a product's defective components and a defendant's product recommendation, the jurors had more flexibility in applying the circuit court's negligence instruction than it did in applying the circuit court's strict liability instruction. Further, the jurors' question concerning strict liability indicates they were struggling with that concept. Yet they had the benefit of the circuit court's instruction that Rita was not required to prove all three theories, i.e., strict liability, negligence, and breach of warranty, to recover from Fisher. They also had the benefit of the instruction that the focus in evaluating a strict liability claim is on the product and the focus in evaluating a negligence claim is on the defendant's conduct.

Moreover, the jurors' punitive damages award and finding for Rita on the breach of warranty claim (in addition to their finding for Rita on the negligence claim) clearly indicates their intent to hold Fisher accountable for Tommy's deadly exposure to the asbestos components of its valves and for its recommendation to use asbestos gaskets on the valves' external flanges.

Therefore, we conclude that the circuit court acted within its discretion in denying Fisher's new trial motion on the ground of inconsistent verdicts. See Austin, 387 S.C. at 49-50, 691 S.E.2d at 149 ("It is the duty of the court to sustain verdicts when a logical reason for reconciling them can be found." (quoting Rhodes, 249 S.C. at 530, 155 S.E.2d at 310)); *id.* at 49, 691 S.E.2d at 149 ("Whether to grant a new trial is a matter within the discretion of the trial judge, and this decision will not be disturbed on appeal unless it is unsupported by the evidence or is controlled by an error of law.").

II. Expert Testimony

Next, Fisher assigns error to the admission of testimony from Rita's causation experts on the grounds that (1) the testimony was unreliable and (2) it violated Rule 403, SCORE. Fisher also asserts that in the absence of this testimony, there was insufficient evidence of proximate cause and, therefore, the circuit court should have granted its JNOV motion. We will address these arguments in turn.

"The admission or exclusion of evidence is a matter within the [circuit] court's sound discretion, and an appellate court may only disturb a ruling admitting or excluding evidence upon a showing of a 'manifest abuse of discretion accompanied by probable prejudice.'" Thompson v. Swicegood, 430 S.C. 648, 661, 845 S.E.2d 920, 926-27 (Ct. App. 2020) (quoting Burke v. Republic Parking Sys., Inc., 421 S.C. 553, 558, 808 S.E.2d 626, 628 (Ct. App. 2017)). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." *Id.* at 661, 845 S.E.2d at 927 (quoting Burke, 421 S.C. at 558, 808 S.E.2d at 628); see also Haselden v. Davis, 341 S.C. 486, 497, 534 S.E.2d 295, 301 (Ct. App. 2000) ("Absent a showing of a clear abuse of that discretion, the [circuit] court's admission or rejection of evidence is not subject to reversal on appeal."). We will now address what the law requires to establish causation in an asbestos case.

Whether the theory under which a products liability plaintiff seeks recovery is negligence, strict liability, or breach of warranty, it is necessary to show "the product defect was the proximate cause of the injury sustained." Bray v. Marathon Corp., 356 S.C. 111, 116, 588 S.E.2d 93, 95 (2003). "Proximate cause requires proof of both causation in fact and legal cause, which is proved by establishing foreseeability." *Id.* at 116-17, 588 S.E.2d at 95. "Ordinarily, the question of proximate cause is one of fact for the jury[,] and the [circuit court's] sole function regarding the issue is to inquire whether particular conclusions are the only reasonable inferences that can be drawn from the evidence." Small, 329 S.C. at 464, 494 S.E.2d at 843.

Further, to account for multiple possible sources of the plaintiff's exposure to asbestos in a workplace setting, the law requires the plaintiff to show "more than a casual or minimum contact with the product"^[7] yet stops short of requiring the

plaintiff to eliminate causation from all possible sources other than the defendant's product.^[6] This compromise in the jurisprudence governing asbestos litigation has been labeled "the substantial factor test," and it has been adopted in most United States jurisdictions.^[9] If the plaintiff can show his "exposure to a specific product on a regular basis over some extended period of time in proximity to where [he] actually worked," the jury may draw from the circumstantial evidence a reasonable inference of that product's "substantial causation" of the plaintiff's illness. Henderson v. Allied Signal, Inc., 373 S.C. 179, 185, 644 S.E.2d 724, 727 (2007); see also Lohrmann, 782 F.2d at 1158, 1162 (applying Maryland law to a pipefitter's products liability claims and restating Maryland's substantial factor test: "To establish proximate causation . . . , the plaintiff must introduce evidence [that] allows the jury to reasonably conclude that it is more likely than not that the conduct of the defendant was a *substantial factor* in bringing about the result." (emphasis added)).

By eliminating the "but for" requirement for proximate cause applied in traditional tort cases, our asbestos jurisprudence has recognized it as an "insuperable barrier to many deserving plaintiffs"^[10] while still requiring the plaintiff to show "more than a casual or minimum contact with the product,"^[11] thereby "absolving defendants who were not responsible for plaintiffs' injuries."^[12] In other words:

Courts, building on the Restatement (Second) of Torts, have concluded that plaintiffs must provide sufficient evidence for a jury to conclude that exposure to the defendant's asbestos or asbestos-containing product was a "substantial factor" in promoting the disease. As the comments to the Restatement (Second) note, if other actors' conduct is the predominant factor in bringing the harm at issue, then a defendant's action is not a "substantial factor" in causing the harm, and thus it is not the legal cause of the harm.

Asbestos plaintiffs have faced the problem that in most cases they were exposed to asbestos many years earlier and are unable to prove with any precision how much exposure they received from any particular defendant's products. Given that this could prove an insuperable barrier to many deserving plaintiffs, courts have overwhelmingly held that proximate cause in the asbestos context should be considered in light of the "frequency, regularity, proximity test" pioneered by the Fourth Circuit Court of Appeals in [Lohrmann]. This test attempts to reduce the evidentiary burden on plaintiffs while still absolving defendants who were not responsible for plaintiffs' injuries.

David E. Bernstein, *Getting to Causation in Toxic Tort Cases*, 74 BROOK. L. REV. 51, 55-56 (2008) (footnotes omitted).

When the exposure occurred in an occupational setting, only the individual who contracted mesothelioma, or his co-workers, can provide the evidence necessary to meet the substantial factor test—an expert on medical causation will not purport to substitute his testimony on the science of medical causation for the legal standard that only evidence of the individual's occupational history can meet. See Rost, 151 A.3d at 1045 ("Ford has confused or conflated the 'irrefutable scientific fact' that every exposure cumulatively contributes to the total dose (which in turn increases the likelihood of disease), with the legal question under Pennsylvania law as to whether particular exposures to asbestos are 'substantial factors' in causing the disease. It was certainly not this [c]ourt's intention, in [its precedent], to preclude expert witnesses from informing juries about certain fundamental scientific facts necessary to a clear understanding of the causation process for mesothelioma, even if those facts do not themselves establish legal (substantial factor) causation."). As we explain below, the expert testimony in the present case reliably established medical causation, and the lay testimony provided the information necessary to meet the substantial factor test.

A. Admissibility

1. Reliability

Fisher asserts that both of Rita's medical causation experts testified that all asbestos exposures are the cause of a person's mesothelioma and this testimony does not meet the standard for reliability set forth in State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999). See *id.* at 20, 515 S.E.2d at 518 ("[T]he proper analysis for determining admissibility of scientific evidence is now under the SCRE. When admitting scientific evidence under Rule 702, SCRE, the [circuit court] must find the evidence will assist the trier of fact, the expert witness is qualified, and the underlying science is reliable."); *id.* at 19, 515 S.E.2d at 517 (setting forth four of "several factors" a court should examine in considering the admissibility of scientific evidence: "(1) the publications and peer review of the technique; (2) prior application of the method to the type of evidence

involved in the case; (3) the quality control procedures used to ensure reliability; and (4) the consistency of the method with recognized scientific laws and procedures").^[13] We disagree with Fisher's characterization of the expert testimony.

Rita presented the testimony of Dr. Arnold Brody, a cell biologist,^[14] and Dr. Arthur Frank, a physician specializing in occupational medicine.^[15] Dr. Brody testified concerning how the inhalation of asbestos causes mesothelioma. As to latency periods,^[16] Dr. Brody stated that most of them are from 30 to 50 or 60 years. Dr. Brody also stated that the consensus "among scientists who understand the literature is that all of the asbestos [fiber] varieties . . . cause mesothelioma."

Additionally, he explained that whether an individual develops mesothelioma from his or her exposure depends on that individual's personal susceptibility based on the response of his or her genetic defenses, and according to many government agencies, there is no known exposure level above background levels that is known to be safe. Dr. Brody described background levels of asbestos in the following manner:

[W]e all have some asbestos in our lungs, not enough to cause disease, but as we walk around every day in our environment, wherever we live, there's what's called an ambient exposure. Ambient air is just what's all around us. And there are a few fibers sitting out in the air from products that release asbestos over the years or naturally occurring asbestos that may get in the air. And we inhale that asbestos over time.

Dr. Brody also explained that "cumulative dose" means the dose of a substance that enters and accumulates in the lungs over time, and that a cumulative dose is what causes disease. He testified that all exposures to that particular substance "contribute to the likelihood of getting a disease." (emphasis added).

Later, Dr. Frank testified, stating that (1) all of the varieties of asbestos fibers "can cause all of the [asbestos] diseases" and (2) this fact is well-established in the medical community. Dr. Frank explained that as an individual's cumulative dose increases, his risk of disease increases. He also testified that to establish a medical connection between asbestos exposure and the development of mesothelioma, three criteria must be met: (1) documentation of asbestos exposure; (2) a latency period of at least ten years; and (3) a proper diagnosis.

After having reviewed Tommy's medical records, Dr. Frank stated, "There's no question in this case that [Tommy] had [] mesothelioma." He also stated that the body of literature about the level of asbestos emitted when asbestos gaskets are removed from a valve indicates that significant levels of asbestos fibers are released when the gasket is removed using a hand wire brush or an electric-powered grinder, showing models from 2.1 to 31 fibers per cubic centimeter.^[17] He explained that these levels could be as high as a million times more than background exposures.

Dr. Frank also explained that even high levels of asbestos fibers cannot be seen, and therefore, if one can see dust emanating from an asbestos product, "it's very likely that that dust is exceeding allowable levels" and "that's when you should particularly worry." Dr. Frank further testified that over the course of a year, repeated exposure at even the current permissible exposure limit presents a mesothelioma risk. According to Dr. Frank, OSHA's legal limit of exposure over an eight-hour working day is one-tenth of one fiber per cubic centimeter.

Dr. Frank acknowledged that many scientific organizations have indicated there is no known safe level of exposure to asbestos: "Outside the world of litigation, there is no entity that I know of, no persons, no organizations that would say that they can identify a safe[] level of exposure to asbestos." He explained that even at low levels of exposure, there is a risk for developing mesothelioma. Based on the evidence of Tommy's occupational exposure, Dr. Frank concluded that during Tommy's years working as an instrument technician for Duke, his regular and frequent exposures, from a distance of ten feet or less, to the removal of asbestos gaskets from the flange face of Fisher valves using wire brushes and power grinders were a significant cause of Tommy's mesothelioma. He stated that if Fisher valves had been the only source of Tommy's repeated exposures to asbestos during his entire life, that would have been sufficient to cause his mesothelioma.

Additionally, the affidavit of Dr. Frank was admitted into evidence. In his affidavit, Dr. Frank noted that over fifty countries have banned the use of all forms of asbestos. He also stated that a person's "cumulative exposure to asbestos contributes to the total dose of asbestos" and "[t]he total cumulative exposure combines to raise the risk of disease and ultimately, in someone with the disease, to cause a patient's mesothelioma." He stressed:

These are my medical and scientific opinions. I am not offering *legal* opinions about whether an exposure is "significant" or "substantial" within the meaning of the law. I can only offer opinions about the *medical* and *scientific* significance of an exposure. Again, it must be remembered that an "exposure" is never a single

fiber; as discussed throughout this affidavit, when someone breathes visible dust from an asbestos product, there may be millions or billions of asbestos fibers present.

(emphasis in original).

Fisher maintains that the expert testimony is unreliable because it employed the "each and every exposure" theory of causation, which espouses the view that "'each and every breath' of asbestos is substantially causative of mesothelioma."^[18] However, Rita's experts relied on the cumulative dose theory, and their reliance on basic medical facts in reaching their opinion is not the equivalent of testifying that "each and every exposure" was a substantial factor in causing Tommy's mesothelioma.^[19]

Further, the cumulative dose theory on which Rita's experts relied easily meets the legal standard for reliability. As to items (1) and (2) of the *Council* factors for determining reliability (publications, peer review, and prior application of the method to the type of evidence involved in the case), Dr. Frank's affidavit indicates that scientists have analyzed cumulative asbestos exposure in order to ascribe causation in numerous peer-reviewed, published epidemiological studies, case series, and case reports. These publications "reinforce the scientific consensus that each occupational and para-occupational exposure to asbestos *contributes* to the cumulative lifetime asbestos exposure and increases a person's risk of developing mesothelioma." (emphasis added). As to item (3) (quality control procedures used to ensure reliability), Dr. Frank and his peers have not limited their analyses to the epidemiology of a substance but have also considered other scientific data, such as genetics, host factors, immunologic status, the relationship between risk and the level of exposure, and the dose-response principle. Dr. Frank stated,

It is precisely because scientists and physicians understand the limitations of epidemiology and how certain factors can bias studies toward a lack of statistical significance or finding of a point estimate of no increased risk[] that we look at the epidemiology of a substance *along with* the other scientific data described above. Each epidemiological study must be evaluated for its strengths and weaknesses, and decisions about cause and effect should only be made on reliable data.

(emphasis added).

As to item (4) (consistency of the method with recognized scientific laws and procedures), Dr. Frank stated that he follows the same weight-of-the-evidence methodology used by the International Agency for Research on Cancer, the World Health Organization, the National Institute for Occupational Safety and Health, and the Agency for Toxic Substances and Disease Registries in reaching his conclusions about the health effects of asbestos. He explained that the duties of these organizations are to evaluate the science and not to set policy. He also noted that occupational and environmental epidemiology "is a blunt instrument and is not, in most cases, well suited to examining *precise* dose-response relationships." (emphasis added). Dr. Frank stated, "When examining the question of causation of sentinel diseases like mesothelioma[,] ^[20] the scientific community recognizes case reports and case series reports are useful and valid tools."

We view the testimony concerning cumulative dose as background information essential for the jury's understanding of medical causation, which must be based on science. This presentation was not an attempt to supplant the *Henderson/Lohrmann* test.^[21] Further, Dr. Frank supplemented this background information with his assessment of the probable level of exposure, 2.1 to 31 fibers per cubic centimeter, for each asbestos gasket removal Tommy was in close proximity to. He further explained that this level is millions of times higher than background exposure. Both of Rita's experts were guided by the facts specific to Tommy's occupational exposure to Fisher's products in forming their opinions concerning causation. Further, Dr. Frank routinely relies on the following factors in examining a specific case:

In determining the relative contribution of any exposures to asbestos above background levels, it is important to consider a number of factors, including: the nature of exposure, the *level* of exposure and the *duration* of exposure, whether a product gives off respirable asbestos fibers, the level of exposure, whether a person was *close to or far from the source* of fiber release, how *frequently* the exposure took place and how long the exposure lasted, whether engineering or other methods of dust control were in place, and whether respiratory protection was used.

(emphases added).

Based on the foregoing, we conclude that only when the science of cumulative exposure is distorted through the lens of the inapt "but for" analysis can it be viewed as unreliable. In any event, Fisher has failed to show there is a reasonable probability the jury's verdict was influenced by any testimony that could be reasonably characterized as espousing the each and every exposure theory. See Fields v. Reg'l Med. Ctr. Orangeburg, 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005) ("To warrant reversal based on the admission or exclusion of evidence, the appellant must prove both the error of the ruling and the resulting prejudice, i.e., that there is a reasonable probability the jury's verdict was influenced by the challenged evidence or the lack thereof.").

Nothing in the testimony of Rita's experts indicates they were seeking to substitute their opinions on the science underlying mesothelioma for the legal standard on causation. Further, the circuit court instructed the jury, in pertinent part,

Under any products liability theory of recovery, strict liability, negligence, or breach of warranty, the plaintiff must establish that the product defect was a proximate cause of the injuries sustained. The plaintiff must prove that the plaintiff's exposure to the defendants' asbestos product was *of such a frequency, regularity, and duration that it was a substantial factor in bringing about the disease or injury.* . . .

(emphasis added).

With clear guidance from the circuit court's instructions on the law, which included the *Henderson/Lohrmann* standard, the jury was capable of distinguishing between the science-based testimony concerning asbestos exposure and the legal standard for establishing causation in the face of multiple possible sources of the plaintiff's exposure. Therefore, any possible presence of unreliable information in isolated portions of the expert testimony would have paled in comparison to the lay testimony concerning Tommy's occupational history.

2. Rule 403

"Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Rule 403, SCRE. "Evidence is unfairly prejudicial if it has an undue tendency to suggest a decision on an improper basis. . . ." Matter of Campbell, 427 S.C. 183, 193, 830 S.E.2d 14, 19 (2019) (quoting State v. Wilson, 345 S.C. 1, 7, 545 S.E.2d 827, 830 (2001)). "The determination of prejudice must be based on the entire record and will generally turn on the facts of each case." Campbell, 427 S.C. at 193, 830 S.E.2d at 19. Further, only exceptional circumstances justify reversing the circuit court's decision on this ground. State v. Huckabee, 419 S.C. 414, 423, 798 S.E.2d 584, 589 (Ct. App. 2017).

The same reasons for our conclusion that the challenged expert testimony was reliable compel us to conclude that this evidence does not tend to mislead the jury or suggest a decision on an improper basis and, therefore, there was no danger of unfair prejudice to Fisher. Only when the science of cumulative exposure is distorted through the lens of the inapt "but for" analysis can it be viewed as misleading, confusing, or unfair to defendants. Therefore, the circuit court acted within its discretion in rejecting Fisher's argument that the testimony required exclusion pursuant to Rule 403. See Rule 403, SCRE ("Although relevant, evidence may be excluded if its probative value is *substantially outweighed* by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." (emphasis added)); Huckabee, 419 S.C. at 423, 798 S.E.2d at 589 (indicating that only exceptional circumstances justify reversing the circuit court's decision on this ground); Thompson, 430 S.C. at 661, 845 S.E.2d at 926-27 ("The admission or exclusion of evidence is a matter within the trial court's sound discretion, and an appellate court may only disturb a ruling admitting or excluding evidence upon a showing of a 'manifest abuse of discretion accompanied by probable prejudice.'"); see also Haselden, 341 S.C. at 497, 534 S.E.2d at 301 ("Absent a showing of a clear abuse of that discretion, the [circuit] court's admission or rejection of evidence is not subject to reversal on appeal.").

B. Sufficiency of Causation Evidence

Because the expert testimony on causation was properly admitted into evidence, we reject Fisher's argument that Rita's evidence of causation was insufficient. See Duckett ex rel. Duckett v. Payne, 279 S.C. 94, 96, 302 S.E.2d 342, 343 (1983) ("[T]he appellant carries the burden of convincing this [c]ourt that the [circuit] court erred."); see also Curcio v. Caterpillar, Inc., 355 S.C. 316, 320, 585 S.E.2d 272, 274 (2003) ("In considering a JNOV, the [circuit court] is concerned with the existence

of evidence, not its weight."); *id.* ("The jury's verdict must be upheld unless no evidence reasonably supports the jury's findings."); *Williams Carpet Contractors, Inc. v. Skelly*, 400 S.C. 320, 325, 734 S.E.2d 177, 180 (Ct. App. 2012). ("When ruling on a JNOV motion, the [circuit] court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the nonmoving party."); *id.* ("This court must follow the same standard."); *id.* ("If more than one reasonable inference can be drawn or if the inferences to be drawn from the evidence are in doubt, the case should be submitted to the jury." (quoting *Chaney v. Burgess*, 246 S.C. 261, 266, 143 S.E.2d 521, 523 (1965))); *Small*, 329 S.C. at 464, 494 S.E.2d at 843 ("Ordinarily, the question of proximate cause is one of fact for the jury and the [circuit court's] sole function regarding the issue is to inquire whether particular conclusions are the only reasonable inferences that can be drawn from the evidence."); *cf.* *Est. of Mims v. S.C. Dep't of Disabilities & Special Needs*, 422 S.C. 388, 403, 811 S.E.2d 807, 815 (Ct. App. 2018) (holding multiple inferences that could be drawn from the evidence precluded summary judgment and required a jury to determine the question of causation).

In addition to the expert testimony showing medical causation, the lay testimony meets *Henderson's* substantial factor test. In a nutshell, for at least 15 years, Tommy's work regularly required him to be within close proximity to co-workers' removal of asbestos gaskets and packing from numerous Fisher valves, and he would have breathed the visible asbestos dust from this process. See *Henderson*, 373 S.C. at 185, 644 S.E.2d at 727 ("To support a reasonable inference of substantial causation from circumstantial evidence, there must be evidence of exposure to a specific product on a regular basis over some extended period of time in proximity to where the plaintiff actually worked." (quoting *Lohrmann*, 782 F.2d at 1162-63)).

III. Jury Instructions

Fisher contends the circuit court erred in declining to instruct the jury on the sophisticated intermediary doctrine, intervening cause, and the unavailability of punitive damages in breach of warranty claims. We will address each of these proposed instructions in turn, but first we consider the law concerning jury instructions in general.

"An appellate court will not reverse the trial court's decision regarding jury instructions unless the trial court abused its discretion." *Clark v. Cantrell*, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." *Id.* "When instructing the jury, the trial court is required to charge only principles of law that apply to the issues raised in the pleadings and developed by the evidence in support of those issues." *Id.* at 390, 529 S.E.2d at 539. "Furthermore, the trial court is required to charge only the current and correct law of South Carolina." *Id.*

"In reviewing jury charges for error, we must consider the court's jury charge as a whole in light of the evidence and issues presented at trial." *State v. Marin*, 415 S.C. 475, 482, 783 S.E.2d 808, 812 (2016) (quoting *State v. Brandt*, 393 S.C. 526, 549, 713 S.E.2d 591, 603 (2011)). "The substance of the law is what must be instructed to the jury, not any particular verbiage." *Id.* (quoting *State v. Smith*, 315 S.C. 547, 554, 446 S.E.2d 411, 415 (1994)).

Accordingly, a refusal to give a requested instruction stating a sound principle of law applicable to the case at hand constitutes reversible error only when "the principle is not otherwise included in the charge." *Clark*, 339 S.C. at 390, 529 S.E.2d at 539. Further, "the [circuit] court is not required to instruct the jury on a principle of law that is irrelevant to the case as proved." *Id.* "Moreover, even if the [circuit] court erred in failing to give a requested instruction, the requesting party also must show that the error was prejudicial to warrant reversal on appeal." *Id.*; see also *Pittman v. Stevens*, 364 S.C. 337, 340, 613 S.E.2d 378, 380 (2005) ("A trial court's refusal to give a properly requested charge is reversible error only when the requesting party can demonstrate prejudice from the refusal.").

A. Sophisticated Intermediary Doctrine

Fisher asserts that the circuit court should have charged the jury on the sophisticated intermediary doctrine because there was sufficient evidence to show that (1) Duke should have been aware of the danger associated with asbestos gaskets and (2) it was reasonable for Fisher to rely on Duke to warn its employees of this danger.^[22] In our view, the evidence in the present case is insufficient to require a jury instruction on this doctrine.

"The [sophisticated intermediary] doctrine originated in the *Restatement Second of Torts*, section 388, comment n, . . . which addresses when warnings to a party in the supply chain are sufficient to satisfy the supplier's duty to warn." *Webb v. Special Elec. Co.*, 370 P.3d 1022, 1033 (Cal. 2016). "The Restatement drafters' most recent articulation of the sophisticated

intermediary doctrine appears in the *Restatement Third of Torts, Products Liability*, section 2, comment i, at page 30. The drafters intended this comment to be substantively the same as section 388, comment n, of the *Restatement Second of Torts*." Webb, 370 P.3d at 1034. Comment i states, in pertinent part:

There is *no general rule* as to whether one supplying a product for the use of others through an intermediary has a duty to warn the ultimate product user directly or may rely on the intermediary to relay warnings. *The standard is one of reasonableness in the circumstances*. Among the factors to be considered are the *gravity of the risks* posed by the product, the likelihood that the intermediary will convey the information to the ultimate user, and the feasibility and effectiveness of giving a warning directly to the user.

Restatement (Third) of Torts: Prods. Liab. § 2, cmt. i (Am. Law Inst. 1998) (emphases added).

Here, the gravity of the risks of lung cancer and death resulting from the inhalation of friable asbestos could not have been greater. Further, Fisher has not shown that placing a written warning on the outside of their valves or on the replacement gaskets it sold to Duke would have been infeasible or ineffective. Therefore, we are not convinced that these circumstances made it reasonable for a supplier of asbestos gaskets to rely on Duke to relay warnings to its employees. *See id.*; Duckett, 279 S.C. at 96, 302 S.E.2d at 343 ("[T]he appellant carries the burden of convincing this [c]ourt that the [circuit] court erred.").

Moreover, it is not enough to show that the supplier's reliance would have been reasonable—the supplier must also show that it actually relied on the intermediary to convey warnings to end users. *See Webb*, 370 P.3d at 1036 ("To establish a defense under the sophisticated intermediary doctrine, a product supplier must show not only that it warned or sold to a knowledgeable intermediary, but also that it *actually* and reasonably relied on the intermediary to convey warnings to end users. This inquiry will typically raise questions of fact for the jury to resolve unless critical facts establishing reasonableness are undisputed." (emphasis added)).^[23]

Rita maintains that Fisher introduced no evidence that it actually relied on Duke to warn its employees about the danger of asbestos gaskets, and Fisher has not cited any evidence to that effect in its briefs. In fact, the testimony of Fisher's corporate representative, Ronald Dumistra, indicates that Fisher could not have relied on Duke to convey warnings to its employees because Fisher did not consider asbestos gaskets to be a health risk. In other words, Fisher's belief that asbestos gaskets posed no health risk is inconsistent with Fisher's claim that it relied on Duke to warn Tommy of the dangers of asbestos gaskets.

Based on the foregoing, Fisher has not carried its burden of convincing this court that the circuit court should have instructed the jury on the sophisticated intermediary doctrine. *See Clark*, 339 S.C. at 389, 529 S.E.2d at 539 ("When instructing the jury, the trial court is required to charge only principles of law that apply to the issues raised in the pleadings and *developed by the evidence* in support of those issues." (emphasis added)); *id.* at 390, 529 S.E.2d at 539 ("[T]he trial court is not required to instruct the jury on a principle of law that is irrelevant to the case as *proved*." (emphasis added)); Duckett, 279 S.C. at 96, 302 S.E.2d at 343 ("[T]he appellant carries the burden of convincing this [c]ourt that the [circuit] court erred.").

B. Superseding Cause

Next, Fisher asserts that the circuit court should have charged the jury on superseding cause because there was sufficient evidence to support such a charge and the foreseeability of the intervening acts of third parties was a fact question for the jury. Specifically, Fisher asserts a superseding cause charge was supported by evidence of (1) Duke's negligent failure to warn employees that friable asbestos was released from asbestos gaskets during the process of removing them from the valves' components or from their external flanges and (2) the existence of non-Fisher sources of asbestos dust in Tommy's workplace.

"The defendant's negligence does not have to be the sole proximate cause of the plaintiff's injury; instead, the plaintiff must prove the defendant's negligence was at least one of the proximate causes of the injury." Roddey v. Wal-Mart Stores E., LP, 415 S.C. 580, 590, 784 S.E.2d 670, 676 (2016). "An intervening force may be a superseding cause that relieves an actor from liability, but *for there to be relief from liability, the intervening cause must be one that could not have been reasonably foreseen or anticipated*." *Id.* (emphasis added). "In other words, the intervening negligence of a third party will not excuse the first wrongdoer if such intervention ought to have been foreseen in the exercise of due care." *Id.* "In such case, the

original negligence still remains active[] and a contributing cause of the injury." *Id.* (quoting *Bishop v. S.C. Dep't of Mental Health*, 331 S.C. 79, 89, 502 S.E.2d 78, 83 (1998)).^[24]

We agree with Fisher that foreseeability is normally a fact question for the jury. See *Steele v. Rogers*, 306 S.C. 546, 551, 413 S.E.2d 329, 332 (Ct. App. 1992) ("Ordinarily, foreseeability is a question of fact to be decided by the jury."). However, for Fisher's superseding cause defense to be successful, it would have to convince the jury that it was unforeseeable for (1) Duke to fail to warn Tommy that friable asbestos was released from asbestos gaskets during the process of removing them from the valves' components or from their external flanges and (2) there to be non-Fisher sources of asbestos dust within Tommy's workplace. We view this case as one of those "rare or exceptional" cases in which the circuit court properly determined that, as a matter of law, both of these circumstances were foreseeable. See *Gause v. Smithers*, 403 S.C. 140, 150, 742 S.E.2d 644, 649 (2013) ("Only in rare or exceptional cases may the issue of proximate cause be decided as a matter of law." (quoting *Bailey v. Segars*, 346 S.C. 359, 367, 550 S.E.2d 910, 914 (Ct. App. 2001))).

When the circuit court made this determination, Fisher's own corporate representative had already testified that Fisher considered the gaskets in its valves, and the replacement gaskets it sold to Duke, to be safe once they left Fisher's supplier because the asbestos in them was encapsulated. In light of its own failure to anticipate the release of asbestos dust from grinding these gaskets, Fisher's claim that it could not have foreseen Duke's similar oversight lacks credibility. Despite Duke's obligation to comply with OSHA regulations, its unwitting noncompliance was foreseeable as a matter of law. Further, it is unrealistic to infer from the evidence that the existence of other sources of asbestos dust in Tommy's workplace was unforeseeable.

Moreover, we are not convinced that Fisher was prejudiced by the circuit court's failure to give a separate instruction on superseding cause. While instructing the jury on proximate cause, the circuit court discussed foreseeability in the following manner:

Plaintiffs must also prove something called "legal cause." And that is proven by showing that the injury was foreseeable. And that means the injury occurred as the *natural and probable* consequence of defendants' negligence.

The plaintiffs must prove that some injury from defendants' negligence was foreseeable. But they do not have to prove that the particular injury that occurred was foreseeable.

However, *the defendant cannot be held responsible for something that could not be expected to happen.* There's more than one cause—there can be more than one cause.

Proximate cause does not mean the only cause. The defendants' actions can be a proximate cause of plaintiff's injury if defendants' conduct was at least one of the direct causes of the injury. Where two or more causes combine to produce the injury, [the] defendant is not relieved from liability for negligence because it's only responsible for one of the [causes]. It is sufficient that its negligence is a proximate cause without which the injury would not have resulted to a greater extent.

Consequently, if defendants' negligence is a proximate cause of an injury to another, the fact that the negligence of a third party occurred with its own — that negligence of a third party occurred with its own negligence to produce the harm does not relieve it of liability. In such cases, each wrongdoer is in breach of the duty of care over the plaintiffs. And because the negligence of each occurred to produce the injury, they can all be liable.

Under South Carolina law, a defendant is entitled to assert that other persons or entities contributed to the alleged injury or damage. The matter of others' alleged fault causing the plaintiff's injury has been raised by the defendant. *It's proper for you to consider the actions of others*, but only so far as plaintiffs have met their burden of proof.

(emphases added). Therefore, even if the foreseeability of third-party negligence had been truly a question of fact in the present case, the above language advised the jury that an unforeseeable intervening force relieves the defendant from liability. See *Clark*, 339 S.C. at 389, 529 S.E.2d at 539 ("It is error for the trial court to refuse to give a requested instruction which states a sound principle of law when that principle applies to the case at hand, and the principle is not otherwise included in the charge." (emphasis added)); *State v. Marin*, 415 S.C. 475, 482, 783 S.E.2d 808, 812 (2016) ("In reviewing

jury charges for error, we must consider the court's jury charge as a whole in light of the evidence and issues presented at trial." (quoting State v. Brandt, 393 S.C. 526, 549, 713 S.E.2d 591, 603 (2011)); *id.* ("The substance of the law is what must be instructed to the jury, not any particular verbiage." (quoting State v. Smith, 315 S.C. 547, 554, 446 S.E.2d 411, 415 (1994))).

Based on the foregoing, we affirm the circuit court's ruling on this issue. See Duckett, 279 S.C. at 96, 302 S.E.2d at 343 ("[T]he appellant carries the burden of convincing this [c]ourt that the [circuit] court erred.").

C. Punitive Damages

Fisher also assigns error to the circuit court's failure to instruct the jury that it was impermissible to award punitive damages on a breach of warranty claim. Fisher asserts that this alleged error was reversible. We disagree.

First, even if we assumed that the circuit court should have given the requested instruction, Fisher was not prejudiced by this omission because the jury found for Rita on her negligence claim, which undoubtedly allows for a punitive damages award if the jury also finds the defendant's conduct was willful, wanton, or reckless. See Taylor, 324 S.C. at 221, 479 S.E.2d at 46 ("In order for a plaintiff to recover punitive damages, there must be evidence the defendant's conduct was willful, wanton, or in reckless disregard of the plaintiff's rights."); Carter v. Beals, 248 S.C. 526, 534, 151 S.E.2d 671, 675 (1966) (holding that causing a collision by violating certain statutes constituted actionable negligence and would justify punitive damages). Here, the jury found "by clear and convincing evidence" that Fisher's conduct was "willful, wanton, or reckless." Therefore, for this reason alone, we would affirm on this issue. See Pittman, 364 S.C. at 340, 613 S.E.2d at 380 ("A trial court's refusal to give a properly requested charge is reversible error only when the requesting party can demonstrate prejudice from the refusal.").

Additionally, we see no merit in the argument that the circuit court was required to give the requested instruction. Although Fisher cites Rhodes v. McDonald, 345 S.C. 500, 504-05, 548 S.E.2d 220, 222 (Ct. App. 2001), in support of its argument, Rhodes does not stand for the proposition that the requested instruction is required when the plaintiff's claims consist of a mix of tort and warranty claims. Further, Fisher has not cited any case law that requires such a specific instruction.

In Rhodes, the plaintiffs' claims against the defendants were breach of contract and breach of the implied warranties of merchantability, habitability, and fitness for a particular purpose. 345 S.C. at 501, 505 n.8, 548 S.E.2d at 221, 223 n.8. On appeal, the defendants assigned error to the circuit court's denial of their directed verdict motion "as to the unavailability of punitive damages on the breach of implied warranty claims." *Id.* at 503, 548 S.E.2d at 221. This court concluded that the circuit court should not have submitted the issue of punitive damages to the jury and, thus, reversed the punitive damages award. *Id.* at 503-05, 548 S.E.2d at 221-23. The critical difference between Rhodes and the present case is that in Rhodes, none of the plaintiffs' claims allowed for a punitive damages award and, in the present case, the negligence claim allows for such an award.

Fisher asserts, "The parties and the trial court cannot assume the jury knew this specific legal principle and analyzed *only Fisher's negligence* in awarding punitive damages. The *only way* to prevent the jury from awarding punitive damages for the breach of warranty claim was for the trial court to instruct the jury that the law prohibits it." (emphases added). However, as unlikely as it would have been, had the jury found for Rita on *only* the breach of warranty claim (rejecting her negligence claim) and also awarded her punitive damages, the circuit court could have easily cured the prejudice to Fisher by granting a JNOV as to the punitive damages award. Further, the jury's focus should not have been on pigeonholing Fisher's recklessness. Rather, in considering the issue of punitive damages, the jury's sole focus should have been on whether there was clear and convincing evidence that Fisher's misconduct was willful, wanton, or with reckless regard for Tommy's rights. The jury should not have been expected to do more than simply follow this standard.

Based on the foregoing, Fisher has not carried its burden of convincing this court that the circuit court erred in declining to give the requested instruction. See Duckett, 279 S.C. at 96, 302 S.E.2d at 343 ("[T]he appellant carries the burden of convincing this [c]ourt that the [circuit] court erred."). Therefore, we affirm this ruling.

IV. Apportionment

A. Application of the South Carolina Contribution Among Joint Tortfeasors Act

We affirm the circuit court's ruling on Fisher's apportionment arguments pursuant to Rule 220(b), SCACR and the following authorities: S.C. Code Ann. § 15-38-15 (Supp. 2022) (allowing a defendant responsible for less than fifty percent of total fault to assert liability against other potential tortfeasors); Burns v. State Farm Mut. Auto. Ins. Co., 297 S.C. 520, 522, 377 S.E.2d 569, 570 (1989) ("The cardinal rule of statutory construction is that we are to ascertain and effectuate the actual intent of the legislature."); State v. Johnson, 396 S.C. 182, 188, 720 S.E.2d 516, 520 (Ct. App. 2011) ("In interpreting a statute, the court will give words their plain and ordinary meaning[] and will not resort to forced construction that would limit or expand the statute."); S.C. Energy Users Comm. v. S.C. Pub. Serv. Comm'n, 388 S.C. 486, 491, 697 S.E.2d 587, 590 (2010) ("Under the plain meaning rule, it is not the province of the court to change the meaning of a clear and unambiguous statute. Where the statute's language is plain, unambiguous, and conveys a clear, definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning." (citation omitted)); Singleary v. S.C. Dep't of Educ., 316 S.C. 153, 162, 447 S.E.2d 231, 236 (Ct. App. 1994) ("The intention of the legislature must be gleaned from the entire section and not simply clauses taken out of context." (emphasis added)); CFRE, LLC v. Greenville Cty. Assessor, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011) (stating that a statute "must be read as a whole and sections [that] are part of the same general statutory law must be construed together and each one given effect" (emphasis added) (quoting S.C. State Ports Auth. v. Jasper County, 368 S.C. 388, 398, 629 S.E.2d 624, 629 (2006))); *id.* ("We therefore should not concentrate on isolated phrases within the statute."); *id.* ("Instead, we read the statute as a whole and in a manner consonant and in harmony with its purpose."); *id.* ("In that vein, we must read the statute so 'that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous,' for '[t]he General Assembly obviously intended [the statute] to have some efficacy, or the legislature would not have enacted it into law.'" (citation omitted) (alterations in original) (quoting State v. Sweat, 379 S.C. 367, 377, 382, 665 S.E.2d 645, 651, 654 (Ct. App. 2008))); Smith v. Tiffany, 419 S.C. 548, 557, 799 S.E.2d 479, 484 (2017) ("[T]he General Assembly took steps to protect nonsettling defendants by codifying a nonsettling defendant's right to argue the so-called empty chair defense in subsection (D) [of section 15-38-15]."); *id.* ("[A] critical feature of the statute is the codification of the empty chair defense—a defendant 'retain[s] the right to assert another potential tortfeasor, whether a party or not, contributed to the alleged injury or damages'—which necessarily contemplates lawsuits in which an allegedly culpable person or entity is not a party to the litigation (hence the chair in question being 'empty')." (first alteration added)).

B. Constitutional Violations

We affirm the circuit court's ruling on Fisher's constitutional arguments pursuant to Rule 220(b), SCACR and the following authorities: S.C. Code Ann. § 15-38-15(D) (Supp. 2022) (codifying a defendant's right to argue the "empty chair" defense); S.C. Code Ann. § 15-38-50(1) (2005) (allowing the application of a setoff from settlement proceeds to a compensatory damages award); R.L. Jordan Co. v. Boardman Petroleum, Inc., 338 S.C. 475, 478, 527 S.E.2d 763, 765 (2000) (indicating that the standard for whether legislation violates the substantive due process protection afforded by Article I, section 3 of the South Carolina Constitution is "[w]hether it bears a reasonable relationship to any legitimate interest of government"); Worsley Companies, Inc. v. Town of Mount Pleasant, 339 S.C. 51, 56, 528 S.E.2d 657, 660 (2000) ("Substantive due process protects a person from being deprived of life, liberty or property for arbitrary reasons."); *id.* ("A plaintiff must show that he was arbitrarily and capriciously deprived of a cognizable property interest rooted in state law."); Fraternal Ord. of Police v. S.C. Dep't of Revenue, 352 S.C. 420, 430, 574 S.E.2d 717, 722 (2002) (recognizing that for purposes of equal protection of the laws, "the determination of whether a classification is reasonable is initially one for the legislature and will not be set aside by the courts unless it is plainly arbitrary." (quoting Gary Concrete Products, Inc. v. Riley, 285 S.C. 498, 504, 331 S.E.2d 335, 338 (1985))); Denene, Inc. v. City of Charleston, 359 S.C. 85, 91, 596 S.E.2d 917, 920 (2004) ("If the classification does not implicate a suspect class or abridge a fundamental right, the rational basis test is used."); *id.* ("Under the rational basis test, the requirements of equal protection are satisfied when: (1) the classification bears a reasonable relation to the legislative purpose sought to be [e]ffected; (2) the members of the class are treated alike under similar circumstances and conditions; and[] (3) the classification rests on some reasonable basis."); Doe v. State, 421 S.C. 490, 505, 808 S.E.2d 807, 814 (2017) ("Those attacking the validity of legislation under the rational basis test of the Equal Protection Clause have the burden to negate every conceivable basis which might support it." (quoting Boiter v. S.C. Dep't of Transp., 393 S.C. 123, 128, 712 S.E.2d 401, 403-04 (2011))); Doctor v. Robert Lee, Inc., 215 S.C. 332, 335, 55 S.E.2d 68, 69 (1949) ("One who is injured by the wrongful act of two or more joint [tortfeasors] has the option of bringing an action

against either one or all of them as [] defendants. . . . To allow a defendant against the will of the plaintiff to bring in other joint [tortfeasors] as defendants would deny the plaintiff the right to name whom he should sue."); Tiffany, 419 S.C. at 563, 799 S.E.2d at 487 ("[T]his right of the plaintiff to choose her defendant has been recognized in South Carolina jurisprudence for almost two hundred years."); *id.* at 556-57, 799 S.E.2d at 483-84 (explaining the policy goals underlying the legislature's enactment of the South Carolina Contribution Among Joint Tortfeasors Act); Roschen v. Ward, 279 U.S. 337, 339 (1929) ("A statute is not invalid under the Constitution because it might have gone farther than it did, or because it may not succeed in bringing about the result that it tends to produce."); Riley v. Ford Motor Co., 414 S.C. 185, 196, 777 S.E.2d 824, 830 (2015) (stating that the South Carolina Contribution Among Joint Tortfeasors Act "represents the Legislature's determination of the proper balance between preventing double-recovery and South Carolina's 'strong public policy favoring the settlement of disputes.'" (quoting Chester v. S.C. Dep't of Pub. Safety, 388 S.C. 343, 346, 698 S.E.2d 559, 560 (2010))); CFRE, 395 S.C. at 74, 716 S.E.2d at 881 (stating that a statute "must be read as a whole and sections [that] are part of the same general statutory law must be construed together and each one given effect" (quoting S.C. State Ports Auth., 368 S.C. at 398, 629 S.E.2d at 629)); *id.* ("[W]e read the statute as a whole and in a manner consonant and in harmony with its purpose.").^[25]

C. Public Policy

We affirm the circuit court's ruling on Fisher's public policy argument pursuant to Rule 220(b), SCACR and the following authority: Tiffany, 419 S.C. at 559, 799 S.E.2d at 485 ("If the policy balance struck by the legislature in [the South Carolina Contribution Among Joint Tortfeasors] Act is to be changed, that prerogative lies exclusively within the province of the Legislative Branch.").

V. Setoff

Fisher contends that the circuit court erred by declining to grant a setoff in the full amount of Rita's settlement proceeds against the full amount of the jury's compensatory damages award because (1) Rita's allocation of the proceeds was unilateral and incomplete and (2) the circuit court failed to review the settlement documents. We agree that the circuit court should review the settlement documents and reconsider the respective amounts to be set off against the compensatory damages awards for Rita's three claims.

"The right to setoff has existed at common law in South Carolina for over 100 years." Riley, 414 S.C. at 195, 777 S.E.2d at 830. "Allowing setoff 'prevents an injured person from obtaining a double recovery for the damage he sustained, for it is almost universally held that there can be only one satisfaction for an injury or wrong.'" *Id.* (quoting Rutland v. S.C. Dep't of Transp., 400 S.C. 209, 216, 734 S.E.2d 142, 145 (2012)). "In 1988, these equitable principles were codified as part of the South Carolina Contribution Among Tortfeasors Act. . . ." *Id.* In particular, section 15-38-50 provides in pertinent part,

When a release or a covenant not to sue or not to enforce judgment is given *in good faith* to one of two or more persons liable in tort *for the same injury* or the same wrongful death . . . it . . . reduces the claim against the others to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is the greater[.]

(emphases added). "Therefore, before entering judgment on a jury verdict, the court must reduce the amount of the verdict to account for any funds previously paid by a settling defendant, so long as the settlement funds were paid to compensate the same plaintiff on a claim for the same injury."^[26] Smith v. Widener, 397 S.C. 468, 471-72, 724 S.E.2d 188, 190 (Ct. App. 2012) (emphases added). In other words, "[a] non-settling defendant is entitled to credit for the amount paid by another defendant who settles for the same cause of action." Riley, 414 S.C. at 195, 777 S.E.2d at 830 (emphasis added) (quoting Rutland, 400 S.C. at 216, 734 S.E.2d at 145).

"When the settlement is for the same injury, the nonsettling defendant's right to a setoff arises by operation of law." Widener, 397 S.C. at 472, 724 S.E.2d at 190. "Under this circumstance, '[s]ection 15-38-50 grants the court no discretion . . . in applying a [setoff]'" *Id.* (quoting Ellis v. Oliver, 335 S.C. 106, 113, 515 S.E.2d 268, 272 (Ct. App. 1999)). On the other hand, when the settlement "involves more than one claim, the allocation of settlement proceeds between various causes of action impacts the amount a non-settling defendant may be entitled to offset." Riley, 414 S.C. at 196, 777 S.E.2d at 830; see also Widener, 397 S.C. at 473, 724 S.E.2d at 191 ("[W]hen the prior settlement involves compensation for a different injury from the one tried to verdict, there is no setoff as a matter of law.").

Here, prior to trial, the circuit court issued an order approving the settlement of Rita's wrongful death and survival claims against some of Fisher's co-defendants pursuant to S.C. Code Ann. § 15-51-42.^[27] The circuit court also stated,

I approve the attorney's fees and expenses and the distribution of 90 [percent] to the wrongful death claim and 10 [percent] to the survival claim. In addition, all future settlements in this case that are disbursed in the same manner (attorney's fees and costs are deducted as indicated above and the remaining is divided pursuant to the heir agreement) are approved.^[28]

The order indicated that Rita had not yet executed a release or received settlement proceeds, and therefore, the circuit court was unable to review the settlement documents before approving the settlement. After trial, Fisher filed a motion for setoff and requested to view the settlement documents. In response, Rita indicated that she had received a total of \$2,805,000 in settlement proceeds. At the motions hearing, the circuit court reviewed a document Rita's counsel prepared showing a breakdown of what each settling defendant paid to Rita. However, the hearing transcript indicates the circuit court did not review the settlement agreements or releases. Instead, Rita's counsel represented to the circuit court that she had released all of her claims against the settling defendants.

The circuit court ruled that the allocation of 90 percent of the proceeds to the wrongful death claim was reasonable because Tommy had 14 more years of life expectancy and died a very painful death. The court also ruled that Rita was "well within [her] rights to allocate nothing to the loss of consortium." In its written order addressing Fisher's post-trial motions, the circuit court stated that its pre-trial approval of Rita's wrongful death and survival settlements "apportioned 90 [percent] of the settlement proceeds to wrongful death and 10 [percent] to survival." The circuit court determined that the setoff for wrongful death was \$2,524,500, which eclipsed the \$1 million awarded to Rita for that claim. The circuit court also determined that the setoff for the survival claim was \$280,000.^[29] The circuit court concluded that Fisher owed Rita "zero for wrongful death damages" and "\$720,000 for survival damages." The circuit court also concluded that there was no setoff for loss of consortium "as that claim was not settled pre-trial by any defendants,"^[30] and the total amount Fisher was responsible for was \$1,720,000, plus punitive damages.

Initially, we note that the circuit court had a responsibility to review the settlement documents *in camera* to verify not only the amount of the settlement and its terms but also whether it was "given in good faith." § 15-38-50 ("When a release or a covenant not to sue or not to enforce judgment is given *in good faith* to one of two or more persons liable in tort for the same injury or the same wrongful death: (1) it . . . reduces the claim against the others to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is the greater; and (2) it discharges the tortfeasor to whom it is given from all liability for contribution to any other tortfeasor." (emphasis added)); Huck v. Oakland Wings, LLC, 422 S.C. 430, 438, 813 S.E.2d 288, 292 (Ct. App. 2018) (remanding a case to the circuit court to review a settlement agreement and determine if a defendant was entitled to setoff). In *Huck*, this court held,

To determine if the nonsettling tortfeasor is entitled to a setoff as a preliminary matter, the documents must be reviewed to determine if their terms shield the settling tortfeasor from the requirements of section 15-38-50(2). Therefore, the court must review the documents to determine the amount of the settlement and its terms. Under section 15-38-50, the court also must determine if the release or covenant was "given in good faith." Because the trial court did not conduct such a review, we remand the case for the trial court to look at the settlement agreement and determine if [the nonsettling defendant] is entitled to a setoff.

Id. Therefore, we are compelled to remand this issue for the circuit court's *in camera* review of the settlement documents in accordance with *Huck*.

We also view the pre-trial allocation as potentially incomplete for purposes of a post-trial setoff because it did not reflect any consideration necessarily given for Rita's release of her loss of consortium claim. See § 15-38-50 ("When a release or a covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons liable in tort for the same injury or the same wrongful death . . . it . . . reduces the claim against the others to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is the greater[.]" (emphases added)); e.g., Sauner v. Pub. Serv. Auth. of S.C., 354 S.C. 397, 406, 581 S.E.2d 161, 166 (2003) ("The necessary elements of a contract are an offer, acceptance, and valuable consideration."). This may be due to the circuit court's stated assumption in its written orders that Rita did not release her loss of consortium claim against the settling defendants.

We acknowledge that our case law favors a plaintiff's ability to apportion settlement proceeds "in the manner most advantageous to [her]."^[31] Riley, 414 S.C. at 197, 777 S.E.2d at 831. However, we hesitate to read Riley too broadly. The principle underlying the right to a setoff, avoiding a double recovery, still requires the settlement of claims and allocation of the proceeds to be grounded in good faith. See § 15-38-50 ("When a release or a covenant not to sue or not to enforce judgment is given *in good faith* to one of two or more persons liable in tort for the same injury or the same wrongful death . . . it . . . reduces the claim against the others *to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it*, whichever is the greater[.]" (emphases added)).

As we read Riley, it appears that unlike the allocation in the present case, that allocation was specified in the settlement documents as contemplated by section 1538-50. Our supreme court reversed this court's re-allocation, concluding that this court erred in disturbing the settling parties' agreement "solely because the apportionment may have been advantageous to the [plaintiff]." 414 S.C. at 196, 777 S.E.2d at 831 (emphasis added)); see *id.* at 197, 777 S.E.2d at 831 ("Settling parties are naturally going to allocate settlement proceeds in a manner that serves their best interests. That fact alone is insufficient to justify appellate reapportionment for the sole purpose of benefitting [the defendant]." (emphasis added)).

Further, nothing in Riley suggests that the circuit court has the discretion to completely deny a setoff against a verdict for a particular claim after the plaintiff receives funds from a co-defendant to settle the same claim. See Widener, 397 S.C. at 472, 724 S.E.2d at 190 ("When the settlement is for the same injury, the nonsettling defendant's right to a setoff arises by operation of law. Under this circumstance, '[s]ection 15-38-50 grants the court no discretion . . . in applying a [setoff].'" (citation omitted) (quoting Ellis v. Oliver, 335 S.C. 106, 113, 515 S.E.2d 268, 272 (Ct. App. 1999)). Rather, Riley indicates that the circuit court has discretion as to merely the amount to be setoff against the verdict when the settlement involves multiple claims. 414 S.C. at 196, 777 S.E.2d at 830 (stating that when the settlement "involves more than one claim, the allocation of settlement proceeds between various causes of action impacts the amount a non-settling defendant may be entitled to offset").

Unlike the allocation in Riley, the unilateral allocation in the present case did not reflect any consideration given by the settling defendants for Rita's release of her loss of consortium claim. As we previously stated, the circuit court may have simply been under the impression that Rita did not release her loss of consortium claim against the settling defendants. In any event, we recognize that the specific amount to setoff against the compensatory damages award for loss of consortium is left to the circuit court's discretion as the three claims released by Rita respectively seek different types of damages and have different, overlapping beneficiaries.

Based on the foregoing, we remand for the circuit court's *in camera* review of the settlement documents in accordance with Huck and its reconsideration of the respective amounts to be set off against the jury's compensatory damages awards for Rita's three claims.

VI. Discovery Sanctions

Finally, Fisher argues the circuit court erred in imposing discovery sanctions on it because Fisher did not act in bad faith but merely sought to proffer expert testimony for purposes of appellate review.^[32] We disagree.

"The entire thrust of the discovery rules involves full and fair disclosure, 'to prevent a trial from becoming a guessing game or one of surprise for either party.'" Samples v. Mitchell, 329 S.C. 105, 113, 495 S.E.2d 213, 217 (Ct. App. 1997) (quoting State Highway Dep't v. Booker, 260 S.C. 245, 252, 195 S.E.2d 615, 619 (1973)). "Essentially, the rights of discovery provided by the rules give the trial lawyer the means to prepare for trial, and when these rights are not accorded, prejudice must be presumed." *Id.* at 113-14, 495 S.E.2d at 217. When a party disobeys a discovery order, Rule 37(b)(2) of the South Carolina Rules of Civil Procedure authorizes the circuit court to "make such orders in regard to the [disobedience] as are just." This language gives the circuit court discretion in the imposition of sanctions. See also Davis v. Parkview Apartments, 409 S.C. 266, 281, 762 S.E.2d 535, 543 (2014) ("The imposition of sanctions is generally entrusted to the sound discretion of the [c]ircuit [c]ourt." (quoting Downey v. Dixon, 294 S.C. 42, 45, 362 S.E.2d 317, 318 (Ct. App. 1987))).

"[A]n appellate court will not interfere with 'a trial court's exercise of its discretionary powers with respect to sanctions imposed in discovery matters' unless the court abuses its discretion." *Id.* (quoting Karppi v. Greenville Terrazzo Co., Inc., 327 S.C. 538, 542, 489 S.E.2d 679, 681 (Ct. App. 1997)). "An 'abuse of discretion' may be found by this [c]ourt where the appellant shows that the conclusion reached by the [circuit] court was without reasonable factual support, resulted in

prejudice to the right of appellant, and, therefore, amounted to an error of law." *Id.* at 282, 762 S.E.2d at 543 (quoting *Dunn v. Dunn*, 298 S.C. 499, 502, 381 S.E.2d 734, 735 (1989)); see also *QZO, Inc. v. Moyer*, 358 S.C. 246, 256, 594 S.E.2d 541, 547 (Ct. App. 2004) (same). "The appealing party bears the burden of demonstrating that the [circuit] court abused its discretion." *Davis*, 409 S.C. at 282, 762 S.E.2d at 543; see also *QZO*, 358 S.C. at 256, 594 S.E.2d at 547 (same).

Here, the circuit court's post-trial sanctions order related to Fisher's conduct and communications with opposing counsel throughout the six weeks prior to trial, which was scheduled to begin on January 14, 2019. On November 28, 2018, a pathologist hired by Fisher, Dr. Timothy Oury, sent Fisher's counsel a report concerning his examination of several slides of lung tissue preserved from Tommy's treatments. Dr. Oury concluded, "[W]hile the finding of a pleural plaque in the pathology specimen suggests this may be an asbestos associated mesothelioma, the lack of bilateral parietal pleural plaques and the lack of asbestos bodies on histologic sections suggest that *prior asbestos exposure may not have contributed to his mesothelioma.*" (emphasis added). Dr. Oury recommended "digestion studies to more rigorously determine if asbestos did or did not contribute to his tumor."^[33]

Fisher's counsel then initiated a discussion with Rita's counsel concerning the digestion study. The communication between two attorneys for Fisher and three attorneys for Rita began with a phone call and follow-up letter and turned to an email exchange in which Rita's counsel reminded Fisher's counsel of a case management order prohibiting the destruction of tissue without an agreement of the parties or a court order.^[34]

Counsel for the parties continued to exchange e-mails in an attempt to come to an agreement on the protocol for dividing the tissue so that Rita could respond to Fisher's digestion study with her own study. However, Rita's counsel, Theile McVey, also advised Fisher's counsel, Yancey McLeod, that she would "need to send the protocol to [Rita's expert] and get him to sign off. Then you can do the division of tissue and send." Accordingly, in a follow-up e-mail sent on December 10, 2018, Mr. McLeod set forth the protocol Dr. Oury would use for the tissue division and digestion. On that same day, Mr. McLeod instructed Dr. Oury to proceed with the study, contrary to Ms. McVey's previous statement that Rita's expert would have to "sign off" on the protocol—Mr. McLeod later told the circuit court in a pre-trial hearing that he had considered the agreement to be finalized once he sent the December 10 e-mail. Ms. McVey responded that there "wasn't an agreement when [Mr. McLeod] sent the protocol" and "[h]e sent the protocol on the 10th, but we didn't have a chance to process it until the 11th."

Beginning at 3:25 p.m. on December 11, 2018, counsel for the parties continued their e-mail exchange to clarify their intentions. The final e-mail in this exchange was from Rita's second attorney, Jonathan Holder, to Fisher's second attorney, Tim Bouch, and Rita's third attorney, Trey Branham. Mr. Holder stated,

We need a [third] party (uninterested) to split evenly the material already in Defense's possession. That is the only way to be sure we are comparing apples to apples, then we can each have our experts do a digestion. But we need to split ASAP to [have] any hope at this getting completed prior to trial.

Mr. Holder copied Mr. McLeod and Ms. McVey on this e-mail. Nonetheless, nothing in the record shows that Fisher's counsel responded to this e-mail, and Fisher indicated in its brief that it did not consider this last e-mail to be part of the agreement on the tissue division protocol—Fisher referenced this e-mail in its brief and stated, "Fisher proceeded based on its understanding that the parties had agreed only to an even division of the tissue as Mr. Branham and Mr. McLeod confirmed in their December 11 emails."

Once Dr. Oury received the tissue in paraffin blocks from Emory University, he circled the parts to be divided and sent them to the RJ Lee Group on December 10 "to perform digestion studies with the instruction to use only ½ of the tissue circled in . . . two blocks to make a single filter." RJ Lee Group performed the digestion and sent to Fisher's counsel the unused tissue samples and a report of its findings. In turn, Fisher's counsel sent the unused tissue samples to Rita's counsel. RJ Lee Group also sent a report and "1/2 of the filter" to Dr. Oury, who in turn examined the "1/2 filter" and sent a report of his findings to Fisher's counsel. Both reports were dated December 18, 2018.

After receiving the unused tissue samples from Fisher's counsel, Mr. Holder responded via e-mail on December 17, 2018, by objecting to the involvement of RJ Lee Group on the ground that it was not an uninterested third party. Mr. Holder asked Fisher's counsel if there was enough tissue left for a digestion by an uninterested third party. Fisher's counsel did not respond to this request.

On December 21, 2018, Fisher served opposing counsel with a formal notice that Fisher would be taking a "trial preservation deposition" of Dr. Oury on January 8, 2019. Subsequently, Rita submitted a motion in limine to strike the tissue

digestion study and "preclude" any related evidence. The motion stated, in part, that Fisher did not follow the condition that the tissue must be divided by an uninterested third party and the division was performed in a manner to prevent Rita's expert from having a sufficient amount of digestible tissue. The motion also stated that Fisher waited "until the eve of trial, after the deadline for all depositions of all Defendants' expert witnesses[,] to introduce for the first [time] the results of a tissue digestion that could have been . . . performed for three years prior to trial" and this delay placed an undue burden on Rita by requiring her to hire a new expert witness to perform a tissue digestion and to be available for a deposition and trial.

Rita also sought an order of protection "from the scheduling of the deposition." Rita based this motion on several grounds: (1) the scheduled deposition would occur one day before the pre-trial hearing; (2) it overlapped deposition dates already set in the case; (3) Fisher declined Rita's requests to reschedule Dr. Oury's trial preservation deposition and to conduct a discovery deposition; (4) Fisher refused to provide Rita's counsel with the "filters or grids . . . to review RJ Lee's work"; (5) Fisher failed to make RJ Lee's scientist available for deposition; (6) the tissue was "destroyed in direct violation of the agreement of [the] parties to have it divided by an independent third party"; (7) Fisher waited over three years to seek an agreement on tissue destruction; (8) the tissue was not evenly split; and (9) Rita was also seeking to exclude the tissue digestion from evidence at trial, and, thus, any deposition of Dr. Oury should occur after the pre-trial hearing.

Attached to the written motion were copies of photographs purporting to show that "more than half of the tissue was taken from the circled area leaving Plaintiffs with insufficient tissue to digest." Fisher responded with an affidavit from RJ Lee's scientist stating that he cut and removed no more than half of the tissue for his own study and there remained sufficient tissue to perform an additional digestion study. On January 7, 2019, the circuit court filed an order granting Rita protection from the scheduling of the deposition. In this order, the circuit court stated, "The [c]ourt will address the admissibility of the testimony for trial and rescheduling of the Oury deposition, if necessary, at the pre-trial hearing scheduled for January 9, 2019."

Unbeknownst to Rita or the circuit court, Fisher's counsel met with Dr. Oury and a court reporter on January 8, 2019 to take Dr. Oury's "Sworn Statement," in the question and answer format typical of a deposition. During the pre-trial hearing on the following day, Fisher's counsel neither advised the circuit court that they had taken Dr. Oury's "Sworn Statement" nor sought to proffer it. As to her motion to exclude the tissue digestion study, Rita's counsel stated at the pre-trial hearing that RJ Lee Group was an "incredibly biased[] third party who solely represents defendants . . . and has been criticized by . . . the Environmental Protection Agency[] in public documents. . . ." Counsel also stated that Rita's new expert indicated he did not have enough tissue to work with and allowing Fisher to introduce evidence on the tissue digestion would require Rita to depose Dr. Oury, RJ Lee's scientist, and Rita's own tissue digestion expert within just a few days before trial, which was scheduled to begin on January 14.

As the pre-trial hearing continued, Fisher's counsel admitted that the tissue had been divided "just after noon" on December 11, before the further e-mail exchange between counsel for the parties, but claimed that the parties "had already come to an agreement." Fisher's counsel also claimed that his December 10 e-mail advising Rita's counsel of the protocols was "just confirming the agreement." Fisher claimed that the parties had already come to an agreement when Mr. Holder sent the e-mail stating that the tissue division had to be performed by a disinterested third party and that prior to that e-mail, Mr. Holder had not been involved in the e-mail exchanges regarding the tissue division: "Mr. Holder was not even a part of the communications between me and [Ms. McVey] and Mr. Branham about how we were going to handle this." However, Mr. Holder was involved in the initial phone call and follow-up letter, and he was copied on all subsequent e-mails between counsel for the parties.

The circuit court concluded that there was no meeting of the minds regarding the tissue division and digestion study and Fisher's counsel should have immediately responded to Mr. Holder's request to start over with unused tissue from Emory to be divided by an uninterested third party rather than a defense expert. The circuit court granted Rita's motion, striking the digestion and precluding Dr. Oury from "testifying regarding the results of the tissue digestion or that a tissue digestion was ever performed." However, the court left open the possibility of admitting testimony regarding a new digestion: "To the extent that the Defendants can show that there is more viable tissue, they are not precluded from seeking to reach an agreement from [Rita] to complete a second digestion." Fisher made no such effort.

Near the conclusion of trial, Fisher attempted to proffer Dr. Oury's "Sworn Statement" for the record. The circuit court stated that it was blindsided and it did not consider the purported sworn statement to be an appropriate proffer because it was not submitted before the court issued the pre-trial order excluding the tissue digestion from evidence. The circuit court also noted that (1) the statement was truly a trial preservation deposition that the court had prohibited; (2) Fisher misled the court

at the pre-trial hearing by staying silent about the sworn statement/deposition; (3) neither the court nor Rita's counsel was notified that the sworn statement/deposition occurred until the end of trial; and (4) the expansion of Dr. Oury's December 18 report via the sworn statement/deposition was subject to Fisher's ongoing obligation under discovery rules to provide opposing counsel with supplemental material generated by their expert. Ultimately, the circuit court allowed the sworn statement/deposition to be used as a proffer but indicated that it would likely impose sanctions on Fisher in a post-trial order if requested by Rita. After trial, Rita submitted a motion for sanctions against Fisher for discovery abuse and violation of the circuit court's order of protection.

The circuit court granted the motion, stating:

Here, Fisher Controls displayed a pattern and practice of disregard for this state's longstanding Discovery and Scheduling Order, the case management order and established case deadlines, the South Carolina Rules of Civil Procedure, and orders from this [c]ourt. In the handling of this issue with the tissue digestion alone, Fisher Controls repeatedly violated court orders. Fisher Controls offered no explanation for waiting until the eve of trial, years after obtaining Thomas Glenn's pathology, to perform a tissue digestion analysis. The case management order in place since June 25, 2015, mandated that a party could not destroy tissue without the agreement of the parties or court order. Fisher Controls ignored this order. Next, Fisher Controls wholly disregarded this [c]ourt's order prohibiting Dr. Timothy Oury's deposition. Although Fisher Controls labeled the deposition a "sworn statement," the statement is clearly a deposition submitted under a label which would not immediately invoke the [c]ourt's ire. The statement was transcribed by an official [c]ourt [r]eporter on the day and at the time that Fisher Controls had originally scheduled Dr. Oury's deposition—a deposition prohibited by an Order of Protection from this [c]ourt. Further, the statement consists of more than just a rote recitation of Dr. Oury's new causation conclusions. Counsel for Fisher Controls engaged in a lengthy examination of Dr. Oury and asked that he not only disclose his new opinions but explain the bases for his new opinions. The problematic nature of this conduct is compounded by the fact that Dr. Oury's new opinions were based on the results of the unauthorized tissue digestion—one in which the tissue was unequally divided and left the Plaintiff without sufficient tissue to conduct her own digestion. Moreover, Fisher Controls, despite being represented at pre-trial hearings and during multiple days of trial, concealed its conduct regarding its violation of [c]ourt [o]rders until the close of the presentation of evidence at the trial in this matter. The failure to produce this information during the pendency of trial, denying counsel information alleged to be "critical," is an abuse of the discovery and trial processes. It also left Plaintiff unable to respond to Fisher Controls' attempted proffer. This pattern and practice of discovery abuse is unacceptable for any party. But for Plaintiffs counsel's request to limit sanctions to a written order, greater sanctions would have been imposed as the gravity and repetitive disregard for the rules of court would have warranted substantial sanctions.

As a result of Fisher Controls' abuse of the discovery and trial processes, this [c]ourt, in lieu of more serious sanctions, finds as follows:

1. Fisher Controls has intentionally and deliberately violated [o]rders from this [c]ourt regarding the discovery and trial processes which created a presumed prejudice of Plaintiff's ability to accurately and fairly present her case to the jury in this matter; and
2. The record shall reflect that Fisher Controls has repeatedly and deliberately engaged in a pattern and practice of sanctionable conduct.

For the foregoing reasons, Plaintiff is entitled to the sanctions as outlined above.

Fisher has not carried its burden of showing that the circuit court abused its discretion. First, the time crunch that Fisher was under was of its own making, and Fisher's choice to take the sworn statement/deposition without consulting with the court or opposing counsel shows a disregard for the power all courts must exercise over parties to proceedings before it in order to effectively dispense justice. See Capital City Ins. Co. v. BP Staff, Inc., 382 S.C. 92, 103, 674 S.E.2d 524, 530 (Ct. App. 2009) ("The court has broad discretion in its supervision over the progression and disposition of a circuit court case in the interests of justice and judicial economy."). Also, it is necessary to uphold the court's authority to enforce its own orders—here, the order of protection—when a lawful means of challenging a particular order is available. If Fisher believed it was necessary to preserve Dr. Oury's testimony for the record and submit it as a proffer, it could have sought the court's

permission to do so at the pre-trial hearing in accordance with the court's language in its January 7 order of protection: "The [c]ourt will address the admissibility of the testimony for trial and rescheduling of the Oury deposition, if necessary, at the pre-trial hearing scheduled for January 9, 2019." The circuit court also gave Fisher the option of a second digestion study meeting Rita's conditions, and Fisher has failed to show that this option could not have been completed before the end of trial.

Fisher argues that it acted in good faith. We disagree. After Fisher's counsel received Mr. Holder's e-mail regarding division of the tissue by an uninterested third party, they made no effort to respond or to advise opposing counsel that the tissue samples had already been divided at that point. Additionally, they made no effort to respond to Mr. Holder's letter asking if another tissue division could be commissioned. In sum, Fisher abandoned any good faith efforts to make things right once it was notified of opposing counsel's concerns, and we are concerned that reversing the sanctions order would send a message to Fisher's counsel that they are not required to be forthright with opposing counsel or the circuit court when rushing to pursue evidence advantageous to their case on the eve of trial.

Further, the sanction imposed, a written slap on the wrist, was mild, and Fisher has failed to carry its burden of showing this sanction prejudiced Fisher or was otherwise "without reasonable factual support." See Davis, 409 S.C. at 282, 762 S.E.2d at 543 ("An 'abuse of discretion' may be found by this [c]ourt where the appellant shows that the conclusion reached by the [circuit] court was without reasonable factual support, resulted in prejudice to the right of appellant, and, therefore, amounted to an error of law." (quoting Dunn, 298 S.C. at 502, 381 S.E.2d at 735)). We agree with the circuit court that both Rita and the circuit court were blindsided by Fisher's failure to engage in forthright communications with them. Therefore, we affirm the circuit court's sanctions order.

CONCLUSION

Accordingly, we affirm in part and remand for the circuit court's *in camera* review of the settlement documents. We also direct the circuit court to reconsider the respective amounts to be set off against the jury's compensatory damages awards for Rita's three claims.

AFFIRMED IN PART AND REMANDED.

HEWITT, J. and HILL, A.J. concur.

[1] A gasket is "a material (such as rubber) or a part (such as an O-ring) used to make a joint fluid-tight." *Gasket*, Merriam-Webster Dictionary, <https://www.merriamwebster.com/dictionary/gasket> (last visited April 3, 2023). According to an employee of one of Fisher's co-defendants, packing is a "product that fits in a pump or a valve to prevent leakage from one area to another."

[2] A flange is "a rib or rim for strength, for guiding, or for attachment to another object." *Flange*, Merriam-Webster Dictionary, <https://www.merriamwebster.com/dictionary/flange> (last visited April 3, 2023).

[3] According to one of Rita's medical causation experts, Dr. Arthur Frank, mesothelioma is "an aggressive cancer of the membranes lining the lungs."

[4] See Taylor v. Medenica, 324 S.C. 200, 221, 479 S.E.2d 35, 46 (1996) ("In order for a plaintiff to recover punitive damages, there must be evidence the defendant's conduct was willful, wanton, or in reckless disregard of the plaintiff's rights.").

[5] Fisher has not assigned error to any of the jury instructions given by the circuit court in this case. To the contrary, Fisher assigns error to the circuit court's omission of certain requested instructions, which we address below.

[6] The language cited from the strict liability instruction is

If the products were defective and unreasonably dangerous *when they left the defendant's hands*, the defendant is liable even if all reasonable care was used in making and selling the products and even if the plaintiff did not buy the product from any of the defendants or enter in any contract with the defendant because the plaintiffs do not have to show negligence under the theory of strict liability. The plaintiffs must only prove the product was defective and unreasonably dangerous when it was placed in the stream of commerce.

(emphasis added).

[7] Lohrmann v. Pittsburgh Corning Corp., 782 F.2d 1156, 1162 (4th Cir. 1986).

[8] See *Tort Law — Expert Testimony in Asbestos Litigation — District of South Carolina Holds the Every Exposure Theory Insufficient to Demonstrate Specific Causation Even If Legal Conclusions Are Scientifically Sound. — Haskins v. 3M Co.* (hereinafter *Asbestos Litigation*),

131 HARV. L. REV. 658, 658-59 (2017) (explaining that courts presiding over asbestos litigation have departed from traditional tort standards to overcome evidentiary hurdles inherent in these cases and highlighting the substantial factor test as a departure from requiring the plaintiff to show that he would not have developed mesothelioma *but for* exposure to the defendant's product); David E. Bernstein, *Getting to Causation in Toxic Tort Cases*, 74 BROOK. L. REV. 51, 52 (2008) ("[W]ith regard to cases in which a plaintiff alleges injury after exposure to a toxin from multiple sources, a given defendant may only be held liable if the plaintiff proves by a preponderance of the evidence that exposure to that defendant's products was a 'substantial factor' in causing that injury."); *id.* at 55 ("Assuming the plaintiff is able to show that his disease was more probably than not caused by asbestos exposure, he still has to prove that a particular defendant's asbestos-containing product was a 'proximate cause' of that injury to recover damages from that defendant."); see also Rost v. Ford Motor Co., 151 A.3d 1032, 1050-51 (Pa. 2016) ("[I]n asbestos products liability cases, evidence of 'frequent, regular, and proximate' exposures to the defendant's product creates a question of fact for the jury to decide. *This [c]ourt has never insisted that a plaintiff must exclude every other possible cause for his or her injury, and in fact, we have consistently held that multiple substantial causes may combine and cooperate to produce the resulting harm to the plaintiff.*" (emphases added) (footnote omitted) (citation omitted)).

[9] See, e.g., Slaughter v. S. Talc Co., 949 F.2d 167, 171 (5th Cir. 1991) ("The most frequently used test for causation in asbestos cases is the 'frequency-regularityproximity' test announced in [*Lohrmann*]."); *id.* at 171 n.3 (listing jurisdictions adopting the *Lohrmann* test).

[10] Bernstein, 74 BROOK. L. REV. at 55.

[11] Lohrmann, 782 F.2d at 1162.

[12] David E. Bernstein, *Getting to Causation in Toxic Tort Cases*, 74 BROOK. L. REV. 51, 56 (2008).

[13] See also State v. Phillips, 430 S.C. 319, 334, 844 S.E.2d 651, 658 (2020) (referencing the discussion in *Council* regarding the circuit court's gatekeeping role in determining the admissibility of expert testimony and its "responsibility to ensure the expert testimony meets the requirements of Rules 702 and 403[. SCRE]."); *id.* at 335 n.7, 844 S.E.2d at 659 n.7 (coining the phrase "*Daubert/Council* hearing" but neither departing from the *Council* standard for determining the reliability of scientific evidence nor explicitly adopting the standard set forth in *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993)).

[14] Dr. Brody is also an experimental pathologist, and he is a professor emeritus in the pathology department at Tulane University School of Medicine. For fifteen years, Dr. Brody worked at the National Institute of Environmental Health Sciences, which was "involved in understanding how agents in the environment cause human disease," and he spent almost his whole career studying asbestos. He has spoken internationally about asbestos on several occasions; written over 150 peer-reviewed papers, most of which address asbestos; and testified as an expert in numerous cases nationwide on how asbestos causes disease. See, e.g., Startley v. Welco Mfg. Co., 78 N.E.3d 639 (Ill. App. 2017).

[15] Dr. Frank also has a doctorate in biomedical sciences. He has been a professor at Drexel University and other colleges and a consultant to federal agencies and private employers. He has published hundreds of peer-reviewed articles and testified in numerous mesothelioma cases nationwide. See, e.g., Rost v. Ford Motor Co., 151 A.3d 1032, 1044 (Pa. 2016). In addition to performing cancer research at the National Cancer Institute, he participated in epidemiologic studies of asbestosexposed populations.

[16] According to Dr. Brody, a latency period spans from the time of an individual's first exposure to a substance until he becomes ill as a result of all of his exposures to that substance.

[17] Dr. Frank explained that a cubic centimeter is "about the size of a sugar cube."

[18] See Rost, 151 A.3d at 1044 ("[E]xpert testimony based upon the notion that 'each and every breath' of asbestos is substantially causative of mesothelioma will not suffice to create a jury question on the issue of substantial factor causation."); Betz v. Pneumo Abex, LLC, 44 A.3d 27, 31 (Pa. 2012) (noting the report of plaintiffs' causation expert concluded that each exposure is "a substantial contributing factor in the development of the disease that actually occurs" and did not assess the plaintiffs' individual exposure history "as this was thought to be unnecessary, given the breadth of the any-exposure theory" (emphasis removed)); see also Yates v. Ford Motor Co., 113 F. Supp. 3d 841, 846 (E.D.N.C. 2015) ("Also referred to as 'any exposure' theory, or 'single fiber' theory, it represents the viewpoint that, because science has failed to establish that any specific dosage of asbestos causes injury, every exposure to asbestos should be considered a cause of injury."). A significant number of jurisdictions have found the "each and every exposure" theory to be unreliable. See, e.g., McIndoe v. Huntington Ingalls Inc., 817 F.3d 1170, 1177 (9th Cir. 2016); Martin v. Cincinnati Gas & Elec. Co., 561 F.3d 439, 443 (6th Cir. 2009); Yates, 113 F. Supp. 3d at 846 (listing jurisdictions); In re New York City Asbestos Litig., 48 N.Y.S.3d 385, 370 (2017); Betz, 44 A.3d at 53 (stating that the trial court "was right to be circumspect about the scientific methodology underlying the any-exposure opinion. [The court] . . . was unable to discern a coherent methodology supporting the notion that every single fiber from among, potentially, millions is substantially causative of disease").

[19] This distinction was also made in Rost, 151 A.3d at 1045-46; see also Bobo v. Tenn. Valley Auth., 855 F.3d 1294, 1301 (11th Cir. 2017) (holding that the district court did not abuse its discretion in admitting expert testimony stating "there is no evidence that there is a threshold level of exposure below which there is zero risk of mesothelioma" and "all 'significant' exposures to asbestos 'contribute to cause mesothelioma'"); *id.* (stating that the defendant mischaracterized the opinion of the plaintiff's expert "as essentially that 'any exposure' to asbestos is a substantial factor in causing mesothelioma, which it says makes his opinion scientifically unreliable. That is not what he

said."); *id.* ("While [the plaintiff's expert] testified that all significant exposures to asbestos contribute to causing mesothelioma, he did not say that any exposure to asbestos is a substantial factor in causing mesothelioma, or even that every significant exposure causes it."); *id.* (stating that the expert's opinion "was also based on an extensive knowledge of the facts in [the] case and was supported by scientific literature").

[20] According to Dr. Frank's affidavit, a sentinel event is "a case of disease that, when it appears, signals the need for action."

[21] See Henderson, 373 S.C. at 185, 644 S.E.2d at 727 ("To support a reasonable inference of substantial causation from circumstantial evidence, there must be evidence of exposure to a specific product on a regular basis over some extended period of time in proximity to where the plaintiff actually worked." (quoting Lohrmann, 782 F.2d at 1162-63)).

[22] A November 21, 1984 script for an asbestos safety course provided to employees by Duke's construction department indicates Duke knew of the dangers of asbestos insulation but was unaware of the dangers of removing asbestos gaskets from a valve:

Actually, asbestos is used very little in Duke Construction today, mostly to insulate electrical cabinets and pack valves, and it is used in gasket material. Even so, the asbestos in these jobs is bonded, which means it produces virtually no dust.

In the past, however, nonbonded asbestos has been used for insulation throughout the Duke system. So[,] there's a good chance asbestos dust is present wherever old insulation is being removed.

Nonetheless, Fisher contends that it was reasonable to rely on Duke to comply with occupational safety laws because Duke "should have been aware of the alleged dangers of asbestos-containing gaskets."

[23] See also Lawing, 415 S.C. at 225-26, 781 S.E.2d at 557 ("[T]he sophisticated user doctrine, which arose from comment *n* to section 388 of the Restatement (Second) of Torts, recognizes that a supplier may rely on an intermediary to provide warnings to the ultimate user if the reliance is reasonable under the circumstances. The sophisticated user doctrine is typically applied as a defense to relieve the supplier of liability for failure to warn where it is difficult or even impossible for the supplier to meet its duty to warn the end user of the dangers associated with the use of a product, and the supplier therefore relies on the intermediary or employer to warn the end user." (emphases added) (citation omitted) (footnote omitted)). Fisher did not show that it was difficult to warn Duke employees of the danger associated with the removal of asbestos gaskets from its valves or from the valves' external flanges.

[24] The Roddey opinion also has language that does not fit asbestos cases in which the "but for" requirement of causation has been relaxed: "Accordingly, if the intervening acts are set into motion by the original wrongful act and are the foreseeable result of the original act, the final result, as well as every intermediate cause, is considered in law to be the proximate result of the first wrongful cause." 415 S.C. at 590-91, 784 S.E.2d at 676 (emphasis added) (quoting Wallace v. Owensill, Inc., 300 S.C. 518, 521, 389 S.E.2d 155, 157 (Ct. App., 1989)).

[25] We do not reach Fisher's argument that it was deprived of its right "to have a jury determine all triable issues" in violation of article I, section 14 of the South Carolina Constitution. The circuit court did not rule on this argument, and Fisher did not file a Rule 59(e) motion seeking the circuit court's ruling on it. Therefore, it is not preserved for review. See, e.g., Noisette v. Ismail, 304 S.C. 58, 58, 403 S.E.2d 122, 124 (1991) (noting the circuit court did not explicitly rule on a particular argument, the appellant failed to show it made a Rule 59(e) motion on this ground, and, therefore, this court should not have addressed the argument).

[26] We reject Fisher's assertion that Rita's wrongful death and survival claims seek damages for a single injury. See S.C. Code Ann. § 15-5-90 (2005) ("Causes of action for and in respect to . . . any and all injuries to the person . . . shall survive both to and against the personal or real representative, as the case may be, of a deceased person . . . , any law or rule to the contrary notwithstanding.") (emphasis added); S.C. Code Ann. § 15-51-10 (2005) ("Whenever the death of a person shall be caused by the wrongful act, neglect or default of another and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, the person who would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, although the death shall have been caused under such circumstances as make the killing in law a felony."); *id.* § 15-51-20 ("Every such action shall be for the benefit of the wife or husband and child or children of the person whose death shall have been so caused, and, if there be no such wife, husband, child or children, then for the benefit of the parent or parents, and if there be none such, then for the benefit of the heirs of the person whose death shall have been so caused. Every such action shall be brought by or in the name of the executor or administrator of such person." (emphasis added)); Riley, 414 S.C. at 196, 777 S.E.2d at 830 (affirming a setoff that conformed to the allocation of damages between a wrongful death claim and a survival claim); Jolly, 435 S.C. at 670, 869 S.E.2d at 853 (explaining why wrongful death and survival are different claims for different injuries despite the fact that they were created out of the same set of facts); Widener, 397 S.C. at 473 n.1, 724 S.E.2d at 191 n.1 (citing Bennett v. Spartanburg Railway, Gas & Electric Co., 97 S.C. 27, 29-30, 81 S.E. 189, 189-90 (1914) for the proposition that wrongful death and survival actions are different claims for different injuries).

[27] Section 15-51-42(C)(1) provides that when "a wrongful death or survival action has been filed in state court and . . . the settlement agreement between the parties is reached before the matters reach trial, the personal representative shall petition the court in which the wrongful death or survival action has been filed" seeking approval of a proposed settlement.

[28] The circuit court and the parties have interpreted this language to mean that 90 percent of the settlement proceeds was allocated to the wrongful death claim and 10 percent of the proceeds was allocated to the survival claim. Rita does not assert that this allocation resulted

from settlement negotiations with Fisher's co-defendants or was stipulated by the written release of her claims, and there is nothing in the record to indicate that the settling defendants agreed to any particular allocation of the proceeds, as contemplated by section 15-38-50. However, we are not prepared to reject the allocation approved by the circuit court solely on the ground that it was "unilateral." Section 15-51-42 gives the circuit court authority to approve the settlement of wrongful death and survival claims, and this authority necessarily encompasses the allocation of the proceeds among those claims to effect a timely distribution of the proceeds to the statutory beneficiaries. Nonetheless, we question whether the pre-trial allocation among the two statutory claims may be incomplete for purposes of a post-trial setoff against the respective damages awards for all three claims given that Rita had also released the settling defendants from her claim for loss of consortium.

[29] Our calculation yields \$280,500.

[30] As previously stated, Rita's trial counsel represented to the circuit court that Rita settled all of her claims against the settling defendants, and appellate counsel confirmed this during oral arguments before this court.

[31] In *Riley*, our supreme court concluded that this court erred in reapportioning settlement proceeds on the basis that the allocation to which the plaintiff and settling defendants agreed "did not seem to be, in the court of appeals' view, proportionately reasonable" and "may have been advantageous to the [plaintiff]." 414 S.C. at 196, 777 S.E.2d at 830-31. The supreme court stated: "Indeed, we agree with the approach taken by the Illinois Court of Appeals, which stated:

A plaintiff who enters into a settlement with a defendant gains a position of control and acquires leverage in relation to a nonsettling defendant. This posture is reflected in the plaintiff's ability to apportion the settlement proceeds in the manner most advantageous to it. Settlements are not designed to benefit nonsettling third parties. They are instead created by the settling parties in the interests of these parties. If the position of a nonsettling defendant is worsened by the terms of a settlement, this is the consequence of a refusal to settle. A defendant who fails to bargain is not rewarded with the privilege of fashioning and ultimately extracting a benefit from the decisions of those who do.

414 S.C. at 197, 777 S.E.2d at 831 (quoting *Lard v. AM/FM Ohio, Inc.*, 901 N.E.2d 1006, 1019 (Ill. App. 2009)).

[32] Fisher has not appealed the issue for which it sought to proffer testimony, i.e., the circuit court's ruling excluding the testimony of Dr. Timothy Oury, Fisher's pathology expert. See *infra*.

[33] Tissue digestion involves "dissolving the organic tissue in acid to leave behind inorganic particulates." Christopher Meisenkothen, *A Shifting Paradigm? Deschenes v. Transco and the Precarious New Landscape of Concurrently Developing Disease in Connecticut's Workers' Compensation Jurisprudence*, 84 Conn. B.J. 339, 374 (2010).

[34] According to the circuit court, a "case management order in place since June 25, 2015, mandated that a party could not destroy tissue without the agreement of the parties or court order."

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

Shannon P. Green and Darrell Russell, Plaintiffs,

v.

Edward C. McGee and David Hudgins, Respondents,

Of whom Shannon P. Green is the Appellant/Respondent

And

Of whom David Hudgins is the Respondent/Appellant.

Appellate Case No. 2020-000203

Appeal From Spartanburg County
Grace Gilchrist Knie, Circuit Court Judge

Opinion No. 6001
Heard March 1, 2023 – Filed July 26, 2023

AFFIRMED IN PART AND REVERSED IN PART

Douglas A. Churdar, of Churdar Law Firm, of Greenville,
for Shannon P. Green.

Jessica Waller Laffitte and Curtis Lyman Ott, both of
Gallivan, White & Boyd, PA, of Columbia, for David
Hudgins.

Michael T. Coulter, of Clarkson, Walsh & Coulter, PA, of
Greenville, for Edward C. McGee.

HEWITT, J.: This case arises out of an unusual car wreck. David Hudgins and Edward McGee were both driving on the interstate. Each claimed the other was driving dangerously. Hudgins called 9-1-1 and began following McGee. The pursuit eventually left the interstate and continued on surface streets. Not long after that, McGee crashed into Shannon Green.

Green sued Hudgins and McGee, claiming both were at fault for the wreck even though the only collision was between McGee's vehicle and hers. She won a verdict of roughly \$88,000 actual damages, punitive damages of \$35,000 against McGee, and punitive damages of \$35,000 against Hudgins. She appealed. Hudgins, the instigator of the vehicular pursuit, filed a cross-appeal.

The main issue in the case is how to properly account for Green's \$100,000 pretrial settlement with McGee's insurance carrier. Both Green and Hudgins argue the trial court erred on this point, but they reach different conclusions. Green argues the trial court impermissibly converted the separate punitive awards to a joint award and that she is due more money, not less. Hudgins argues that his liability to Green is completely extinguished because even though the jury awarded Green more than \$100,000 in damages, Hudgins' share of the judgment is less than the \$100,000 Green has already received.

We agree that the trial court's setoff calculation was not correct, but we disagree with Hudgins' argument that this extinguishes all of his liability to Green. We respectfully disagree with the parties' remaining arguments for reversal.

FACTS

It is not necessary to describe much more of the background leading up to the crash. Both Hudgins and McGee said traffic on the interstate was heavy. McGee claimed he was stuck behind Hudgins and that Hudgins slammed on his brakes three times, almost causing the vehicles to collide. When the interstate expanded from two lanes to three, McGee changed lanes and hurriedly passed Hudgins. Hudgins called 9-1-1 to report McGee's driving and followed McGee.

McGee said he could see Hudgins following him and that this made him feel uncomfortable. Both McGee and Hudgins pled guilty to driving too fast for conditions.

Green testified she did not remember the collision. She woke up with broken glass in her mouth and had difficulty breathing. She said she thought she was going to

die. Green sustained two broken ribs and damage to the bicep in her left arm. She had her left arm in a sling for six weeks and testified that she had to temporarily rely on her husband for assistance with some normal daily functions. The extent to which her injuries limited her ongoing activities of daily living was disputed.

The jury found McGee sixty percent at fault and Hudgins forty percent at fault. The precise award for actual damages was \$88,546.78. We mention this because one of the issues in this case relates to the fact that Green offered the same exact number to the jury as the direct financial costs to her from the wreck.

The jury also heard the claim brought by Green's husband for loss of consortium. There, the jury returned a defense verdict.

Green filed a post-trial motion seeking a new trial nisi additur. She also asked the trial court to allocate some of the \$100,000 settlement with McGee to her husband's consortium claim.

Hudgins filed a post-trial motion seeking a ruling releasing him from all liability, releasing him from punitive damages, and (if nothing else) a setoff of the jury's verdict on account of Green's settlement with McGee.

The trial court denied all motions except the motion for setoff. The court calculated the setoff by adding the actual damages award (again, roughly \$88,000) and both punitive damages awards (\$35,000 each) for a total verdict of roughly \$158,000. Then, the court subtracted the \$100,000 settlement. This left about \$58,000 in damages remaining. The trial court held this would be shared by the defendants and allocated 60/40 between them according to the fault assigned by the jury.

GREEN'S ISSUES

1. Whether the trial court abused its discretion by declining to grant a new trial nisi additur based on Green's argument that the award for actual damages is the precise amount of her economic loss with no award for pain and suffering.
2. Whether the trial court should have allocated some of Green's \$100,000 settlement with McGee to Green's husband's loss of consortium claim.
3. Whether the trial court erred in dividing the punitive damage awards against McGee and Hudgins on a pro rata basis.

HUDGINS' ISSUES

4. Whether the trial court erred in declining to set aside the verdict against Hudgins in its entirety.
5. Whether the trial court erred in declining to set aside the punitive verdict against Hudgins.
6. Whether the trial court erred in rejecting the argument that the proper application of the setoff for Green's settlement with McGee precludes Green from recovering anything against Hudgins.

NEW TRIAL *NISI ADDITUR*

Green argues the trial court abused its discretion in declining to grant additur. She says it is evident the jury's award of actual damages does not include anything for her pain and suffering.

Our task does not involve deciding whether we agree with the jury's verdict or whether we agree with the circuit court's decision to let the jury's verdict stand. The standard of review is highly deferential. *See Burke v. AnMed Health*, 393 S.C. 48, 56, 710 S.E.2d 84, 88 (Ct. App. 2011) ("A jury's determination of damages is entitled to 'substantial deference.'" (quoting *Todd v. Joyner*, 385 S.C. 509, 517, 685 S.E.2d 613, 618 (Ct. App. 2008), *aff'd*, 385 S.C. 421, 685 S.E.2d 595 (2009))); *id.* ("The decision to grant or deny a 'new trial motion rests within the discretion of the circuit court, and its decision will not be disturbed on appeal unless its findings are wholly unsupported by the evidence or the conclusions reached are controlled by error of law.'" (quoting *Brinkley v. S.C. Dep't of Corr.*, 386 S.C. 182, 185, 687 S.E.2d 54, 56 (Ct. App. 2009))); *id.* at 57, 710 S.E.2d at 89 ("The denial of a motion for a new trial nisi is within the trial court's discretion and will not be reversed on appeal absent an abuse of discretion." (quoting *James v. Horace Mann Ins. Co.*, 371 S.C. 187, 193, 638 S.E.2d 667, 670 (2006))); *see also Bailey v. Peacock*, 318 S.C. 13, 14, 455 S.E.2d 690, 691 (1995) ("If an award is merely inadequate or unduly liberal, the trial judge alone has the discretion to grant a new trial *nisi additur*.").

We must defer to the jury and the trial court. Despite the fact the actual damages award corresponds exactly (to the cent) with the exhibit Green offered for her economic damages, we do not know, and the jury was not asked, whether the jury limited Green's damages in this way. The jury found Green had no fault in the wreck, and there is no doubt she received serious injuries in the wreck, but causation was

an issue for treatment and ongoing pain because Green had pre-existing medical ailments. The trial court believed the verdict was appropriate and declined to invade the jury's province. We do not see how we can question that determination given our standard of review.

Green argues this court's decision in *Waring v. Johnson* establishes that we need look at nothing more than the fact that the actual damages award corresponds exactly with Green's offered economic damages. See 341 S.C. 248, 260, 533 S.E.2d 906, 912 (Ct. App. 2000). As we see it, the key to *Waring* is that this court was reviewing a grant of additur rather than the denial of it. *Id.* at 256-61, 533 S.E.2d at 910-13. The standard of review is weighted in favor of affirming the trial court's decision; no doubt because that court possesses a superior sense of the case having presided over the trial. Just as the standard of review led this court to affirm in *Waring*, so too it leads us to affirm here.

ALLOCATING FUNDS TO THE CONSORTIUM CLAIM

As already noted, Green argues the trial court erred by not attributing some of her \$100,000 settlement with McGee's insurance carrier to her husband's consortium claim. This argument draws on the principle that funds previously paid to the plaintiff mandate a reduction in the amount of the plaintiff's claim against other tortfeasors causing the same injury. See, e.g., S.C. Code Ann. § 15-38-50 (2005) (codifying the right to setoff). If it is true that some of the settlement was compensation for injuries to Green's husband, this would reduce the settlement funds attributed to Green and the offset to which Hudgins is entitled.

Precedent explains that when a settlement involves multiple claims, the trial court "must make the factual determination of how to allocate the settlement between the [] claims." *Smith v. Widener*, 397 S.C. 468, 473, 724 S.E.2d 188, 191 (Ct. App. 2012); see also *Rutland v. S.C. Dep't of Transp.*, 400 S.C. 209, 216, 734 S.E.2d 142, 145 (2012) (reallocating settlement funds the parties attributed to a survival claim when there was no evidence of pain and suffering). Here, however, it does not appear that Green's settlement with McGee's insurance company involved multiple claims. The facts are confusing. The same day Green received the full limits of \$100,000 under McGee's liability policy, Green's husband signed his own covenant not to execute against McGee in exchange for \$2,500. Green argues this \$2,500 was not for her husband's consortium claim, but there is no limiting language in the settlement documents we have in the record.

Beyond that, the jury returned a defense verdict on the consortium claim. We were not able to locate a case authorizing a judge, sitting after the verdict, to allocate settlement funds to a claim after the jury determines the claim has no value. The situation would be different if there had been an allocation before the jury spoke. In *Riley v. Ford Motor Co.*, for example, our supreme court upheld a pretrial allocation of settlement funds to a survival claim even though the plaintiff later withdrew that claim during the trial. 414 S.C. 185, 197-98, 777 S.E.2d 824, 831 (2015). Green's argument that setoff is equitable in nature and should be based on all of the circumstances is a correct statement of precedent. Here, however, the trial court was asked to allocate settlement money to a claim after the jury rejected it. Again, we are not presented with any authority suggesting it was error for the trial court to decline this request.

MOTIONS TO SET VERDICTS AGAINST HUDGINS ASIDE

Hudgins offers several reasons the trial court erred in denying his motions to set the verdict against him aside in its entirety, or at least to set the punitive damages award aside. He argues a wholesale reversal is required because (1) the only reasonable inference is that McGee was the sole cause of the wreck; (2) a reasonable jury could not conclude he (Hudgins) breached a duty or proximately caused the wreck; (3) McGee was an independent intervening cause and Hudgins was a remote cause rather than a proximate cause; and (4) a jury could not determine that Green's injuries were proximately caused by the wreck because Green did not present medical evidence supporting causation. He argues the punitive award cannot stand because no reasonable jury could find that his behavior was willful, wanton, or reckless by clear and convincing evidence.

The record supports the trial court's decision denying these motions. See *Burns v. Universal Health Servs., Inc.*, 361 S.C. 221, 232, 603 S.E.2d 605, 611 (Ct. App. 2004) ("The appellate court will reverse the trial court's ruling on a JNOV motion only when there is no evidence to support the ruling or where the ruling is controlled by an error of law."); *id.* ("The verdict will be upheld if there is any evidence to sustain the factual findings implicit in the jury's verdict."); *Gastineau v. Murphy*, 331 S.C. 565, 568, 503 S.E.2d 712, 713 (1998) ("A motion for JNOV may be granted only if no reasonable jury could have reached the challenged verdict.").

McGee testified Hudgins followed him after he passed Hudgins on the interstate. McGee said he was concerned for his safety and feared Hudgins might harm him if he pulled over. Hudgins disputed that he was "following" McGee, but other evidence suggested this denial was not truthful. The encounter between Hudgins

and McGee lasted for an extended period of time over different roadways, and while Hudgins claimed he was driving this route on purpose, he told authorities during his phone call with them that he did not know where he was. After the wreck, Hudgins can be heard on the 9-1-1 recording driving past McGee and telling McGee that he had the police coming for him. It was reasonable for the jury to find Hudgins chased or followed McGee, which made McGee distracted and nervous, and therefore made Hudgins a proximate cause of the collision. As for punitive damages, we need go no further than Hudgins' guilty plea to driving too fast for conditions, which is some evidence that Hudgins acted recklessly, willfully, and wantonly. See *Austin v. Specialty Transp. Servs., Inc.*, 358 S.C. 298, 315, 594 S.E.2d 867, 875-76 (Ct. App. 2004) ("Violation of a statute does not constitute recklessness, willfulness, and wantonness per se, but is some evidence the defendant acted recklessly, willfully, and wantonly. . . . The jury determines whether a party has been reckless, willful, and wanton.").

SETOFF AND PUNITIVE DAMAGES

We come now to the remaining setoff arguments. Green argues the trial court erred in its setoff calculation by crediting the settlement against the entire verdict and dividing the unsatisfied punitive damage awards on a pro rata basis. Hudgins argues that he has no liability to Green because the \$100,000 settlement exceeds his share of the actual damages and the punitive damage award against him.

Setoff comes from the principle that "there can be only one satisfaction for an injury or wrong." *Hawkins v. Pathology Assocs. of Greenville, P.A.*, 330 S.C. 92, 113, 498 S.E.2d 395, 407 (Ct. App. 1998) (quoting *Truesdale v. S.C. Highway Dep't.*, 264 S.C. 221, 235, 213 S.E.2d 740, 746 (1975)). By statute, a settlement with a joint tortfeasor "reduces the claim against the others to the extent of any amount stipulated by the release or the covenant." S.C. Code Ann. § 15-38-50(1) (2005). Precedent instructs that before entering judgment on a jury verdict, the court must reduce the amount of the verdict to account for any funds previously paid by a settling defendant, so long as the settlement funds were paid to compensate the same plaintiff on a claim for the same injury. *Hawkins*, 330 S.C. at 113, 498 S.E.2d at 406-07. When the settlement is for the same injury, the non-settling defendant's right to a setoff arises by operation of law. *Ellis v. Oliver*, 335 S.C. 106, 112, 515 S.E.2d 268, 271 (Ct. App. 1999).

Hudgins argues that the setoff statute compels the court to find that his liability to Green is extinguished. The statute says that a settlement reduces the amount of a plaintiff's claim against "other tortfeasors." § 15-38-50(1). Green's underinsured

motorist (UIM) carrier took over litigating McGee's part of the case after McGee's liability carrier settled. Hudgins has \$1 million in liability coverage and no funds have been paid on his behalf towards the verdict. Even so, he argues a UIM carrier is not a tortfeasor and that as the only tortfeasor, he is entitled to credit the \$100,000 settlement towards his share of the liability.

We respectfully reject this argument. We note our supreme court's statement in *Riley* that the Uniform Contribution Among Tortfeasors Act codified the "equitable principles" of setoff. 414 S.C. at 195, 777 S.E.2d at 830. *Riley* also noted that setoff "should be exercised so as to do justice between parties." *Id.* (quoting *Rookard v. Atlanta & Charlotte Air Line Ry. Co.*, 89 S.C. 371, 71 S.E. 992, 995 (1911)). We think it plain that neither justice nor equity support giving Hudgins—who did not settle and has paid no money—the benefit of settlement funds that were paid on McGee's behalf before those funds are credited to McGee's share of the verdict. After all, precedent explains that when a liability insurance carrier provides funds for a settlement, the funds are provided to benefit its insured. *Cobb v. Benjamin*, 325 S.C. 573, 579, 482 S.E.2d 589, 592 (Ct. App. 1997).

In many cases, if not most, a settling defendant will not be a party when the jury decides the case, and will thus not be listed on the verdict form and will not receive an allocation of comparative fault. *E.g.*, *Smith v. Tiffany*, 419 S.C. 548, 799 S.E.2d 479 (2017) (joint tortfeasor who settled was not to be included in the jury's apportionment of fault). In deciding the case, the jury is tasked with determining the total amount of the plaintiff's damages (if any). S.C. Code Ann. § 15-38-15(C)(1) (Supp. 2022). The setoff for funds paid on the same injury are then applied to the verdict in proportion to each defendant's percentage of liability as found by the jury. § 15-38-15(E).

Here, we face a situation where a joint tortfeasor—McGee—remained a defendant and received an allocation of fault notwithstanding the settlement on his behalf. We are keenly mindful that the legislature's word with respect to public policy is final. *Tiffany*, 419 S.C. at 559, 799 S.E.2d at 485. Still, the result Hudgins seeks to achieve is so far from the equitable purpose of setoff—he seeks to pay nothing even though the verdict plainly exceeds his co-defendant's coverage—that his interpretation is an interpretation we cannot follow.

We still face the question of how the \$100,000 should be allocated between the various parts of the verdict. Should it apply first to McGee's sixty percent of the actual damages award and then to McGee's punitive award before the excess is credited to Hudgins, or should it follow some other allocation?

We approach this question mindful of the fact that this case involves a settling tortfeasor who remained a defendant and was allocated a percentage of fault by the jury. We are also mindful of precedent's explanation that though the relevant statutes were not designed to achieve perfect equity, they were designed to promote and foster settlements. See *Tiffany*, 419 S.C. at 557, 799 S.E.2d at 484 (citing *Riley*, 414 S.C. at 196, 777 S.E.2d at 830).

The jury determined that the wreck caused Green to suffer \$88,000 in actual damages and that sixty percent of the fault belonged to McGee. The jury also found McGee liable for \$35,000 in punitive damages. The principles above dictate that the \$100,000 should be allocated first to McGee's share of the actual damages, then to the punitive award against him. After that, the excess should be credited to the judgments against Hudgins.

We have already explained why we reject one of the alternative approaches. Suppose the jury entered the same allocation of fault but found actual damages of \$200,000 rather than the \$88,000 awarded here. Hudgins would say he still owes Green nothing because he believes Green's claim against him (forty percent of \$200,000) should be reduced by the \$100,000 Green received from McGee. There, as here, extinguishing Hudgins' liability is so at variance with the equitable purpose of setoff we do not think the legislature could have intended it.

The other alternative approach would be to first apply the settlement funds to the entire actual damages award (as the trial court did here), and then to the punitive awards against McGee, Hudgins, or both. We reject this alternative because, as with the other, it is contrary to the principles of setoff. Setoff is designed to prevent a plaintiff from recovering more than one share of her damages, not to prevent a plaintiff from recovering damages the jury determined she was entitled to recover. Hudgins has sufficient liability coverage to satisfy the awards against him. The equitable principles codified in the statute dictate that McGee receive first credit for funds paid on his behalf, and that the excess be applied to the judgment against Hudgins.

The jury determined Green's total actual damages were \$88,546.78. The sixty percent allocated to McGee is \$53,128.07. When added to the \$35,000 in punitive damages, McGee's liability would be \$88,128.07. Applying the \$100,000 settlement to McGee's liability leaves \$11,871.93 in remaining settlement funds that are allocated to Hudgins' liability. Hudgins' forty percent share of the actual damages award comes to \$35,418.71. Subtracting the remaining settlement funds leaves

Hudgins responsible for \$23,546.78 in actual damages and \$35,000 in punitive damages. Hudgins' total remaining liability (exclusive of any applicable interest) is \$58,546.78.

CONCLUSION

Based on the foregoing, the trial court's judgment is

AFFIRMED IN PART and REVERSED IN PART.

THOMAS and MCDONALD, JJ., concur.

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Aug 09 2023

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas
The Honorable Grace Gilchrist Knie, Circuit Court Judge

Case No. 2017CP4203523
Appellate Case No. 2020-000203

Shannon P. Green,
and Darrell Russell, ... Plaintiffs,

v.

Edward C. McGee,
and David Hudgins, ... Respondents,

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

And

Of whom David Hudgins is the Respondent-Appellant.

**PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING *EN BANC*
OF RESPONDENT-APPELLANT DAVID HUDGINS**

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Pursuant to Rules 219, 221(a), and 240, SCACR, Respondent-Appellant David Hudgins (“Mr. Hudgins”) requests rehearing or rehearing *en banc* of the Panel’s Opinion 6001, filed July 26, 2023 (Howard Advance Sheet No. 29, pp. 37-46¹), affirming in part and reversing in part the Circuit Court’s post-trial rulings.

ARGUMENT

Mr. Hudgins respectfully submits that the Panel overlooked or misapprehended controlling law when it reallocated the Circuit Court’s setoff calculation. Rather than follow the plain language of S.C. Code Ann. § 15-38-50(1), the Panel instead credited settlement amounts paid on behalf of Respondent Edward C. McGee (“Mr. McGee”) *back to him*, offsetting in full the verdict amounts rendered against Mr. McGee and improperly reducing the statutory setoff to which only his other joint tortfeasor, Mr. Hudgins, was entitled. Specifically, the Panel credited \$88,128.07 of the \$100,000.00 in settlement proceeds, which were paid by Mr. McGee’s liability carrier to Appellant-Respondent Shannon P. Green (“Ms. Green”) in exchange for a covenant not to execute against Mr. McGee, to fully set off the jury’s verdicts against Mr. McGee, which cannot be executed against Mr. McGee and for which Ms. Green’s underinsured motorist (“UIM”) carrier is statutorily and contractually liable. The Panel’s reallocation left an excess of only \$11,871.93 to reduce the verdict amounts against Mr. Hudgins, even though Mr. Hudgins was the *only* other tortfeasor with the statutory right to setoff after Mr. McGee was given a covenant not to execute.

As outlined below, although the Panel correctly determined the Circuit Court’s setoff

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

calculation was improper,² the Panel's recalculation of the setoff amount was flawed from its inception: The plain language of § 15-38-50(1) and the accompanying case law do not permit a court to reduce the claim against Mr. McGee by settlement payments made on his own behalf, nor credit those payments to a non-joint tortfeasor UIM carrier while denying the only other joint tortfeasor the full setoff to which he is statutorily entitled. Consideration *en banc* is necessary to secure or maintain uniformity of decisions on this important issue, because the Opinion directly conflicts with *Ellis v. Oliver*, 335 S.C. 106, 113, 515 S.E.2d 268, 272 (Ct. App. 1999), which recognized only the General Assembly, not this Court, makes the law and can correct any perceived, unintended results in the statute's application.

Additionally, the Opinion overlooked or misapprehended both the record and the controlling law when it affirmed the Circuit Court's denial of Mr. Hudgins' motions to set aside the verdicts against him, and rehearing is warranted for this reason as well.

I. The Panel's settlement reallocation overlooked or misapprehended controlling law and the plain language of S.C. Code § 15-38-50(1).

The plain language of § 15-38-50(1) is unambiguous in its application: When, as here, a covenant not to execute was given to Mr. McGee who is one of two tortfeasors, "it reduces the claim against the *other*[tortfeasors]," here Mr. Hudgins, and it does so "to the extent of any amount stipulated by the release or the covenant [\$100,000.00 here], or in the amount of the

² As the Opinion explains:

The [circuit] court calculated the setoff by adding the actual damages award (again, roughly \$88,000) and both punitive damages awards (\$35,000 each) for a total verdict of roughly \$158,000. Then, the court subtracted the \$100,000 settlement. This left about \$58,000 in damages remaining. The trial court held this would be shared by the defendants and allocated 60/40 between them according to the fault assigned by the jury.

(Opinion, p. 39).

consideration paid for it [\$100,000.00 here], whichever is greater.” S.C. Code Ann. § 15-38-50(1)(emphasis added). The statute defines “tortfeasors” for the purpose of setoff as “persons liable in tort for the same injury or the same wrongful death,” *id.*, of which there are only two in this case: Mr. McGee and Mr. Hudgins. And, once Ms. Green gave one of those two tortfeasors (Mr. McGee) a covenant not to execute in exchange for a \$100,000.00 settlement payment from Mr. McGee’s liability carrier, the only “other[tortfeasors]” allegedly “liable in tort for the same injury” and therefore entitled to setoff was Mr. Hudgins. The statutory language leaves no room for interpretation and “grants the court no discretion in determining the equities involved in applying a set-off” when – as here – “a release has been executed in good faith between the plaintiff and one of several joint tortfeasors.” *Ellis*, 335 S.C. at 113, 515 S.E.2d at 272.

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

It is apparent from the Opinion that the Panel overlooked or misapprehended the weight that must be given to the General Assembly’s delineation of those to whom setoff can and must be applied. Mr. Hudgins is the only “other tortfeasor” whose claim can be reduced by the settlement proceeds under the plain, unambiguous language of the statute, as neither Mr. McGee nor Ms. Green’s UIM carrier qualifies as an “other[tortfeasor]” per the statutory definition. Mr. McGee by exclusion cannot be the “other[tortfeasor],” because he is the initial tortfeasor identified in § 15-38-50(1) in whose favor the covenant not to execute was given by Ms. Green. Ms. Green’s UIM carrier too fails to qualify: Although her UIM carrier may be *contractually and statutorily* liable for the verdict against Mr. McGee, it is not “liable *in tort* for the same injury” as the statute requires.

Despite this straightforward application of the plain language which yields only one

result, the Opinion “reject[s] this argument.”³ Although the Panel correctly is “keenly mindful that the legislature’s word with respect to public policy is final,” the Panel nevertheless boldly rules this “*is an interpretation we cannot follow.*” (Opinion, p. 44) (emphasis added). This clear error requires rehearing or rehearing *en banc*.

b. The Opinion exercises discretion not permitted under the plain language of § 15-38-50(1) as outlined in other decisions of this Court.

The Panel’s decision to override the plain language chosen by the General Assembly in favor of what the Opinion terms “the equitable purpose of setoff” (*id.*) also exercises discretion when the statute grants none. As previously noted, “once a release has been executed in good faith between a plaintiff and one of several joint tortfeasors,” the Court has “*no discretion* in determining the equities involved in applying a set-off.” *Ellis*, 335 S.C. at 113, 515 S.E.2d at 272 (emphasis added). In so finding, this Court in *Ellis* acknowledged that even when application of the plain language diverges from what a court might otherwise deem to be “equitable,” the statutory language still must prevail:

We recognize that a strict application of the statute may lead to unintended results; however, this is a matter for the legislature to correct if our interpretation is contrary to its intent. *See Adkins v. Comcar Indus., Inc.*, 316 S.C. 149, 151, 447 S.E.2d 228, 230 (Ct. App. 1994) (An appellate court “has no legislative powers. Our sole function is to determine and, within constitutional limits, give effect to the intention of the legislature while the responsibility for the justice or wisdom of legislation rests exclusively with the legislature, whether or not we agree with the laws it enacts.” (internal citation omitted)), *aff’d*, 323 S.C. 409, 475 S.E.2d 762 (1996).

Ellis, 335 S.C. at 113–14, 515 S.E.2d at 272. The Panel misapprehended or overlooked this guiding principle which has echoed over the years in other opinions from this Court. *See, e.g., Huck v. Oakland Wings, LLC*, 422 S.C. 430, 437, 813 S.E.2d 288, 291 (Ct. App. 2018); *Vortex*

³ This actually is not an “argument” but rather the only result reached when applying the statute to these facts.

Sports & Entertainment, Inc. v. Ware, 378 S.C. 197, 210, 662 S.E.2d 444, 451 (Ct. App. 2008).

The Opinion and this Court’s recognition in *Ellis* of the General Assembly’s province cannot be reconciled. To secure and ensure consistency in these decisions and those to come, *en banc* rehearing is necessary.

c. Disagreement with the intended result of setoff undergirds the Opinion, but that is a matter for the General Assembly and not the courts.

Although the Opinion concludes “neither justice nor equity support [sic] giving Hudgins—who did not settle and has paid no money—the benefit of settlement funds that were paid on McGee’s behalf,” (Opinion, p. 44), *that very scenario is the natural and intended result of § 15-38-50(1)*. When setoff is applied properly, it is the “non-settling defendant [who] is entitled to credit for the amount paid by another defendant who settles for the same cause of action.” *Riley v. Ford Motor Co.*, 414 S.C. 185, 195, 777 S.E.2d 824, 830 (2015). In other words, the tortfeasor who benefits from setoff by having his claim reduced is *by design* the tortfeasor “who did not settle and has paid no money,” and his claim will be reduced by the amount paid to settle *another* tortfeasor’s claim “to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is greater.” S.C. Code Ann. § 15-38-50(1). This is because is well-established “there can be only one satisfaction for an injury or wrong,” *Truesdale v. South Carolina Highway Dep’t*, 264 S.C. 221, 235, 213 S.E.2d 740, 746 (1975), and “[a]llowing this credit prevents an injured person from obtaining a double recovery for the damage he sustained,” *Rutland v. S.C.D.O.T.*, 400 S.C. 209, 216, 734 S.E.2d 142, 145 (2012).

Moreover, although § 15-38-50(1) *requires* a court to reduce the jury’s verdict by amounts already recovered from a joint tortfeasor for the same injury, the Opinion suggests this

is a result to be avoided: “Setoff is designed to prevent a plaintiff from recovering more than one share of her damages, not to prevent a plaintiff from recovering damages *the jury determined she was entitled to recover*.” (Opinion, p. 45) (emphasis added). In fact, when setoff is applied according to the dictates of § 15-38-50(1), a plaintiff may not recover some (or all) damages the jury determined she was entitled to recover against a particular tortfeasor if she has already recovered some (or all) of those damages from another tortfeasor with whom she chose to settle before trial and seek recovery of UIM benefits. Ms. Green “is entitled to only one recovery, and the collection of a judgment against one wrongdoer extinguishes any claim against the other.” *Rourk v. Selvey*, 252 S.C. 25, 27-28, 164 S.E.2d 909, 910 (1968). When – as here – there is no dispute the settlement is for the same injury as a matter of law, “the right to setoff arises as an operation of law, and the circuit court must award a setoff.” *Smith v. Widener*, 397 S.C. 468, 474, 724 S.E.2d 188, 191 (Ct. App. 2012). Even if the Panel views this as an “unintended result” of the statute’s strict application, “this is a matter for the legislature to correct if our interpretation is contrary to its intent.” *Ellis*, 335 S.C. at 113–14, 515 S.E.2d at 272.

d. The Opinion prioritizes “equitable principles” that are beyond the plain language of § 15-38-50(1) and inconsistent therewith.

Finally, the Opinion erroneously infuses the setoff analysis with “equitable principles” that appear nowhere in the plain language of the statute, directly contradict the procedure and result dictated by the statute, and encourage punishment of any non-settling defendant with the ability to satisfy a judgment against him. It is axiomatic that when setoff is applied in accordance with the plain language of § 15-38-50(1), it is the non-settling, non-paying joint tortfeasors who receive the first (and only) credit for settlement funds paid by another. The Opinion seemingly disagrees with this result and invokes the phrase “equitable principles” to justify a different

outcome: “The equitable principles codified in the statute dictate that [settling tortfeasor] McGee receive first credit for funds paid on his behalf.” (Opinion, p. 45). But this Panel’s subjective sense of “equitable principles” appears nowhere in the case law and nowhere in the codified language of § 15-38-50(1). The Panel provides no legal basis whatsoever for giving “first credit” to a tortfeasor who has been given a covenant not to execute, was found by the jury to be more at fault, and who was driving the car that wrecked into Ms. Green.

Nor does the statute permit the court to consider whether Mr. “Hudgins has sufficient liability coverage to satisfy the awards against him” (*id.* at 45) or whether “the verdict plainly exceeds his co-defendant’s coverage” (*id.* at 44). The General Assembly allotted no discretion – much less permitted consideration of the availability of inadmissible liability insurance to satisfy a verdict – when it outlined the procedure for determining the setoff to which a non-settling joint tortfeasor is entitled when the injury is the same. It was error for the Panel to inject the straightforward setoff analysis with extraneous factors.

For all these reasons, the Panel’s settlement reallocation overlooked or misapprehended controlling law and the plain language of S.C. Code § 15-38-50(1), and setoff must be recalculated to credit Mr. Hudgins – the only non-settling “other tortfeasor” – with the full \$100,000.00 paid in exchange for a covenant not to execute against his joint tortfeasor Mr. McGee. This recalculation will offset in its entirety the jury’s verdicts against Mr. Hudgins,⁴

⁴ Although the setoff calculated by both the Circuit Court and the Panel included the improper credits in Mr. McGee’s favor discussed above, both courts properly used the jury’s 40/60 fault allocation for actual damages – which was not appealed by Ms. Green and therefore is the law of the case – to determine Mr. Hudgins bore responsibility for 40% of the jury’s \$88,546.78 actual damages award. (*Compare* Opinion, p. 39 (noting the Circuit Court “allocated 60/40 between them according to the fault assigned by the jury”) *with* p. 45 (finding “Hudgins’ forty percent share of the actual damages award comes to \$35,418.71)). As the Panel correctly noted, Mr. Hudgins bears responsibility for \$35,418.71 in actual damages and \$35,000.00 in punitive

regardless of whether they should have been set aside as discussed below.

II. The Panel overlooked or misapprehended both the record and the controlling law when it affirmed the Circuit Court’s denial of Mr. Hudgins’ motions to set aside the verdicts against him.

The Panel’s decision to affirm the Circuit Court’s denial of Mr. Hudgins’ motions to set aside the actual damages and/or punitive damages verdicts also overlooks or misapprehends the record and the controlling law.

As to the jury’s award of \$88,546.78 in actual damages, for which the jury determined Mr. Hudgins was 40% responsible, the Opinion concludes “[i]t was reasonable for the jury to find Hudgins chased or followed McGee, which made McGee distracted and nervous, and therefore made Hudgins a proximate cause of the collision.” (Opinion, p. 43). This conclusion is “blatantly contradicted by the record” and misapprehends or overlooks the evidence the jury had before it. *See Scott v. Harris*, 550 U.S. 372, 380 (2007) (“When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonably jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment.”).

The record before the jury established Mr. Hudgins: (1) kept at least two to three car lengths behind Mr. McGee; (2) did not flash his lights; (3) never tried to run Mr. McGee off the road or otherwise encroached on Mr. McGee’s vehicle; and (4) did nothing to distract Mr.

damages, for a total of \$70,418.71. (*Id.*). Accordingly, Mr. Hudgins’ total liability to Ms. Green would be setoff in its entirety by the \$100,000.00 in settlement paid to Ms. Green on Mr. McGee’s behalf. And, even if Ms. Green had appealed the propriety of an allocation in light of the jury’s finding of reckless, willful, and wanton conduct, and even if this Court rejects Mr. Hudgins’ arguments *infra* Section II and finds that he is liable for the entire \$88,546.78 actual damages award, the maximum amount for which Mr. Hudgins could be responsible after setoff is \$23,546.78 (\$88,546.78 total actual damages award + \$35,000.00 punitive damages award - \$100,000.00 setoff = \$23,546.78).

McGee's attention from the roadway. The 911 Call played for the jury reflected that as Mr. McGee turned onto Simuel Road – 12 seconds before the accident occurred there – Mr. Hudgins stated to the 911 Operator, "He's gone. I'm not going to chase him." Even assuming *arguendo* the jury heard evidence to reasonably conclude Mr. Hudgins followed Mr. McGee *at some point prior to his turn on Simuel Road* or made him "nervous" *at some point prior to his turn on Simuel Road*, this contemporaneous evidence contradicts any finding Mr. Hudgins was chasing Mr. McGee or otherwise distracting him *when the accident occurred on Simuel Road*. When, as here, "the negligence appears merely to have brought about a condition of affairs, or a situation in which another and entirely independent and efficient agency intervenes to cause the injury, the latter is to be deemed the direct or proximate cause, and the former only the indirect or remote cause." *Woody v. South Carolina Power Co.*, 202 S.C. 73, 84-85, 24 S.E.2d 121, 125 (1943).

The jury's award of punitive damages in the amount of \$35,000.00 against Mr. Hudgins also should have been set aside. The Opinion's one-sentence basis for affirming the Circuit Court's denial of Mr. Hudgins' motion to set aside the punitive damages verdict overlooks or misapprehends the law:

As for punitive damages, we need go no further than Hudgins' guilty plea to driving too fast for conditions, which is *some evidence* that Hudgins acted recklessly, willfully, and wantonly. *See Austin v. Specialty Transp. Servs., Inc.*, 358 S.C. 298, 315, 594 S.E.2d 867, 875-76 (Ct. App. 2004) ("Violation of a statute does not constitute recklessness, willfulness, and wantonness per se, but is some evidence the defendant acted recklessly, willfully, and wantonly. . . . The jury determines whether a party has been reckless, willful, and wanton.").

(Opinion, p. 43)(emphasis added). First, the Opinion fails to recognize that not every violation of a statute constitutes "some evidence" of reckless, willful, or wanton conduct – only "*causative* violation[s] of a statute" do. *Wise v. Broadway*, 315 S.C. 273, 276, 433 S.E.2d 857, 859 (1993) (emphasis added). No reasonable jury could have concluded there was a "causative" statutory

violation responsible for the accident here. The evidence was undisputed at trial that Mr. Hudgins was at least “two or three car lengths” away from Mr. McGee when the accident occurred, rendering Mr. Hudgins’ rate of speed irrelevant to Mr. McGee’s wreck with *another vehicle*. Only Mr. McGee’s own high rate of speed (which he acknowledged by pleading guilty to driving too fast for conditions) could be causative of an accident in which only Mr. McGee’s vehicle crashed into the vehicle driven by Ms. Green. Second, even assuming arguendo the jury reasonably could have found Mr. Hudgins’ plea constitutes “some evidence” that he acted recklessly, willfully, or wantonly, that is not enough: The evidence must have risen to the level of “clear and convincing” for a reasonable jury to award punitive damages. S.C. Code Ann. § 15-32-520(D). It did not in this case, and this verdict should have been set aside.

CONCLUSION

For all reasons set forth herein, and for the reasons set forth in his appellate briefs, Mr. Hudgins respectfully submits that he is entitled to rehearing and rehearing *en banc* of the Panel’s Opinion.

Respectfully submitted,

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August 9, 2023

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Aug 09 2023

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

Grace Gilchrist Knie, Circuit Court Judge

Case No. 2017CP4203523

Appellate Case No. 2020-000203

Shannon P. Green,
and Darrell Russell,

Appellant-Respondent,

v.

Edward C. McGee,
and David Hudgins,

Respondent,
Respondent-Appellant,

PROOF OF SERVICE

I, the undersigned employee of Gallivan, White & Boyd, P.A., do hereby certify that I have caused the below referenced to be served via email to all parties of record at the address(es) shown below.

1. Petition for Rehearing and Suggestion for Rehearing En Banc of Respondent-Appellant
David Hudgins

Parties of Record

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Legal Assistant

August 9, 2023

The South Carolina Court of Appeals

Shannon P. Green and Darrell Russell, Plaintiffs,

v.

Edward C. McGee and David Hudgins, Respondents,

Of whom Shannon P. Green is the Appellant/Respondent

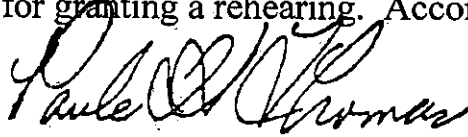
And

Of whom David Hudgins is the Respondent/Appellant.

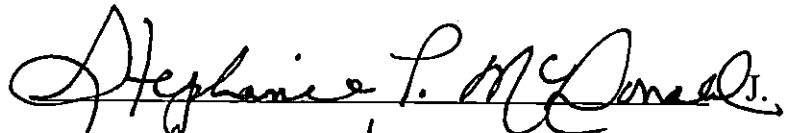
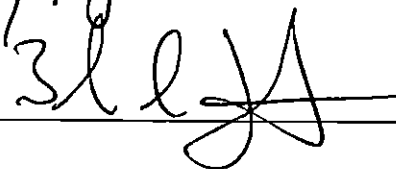
Appellate Case No. 2020-000203

ORDER

After careful consideration of the petitions for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.


Paul W. Thomas

J.


Stephanie L. McDonald

3rd Justice

J.

Columbia, South Carolina

FILED
Oct 11 2023

Appendix - 000670

cc:

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The Honorable Grace Gilchrist Knie