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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The SUPREME COURT

APPEAL FROM SC COURT OF APPEALS
AND
SPARTANBURG COUNTY
COURT OF COMMON PLEAS

Grace Gilchrist Knie, Circuit Court Judge

Appellate Case No. 2023-001735

Case No. 2017CP4203523

Shannon P. Green and Darrell Russell……. Plaintiff(s),

v.

Edward C. McGee and David Hudgins…… Defendants(s),

Of whom Shannon P. Green is Respondent

And

Of whom David Hudgins is the Petitioner

BRIEF OF RESPONDENT

Douglas A. Churdar, Esq.
UPSTATE LAWYER
SC Bar No. 11971
304 Pettigru Street
Greenville, SC 29601
Tel.: (864) 233-0203
Fax: (864) 233.3020
Email: doug@upstatelawyer.com

Attorney for Respondent
Shannon P. Green

Other Counsel of Record:

Curtis L. Ott, SC Bar #66145
Jessica W. Laffitte, SC Bar #100256
Ioannis (Ian) G. Conits, SC Bar #102675
GALLIVAN, WHITE & BOYD, P.A.]
P.O. Box 10589
Greenville, SC 29603
Tel.: (864) 271-9580
Email: cott@gwblawfirm.com
jlaffitte@gwblawfirm.com
iconits@gwblawfirm.com

Attorneys for Petitioner David Hudgins

Michelle Endemann, SC Bar #
Michael T. Coulter, SC Bar #15177
1164A Woodruff Road (29607
P.O. Box 6728
Greenville, SC 29606
Tel.: (864) 232-4400
Email: upstatecoulter@clarksonwalsh.com

Attorney for Respondent Progressive Direct Insurance Company as UIM Carrier

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ISSUE ON APPEAL

Whether the Court of Appeals properly rejected David Hudgins' ("Mr. Hudgins") argument that §15-38-50(1) allows him to convert the entire $100,000.00 settlement paid by his co-defendant/joint tortfeasor, Edward C. McGee ("Mr. McGee").

STATEMENT OF THE CASE

This case arises from an MVA that occurred on November 19, 2015, in Spartanburg County. The case was tried in October 2019. The following facts are not in dispute:

1. Prior to trial, Mr. McGee's liability carrier (Nationwide) paid Ms. Green One Hundred Thousand Dollars ($100,000.00), for which Mr. McGee was given a "Covenant Not to Execute". The Covenant prevents Ms. Green from executing against Mr. McGee "any judgment…on account of … any damages." (Appx. pp. 463-465).
2. Ms. Green had underinsured motorist ("UIM") coverage through Progressive. Mr. McGee remained in the case as a Defendant and was represented by counsel retained by Progressive.
3. On October 16, 2019, the jury returned a verdict in favor of Ms. Green (Appx. pp 9-12.).

4. The jury found both Mr. Hudgins and Mr. McGee were negligent and proximately caused the motor vehicle accident and Ms. Green's injuries, with Mr. Hudgins forty percent (40%) at fault and Mr. McGee sixty percent (60%) at fault. (*Id.* at 9-10). The jury found Ms. Green was entitled to actual damages in the amount of $88,546.78. (*Id.* at 10).
5. The jury also found Mr. Hudgins and Mr. McGee "acted recklessly, willfully, and wantonly". Thus, it awarded $35,000.00 in punitive damages against Mr. Hudgins and $35,000.00 in punitive damages against Mr. McGee. (*Id.* at 11).

Mr. Hudgins contends he is entitled to a reduction of the actual damages award (a common liability) based upon the jury's allocation of fault. Thus, he contends he is only liable for 40% of the $88,546.78 actual damages award (or $35,418.71) and the $35,000.00 punitive damages award specific to him alone – for a total liability of $70,418.71. He also contends he is entitled to a $100,000.00 setoff based upon the settlement paid by his co-defendant/joint tortfeasor, Mr. McGee. Accordingly, Mr. Hudgins contends that there can be no judgment against him after the $100,000.00 setoff is applied to his total liability of $70,418.71.

The Court of Appeals filed its Opinion on July 26, 2023. It found that Mr. Hudgins is liable to Ms. Green in the amount of $58,546.75 (exclusive of interest). Mr. Hudgins filed a Petition for Rehearing, and the Court of Appeals denied the Petition on October 11, 2023. Mr. Hudgins filed a Petition for Writ of Certiorari with this Court.

ARGUMENT

THE COURT OF APPEALS PROPERLY REJECTED MR. HUDGINS' ARGUMENT THAT S.C. CODE §15-38-50(1) ALLOWS HIM TO CONVERT THE ENTIRE $100,000.00 SETTLEMENT PAID BY HIS CO-DEFENDANT/JOINT TORTFEASOR, MR. MCGEE.

SUMMARY OF ARGUMENT

Mr. Hudgins initially bases his argument on a false premise, namely that S.C. Code §15-38-50(1) is plain and unambiguous. (It is not, and in fact the relevant language can be reasonably construed in at least two (2) ways.) Based upon that false premise, Mr. Hudgins argues for a construction of §15-38-50(1) that is entirely inconsistent with legislative intent as repeatedly recognized by this Court; his construction would "turn the Act on its head to benefit [a] non-settling defendant[ ] at the expense of [a] plaintiff[ ] and those who do settle." *Smith v. Tiffany,* 419 SC 548, 559, 799 SE2d 479 (2017). Such a construction "is not the balance the General Assembly struck in the Act." *Id.* Mr. Hudgins proposes to "fashion[ ] and ultimately extract[ ] a benefit from the decisions of those who do [settle]." *Id., citing Riley v. Ford Motor Co,* 414 SC 185, 197, 777 SE2d 824, 831 (2015). Despite having been found not only negligent but also reckless, willful, and wanton, Mr. Hudgins argues: 1) he should pay nothing against a judgment of $158,546.78, even though it includes an actual damages award of $88,546.78, for which he can be held 100% liable, and a $35,000.00 punitive damages award specific to him alone; and 2) Mr. McGee, his co-defendant/joint tortfeasor, has an obligation to Ms. Green of $88,128.07 (before

setoff), which is 56% of the jury's verdict in her favor ($53,128.07 actual damages [$88,546.78 x .60] and $35,000.00 punitive damages).[1]

Mr. Hudgins' proposed construction is inconsistent with other statutory provisions. First, §15-38-15(F). Mr. Hudgins' argument depends upon use of the jury's allocation of fault. This would prevent Ms. Green from exercising her right to seek the $88,546.78 actual damages award from whichever co-defendant/joint tortfeasor she chooses. The jury determined Mr. Hudgins "acted recklessly, willfully, and wantonly". Thus, based upon §15-38-15(F), the jury's allocation of fault "does not apply".[2] (The Court of Appeals did not properly address this issue.[3]) Second, §15-32-520(G). Mr. Hudgins' argument depends upon converting Mr. McGee's settlement to satisfy a $35,000.00 *punitive* damages award against him. Based upon §15-32-520(G), Mr. McGee could *never* have been liable for a punitive damages award against Mr. Hudgins; punitive damages are not a common liability.[4] Absent very clear language in the Covenant Not to Execute, Mr. McGee did not settle a liability that could never have been his. Thus, Mr. Hudgins cannot use Mr. McGee's $100,000.00 settlement payment to satisfy the $35,000.00 punitive damages award against him.

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1 Since Mr. McGee is entitled to a $100,000.00 setoff based upon Nationwide's settlement payment, Mr. Hudgins is effectively arguing there are two (2) setoffs – one for him and one for Mr. McGee. In fact, he did that explicitly before the Circuit Court. The $100,000.00 payment by Mr. McGee's liability carrier magically morphs into a $200,000.00 setoff.

2 Nor does §15-38-15(E) apply. Mr. McGee, who paid a $100,000.00 settlement to Ms. Green, was not a "potential tortfeasor" but rather a "defendant" and, as the jury determined, an "actual" tortfeasor. The terms "potential tortfeasor" and "defendant" are not synonymous. *Smith v. Tiffany*, 419 at 557-558.

3 This argument was made to the Court of Appeals (Appx. pp. 510 and 526-27).

4 This argument was made to the Court of Appeals (Appx. p. 510).

(The Court of Appeals did not apply the jury's allocation of fault to the punitive damages award against Mr. Hudgins, but neither did it address this issue.)

I. §15-38-50(1) IS NOT CLEAR AND UNAMBIGUOUS.

Hudgins argues that §15-38-50(1) is clear and unambiguous. It is not. Multiple lawyers and judges have wrestled with its meaning and application – not only in this case but in several prior cases. Justice Kittredge recently recognized (understatedly) "that section 15-38-50 is not a model of clarity…". *Jolly v. Fisher Controls Int'l*, 443 SC 511, 541, 905 S.E.2d 380, 396 (2024) (Kittredge, J., dissenting). (At oral argument, he referred to it as "a train wreck". Twice.)

"Statutes must be read as a whole, and sections which are part of the same general statutory scheme must be constructed together and given effect, if it can be done so by *any reasonable construction*." *Higgins v. State,* 307 SC 446, 449 (1992). (Emphasis provided.) There are at least two (2) reasonable constructions of §15-38-50(1). The first is the one proposed by Hudgins, namely that he can divert McGee's settlement payment for his own use. The second is that the extent of the $100,000.00 payment is available to be spent among "two or more persons liable in tort for the same injury". The payment benefits McGee, of course, but other tortfeasors get whatever is left ("to the extent"). "To the extent" means the outer limit. While Mr. Hudgins' liability is not discharged by Mr. McGee's settlement, it is reduced against him to the outer limit of Mr. McGee's settlement. ("[I]t reduces the claim against the others *to the extent* of any amount stipulated by the release or covenant…")

II. MR. HUDGINS ARGUES FOR A CONSTRUCTION OF §15-38-50(1) THAT IS ENTIRELY INCONSISTENT WITH LEGISLATIVE INTENT.

Mr. Hudgins' argument must be rejected because it would lead to an absurd result - one that is entirely inconsistent with legislative intent. "The cardinal rule of statutory construction is that [the courts] are to ascertain and effectuate the actual intent of the legislature." *Burns v. State Farm,* 297 SC 520,522, 377 SE2d 569, 570 (1989). Every rule of statutory construction is subservient to the goal of achieving the manifest intent of the legislature. *Martin v. Ellisor, 266 SC 377, 381,* 223 SE2d 415 (1976). When the literal application of a statute produces an absurd result, the court will consider a different meaning. *Id.* The rule of literal interpretation will be forced to yield. *Id.* "However plain the ordinary meaning of words used in a statute may be, the courts will reject that meaning when to accept it would lead to a result so plainly absurd that it could not possibly be intended by the legislature or defeat the plain legislative intention." *Miller v. Aiken,* 354 SC 303, 613 SE2d 364, 366 (2005).

This Court has repeatedly recognized the legislative intent of the Act. The Act codified equitable principles relating to setoff that existed for over one hundred (100) years. *Riley,* 414 S.C. at 195, 777 SE2d at 830. In short, the Act is intended to "strike a fair balance for all involved – plaintiffs and defendants – and to do so in a way that promotes and fosters settlements." *Smith v. Tiffany*, 419 SC at 557. Specifically, this Court has regularly stated the legislature intended to 1) prevent double recovery by plaintiffs, *Riley,* 414 SC at 196; and 2) promote settlements. *Id.; Smith v. Tiffany,* 419 SC at 557.

Mr. Hudgins' position has nothing to do with preventing double recovery by Ms. Green, which was cause enough for the Court of Appeals to reject it. His position would unfairly deprive Ms. Green of a full recovery – a single recovery. While Ms. Green received a verdict of $158,546.78, Mr. Hudgins argues that she should receive nothing from him. Applying Mr. Hudgins' calculation, Ms. Green would have been entitled to $83,128.07 from Mr. McGee, but Mr. McGee also owes her nothing because he overpaid her with the settlement. (His 60% of the $88,546.78 = $53,128.07 + $35,000 punitive = $88,128.07.) In Mr. Hudgins' analysis, Ms. Green merely receives the original amount of settlement, which is less than two-thirds (2/3) of the jury verdict in her favor. This inequity is prevented in some jurisdictions by a rule that makes sense and should be adopted in South Carolina: Setoff is available "only to the extent necessary to prevent a double recovery". *Hoglund v. State Farm Automobile Insurance Company,* 148 Ill.2d 272, 592 NE2d 1031, 1035 (1992).

Mr. Hudgins' position will also not promote settlements. To the contrary, it will discourage settlements at least in the common scenario involving UIM. No plaintiff injured by joint tortfeasors would settle with the liability carrier for one of them and proceed against her own carrier for UIM benefits. The settlement payment would be doubled. Such a settlement would never benefit a plaintiff.

III. MR. HUDGINS' POSITION DEPENDS UPON AN ALLOCATION OF FAULT THAT DOES NOT APPLY.

Mr. Hudgins argues that his liability from the jury's verdict is $70,418.71 ($35,418.71 [forty (40% of $88,546.78 - the actual damages awarded], plus the

punitive damages award of $35,000.00 against him). Obviously, this position depends upon application of the jury's allocation of fault – 60% to Mr. McGee and 40% to Mr. Hudgins. The Act provides for allocation of fault in most cases to ensure that no defendant pays more than his equitable share of a common liability. Thus, except where defendants have acted recklessly, willfully, and wantonly (among other things), a defendant "who has paid more than his pro-rata share of the common liability" may seek contribution from a fellow tortfeasor. §15-38-20(A) & (B). (Except where, as here, one tortfeasor has entered into a settlement. Mr. McGee cannot claim contribution from Mr. Hudgins. §15-38-20(D). And Mr. Hudgins cannot claim contribution from Mr. McGee. §15-38-50(2).)

But Mr. Hudgins fails to reconcile the fact that the jury found he had "acted recklessly, willfully, and wantonly" and that punitive damages were awarded against him. (As will be discussed below, punitive damages are not a common liability.) In such a case, allocation of fault is irrelevant. §15-38-15(F) provides: "This section does not apply to a defendant whose conduct is determined to be willful, wanton, reckless, grossly negligent..." The jury's allocation of fault "does not apply".

The actual damages award of $88,546.78 is a pure joint and several award – a common liability. Ms. Green is entitled to a judgment against either Mr. McGee or Mr. Hudgins for 100% of those actual damages (before setoff). In addition, Mr. Hudgins is solely responsible for the punitive damages award against him in the amount of $35,000.00. Thus, the judgment against him could have been $123,546.78. Should Ms. Green pursue the $88,546.78 actual damages award from Mr. Hudgins,

he is entitled to "the extent of" a $100,000.00 setoff ("the extent of any amount stipulated by the release or the covenant") for those actual damages. Thus, he would owe nothing in actual damages.

IV. MR. HUDGINS' POSITION DEPENDS UPON SETOFF OF THE PUNITIVE DAMAGES AWARD AGAINST HIM, WHICH IS IMPERMISSIBLE.

Punitive damages are not joint and several; they are not a common liability. If there was any doubt about that, such doubt was clarified with adoption of the Non-Economic Damages Act in 2012. §15-32-520(G) provides: "In 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 paid against that defendant." Neither Mr. McGee nor Mr. Hudgins can be liable for a punitive damages award against the other. As a result, a release or covenant that covers Mr. McGee's liability and damages does not cover a punitive damages award against Mr. Hudgins. Mr. Hudgins alone is responsible for the $35,000.00 punitive damages award against him.

Such a policy – that there is no joint and several liability for punitive damages – has prevailed for years in many jurisdictions. "As a general rule, partial compensation by one tortfeasor may be shown by another tortfeasor in mitigation or reduction of damages… There are recognized limits to the application of the general rule and it only applies in determining actual damages." *25 CJS Damages §177.* The reasoning for the policy is that punitive damages are awarded for specific egregious acts by specific defendants.

> "While [joint and several liability] is not unnecessarily undesirable with respect to a judgment awarding compensatory damages, it is contrary to the policies underlying an award of punitive damages. The later award is intended in part as a penalty against a defendant who has exhibited a high degree of moral culpability and as a deterrence against further similar conduct by that defendant. Those interests are disserved if the judgment gives such a defendant an opportunity to escape payment of the penalty assessed. Thus, imposition of joint liability for a punitive award is improper." *Smith v. Lightning Bolt Productions, Inc.,* 861 F.2d 363, 374 (2nd Cir. 1988).

See also, Crown Life Insurance Company v. Casteel, 22 SW2d 378, 291-392 (Tex. 2000):

> "Under the one satisfaction rule, the nonsettling defendant may only claim a credit based on the damages for which all tortfeasors are jointly liable [citations omitted]…[T]he nonsettling defendant is entitled to offset any liability for joint and several damages by the amount of common damages paid by the settling defendant, but not for any amount of separate or punitive damages paid by the settling defendant."; and *MAR Oil Co. v. Korpan,* Case No. 3:11CV1261-JGC (N.D. Ohio 9/29/15). (Joint and several punitive damages award not permitted.)

South Carolina has historically supported the policy that setoff among joint tortfeasors can only apply to a common liability. In *Collins v. Bisson Moving & Storage, Inc.,* 332 SC 290, 304-305, 504 SE2d 347 (1998), the Court of Appeals qualified the setoff rule. "[T]his rule applies to only those damages for which all tortfeasors are equally liable. 25 *C.J.S.* Damages §98(2) (1966)." *Id.*

Ms. Green is aware of *Smith v. Widener*, 397 SC 468, 748 SE2d 188 (2012). There this Court held that when an injury is caused by joint tortfeasors, and a plaintiff seeks actual and punitive damages, §15-38-50(1) requires a setoff that applies to all damages arising from "the same claim", including punitive damages. This Court's focus was on the meaning of the term "the same claim". The "plaintiff's

claim for actual and punitive damages arising from the same injury is the same claim for purposes of setoff under §15-38-50(1)." *Id.* at 473.

Significantly, *Smith v. Widener* was heard *before* the effective date of the Non-Economic Damages Act in 2012 and without analyzing the impact of §15-32-520(G). This section made clear the legislature's intent that liability for punitive damages is specific to the defendant against whom imposed. Such liability for punitive damages is not and cannot be a common liability among co-defendants. As to how this relates to the Contribution Among Joint Tortfeasors Act, the focus must now be on references to the term "common liability". §§15-38-20 & 15-38-30 make clear that joint tortfeasors must not be required to pay more than their "pro rata share of the *common liability*". §15-38-20(B) (Emphasis provided.) A joint tortfeasor "who has paid more than his pro rata share of the *common liability"* may ordinarily seek contribution from another. *Id.* So while separate punitive damages awards against two (2) joint tortfeasors may arise from the same claim, it cannot be argued that they are a "common liability".

CONCLUSION

For the foregoing reasons, this Court should hold that Ms. Green is entitled to pursue judgment against either Defendant in the amount of $88,546.78 actual damages (before setoff) and $35,000.00 punitive damages from each of them.

If Ms. Green pursues judgment for actual damages against Mr. McGee, he can apply his $100,000.00 settlement as a setoff, and he is left with a credit of $11,453.22

that also reduces the $35,000.00 punitive damages award against him. (The Covenant prevents Ms. Green from executing against Mr. McGee "any judgment… on account of…any damages").

As to McGee: $ 88,546.78 (Actual damages)
+ $ 35,000.00 (Punitive damages)
$123,546.78
- $100,000.00 (Setoff for Covenant Not to Execute)
$ 23,546.78 (Judgment against McGee)

As to Hudgins: + $35,000.00 (Punitive damages)
$35,000.00 (Judgment against Hudgins)

If Ms. Green pursues judgment for actual damages against Mr. Hudgins, he can apply the $100,000.00 settlement as a setoff but *only* against the judgment for actual damages. He is *not* left with a credit that can be applied to the $35,000.00 punitive damages award against him.

As to Hudgins: + $ 88,546.78 (Actual damages)
- $100,000.00 (Setoff for Covenant Not to Execute)
$ 11,453.22 (Hudgins cannot use for punitive damages award)

+ $ 35,000.00 (Punitive damages)
$ 35,000.00 (Judgment against Hudgins)

As to McGee: + $ 35,000.00 (Punitive damages)
- $ 11,453.22 (Balance of setoff)
$ 23,546.78 (Judgment against McGee)

Ms. Green receives $53,546.78, which is the exact amount she would receive using the Court of Appeals' analysis. Any amount due by either Defendant must now include interest.

February 6, 2025

/s/ Douglas A. Chudar
Douglas A. Churdar, Esq.
UPSTATE LAWYER
SC Bar No. 11971
304 Pettigru Street
Greenville, SC 29601
Tel.: (864) 233-0203
Fax: (864) 233.3020
Email: doug@upstatelawyer.com

Attorney for Respondent
Shannon P. Green