THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BAMBERG COUNTY
Court of Common Pleas

Doyet A. Early, II, Circuit Court Judge

Case No.: 2008-CP-05-00235

Laura Riley as the Personal Representative of the Estate of Benjamin Riley,..... Respondent,

v.

Ford Motor Company .....Appellant.

RESPONDENT'S PETITION FOR REHEARING AND SUGGESTION FOR REHEARING *EN BANC*

Pursuant to Rule 221(a) of the South Carolina Appellate Court Rules, Respondent Laura Riley, as Personal Representative of the Estate of Benjamin Riley (hereinafter, "Estate" or "Riley") respectfully petitions the Court for Rehearing and/or to Alter its Opinion number 5195 of February 5, 2014.[1] This Opinion reversed the trial court's denial of Ford's motion for setoff and the trial court's granting of the Estate's motion for new trial *nisi additur*. Respondent also respectfully petitions and suggests the desirability of rehearing by the Court *en banc* because the proceeding involves questions of exceptional importance.

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[1] Respondents requested, and were granted by Order of this Court, an extension of time until March 7, 2014 to file and serve its Petition for Rehearing and Request for Rehearing *En Banc*.

The Opinion's rulings on the issues of setoff and new trial *nisi additur* are fundamentally flawed and sow the seeds of far reaching ramifications beyond the outcome of this case. On both issues the Opinion overlooks and misapprehends the standard of review to be employed and deviates from the binding case law upon which these issues historically have been analyzed.

First, on the issue of setoff (equitable reallocation), the Court's ruling radically diverges from the standard of review which has heretofore been applied by our appellate Courts. Instead of following the well-established discretionary/any evidence standard of review, from various strands of *dicta* the Opinion weaves together a new standard that allows the appellate Court to substitute its own view of the evidence and the record for that of the trial court. The analysis in the Opinion therefore misapprehends existing case law and instead breaks new ground, creating a novel issue of law by its misapplication of the existing standards. As analyzed below, the ruling on setoff should be reconsidered because it is inconsistent with binding precedent and for the policy reasons set forth below.

Second, the Court's reversal of the trial court's grant of new trial *nisi additur* misapprehends binding precedent of the standard of review. On this issue the Opinion again charts new territory with sweeping language that diminishes, if not totally negates, significant and longstanding discretionary powers of the trial court.

I. The Opinion Creates a New Standard of Review For Setoff and Equitable Reallocation based upon Misapprehension of Controlling Case Law Regarding the Appropriate Standard of Review

The Opinion first misapprehends binding law concerning the trigger, or threshold requirement, for the application of setoff through equitable reallocation. In equitably

reallocating the settlement on appellate review – when there is no finding that the settlement between the Estate and Carter was fraudulent or a sham and, in fact, after correctly ruling that evidence existed to support a survival action – the Opinion creates absolutely new precedent in still choosing to reallocate. Under existing precedent, this Court's only analysis of setoff and reallocation historically has been to review the record to determine whether ANY EVIDENCE exists to support the agreed upon allocation to a particular cause of action. If some, or any, evidence exists to support the allocation, then the analysis has ended there under our binding precedent. On the other hand, in cases such as *Rutland*, *Epstein*, *Welch*, etc. discussed below, where the reviewing court found no evidence existed to support the cause of action to which proceeds were allocated, then the settlement allocation was by definition a sham. In that instance, equitable reallocation should be available to the party claiming the right to setoff.

Here, however, the Opinion correctly finds that evidence exists to support a survival cause of action. Having correctly made that determination, by definition the settlement allocation between the Estate and Carter cannot be fraudulent. If existing precedent were followed, the analysis would end there. It did not, however. The Opinion should be reconsidered.

A. Equitable Reallocation and the Standard of Review

A motion to set off one judgment against another is "equitable in nature and should be exercised when necessary to provide justice between the parties." *Welch v. Epstein*, 342 S.C. 279, 536 S.E.2d 408 (Ct. App. 2000). Such discretion may be exercised when a settlement or judgment is "based on a fraud or a sham." *Id.* There are

essentially two foundational cases addressing setoff and equitable reallocation: *Welch* and *Ward v. Epting*, 290 S.C. 547, 351 S.E.2d 867 (Ct. App. 1986)

In *Ward*, Defendant Epting argued that the plaintiff's pain and suffering cause of action was a sham and therefore, he should be entitled to setoff for the previous settlement for the same cause of action. The trial judge refused to attack the prior settlement absent a showing of fraud or lack of jurisdiction. The trial court noted that under the "any evidence" standard of *Croft v. Hall*, 208 S.C. 187, 37 S.E.2d 537 (1946), evidence existed in that record from which a jury could reasonable find conscious pain and suffering existed. *Ward*, 351 S.E.2d at 874-875. Upon the finding that some evidence existed to support the cause of action to which the disputed settlement funds had been allocated (of note, there only 1.6% of the settlement proceeds was allocated towards the wrongful death cause of action for which the Defendant was entitled to setoff as a matter of law), the trial court refused to equitably reallocate. Because the settlement was not a fraud, the Court of Appeals did not disturb the trial court's ruling.

On the other hand, we have *Welch v. Epstein*, where a settlement was successfully collaterally attacked, found to be a sham, and overturned. In *Welch*, a medical malpractice suit dealing with substandard post-operative care, the only evidence presented as to the plaintiff's pain and suffering was that the plaintiff suffered pain as a result of an underlying back surgery, rather than as a result of the post-surgical failures and omissions giving rise to the lawsuit. *Id.* at 426. The trial court therefore found that the plaintiff's burden to prove a survival action had not been met and equitable reallocation was proper. In essence, the settlement apportionment in *Welch* was

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

Furthermore, it is clear that the "any evidence" standard relied upon by our courts to test the sufficiency of the evidence is a low bar. The "any evidence" standard is equivalent to a "scintilla of evidence." *Hancock v. Mid-South Management Co., Inc.*, 381 S.C. 326, 673 S.E.2d 801 (2008). "If there is *any* evidence from which a jury could reasonably conclude a decedent experienced conscious pain and suffering," then the claim must be submitted to the jury. *Vereen v. Liberty Life Ins. Co.*, 306 S.C. 423, 432, 412 S.E.2d 425,431 (Ct. App. 1991); *Smalls v. South Carolina Department of Education*, 339 S.C. 208, 528 S.E.2d 682 (Ct. App. 2000). It is well settled that under this "any evidence" standard, even "weak" evidence is sufficient. *Croft*, supra. Furthermore, in this analysis the evidence – even if only a scintilla exists – must be viewed in the light most favorable to the non-moving party. *Vereen.* If that evidence is susceptible of more than one reasonable inference, the evidence is sufficient to support the survival cause of action. *Id.*, 306 S.C. at432, 412 S.E.2d at 431.

Croft, is a seminal cases addressing conscious pain and suffering. In that case, this Court addressed a factual showing that it noted to be "weak" and concluded that sufficient evidence existed that the issue should go to the jury. The only testimony in Croft case in support of pain and suffering was the testimony of the decedent's mother that her daughter "recognized her" and that the decedent "opened her eyes and looked at me several times." *Id.* at 540. In contrast to this testimony, the attending physicians and nurses testified that in their medical opinions, there was no conscious

suffering. *Id.* Faced with the testimony of the mother that the decedent opened her eyes and recognized her mother, the Court held:

> There was positive testimony of the physician, nurses and others that in their opinion there was no conscious suffering, which may convince the jury upon trial to that conclusion, and it might so persuade us were we empowered to find the facts; but that was the jury's province in this, a case at law.... [O]ur decision is not of the preponderance of the evidence but whether there was any from which the jury could reasonably find conscious pain and suffering.

Id.

Vereen also illustrates where wholly circumstantial and "weak" evidence of conscious pain and suffering nevertheless supported a viable cause of action for survival. In *Vereen*, the trial court directed a verdict against the plaintiff on his survival cause of action and the appellate Court reversed. The investigating law enforcement officer arrived on the scene to find the sole occupant of the vehicle already deceased. The officer testified, however, that upon arrival he "saw an eight foot trail of blood leading away from Vereen's body and who observed Vereen's hands clutching his chest with leaves and pine needles on them." *Id.* at 431. A photograph showing how the hands were positioned was also admitted into evidence. The Supreme Court held that this evidence constituted sufficient circumstantial evidence to preclude a directed verdict on the survival cause of action. *Id.*, 306 S.C. at 432, 412 S.E.2d at 431.

Under the analysis of the "any evidence" standard, circumstantial and weak evidence may even support a settlement allocation and that allocation will not be determined to be sham. The law as it existed before the Opinion is that only a fraudulent

or sham allocation would be attacked. If some evidence existed, then the settlement would not be equitably reallocated.

B. Though the Opinion Correctly Found Evidence Exists to Support Allocation of Settlement Proceeds to a Survival Cause of Action, the Opinion Alters the Existing Scope of Review by Then Conducting its Own *De Novo* Review and Reallocating a Non-Fraudulent, Non-Sham Settlement Allocation

The Estate's settlement with Carter allocating $20,000.00 to a survival cause of action was appropriate. It was supported by evidence of conscious pain and suffering, as acknowledged in the Opinion: "We find some evidence that Riley suffered consciously." Opinion, p. 10. Having found that evidence exists to support the survival cause of action, the settlement allocation was appropriate under existing law. The Opinion does not employ the longstanding "any evidence" standard. Instead, the Opinion chooses to engage in its own review of the proportionality of the settlement figures allocated to each cause of action, an undertaking without precedent to the undersigned's review.

In doing so, the Opinion attacks the trial court's denial of the motion for setoff by noting that the trial court's order contains "no analysis" of the issue. No such analysis has been required by any of the common law addressed before this Court, nor statutory or rule based requirements. Typically the only "approval" of such actions needed is that required by the wrongful death/ survival action settlement approval statutes of S.C. Code Ann. §§ 15-51-10, 15-51-60, and 15-5-90. In this case, such approval was given, in compliance with the statutes. The trial court analyzed the petitions and concluded appropriately that the settlement between Carter and the Estate was fair, reasonable, and in the best interests of the beneficiaries and Estate.

Finally, in engaging in a proportionality analysis at the appellate level drawing its own conclusions of a "reasonable" allocation in accordance with its own view of the facts, the Opinion greatly detracts from the inherent discretionary powers of the trial court. Great deference is to be given to the trial judge, who heard the evidence and is more familiar with the evidentiary atmosphere at trial, and who thus possesses a better-informed view of the damages than this [appellate] Court. *Proctor v. Dep't of Health & Envtl. Control*, 368 S.C. 279, 319-21, 628 S.E.2d 496, 518 (Ct. App.2006) (internal citations and quotation marks omitted). The decision to conduct de novo appellate review of the issues at hand flies in the face of the historical "any evidence/abuse of discretion" standard which clearly applies. The decision also raises significant policy concerns for litigants, lawyers, and the trial bench. First and foremost, the possibility of *de novo* review of settlements between agreeing parties on appeal will greatly chill settlements to the detriment of plaintiffs and settling co-defendants. If a non-fraudulent allocation that is supported by evidence might then be equitably reallocated on appeal, what incentive does a plaintiff have to settle with and release a co-defendant in litigation? More defendants would be forced to bear the expense and delay of litigation in a case in which they previously might have settled. Plaintiff's counsel would face potential pitfalls in advising a client to accept partial satisfaction from one defendant. Finally, are appellate courts, in face of the glut of appeals they face, equipped for, willing, and desiring of *de novo* review of records where there has been no sham settlement?

This Opinion should be altered, because it misapprehends existing standards of review and creates far reaching issues and problems for litigants, lawyers, and the trial bench. Most troubling, the Opinion weakens the historic, inherent discretionary powers

of the trial bench to make equitable determinations concerning the propriety of setoff and allocation.

II. The Opinion Misapprehends Binding Precedent Concerning New Trial *Nisi Additur* and in Fact Creates a New Bright Line Test with No Precedential Support.

Plaintiffs aggrieved by jury verdicts perceived to be inadequate in light of the evidence presented at trial have long been afforded an avenue of relief, whether by moving for a new trial or for new trial *nisi additur*.

In this case, the trial court entered a detailed, comprehensive order discussing the compelling reasons it chose to add $600,000.00 to the jury verdict of $300,000.00. Furthermore, though not addressed in the Opinion, the record includes statements by the trial judge that clearly bolster the "reasons" for the trial court's compulsion to grant *additur*. Before excluding multiple damages witnesses, who had not yet testified, the Court stated:

> ... But it seems to me that we've had a – in fact, I've been doing this a long time and I can't remember a trial that I was either involved in as a lawyer or as a judge where I've heard more glowing testimony and genuine testimony about the person's life and his service to his family and to the community. I mean, it's been – it's been very touching, to be quite frank with you; so tell me what else you want to do other than what you have done.

(R. p. 169, lines 16-24). In this case, the trial court satisfied all requirements of existing case law in its order by giving numerous compelling reasons for its decision.

Despite compliance with existing standards in applying the nebulous and still undefined "compelling reasons" requirement, the Opinion reverses the trial court's decision, seemingly relying upon concerns that the trial court invaded the jury's province in an impermissible manner. By the language of the Opinion, the end result of the

Opinion's ruling on *additur* certainly appears to be founded in sincere and admirable concern for judicial deference to a jury's verdict and the parties' rights to trial by jury. However, the historic power of the trial court to grant the relief of new trial or new trial *nisi additur* has always been tempered by deference due to the jury's findings and the parties' rights to trial by jury. Review of the case law defining *nisi additur* as a discretionary power of the trial court clearly indicates the Courts grappled with those same lofty concerns many years ago, yet allowed the trial court wide discretionary powers in dealing with the issue. The trial court's order in this case in no way offends those notions; rather, the trial court struck a careful balance here in its detailed order granting *additur*. All applicable standards, no matter how ill-defined, were rigorously adhered to by the trial court; yet the Opinion reversed the trial court's grant of *additur*. The Court's reversal of the grant of *nisi additur* is inconsistent with existing case law.

Furthermore, the holding here sets a new and dangerous precedent which binds the hands of the trial court on post-trial review: the opinion stands for the proposition that if **any** amount of "noneconomic" damages above the claimed "economic" damages claimed is awarded by a jury, then the trial court cannot through the exercise of discretion grant *additur*. A bright line test of this nature has never existed, nor should it. The holding here flies in the face of the precedent of *Toole v. Toole*, 260 S.C. 235, 195 S.E.2d 389 (1973), as addressed below.

Perhaps recognizing the inconsistency of the result in this matter, as well as the dissonance between existing precedent and the logical path to arrive at the result in this case, the Opinion's exact holding reads:

> Limiting our holding to the facts of this case, we find the jury awarded damages for noneconomic loss, and the trial court's mere

> disagreement with the jury's determination of the proper amount of those damages is not a compelling reason for granting *additur*.

While the Opinion quotes some of the compelling reasons for the *additur* from the trial court's order, it then ignores the same compelling reasons given and simply states that the trial court's disagreement with the jury verdict is not a "compelling reason." The Opinion completely misses the point that the through the exercise of the long vested discretion, a trial court, in the first instance, for any *additur* that has ever been granted, has necessarily disagreed with the amount of the verdict and made a determination that the verdict was too low. This is, and has always been, the primary, threshold question when faced with a motion for *nisi additur,* where the trial court can grant the motion in the face of a merely inadequate verdict. Only after this initial exercise of discretion – the finding of mere inadequacy – must the grant of *additur* be justified by "compelling reasons." Here, the trial court's order exhaustively lists the numerous compelling reasons which are ignored in the Opinion. Respectfully, the Opinion's holding in this matter should be altered to bring it in line with existing law.

A. The Wide Discretion of the Trial Court to Grant *Additur* and the Evolution of, and Lack of Guidance as to, the "Compelling Reasons" Analysis.

A motion for a new trial may be granted in tort actions where the verdict is grossly inadequate; such motions are addressed to the sound discretion of the trial judge. *Bodie v. Charleston & W.C. Ry. Co.*, 66 S.C. 302, 44 S.E. 943 (1903); *Toole v. Toole*, 260 S.C. 235, 195 S.E.2d 389 (1973); *Daniel v. Hazel*, 242 S.C. 443, 131 S.E.2d 269 (1963). "Motions for new trial on the ground of either excessiveness or inadequacy are addressed to the sound discretion of the trial judge. His exercise of such discretion,

however, is not absolute and it is the duty of this Court to review and determine whether there has been an abuse of discretion amounting to an error of law." *Toole v. Toole.*

"The trial judge alone has the power to grant a new trial *nisi* when he finds the amount of the verdict to be merely inadequate or excessive... ." *Chapman v. Upstate RV & Marine*, 610 S.E.2d 852 (Ct. App. 2005) (quoting *McCourt by & Through McCourt v. Abernathy,* 318 S.C. 301, 308, 457 S.E.2d 603, 607 (1995)). The trial court may exercise this discretion and the power to grant a motion for new trial *nisi additur* when that trial court determines that the jury's verdict is merely inadequate in light of the evidence presented." *Bailey v. Peacock*, 318, S.C. 13, 14, 455 S.E.2d 690, 691 (1995); *Howard v. Roberson*, 376 S.C. 143, 654 S.E.2d 877 (Ct. App. 2007) (citing, *Green v. Fritz,* 356 S.C. 566, 570, 590 S.E.2d 39, 41 (Ct. App. 2003)). The trial court is given "wide discretion" in ruling on a motion for *additur*. *Luchok v. Vena*, 391 S.C. 262, 264, 705 S.E.2d 690, 691 (Ct. App. 2010). While the jury's determination of damages must be given substantial deference, *id.*, on appeal the trial court's decision to grant *additur* likewise is entitled to "great deference." *Krepps by Krepps v. Ausen*, 324 S.C. 597, 608, 470 S.E.2d 290, 295 (1996). "The consideration of a motion for a new trial *nisi additur* requires the trial judge to consider the adequacy of the verdict in light of the evidence presented." *Id.*, citing, *Patterson v. Reid*, 318 S.C. 183, 456 S.E.2d 436 (Ct. App. 1998). Furthermore, "[t]he trial judge, who heard the evidence and is more familiar with the evidentiary atmosphere at trial, possesses the better-informed view of the damages than this [the appellate] Court." *Krepps*, quoting *Rush v. Blanchard*, 310 S.C. 375, 426 S.E.2d 802 (1993).

Historically, a trial court's grant of *additur* would only be reversed if an abuse of discretion occurred which amounted to an error of law. In 1984 the innocuous and as yet

undefined phrase "compelling reasons" entered our appellate courts' lexicon under the abuse of discretion framework. The "compelling reasons" analysis requires a trial court granting *additur* to state "compelling reasons" for doing so in its order. This requirement – which has never been defined – is borne of *dicta* from an opinion of September of 1984 by the Court of Appeals, *Haskins v. Fairfield Elec. Co-op.*, 321 S.E.2d 185 (Ct. App. 1984).[2]

Prior to *Haskins*, to the best of the Estate's research, the phrase "compelling reasons" had never been included in appellate analysis of the trial court's discretionary decision making as to the propriety of *additur*. In fact, only months before *Haskins*, in *Graham v. Whitaker*, 321 S.E.2d 40, 45 (1984), our Supreme Court affirmed a grant of *additur* under the normal "abuse of discretion" standard. In *Graham v. Whitaker, the* Supreme Court lucidly addressed the concepts, standards, and historical underpinnings of *nisi additur* that are still (or should be) the standard today:

> There can be no question but that the trial judge has the authority and traditionally has in this State granted new trials outright when he, sitting as the thirteenth juror charged with the duty of seeing that justice is done, is convinced that a new trial is necessitated on the basis of the facts in the case. There is given to the trial judge a broad discretion which has been used sparsely and rightly so.
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> In like fashion, it is well settled that judges have the authority to grant a new trial *nisi remittitur*. In such cases, the judge may not impose a substitute for the jury verdict on an unwilling plaintiff. He may give the defendant the right to a new trial unless the plaintiff agrees to remit a portion of the verdict. If the plaintiff chooses not to remit a new trial is essential.
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> The motion for a new trial *additur* has not been frequently used but it is true that the trial judge has the authority to grant a new trial to

[2] Of note, the "compelling reasons" analysis is completely absent from appellate review of an order granting new trial *nisi remittur*. A trial court finding a verdict to be excessive has no burden of presenting compelling reasons, whatever those may be, for the decision. This is fundamentally unfair.

> the plaintiff unless the defendant agrees to the payment of an additional amount. We need not plow new ground in holding that the authority to act in behalf of the plaintiff is equally appropriate.
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> . . .
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> We know of no just reason why relief from excessiveness or inadequacy should not be equally available to plaintiffs and defendants. In neither case may a judge impose his will upon a party. The option must be given. Certainly, he has no right to substitute his judgment for that of the jury. In actuality, the import of a new trial *nisi additur* or *nisi remittitur* is a suggestion on part of the judge of a settlement figure. If the party ruled against agrees to the suggested amount he may not complain. The prevailing party having asked for the relief must likewise be content with the determination.

Id., 321 S.E.2d at 45 (1984). Months later in *Haskins*, Judge Shaw added: "However, compelling reasons must be stated in the order as to why it was necessary to invade the jury's province in this [grant of *additur*] manner." *Id.*, 321 S.E.2d at 190. This sentence appeared in *dicta* and no standards or definitions of "compelling reasons" were offered.

The Court of Appeals next adopted this language in *Jones v. Ingles*, 293 S.C. 490, 361 S.E.2d 775 (1987). In *Jones*, the defendant store sought review of the trial court's order granting *additur*. There, the jury found in favor of the plaintiff on her claim for malicious prosecution, yet awarded only $150, the amount plaintiff paid an attorney to defend her on her criminal charges. The trial court granted plaintiff's motion for a new trial *nisi* and ordered a new trial on damages unless the defendant agreed to the *additur* of $7,500 in actual damages. The Court noted too that she also was arrested, taken away from her children, subjected to a "mug shot," and incarcerated in a jail cell. In affirming the trial judges' decision, the Court of Appeals offered clear analysis of the trial judge's power, sitting as the thirteenth juror:

> A trial judge, sitting as the thirteenth juror charged with the duty of seeing that justice is done, has the authority to grant new trials when he is convinced that a new trial is necessitated by the facts of the case. *Graham v. Whitaker*, 282 S.C. 393, 321 S.E.2d 40 (1984). While the trial judge may not impose his will on a party by substituting his judgment for that of the jury, he may give the party an option in the way of *additur* or *remittitur,* or, in the alternative a new trial. If the party ruled against agrees to the suggested amount, he may not complain. *Graham, supra.*
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> Motions for a new trial on the grounds of either excessiveness or inadequacy of the verdict are addressed to the sound discretion of the trial judge, subject to review on appeal as to whether there has been an abuse of discretion amounting to an error of law. *Chiappetta v. Orr*, 359 S.E.2d 530 (Ct. App. 1987); *Toole v. Toole*, 260 S.C. 235, 195 S.E.2d 389 (1973).
>
> The trial judge has the power to grant a new trial *nisi additur* when he finds the verdict so grossly inadequate as to be the result of prejudice and passion or merely insufficient based on the evidence. *Haskins v. Fairfield Electric Co-Op.*, 283 S.C. 229, 321 S.E.2d 185 (Ct. App. 1984). Compelling reasons, however, must be stated in the order as to why it was necessary to invade the jury's province in this manner.

Jones, 361 S.E.2d at 776-777.

Like *Haskins,* the *Jones* opinion offered no analysis or explanation of what constitutes "compelling reasons." Yet, in *Jones*, the trial court's grant was affirmed. Indeed, thirty years after the genesis of "compelling reasons," there is still no definition or guidance as to what would satisfy the standard. Since *Haskins* there have been a number of *additur* cases which either contain no mention of the compelling reasons

requirement[3], or that incorporate the *Haskins* language but offer no guidance as to the meaning of the phrase.[4]

Without definition of "compelling reasons," in the context of *additur* it appears that "compelling reasons" language has been treated as a descriptor, or rough shorthand equivalent for, the abuse of discretion standard existing before and after *Hoskins*. As noted in *Waring v. Johnson*, 341 S.C. 248, 533 S.E.2d 906 (Ct. App. 2000), even if the requirement of compelling reasons is an "extra" threshold requirement, the standard of review remains the same:

> [T]he grant or denial of a motion for a new trial *nisi* rests within the discretion of the trial judge and his decision will not be disturbed on appeal unless his findings are wholly unsupported by the evidence or the conclusions reached are controlled by error of law.

Id., *citing Krepps by Krepps, supra*; see also, *Vinson v. Hartley*, 324 S.C. 389, 477 S.E.2d 715 (Ct. App. 1996) (grant of motion for new trial *nisi* is within trial judge's discretion and will not be reversed on appeal absent abuse of discretion).

Thus, regardless of the "compelling reasons" dicta of *Hoskins* and its progeny, absent an abuse of discretion, it is clear that the trial court's grant of new trial *nisi additur* should not be reversed on appeal. See *e.g.*, *Graham v. Whitaker*, *supra* (where judge stated "appropriate reasons" in his order, trial court did not abuse its discretion in

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[3] *Chiappetta v. Orr*, 359 S.E.2d 530 (Ct. App. 1987); *Thomas v. Seay*, 295 S.C. 455, 369 S.E.2d 660 (Ct. App. 1988); *Stroud v. Stroud*, 299 S.C. 394, 385 S.E.2d 205 (Ct. App. 1989); *Kalchthaler v. Workman*, 316 S.C. 499, 503, 450 S.E.2d 621, 623 (Ct. App. 1994).

[4] *Williams v. Gilchrist Constr. Co.*, 301 S.C. 153, 390 S.E.2d 483 (Ct. App. 1990); *overruled on other grounds by O'Neal v. Bowles*, 314 S.C. 525, 431 S.E.2d 555 (1993); *Pelican Bldg. Centers v. Dutton*, 427 S.E.2d 673 (1993); *Bailey v. Peacock*, 318 S.C. 13, 455 S.E.2d 690 (1995); *Patterson v. Reid*, 318 S.C. 183, 456 S.E.2d 436 (Ct. App. 1995); *Estes v. Gray*, 319 S.C. 551, 462 S.E.2d 561 (Ct. App. 1995); *Krepps by Krepps v. Ausen*, 324 S.C. 597, 479 S.E.2d 290 (Ct. App. 1996); *Vinson v. Hartley*, 324 S.C. 389, 477 S.E.2d 715 (Ct. App. 1996); *Waring v. Johnson*, 341 S.C. 248, 533 S.E.2d 906 (Ct. App. 2000).

granting patient, who had been awarded $10,000 in actual damages and $10,000 in punitive damages against doctor for injuries sustained in a fall in doctor's office, a new trial *nisi* on damages unless ophthalmologist agreed to an *additur* of $67,500 in actual damages); *Estes v. Gray*, 319 S.C. 551, 462 S.E.2d 561 (Ct. App. 1995) (affirming trial court's grant of motion for new trial *nisi additur* even where plaintiff claimed on appeal that $500 in additional damages was inadequate); *Patterson v. Reid*, 318 S.C. 183, 456 S.E.2d 436 (Ct. App. 1995) (holding trial judge who increased award to plaintiff from jury's $500.54 (well less than claimed medical costs) to $7,639.40 did not abuse its discretion, even where treating doctor testified that plaintiff had fibrosis which was most probably result of accident, that doctor did not believe motorist had psychosomatic problems, and that, due to accident, motorist's daily pain increased to eight on scale of ten from five, and where conflicting evidence was presented regarding effects of, and daily pain level of five prior to accident); *Kalchthaler v. Workman*, 316 S.C. 499, 503, 450 S.E.2d 621, 623 (Ct. App. 1994) (trial court did not abuse its discretion in granting new trial *nisi additur* in the amount of $2,553.76 where the plaintiff's motion specified "an amount 'up to $15,000'" and in denying motion for new trial absolute where verdict was not so shockingly disproportionate to injuries sustained as to indicate some influence outside evidence motivated jury's decision); *Stroud v. Stroud*, 299 S.C. 394, 385 S.E.2d 205 (Ct. App. 1989) (granting new trial *nisi additur* of $4000, for a total of $8765.17, in personal injury action arising when plaintiff was injured while visiting his brother's repair shop was not abuse of discretion, although plaintiff did not receive amount he had requested); *Thomas v. Seay*, 295 S.C. 455, 369 S.E.2d 660 (Ct. App. 1988) (evidence in record, that plaintiff suffered 10-15% permanent impairment to her neck and incurred

medical bills totaling almost $2,000 as result of automobile accident, supported grant of new trial *nisi additur* raising jury verdict of $371 in actual damages to $7,500).

The extended line of cases on *additur* neither have formalized any definition of, nor provided any guideposts for, "compelling reasons." Rather, the line of cases adheres to recognition of the trial court's wide discretion stated succinctly, post-*Haskins*, in *Thomas v. Seay*, *supra*. There, the Court wrote:

> The decision to grant a new trial *nisi additur* rests within the sound discretion of the trial judge. *Graham v. Whitaker*, 282 S.C. 393, 321 S.E.2d 40 (1984).
>
> This is true even where the jury returns a verdict which falls within the range of the evidence. *Chiappetta v. Orr*, 293 S.C. 250, 359 S.E.2d 530 (Ct. App. 1987). If the amount of the verdict appears to be insufficient based upon the evidence, the trial judge may grant a new trial or an *additur*. *Haskins v. Fairfield Electric Cooperative*, 283 S.C. 229, 321 S.E.2d 185 (Ct. App. 1984). An appellate court will not review the trial court's decision for an *additur* or a new trial unless it is wholly without evidentiary support or manifestly controlled by error of law. *Albertini v. Veal*, 292 S.C. 561, 357 S.E.2d 716 (Ct. App. 1987).

Thomas v. Seay, 295 S.C. at 457.

Only two recent cases show the continued use of the phrase and appear to boast a more formal rigidity to the "compelling reasons" language, and then only making findings of what were deemed NOT to be compelling reasons. These two cases appear to be the only appellate cases where the trial court was found to have abused its discretion for failing to cite "compelling reasons" in its order granting *additur*: *Green v. Fritz*, 356 S.C. 566, 590 S.E.2d 39 (Ct. App. 2003) and *Luchok v. Vena*, 391 S.C. 262, 705 S.E.2d 71 (Ct. App. 2010).

Luchok v. Vena most recently addressed the issue of whether a trial judge's grant of *additur* was sustainable. *Luchok* involved a rear-end collision where the verdict was

significantly lower than the damages claimed by the plaintiff. The plaintiff claimed over $10,000.00 in medical bills, but the jury returned a verdict for $3,023.90. At trial the defendant admitted that her negligence caused the accident but disputed whether all of the damages claimed by the plaintiff were proximately caused by her negligence. In granting *additur*, the trial court's order stated as follows:

> During trial, Plaintiff presented evidence that her medical bills alone totaled $10,071.00... Plaintiff testified at trial that the treatment for her injuries was reasonable and necessary...
>
> Based on the findings of fact as set forth above, the Court concludes and orders:
>
> ...the amount awarded does not approach the amount of medical costs reasonably and necessarily incurred by the Plaintiff.

Id. at 263-264. This Court reversed the trial court's decision to grant *additur*. Chief Judge Few's opinion stated:

> In *Green,* we repeated the long-standing requirement that "a judge must offer compelling reasons for invading the jury's province by granting a motion for *additur.*" (citations omitted). We find the judge's order does not comply with the requirement.

Luchok at 264. This Court's reasoning for finding the trial court's order insufficient in stating compelling reasons was stated as follows:

> The amount of recoverable damages was hotly contested. The only two points made by defense counsel in her opening statement were to argue that Plaintiff did not prove causation as to the chiropractic treatments and to focus the jury on the question of whether those treatments were reasonable and necessary.
>
> We interpret the judge's order to set forth two reasons for invading the jury's province. First, the verdict did not cover all the chiropractic bills. In the face of the sharply conflicting evidence, this is not a compelling reason to grant the motion. *See, Green,* 356 S.C. at 571, 590 S.E.2d at 41 ("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."). ... Second, the "charges for chiropractic treatment of Plaintiff's injuries were reasonable and necessary." The judge is not entitled to make that determination as a matter of law when the evidence is conflicting. Therefore, there is no compelling reason and the trial judge's improper invasion of the province of the jury amounts to an abuse of discretion.

Luchok at 264-265 (emphasis added). In the case of *Green v. Fritz,* cited by *Luchok*, this Court reversed another of the same trial judge's grants of *additur.* The *Green* case was factually similar to that of *Luchok.* The *Green* Court reversed because the trial court did not provide a compelling reason in its order, without useful discussion of the standard (and also for the trial judge erroneously blending thirteenth juror concepts of passion, caprice, and prejudice in support of a new trial *nisi additur*.) The contrast between the damages evidence presented in *Luchok* and in the case at bar was discussed at length in the briefings below and will not be rehashed here.

Discussion of what does or does not constitute "compelling reasons" aside, the specific holding in this Opinion arrives without precedential support. The Opinion holds that where some, any, or even a nominal award of non-economic damages can be discerned from the verdict, the trial judge's "mere disagreement with the jury's determination of the proper amount of those [non-economic] damages is not a compelling reason for granting *additur.*" The Opinion holds that where some, any, or even a nominal award of non-economic damages can be discerned from the verdict, the trial judge who presided over the case, heard the evidence, observed the witnesses, and who is more familiar with the evidentiary atmosphere at trial than the appellate Courts, is stripped of

long-held discretionary power and is denied the "great deference" historically due to a trial judge.[5]

In support of this notion, the Opinion cites a line of cases which purportedly contrast with the award of some amount of non-economic damages in this case. See, Opinion, p. 15, Footnote 10. This ignores, at least, the precedent of *Toole v. Toole*, *supra.* *Toole* involved a wrongful death action for parents of an 11 year old son "who had been friendly, had been in good health, had helped clean the house, wash dishes and iron clothes and who had helped with farming and costs of whose funeral was $916.05." *Id.* The amount of $916.05 was the only economic damages sustained. The jury awarded $2,500.00 and the trial court denied plaintiff's motion for a new trial.[6] The Supreme Court reversed, stating: "It follows that the sum of only $1,583.95 was awarded to the mother and father to compensate them for the mental shock, suffering, wounded feelings, grief, sorrow, loss of companionship and deprivation of the comfort and solace of the society of their eleven year old son." Thus, the Supreme Court refused to acknowledge that the award of some amount over economic damages provided some prohibition of the trial court's use of discretion.

Likewise, there has never been an Opinion, that draws a bright line rule that the strips the trial court of inherent, wide, and sound discretionary power to order *nisi additur*

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[5] "The consideration for a motion for a new trial *nisi* [*additur* or] *remittitur* requires the trial judge to consider the adequacy of the verdict in light of the evidence presented. Great deference is given to the trial judge who heard the evidence and is more familiar with the evidentiary atmosphere at trial, and who thus possesses a better-informed view of the damages than this Court. *Proctor v. Dep't of Health & Envtl. Control*, 368 S.C. 279, 319-21, 628 S.E.2d 496, 518 (Ct. App.2006) (internal citations and quotation marks omitted).

[6] As noted, *Toole* addressed a motion for new trial, not new trial *nisi additur.* A motion for a new trial involves a finding that the verdict was motivated by passion, prejudice, or caprice. However, all post-trial analyses are reviewed under an abuse of discretion standard. *Toole* is instructive on the issue.

if there is an award of "some" amount over the tangible damages claimed. Never before has a South Carolina Court rationalized that if, on appeal, the reviewing Court might be able to discern that *an* amount – whether one million dollars, or one dollar – of a Plaintiff's verdict was beyond the economic loss for tangible actual damages, then the trial court is stripped of the inherent discretionary power to order new trial *additur*. For these reasons, the Estate respectfully seeks reconsideration and alteration of the Opinion on this issue.

CONCLUSION

Inexplicably, this Opinion reverses the trial court – the court familiar with the witnesses, the testimony, the evidence, and the tenor of the trial as a whole – for purportedly overstepping its discretionary power to grant relief when the verdict was merely inadequate. Deference is due to the jury by the trial court, and the trial court's order exhibits deference, prudence, and serious circumspection through detailed explanation of the reasons why the trial judge was compelled to grant *additur* in this case. The trial court followed the law as it has been applied under binding precedent. Deference is due also, to the trial court by the reviewing court; yet, the Opinion fails to recognize this through misapplication of the standards at issue.

Likewise, as to the equitable setoff ruling, the Opinion improperly diminishes the inherent power of the trial court. The Opinion charts new territory of equitably reallocating a settlement that by definition under our precedent is NOT a sham.

On both issues addressed herein, the Opinion radically alters the standards of review and binding precedent that informed the parties' and the trial court's analysis of the issues. The trial court plowed no new ground in arriving at its proper discretionary rulings. The Opinion, though, in its misapplication of years of binding precedent, creates

a future minefield of misunderstanding and confusion for litigants, lawyers, and the bench if its stands without reconsideration.

The Opinion should be reconsidered and altered to follow the correct, binding precedent. Furthermore, due to the far reaching implications of the Opinion the Estate respectfully requests rehearing *en banc*.

Respectfully submitted,

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March 7, 2014
Ridgeland, S.C.

In The Court of Appeals

APPEAL FROM BAMBERG COUNTY
Court of Common Pleas

Doyet A. Early, II, Circuit Court Judge

Case No.: 2008-CP-05-00235

Laura Riley as the Personal Representative
of the Estate of Benjamin Riley,.....Respondent,

v.

Ford Motor Company,..... Appellant.

CERTIFICATE OF COMPLIANCE

The undersigned counsel hereby certifies that the Petition for Rehearing and Suggestions for Rehearing *Enc Banc* complies with South Carolina Appellate Court Rule 267 and the August 13, 2007 Order of the South Carolina Supreme Court.

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March 7, 2014
Ridgeland, South Carolina

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PROOF OF SERVICE

I certify that I have served the Respondent's Petition for Rehearing and Suggestion For Rehearing *En Banc* via hand delivery of it to the Court and in the United States Mail, postage prepaid, on March 7, 2014, addressed to the respective attorneys of record as follows:

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