

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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MAR 17 2014

**SC Court of Appeals**

APPEAL FROM BAMBERG COUNTY  
Court Of Common Pleas

The Honorable Doyet A. Early III, Circuit Court Judge

Case No: 2008-CP-05-235  
Appellate Case No.: 2012-207489  
Opinion No. 5195

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

v.

Ford Motor Company .....Appellant.

APPELLANT’S RETURN  
TO RESPONDENT’S PETITION FOR REHEARING

Pursuant to Rules 221 and 240 of the South Carolina Appellate Court Rules, Appellant Ford Motor Company (“Ford”) submits this return to the Petition for Rehearing (“Petition”) filed by Respondent Laura Riley as the Personal Representative of the Estate of Benjamin Riley (the “Estate”). The Estate’s Petition seeks rehearing for two reasons, neither of which have merit: (1) “the Court’s ruling [on setoff] radically diverges from the standard of review which has heretofore been applied;” and (2) “the Court’s reversal of the trial court’s grant of new trial *nisi additur* misapprehends binding precedent of the standard of review.” (Estate’s Petition, p. 2).

**I. The Estate's Setoff Analysis Misses The Mark.**

Despite having already conceded that the trial court erred in its summary denial of Ford's request for setoff because Ford is entitled to at least \$5,000, (Op. p. 10), the Estate now presents the trial court's setoff decision as above reproach – an assessment that cannot be disturbed or reassessed by this Court because “[t]he 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 the Estate,” (Estate's Petition, p. 7). This defense of the trial court's “equitable determination[] concerning the propriety of setoff and allocation,” (Estate's Petition pp. 8-9), is not only inconsistent with the Estate's tacit admission that the trial court erred in its analysis, it misses the mark. This Court properly concluded that the trial court conducted “no analysis” when it issued a form order denying Ford's motion for setoff, permitting this Court to reverse and render its own findings on the equitable reallocation issue. (Op. p. 10).

Although Ford agrees with the Estate that rehearing is warranted on the issue of setoff, it does so for a different reason. The Court's misapprehension that requires rehearing occurred in the first step of the Court's analysis even before the reallocation that the Estate now challenges – when the Court concluded that “a gasping sound . . . [is] some evidence to support a survival action.” (Op. p. 11). As outlined in Ford's Petition for Rehearing, this conclusion cannot be reconciled with the threshold for evidence of conscious pain and suffering set forth in *Rutland v. South Carolina Department of Transportation*, 400 S.C. 209, 734 S.E.2d 142 (2012), and *Camp v. Petroleum Carrier*

*Corporation*, 204 S.C. 133, 28 S.E.2d 683 (1944). The “gasp” allegedly heard by a witness in this case is indistinguishable from the groan heard by a witness in *Camp*, 204 S.C. 133, 28 S.E.2d at 685, and the pulse observed by a witness in *Rutland*, 400 S.C. at 215, 734 S.E.2d at 145. This testimony was not evidence of conscious pain and suffering in *Camp* or *Rutland*, and it is not evidence of conscious pain and suffering in this case.

The Court did not err when it found that reversal was necessitated by the complete lack of analysis by the trial court, which resulted in the denial of a \$5,000 setoff to which even the Estate admits Ford is entitled. The Court deviated from well-established South Carolina law when it allocated settlement proceeds *in any amount* to the survival claim because as a matter of law, the evidence failed to support a survival claim under South Carolina law.

## **II. The Estate’s Concerns About This Court’s New Trial *Nisi Additur* Analysis Are Unfounded And Do Not Warrant Rehearing.**

There was no misapprehension of fact or law in this Court’s thorough and well-reasoned opinion reversing the trial court’s decision to usurp, without compelling reason, the jury’s province to assess damages. The Estate’s argument for rehearing is premised on an incorrect and overstated view of the Court’s holding: “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*.” (Estate’s Petition, p. 10)(emphasis in original). This interpretation is not consistent with the language of the Opinion itself, which specifically preempts such a broad reading:

*Limiting our holding to the facts of this case*, we find that the jury

awarded damages for noneconomic loss, and the trial court's mere disagreement with the jury's determination of the proper amount is not a compelling reason for granting *additur*. Therefore, we reverse and reinstate the jury's verdict of \$300,000.

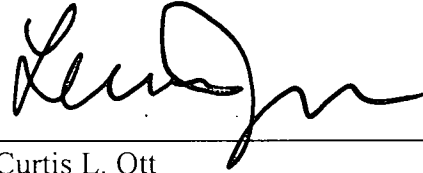
(Op. p. 16)(emphasis added). There is no merit to the Estate's dramatic claim that the Court's holding "sow[s] the seeds of far reaching ramifications beyond the outcome of this case." (Estate's Petition, p. 2). It is clear that this Court intended for its holding to be limited to the unique facts of this case.

Moreover, the Estate's academic and historical review of South Carolina case law addressing new trial *nisi additur*, (Estate's Petition, pp. 11-22), only confirms that the Opinion in this case is consistent with binding precedent authorizing reversal of a *nisi additur* decision which was not premised on a compelling reason. Not just any reason – a *compelling* reason – which this Court previously specified cannot be a mere recitation of the claimed damages when damages are debatable. *Green v. Fritz*, 356 S.C. 566, 571, 590 S.E.2d 39, 41 (Ct. App. 2003). The trial court's "compelling" reason in this case was nothing more than a rendition of the damages testimony, which the trial court deemed more "emotionally compelling" than the jury found it to be when it awarded at least \$61,199 for noneconomic losses. (R. pp. 8-9). This Court rejected the trial court's "mere disagreement" with the jury's assessment as a compelling reason, and that decision flows logically from the guidance provided in prior case law, including *Green*. This is not, as the Estate suggests, a holding "without precedential support." (Estate's Petition, p. 20).

### CONCLUSION

The Estate has not carried its burden of demonstrating that this Court "overlooked

or misapprehended [its] argument.” *Kennedy v. S. Carolina Ret. Sys.*, 349 S.C. 531, 532, 564 S.E.2d 322 (2001). For the foregoing reasons, this Court should deny the Estate’s Petition for Rehearing.



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March 17, 2014

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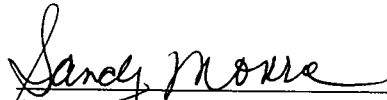
v.

Ford Motor Company ..... Appellant.

PROOF OF SERVICE

I, Sandy Moore, the undersigned employee of Gallivan, White & Boyd, P.A.,  
attorneys for the Appellant, do hereby certify that I have served a copy of the foregoing  
**Appellant's Return to Respondent's Petition for Rehearing**, in connection with the  
above-referenced case by mailing a copy of the same on March 17, 2014, by e-mail and  
United States Mail, postage prepaid, to the following address:

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