The South Carolina Court of Appeals

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

v.

Ford Motor Company, Appellant.

Appellate Case No. 2012-207489

ORDER

The Estate of Benjamin Riley and Ford Motor Company filed petitions for rehearing in this case. Ford's petition restates the same arguments we addressed in our opinion, and thus we have no further explanation of our ruling. After careful consideration of Ford's petition, 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 rehearing.

Our ruling on the Estate's petition warrants explanation. The Estate makes two general arguments—that this court erred in reversing the trial court's (1) denial of setoff, and (2) award of additur.

As to the first argument, the Estate asserts this court erred by reallocating proceeds from a previous settlement agreement in awarding setoff. The Estate relies on *Welch v. Epstein*, 342 S.C. 279, 536 S.E.2d 408 (Ct. App. 2000), and argues that under *Welch* an appellate court may not review a previous allocation of settlement proceeds between a settling defendant and the plaintiff in determining the amount of setoff unless the allocation was "based on a fraud or a sham." The Estate purports to quote *Welch* for this proposition. However, *Welch* contains no such statement. Moreover, *Welch* does not support the Estate's proposition.

In *Welch*, the plaintiff and a co-defendant agreed to settle wrongful death and survival claims, allocating a portion of the settlement funds between the causes of action. 342 S.C. at 312, 536 S.E.2d at 425. Although the opinion in *Welch* contains limited facts on this issue, it appears there was evidence of conscious pain and suffering to support the allocation in the agreement. *See* 342 S.C. at 313, 536 S.E.2d at 426 (noting "the personal representative claims [the plaintiff] was in considerable pain prior to the [cardiac] arrest"). However, the trial court found the pain was not causally related to the tortious conduct alleged by the plaintiff. *See id.* Therefore, despite the existence of some evidence of conscious pain and suffering, the trial court looked behind the allocation agreement and reallocated the settlement proceeds. 342 S.C. at 313-14, 536 S.E.2d at 425-26. In affirming this reallocation, we stated "the allocation between the survival and wrongful death claims must yield to fairness and justice." 342 S.C. at 313-14, 536 S.E.2d at 426. Thus, *Welch* supports our holding that this court may review a previously agreed upon settlement allocation to determine whether it is reasonable in light of the evidence in the record. Neither *Welch* nor any other decision of this court or the supreme court supports the Estate's argument that a court must find an allocation was "based on fraud or a sham" before looking behind the agreement to fairly allocate settlement proceeds.

As to the Estate's argument that an "any evidence" standard is applicable to our determination, the argument is based on a misunderstanding of the cases it cites in support. These cases concern whether there is sufficient evidence to submit a survival claim to the jury—a legal question—and not whether an allocation in a previous settlement agreement controls the amount of setoff—an equitable question. *See Croft v. Hall*, 208 S.C. 187, 195, 37 S.E.2d 537, 540 (1946) (addressing "whether there was any [evidence] from which the jury could reasonably find conscious pain and suffering"); *Smalls v. S.C. Dep't of Educ.*, 339 S.C. 208, 217, 528 S.E.2d 682, 687 (Ct. App. 2000) (finding the existence of contradictory testimony regarding pain and suffering created "a question of fact properly left for the jury"); *Vereen v. Liberty Life Ins. Co.*, 306 S.C. 423, 432, 412 S.E.2d 425, 431 (Ct. App. 1991) ("If there is any evidence from which a jury could reasonably conclude a decedent experienced conscious pain and suffering, the issue must be submitted to the jury."). *Compare Church v. McGee*, 391 S.C. 334, 342, 705 S.E.2d 481, 485 (Ct. App. 2011) (stating setoff is equitable in nature, and thus an appellate court may find facts in accordance with its own view of the preponderance of the evidence).

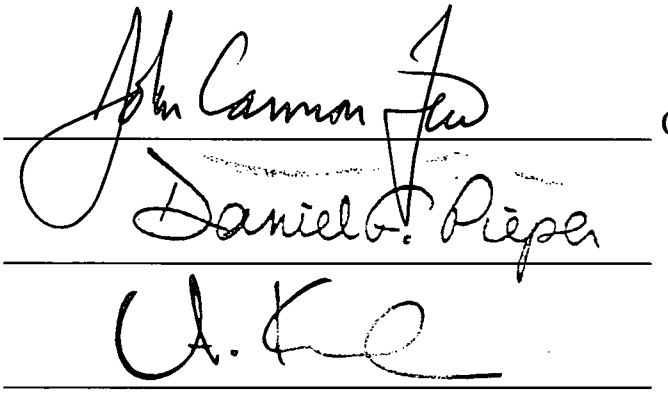
Furthermore, we find no basis for the Estate's suggestion that "*de novo* review of settlements between agreeing parties" creates a disincentive for parties to reach

partial settlement agreements. Our opinion has nothing to do with a plaintiff's right to settle with a defendant, nor with the overall amount of any such settlement. Our holding applies only when a non-settling defendant requests that a previous settlement be set off from a judgment, and the plaintiff seeks to bind the non-settling defendant, who was not a party to the agreement, to the same allocation of settlement proceeds.

As to the award of additur, the Estate argues for the first time that the "compelling reasons" requirement is dicta from prior cases and suggests it is not required for the granting of additur. We disagree. The requirement was cited by the supreme court in *Pelican Bldg. Ctrs. of Horry-Georgetown, Inc. v. Dutton*, 311 S.C. 56, 61, 427 S.E.2d 673, 676 (1993), and *Bailey v. Peacock*, 318 S.C. 13, 14, 455 S.E.2d 690, 691 (1995), and was applied by this court as the basis of its decision in *Green v. Fritz*, 356 S.C. 566, 570-71, 590 S.E.2d 39, 41-42 (Ct. App. 2003). The requirement of stating compelling reasons to invade the jury's province is an established tenet of the law of additur. As such, this court and the trial court are bound to apply it.

After careful consideration of the Estate's petition 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 rehearing.

Accordingly, both petitions for rehearing are denied.



C.J.

J.

J.

Columbia, South Carolina

cc:

FILED
April 3, 2014

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